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Katz v. United States: The Untold Story

Harvey A. Schneider*

I. INTRODUCTION

In October 1967 I had the privilege of arguing *Katz v. United States*¹ before the United State Supreme Court. I had been admitted to practice less than four years at the time *Katz* was argued. To this day, after a lifetime spent in the law as a judge and lawyer, *Katz* remains my seminal legal experience.

I was persuaded by the author of the preceding article that my story may have some historical significance and should be reduced to writing. The facts in this article do not appear in the Court's opinion and are probably known only by me.

II. THE FACTS

In his opinion in *Katz*, Justice Stewart tersely delineated the operative facts of the case. He stated only that “[a]t trial the Government was permitted, over the petitioner’s objection, to introduce evidence of the petitioner’s end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls.”² This statement is true enough, but it tells little of the whole story. I now fill in those details.

Charles Katz was probably the preeminent college basketball handicapper³ in America in 1967. He lived in an apartment building on Sunset Boulevard in Los Angeles. On most days he would stroll from his apartment to a group of three public telephone booths that were also located on Sunset Boulevard. Katz would enter one of these booths and place telephone calls, usually to Miami and Boston, during which he would transmit wagering information in violation of 18 U.S.C. §1084.⁴

The FBI ultimately got wind of Katz’s activities and set out to arrest him, devising a rather elaborate plan to do so.⁵ First, the agents obtained the telephone company’s consent to put one of the telephone booths out of order. Second, they affixed an electronic listening and recording device on top and between the two

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

2. *Id.* at 348.

3. A “handicapper” is a person who tries to predict the winner in any given competition, such as an athletic event. Often, but not always, a handicapper bets on the events he is attempting to predict.

4. *Katz*, 389 U.S. at 348.

5. *See id.* at 348, 354.

remaining booths. In this way the agents could overhear Katz's conversations irrespective of which of the two remaining booths he used. Third, the FBI stationed an agent outside Katz's apartment in order to observe him when he left. Fourth, when this agent observed Katz leaving, he gave the "high sign" to another agent who ran over and actuated the listening device before Katz entered one of the two remaining booths. The agents' plan worked. The FBI overheard Katz's conversations and subsequently arrested him. There was one problem with the FBI's plan: the agents did not have a search warrant when they intercepted Katz's conversations.⁶

Following his arrest, Katz was indicted in what is now the United States District Court for the Central District of California. Katz employed attorney Burton Marks to represent him in the district court. At the time of Katz's prosecution, Marks was one of the most prominent, skilled, and successful criminal attorneys in Los Angeles. In the more than forty years I have been a lawyer and judge, I have never known an attorney who was more creative and imaginative than he was.

His brilliance notwithstanding, Burton Marks had one small failing: he did not always read as carefully as he should have the court papers his secretary typed. Thus, when Marks challenged the constitutionality of the seizure of Katz's communications in the district court, the point he wanted to make was that a man has as much right to be let alone in a public telephone booth as in his own home. Unfortunately, Marks' secretary typed, "a man has as much right to bet alone in a public telephone booth as in his own home." This error, which was not discovered by Marks before his motion was filed, caused even the staid federal judge who presided over Katz's case to howl.

When the district court denied Marks' motion to suppress, he appealed the judgment of conviction to the Ninth Circuit Court of Appeals. That court affirmed and, in the process, held that no Fourth Amendment violation occurred because "[t]here was no physical entrance into the area occupied by [the petitioner]."⁷

III. THE PRE-KATZ LAW

It was about this time that I went to work for Burton Marks. I had worked for Marks one summer while I was in law school and, as a result, he was familiar with my legal writing. He assigned me the task of preparing the Petition for Writ of Certiorari that was to be filed in the United States Supreme Court on behalf of Katz. Upon receiving the assignment from Marks, I immediately began reading every relevant case I could get my hands on. My research disclosed two

6. *Id.* at 354-55.

7. *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

significant lines of cases that I will refer to as the “trespass cases” and the “constitutionally protected area” cases.

*Goldman v. United States*⁸ and *Silverman v. United States*⁹ illustrate the “trespass cases.” In *Goldman*,

two federal agents, with the assistance of the building superintendent, obtained access at night to Shulman’s [one of the petitioners] office and to the adjoining one They had with them . . . [a] device, a detectaphone having a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in Shulman’s office, and means for amplifying and hearing them. With this the agents overheard, and the stenographer transcribed, portions of conversations between Hoffman, Shulman, and Martin Goldman on several occasions, and also heard what Shulman said when talking over the telephone from his office.¹⁰

The Government used the intercepted conversations as the basis for the prosecution of Goldman and his confederates. In its decision, the Supreme Court affirmed the defendants’ convictions based on the reasoning, *inter alia*, that there had been no trespass into the office occupied by the defendants to install the detectaphone.¹¹

In *Silverman*, agents trespassed onto the defendant’s property to install a listening device called a “spike mike.”¹²

The officers inserted the spike under a baseboard in a second-floor room of the vacant house [next to Silverman’s] and into a crevice extending several inches into the party wall, until the spike hit something solid “that acted as a very good sounding board.” The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioners’ convictions.¹³

8. 316 U.S. 129 (1942).

9. 365 U.S. 505 (1961).

10. *Goldman*, 316 U.S. at 131-32.

11. *Id.* at 134-35.

12. *Silverman*, 365 U.S. at 505-06.

13. *Id.* at 506-07.

The Supreme Court ruled that the Government violated the Fourth Amendment in obtaining Silverman's conversation because "an actual intrusion into a constitutionally protected area" had occurred.¹⁴

In the "constitutionally protected area" cases, the Court determined that a constitutional violation had or had not occurred depending on whether the Government conducted the search and seizure in what the Court deemed to be a "constitutionally protected area." For example, in *Rios v. United States*,¹⁵ the Court stated in a footnote that "[a]n occupied taxicab is not to be compared to an open field or a vacated hotel room."¹⁶ I interpreted that footnote to mean that an occupied taxicab was a constitutionally protected area. Similarly, in *United States v. Jeffers*, the Court held the defendant had a right of privacy in a hotel room where he had stashed narcotics.¹⁷ This suggested to me that the Supreme Court considered a hotel room to be a constitutionally protected area.

IV. PETITION FOR WRIT OF CERTIORARI

Such was the state of the decisions when I was preparing the Petition for Writ of Certiorari.¹⁸ I knew we could not argue *Silverman* because the FBI agents were very careful to attach the listening device to the outside of the telephone booths without physically penetrating the airspace of either booth. This left us with the "constitutionally protected area" cases and, accordingly, as Justice Stewart later pointed out in his opinion in *Katz*, I phrased the issues as follows:

- "A. 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 privacy of the user of the booth.
- "B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."¹⁹

14. *Id.* at 512.

15. 364 U.S. 253 (1960).

16. *Id.* at 262 n.6 (internal citations to *Hester v. United States*, 265 U.S. 57, 44 (1924), and *Abel v. United States*, 362 U.S. 217 (1960), omitted).

17. 342 U.S. 48, 51-52 (1951).

18. Although I do not recall any specific discussions, I have no doubt I discussed the issues involved in *Katz* with Burton Marks and received his input before the petition was filed. Since Marks was a far more experienced lawyer than I, it would have been inconceivable for me not to have tapped his extraordinary legal mind during the process of preparing the petition.

19. *Katz v. United States*, 389 U.S. 347, 349-50 (1967) (quoting petitioners' phrasing of the issues). I have always been miffed that, in his *Katz* opinion, Justice Stewart chastised the parties for the "misleading way the issues have been formulated." *Id.* at 351. I formulated the issues in "constitutionally protected area" terms because, prior to *Katz*, that was the language of choice the Supreme Court employed in a number of its cases. For example, in *Silverman v. United States*, an opinion written by Justice Stewart himself, the Court noted

So, the Petition was prepared and shipped to the court for filing. Then the waiting period began. Several long months later, we had our answer. The Court granted our Petition and requested additional briefing on the issues that it had designated for review.²⁰

V. THE POST-GRANT OF CERTIORARI BRIEF

The post-grant of certiorari brief that I prepared is interesting for what it does and does not say. In this brief, I first pointed out that after *Goldman* and *Silverman*, the question remained whether the Court had abandoned the physical trespass test enunciated in *Goldman*. I also pointed out that “[t]he confusion was deepened by the subsequent decision in *Lopez v. United States*”²¹ because, in that case, the Court was unwilling to reconcile the apparent conflict between *Goldman* and *Silverman* and, in fact, spoke about “privacy” and “unlawful physical invasion” in almost the same breath, thus indicating that the Court had not completely abandoned its property analysis.²²

I next pointed out that “the foregoing brief dissertation concerning the judicial development of the law of search and seizure in the eavesdropping area is of academic importance only”²³ since the Court’s subsequent decisions (*Warden, Maryland Penitentiary v. Hayden*,²⁴ *Berger v. New York*,²⁵ and *Camara v. Municipal Court*²⁶) unequivocally indicated the Court’s shift from a property paradigm to a privacy paradigm and that “the primary concern of the Fourth Amendment is the protection of the individual’s right to privacy.”²⁷

However, even though I recognized in this brief that the Fourth Amendment primarily protected an individual’s right to privacy,²⁸ I nevertheless stated that “[t]he crucial inquiry as applied to the instant case is, therefore, whether a public telephone booth is a constitutionally protected area so that an interception of Petitioner’s calls while an occupant thereof constituted an invasion of his constitutionally protected right to privacy.”²⁹

emphatically: “But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.” 365 U.S. at 512.

20. The Court requested additional briefing on the telephone booth issue, as well as whether Katz’s papers, which had been seized at his apartment building following his arrest, were properly seized as fruits and instrumentalities of the offense pursuant to Rule 41 of the Federal Rules of Criminal Procedure. Although the latter issue was briefed and argued by me before the Court, it was never discussed in the Court’s opinion.

21. Brief for Petitioner at 10, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113605.

22. See *Lopez v. United States*, 373 U.S. 427, 438-39 (1963).

23. Brief for Petitioner, *supra* note 21, at 11.

24. 387 U.S. 294 (1967).

25. 388 U.S. 41 (1967).

26. 387 U.S. 523 (1967).

27. Brief for Petitioner, *supra* note 21, at 11.

28. *Id.* at 11-12.

29. *Id.* at 12.

I then stated:

When the now discredited physical trespass theory is abandoned in favor of one stressing the right to privacy, it is possible to suggest a workable test to be employed in determining whether or not a specific area is protected by the Fourth Amendment. This test merely turns on the answer to the question: “Does the area in question have the ‘attributes of privacy?’” or, said in another way, “Would the average reasonable man believe that the person whose conversation had been intercepted intended and desired his conversation to be private?” Under this test the degree of privacy afforded by a facility would be one criterion in determining the degree of privacy protected. 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.³⁰

I then summarized Petitioner’s position: “When examined in light of this proposed test, there is little room for doubt that a public telephone booth with a door [as in the instant case] is and should be a constitutionally protected area.”³¹

As evidenced by the brief, while I was beginning to think in terms of the right of privacy, I was suggesting a subjective test for making that determination; I was still focused on whether a particular communication had been intercepted in a constitutionally protected area. Noticeably absent from the brief was any suggestion of an objective test based on a reasonable expectation of privacy.

VI. THE EPIPHANY

After the additional brief requested by the Court was filed, the next step was to receive the date the Court set for oral argument. Soon after that date was set (October 17, 1967),³² I began preparing for oral argument. Burton Marks decided that I would give the opening argument for Katz and that he would argue in rebuttal.

It was during my preparation for oral argument that I experienced a mind changing event. To understand the evolution of this experience, several facts must be kept in mind. First, since I had graduated from law school a little more than three years before I began working on *Katz*, my law school experience was still fresh in my mind. As I ruminated about the *Katz* case, I reflected on my Torts class, especially the tort of negligence. I remembered we were taught that

30. *Id.* at 13 (citation to *Lanza v. United States*, 370 U.S. 139 (1962), omitted).

31. *Id.*

32. The Court granted each side one hour for argument, a period of time reserved for only the Court’s most important cases. See Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, J. KAN. B. ASS’N 25, 40 (1995) (stating that each side is permitted one half hour for oral argument and that additional time is rarely accorded).

negligence was doing what a reasonable man would not do or failing to do what a reasonable man would do. We called the reasonable man TARM (The Average Reasonable Man).

Then it hit me. We (both the Court and the attorneys) had it all wrong. The test for determining whether Katz's communications had been constitutionally seized was not whether the FBI agents engaged in a trespass (a theory that the Court had already abandoned) or whether a public telephone booth was a constitutionally protected area. Rather, the test was whether a reasonable person (TARM) could have expected his communication to be private.³³ The test was an objective one, not the subjective test that had been suggested in our post-grant of certiorari brief. I rushed into Burton Mark's office and informed him of my discovery. It was at this point that our entire approach changed and we began the analysis that culminated in the oral argument before the Court.

VII. ORAL ARGUMENT

On October 16, 1967, Burton Marks, who argued before the Court in the past, moved for my admission to the Court. This motion was granted by Chief Justice Earl Warren. That night I got little sleep as I went over my argument time and time again.

October 17, 1967 was a day I will never forget. It is difficult to describe the sensation and emotion I had when *Katz v. United States* was called for argument by the Chief Justice. As I approached the lectern, I looked up and saw all the legal giants whose opinions I had studied in law school only three years before: Warren, Black, Douglas, Harlan, White, Brennan, Stewart, and Fortas.³⁴

Upon reading or listening to my oral argument in *Katz*, one will immediately recognize how our approach evolved from the time we filed the Petition for Writ of Certiorari.³⁵ During oral argument I specifically admitted "whether or not a telephone booth or any other area is constitutionally protected is the wrong initial inquiry. We do not believe the question should be determined as to whether or not you have an invasion of a constitutionally protected area . . ."³⁶ I also made clear that we were proposing an objective test.

33. In his concurring opinion, Justice Harlan articulated the now famous "reasonable expectation of privacy" test. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

34. As explained in Peter Winn's introductory article, Justice Marshall took "no part in the consideration or decision of this case." *Id.* at 359.

35. The argument can now be heard on OYEZ.com. Oyez, *Katz v. United States—Oral Argument*, http://www.oyez.org/cases/1960-1969/1967/1967_35/argument/ (last visited Sept. 1, 2008).

36. Transcript of Oral Argument, *Katz v. United States*, at 5, reprinted in 65 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 106 (Philip B. Kurland & Gerhard Casper eds., 1975).

Thus, when Justice White asked me a question that seemed to suggest he was focusing on a subjective test, I responded:

I think, if I understand the import of the Court's question, the Court, or Mr. Justice White, is suggesting a subjective test of whether or not the person who is conducting the conversation intended his communication to be private. And, of course, almost in every instance the answer to that will be in the affirmative. I'm suggesting, rather, an objective test of whether a third party, looking at the overall scene, would arrive at that conclusion.³⁷

When a member of the Court again suggested the continuing viability of the constitutionally protected area doctrine, I responded:

I feel that the emphasis on whether or not you have a constitutionally protected area may be placing the emphasis in the wrong place. We feel that the Fourth Amendment and the Court's decisions recently and for a long time have indicated that the right to privacy is what's protected by the Fourth Amendment. We feel that the right to privacy follows the individual and that whether or not he's in a space enclosed by four walls and a ceiling and a roof, or in an automobile, or in any other physical location, is not determinative of the issue of whether or not the communication can ultimately be declared confidential. We think that the right to privacy follows the individual and, if all the other aspects of confidentiality are present, he's entitled to the confidentiality of his communication³⁸

I then explained to the court how we believed the reasonable expectation of privacy test should be applied:

We propose a test using a way that's not too dissimilar from the tort "reasonable man" test. We're suggesting that what should be used is: the communication setting should be observed; and those items that should be considered are the tone of voice, the actual physical location where the conversation took place, the activities on the part of the officer; when all those things are considered, we would ask that the test be applied as to whether or not a third person objectively looking at the entire scene could reasonably interpret, and could reasonably say, that the communicator intended his communication to be confidential.³⁹

37. *Id.* at 6.

38. *Id.* at 7.

39. *Id.* at 11-12.

VIII. POST ARGUMENT

After the conclusion of oral argument, I was convinced we had proposed to the court a new test which, if accepted, would radically change the analysis of search and seizure cases involving the interception by law enforcement officers of a criminal defendant's oral and visual communications.⁴⁰ The Court's opinion, which we received two months after argument, made it clear that the Court had accepted our test. While Justice Stewart's opinion for the Court refers to "a person's general right to privacy—his right to be let alone"⁴¹ and concludes that the FBI agents had "violated the privacy upon which [Katz] justifiably relied while using the telephone booth,"⁴² it remained for Justice Harlan, in his concurring opinion, to articulate the test that has become synonymous with *Katz*: Whether "a person has a constitutionally protected reasonable expectation of privacy."⁴³

IX. APPLYING *KATZ*

Although my argument before the Court suggested how we thought the Court should apply our objective test, it is appropriate to emphasize and amplify the points I made during argument.

In my view, the *Katz* test applies whether law enforcement officers intercept a suspect's oral communication or physical conduct. If an oral communication is involved, I suggested during argument that a court should examine three criteria, none of which are individually dispositive: the tone of voice utilized by the person whose communication was intercepted, the physical location at which the conversation took place, and the activities of the law enforcement officers who made the interception. A few examples may help explain my view of the application of the *Katz* test.

It is difficult to perceive a more private place than a person's bedroom. If, however, a person appears at his bedroom window and speaks in a voice loud enough for any passer-by to hear, it could easily be concluded that the person had no reasonable expectation of privacy with regard to this communication. Moreover, as a general principle, the more activity a law enforcement officer has to engage in to intercept a communication, the more likely, at least as to this criterion, the communication was intended to be confidential.

40. When I returned from Washington following oral argument I was euphoric. The entire experience—briefing and argument—had for me been a once in a lifetime experience. But the law is a humbling profession. The very next case that I had after argument in *Katz* was representing a gentleman on a traffic ticket in Inglewood, California.

41. *Katz v. United States*, 389 U.S. 347, 350 (1967).

42. *Id.* at 353.

43. *Id.* at 360 (Harlan, J., concurring).

One of the cases we had to contend with prior to oral argument was *Hester v. United States*,⁴⁴ an older case in which Justice Holmes stated that “the special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers and effects,’ is not extended to the open fields.”⁴⁵

It may be that even if the *Katz* test was applied to the *Hester* factual situation, it could reasonably be concluded that the defendant had no reasonable expectation of privacy since Hester and his associates engaged in conduct in plain view of the revenue officers and the officers did not have to exert much effort to make their observation.

I would argue, however, that a factual scenario could be envisioned in which a defendant had a reasonable expectation of privacy in an open field. For example, if a defendant went to the middle of an open field to ensure that his communication with another person would be confidential, and law enforcement officers were able to intercept the communication only by utilizing a sophisticated listening device, a strong argument could be made that the defendant had a reasonable expectation of privacy with regard to this communication.⁴⁶

Previously, I stated that, in addition to oral communications, the *Katz* test applied to visual observations made by law enforcement officers. In fact, the only difference between the interception of a defendant’s oral communications and physical conduct is that no tone of voice is involved in the latter. Again, an example is illustrative.

Suppose that, in *Katz*, instead of tape recording Katz’s communications, the FBI agents saw Katz doing something in the phone booth that had relevance to his prosecution. Although the Court ruled that Katz’s oral communications could not be intercepted without a search warrant, it seems clear that, under my hypothetical, what Katz *did* in the phone booth (which was clearly observable by anyone passing by the booth) was fair game for the agents. Stated otherwise, Katz could have no reasonable expectation of privacy for his *conduct* in a telephone booth with a glass door. Nor would a warrant be required because Katz’s conduct was in plain view.⁴⁷

In sum, it seems to me that the *Katz* test can be applied to the interception of a defendant’s oral communication or to the observation of a defendant’s conduct. In either situation, the focus is on the individual’s right of privacy, which, as the

44. 265 U.S. 57 (1924).

45. *Id.* at 59.

46. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“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.”).

47. *See, e.g.,* *Harris v. United States*, 390 U.S. 234, 236 (1968) (“[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.”); *see also* *United States v. Bulacan*, 156 F.3d 963, 968 (9th Cir. 1998) (explaining the plain view test).

Court held before *Katz*, is the central protection with which the Fourth Amendment is concerned.⁴⁸

Moreover, it is clear that the Court adopted the *Katz* test because the advent of modern technology (and surveillance) out-dated the property principles underlying earlier Supreme Court decisions.⁴⁹

Finally, it is important to state that *Katz* did not purport to render unconstitutional all electronic surveillance. Rather, the vice of the agents' conduct in *Katz* was that they intercepted *Katz*'s communications without a search warrant, i.e., without the intervention of a neutral and detached magistrate. If a search warrant based upon probable cause had been obtained to listen to *Katz*'s communications, it is clear that the use of those communications against him at trial would not have violated the Constitution.⁵⁰

X. POSTSCRIPT

There is a postscript to *Katz* which the reader might find interesting and perhaps demonstrative of human nature. When Burton Marks informed *Katz* of the historic decision that now bears his name, his first response was not one of thanks or gratitude. Rather, he wanted to know if he could sue the telephone company for permitting the FBI agents to put the one telephone booth out of order. And so it goes.

48. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (“[T]he principal object of the Fourth Amendment is the protection of privacy rather than property”); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”).

49. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928).

50. See *Katz v. United States*, 389 U.S. 347, 356-57 (1967); see also *id.* at 362-63 (White, J., concurring).

* * *