

# A Postscript on *Katz* and Stonewall: Evidence From Justice Stewart's First Draft

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In an article published in this journal in 2008,<sup>1</sup> I suggested that anxieties about homosexuality and its policing lay behind and helped to shape the criminal procedure decisions of the Warren Court — in particular, the landmark Fourth Amendment ruling in *Katz v. United States*.<sup>2</sup> *Katz* is the telephone eavesdropping case in which the Supreme Court famously declared that the Fourth Amendment protects “people, not places”; it is the basis for the modern rule that whether police activity constitutes a “search” under the Fourth Amendment depends on whether it intrudes on a reasonable expectation of privacy, not on whether it involves a physical trespass. I argued in 2008 that when deciding *Katz* at least some of the Justices may have had, in the back in their minds, the then-widespread police practice of spying on men in public toilet stalls to detect homosexual sodomy.<sup>3</sup> *Katz* plainly helped to end that practice. I suggested that this result was one that the Court, or at least some of its members, would have foreseen and welcomed, but that it was not something the Court felt comfortable addressing directly.

When my article was published, the papers of Justice Potter Stewart, the author of the Court's opinion in *Katz*, were still under seal. Pursuant to Justice Stewart's directions they became public with the retirement of the last Justice to have served with Justice Stewart. That

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<sup>1</sup> David Alan Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 UC DAVIS L. REV. 875 (2008).

<sup>2</sup> 389 U.S. 347 (1967).

<sup>3</sup> See Sklansky, *supra* note 1, at 886-96.

turned out to be Justice Stevens, who stepped down from the Court in 2010.<sup>4</sup> The Stewart Papers include the first draft of what eventually became the Court's opinion in *Katz*, and that draft contains a small bit of additional support for the argument I made three years ago. The new evidence is very far from conclusive, but it seems sufficiently suggestive to warrant this brief postscript.<sup>5</sup>

First some background. Part of the argument in my earlier article had to do with *Smayda v. United States*, a case decided by the United States Court of Appeals for the Ninth Circuit in 1965, a year before it issued the ruling later reversed by the Supreme Court in *Katz*.<sup>6</sup> *Smayda* was a pioneering effort to use the law to protect the rights of gay men; it was litigated by lawyers closely associated with pre-Stonewall "homophile" organizing in San Francisco.<sup>7</sup> The defendants were two men sentenced to six months in jail for having sex in a toilet stall in Yosemite National Park. They were caught late at night by a park ranger spying through a ceiling peephole disguised as an air vent. The defendants' lawyers argued that the surveillance violated the Fourth Amendment, but a divided panel of the Ninth Circuit disagreed, emphasizing that the toilet stall was a "public place" and that, in any event, there had been no "physical invasion" of the stall by law enforcement.<sup>8</sup> The following year, when upholding the telephone eavesdropping in *Katz*, the Ninth Circuit relied on these same principles and cited *Smayda* in support. Because the defendant in *Katz* had been using a public telephone booth, and because there had been no physical trespass into the booth, the Ninth Circuit concluded that the Fourth Amendment was not implicated.<sup>9</sup>

*Smayda* was a notorious and controversial decision. The law reviews were sharply critical.<sup>10</sup> Moreover, there was a strong dissent in the

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<sup>4</sup> See Linda Greenhouse, *Down the Memory Hole*, N.Y. TIMES, Oct. 2, 2009, at A31.

<sup>5</sup> The preliminary drafts of Justice Stewart's opinion in *Katz*, along with some inter-chambers memoranda regarding the opinion, are contained in Box 48, Folders 423-25 of the Potter Stewart Papers (MS 1367), Manuscripts and Archives, Yale University Library.

<sup>6</sup> *Smayda v. United States*, 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

<sup>7</sup> See Sklansky, *supra* note 1, at 889 n.60.

<sup>8</sup> *Smayda*, 352 F.2d at 255-56.

<sup>9</sup> See *Katz v. United States*, 369 F.2d 130, 133 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

<sup>10</sup> See Comment, *Criminal Law: Unreasonable Visual Observation Held to Violate Fourth Amendment*, 55 MINN. L. REV. 1255, 1259 (1971); Anthony D. Osmundson, Note, *Fourth Amendment Application to Semi-Public Areas: Smayda v. United States*, 17 HASTINGS L.J. 835 (1966); Walter H. Ryland, Comment, *Police Surveillance of Public Toilets*, 23 WASH. & LEE L. REV. 423 (1966).

Ninth Circuit, written by Judge James Browning, who had recently been appointed to the Court following a three-year stint as Clerk of the United States Supreme Court. Closely foreshadowing the reasoning later adopted by the Supreme Court in *Katz*, Judge Browning argued in *Smayda* that “the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances.”<sup>11</sup>

The defendants in *Smayda* petitioned for certiorari but were unsuccessful: only Justice Douglas voted to grant review.<sup>12</sup> This result was unsurprising. Throughout the 1960s and 1970s, the Supreme Court conspicuously and intentionally steered clear of the issue of homosexuality.<sup>13</sup> In fact, when political scientist H.W. Perry interviewed Justices and law clerks about the 1976–1980 court terms, homosexuality was the *only* area of public controversy they admitted the Court had purposely avoided.<sup>14</sup> Like Americans more generally, the Justices were uncomfortable with the topic of homosexuality. Like many Americans though, the Justices — or at least some of them — were also uncomfortable with the ways in which homosexuality was policed, including the widespread and heavily criticized practice of spying on men in public toilet stalls.<sup>15</sup>

The *Smayda* case did not escape notice at the Supreme Court. At least three law clerks recommended that the Court take the case because of the important Fourth Amendment issues that it raised.<sup>16</sup> And a few months later, when Justice Douglas dissented in a trio of undercover informant cases, he pointed to *Smayda*, and the men’s room spying it condoned, as a troubling indication that “[w]e are rapidly entering the age of no privacy, where everyone is open to surveillance at all times.”<sup>17</sup> All of this suggests that the Court may have had *Smayda* and the practice of toilet-stall snooping at the back of its mind when deciding *Katz*. Concerns about the policing of homosexuality were not the principal motivation for *Katz*, but they

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<sup>11</sup> *Smayda*, 352 F.2d at 260 (Browning, J., dissenting).

<sup>12</sup> *Smayda v. United States*, 382 U.S. 981 (1966); see Sklansky, *supra* note 1, at 891 & n.74.

<sup>13</sup> See Sklansky, *supra* note 1, at 898-99.

<sup>14</sup> See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 257 (1991).

<sup>15</sup> See Sklansky, *supra* note 1, at 900-17.

<sup>16</sup> See *id.* at 891-92. Unfortunately, the Stewart Papers do not include the certiorari memoranda prepared for him before the term beginning in 1973. See *MANUSCRIPTS AND ARCHIVES, YALE UNIVERSITY LIBRARY, GUIDE TO THE POTTER STEWART PAPERS* 6 (rev. ed. 2010).

<sup>17</sup> *Osborn v. United States*, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

operated as kind of suppressed subtext. At least that was what I argued in 2008.

Now for the Stewart Papers. The first draft of the *Katz* opinion that Justice Stewart preserved consists of twenty-one double-spaced, typewritten pages, interleaved with six entirely handwritten pages, some in pencil and some in pen.<sup>18</sup> The typewritten pages also contain handwritten annotations, again some in pencil and some in pen. The handwriting, both on the typewritten pages and on the lined pages, appears to be in the hand of Justice Stewart and the law clerk assigned to the case, Laurence Tribe. For the most part the writing in pen seems to be Tribe's and the writing in pencil appears to be by Justice Stewart.<sup>19</sup> There are some heavy pencil annotations that appear to be in Tribe's hand, but most of the pencil writing is light, and all of the light pencil markings look like Justice Stewart made them. All of the writing by pen seems to be by Tribe. It appears that the typewritten pages were prepared first, presumably by Tribe, and then marked up, first by Justice Stewart and then by Tribe; the handwritten pages seem to have been added during this editing process.

The draft includes the language for which *Katz* is now best known:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>20</sup>

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<sup>18</sup> The draft is the first document in Box 48, Folder 423 of the Stewart Papers. A photographic reproduction appears as an appendix to the online version of this essay. The Court was initially divided 4-4 in *Katz*, with Justice Stewart voting to affirm and Justice Marshall recusing himself because he had participated in the case while Solicitor General. Justice Stewart evidently asked his colleagues to delay announcement of the result — affirmance by an equally divided Court. Because the opinion that Tribe prepared concluded that the Ninth Circuit had erred, he appears to have couched it as an opinion of the Court, recognizing that if Justice Stewart changed his vote there would now be a majority for reversal. Justice Stewart, though, chose to circulate the first draft as a memorandum in which he spoke only for himself. See William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment*, AM. CRIM. L. REV. 1013, 1068-74 (1994); Peter Winn, *Katz and the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 2-3 (2009). Ultimately only Justice Black dissented from the reversal of the Ninth Circuit's decision in *Katz*.

<sup>19</sup> This is Professor Tribe's recollection as well. Email from Laurence Tribe to author (Nov. 14, 2011) (on file with author).

<sup>20</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (citations omitted). Before it

Immediately after that passage, Tribe added the following language by hand: “‘In sum, the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances,’ *Smayda v. United States*, 352 F.2d 251, 260 (dissenting opinion).”

The quotation from Judge Browning’s dissent in *Smayda* did not survive. There are light pencil markings, apparently by Justice Stewart, circling the words “such privacy” and suggesting, with a question mark and a proofreader’s symbol, that perhaps the entire quotation and citation should be deleted. There are also ink markings, apparently added later by Tribe, crossing out the quotation and citation. The next draft of the opinion in the file does not contain either the quoted language from *Smayda* or any reference to that case, and neither do any of the subsequent drafts.

It is possible that Justice Stewart was uncomfortable relying on an opinion from a sodomy case. But he had other reasons to delete the language from *Smayda*. He was at pains to avoid suggesting in *Katz* that the Constitution recognized a general right to privacy. In fact Justice Stewart added language to Tribe’s draft explicitly rejecting that idea:

... I do not believe there is any such thing as a general *Constitutional* “right to privacy.” The Fourth Amendment protects against certain specific governmental intrusions upon a person’s privacy. But its protections go further, and often have nothing to do with privacy at all. . . . And the protection of a person’s *general* right to privacy is, like the protection of the right to his property, and his very life, left to the law of the individual states.<sup>21</sup>

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was marked up, the draft appears to have read as follows (again, the citations have been omitted): “What a person knowingly exposes to the public, even in the sanctity of his own home or office, is not entitled to Fourth Amendment protection. But what he seeks to preserve as confidential, even in an area accessible to the public, may be constitutionally protected.”

<sup>21</sup> This language later appeared with minor modification in the published opinion for the Court in *Katz*, which provides as follows:

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

And later in the opinion, where Tribe had written that “the Fourth Amendment secures personal privacy — and not simply ‘protected areas,’” Justice Stewart changed the language to read, “the Fourth Amendment protects people — and not simply ‘areas.’” So Justice Stewart may have dropped the quotation from the *Smayda* dissent simply because he did not like Judge Browning’s suggestion that the Fourth Amendment “protects . . . privacy.”<sup>22</sup>

Regardless why the quotation from *Smayda* was cut, though, the first draft of the *Katz* opinion indicates that Justice Stewart and his law clerk were aware of the connections between *Katz* and *Smayda* and that they knew about the reliance that Judge Browning had placed on the expectations of a reasonable person. The draft thus provides additional evidence that *Smayda* was a salient part of the context in which the Court, in *Katz*, shifted Fourth Amendment analysis away from a focus on property and trespass and toward an emphasis on reasonable expectations of privacy — and that the implications of that shift for the policing of homosexuality were unlikely to have come as a surprise.

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*Id.* at 350-51.

<sup>22</sup> *Smayda v. United States*, 352 F.2d 251, 260 (9th Cir. 1965) (Browning, J., dissenting).