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## THAT'S NOT MY BAG, BABY: THE SEVENTH CIRCUIT TACKLES FOURTH AMENDMENT STANDING IN *UNITED STATES V. CARLISLE*

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Imagine you are walking down the street, wearing a backpack, and a police officer stops you and searches your bag.<sup>1</sup> Even though you are carrying the backpack and its contents are concealed from outside view, you may still be required to prove that you expected the backpack to remain free from government intrusion.<sup>2</sup> Should this expectation be implied? Under current Fourth Amendment standing doctrine, it is not.<sup>3</sup> And if the backpack belongs to somebody else, you may have to claim an interest in its contents—even if they are illicit—to challenge an unlawful search.<sup>4</sup> These requirements create a risky choice for defendants: either admit to knowledge of the illicit contents or lose the ability to challenge an unlawful search.<sup>5</sup>

However, claiming a subjective expectation that property will remain free from governmental intrusion is no simple task. A party

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<sup>1</sup> See *Carlisle II*, 614 F.3d 750, 753 (7th Cir. 2010).

<sup>2</sup> See *id.* at 756.

<sup>3</sup> See *id.* at 758.

<sup>4</sup> *Id.*

<sup>5</sup> See *id.* at 756–57.

seeking to challenge a search is responsible for proving by a preponderance of the evidence that he or she held a subjective expectation of privacy.<sup>6</sup> Moreover, a simple assertion that one expected privacy may not be enough to establish a subjective expectation of privacy.<sup>7</sup> But, a privacy interest can be disclaimed with a simple statement.<sup>8</sup> In evaluating whether a person has demonstrated a subjective expectation of privacy, courts usually find themselves in the position of evaluating whether the person has met his or her evidentiary burden and produced enough evidence to demonstrate that he or she believed an area would be private.<sup>9</sup>

This Article explores the law surrounding Fourth Amendment standing. Part I examines the constitutional framework of Fourth Amendment law. Part II describes the Seventh Circuit's recent decision in *United States v. Carlisle*, where the court held that a defendant carrying a backpack could not challenge its search because he failed to establish a subjective expectation of privacy.<sup>10</sup> Part III contends that the court's use of a five-factor test to determine whether the defendant held a reasonable expectation of privacy clouds the proper constitutional inquiry, especially when a defendant provides testimony at a suppression hearing. Rather, the court should use the

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<sup>6</sup> *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

<sup>7</sup> *See United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \*5–6 (C.D. Ill. Oct. 24, 2008) (holding that a defendant failed to prove subjective expectation of privacy when the only testimony he personally provided was an assertion in his memorandum that he “believed he had an expectation of privacy”); *United States v. Best*, 255 F.Supp.2d 905, 911 (N.D. Ind. Feb. 10, 2003) (holding that a defendant failed to prove a subjective expectation of privacy when he submitted an affidavit saying he expected a residence would remain private).

<sup>8</sup> *See Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (holding that a defendant had no subjective expectation of privacy when he testified that he did not believe the area searched would remain free from governmental intrusion); *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*10 (N.D. Ind. Dec. 3, 2008) (stating that there are no “magic words” for disclaiming a privacy interest but that a defendant can make an implicit disavowal by denying knowledge of the illicit items discovered in a search).

<sup>9</sup> *See Rawlings*, 448 U.S. at 105–06.

<sup>10</sup> *See Carlisle II*, 614 F.3d at 759–60.

two-prong reasonable-expectation-of-privacy analysis set out by the Supreme Court in *Katz v. United States*.<sup>11</sup> Part IV explains that despite using the wrong test, the Seventh Circuit nevertheless arrived at the legally correct result. In light of the current state of the law, this Article concludes with a policy discussion and a suggestion that the law surrounding Fourth Amendment standing should be revisited.

## I. CONSTITUTIONAL FRAMEWORK: THE FOURTH AMENDMENT

### *A. Reasonableness: An Exercise in Balancing*

The starting point for any search analysis is the first clause of the Fourth Amendment, which states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>12</sup> This language provides the basis for the Supreme Court’s ubiquitous statement that reasonableness is the touchstone of any Fourth Amendment analysis.<sup>13</sup> To determine whether a search or seizure is reasonable, courts must examine the totality of the circumstances.<sup>14</sup> Because this is a highly fact-specific inquiry, the factors a court considers will vary from case-to-case.<sup>15</sup> For instance, when police officers conduct a warrantless search, it may be relevant whether the individual has consented to a search.<sup>16</sup> But if officers have obtained a valid warrant, consent is largely irrelevant and courts will instead look

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<sup>11</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>12</sup> U.S. CONST. amend. IV.

<sup>13</sup> *Katz*, 389 U.S. at 359.

<sup>14</sup> *Samson v. California*, 547 U.S. 843, 848 (2006).

<sup>15</sup> *United States v. Banks*, 540 U.S. 31, 36 (2003) (“[W]e have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case.”).

<sup>16</sup> *See Camara v. Municipal Court*, 387 U.S. 523, 528–29 (1967) (“[A] search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”) (internal citations omitted).

to whether the warrant was executed reasonably.<sup>17</sup> Ultimately, courts consider whether the intrusion upon an individual's liberty was reasonable, in light of all the facts surrounding an event.<sup>18</sup>

Balancing is central to this inquiry. On a factual level, the relevant factors in a given case are balanced against each other.<sup>19</sup> Certain facts would suggest that government agents acted unreasonably, while others cut against that conclusion. For example, the fact that police officers requested consent to search a bag is a factor suggesting they behaved reasonably.<sup>20</sup> However, if that consent was obtained while a dozen officers surrounded an unarmed defendant with their guns drawn, those factors would suggest that the officer behaved unreasonably.<sup>21</sup> These facts would not be the end of the inquiry; a court would examine *all* factors with any bearing on whether the officers behaved reasonably in evaluating their conduct.<sup>22</sup> By doing so, courts are striving to get a complete picture of an incident, so they can evaluate officer conduct within the appropriate context.<sup>23</sup>

Along with balancing specific facts, the reasonableness inquiry also embodies balancing policy interests.<sup>24</sup> These interests include

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<sup>17</sup> *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (“A valid warrant is an independent basis for arrest, making consent irrelevant.”).

<sup>18</sup> *See Rakas v. Illinois*, 439 U.S. 128, 152 (Powell J., concurring) (“The ultimate question, therefore, is whether one’s claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances.”)

<sup>19</sup> *See Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (using a totality-of-the-circumstances balancing test to evaluate a seizure).

<sup>20</sup> *See United States v. Mendenhall*, 446 U.S. 544, 551 (1980) (recognizing that consent makes a warrantless search reasonable, in that the search does not violate the Fourth Amendment).

<sup>21</sup> *See id.* at 554 (suggesting that a person would be unreasonably seized, in violation of the Fourth Amendment, when faced with “the threatening presence of several officers” or when an officer displayed a weapon).

<sup>22</sup> Courts look to all the circumstances surrounding an event to determine if officers behaved in accordance with the Fourth Amendment. *See id.*

<sup>23</sup> *See Rakas*, 439 U.S. at 152.

<sup>24</sup> *See United States v. Place*, 462 U.S. 696, 703 (1983) (stating that a court “must balance the nature and quality of the intrusion on the individual’s Fourth

due regard for both the individual's liberty interest and the government's interest in prosecuting crime.<sup>25</sup> The reasonableness inquiry walks the line between these competing goals by striving to strike a balance. This tension extends to the very core of the Fourth Amendment, as courts routinely disagree about its primary purpose.<sup>26</sup> Some courts have stated that the Fourth Amendment was primarily intended to protect individual liberty,<sup>27</sup> while others argue that its main objective is to constrain the conduct of police officers.<sup>28</sup>

While this may seem like an inconsequential dispute, our understanding of the Fourth Amendment's purpose plays a key role in how searches and seizures are analyzed.<sup>29</sup> For instance, if that purpose is limiting governmental action, it follows that searches and seizures should be analyzed by looking at facts known to a governmental actor at the time of the event.<sup>30</sup> However, if we believe that the Fourth Amendment's primary purpose is to protect individual liberty, then it may be preferable to consider *any* facts that shed light on whether

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Amendment interests against the importance of the governmental interests alleged to justify the intrusion" in discussing whether a seizure was reasonable).

<sup>25</sup> See *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006) ("the Fourth Amendment is intended to strike a balance between the interest of the individual in being left alone by the police and the interest of the community in being free from the menace of crime"); see also *United States v. Fernandez-Guzman*, 577 F.2d 1093, 1097 (7th Cir. 1978) (stating that the seizure inquiry seeks to strike a "proper balance between the often conflicting interests of government control of crime and individual privacy").

<sup>26</sup> Compare *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), with *Brown v. Illinois*, 422 U.S. 590, 599–600 (1975).

<sup>27</sup> See *Camara*, 387 U.S. at 528 ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

<sup>28</sup> See *Brown*, 422 U.S. at 599–600 (recognizing that the exclusionary rule's deterrent effect on "lawless conduct by federal officers" protects a Fourth Amendment guarantee).

<sup>29</sup> See *infra* Part IV.

<sup>30</sup> See *United States v. Grogg*, 534 F.3d 807, 810 (7th Cir. 2008) ("In evaluating the reasonableness of a *Terry* stop, we examine the totality of the circumstances known to the officer at the time of the stop.") (citations and internal quotation marks omitted).

individual liberty has been infringed, even if those facts were not known to officers at the time of the search or seizure (and thus, did not influence the officers' conduct).<sup>31</sup> This understanding may justify a finding that no Fourth Amendment violation has occurred, even in cases where officer conduct was unlawful.<sup>32</sup> This scenario forms the basis of so-called Fourth Amendment standing issues, which are the focus of this Article.

### *B. Fourth Amendment Analysis*

In most cases, the Fourth Amendment analysis occurs before trial, when the court is presented with a motion to suppress evidence.<sup>33</sup> Fourth Amendment challenges (such as a challenge to the legality of a search) usually arise in criminal proceedings,<sup>34</sup> where they are brought by defendants.<sup>35</sup> In the motion to suppress evidence, defendants assert that evidence was obtained in violation of the Fourth Amendment and that it should be kept out of the criminal proceeding.<sup>36</sup> After briefing by both sides, courts usually hold a suppression hearing where the defendant testifies.<sup>37</sup> Then the judge rules on the motion.<sup>38</sup>

The suppression analysis for a search has three main parts, discussed in greater depth in the following sections. First, a defendant must prove that he or she had a reasonable expectation of privacy in the area searched.<sup>39</sup> If the defendant establishes a reasonable

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<sup>31</sup> See *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (relying on a defendant's statements at a suppression hearing in holding that he did not have standing to challenge a search).

<sup>32</sup> Cf. *Carlisle II*, 614 F.3d 750, 759–60 (7th Cir. 2010).

<sup>33</sup> See *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*1 (N.D. Ind. Dec. 3, 2008).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at \*3.

<sup>37</sup> See *id.* at \*1.

<sup>38</sup> See *id.*

<sup>39</sup> *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1182 (7th Cir. 1993).

expectation of privacy, the court will analyze whether a constitutional violation occurred.<sup>40</sup> Finally, if the court determines that a violation occurred, suppression is usually the remedy.<sup>41</sup>

1. Reasonable expectation of privacy: a threshold inquiry

Before a court will examine whether a search was lawful under the Fourth Amendment, a defendant must prove that he or she had a reasonable expectation of privacy in the area being searched.<sup>42</sup> A reasonable expectation of privacy is a term of art that refers to a privacy interest protected by the Fourth Amendment.<sup>43</sup> Not every search conducted by law enforcement is entitled to Fourth Amendment protection.<sup>44</sup> A search within the meaning of the Fourth Amendment can *only* occur if the government intrudes upon a place where a person expected privacy.<sup>45</sup> In this sense, the reasonable-expectation-of-privacy inquiry is a threshold question.<sup>46</sup>

Prior to the 1960s, Fourth Amendment rights were tied to property rights in the context of warrantless searches.<sup>47</sup> That is, there could be no unconstitutional search unless the government impeded upon a

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<sup>40</sup> See *United States v. Haydel*, 649 F.2d 1152, 1155–56 (5th Cir. 1981) (moving on to assess whether a search was unlawful after determining that a defendant had a reasonable expectation of privacy in the area searched).

<sup>41</sup> See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that the exclusionary rule operates to keep illegally-obtained evidence out of both state and federal courts).

<sup>42</sup> *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1182 (7th Cir. 1993).

<sup>43</sup> Orin S. Kerr, *The Fourth Amendment and New Technologies: The Case for Caution*, 102 Mich. L. Rev. 801, 809 (2004).

<sup>44</sup> See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that a narcotics-detection dog sniffing the exterior of a car was not a search because the driver did not have a reasonable expectation of privacy in the air molecules carrying the scent of illegal drugs).

<sup>45</sup> *Id.* at 408.

<sup>46</sup> *McGann*, 8 F.3d at 1182.

<sup>47</sup> *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that a wiretap was not an unlawful search because the defendant did not have a property interest in the telephone wires), *overruled by* *Katz v. United States*, 389 U.S. 347, 353 (1967).

recognized, tangible property interest.<sup>48</sup> However, the Supreme Court's decision in *Katz v. United States* closed the door on overtly limiting an individual's privacy rights along the lines of property interests.<sup>49</sup> Instead, the Court declared that "the Fourth Amendment protects people, not places."<sup>50</sup> *Katz* also introduced a new threshold inquiry: the reasonable expectation of privacy.<sup>51</sup> A reasonable expectation of privacy has two components: (1) a person must demonstrate a subjective expectation of privacy in the area being searched and (2) that expectation must be objectively reasonable.<sup>52</sup>

A subjective expectation of privacy exists when an individual has exhibited a desire to preserve something as private.<sup>53</sup> This usually comes in the form of statements made at the time of the search or at the suppression hearing.<sup>54</sup> Even though this subjective expectation is based solely on a defendant's state of mind, a defendant cannot always prove a subjective expectation simply by saying so.<sup>55</sup> In the same way that courts evaluate the intent of the defendant where intent is a necessary element of the offense, the goal is to use existing evidence to get a glimpse into the defendant's mind.<sup>56</sup> Accordingly, courts look to the totality of the circumstances to determine whether a subjective

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<sup>48</sup> *See id.* at 464–66.

<sup>49</sup> *Katz*, 389 U.S. at 353.

<sup>50</sup> *Id.* at 351.

<sup>51</sup> *See id.* at 361 (Harlan J., concurring).

<sup>52</sup> *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (*citing Katz*, 389 U.S. at 361).

<sup>53</sup> *Bond v. United States*, 529 U.S. 334, 338 (2000).

<sup>54</sup> *See United States v. Ruth*, 65 F.3d 599, 605 (7th Cir 1995) (explaining that it would be "almost impossible" for a defendant to demonstrate a subjective expectation of privacy without providing an affidavit or testimony).

<sup>55</sup> *See United States v. Best*, 255 F.Supp.2d 905, 911 (N.D. Ind. Feb. 10, 2003) (holding that a defendant failed to prove a subjective expectation of privacy when he submitted an affidavit saying he expected a residence would remain private).

<sup>56</sup> *See Nelson v. Thieret*, 793 F.2d 146, 148 (7th Cir. 1986) (discussing intent in the context of murder, the court noted that "intent is a state of mind and may be inferred from the surrounding circumstances") (quoting *People v. Pagliuca*, 119 458 N.E.2d 908, 912 (Ill. App. Ct. 1st Dist. 4th Div. 1983)).

expectation of privacy existed.<sup>57</sup> This totality-of-the-circumstances inquiry encompasses both facts known to officers at the time of the search *and* facts that may be discovered well after the event.<sup>58</sup>

Under this approach, a defendant's assertion that he or she held a subjective expectation may be overcome by contrary evidence.<sup>59</sup> For instance, a defendant may claim in court that he or she expected privacy in a bag, but the prosecution may be able to provide witnesses saying they saw the defendant publicizing the illicit contents of a bag in an attempt to sell drugs.<sup>60</sup> A court would not accept this defendant's claim as definitive proof in the face of such contrary evidence.<sup>61</sup> Indeed, the burden for proving a subjective expectation of privacy falls on the defendant, and it must be met through a preponderance of the evidence.<sup>62</sup>

Nevertheless, demonstrating a subjective expectation of privacy is a fairly low threshold and courts ordinarily find that it is met.<sup>63</sup> For instance, in *California v. Greenwood*, the Supreme Court was willing to entertain the notion that a defendant held a subjective expectation of privacy in trash bags he had placed on the curb (even though the court held that the expectation was not objectively reasonable).<sup>64</sup> In many cases, a defendant's testimony that he or she expected an area would be free from government intrusion will be enough to make this showing.<sup>65</sup>

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<sup>57</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 104–06 (1980).

<sup>58</sup> See *id.* at 104–05.

<sup>59</sup> *Best*, 255 F.Supp.2d at 911.

<sup>60</sup> *Cf. id.* (rejecting the defendant's claim that he expected access to a residence would be limited to those with keys where a witness testified that he sold drugs out of the residence in eight-hour shifts without having a key).

<sup>61</sup> See *id.*

<sup>62</sup> *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

<sup>63</sup> See *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (“Clearly—and understandably—[the defendant] has met the test of manifesting his own subjective intent and desire to maintain privacy.”)

<sup>64</sup> *California v. Greenwood*, 486 U.S. 35, 39 (1988).

<sup>65</sup> See, e.g., *id.*; but see *United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \* 5–6 (C.D. Ill. Oct. 24, 2008) (holding that a defendant failed to prove

Of course, a subjective expectation of privacy is not enough to trigger Fourth Amendment protection; society also must be prepared to recognize that expectation as reasonable.<sup>66</sup> This step of the inquiry “is a value judgment” that looks to whether an expectation of privacy would be “[c]onsistent with the aims of a free and open society.”<sup>67</sup> In determining whether a subjective expectation of privacy is objectively reasonable, courts once again look to the totality of the circumstances.<sup>68</sup> This is where defendants usually fail if they are unable to demonstrate a reasonable expectation of privacy.<sup>69</sup> Ordinarily, it is more difficult to prove that an expectation of privacy is objectively reasonable than it is to prove a personal expectation of privacy.<sup>70</sup>

Individuals can maintain a reasonable expectation of privacy against government intrusion even when they expect that other people may access the property.<sup>71</sup> For example, when two people share a home, each may have a reasonable expectation of privacy against

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subjective expectation of privacy when the only testimony he personally provided was an assertion in his memorandum that he “believed he had an expectation of privacy”).

<sup>66</sup> As the Supreme Court explained in *Rakas v. Illinois*, “[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy,” but that does not make it reasonable.

<sup>67</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1978); see *Katz v. United States*, 389 U.S. 347, 353 (1968) (where the Court concluded our society would consider it reasonable to expect that conversations in a public phone booth will not be recorded).

<sup>68</sup> See *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999) (applying the totality-of-the-circumstances inquiry to both prongs of the reasonable-expectation-of-privacy analysis).

<sup>69</sup> See *Greenwood*, 486 U.S. at 39 (accepting the defendant’s subjective expectation with little question, but rejecting the claim that it was objectively reasonable).

<sup>70</sup> Whereas a subjective expectation need only exist in a defendant’s mind, the objective prong takes into account societal values and judgments. See *Katz*, 389 U.S. at 361.

<sup>71</sup> See *Mancusi v. DeForte*, 392 U.S. 364, 368–70 (1968).

everyone except the other person—including law enforcement.<sup>72</sup> Likewise, where multiple people share an office, they may have a reasonable expectation of privacy against everyone except their co-workers.<sup>73</sup> At a certain point, an area may be open to so many people that an expectation of privacy is no longer reasonable.<sup>74</sup> For example, the Fourth Amendment does not protect property that is in plain view because no reasonable person would expect it to be private.<sup>75</sup> However, the critical point is that the expectation of privacy exists as against *governmental intrusion*.<sup>76</sup>

Once both the subjective and the objective prongs of this analysis have been satisfied, an individual has established a reasonable expectation of privacy.<sup>77</sup> This means that the area searched is subject to Fourth Amendment protections.<sup>78</sup> In our discussion, we may refer to passing through this threshold as a “constitutional moment.”

## 2. Evaluating searches and seizures

After a defendant has established both prongs of the reasonable-expectation-of-privacy analysis, he or she must then prove that a constitutional violation occurred.<sup>79</sup> As discussed above,

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<sup>72</sup> See *United States v. Matlock*, 415 U.S. 164, 169–71 (1974).

<sup>73</sup> See *Mancusi*, 392 U.S. at 368–70 (holding that a defendant had a reasonable expectation of privacy against government intrusion, even though he shared an office with co-workers and expected that those co-workers might access his workplace).

<sup>74</sup> See *O’Connor v. Ortega*, 480 U.S. 709, 718 (1987) (plurality) (“[S]ome government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.”)

<sup>75</sup> See *id.*

<sup>76</sup> See, e.g., *Mancusi*, 392 U.S. at 368–70.

<sup>77</sup> *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (“Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment.”) (citations and internal quotation marks omitted).

<sup>78</sup> *Rakas v. Illinois*, 439 U.S. 128, 134, 139 (1978).

<sup>79</sup> See *Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (ending the Fourth Amendment inquiry after determining that the defendant had no reasonable expectation of privacy).

reasonableness is at the heart of this inquiry.<sup>80</sup> Even though both searches and seizures are governed by the same clause of the Fourth Amendment, the legal standards for these constitutional moments are not the same.<sup>81</sup>

This Article is primarily concerned with searches, but a brief primer on seizures is useful to illustrate a contrast. A person is seized, within the meaning of the Fourth Amendment, when a governmental actor “by means of physical force or show of authority terminates or restrains [the person’s] freedom of movement.”<sup>82</sup> Courts look to the totality of the circumstances to determine whether a seizure is reasonable within the meaning of the Fourth Amendment.<sup>83</sup> In the context of a seizure, however, the “totality of the circumstances” only encompasses facts known to officers in the moments preceding the seizure.<sup>84</sup> This means that facts discovered after an individual has been seized cannot be used to justify the seizure.<sup>85</sup> For example, if an officer discovers an illegal weapon on a person he or she has seized, that weapon cannot be used to justify the initial seizure.<sup>86</sup> In this sense, the seizure inquiry focuses heavily on constraining the conduct of governmental actors.<sup>87</sup>

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<sup>80</sup> *O’Connor v. Ortega*, 480 U.S. 709, 723 (1987) (plurality) (stating that the Court must determine the appropriate standard of reasonableness for a workplace search).

<sup>81</sup> *Compare* *United States v. Mendenhall*, 446 U.S. 554, 557–58 (1980) (using the totality-of-the-circumstances inquiry to determine whether a defendant was seized), *with* *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2647 (2009) (Thomas J., concurring) (stating that the standard for a search is that it must be reasonable at its inception and in its scope).

<sup>82</sup> *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal quotation marks omitted).

<sup>83</sup> *See* *United States v. Grogg*, 534 F.3d 807, 810 (7th Cir. 2008) (“In evaluating the reasonableness of a *Terry* stop, we examine the totality of the circumstances known to the officer at the time of the stop”).

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *Cf. id.*

<sup>87</sup> *See supra* Part I.A.

Searches implicating the Fourth Amendment may occur with or without a warrant,<sup>88</sup> although here we are only concerned with the latter. Even though warrantless searches are per se unreasonable,<sup>89</sup> a warrantless search does not necessarily violate the Fourth Amendment.<sup>90</sup> The government can overcome this negative presumption by showing that a warrantless search was reasonable both at its inception and in its scope.<sup>91</sup> In fact, the government is frequently able to justify warrantless searches in this manner, and courts have recognized that they are a valuable tool for law enforcement.<sup>92</sup>

Generally, three levels of suspicion will justify a warrantless search at its inception. At the lowest level, a search is permissible absent any suspicion so long as an officer obtains consent from the person being searched.<sup>93</sup> An intermediate level of suspicion is called reasonable suspicion.<sup>94</sup> This is a term of art referring to suspicion based on specific and articulable facts,<sup>95</sup> and justified on the basis on officer safety.<sup>96</sup> These searches are also known as *Terry* frisks. The term refers to the seminal Supreme Court decision in *Terry v. Ohio*, where the Court first recognized reasonable suspicion as a valid basis

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<sup>88</sup> Compare *United States v. Peters*, 791 F.2d 1270, 1278 (7th Cir. 1986) (search conducted pursuant to a warrant), with *Carlisle II*, 614 F.3d 750, 759 (7th Cir. 2010) (warrantless search).

<sup>89</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>90</sup> See *Terry v. Ohio*, 392 U.S. 1, 20 (1968)

<sup>91</sup> See *id.* at 27–28.

<sup>92</sup> *Id.* at 24 (stating that “we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest,” in holding that a warrantless search was reasonable).

<sup>93</sup> See *United States v. Friend*, 151 Fed. App’x. 778, 780 (11th Cir. 2006) (per curiam) (searches conducted pursuant to valid consent do not require any suspicion).

<sup>94</sup> *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006).

<sup>95</sup> See *Terry*, 392 U.S. at 21.

<sup>96</sup> *Id.* at 28, 30.

for a search.<sup>97</sup> The third and highest level of suspicion is probable cause.<sup>98</sup>

Once the requisite level of suspicion has been satisfied, it defines the scope of the search.<sup>99</sup> This means that a search may not be broader or more invasive than necessary to satisfy an officer's initial purposes for conducting the search.<sup>100</sup> For example, a search based on reasonable suspicion must be brief and last only as long as necessary to satisfy the officer's initial suspicion.<sup>101</sup> This requirement recognizes that this intermediate level of suspicion justifies only a limited intrusion into an individual's privacy.<sup>102</sup> Certainly, in the course of conducting a *Terry* frisk, an officer may uncover evidence that creates a higher level of suspicion, and that is constitutionally permissible.<sup>103</sup> For instance, an officer may conduct a *Terry* frisk of an individual fleeing the scene of a crime, and the officer may find illegal drugs during the search. This discovery may justify a more extensive search or the search of another area, such as the person's home.<sup>104</sup> However,

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<sup>97</sup> See *United States v. Robinson*, 615 F.3d 804, 807–08 (7th Cir. 2010).

<sup>98</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (recognizing that probable cause is a higher level of suspicion than reasonable suspicion).

<sup>99</sup> *Terry*, 392 U.S. at 28–29 (explaining that the scope of a warrantless search is limited to the initial justification for the search).

<sup>100</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (holding that roving border searches are justified on less than probable cause because they are brief and so the intrusion is minimal); *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006) (“the less protracted and intrusive a search is, the less suspicion the police need in order to be authorized by the Fourth Amendment to conduct it, and vice versa”).

<sup>101</sup> *Terry*, 392 U.S. at 19 (“The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.”) (internal quotation marks omitted).

<sup>102</sup> See *id.*

<sup>103</sup> See *Brignoni-Ponce*, 422 U.S. at 881–82 (stating that officers who make brief investigative stops at the border may conduct more extensive searches if they are justified by a higher level of suspicion).

<sup>104</sup> See also *id.*

courts must remain vigilant of *post hoc* justification: the discovery of illicit goods will not validate unlawful means.<sup>105</sup>

### 3. The exclusionary rule: a remedy

When government actors conduct an illegal search, the remedy is found in the exclusionary rule.<sup>106</sup> In criminal proceedings, the exclusionary rule directs courts to suppress evidence obtained in violation of the Fourth Amendment.<sup>107</sup> When evidence is suppressed, it cannot be used in the government's case-in-chief.<sup>108</sup> The evidence may still be used for impeachment purposes.<sup>109</sup> However, without the suppressed evidence, the government is often unable to prove its case and the charges are dropped.<sup>110</sup> Although the exclusionary rule was created to safeguard against constitutional violations,<sup>111</sup> the rule itself is a court-made remedy and not a constitutional mandate.<sup>112</sup>

"Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct."<sup>113</sup> Despite its deterrent objective, the exclusionary rule has been limited not along the lines of

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<sup>105</sup> *United States v. One 1968 Cadillac Coupe DeVille*, Vin No. J8129552, 730 F.Supp. 1434, 1439 (N.D. Ill. Jan. 5 1990) ("[T]he law of search and seizure does not reason from results—it does not permit *post hoc ergo propter hoc* justification of a search.").

<sup>106</sup> MARK L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: THE POLICE* 371 (Erwin Chemerinsky et al. eds., Aspen Publishers, 3rd ed. 2007).

<sup>107</sup> *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

<sup>108</sup> *Id.*

<sup>109</sup> *United States v. Havens*, 446 U.S. 620, 628–29 (1980). Some state courts have eliminated that use of illegally-obtained evidence altogether. *See, e.g.*, *Commonwealth v. Fini*, 531 N.E.2d 570, 573–74 (Mass. 1988).

<sup>110</sup> *See Rakas v. Illinois*, 439 U.S. 128, 137 (1978).

<sup>111</sup> Without the exclusionary rule, "the Fourth Amendment would have been reduced to a form of words." *Mapp*, 367 U.S. at 648 (internal quotation marks omitted).

<sup>112</sup> *United States v. Leon*, 468 U.S. 897, 906 (1984).

<sup>113</sup> *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

whether officers have committed a constitutional violation (i.e., an unlawful search), but based on whether the individual claiming the protection is able to prove a reasonable expectation of privacy.<sup>114</sup> This limitation is created by the Fourth Amendment standing requirement.<sup>115</sup> In short, the exclusionary rule will only be applied in cases where a defendant can prove that a Fourth Amendment violation infringed his or her *own* privacy interests.<sup>116</sup>

### *C. Fourth Amendment Standing: A Policy Decision*

Although we use the word “standing” to describe whether a person can bring a Fourth Amendment challenge, the term is somewhat of a misnomer. Like the ordinary standing inquiry governed by Article III, so-called “Fourth Amendment standing” governs *who* can bring a constitutional challenge.<sup>117</sup> Unlike Article III standing, it is evaluated in the context of substantive Fourth Amendment law.<sup>118</sup> Specifically, it refers to the threshold reasonable-expectation-of-privacy inquiry.<sup>119</sup> The Ninth Circuit provides a useful primer on Fourth Amendment standing:

The term “standing” is often used to describe an inquiry into who may assert a particular fourth amendment claim. Fourth [A]mendment standing is quite different, however, from “case or controversy” determinations of [A]rticle III standing. Rather, it is a matter of substantive [F]ourth [A]mendment law; to say that a party lacks [F]ourth [A]mendment standing is to say that [the party’s] reasonable expectation of privacy

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<sup>114</sup> See *Rakas*, 439 U.S. at 134.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 139.

<sup>119</sup> *Id.*

has not been infringed. It is with this understanding that we use “standing” as a shorthand term.<sup>120</sup>

The standing inquiry exists because “Fourth Amendment rights are personal rights which, like other constitutional rights, may not be vicariously asserted.”<sup>121</sup> A defendant may be harmed by the introduction of damaging evidence, but that does not necessarily mean that the defendant’s own Fourth Amendment rights have been violated.<sup>122</sup>

Fourth Amendment standing issues commonly arise in situations where a defendant seeks to suppress the search of property belonging to a third party.<sup>123</sup> For instance, in *Rawlings v. Kentucky*, a defendant sought to suppress the admission of illegal drugs found in his girlfriend’s purse.<sup>124</sup> Whether a defendant has standing to challenge a search depends on whether the defendant can demonstrate a reasonable expectation of privacy.<sup>125</sup>

## 1. Substantive law

In this Article, the “substantive law” of Fourth Amendment standing refers to whether the facts in a given case are legally sufficient to establish a reasonable expectation of privacy. This comes into play most frequently in evaluating the objective prong of the inquiry.<sup>126</sup> Because the objective prong uses a reasonableness standard, courts are able to craft near-bright-line rules for those

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<sup>120</sup> *United States v. Taketa*, 923 F.2d 665, 669–70 (9th Cir. 1991) (*citing Rakas*, 439 U.S. at 139–50) (internal citations omitted).

<sup>121</sup> *Rakas*, 439 U.S. at 133–34 (internal quotation marks omitted).

<sup>122</sup> *Id.*

<sup>123</sup> *See e.g. Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980). This may also be due to the fact that prosecutors are less likely to challenge defendants’ privacy interest in property they actually own. *See United States v. Salvucci*, 448 U.S. 83, 90 (1980) (although property ownership is not controlling, it is factor to be considered in evaluating a reasonable expectation of privacy).

<sup>124</sup> *Rawlings*, 448 U.S. at 102.

<sup>125</sup> *Rakas*, 439 U.S. at 139.

<sup>126</sup> *See infra* Part III.B-C.

expectations that society is prepared to consider reasonable.<sup>127</sup> For instance, the Supreme Court has made clear that individuals may possess a reasonable expectation of privacy in the contents of their telephone conversations,<sup>128</sup> but not in the numbers they dial.<sup>129</sup> In fact, some courts view the objective prong as a question of pure law and the subjective prong as a question of pure fact.<sup>130</sup>

Although rules are more difficult to discern with respect to the subjective prong,<sup>131</sup> certain cases are instructive. One such case is the Seventh Circuit's decision in *United States v. Amaral-Estrada*.<sup>132</sup> In *Amaral-Estrada* the defendant challenged the search of his friend's car.<sup>133</sup> Even though a police officer watched the defendant exit the car and found the keys in the defendant's pocket,<sup>134</sup> the defendant continued to deny knowledge of the car and its contents.<sup>135</sup> When the officer searched the car, he found a black duffel bag in the backseat containing over \$250,000 in cash.<sup>136</sup> At the suppression hearing, the defendant stated that a friend had loaned him the car.<sup>137</sup> The defendant also testified that his friend (the car owner) instructed him to leave the

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<sup>127</sup> See *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that it is objectively reasonable to believe a conversation on a public pay phone would not be recorded by police without a warrant); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (holding that it is objectively unreasonable to entertain an expectation of privacy in the phone numbers dialed from a private phone because the telephone company keeps a permanent record of everyone's calls).

<sup>128</sup> *Katz*, 389 U.S. at 353.

<sup>129</sup> *Smith*, 442 U.S. at 742.

<sup>130</sup> See e.g. *United States v. McKennon*, 814 F.2d 1539, 1543 (11th Cir. 1987) (per curiam) (citing *California v. Ciraolo*, 476 U.S. 207, 210–13 (1986); *United States v. Garzon*, 119 F.3d 1446, 1450 (10th Cir. 1997) (making the distinction in the abandonment context).

<sup>131</sup> See *McKennon*, 814 F.2d at 1543.

<sup>132</sup> *United States v. Amaral-Estrada*, 509 F.3d 820 (7th Cir. 2007).

<sup>133</sup> *Id.* at 825.

<sup>134</sup> *Id.* at 824 (the officer used the key found in the defendant's pocket during a *Terry* frisk to unlock the car).

<sup>135</sup> *Id.* at 823–24.

<sup>136</sup> *Id.* at 824.

<sup>137</sup> *Id.* at 823.

car in a certain parking lot, and told him that while he was gone somebody would put something in the backseat of the car.<sup>138</sup> Applying the two-prong reasonable-expectation-of-privacy inquiry set forth in *Katz*, the court held that the defendant lacked standing to challenge the car search because he did not exhibit a legitimate privacy interest in the car.<sup>139</sup>

In holding that the defendant failed to exhibit a subjective<sup>140</sup> expectation of privacy in the car, the court pointed to the following factors: the defendant expected others to enter the car; the defendant expected items to be left in the car (and possibly also removed); the defendant testified that he did not care about the duffel bag found in the backseat because it was not his bag and it was not his car; and the defendant initially denied knowledge of the car when questioned by police.<sup>141</sup> This case provides a clear example of a defendant's substantive failure to prove a subjective expectation of privacy.<sup>142</sup> This is a substantive failure, in the sense that the facts surrounding this case suggest that the defendant could not legally prove his subjective expectation,<sup>143</sup> rather than an evidentiary failure, where a defendant simply fails to put on enough evidence to demonstrate a subjective expectation that likely existed.<sup>144</sup> Here, the substantive lesson is that a

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 827.

<sup>140</sup> The court states the defendant “failed to manifest any sort of actual or subjective expectation of privacy.” *Id.* While this might refer to both prongs of the reasonable-expectation-of-privacy analysis, in this case the court is using it to refer to the subjective prong. *Id.* This is because the court phrases the first prong of the reasonable-expectation-of-privacy inquiry as whether “the defendant exhibits an actual or subjective expectation of privacy.” *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See explanation of “substantive law” Part II.C.1 *supra*.

<sup>143</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (holding that a defendant failed to manifest a subjective expectation of privacy where he admitted that he did not expect the area searched would remain free from governmental intrusion).

<sup>144</sup> See *United States v. Salvucci*, 448 U.S. 83, 95 (1980) (remanding the case where defendants erroneously relied on automatic standing and did not attempt to establish a reasonable expectation of privacy).

defendant must admit to at least having knowledge of the area searched in order to claim a subjective expectation of privacy.<sup>145</sup>

The test a court uses is another substantive component in assessing a subjective expectation of privacy.<sup>146</sup> Although the overwhelming majority of decisions (in this and all other circuits) apply the *Katz* test,<sup>147</sup> this has not always been the case in the Seventh Circuit.<sup>148</sup>

In *United States v. Peters*, the court acknowledged that the reasonable-expectation-of-privacy inquiry “embraces two discrete questions” (the subjective and objective prongs),<sup>149</sup> but the court adopted a factor test instead.<sup>150</sup> Under this test, five factors are relevant in determining whether an individual has shown a reasonable expectation of privacy: (1) whether the defendant has a possessory interest or ownership interest in the place searched; (2) whether the defendant has the right to exclude others from the place; (3) whether a defendant has exhibited a subjective expectation that the area would remain free from government intrusion; (4) whether the defendant took normal precautions to defend his privacy; and (5) whether the defendant was legitimately on the premises when the search occurred.<sup>151</sup> No single factor is talismanic to this inquiry.<sup>152</sup>

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<sup>145</sup> See *Amaral-Estrada*, 509 F.3d at 827.

<sup>146</sup> See explanation of “substantive law” in Part II.C.1 *supra*.

<sup>147</sup> Jeremy C. Smith, *The USA Patriot Act: Violating Reasonable Expectations of Privacy Protected By the Fourth Amendment Without Advancing National Security*, 82 N.C. L. Rev. 412, 441 (2003) (the *Katz* test is the predominant test for determining whether a reasonable expectation of privacy exists).

<sup>148</sup> See *United States v. Mitchell*, 64 F.3d 1105, 1109 (7th Cir. 1995); *Clark v. United States*, No. 93-3530, 46 F.3d 1133, at \*3 (7th Cir. 1994); *United States v. Duprey*, 895 F.2d 303, 309 (7th Cir. 1989), *abrogation on other grounds recognized by United States v. Bolivar*, 90 Fed. App’x. 153, 155 (7th Cir. 2004); *United States v. Peters*, 791 F.2d 1270, 1281 (7th Cir. 1986), *overruled on other grounds*.

<sup>149</sup> *Peters*, 791 F.2d at 1281.

<sup>150</sup> See *United States v. Haydel*, 649 F.2d 1152, 1154–55 (5th Cir. 1981).

<sup>151</sup> *Peters*, 791 F.2d at 1281.

<sup>152</sup> *Haydel*, 649 F.2d at 1154.

## 2. Evidentiary burden

The question of whether a movant has established a reasonable expectation of privacy in arguing a motion to suppress is a separate (but related) inquiry from whether the facts in a given case *could* support a reasonable expectation of privacy.<sup>153</sup> Indeed, there are cases where the facts may be sufficient to establish a reasonable expectation of privacy, but where the defendant has failed to make a sufficient evidentiary showing.<sup>154</sup> This is the distinction between the substantive and the evidentiary requirements for establishing a reasonable expectation of privacy.

In *Rawlings*, the Supreme Court made clear that defendants bear the burden of proving a reasonable expectation of privacy when challenging a search.<sup>155</sup> Moreover, defendants must prove their reasonable expectation of privacy through a preponderance of the evidence.<sup>156</sup> This means that mere assertions may not be enough to carry this burden.<sup>157</sup> Finally, this burden must be carried at the suppression hearing.<sup>158</sup>

When courts have held that a movant failed to meet his or her evidentiary burden in a motion to suppress, it is often because the movant has failed to provide sufficient testimony as to his or her subjective expectation of privacy.<sup>159</sup> For instance, in *United States v.*

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<sup>153</sup> See discussion of evidentiary burdens Part II.C.2 *infra*.

<sup>154</sup> See *United States v. Salvucci*, 448 U.S. 83, 95 (1980) (remanding the case where defendants erroneously relied on automatic standing and did not attempt to establish a reasonable expectation of privacy).

<sup>155</sup> *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980).

<sup>156</sup> *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

<sup>157</sup> *United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \*5–6 (C.D. Ill. Oct. 24, 2008) (holding that a defendant failed to prove subjective expectation of privacy when the only testimony he personally provided was an assertion in his memorandum that he “believed he had an expectation of privacy”).

<sup>158</sup> See *Rawlings* at 104–05.

<sup>159</sup> See *United States v. Meyer*, 157 F.3d 1067, 1080 (7th Cir. 1998) (holding that a defendant failed to prove a reasonable expectation of privacy because he did

*Ruth*, the Seventh Circuit held that a defendant failed to meet his burden because he did not put forth enough evidence to establish a subjective expectation of privacy.<sup>160</sup> The defendant in that case did not make any statements pertaining to his subjective expectation of privacy because he feared that evidence would be used against him at trial.<sup>161</sup> Instead, he relied on facts from the affidavit accompanying a search warrant and the testimony of a government agent.<sup>162</sup> However, the court explained that the defendant bears the burden of establishing a privacy interest, and thus it is “almost impossible” to find a subjective expectation of privacy without some testimony or affidavit from the defendant.<sup>163</sup> This is because the subjective prong of this inquiry can only be proven by evidence of what was in the defendant’s mind.<sup>164</sup>

## II. THE SEVENTH CIRCUIT’S DECISION IN *UNITED STATES V. CARLISLE*

The issue of Fourth Amendment standing was recently addressed by the Seventh Circuit in *United States v. Carlisle*.<sup>165</sup> In ruling on a defendant’s motion to suppress, the court held that the defendant could not challenge the search because he failed to establish a reasonable expectation of privacy.<sup>166</sup> Specifically, the court held that the defendant failed to prove a subjective expectation of privacy in the contents of the backpack that was searched by police.<sup>167</sup> Because

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not testify or submit an affidavit regarding his subjective expectation); *United States v. Ruth*, 65 F.3d 599, 605 (7th Cir. 1995).

<sup>160</sup> *Ruth*, 65 F.3d at 605.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 604–05.

<sup>163</sup> *Id.* at 605 (citation omitted).

<sup>164</sup> *Id.*

<sup>165</sup> *Carlisle II*, 614 F.3d 750 (7th Cir. 2010).

<sup>166</sup> *Id.* at 759.

<sup>167</sup> *Id.* at 759–60.

standing under the Fourth Amendment is a necessarily fact-specific inquiry,<sup>168</sup> a recitation of the facts is required under this analysis.

### A. *The Facts*

In February 2008, Eddie Lamar Carlisle was arrested after police officers in Fort Wayne, Indiana, visited the home of Michael Chapman to investigate suspected drug trafficking.<sup>169</sup> While executing a warrant down the street from Chapman's residence, officers saw people coming and going from Chapman's house in a manner indicative of drug activity.<sup>170</sup> However, officers did not even need reasonable basis for visiting Chapman's home, due to his status as a home detainee.<sup>171</sup> As part of home detention, Chapman and all adults living in his home signed a consent form authorizing unannounced searches of the residence.<sup>172</sup> As a result, officers were authorized to search Chapman's home at any time, without a warrant.<sup>173</sup> If Carlisle had signed the consent form, he would have essentially forfeited his right to challenge the search.<sup>174</sup> But Carlisle did not sign this form.<sup>175</sup>

Police officers knocked on Chapman's front door and identified themselves as law enforcement.<sup>176</sup> After the knock, prior to the door opening, officers saw people moving around inside the house and heard breaking glass.<sup>177</sup> One officer saw a person look through the

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<sup>168</sup> *United States v. Espinoza*, 256 F.3d 718, 731 (7th Cir. 2001) ("The Supreme Court... has always stressed the fact-specific nature of Fourth Amendment inquiries.").

<sup>169</sup> *Carlisle II*, 614 F.3d at 753.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*1 (N.D. Ind. Dec. 3, 2008).

<sup>173</sup> *Carlisle II*, 614 F.3d at 753.

<sup>174</sup> *See id.*

<sup>175</sup> *Carlisle I*, 2008 WL 5111346, at \*1.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

vertical blinds on the side of the house.<sup>178</sup> Then, before the front door was opened, officers saw a man exit through the back door.<sup>179</sup> The man looked nervous and he paused for a moment to look around, before running toward the alley behind the garage.<sup>180</sup> One officer ordered the man to stop and pulled out his taser; another officer drew his gun.<sup>181</sup> The man lay down on the ground and placed the backpack he was carrying on the ground beside him.<sup>182</sup> Officers handcuffed the man and brought him, along with the backpack, inside.<sup>183</sup> At that point, officers did not know the identity of the man who was, of course, Eddie Lamar Carlisle.<sup>184</sup>

Once inside, Carlisle consented to the officers' request for identification, at which point they knew he was not Chapman.<sup>185</sup> Officers conducted a *Terry* frisk to ensure that Carlisle was not carrying any weapons, which he was not.<sup>186</sup> Then things got interesting (for our purposes, at least). Without obtaining Carlisle's consent,<sup>187</sup> one of the officers opened the backpack and searched its contents.<sup>188</sup> The officer testified that he was unable to determine the contents of the backpack without opening it.<sup>189</sup> However, there is no evidence that the officer attempted to conduct a *Terry*-frisk of the backpack prior to opening it.<sup>190</sup> Additionally, Carlisle was still handcuffed when officers searched the backpack and he did not have

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at \*3.

<sup>188</sup> *Carlisle II*, 614 F.3d 750, 754 (7th Cir. 2010).

<sup>189</sup> *Carlisle I*, 2008 WL 5111346, at \*3.

<sup>190</sup> *Carlisle II*, 614 F.3d at 753–54.

access to it.<sup>191</sup> Upon searching the backpack, the officer discovered drugs and drug paraphernalia.<sup>192</sup>

After reading Carlisle his *Miranda* rights, the officer asked him about the backpack.<sup>193</sup> Carlisle told the officer he took the backpack from inside the house, without knowing what was inside it.<sup>194</sup> Carlisle did not claim or deny ownership of the backpack at that time.<sup>195</sup> At the suppression hearing, Carlisle testified that the backpack belonged to Chapman, who asked him to put it in the garage.<sup>196</sup> Carlisle also reiterated that he did not know what was in the backpack.<sup>197</sup>

### *B. The Decision*

The Seventh Circuit's decision is unusual in that it rested its holding on Carlisle's purported failure to establish a subjective expectation of privacy.<sup>198</sup> When holding that defendants are not entitled to Fourth Amendment protection, courts more commonly rest their decision on the objective prong of the analysis, by determining that a defendant's belief is not reasonable.<sup>199</sup> Although the Seventh Circuit considered both prongs of the reasonable-expectation-of-privacy inquiry (perhaps inadvertently, as a result of using the *Peters* test),<sup>200</sup> its decision rested on the subjective prong.<sup>201</sup>

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<sup>191</sup> *Carlisle I*, 2008 WL 5111346, at \*3.

<sup>192</sup> *Carlisle II*, 614 F.3d at 754.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See id.* at 759–60.

<sup>199</sup> *See, e.g., California v. Greenwood*, 486 U.S. 35, 39–41 (1986).

<sup>200</sup> *See* discussion of the *Peters* test Part III.B *infra*.

<sup>201</sup> *See Carlisle II*, 614 F.3d at 759–60.

## 1. District Court

In December 2008, the Northern District of Indiana denied Carlisle's motion to suppress the backpack search.<sup>202</sup> First, the court determined that Carlisle did not have a reasonable expectation of privacy in the contents of the backpack.<sup>203</sup> Relying on Fourth Amendment standing cases like *Rakas v. Illinois*, the court reiterated "Fourth Amendment rights are personal rights that may not be asserted vicariously; in other words, the legality of a search of another person's property cannot be asserted to suppress evidence located as a result of the search."<sup>204</sup> Accordingly, the district court held that Carlisle did not have standing to challenge the backpack search.<sup>205</sup>

The court based this conclusion on Carlisle's testimony at the suppression hearing "that the backpack belonged to Chapman, that Chapman asked Carlisle to take [the backpack] outside to the garage, and that Carlisle had no knowledge of [the backpack's] contents."<sup>206</sup> The court characterized these statements as an implicit disavowal of Carlisle's privacy interest in the backpack.<sup>207</sup> Ironically, the court noted that "no magic or literal words" are required to disclaim a privacy interest,<sup>208</sup> but it did not comment on whether a defendant is required to recite any specific language to *prove* a privacy interest. The court recognized that Carlisle "didn't claim or deny ownership of the backpack" when questioned by an officer, immediately following the search.<sup>209</sup> Although these facts support Carlisle's reasonable

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<sup>202</sup> *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*11 (N.D. Ind. Dec. 3, 2008).

<sup>203</sup> *Id.*, at \*10.

<sup>204</sup> *Id.* (quoting *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1974)).

<sup>205</sup> *Carlisle I*, 2008 WL 5111346, at \*10.

<sup>206</sup> *Id.* at \*9.

<sup>207</sup> *Id.* at \*10.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at \*9.

expectation of privacy, it was apparently not enough to overcome the statements he made under oath at the suppression hearing.<sup>210</sup>

Indeed, the court stated that Carlisle could not “have it both ways” by claiming the backpack did not belong to him and then attempting to assert a Fourth Amendment right to privacy in the bag and its contents.<sup>211</sup> However, this statement seems to overlook Supreme Court cases holding that property rights do not control a reasonable expectation of privacy.<sup>212</sup> The court also rejected Carlisle’s argument that “since he neither claimed ownership of the backpack nor denied ownership of it, the police had no right to search it without first reading him his *Miranda* rights and, possibly, without first pressing him to expressly state whether or not the bag belonged to him.”<sup>213</sup> The court cautioned that suppressing the search in this case could create a dangerous precedent whereby suspects in a similar situation would be free to remain silent about ownership of an object, and then succeed on a Fourth Amendment challenge while disclaiming any ownership interest in the object.<sup>214</sup> Once again, the court’s focus on ownership is somewhat misplaced in light of *Katz*.<sup>215</sup>

After his motion to suppress was denied, Carlisle entered a conditional guilty plea<sup>216</sup> and appealed the ruling to the Seventh Circuit.<sup>217</sup>

## 2. Seventh Circuit

The Seventh Circuit affirmed the district court’s decision denying the motion to suppress.<sup>218</sup> While the standard of review is somewhat

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at \*10.

<sup>212</sup> *See e.g.* *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>213</sup> *Id.* at \*9.

<sup>214</sup> *Id.*

<sup>215</sup> *See Katz*, 389 U.S. at 353.

<sup>216</sup> *Carlisle II*, 614 F.3d 750, 752 (7th Cir. 2010) (“Carlisle pleaded guilty but reserved his right to appeal the district court’s denial of his motion to suppress.”).

<sup>217</sup> *See id.*

unclear, the court appeared to be evaluating the district court's decision *de novo*.<sup>219</sup> The *Carlisle* court explained that when reviewing the denial of a motion to suppress, questions of fact are reviewed for clear error, while questions of law are reviewed *de novo*.<sup>220</sup> However, the court suggested that “when ‘what happened?’ is not at issue, the ultimate resolution... is a question of law [to be] review[ed] *de novo*.”<sup>221</sup> When the court articulated this standard, it explicitly mentioned reasonable suspicion and probable cause—but not a reasonable expectation of privacy.<sup>222</sup> However, in the absence of any identifiable factual dispute with respect to “what happened?” it is likely the court reviewed the decision below *de novo*.<sup>223</sup>

At the start of its analysis, the court briefly distinguished this case from abandonment cases, where a defendant denies any interest in the property at the time of the search (or more precisely, immediately prior to the search).<sup>224</sup> For instance, if a defendant tells a police officer prior to a search that the contents of a bag do not belong to him, the bag is deemed abandoned.<sup>225</sup> Abandoned property does not receive Fourth Amendment protection,<sup>226</sup> so any subsequent search is not a constitutional moment.<sup>227</sup> The court noted that “*Carlisle* did not claim nor deny ownership of the bag at the time of the search.”<sup>228</sup>

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<sup>218</sup> *Id.* at 760.

<sup>219</sup> *See id.* at 754.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See id.* at 757–60 (search analysis); *see also* *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (“as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo*”).

<sup>224</sup> *Carlisle II*, 614 F.3d at 757.

<sup>225</sup> *See* *Bond v. United States*, 77 F.3d 1009, 1013 (7th Cir. 1996).

<sup>226</sup> *Carlisle II*, 614 F.3d at 757.

<sup>227</sup> *See* discussion of reasonable expectation of privacy Part I.B.1 *supra*.

<sup>228</sup> *Carlisle II*, 614 F.3d at 757.

Accordingly, the court held that abandonment cases were inapplicable.<sup>229</sup>

While the court correctly rejected the abandonment framework, its framing of the issue is somewhat dubious. The court cast the issue as: “under what circumstances does a defendant have a subjective privacy interest in a piece of property when ownership is ambiguous at the time of the search?”<sup>230</sup> This formulation ignores the fact that officers never asked Carlisle whether the backpack belonged to him prior to searching it.<sup>231</sup> Ownership of the bag only became ambiguous *after* the search, when Carlisle denied knowing what was in the bag and made no statement about whether he owned it.<sup>232</sup>

Nevertheless, the Seventh Circuit determined that Carlisle did not have a reasonable expectation of privacy in the backpack.<sup>233</sup> However, the court also noted, “this case is closer to the line than it appears at first glance.”<sup>234</sup> The court cited *Rakas* for the proposition that Fourth Amendment standing issues should be evaluated in the context of substantive Fourth Amendment law—specifically, in terms of whether a defendant has a reasonable expectation of privacy.<sup>235</sup> The court also pointed out that *Rawlings* placed the burden of establishing a reasonable expectation of privacy on the defendant.<sup>236</sup> According to the Seventh Circuit, the *Rawlings* court rejected the defendant’s claim that he had a subjective expectation of privacy because he could not exclude other people from the area searched and because he admitted that he did not expect the area would remain free from governmental intrusion.<sup>237</sup> In light of the defendant’s admission, which effectively

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> The officer did not ask Carlisle if the backpack belonged to him until after opening it and discovering illicit items. *See id.* at 754.

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at 756.

<sup>234</sup> *Id.* at 759.

<sup>235</sup> *Id.* at 756.

<sup>236</sup> *Id.* at 757–58.

<sup>237</sup> *Id.*

disclaimed his privacy interest, the ability to exclude others is somewhat irrelevant.<sup>238</sup> Finally, the court noted that *Salvucci* abolished the notion of automatic standing for crimes of possession.<sup>239</sup>

After laying out the Supreme Court framework, the court discussed precedent from the Seventh Circuit. The court explained that the five-factor test from *Peters* was not on point.<sup>240</sup> The court then discussed its more recent decision in *Amaral-Estrada*.<sup>241</sup> Although *Amaral-Estrada* did not explicitly outline what defeated the defendant's subjective expectation of privacy,<sup>242</sup> the *Carlisle* court's interpretation was that the defendant lacked a subjective expectation of privacy because "based on his own testimony, he expected others to enter the car to leave or remove items."<sup>243</sup> The *Carlisle* court acknowledged that neither the Supreme Court cases nor the decisions from its own circuit were "factually identical" to *Carlisle*'s circumstances.<sup>244</sup> However, the court used facts from *Rawlings* and *Amaral-Estrada* to evaluate *Carlisle*'s search within the *Peters* framework.<sup>245</sup>

Ultimately, the court held that *Carlisle* lacked standing to challenge the backpack search because he lacked a reasonable

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<sup>238</sup> Compare *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (holding that a defendant did not have a subjective expectation of privacy in drugs he put in his girlfriend's purse where the defendant testified that he did not expect the purse to remain free from governmental intrusion), with *United States v. McKennon*, 814 F.2d 1539, 1542–43 (11th Cir. 1987) (per curiam) (holding that a defendant had a subjective expectation of privacy in drugs he placed in his female companion's bag, in the absence of a statement disclaiming a subjective expectation of privacy).

<sup>239</sup> *Carlisle II*, 614 F.3d at 758.

<sup>240</sup> *Id.* at 759.

<sup>241</sup> See *id.* at 758–59.

<sup>242</sup> See *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007) (the court merely stated that "[the defendant] failed to manifest any sort of actual or subjective expectation of privacy," and then cited several factors proving that he lacked standing to challenge the search).

<sup>243</sup> *Carlisle II*, 614 F.3d at 759.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

expectation of privacy.<sup>246</sup> Nonetheless, the court recognized that at least two factors tipped decidedly in favor of finding a reasonable expectation of privacy.<sup>247</sup> Namely, the court found that Carlisle was legitimately in possession of the property, unlike the defendant in *Rawlings*.<sup>248</sup> Likewise, the court found that Carlisle “indicated that he intended to maintain privacy in the bag by holding onto it as he left the house and by keeping it closed.”<sup>249</sup> Thus, the fourth and fifth *Peters* factors counsel for finding a reasonable expectation of privacy.

Judge Flaum called the issue of exclusivity (the second *Peters* factor) “murkier.”<sup>250</sup> The court acknowledged that Carlisle had the right to exclude all others, except Chapman, while he was in possession of the backpack.<sup>251</sup> This distinguished Carlisle’s situation from the defendant in *Amaral-Estrada*,<sup>252</sup> who expected that other people—people he did not know—would access the car.<sup>253</sup> The court then made the leap from a “right to exclude others” (the second *Peters* factor) to “exclusive control.”<sup>254</sup> Certainly, the right to exclude some people is different from the right to exclude everyone; however, the court seems to be using “exclusive control” as shorthand for the fact that Carlisle did not know who had accessed the backpack before he received it.<sup>255</sup> The Seventh Circuit stated that Carlisle’s own testimony at the suppression hearing “strongly cut... against any claim of exclusive control.”<sup>256</sup> Specifically, the court pointed to Carlisle’s statement that “he did not know what was in the bag or who was using

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<sup>246</sup> *Id.*

<sup>247</sup> *See id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Carlisle II*, 614 F.3d at 759.

<sup>253</sup> *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).

<sup>254</sup> *Carlisle II*, 614 F.3d at 759.

<sup>255</sup> *See id.*

<sup>256</sup> *Id.*

the bag immediately prior to his taking it.”<sup>257</sup> This statement made Carlisle’s situation analogous to that of the defendant in *Rawlings*, who lacked control over who accessed the property just prior to the search.<sup>258</sup> Interestingly, this is the only time the court analogized Carlisle’s situation to another case.<sup>259</sup>

The court did not explicitly address whether Carlisle had a possessory or ownership interest in the backpack (the first *Peters* factor).<sup>260</sup> Even without this component, the court held that Carlisle’s “complete lack of testimony” about a subjective expectation of privacy “pushe[d] this case completely over the line.”<sup>261</sup> The court stated, “[t]he record lacks any evidence of [a] subjective expectation and Carlisle’s testimony cuts against a finding of any subjective expectation of privacy in the bag since he disclaimed ownership or even knowledge of its contents.”<sup>262</sup> Accordingly, the court held that Carlisle did not have a reasonable expectation of privacy in the backpack.<sup>263</sup> Because Carlisle did not satisfy this threshold inquiry, the court did not examine whether the backpack search violated the Fourth Amendment.<sup>264</sup> Indeed, without a reasonable expectation of privacy, the search did not rise to the level of a constitutional moment worthy of Fourth Amendment protection.<sup>265</sup>

### III. MEASURING A REASONABLE EXPECTATION OF PRIVACY

The *Peters* test is not an appropriate standard for measuring a reasonable expectation of privacy in cases like *Carlisle*. Instead, the court should have used the two-prong reasonable-expectation-of-

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *See id.* at 750–60.

<sup>260</sup> *See id.*

<sup>261</sup> *Id.* at 759.

<sup>262</sup> *Id.* at 759–60.

<sup>263</sup> *Id.* at 760.

<sup>264</sup> *See id.*

<sup>265</sup> *See* discussion of reasonable expectation of privacy Part I.B.1 *supra*.

privacy inquiry set forth by the Supreme Court in *Katz*. The two-prong inquiry makes clear the subjective and the objective expectation of privacy are two separate steps in the analysis.<sup>266</sup> The *Katz* test allows a court to clearly address each step of the analysis, without confusing which facts go toward proving a particular type of expectation (subjective or objective).<sup>267</sup> Further, the two-prong test prevents conflating a defendant's evidentiary burden, which usually comes into play when proving a subjective expectation of privacy, with the substantive legal requirement of proving both prongs.<sup>268</sup>

It should be noted that the Seventh Circuit is not the only circuit to use the five-factor test.<sup>269</sup> However, the analysis in this Article pertains only to the Seventh Circuit. This Circuit's interpretation and application of the *Peters* test suggest that it should not be used in most circumstances.<sup>270</sup> And even where it is not wholly inapplicable, the *Peters* test remains a second-best to the two-prong inquiry.<sup>271</sup>

#### A. Understanding the Peters Test

The five-factor test from *Peters* was first introduced by the Fifth Circuit in *United States v. Haydel*.<sup>272</sup> In that case, a defendant sought to claim a reasonable expectation of privacy in gambling records he stored at his parents' house, under their bed.<sup>273</sup> Although the court phrased the inquiry as "whether [the defendant] had a legitimate

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<sup>266</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

<sup>267</sup> See *infra* Part III.B.

<sup>268</sup> *Id.*

<sup>269</sup> See, e.g., *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000) (*citing* *United States v. Haydel*, 649 F.2d 1152, 1154–55 (5th Cir. 1981)); *United States v. Gomez*, 276 F.3d 694, 697–98 (5th Cir. 2001) (*citing Haydel*, 649 F.2d at 1155); *United States v. Breland*, 715 F.Supp. 7, 9 (D.C. Cir. 1989) (*citing Haydel*, 649 F.2d at 1154–55).

<sup>270</sup> See *infra* Part III.B.

<sup>271</sup> See *infra* Part III.C.

<sup>272</sup> *Haydel*, 649 F.2d at 1154–55; see *United States v. Peters*, 791 F.2d 1270, 1281 (7th Cir. 1986) (*citing Haydel*, 649 F.2d at 1155)).

<sup>273</sup> *Haydel*, 649 F.2d at 1154.

expectation of privacy,” it was referring to both prongs of the reasonable-expectation-of-privacy inquiry.<sup>274</sup> This becomes evident when the court concedes that the defendant clearly “exhibited a subjective expectation of privacy,” but goes on to use the factors to determine whether that expectation was reasonable.<sup>275</sup> This means that the *Peters* test is not geared towards evaluating a solely subjective expectation of privacy.

Moreover, the “factors” in the test are culled from various Supreme Court decisions on Fourth Amendment standing.<sup>276</sup> While the Court may seem like an appropriate authority to rely upon when fashioning a constitutional test, the Fourth Amendment inquiry is necessarily fact-specific.<sup>277</sup> Simply because certain facts were present and relevant in one case, does not mean that they will be relevant in every case.<sup>278</sup>

Since adopting this test, the Seventh Circuit has only applied it a handful of times.<sup>279</sup> As noted above, the *Amaral-Estrada* court did not apply the test.<sup>280</sup> This *Peters* test is no more prevalent in the lower

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<sup>274</sup> *See id.* Not to be confused with the term “actual expectation of privacy,” which courts have used as a proxy for a subjective expectation of privacy. *See United States v. Amaral-Estrada*, 509 F.3d 820, 827 (2007).

<sup>275</sup> *Haydel*, 649 F.2d at 1155.

<sup>276</sup> *See id.* at 1154–55 (*citing Rakas v. Illinois*, 439 U.S. 128, 148 (1978); *United States v. Salvucci*, 448 U.S. 83, 92 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980)).

<sup>277</sup> *See Haydel*, 649 F.2d at 1154–55.

<sup>278</sup> *See United States v. Banks*, 540 U.S. 31, 36 (2003) (“[W]e have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case.”).

<sup>279</sup> *See, e.g., United States v. Mitchell*, 64 F.3d 1105, 1109 (7th Cir. 1995); *Clark v. United States*, No. 93-3530, 46 F.3d 1133, at \*3 (7th Cir. 1994); *United States v. Duprey*, 895 F.2d 303, 309 (7th Cir. 1989), *abrogation on other grounds recognized by United States v. Bolivar*, 90 Fed. App’x. 153, 155 (7th Cir. 2004).

<sup>280</sup> *See United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).

courts within the Seventh Circuit.<sup>281</sup> In fact, the district court in *Carlisle* did not apply the *Peters* test.<sup>282</sup>

Interestingly, every time the Seventh Circuit has used the five-factor test, the court has found the defendant lacked standing to contest the search.<sup>283</sup> Of course, this is merely an observation and it does not necessarily suggest that the factor test is skewed against defendants. Indeed, when the Fifth Circuit formulated the test in *United States v. Haydel*, the court *did* find that the defendant had a reasonable expectation of privacy.<sup>284</sup> However, this trend in the Seventh Circuit may suggest that the *Peters* test skews the proper inquiry, making it more difficult for defendants to understand and meet their burden.<sup>285</sup>

*Carlisle* is the first time the Seventh Circuit has used the *Peters* test in more than fifteen years.<sup>286</sup> The *Carlisle* decision characterized *Peters* as giving the court “occasion to address the issue of when a defendant has a subjective privacy interest.”<sup>287</sup> While this may be true,

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<sup>281</sup> See, e.g., *United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \*5 (C.D. Ill. Oct. 24, 2008); *United States v. Bermudez*, No. IP 05-43-CR-B/F, 2006 WL 3197181, at \*17 (S.D. Ind. June 30, 2006); *United States v. Hamilton*, No. 91-CR-163, 1992 WL 26905, at \*3 (N.D. Ill. Feb. 11, 1992); *United States v. Schuster*, 775 F.Supp. 297, 300 (W.D. Wis. Sep. 6, 1990).

<sup>282</sup> See *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*1 (N.D. Ind. Dec. 3, 2008).

<sup>283</sup> See, e.g., *Carlisle II*, 614 F.3d 750, 759–60 (7th Cir. 2010); *United States v. Mitchell*, 64 F.3d 1105, 1110 (7th Cir. 1995); *Clark v. United States*, No. 93-3530, 46 F.3d 1133, at \*4 (7th Cir. 1994); *United States v. Duprey*, 895 F.2d 303, 310 (7th Cir. 1989), *abrogation on other grounds recognized by United States v. Bolivar*, 90 Fed. App'x. 153, 155 (7th Cir. 2004); *United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \*6 (C.D. Ill. Oct. 24, 2008); *United States v. Bermudez*, No. IP 05-43-CR-B/F, 2006 WL 3197181, at \*17 (S.D. Ind. June 30, 2006); *United States v. Hamilton*, No. 91-CR-163, 1992 WL 26905, at \*3 (N.D. Ill. Feb. 11, 1992); *United States v. Schuster*, 775 F.Supp. 297, 300 (W.D. Wis. Sep. 6, 1990).

<sup>284</sup> *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1981).

<sup>285</sup> See discussion of the *Peters* test's effect on a defendant's evidentiary burden Part III.B *infra*.

<sup>286</sup> See *Mitchell*, 64 F.3d at 1109 (the Seventh Circuit's most recent application of the *Peters* test, prior to *Carlisle*).

<sup>287</sup> *Carlisle II*, 614 F.3d at 758.

the *Peters* test itself does not aid in that endeavor.<sup>288</sup> Even when it was introduced, the *Peters* test was not used, or intended, to evaluate a strictly subjective expectation of privacy.<sup>289</sup>

### *B. Problems with applying the Peters test*

First, the *Peters* test is somewhat misleading, because it is not a factor test at all. Ordinarily, in a factor test, no single factor is dispositive.<sup>290</sup> However, the *Peters* test combines both the objective and the subjective prongs of the *Katz* test.<sup>291</sup> Both of these prongs must be met to establish a reasonable expectation of privacy.<sup>292</sup> Yet, whether a defendant exhibits a subjective expectation of privacy or not is one of the five *Peters* factors.<sup>293</sup> Nevertheless, this factor is dispositive because a reasonable expectation of privacy cannot exist without a subjective expectation of privacy.<sup>294</sup>

Second, the *Peters* test convolutes the reasonable-expectation-of-privacy inquiry. The vast majority of cases analyzing a defendant's reasonable expectation of privacy use the two-prong inquiry.<sup>295</sup> In this

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<sup>288</sup> See *infra* Part III.B.

<sup>289</sup> See *United States v. Peters*, 791 F.2d 1270, 1282 (7th Cir. 1986) (evaluating both the subjective and the objective prongs).

<sup>290</sup> See *CAE, Inc. v. Clean Air Engineering, Inc.*, 267 F.3d 660, 678 (7th Cir. 2001) (in an equitable balancing test, so single factor is dispositive); see also *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1981) (no one factor is talismanic to this inquiry).

<sup>291</sup> See *supra* Part III.A.

<sup>292</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

<sup>293</sup> See *Peters*, 791 F.2d at 1281. Some jurisdictions use a modified four-factor version of the *Peters* test, whereby the third *Peters* factor (the subjective expectation) is eliminated, and the remaining four factors inform the court's assessment of both the subjective and the objective prongs. See, e.g., *In re Kerlo*, 311 B.R. 256, 265 (Bankr. C.D. Cal. 2004); *United States v. Melucci*, 888 F.2d 200, 202 (1st Cir. 1989) (using the other four *Peters* factors, along with "the totality of the circumstances" to evaluate both prong of the reasonable expectation of privacy).

<sup>294</sup> See *Katz*, 389 U.S. at 361.

<sup>295</sup> *Jeremy C. Smith*, *supra* note 152, at 441 (the *Katz* test is the predominant test for determining whether a reasonable expectation of privacy exists).

more common analysis, it is clear that certain facts go toward proving a subjective expectation, while others are only relevant insofar as they affect whether that expectation is objectively reasonable.<sup>296</sup> However, the *Peters* test forces courts to consider both prongs at once.<sup>297</sup> Along with inquiring whether a defendant exhibited a subjective expectation of privacy, the test asks whether the defendant: had an ownership or possessory interest; had the right to exclude others; took normal precaution to ensure privacy; and possessed the property legitimately.<sup>298</sup> In *Carlisle*, where the defendant testified about his knowledge and expectation surrounding the backpack, these further inquiries go toward whether that expectation was objectively reasonable.<sup>299</sup> By holding that Carlisle had no subjective expectation of privacy,<sup>300</sup> the court did not need to address the objective prong.<sup>301</sup>

Moreover, cases using the *Katz* test do not fit so easily into the *Peters* framework.<sup>302</sup> The difficulty of shoehorning a two-prong inquiry into a five-factor test is demonstrated by the court's analysis in *Carlisle*.<sup>303</sup> For instance, the court points out that both *Carlisle* and the

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<sup>296</sup> See, e.g., *California v. Greenwood*, 486 U.S. 35, 39–40 (1988) (evaluating the subjective prong by considering that defendants asserted a privacy interest in their trash and by evaluating the credibility of that assertion, while looking to more general evidence—such as that “animals, children, scavengers, snoops, and other members of the public” could access the trash bags—in evaluating the objective prong).

<sup>297</sup> See *supra* Part III.A.

<sup>298</sup> *Peters*, 791 F.2d at 1281.

<sup>299</sup> See *Carlisle II*, 614 F.3d 750, 759–60 (7th Cir. 2010).

<sup>300</sup> *Id.*

<sup>301</sup> See *Greenwood*, 486 U.S. at 40–41 (moving on to evaluate whether an expectation of privacy was objectively reasonable only after having found that the defendant subjectively expected privacy). In the name of judicial restraint, a court's ruling should be limited to resolving the dispute. See Jeffrey W. Childers, *Kyllo v. United States: A Temporary Reprieve from Technology-Enhanced Surveillance of the Home*, 81 N.C. L.Rev 728, 755 (2003) (criticizing the Court in *Kyllo v. United States* for going further than necessary in its reasonable-expectation-of-privacy holding).

<sup>302</sup> See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980).

<sup>303</sup> See, e.g., *Carlisle II*, 614 F.3d at 759.

defendant in *Rawlings* lacked control over who had access to the searched property immediately prior to the search.<sup>304</sup> However, the *Rawlings* court did not interpret the defendant's lack of control over the purse as evidence against a subjective expectation of privacy; instead the court saw this as a failure to take "normal precautions" to maintain privacy.<sup>305</sup> The Seventh Circuit found just the opposite, holding that Carlisle *did* take normal precautions to maintain privacy in the backpack "by holding onto it as he left the house and by keeping it closed."<sup>306</sup> Moreover, the question of whether a defendant took normal precautions to maintain privacy goes towards the objective prong of the inquiry.<sup>307</sup> This confusion persists even though the *Peters* test is purportedly based on *Rawlings*.<sup>308</sup>

Third, the *Peters* test conflates the defendant's evidentiary burden with the substantive legal requirements of proving an expectation of privacy. Many courts explicitly separate factual and legal questions when conducting a reasonable-expectation of privacy analysis.<sup>309</sup> These courts hold that whether a defendant has proven the subjective prong is a purely factual question, whereas whether the objective prong is met is a purely legal question.<sup>310</sup>

Even without going so far, the subjective prong is really a question of whether the defendant has met the burden of demonstrating a belief that an area would remain free from

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<sup>304</sup> *Id.*

<sup>305</sup> *Rawlings*, 448 U.S. at 104.

<sup>306</sup> *Carlisle II*, 614 F.3d at 759.

<sup>307</sup> *See California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (holding that a defendant's subjective belief was objectively unreasonable because placing trash bags on the street exposed them to the public, i.e. the defendant relinquished control).

<sup>308</sup> *See United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1981) (*citing Rawlings*, 448 U.S. at 104–05).

<sup>309</sup> *See, e.g., United States v. McKennon*, 814 F.2d 1539, 1543 (11th Cir. 1987) (per curiam) (*citing California v. Ciraolo*, 476 U.S. 207, 210–13 (1986)); *United States v. Garzon*, 119 F.3d 1446, 1450 (10th Cir. 1997) (making the distinction in the abandonment context).

<sup>310</sup> *See, e.g., McKennon*, 814 F.2d at 1543; *Garzon*, 119 F.3d at 1450.

governmental intrusion.<sup>311</sup> As *Greenwood* demonstrates, a defendant can have a subjective belief that is objectively unreasonable.<sup>312</sup> For the sake of producing coherent and useful precedent, courts should analyze the objective and the subjective prong separately. This avoids conflating situations where a belief is objectively unreasonable with situations where the defendant has failed to make a sufficient evidentiary showing to establish his or her subjective belief.<sup>313</sup>

The Seventh Circuit used two separate bases for holding that Carlisle did not establish a subjective expectation of privacy, even though it did not identify them as such. First, on a substantive level, the court interpreted Carlisle's statements at the suppression hearing as cutting against a subjective expectation of privacy.<sup>314</sup> Second, on an evidentiary level, the court suggests that Carlisle did not meet his evidentiary burden by providing sufficient testimony to establish a subjective expectation of privacy.<sup>315</sup> This evidentiary deficiency seems to contribute more heavily to the court's determination.<sup>316</sup> However, the court makes no overt distinction between these requirements<sup>317</sup>—perhaps because the *Peters* test makes it practically difficult to parse them.

The *Peters* test clouds analysis of the defendant's evidentiary burden, especially in cases where he or she testifies at the suppression hearing.<sup>318</sup> Carlisle stated that he did not know what was in the

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<sup>311</sup> See *United States v. Rawlings*, 448 U.S. 98, 104–05 (1980) (holding that defendants bear the evidentiary burden of proving a reasonable expectation of privacy and then holding that the defendant failed to do so because he did not demonstrate a subjective expectation of privacy).

<sup>312</sup> Recall that the defendant in *Greenwood* believed his trash bags left on the street would remain private. *Greenwood*, 486 U.S. at 39–40.

<sup>313</sup> See, e.g., *Carlisle II*, 614 F.3d 750, 759–60 (7th Cir. 2010).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 759.

<sup>316</sup> “The record lacks any evidence of [a] subjective expectation and Carlisle's testimony cuts against a finding of any subjective expectation of privacy in the bag since he disclaimed ownership or even knowledge of its contents.” See *id.*

<sup>317</sup> See *id.* at 750–60.

<sup>318</sup> See *id.* at 759.

backpack, so why should it matter (for instance) whether he had the right to exclude others?<sup>319</sup> *Amaral-Estrada* stands for the proposition that a defendant cannot claim a subjective expectation of privacy in property that he or she has no knowledge of, without some further showing of an expectation against governmental intrusion.<sup>320</sup> And if Carlisle had admitted at the suppression hearing, as did the defendant in *Rawlings*,<sup>321</sup> that he did not expect the backpack to remain free from governmental intrusion, why should a court even consider (for example) whether he took normal precautions to ensure privacy? Under ordinary circumstances, when a defendant testifies at a suppression hearing about his or her subjective expectation of privacy, the only question is whether the defendant has met the evidentiary requirements set forth in *Rawlings* and its progeny.<sup>322</sup>

Indeed, Carlisle likely could have met his evidentiary burden of proving a subjective expectation of privacy at the suppression hearing, based on his conduct at the time of the search, by testifying that he expected the bag would remain free from governmental intrusion.<sup>323</sup> For instance, in *Katz* the Court recognized the defendant's subjective expectation of privacy even though he did not meet those *Peters* factors also not found in Carlisle's favor (notwithstanding the subjective expectation).<sup>324</sup> The defendant in *Katz* did not have an ownership of possessory interest in the public phone booth, nor did he have a right to exclude others.<sup>325</sup> While these facts may have affected

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<sup>319</sup> *See id.*

<sup>320</sup> *See supra* Part II.C.1.

<sup>321</sup> *See Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

<sup>322</sup> *See, e.g., United States v. Salas*, No. 92-2056, 979 F.2d 853, at \*3 (7th Cir. 1992).

<sup>323</sup> *See Carlisle II*, 614 F.3d at 759.

<sup>324</sup> *See Katz v. United States*, 389 U.S. 347, 359 (holding that the defendant had a reasonable expectation of privacy); *Carlisle II*, 614 F.3d at 759 (holding that Carlisle did not have the right to exclude others from the backpack).

<sup>325</sup> *Katz*, 389 U.S. at 352 (stating that a defendant is entitled to constitutional protections, even in an area accessible to the public).

the Court's assessment of the objective prong, they did not defeat the defendant's subjective expectation of privacy.<sup>326</sup>

If all that Carlisle needed to say was that he thought the backpack would remain free from governmental intrusion, why not just say so? There are several possible explanations. First, he may not have believed that the backpack would remain private and he did not want to commit perjury.<sup>327</sup> Second, it may have been a strategic decision on his part. After all, any statement he made admitting knowledge of the backpack's contents could have been used to impeach him at trial.<sup>328</sup> However, this explanation is unlikely because his decision to enter a conditional guilty plea when the district court denied his motion to suppress effectively eschewed his right to a trial.<sup>329</sup> It does not make sense for Carlisle to claim that he did not know what was in the backpack, and lose his ability to challenge the search, then forego his right to a trial where he could argue to the jury that he denied knowledge of the backpack's contents all along.<sup>330</sup> A third explanation, and perhaps the most plausible, is that Carlisle simply did not understand the legal and evidentiary requirements for proving a reasonable expectation of privacy.<sup>331</sup> Regardless of what motivated Carlisle's testimony at the suppression hearing, the Seventh Circuit's decision illustrates that the *Peters* test convolutes the reasonable-expectation-of-privacy inquiry.

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<sup>326</sup> See *id.* at 359.

<sup>327</sup> See *United States v. Humphreys*, No. 03 CR 480, 2004 WL 609796, at \*1 (N.D. Ill. Mar. 24, 2004) (citing *Quesada-Rosal*, 685 F.2d 1281, 1283(11th Cir. 1982)) (holding that a defendant's statement at a suppression hearing may be used for impeachment purposes at trial because the defendant has an obligation to testify truthfully at every proceeding).

<sup>328</sup> See *id.*

<sup>329</sup> See *Carlisle II*, 614 F.3d 750, 752 (7th Cir. 2010).

<sup>330</sup> See also *id.*

<sup>331</sup> See Brief of the Defendant-Appellant at 14–15 *Carlisle II*, 614 F.3d 750 (No. 10-1173), 2010 WL 1062301 at \*14–15 (arguing that abandonment cases provide the controlling law for this case).

*C. Alternative Uses for the Peters Test*

Because Carlisle provided testimony at the suppression hearing, the court should have evaluated whether that testimony, and other pertinent facts surrounding the search, met the evidentiary requirement for proving a subjective expectation of privacy by a preponderance of the evidence.<sup>332</sup> However, the *Peters* test may not always be misplaced. Although it does not make sense to cast a necessary element (a defendant's subjective expectation of privacy)<sup>333</sup> as but one of several "factors,"<sup>334</sup> it may not be dispositive in all cases. In fact, when the defendant does not provide testimony at a suppression hearing, *Peters* just may be an appropriate measure of whether he or she has manifested a subjective expectation of privacy.<sup>335</sup>

Recall the Seventh Circuit's statement that it is "almost impossible" for a defendant to carry his or her burden at a suppression hearing without providing some testimony or affidavit with respect to his or her subjective expectation of privacy.<sup>336</sup> The court has also held that a bald assertion that a defendant expected privacy, when made in a memorandum or in a motion, is insufficient to establish a subjective expectation of privacy (without more).<sup>337</sup> Unlike affidavits, memoranda and motions are not made under oath, so they cannot be used as a substitute for testimony.<sup>338</sup> However, the Seventh Circuit has been careful not to completely preclude the possibility that a defendant

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<sup>332</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980).

<sup>333</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

<sup>334</sup> See *United States v. Peters*, 791 F.2d 1270, 1281 (7th Cir. 1986).

<sup>335</sup> See discussion on applying the *Peters* test where the defendant does not provide testimony about his or her subjective expectation Part II.A.3 *supra*.

<sup>336</sup> *United States v. Ruth*, 65 F.3d 599, 605 (7th Cir 1995).

<sup>337</sup> *United States v. Bryant*, No. 07-CR-20043, 2008 WL 4724282, at \* 5–6 (C.D. Ill. Oct. 24, 2008) (holding that a defendant failed to prove a subjective expectation of privacy when the only testimony he personally provided was an assertion in his memorandum that he "believed he had an expectation of privacy").

<sup>338</sup> See *Resolution Trust Corp. v. Juergens*, 965 F.2d 149, 153 (7th Cir. 1992) (an affidavit is a substitute for live testimony).

could prove a subjective expectation *without* providing testimony.<sup>339</sup> In these cases, when a defendant merely asserts in a document submitted to a court that he or she expected privacy, that assertion may truly be but one of several factors to consider;<sup>340</sup> certainly, it is insufficient on its own to establish a subjective expectation of privacy.<sup>341</sup>

As noted above, the *Peters* test had only been applied a handful of times in the Seventh Circuit.<sup>342</sup> Other than *Carlisle* and *Peters* itself, *United States v. Bermudez* is the only instance of a court in this jurisdiction using the *Peters* test while relying on a defendant's testimony at a suppression hearing.<sup>343</sup> Although that case name may not be familiar, it had a different name on appeal: *Amaral-Estrada*.<sup>344</sup> Recall that the Seventh Circuit did not use the *Peters* test in that case.<sup>345</sup> Of course, this may just be a coincidence. Since courts within the Seventh Circuit seem to have a choice between applying the two-prong *Katz* test or the five-factor *Peters* test,<sup>346</sup> it is possible that courts choose the *Peters* test for a reason in cases where the defendant did not provide testimony.

Another possible use for the *Peters* test is cases where the court has reason to believe the defendant may be lying about his or her subjective expectation.<sup>347</sup> In *United States v. Best*, a district court

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<sup>339</sup> See *Ruth*, 65 F.3d at 605.

<sup>340</sup> See *id.*

<sup>341</sup> See *Bryant*, 2008 WL 4724282, at \* 5–6.

<sup>342</sup> See discussion of the *Peters* test's prevalence within the Seventh Circuit Part III.A.1 *supra*.

<sup>343</sup> See *United States v. Bermudez*, No. IP 05-43-CR-B/F, 2006 WL 3197181, at \*17 (S.D. Ind. June 30, 2006)

<sup>344</sup> *Bermudez*, 2006 WL 3197181, *aff'd sub nom.* *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).

<sup>345</sup> *Amaral-Estrada*, 509 F.3d at 827.

<sup>346</sup> Compare *Bermudez*, 2006 WL 3197181, at \*17 (applying the *Peters* test), with *Amaral-Estrada*, 509 F.3d at 827 (applying the *Katz* test in identical factual circumstances).

<sup>347</sup> See *United States v. Best*, 255 F.Supp.2d 905, 911 (N.D. Ind. Feb. 10, 2003).

within the Seventh Circuit rejected a defendant's claim that he expected privacy in a residence, even though he provided an affidavit claiming as much.<sup>348</sup> The court gave two reasons for rejecting the affidavit as proof of the defendant's subjective expectation: first, the defendant's credibility was "to say the least, lacking"; and second, the court found the affidavit to contain "unsupported and otherwise contradicted assertions and conclusions."<sup>349</sup> Both of these reasons boil down to the court's belief that the defendant was not being honest based on his demeanor in court<sup>350</sup> and on other evidence contradicting the affidavit.<sup>351</sup>

This holding is somewhat extraordinary, especially in light of *Greenwood*.<sup>352</sup> But it also illustrates that a defendant's evidentiary burden is real.<sup>353</sup> In the face of contradictory evidence, or where a defendant's credibility is otherwise questioned, even a direct assertion that he or she expected privacy may not be enough.<sup>354</sup> In those cases, the other *Peters* factors (other than whether the defendant claimed to have a subjective expectation) could provide insight into whether the defendant actually held a subjective expectation of privacy.

For instance, in *Best*, a more credible witness testified that he sold crack cocaine from the residence in eight hour shifts, even though he did not have a key, and that others entered the residence to buy

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<sup>348</sup> *Id.*

<sup>349</sup> The affidavit gave the defendant's name, stated the he had keys to a residence at the time it was searched because he was a "renter," and stated that he expected privacy in the residence in that access would be limited to those with keys. *Id.* at 909.

<sup>350</sup> The court noted that it had ample opportunity to observe the defendant's demeanor as it presided over his criminal trial where the defendant "dabbled" in self-representation, and several post-trial hearing during which the defendant testified. *Id.* at 911.

<sup>351</sup> A witness testified that he sold crack out of the residence in eight hours shifts, even though he didn't have a key, and that several people without keys entered the residence to buy crack cocaine. *Id.*

<sup>352</sup> *See California v. Greenwood*, 486 U.S. 35, 39 (1988).

<sup>353</sup> *See Best*, 255 F.Supp.2d at 911.

<sup>354</sup> *See id.*

drugs.<sup>355</sup> The court also expressed doubt about the defendant's status as a "renter" and questioned what this term meant in his affidavit.<sup>356</sup> In this case, looking to the other four *Peters* factors could shed light on whether the defendant met his evidentiary burden of showing a subjective expectation of privacy.<sup>357</sup> These external, objective facts could help discern whether the defendant truly believed the residence would be private.<sup>358</sup> Interestingly, it is the test's inevitable tendency to sweep in objective facts<sup>359</sup> that makes it inappropriate in cases like *Carlisle* (where there was no question with respect to the defendant's credibility),<sup>360</sup> and useful in cases like *Best*.

Despite these possible alternative uses, the *Katz* test remains the gold standard in evaluating both prongs of the reasonable expectation of privacy.<sup>361</sup> Although this discussion of alternative uses provides further illustration of how the *Peters* test operates, many of the problems identified in Part B of this Section would still persist—notably, the fact that applying a five-factor test makes it difficult to interpret most case law, which uses the two-prong test.<sup>362</sup> In short, *Carlisle* illustrates that the *Peters* test is misplaced, especially in cases where the defendant provides testimony at a suppression hearing and where there is no question of credibility.

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<sup>355</sup> *Id.* at 911.

<sup>356</sup> "Defendant's affidavit raises more questions than it answers. From whom was [d]efendant renting? When did the rental begin? Where is the lease agreement? What was the monthly fee? How was it paid? What documents reflect that payments were actually made? Did payments stop after GRIT agents searched the property on December 3, 1999, or did they continue until [d]efendant was arrested on October 5, 2000?" *Id.*

<sup>357</sup> See *United States v. Peters*, 791 F.2d 1270, 1281 (7th Cir. 1986).

<sup>358</sup> See *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (recognizing that a defendant can demonstrate a subjective expectation of privacy through conduct).

<sup>359</sup> See *supra* Part III.B.

<sup>360</sup> See *Carlisle II*, 614 F.3d 750, 750–60 (7th Cir. 2010).

<sup>361</sup> See Jeremy C. Smith, *supra* note 152, at 441.

<sup>362</sup> See Part III.B *supra*.

#### IV. WRONG TEST, RIGHT RESULT?

##### *A. Right result under existing law*

Although the Seventh Circuit may have confused its analysis, it did not reach the wrong result under existing precedent. *Rawlings* makes clear that a defendant bears the burden of proving a reasonable expectation of privacy.<sup>363</sup> This becomes even more important when the defendant is not the owner of the property searched.<sup>364</sup> Although Carlisle never stated that he did not care about the backpack, the fact that he denied knowledge of its contents makes this case analogous to *Amaral-Estrada*.<sup>365</sup> Moreover, his failure to make any definite statement that he expected the backpack to remain free from governmental intrusion indicates that he failed to meet his evidentiary burden.<sup>366</sup>

As the district court noted, there are no “magic words” for disclaiming a subjective expectation of privacy.<sup>367</sup> In *Rawlings*, the defendant outright admitted at the suppression hearing that he did not expect his girlfriend’s purse would remain free from governmental intrusion.<sup>368</sup> This type of admission will usually suffice to extinguish any subjective expectation of privacy.<sup>369</sup>

Along the same lines, the Eleventh Circuit has announced that defendants who explicitly deny having any relationship to the area searched, other than access, cannot meet their burden of proving a

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<sup>363</sup> *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

<sup>364</sup> *See id.* at 104–05; *United States v. Salvucci*, 448 U.S. 83, 90 (1980) (although property ownership is not controlling, it is factor to be considered in evaluating a reasonable expectation of privacy).

<sup>365</sup> *See Carlisle II*, 614 F.3d at 759; *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).

<sup>366</sup> *See Amaral-Estrada*, 509 F.3d at 827.

<sup>367</sup> *Carlisle I*, No. 1:08-CR-22, 2008 WL 5111346, at \*10 (N.D. Ind. Dec. 3, 2008).

<sup>368</sup> *Rawlings*, 448 U.S. at 105.

<sup>369</sup> *See id.*

subjective expectation of privacy.<sup>370</sup> Although this rule is not controlling in the Seventh Circuit, it provides a context for understanding the *Amaral-Estrada* decision.

In *Amaral-Estrada*, the court discussed both the defendant's testimony at the suppression hearing and the facts surrounding the search in holding that he lacked a subjective expectation of privacy.<sup>371</sup> However, with respect to the subjective prong of the analysis, it is really the defendant's testimony that he "did not care about the bag" that defeats his claim.<sup>372</sup> He also denied knowledge of the car when officers asked him about it, which has the same effect.<sup>373</sup> These statements by the defendant evidence, and ultimately defeat, his subjective expectation of privacy. Although the court also mentioned that people the defendant did not know would enter and leave the car, possibly leaving or removing items, this goes toward whether his expectation was objectively reasonable.<sup>374</sup>

Like the defendant in *Amaral-Estrada*, Carlisle denied knowledge of the backpack's contents.<sup>375</sup> He also failed to make any statements that he expected the backpack would remain free from governmental intrusion or that he expected privacy.<sup>376</sup> Although Carlisle did not go so far as to say he "didn't care" about the backpack,<sup>377</sup> the fact that he denied knowledge of its contents makes it difficult to believe that he

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<sup>370</sup> See, e.g., *United States v. Sweeting*, 933 F.2d 962, 964 (11th Cir. 1991).

<sup>371</sup> *Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).

<sup>372</sup> See *id.*; compare *Rawlings*, 448 U.S. at 105 (holding that a defendant did not have a subjective expectation of privacy in drugs he put in his girlfriend's purse where the defendant testified that he did not expect the purse to remain free from governmental intrusion), with *United States v. McKennon*, 814 F.2d 1539, 1542–43 (11th Cir. 1987) (per curiam) (holding that a defendant had a subjective expectation of privacy in drugs he placed in his female companion's bag, in the absence of a statement disclaiming a subjective expectation of privacy).

<sup>373</sup> See 509 F.3d at 827; *supra* note 381.

<sup>374</sup> See *Amaral-Estrada*, 509 F.3d at 827; *supra* Part III.B.

<sup>375</sup> See *Carlisle II*, 614 F.3d 750, 759 (7th Cir. 2010); *Amaral-Estrada*, 509 F.3d at 827.

<sup>376</sup> See *Carlisle II*, 614 F.3d at 750–60.

<sup>377</sup> See *Amaral-Estrada*, 509 F.3d at 827.

had a stake in them.<sup>378</sup> Even assuming that the Seventh Circuit owed no deference to the district court, its decision has a sufficient basis in existing precedent.<sup>379</sup>

### *B. Reconsidering Fourth Amendment standing*

The *Carlisle* decision, and what it reveals about Fourth Amendment standing, suggests that the law in this area is in need of revision. On a procedural level, the rules surrounding Fourth Amendment standing seem stacked against defendants.<sup>380</sup> On a policy level, the deterrent value of the exclusionary rule appears to have given way to an overly-technical, and unduly property-based, privacy analysis.<sup>381</sup> Instead of ensuring that government officials adhere to the procedural guarantees of the Fourth Amendment, the standing requirement places the burden on defendants to prove that they are worthy of such protections.<sup>382</sup>

As a result, defendants often are presented with a catch-22. They must either admit to at least having knowledge of illicit goods (to prove a privacy interest),<sup>383</sup> or forfeit a motion to suppress<sup>384</sup> (that could prevent a trial altogether).<sup>385</sup> The Supreme Court brushed aside this concern in *United States v. Salvucci*, where it held that a defendant charged with a possessory offense does not necessarily have standing

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<sup>378</sup> See *Carlisle II*, 614 F.3d at 759.

<sup>379</sup> See *Amaral-Estrada*, 509 F.3d 827; *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980); *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

<sup>380</sup> See e.g. *United States v. Salvucci*, 448 U.S. 83, 85–86 (1980); *United States v. Humphreys*, No. 03 CR 480, 2004 WL 609796, at \*1 (N.D. Ill. Mar. 24, 2004).

<sup>381</sup> See *Kerr*, *supra* note 48, at 815–16.

<sup>382</sup> See *Rawlings*, 448 U.S. at 104–05.

<sup>383</sup> See *Amaral-Estrada*, 509 F.3d 827.

<sup>384</sup> See *Carlisle II*, 614 F.3d 750, 750–60 (7th Cir. 2010).

<sup>385</sup> See *Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (excluded evidence can destroy the case against a defendant).

to challenge the search.<sup>386</sup> This holds true even when possession is one of the essential elements of the offense that must be proven by the prosecution at trial.<sup>387</sup> The Court responded to self-incrimination concerns by noting that the government cannot use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial.<sup>388</sup> However, the *Salvucci* Court determined that it was unnecessary to decide whether statements made at a suppression hearing could be used for impeachment purposes.<sup>389</sup> In fact, the Court still has not ruled on the issue.<sup>390</sup>

Circuit courts have held that a criminal defendant may be impeached by his or her testimony at a suppression hearing.<sup>391</sup> The Seventh Circuit has not yet ruled on this issue, but a lower court within this circuit has adopted the view that suppression testimony may be used to impeach a defendant.<sup>392</sup> The rationale behind these decisions is that a defendant has an obligation to testify truthfully, both on direct and cross-examination.<sup>393</sup> So long as the prior testimony is used only to attack a defendant's credibility at trial, rather than to establish the truth of the matter asserted, its use is not improper.<sup>394</sup>

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<sup>386</sup> *United States v. Salvucci*, 448 U.S. 83, 85–86 (1980), *overruling* *Jones v. United States*, 362 U.S. 257 (1960) (automatic standing for defendants charged with crimes of possession).

<sup>387</sup> *See Salvucci*, 448 U.S. at 91.

<sup>388</sup> *See id.* at 93–94 (*citing* *Simmons v. United States*, 390 U.S. 377, 394 (1968)).

<sup>389</sup> *See Salvucci*, 448 U.S. at 93.

<sup>390</sup> *See United States v. Humphreys*, No. 03 CR 480, 2004 WL 609796, at \*1 (N.D. Ill. Mar. 24, 2004).

<sup>391</sup> *United States v. Jaswal*, 47 F.3d 539, 543–44 (2d Cir. 1995); *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289–91 (9th Cir. 1994); *United States v. Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982).

<sup>392</sup> *Humphreys*, 2004 WL 609796, at \*1.

<sup>393</sup> *Id.* (*citing Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982)).

<sup>394</sup> *Humphreys*, 2004 WL 609796, at \*1 (*citing Jaswal*, 47 F.3d at 543).

In the case of co-conspirators, evidence may be suppressed with respect to one defendant, but used in the criminal trial of another.<sup>395</sup> This means that two defendants facing identical charges for identical crimes could receive dramatically different sentences, which undermines the even-handed administration of justice.<sup>396</sup>

Perhaps even more troubling than the procedural pitfalls of Fourth Amendment standing are its policy implications. The totality-of-the-circumstances approach used to evaluate a reasonable expectation of privacy encompasses both facts known to officers at the time of the search *and* facts that may be discovered well after the event.<sup>397</sup> In this sense, the reasonable-expectation-of-privacy inquiry focuses more heavily on protecting what courts view as legitimate constitutional rights, rather than constraining the behavior of police officers.<sup>398</sup> The inquiry focuses on who is afforded constitutional protection, instead of whether police officers behaved in accordance with the Fourth Amendment.<sup>399</sup>

The exclusionary rule has been criticized as allowing defendants to “get off on a technicality.”<sup>400</sup> If a defendant wins a motion to suppress, it may be impossible for the prosecution to prove guilt beyond a reasonable doubt without the excluded evidence.<sup>401</sup> Prosecutors may decide not to proceed with the trial and the defendant

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<sup>395</sup> See *Alderman v. United States*, 394 U.S. 165, 174 (1969) (holding that co-defendants are not afforded any special standing to challenge unlawful searches of each other); see also *United States v. Peters*, 791 F.2d 1270, 1280–82 (7th Cir. 1986) (holding that a defendant did not have standing to challenge the search of his co-conspirator’s car).

<sup>396</sup> See *Kimbrough v. United States*, 552 U.S. 85, 88 (2007) (“uniformity remains an important sentencing goal”)

<sup>397</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980).

<sup>398</sup> See *Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (recognizing that excluding evidence may completely preclude a prosecution).

<sup>399</sup> See *id.* at 133 (“Fourth Amendment rights are personal rights.”) (quoting *Brown v. United States*, 411 U.S. 223 (1973)).

<sup>400</sup> M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, 95 F.R.D. 211, 225 (1982).

<sup>401</sup> See *Rakas*, 439 U.S. at 137 (excluding probative evidence as a result of a constitutional violation could weaken or destroy the case against the defendant).

essentially “wins.”<sup>402</sup> Regardless of whether one sees the procedural guarantees of the Fourth Amendment as a “technicality,” it should be noted that the standing requirement is the “technicality” corollary for police officers. A search may have been conducted illegally, but there will be no legal recourse unless the defendant can first prove a reasonable expectation of privacy.<sup>403</sup> Only after the defendant proves this expectation does the burden shift to the government to show that a warrantless search was not unreasonable.<sup>404</sup>

The Supreme Court has justified this limiting of the exclusionary rule as a way to maintain the balance between competing interests inherent in the Fourth Amendment.<sup>405</sup> The Court summarized the interests at stake by stating:

The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.<sup>406</sup>

Some would argue that the standing inquiry strikes an appropriate balance in this respect.<sup>407</sup> But *Carlisle* suggests that the Fourth

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<sup>402</sup> See Wilkey *supra* note 405.

<sup>403</sup> See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

<sup>404</sup> Because warrantless searches are per se unreasonable, the government must overcome that presumption to prove that no constitutional violation occurred. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>405</sup> *Rakas*, 439 U.S. at 137.

<sup>406</sup> *Id.* (quoting *Alderman v. United States*, 394 U.S. 165, 174-175 (1969)).

<sup>407</sup> See *id.*

Amendment is better served encouraging more suppression of evidence, to eliminate any incentive for unlawful searches.<sup>408</sup>

Moreover, Fourth Amendment standing does not fit within the reasoning put forth to justify other exceptions to the exclusionary rule. For instance, courts have allowed the use of illegally-obtained evidence in grand jury proceedings because in that context, where the evidence is already excludable from the criminal trial, the rule would have little deterrent effect on police officers.<sup>409</sup> Likewise, courts have reasoned that allowing illegally-obtained evidence to be used for impeachment does not undermine the deterrent effect of the exclusionary rule because the usefulness of such evidence is difficult to predict.<sup>410</sup> Unlike these exceptions, applying the exclusionary rule on the basis of whether a defendant can prove a reasonable expectation of privacy creates a real possibility that illegally obtained evidence may be used at trial. This undercuts the deterrent value of the exclusionary rule by allowing the government to benefit from unlawful searches, without any repercussions.<sup>411</sup>

Certainly, this Article does not advocate for the complete abolishment of the reasonable-expectation-of-privacy inquiry. However, the purpose of the Fourth Amendment may be better served by putting a thumb on the scale (so to speak) when evaluating a defendant's subjective expectation of privacy. Indeed, if the expectation exists as against governmental intrusion,<sup>412</sup> would it not be fair to assume that *everyone* has a subjective expectation that police officers will not conduct warrantless searches of bags they are carrying (regardless of who they belong to)? *Carlisle*, and on a broader level, the standing inquiry itself, do subscribe to this assumption.

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<sup>408</sup> See also *Carlisle II*, 614 F.3d 750, 759–60 (7th Cir. 2010).

<sup>409</sup> *United States v. Calandra*, 414 U.S. 338, 351–52 (1974).

<sup>410</sup> *United States v. Havens*, 446 U.S. 620, 627–28 (1980).

<sup>411</sup> See *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

<sup>412</sup> See *Mancusi v. DeForte*, 392 U.S. 364, 368–70 (1968).

## CONCLUSION

Although the law of Fourth Amendment standing has come a long way in the last fifty years, it still needs some work. The foregoing analysis of case law suggests that evaluating a subjective expectation of privacy is really an exercise in measuring whether the defendant has proven that expectation through a preponderance of the evidence. However, the Seventh Circuit's decision in *Carlisle* illustrates that some courts are still confused about the appropriate measure for a reasonable expectation of privacy—and even more so with respect to measuring a subjective expectation.

In applying the five-factor Peters test, the court rolled the subjective and the objective prongs into a single inquiry. This conflated the defendant's evidentiary burden with his substantive legal requirements, and convoluted the reasonable-expectation-of-privacy inquiry. The court should have used the two-prong Katz test instead. Nevertheless, the court arrived at a result supported by prevailing precedent. The issues raised by this case suggest that further clarification is needed with respect to measuring a reasonable expectation of privacy. The decision also highlights some of the problems that persist in this area. In short, it may be time to re-evaluate the law of Fourth Amendment standing.