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

MARIANA KARAMPELAS*

Imagine you are walking down the street, wearing a backpack, and a police officer stops you and searches your bag.¹ 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.² Should this expectation be implied? Under current Fourth Amendment standing doctrine, it is not.³ 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.⁴ 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.⁵

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

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¹ See Carlisle II, 614 F.3d 750, 753 (7th Cir. 2010).
² See id. at 756.
³ See id. at 758.
⁴ Id.
⁵ 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. Moreover, a simple assertion that one expected privacy may not be enough to establish a subjective expectation of privacy. But, a privacy interest can be disclaimed with a simple statement. 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.

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. 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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7 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).
8 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).
9 See Rawlings, 448 U.S. at 105–06.
10 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*. 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.” This language provides the basis for the Supreme Court’s ubiquitous statement that reasonableness is the touchstone of any Fourth Amendment analysis. To determine whether a search or seizure is reasonable, courts must examine the totality of the circumstances. Because this is a highly fact-specific inquiry, the factors a court considers will vary from case-to-case. For instance, when police officers conduct a warrantless search, it may be relevant whether the individual has consented to a search. But if officers have obtained a valid warrant, consent is largely irrelevant and courts will instead look

12 U.S. CONST. amend. IV.
13 *Katz*, 389 U.S. at 359.
15 *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.”).
16 *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.\textsuperscript{17} Ultimately, courts consider whether the intrusion upon an individual’s liberty was reasonable, in light of all the facts surrounding an event.\textsuperscript{18}

Balancing is central to this inquiry. On a factual level, the relevant factors in a given case are balanced against each other.\textsuperscript{19} 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.\textsuperscript{20} 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.\textsuperscript{21} 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.\textsuperscript{22} By doing so, courts are striving to get a complete picture of an incident, so they can evaluate officer conduct within the appropriate context.\textsuperscript{23}

Along with balancing specific facts, the reasonableness inquiry also embodies balancing policy interests.\textsuperscript{24} These interests include

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  \item \textsuperscript{17} Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004) (“A valid warrant is an independent basis for arrest, making consent irrelevant.”).
  \item \textsuperscript{18} 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.”)
  \item \textsuperscript{20} 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).
  \item \textsuperscript{21} 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).
  \item \textsuperscript{22} Courts look to all the circumstances surrounding an event to determine if officers behaved in accordance with the Fourth Amendment. See id.
  \item \textsuperscript{23} See Rakas, 439 U.S. at 152.
  \item \textsuperscript{24} 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
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due regard for both the individual’s liberty interest and the
government’s interest in prosecuting crime. 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. Some courts have stated that the Fourth Amendment was primarily
intended to protect individual liberty, while others argue that its main
objective is to constrain the conduct of police officers.

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. 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. 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

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

25 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”).

26 Compare Camara v. Municipal Court, 387 U.S. 523, 528 (1967), with Brown

27 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.”).

28 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).

29 See infra Part IV.

30 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). This understanding may justify a finding that no Fourth Amendment violation has occurred, even in cases where officer conduct was unlawful. 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. Fourth Amendment challenges (such as a challenge to the legality of a search) usually arise in criminal proceedings, where they are brought by defendants. 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. After briefing by both sides, courts usually hold a suppression hearing where the defendant testifies. Then the judge rules on the motion. 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. If the defendant establishes a reasonable

31 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).
32 Cf. Carlisle II, 614 F.3d 750, 759–60 (7th Cir. 2010).
34 See id.
35 See id.
36 See id. at *3.
37 See id. at *1.
38 See id.
expectation of privacy, the court will analyze whether a constitutional violation occurred. Finally, if the court determines that a violation occurred, suppression is usually the remedy.

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. A reasonable expectation of privacy is a term of art that refers to a privacy interest protected by the Fourth Amendment. Not every search conducted by law enforcement is entitled to Fourth Amendment protection. A search within the meaning of the Fourth Amendment can only occur if the government intrudes upon a place where a person expected privacy. In this sense, the reasonable-expectation-of-privacy inquiry is a threshold question.

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

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40 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).

41 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).


44 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).

45 Id. at 408.

46 McGann, 8 F.3d at 1182.

47 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.\textsuperscript{48} However, the Supreme Court’s decision in \textit{Katz v. United States} closed the door on overtly limiting an individual’s privacy rights along the lines of property interests.\textsuperscript{49} Instead, the Court declared that “the Fourth Amendment protects people, not places.”\textsuperscript{50} \textit{Katz} also introduced a new threshold inquiry: the reasonable expectation of privacy.\textsuperscript{51} 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.\textsuperscript{52}

A subjective expectation of privacy exists when an individual has exhibited a desire to preserve something as private.\textsuperscript{53} This usually comes in the form of statements made at the time of the search or at the suppression hearing.\textsuperscript{54} 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.\textsuperscript{55} 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.\textsuperscript{56} Accordingly, courts look to the totality of the circumstances to determine whether a subjective

\begin{itemize}
\item \textsuperscript{48} See id. at 464–66.
\item \textsuperscript{49} Katz, 389 U.S. at 353.
\item \textsuperscript{50} Id. at 351.
\item \textsuperscript{51} See id. at 361 (Harlan J., concurring).
\item \textsuperscript{52} Smith v. Maryland, 442 U.S. 735, 740 (1979) (citing Katz, 389 U.S. at 361).
\item \textsuperscript{53} Bond v. United States, 529 U.S. 334, 338 (2000).
\item \textsuperscript{54} 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).
\item \textsuperscript{55} 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).
\item \textsuperscript{56} 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)).
\end{itemize}
expectation of privacy existed. 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.

Under this approach, a defendant’s assertion that he or she held a subjective expectation may be overcome by contrary evidence. 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. A court would not accept this defendant’s claim as definitive proof in the face of such contrary evidence. 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.

Nevertheless, demonstrating a subjective expectation of privacy is a fairly low threshold and courts ordinarily find that it is met. 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). 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.

See id. at 104–05.
Best, 255 F.Supp.2d at 911.
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).
See id.
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.”)
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. 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.” In determining whether a subjective expectation of privacy is objectively reasonable, courts once again look to the totality of the circumstances. This is where defendants usually fail if they are unable to demonstrate a reasonable expectation of privacy.

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

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”).

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.

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).

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).

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).

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.

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

Once both the subjective and the objective prongs of this analysis have been satisfied, an individual has established a reasonable expectation of privacy. This means that the area searched is subject to Fourth Amendment protections. 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. As discussed above,

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73 See Mancusi, 392 U.S. at 366–70 (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).
74 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.”)
75 See id.
76 See, e.g., Mancusi, 392 U.S. at 366–70.
77 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).
79 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.\textsuperscript{80} Even though both searchs and seizures are governed by the same clause of the Fourth Amendment, the legal standards for these constitutional moments are not the same.\textsuperscript{81}

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.”\textsuperscript{82} Courts look to the totality of the circumstances to determine whether a seizure is reasonable within the meaning of the Fourth Amendment.\textsuperscript{83} In the context of a seizure, however, the “totality of the circumstances” only encompasses facts known to officers in the moments preceding the seizure.\textsuperscript{84} This means that facts discovered after an individual has been seized cannot be used to justify the seizure.\textsuperscript{85} 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.\textsuperscript{86} In this sense, the seizure inquiry focuses heavily on constraining the conduct of governmental actors.\textsuperscript{87}

\textsuperscript{80} 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).

\textsuperscript{81} 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).

\textsuperscript{82} Brendlin v. California, 551 U.S. 249, 254 (2007) (internal quotation marks omitted).

\textsuperscript{83} 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”).

\textsuperscript{84} See id.

\textsuperscript{85} See id.

\textsuperscript{86} Cf. id.

\textsuperscript{87} See supra Part I.A.
Searches implicating the Fourth Amendment may occur with or without a warrant, although here we are only concerned with the latter. Even though warrantless searches are per se unreasonable, a warrantless search does not necessarily violate the Fourth Amendment. The government can overcome this negative presumption by showing that a warrantless search was reasonable both at its inception and in its scope. 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.

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. An intermediate level of suspicion is called reasonable suspicion. This is a term of art referring to suspicion based on specific and articulable facts, and justified on the basis on officer safety. 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 for a warrantless search.

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88 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).
91 See id. at 27–28.
92 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).
93 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).
94 United States v. Burton, 441 F.3d 509, 511 (7th Cir. 2006).
95 See Terry, 392 U.S. at 21.
96 Id. at 28, 30.
for a search.\textsuperscript{97} The third and highest level of suspicion is probable cause.\textsuperscript{98}

Once the requisite level of suspicion has been satisfied, it defines the scope of the search.\textsuperscript{99} 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.\textsuperscript{100} 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.\textsuperscript{101} This requirement recognizes that this intermediate level of suspicion justifies only a limited intrusion into an individual’s privacy.\textsuperscript{102} Certainly, in the course of conducting a \textit{Terry} frisk, an officer may uncover evidence that creates a higher level of suspicion, and that is constitutionally permissible.\textsuperscript{103} For instance, an officer may conduct a \textit{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.\textsuperscript{104} However,

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\item \textsuperscript{97} See United States v. Robinson, 615 F.3d 804, 807–08 (7th Cir. 2010).
\item \textsuperscript{98} 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).
\item \textsuperscript{99} \textit{Terry}, 392 U.S. at 28–29 (explaining that the scope of a warrantless search is limited to the initial justification for the search).
\item \textsuperscript{100} 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”).
\item \textsuperscript{101} \textit{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).
\item \textsuperscript{102} See id.
\item \textsuperscript{103} 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).
\item \textsuperscript{104} See also id.
\end{itemize}
courts must remain vigilant of *post hoc* justification: the discovery of illicit goods will not validate unlawful means.\(^\text{105}\)

3. The exclusionary rule: a remedy

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

“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.”\(^\text{113}\) Despite its deterrent objective, the exclusionary rule has been limited not along the lines of

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\(^{108}\) Id.


\(^{111}\) 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).


\(^{113}\) 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.114 This limitation is created by the Fourth Amendment standing requirement.115 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.116

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.117 Unlike Article III standing, it is evaluated in the context of substantive Fourth Amendment law.118 Specifically, it refers to the threshold reasonable-expectation-of-privacy inquiry.119 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

114 See Rakas, 439 U.S. at 134.
115 Id.
116 Id.
117 Id.
118 Id. at 139.
119 Id.
has not been infringed. It is with this understanding that we use “standing” as a shorthand term. The standing inquiry exists because “Fourth Amendment rights are personal rights which, like other constitutional rights, may not be vicariously asserted.” 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.

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

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. Because the objective prong uses a reasonableness standard, courts are able to craft near-bright-line rules for those

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120 United States v. Taketa, 923 F.2d 665, 669–70 (9th Cir. 1991) (citing Rakas, 439 U.S. at 139–50) (internal citations omitted).
121 Rakas, 439 U.S. at 133–34 (internal quotation marks omitted).
122 Id.
123 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).
124 Rawlings, 448 U.S. at 102.
125 Rakas, 439 U.S. at 139.
126 See infra Part III.B-C.
expectations that society is prepared to consider reasonable.127 For instance, the Supreme Court has made clear that individuals may possess a reasonable expectation of privacy in the contents of their telephone conversations,128 but not in the numbers they dial.129 In fact, some courts view the objective prong as a question of pure law and the subjective prong as a question of pure fact.130

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

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127 See Katz v. United States, 389 U.S. 347, 353 (1967) (holding that it is objectively reasonable 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).

128 Katz, 389 U.S. at 353.

129 Smith, 442 U.S. at 742.


131 See McKennon, 814 F.2d at 1543.

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

133 Id. at 825.

134 Id. at 824 (the officer used the key found in the defendant’s pocket during a Terry frisk to unlock the car).

135 Id. at 823–24.

136 Id. at 824.

137 Id. at 823.
In a certain parking lot, and told him that while he was gone somebody would put something in the backseat of the car. 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.

In holding that the defendant failed to exhibit a subjective 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. This case provides a clear example of a defendant’s substantive failure to prove a subjective expectation of privacy. 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, rather than an evidentiary failure, where a defendant simply fails to put on enough evidence to demonstrate a subjective expectation that likely existed. Here, the substantive lesson is that a

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138 *Id.*

139 *Id.* at 827.

140 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.*

141 *Id.*

142 See explanation of “substantive law” Part II.C.1 *supra.*

143 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).

144 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).

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defendant must admit to at least having knowledge of the area searched in order to claim a subjective expectation of privacy.\footnote{See Amaral-Estrada, 509 F.3d at 827.} 

The test a court uses is another substantive component in assessing a subjective expectation of privacy.\footnote{See explanation of “substantive law” in Part II.C.1 supra.} Although the overwhelming majority of decisions (in this and all other circuits) apply the \textit{Katz} test,\footnote{Jeremy C. Smith, \textit{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 \textit{Katz} test is the predominant test for determining whether a reasonable expectation of privacy exists).} this has not always been the case in the Seventh Circuit.\footnote{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), \textit{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), \textit{overruled on other grounds}.} 

In \textit{United States v. Peters}, the court acknowledged that the reasonable-expectation-of-privacy inquiry “embraces two discrete questions” (the subjective and objective prongs),\footnote{Peters, 791 F.2d at 1281.} but the court adopted a factor test instead.\footnote{See United States v. Haydel, 649 F.2d 1152, 1154–55 (5th Cir. 1981).} 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.\footnote{Peters, 791 F.2d at 1281.} No single factor is talismanic to this inquiry.\footnote{\textit{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. 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. 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. Moreover, defendants must prove their reasonable expectation of privacy through a preponderance of the evidence. This means that mere assertions may not be enough to carry this burden. Finally, this burden must be carried at the suppression hearing.

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. For instance, in United States v.

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153 See discussion of evidentiary burdens Part II.C.2 infra.
157 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”).
158 See Rawlings at 104–05.
159 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.\textsuperscript{160} 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.\textsuperscript{161} Instead, he relied on facts from the affidavit accompanying a search warrant and the testimony of a government agent.\textsuperscript{162} 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.\textsuperscript{163} This is because the subjective prong of this inquiry can only be proven by evidence of what was in the defendant’s mind.\textsuperscript{164}

II. THE SEVENTH CIRCUIT’S DECISION IN \textit{UNITED STATES V. CARLISLE}

The issue of Fourth Amendment standing was recently addressed by the Seventh Circuit in \textit{United States v. Carlisle}.\textsuperscript{165} 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.\textsuperscript{166} 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.\textsuperscript{167} Because

\textsuperscript{160}Ruth, 65 F.3d at 605.
\textsuperscript{161}Id.
\textsuperscript{162}Id. at 604–05.
\textsuperscript{163}Id. at 605 (citation omitted).
\textsuperscript{164}Id.
\textsuperscript{165}Carlisle II, 614 F.3d 750 (7th Cir. 2010).
\textsuperscript{166}Id. at 759.
\textsuperscript{167}Id. at 759–60.
standing under the Fourth Amendment is a necessarily fact-specific inquiry, 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. 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. However, officers did not even need reasonable basis for visiting Chapman’s home, due to his status as a home detainee. As part of home detention, Chapman and all adults living in his home signed a consent form authorizing unannounced searches of the residence. As a result, officers were authorized to search Chapman’s home at any time, without a warrant. If Carlisle had signed the consent form, he would have essentially forfeited his right to challenge the search. But Carlisle did not sign this form.

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

168 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.”).
169 Carlisle II, 614 F.3d at 753.
170 Id.
171 Id.
173 Carlisle II, 614 F.3d at 753.
174 See id.
175 Carlisle I, 2008 WL 5111346, at *1.
176 Id.
177 Id.
vertical blinds on the side of the house. Then, before the front door was opened, officers saw a man exit through the back door. The man looked nervous and he paused for a moment to look around, before running toward the alley behind the garage. One officer ordered the man to stop and pulled out his taser; another officer drew his gun. The man lay down on the ground and placed the backpack he was carrying on the ground beside him. Officers handcuffed the man and brought him, along with the backpack, inside. At that point, officers did not know the identity of the man who was, of course, Eddie Lamar Carlisle.

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

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178 Id.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
186 Id.
187 Id. at *3.
188 Carlisle II, 614 F.3d 750, 754 (7th Cir. 2010).
189 Carlisle I, 2008 WL 5111346, at *3.
190 Carlisle II, 614 F.3d at 753–54.
access to it.\textsuperscript{191} Upon searching the backpack, the officer discovered drugs and drug paraphernalia.\textsuperscript{192}

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

\textbf{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.\textsuperscript{198} 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.\textsuperscript{199} Although the Seventh Circuit considered both prongs of the reasonable-expectation-of-privacy inquiry (perhaps inadvertently, as a result of using the Peters test),\textsuperscript{200} its decision rested on the subjective prong.\textsuperscript{201}

\textsuperscript{191} Carlisle I, 2008 WL 5111346, at *3.
\textsuperscript{192} Carlisle II, 614 F.3d at 754.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See id. at 759–60.
\textsuperscript{200} See discussion of the Peters test Part III.B infra.
\textsuperscript{201} 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.\textsuperscript{202} First, the court determined that Carlisle did not have a reasonable expectation of privacy in the contents of the backpack.\textsuperscript{203} Relying on Fourth Amendment standing cases like \textit{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.”\textsuperscript{204} Accordingly, the district court held that Carlisle did not have standing to challenge the backpack search.\textsuperscript{205}

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.”\textsuperscript{206} The court characterized these statements as an implicit disavowal of Carlisle’s privacy interest in the backpack.\textsuperscript{207} Ironically, the court noted that “no magic or literal words” are required to disclaim a privacy interest,\textsuperscript{208} 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.\textsuperscript{209} Although these facts support Carlisle’s reasonable

\begin{footnotes}
\item[203] \textit{Id.}, at *10.
\item[204] \textit{Id.} (quoting \textit{Rakas v. Illinois}, 439 U.S. 128, 133–34 (1974)).
\item[206] \textit{Id.} at *9.
\item[207] \textit{Id.} at *10.
\item[208] \textit{Id.}
\item[209] \textit{Id.} at *9.
\end{footnotes}
expectation of privacy, it was apparently not enough to overcome the statements he made under oath at the suppression hearing. 210

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. 211 However, this statement seems to overlook Supreme Court cases holding that property rights do not control a reasonable expectation of privacy. 212 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.” 213 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. 214 Once again, the court’s focus on ownership is somewhat misplaced in light of Katz. 215

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

2. Seventh Circuit

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

210 Id.
211 Id. at *10.
213 Id. at *9.
214 Id.
215 See Katz, 389 U.S. at 353.
216 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.”).
217 See id.
unclear, the court appeared to be evaluating the district court’s decision *de novo.* 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.* 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.*” When the court articulated this standard, it explicitly mentioned reasonable suspicion and probable cause—but not a reasonable expectation of privacy. 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.*

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). 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. Abandoned property does not receive Fourth Amendment protection, so any subsequent search is not a constitutional moment. The court noted that “Carlisle did not claim nor deny ownership of the bag at the time of the search.”

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218 *Id.* at 760.
219 *See id.* at 754.
220 *Id.*
221 *Id.*
222 *See id.*
223 *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*”).
224 *Carlisle II,* 614 F.3d at 757.
225 *See* Bond v. United States, 77 F.3d 1009, 1013 (7th Cir. 1996).
226 *Carlisle II,* 614 F.3d at 757.
227 *See* discussion of reasonable expectation of privacy Part I.B.1 *supra.*
228 *Carlisle II,* 614 F.3d at 757.
Accordingly, the court held that abandonment cases were inapplicable.\footnote{Id.} 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?”\footnote{Id.} This formulation ignores the fact that officers never asked Carlisle whether the backpack belonged to him prior to searching it.\footnote{Id. at 754.} 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.\footnote{Id.}

Nevertheless, the Seventh Circuit determined that Carlisle did not have a reasonable expectation of privacy in the backpack.\footnote{Id. at 756.} However, the court also noted, “this case is closer to the line than it appears at first glance.”\footnote{Id. at 759.} 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.\footnote{Id. at 756.} The court also pointed out that Rawlings placed the burden of establishing a reasonable expectation of privacy on the defendant.\footnote{Id. at 757–58.} 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.\footnote{Id. at 757–58.} In light of the defendant’s admission, which effectively

\footnote{Id.}

\footnote{Id.}

\footnote{Id. at 754.}

\footnote{Id. at 756.}

\footnote{Id. at 759.}

\footnote{Id. at 756.}

\footnote{Id. at 757–58.}

\footnote{Id.}
disclaimed his privacy interest, the ability to exclude others is somewhat irrelevant. Finally, the court noted that Salvucci abolished the notion of automatic standing for crimes of possession.

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. The court then discussed its more recent decision in Amaral-Estrada. Although Amaral-Estrada did not explicitly outline what defeated the defendant’s subjective expectation of privacy, 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.” The Carlisle court acknowledged that neither the Supreme Court cases nor the decisions from its own circuit were “factually identical” to Carlisle’s circumstances. However, the court used facts from Rawlings and Amaral-Estrada to evaluate Carlisle’s search within the Peters framework.

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

238 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).

239 Carlisle II, 614 F.3d at 758.
240 Id. at 759.
241 See id. at 758–59.
242 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).

243 Carlisle II, 614 F.3d at 759.
244 Id.
245 Id.
expectation of privacy. Nonetheless, the court recognized that at least two factors tipped decidedly in favor of finding a reasonable expectation of privacy. Namely, the court found that Carlisle was legitimately in possession of the property, unlike the defendant in Rawlings. 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.” 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.” The court acknowledged that Carlisle had the right to exclude all others, except Chapman, while he was in possession of the backpack. This distinguished Carlisle’s situation from the defendant in Amaral-Estrada, who expected that other people—people he did not know—would access the car. The court then made the leap from a “right to exclude others” (the second Peters factor) to “exclusive control.” 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. The Seventh Circuit stated that Carlisle’s own testimony at the suppression hearing “strongly cut… against any claim of exclusive control.” Specifically, the court pointed to Carlisle’s statement that “he did not know what was in the bag or who was using

246 Id.
247 See id.
248 Id.
249 Id.
250 Id.
251 Id.
252 Carlisle II, 614 F.3d at 759.
253 United States v. Amaral-Estrada, 509 F.3d 820, 827 (7th Cir. 2007).
254 Carlisle II, 614 F.3d at 759.
255 See id.
256 Id.
the bag immediately prior to his taking it.”257 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. 258 Interestingly, this is the only time the court analogized Carlisle’s situation to another case.259

The court did not explicitly address whether Carlisle had a possessory or ownership interest in the backpack (the first *Peters* factor).260 Even without this component, the court held that Carlisle’s “complete lack of testimony” about a subjective expectation of privacy “pushed this case completely over the line.”261 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.”262 Accordingly, the court held that Carlisle did not have a reasonable expectation of privacy in the backpack.263 Because Carlisle did not satisfy this threshold inquiry, the court did not examine whether the backpack search violated the Fourth Amendment.264 Indeed, without a reasonable expectation of privacy, the search did not rise to the level of a constitutional moment worthy of Fourth Amendment protection.265

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-
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.\(^{266}\) 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).\(^{267}\) 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.\(^{268}\)

It should be noted that the Seventh Circuit is not the only circuit to use the five-factor test.\(^{269}\) 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.\(^{270}\) And even where it is not wholly inapplicable, the *Peters* test remains a second-best to the two-prong inquiry.\(^{271}\)

**A. Understanding the Peters Test**

The five-factor test from *Peters* was first introduced by the Fifth Circuit in *United States v. Haydel*.\(^{272}\) 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.\(^{273}\) Although the court phrased the inquiry as “whether [the defendant] had a legitimate


\(^{267}\) See infra Part III.B.

\(^{268}\) Id.


\(^{270}\) See infra Part III.B.

\(^{271}\) See infra Part III.C.

\(^{272}\) *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).

\(^{273}\) *Haydel*, 649 F.2d at 1154.
expectation of privacy,” it was referring to both prongs of the reasonable-expectation-of-privacy inquiry. 274 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. 275 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. 276 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. 277 Simply because certain facts were present and relevant in one case, does not mean that they will be relevant in every case. 278

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

274 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).
275 Haydel, 649 F.2d at 1155.
277 See Haydel, 649 F.2d at 1154–55.
278 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.”).
279 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).
280 See United States v. Amaral-Estrada, 509 F.3d 820, 827 (7th Cir. 2007).
courts within the Seventh Circuit. 281 In fact, the district court in Carlisle did not apply the Peters test. 282

Interestingly, every time the Seventh Circuit has used the five-factor test, the court has found the defendant lacked standing to contest the search. 283 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. 284 However, this trend in the Seventh Circuit may suggest that the Peters test skew the proper inquiry, making it more difficult for defendants to understand and meet their burden. 285

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


285 See discussion of the Peters test’s effect on a defendant’s evidentiary burden Part III.B infra.

286 See Mitchell, 64 F.3d at 1109 (the Seventh Circuit’s most recent application of the Peters test, prior to Carlisle).

287 Carlisle II, 614 F.3d at 758.
the Peters test itself does not aid in that endeavor.\textsuperscript{288} Even when it was introduced, the Peters test was not used, or intended, to evaluate a strictly subjective expectation of privacy.\textsuperscript{289}

\textbf{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.\textsuperscript{290} However, the Peters test combines both the objective and the subjective prongs of the Katz test.\textsuperscript{291} Both of these prongs must be met to establish a reasonable expectation of privacy.\textsuperscript{292} Yet, whether a defendant exhibits a subjective expectation of privacy or not is one of the five Peters factors.\textsuperscript{293} Nevertheless, this factor is dispositive because a reasonable expectation of privacy cannot exist without a subjective expectation of privacy.\textsuperscript{294}

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.\textsuperscript{295} In this

\begin{itemize}
\item \textsuperscript{288} See infra Part III.B.
\item \textsuperscript{289} See United States v. Peters, 791 F.2d 1270, 1282 (7th Cir. 1986) (evaluating both the subjective and the objective prongs).
\item \textsuperscript{290} 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).
\item \textsuperscript{291} See supra Part III.A.
\item \textsuperscript{292} Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan J., concurring).
\item \textsuperscript{293} 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).
\item \textsuperscript{294} See Katz, 389 U.S. at 361.
\item \textsuperscript{295} Jeremy C. Smith, supra note 152, at 441 (the Katz test is the predominant test for determining whether a reasonable expectation of privacy exists).
\end{itemize}
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.296 However, the Peters test forces courts to consider both prongs at once.297 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.298 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.299 By holding that Carlisle had no subjective expectation of privacy,300 the court did not need to address the objective prong.301

Moreover, cases using the Katz test do not fit so easily into the Peters framework.302 The difficulty of shoehorning a two-prong inquiry into a five-factor test is demonstrated by the court’s analysis in Carlisle.303 For instance, the court points out that both Carlisle and the
defendant in *Rawlings* lacked control over who had access to the searched property immediately prior to the search. 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. 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.” Moreover, the question of whether a defendant took normal precautions to maintain privacy goes towards the objective prong of the inquiry. This confusion persists even though the Peters test is purportedly based on *Rawlings*.

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. 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.

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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304 *Id.*
305 *Rawlings*, 448 U.S. at 104.
306 *Carlisle II*, 614 F.3d at 759.
307 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).
310 See, e.g., *McKennon*, 814 F.2d at 1543; *Garzon*, 119 F.3d at 1450.
governmental intrusion. As Greenwood demonstrates, a defendant can have a subjective belief that is objectively unreasonable. 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.

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. 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. This evidentiary deficiency seems to contribute more heavily to the court’s determination. However, the court makes no overt distinction between these requirements—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. Carlisle stated that he did not know what was in the

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311 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).

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

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

314 Id.

315 Id. at 759.

316 “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.

317 See id. at 750–60.

318 See id. at 759.
backpack, so why should it matter (for instance) whether he had the right to exclude others?\footnote{319} 

\textit{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.\footnote{320} And if Carlisle had admitted at the suppression hearing, as did the defendant in \textit{Rawlings}, \footnote{321} 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 \textit{Rawlings} and its progeny.\footnote{322}

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.\footnote{323} For instance, in \textit{Katz} the Court recognized the defendant’s subjective expectation of privacy even though he did not meet those \textit{Peters} factors also not found in Carlisle’s favor (notwithstanding the subjective expectation).\footnote{324} The defendant in \textit{Katz} did not have an ownership of possessory interest in the public phone booth, nor did he have a right to exclude others.\footnote{325} While these facts may have affected

\begin{flushleft}
\footnote{319}{See id.}
\footnote{320}{See supra Part II.C.1.}
\footnote{321}{See Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).}
\footnote{322}{See, e.g., United States v. Salas, No. 92-2056, 979 F.2d 853, at *3 (7th Cir. 1992).}
\footnote{323}{See Carlisle II, 614 F.3d at 759.}
\footnote{324}{See Katz v. United States, 389 U.S. 347, 359 (holding that the defendant had a reasonable expectation of privacy); \textit{Carlisle II}, 614 F.3d at 759 (holding that Carlisle did not have the right to exclude others from the backpack).}
\footnote{325}{\textit{Katz}, 389 U.S. at 352 (stating that a defendant is entitled to constitutional protections, even in an area accessible to the public).}
\end{flushleft}
the Court’s assessment of the objective prong, they did not defeat the defendant’s subjective expectation of privacy.  

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. 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. 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. 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. 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. 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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326 See id. at 359.
327 See United States v. Humphreys, No. 03 CR 480, 2004 WL 609796, at *1 (N.D. Ill. Mar. 24, 2004) (citing Quesada-Rosadal, 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).
328 See id.
329 See Carlisle II, 614 F.3d 750, 752 (7th Cir. 2010).
330 See also id.
331 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.\textsuperscript{332} 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)\textsuperscript{333} as but one of several “factors,”\textsuperscript{334} 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.\textsuperscript{335}

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.\textsuperscript{336} 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).\textsuperscript{337} Unlike affidavits, memoranda and motions are not made under oath, so they cannot be used as a substitute for testimony.\textsuperscript{338} However, the Seventh Circuit has been careful not to completely preclude the possibility that a defendant

\textsuperscript{332} See Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980).
\textsuperscript{333} See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan J., concurring).
\textsuperscript{334} See United States v. Peters, 791 F.2d 1270, 1281 (7th Cir. 1986).
\textsuperscript{335} 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.
\textsuperscript{336} United States v. Ruth, 65 F.3d 599, 605 (7th Cir 1995).
\textsuperscript{337} 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”).
\textsuperscript{338} 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.\textsuperscript{339} 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;\textsuperscript{340} certainly, it is insufficient on its own to establish a subjective expectation of privacy.\textsuperscript{341}

As noted above, the Peters test had only been applied a handful of times in the Seventh Circuit.\textsuperscript{342} 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.\textsuperscript{343} Although that case name may not be familiar, it had a different name on appeal: Amaral-Estrada.\textsuperscript{344} Recall that the Seventh Circuit did not use the Peters test in that case.\textsuperscript{345} 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,\textsuperscript{346} 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.\textsuperscript{347} In United States v. Best, a district court

\begin{itemize}
\item \textsuperscript{339} See Ruth, 65 F.3d at 605.
\item \textsuperscript{340} See id.
\item \textsuperscript{341} See Bryant, 2008 WL 4724282, at * 5–6.
\item \textsuperscript{342} See discussion of the Peters test’s prevalence within the Seventh Circuit Part III.A.1 supra.
\item \textsuperscript{343} See United States v. Bermudez, No. IP 05-43-CR-B/F, 2006 WL 3197181, at *17 (S.D. Ind. June 30, 2006)
\item \textsuperscript{344} Bermudez, 2006 WL 3197181, aff’d sub nom. United States v. Amaral-Estrada, 509 F.3d 820, 827 (7th Cir. 2007).
\item \textsuperscript{345} Amaral-Estrada, 509 F.3d at 827.
\item \textsuperscript{346} 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).
\item \textsuperscript{347} See United States v. Best, 255 F.Supp.2d 905, 911 (N.D. Ind. Feb. 10, 2003).
\end{itemize}
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. 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.” Both of these reasons boil down to the court’s belief that the defendant was not being honest based on his demeanor in court and on other evidence contradicting the affidavit.

This holding is somewhat extraordinary, especially in light of Greenwood. But it also illustrates that a defendant’s evidentiary burden is real. 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. 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 crack cocaine.

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348 Id.
349 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.
350 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.
351 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.
353 See Best, 255 F.Supp.2d at 911.
354 See id.
The court also expressed doubt about the defendant’s status as a “renter” and questioned what this term meant in his affidavit. 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. These external, objective facts could help discern whether the defendant truly believed the residence would be private. Interestingly, it is the test’s inevitable tendency to sweep in objective facts that makes it inappropriate in cases like Carlisle (where there was no question with respect to the defendant’s credibility), 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. 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. 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.

355 Id. at 911.
356 "Defendant's affidavit raises more questions than it answers. From whom was defendant 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 defendant was arrested on October 5, 2000?" Id.
357 See United States v. Peters, 791 F.2d 1270, 1281 (7th Cir. 1986).
358 See Smith v. Maryland, 442 U.S. 735, 740 (1979) (recognizing that a defendant can demonstrate a subjective expectation of privacy through conduct).
359 See supra Part III.B.
360 See Carlisle II, 614 F.3d 750, 750–60 (7th Cir. 2010).
361 See Jeremy C. Smith, supra note 152, at 441.
362 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.\(^{363}\) This becomes even more important when the defendant is not the owner of the property searched.\(^{364}\) 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*.\(^{365}\) 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.\(^{366}\)

As the district court noted, there are no “magic words” for disclaiming a subjective expectation of privacy.\(^{367}\) 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.\(^{368}\) This type of admission will usually suffice to extinguish any subjective expectation of privacy.\(^{369}\)

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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364 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).
365 See *Carlisle II*, 614 F.3d at 759; *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).
366 See *Amaral-Estrada*, 509 F.3d at 827.
368 *Rawlings*, 448 U.S. at 105.
369 See *id.*
subjective expectation of privacy. 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. 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. He also denied knowledge of the car when officers asked him about it, which has the same effect. 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.

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

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370 See, e.g., United States v. Sweeting, 933 F.2d 962, 964 (11th Cir. 1991).
371 *Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007).
372 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).
373 See 509 F.3d at 827; supra note 381.
374 See *Amaral-Estrada*, 509 F.3d at 827; supra Part III.B.
375 See *Carlisle II*, 614 F.3d 750, 759 (7th Cir. 2010); *Amaral-Estrada*, 509 F.3d at 827.
376 See *Carlisle II*, 614 F.3d at 750–60.
377 See *Amaral-Estrada*, 509 F.3d at 827.
had a stake in them.\textsuperscript{378} Even assuming that the Seventh Circuit owed no deference to the district court, its decision has a sufficient basis in existing precedent.\textsuperscript{379}

\textit{B. Reconsidering Fourth Amendment standing}

The \textit{Carlisle} decision, and what it reveals about Fourth Amendment standing, suggests that the law in this area is need of revision. On a procedural level, the rules surrounding Fourth Amendment standing seem stacked against defendants.\textsuperscript{380} 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.\textsuperscript{381} 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.\textsuperscript{382}

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),\textsuperscript{383} or forfeit a motion to suppress\textsuperscript{384} (that could prevent a trial altogether).\textsuperscript{385} The Supreme Court brushed aside this concern in \textit{United States v. Salvucci}, where it held that a defendant charged with a possessory offense does not necessarily have standing
to challenge the search.\(^{386}\) This holds true even when possession is one of the essential elements of the offense that must be proven by the prosecution at trial.\(^{387}\) 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.\(^{388}\) However, the Salvucci Court determined that it was unnecessary to decide whether statements made at a suppression hearing could be used for impeachment purposes.\(^{389}\) In fact, the Court still has not ruled on the issue.\(^{390}\)

Circuit courts have held that a criminal defendant may be impeached by his or her testimony at a suppression hearing.\(^{391}\) 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.\(^{392}\) The rationale behind these decisions is that a defendant has an obligation to testify truthfully, both on direct and cross-examination.\(^{393}\) 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.\(^{394}\)

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\(^{387}\) See Salvucci, 448 U.S. at 91.

\(^{388}\) See id. at 93–94 (citing Simmons v. United States, 390 U.S. 377, 394 (1968)).

\(^{389}\) See Salvucci, 448 U.S. at 93.


\(^{391}\) 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).

\(^{392}\) Humphreys, 2004 WL 609796, at *1.

\(^{393}\) Id. (citing Quesada-Rosadal, 685 F.2d 1281, 1283 (11th Cir. 1982)).

\(^{394}\) 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.\footnote{395} This means that two defendants facing identical charges for identical crimes could receive dramatically different sentences, which undermines the even-handed administration of justice.\footnote{396}

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 \textit{and} facts that may be discovered well after the event.\footnote{397} 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.\footnote{398} The inquiry focuses on who is afforded constitutional protection, instead of whether police officers behaved in accordance with the Fourth Amendment.\footnote{399}

The exclusionary rule has been criticized as allowing defendants to “get off on a technicality.”\footnote{400} 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.\footnote{401} Prosecutors may decide not to proceed with the trial and the defendant

\footnotesize{\begin{itemize}
\item \footnote{395} See \textit{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); \textit{see also} \textit{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).

\item \footnote{396} See \textit{Kimbrough v. United States}, 552 U.S. 85, 88 (2007) (“uniformity remains an important sentencing goal”)

\item \footnote{397} See \textit{Rawlings v. Kentucky}, 448 U.S. 98, 104–05 (1980).

\item \footnote{398} See \textit{Rakas v. Illinois}, 439 U.S. 128, 137 (1978) (recognizing that excluding evidence may completely preclude a prosecution).

\item \footnote{399} \textit{See id.} at 133 (“Fourth Amendment rights are personal rights.”) (quoting \textit{Brown v. United States}, 411 U.S. 223 (1973)).

\item \footnote{400} \textit{M. Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule}, 95 F.R.D. 211, 225 (1982).

\item \footnote{401} \textit{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).
\end{itemize}}
essentially “wins.”\textsuperscript{402} 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.\textsuperscript{403} Only after the defendant proves this expectation does the burden shift to the government to show that a warrantless search was not unreasonable.\textsuperscript{404}

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.\textsuperscript{405} 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.\textsuperscript{406}

Some would argue that the standing inquiry strikes an appropriate balance in this respect.\textsuperscript{407} But \textit{Carlisle} suggests that the Fourth

\begin{itemize}
  \item See Wilkey \textit{supra} note 405.
  \item Because warrantless searches are per se unreasonable, the government must overcome that presumption to prove that no constitutional violation occurred. See \textit{Katz v. United States}, 389 U.S. 347, 357 (1967).
  \item \textit{Rakas}, 439 U.S. at 137.
  \item \textit{id. (quoting Alderman v. United States}, 394 U.S. 165, 174-175 (1969)).
  \item See \textit{id}.
\end{itemize}
Amendment is better served encouraging more suppression of evidence, to eliminate any incentive for unlawful searches.\textsuperscript{408} 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.\textsuperscript{409} 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.\textsuperscript{410} 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.\textsuperscript{411}

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,\textsuperscript{412} would it not be fair to assume that \textit{everyone} has a subjective expectation that police officers will not conduct warrantless searches of bags they are carrying (regardless of who they belong to)? \textit{Carlisle}, and on a broader level, the standing inquiry itself, do subscribe to this assumption.

\textsuperscript{408} See also \textit{Carlisle II}, 614 F.3d 750, 759–60 (7th Cir. 2010).
\textsuperscript{411} See \textit{Terry} v. Ohio, 392 U.S. 1, 12 (1968).
\textsuperscript{412} See \textit{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.