KATZ IN THE DIGITAL AGE: WHY THE *KATZ* SUBJECTIVE PRONG MUST BE RESTRENGTHENED

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I. INTRODUCTION

Despite its formulation as a two-step analysis, one of the two prongs of the *Katz* test has been reduced to a mere formality. Under the *Katz* test established in *Katz v. United States*, a "search" within the meaning of the Fourth Amendment occurs whenever the government violates an individual's reasonable expectation of privacy.[1] Justice Harlan's original formulation of the test had two conditions required to establish the existence of a reasonable expectation of privacy.[2] First, an individual must exhibit an actual, subjective expectation of privacy.[3] Second, that expectation must be one that society is willing to recognize as "reasonable."[4]

Now, over fifty years since Harlan's creation of the test, courts seemingly ignore the subjective portion of the test entirely. Instead, the objective prong is oftentimes the sole inquiry used to determine whether an "unreasonable search" has occurred under the Fourth Amendment. In 2012, nine out of ten cases that applied the *Katz* test never even *considered* the defendant's subjective expectation of privacy.[5] Instead, since there is no standard for what society is willing to recognize as reasonable, the content of the objective prong, the Supreme Court has become the sole authority to

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1. 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).
2. *Id.*
3. *Id.*
4. *Id.*
5. Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 118 (2015).

decide what violates citizens' privacy. As a result, lower courts have issued confusing and inconsistent rulings failing to protect people's privacy as intended.[6]

This Note argues that the Supreme Court must restore the *Katz* test to its intended application by reestablishing the subjective prong as its own distinct inquiry. Part II describes the historical background of the Fourth Amendment and the origination of the *Katz* test. Part III explains Justice Harlan's intent for the subjective prong and examines the current problematic application of this prong and the third-party doctrine. Part IV argues that the subjective prong needs to be restrengthened and explains its proper application to best preserve the Framers' intent. Finally, Part V concludes that the third-party doctrine must be retired, and the Supreme Court must outline the factors that should be analyzed under each of the two prongs of the *Katz* test.

II. THE *KATZ* TEST: ORIGINS AND HISTORICAL BACKGROUND

The British Crown's abuse of "general warrants" to justify unreasonable searches greatly impacted the Framers' drafting of the Fourth Amendment.[7] General warrants essentially amounted to "permanent search warrants" that gave officials broad discretion to search.[8] When drafting the Fourth Amendment, the Founding Fathers sought to protect all citizens from such unbridled searches and seizures and ensure citizens are "secure in their persons, houses, papers, and effects."[9] Unfortunately, the Framers neglected to define the term "search."

Until 1967, courts used the "trespass doctrine" to determine what constituted a "search" under the Fourth Amendment.[10] Under this property-centric approach, a "search" by the government required a physical intrusion into a constitutionally protected area.[11] For example, in *Olmstead v. United States*, the Supreme Court held that wiretapping private phone conversations was *not* a search under the Fourth Amendment because government officials did not physically trespass onto the defendant's property.[12]

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6. Kelly A. Borchers, Note, *Mission Impossible: Applying Arcane Fourth Amendment Precedent to Advanced Cellular Phones*, 40 VAL. U. L. REV. 223, 253 (2005); Timothy T. Takahashi, *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72, 105 (2012).

7. Boyd v. United States, 116 U.S. 616, 624-67 (1886).

8. Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487, 492-93 (2013).

9. U.S. CONST. amend. IV.

10. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928).

11. Katz v. United States, 389 U.S. 347, 353 (1967).

12. *Olmstead*, 277 U.S. at 466.

The physical trespass doctrine quickly became outdated. As technology advanced beyond what the Framers could have envisioned, the physical trespass doctrine was no longer sufficient to safeguard Fourth Amendment rights. People's privacy interests grew beyond their "persons, houses, papers, and effects," and into the realm of the intangible. Instead of being limited to letters and kitchen drawers, privacy began to transition to the contents of emails and cloud accounts. The Supreme Court needed to readjust the meaning of the term "search" to keep pace with dynamic shifts in privacy expectations.[13]

To keep up with changing privacy concerns, the Supreme Court added to the definition of "search" to include a person-centric approach, which considers an individual's subjective expectations of privacy.[14] In *Katz*, the Federal Bureau of Investigation (FBI) attached an electronic listening and recording device to a public telephone booth.[15] Unaware that his phone conversation was being monitored by the police, Katz transmitted gambling information across state lines and was subsequently arrested.[16] Justice Stewart, writing for the majority, explained that the Fourth Amendment protections are not limited to constitutionally protected area[s],"[17] because "the Fourth Amendment protects people, not places."[18] The Court further clarified that while there is no "general right to privacy," what an individual subjectively views as private, even if in a publicly accessible area, may still be constitutionally protected.[19] The Court concluded that Katz reasonably believed that he was free from government intrusion when he entered the phone booth and closed the door behind him.[20]

In his concurring opinion, Justice Harlan outlines a two-prong test to determine whether a "reasonable expectation of privacy" exists.[21] First, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[22] Justice Harlan's test replaced the physical trespass

13. *See Katz*, 389 U.S. at 349-50.
14. *See id.* at 351 (majority opinion); *see id.* at 361 (Harlan, J., concurring).
15. *Id.* at 348.
16. *Id.*
17. *Id.* at 350.
18. *Id.* at 351.
19. *Id.* at 350-51.
20. *Id*. at 352.
21. *Id.* at 360-61 (Harlan, J., concurring).
22. *Id.* at 361.

doctrine used to determine what constitutes a "search,"[23] and remains the controlling test.

In addition to the two-prong *Katz* analysis, the "third-party doctrine" established in *United States v. Miller*[24] and *Smith v. Maryland*[25] added an additional wrinkle to determining whether a reasonable expectation of privacy exists. Under the third-party doctrine, a person who voluntarily shares their information no longer has a "reasonable expectation of privacy" in that information because they assume the risk that others will reveal it.[26] In *Miller*, the Court held that the government's obtaining of the defendant's bank records did not constitute a search because they were not his "private papers."[27] The Court reasoned that the defendant had no reasonable expectation of privacy because the information was voluntarily conveyed to the banks.[28] Similarly, the *Smith* Court held that the government's installation of a pen register[29] at defendant's phone company to record the numbers dialed from his home was not a search.[30] The Court reasoned that the subjective expectation of privacy prong was not met because people do not generally "entertain any expectation of privacy in the numbers they dial."[31] The third-party doctrine forces the conclusion that if an individual shares information with others, then he cannot therefore have a subjective expectation of privacy in that information. However, this is not analyzed under the subjective prong, but as its own sort of objective caveat on the side. Without a reasonable expectation of privacy, a person cannot claim Fourth Amendment protections. Therefore, the third-party doctrine circumvents the subjective prong altogether.

Over time, the Framers' purpose behind the Fourth Amendment—to ensure freedom from unreasonable government intrusion into citizens' private information and things—has become an afterthought. Justice Harlan's two-prong *Katz* test was meant to keep the Framers' intentions intact when litigating Fourth Amendment cases and has been effective for a

23. Although the trespass doctrine is no longer controlling, *id.* at 353, it is still a legitimate test relied upon in cases where a physical trespass has occurred, *see* United States v. Jones, 565 U.S. 400, 406-07 (2012).

24. 425 U.S. 435, 443 (1976).

25. 442 U.S. 735, 744 (1979).

26. *Smith*, 442 U.S. at 743-44; *Miller*, 425 U.S. at 441.

27. *Miller*, 425 U.S. at 440.

28. *Id.* at 440-43.

29. A pen register is a device installed by a telephone provider that records all the phone numbers dialed from the line it is attached to, as well as from all incoming calls. *See* John Applegate & Amy Grossman, *Pen Registers After* Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV., 753, 753-54 (1980).

30. *Smith*, 442 U.S. at 745-46.

31. *Id.* at 742.

long time. However, in the following fifty years since its creation, the test has been applied improperly. The subjective prong, due in part to the establishment of the third-party doctrine, is now completely ignored in Fourth Amendment analyses.

III. THE SUBJECTIVE PRONG HAS BEEN REDUCED TO A PURE FORMALITY

A. Justice Harlan's Intent for the Subjective Prong

Although Justice Harlan intended the *Katz* test to be a two-pronged analysis, modern law ignores the *Katz* subjective prong altogether. A 2012 study illustrates the irrelevance of the *Katz* subjective prong.[32] The study examined all cases published in 2012 that applied the *Katz* test and revealed that only three percent mentioned the subjective prong, and just twelve percent actually applied it.[33] Most surprisingly, there was not a *single* case in which the subjective prong was controlling.[34] The subjective prong was intended to be much more prominent than it is, and in the five decades following *Katz,* courts slowly eroded this prong by drifting away from its intended purpose.

In addition to the subjective prong's loss of use, Justice Harlan's test has been highly criticized. Some critics argue that the test is circular,[35] needlessly complex, and unworkable.[36] Others opine that it has strayed too far from its original meaning.[37] One such critic, Jim Harper, exclaimed that the *Katz* test "reversed the Fourth Amendment's focus from the reasonableness of government action . . . to the reasonableness of the interests the Amendment was meant to protect."[38] Harper claims that the *Katz* test erroneously focuses on whether it was *reasonable* to expect privacy in a certain situation, rather than whether the government acted *reasonably* in that situation.[39] The *Katz* test explicitly considers a person's subjective expectation of privacy, and the

32. Kerr, *supra* note 5, at 114.

33. *Id.*

34. *Id.*

35. Kyllo v. United States, 533 U.S. 27, 34 (2001); United States v. Jones, 565 U.S. 400, 427 (2012) (Alito, J., concurring) ("The *Katz* expectation-of-privacy test . . . involves a degree of circularity, . . . and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks"); Jeb Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 132-33 (2008) ("The circularity problem . . . afflicts expectations-of-privacy analysis.").

36. Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 AM. U.L. REV. 1381, 1381 (2008).

37. *See* Clancy, *supra* note 8, at 505-06.

38. Harper, *supra* note 36, at 1386.

39. *Id.* at 1383.

focus of a Fourth Amendment search analysis was never to rely solely on the reasonableness of government action. Regardless, it is clear that the subjective prong as it currently stands is simply not working.

What caused the subjective prong's relegation to the backburner of Fourth Amendment analysis? Much of the misuse of Justice Harlan's original two-pronged test stems from a misunderstanding of the rights granted by the Fourth Amendment. The language of the Fourth Amendment simply ensures that people are "secure" in their "persons, houses, papers, and effects, against unreasonable searches."[40] That is all the Framers wrote. The Fourth Amendment does *not* explain what an "unreasonable" search is. Is a search deemed unreasonable due to the government acting unreasonably? Or is a search unreasonable because the individual had a reasonable expectation of privacy in the location searched? Nonetheless, the *purpose* behind the Fourth Amendment is clear; the Framers wanted to ensure privacy in people's personal belongings and information by preventing unreasonable government intrusion. However, courts have repeatedly misinterpreted the Fourth Amendment as granting a general right to privacy, a notion that the Supreme Court explicitly rejected in *Katz*.[41]

The Framers intended to protect the privacy of people's private belongings and communications, or what Justice Scalia called the "intimate details of [a person's daily] life."[42] When the Fourth Amendment was adopted, privacy concerns were invariably linked to tangible objects.[43] With the writs of assistance fresh in their memories, the Framers did not want the government to be able to search people's belongings without proper justification.[44] Documents such as letters carried high privacy concerns for the Framers.[45] These documents were protected because they contained personal, *confidential communications*. The Framers aimed to prevent the government from seizing and searching such documents without having a good reason to do so. Therefore, the Framers clearly intended for security in personal privacy.

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40. U.S. CONST. amend. IV.

41. *See* Katz v. United States, 389 U.S. 347, 350 (1967) (holding that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'"). *But see* Truelove v. Hunt, 67 F. Supp. 2d 569, 576 (1999) (stating that "individuals have a general Fourth Amendment right to privacy); Buonocore v. Harris, 65 F.3d 347, 353 (stating that "the Framers recognized a person's special right to privacy").

42. Kyllo v. United States, 533 U.S. 27, 31 (2001).

43. *See* Boyd v. United States, 116 U.S. 616, 627-28 (1886).

44. *Id.*

45. Michael W. Price, *Rethinking Privacy: Fourth Amendment Papers and the Third-Party Doctrine*, 8 J. NAT'L SEC. L. & POL'Y, 247, 282 (2016).

As technology evolved beyond what the Framers could have envisioned, privacy expectations have shifted dramatically. Since technology has radically transformed the way individuals share information, private communications are no longer bound to physical documents. Despite this, the same privacy concerns still exist today. Consider emails as an example. They are merely written letters in electronic form. Emails thus contain all the private information present in physical letters and the privacy interests in emails are identical to those in the letters that the Framers deliberately sought to protect from arbitrary government intrusion. Nonetheless, emails do not fit neatly into any of the proscribed categories of the Fourth Amendment because it is impossible to neatly label an email as a person, house, paper, or effect. Had the Supreme Court opted to maintain a firm textualist stance and refuse to go beyond the language of the Fourth Amendment, emails would never be entitled to protection.

While the Framers sought to preserve secure, private information, they could not explicitly protect privacy interests held within technology that did not yet exist. By updating the law to keep pace with evolving technology and privacy expectations, the Supreme Court has demonstrated its desire to uphold the Fourth Amendment protections and preserve the Framers' original intent.[46] Now that privacy expectations are once again passing beyond the protections offered by the *Katz* test as it is currently applied, the Court needs to adjust how the test is applied to preserve the Framers' intent behind the Fourth Amendment.

B. The Third-Party Doctrine Should Be Abandoned

In modern times, the third-party doctrine muddles the analysis of what should be done under Justice Harlan's two-pronged test. The crux of the subjective prong, in conjunction with the majority opinion in *Katz*, is whether an individual has manifested a subjective expectation of privacy or has taken steps to maintain his privacy.[47] Despite the inquiry of whether an individual has shared private information already existing as a factor in the subjective prong of the *Katz* analysis, the *Smith* and *Miller* Court, established the third-party doctrine.[48] This ultimately overstated the importance of third-party disclosures and left lower courts uncertain about how such disclosures affect a person's Fourth Amendment rights.

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46. There are many instances of Supreme Court holdings about what constitutes a "search" in response to changing technology and new privacy concerns. *See* Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring); *see also* Smith v. Maryland, 442 U.S. 735, 744 (1979); Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018).

47. *Katz,* 389 U.S. at 361.

48. *See Carpenter*, 138 S. Ct. at 2216.

Before *Smith* and *Miller*, third-party disclosures were merely a factor to be considered within the subjective prong.[49] Over time, the third-party doctrine has morphed into a bright-line rule that bars Fourth Amendment protections altogether, without considering any other factors.[50] The application of third-party disclosures is now erringly analyzed under the objective prong, instead of under the subjective prong.[51] Thus, such disclosures are analyzed as an objective barrier to a finding of a reasonable expectation of privacy *without* considering the impact such disclosures have on a *subjective* expectation of privacy.[52] The question shifted from "has this individual manifested a subjective expectation of privacy" to "is it objectively reasonable for this individual to have an expectation of privacy after sharing their information with a third party?" [53] The third-party doctrine effectively replaced the subjective expectation test, mirroring the objective analysis of the *Katz* test.[54] This shift led to the misuse of the subjective prong because third-party disclosures were intended to be a mere *factor* within the subjective prong of Justice Harlan's formulation of the *Katz* two-pronged test.[55]

Moreover, the entire rationale underlying the third-party doctrine—that it is unreasonable to expect privacy in information voluntarily shared with others—is outdated in the modern world. When the Supreme Court decided *Smith* and *Miller*, the loss of privacy expectations when information was shared with others was straightforward because a person would have to reveal information knowingly and deliberately—for example, by having a conversation out loud, in public, or by handing a letter to be passed amongst friends. With people's increasing reliance on technology, it is no longer a simple inquiry with a simple answer—information is now continuously collected and exchanged without users' affirmative participation.

This reality was explored in *Carpenter v. United States,* where the Court considered whether the government's seizure of the defendant's historical cell-site location information (CSLI) from wireless carriers constituted a search.[56] To function properly, cell phones continuously connect to cell-sites (a set of radio antennas attached to cell towers, flagpoles, buildings, etc.) to

49. *Id.* at 2210.

50. *See* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002); *see also* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1107 (2002).

51. Kerr, *supra* note 5, at 115.

52. *See id.* at 118, 127.

53. *See id.* at 130.

54. *See id.* at 115.

55. *See id.* at 130.

56. Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).

maintain the best signal possible.[57] Whenever a cell phone connects to a cell-site, a time-stamped record of the connection is created.[58] In *Carpenter*, after identifying the defendant as a robbery suspect, the Federal Bureau of Investigation obtained the defendant's CSLI data without a warrant.[59] The CSLI data revealed Carpenter's precise location history and placed him in the vicinity of the robberies.[60] The government argued that the third-party doctrine barred Carpenter from asserting a Fourth Amendment violation because cell-site records are maintained by third-party wireless carriers, and thus obtaining such data was not a "search."[61] The Court rejected this argument, reasoning that the third-party doctrine's rationale does not hold water in this context because cell-site records are "unique."[62] Unlike pure Global Positioning System (GPS) records, CSLI data lies at the intersection of expectations of privacy regarding physical movements and information shared with third parties. CSLI data is extremely detailed and continuously collected, regardless of whether an individual is being monitored or not, allowing the government to achieve "near perfect surveillance."[63] With such precise location tracking, "police need not even know in advance whether they want to follow a particular individual, or when."[64] This "encompassing record" of the user's whereabouts can be accessed with "just the click of a button," a far cry from the expensive and time-consuming investigatory techniques of the past.[65]

Furthermore, the Court reasoned, "phone location information is not truly 'shared' as one normally understands the term."[66] Cell phones, once powered on, automatically collect this data without any affirmative act required by the user.[67] As a result, even though the user's information is routed through third-party carriers, this information is not "shared" in the sense intended to defeat an argument of the existence of a subjective expectation of privacy. There is no intent and no voluntary assumption of risk that the disclosed information "would be divulged to police."[68] Thus, it can hardly be argued that anyone who turns on their cell phone takes the time to consider and assume the risk that their CSLI data may be given to the

57. *Id.* at 2211.
58. *Id.*
59. *Id.* at 2212.
60. *Id.* at 2213.
61. *Id.* at 2219.
62. *Id.* at 2217.
63. *Id*. at 2218.
64. *Id.*
65. *Id.* at 2217-18.
66. *Id.* at 2220.
67. *Id.*
68. Smith v. Maryland, 442 U.S. 735, 745 (1979).

police. It would be unreasonable to claim people relinquish their constitutional right to be free from unreasonable searches merely because their devices automatically route through third-party carriers. Additionally, cell phones and their services are "'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society."[69]

The idea that unavoidable sharing of private information should not bar the assertion of Fourth Amendment protections is not new: the *Carpenter* Court echoes that of the dissent in the original third-party doctrine case, *United States v. Miller*.[70] Arguing against the idea that individuals do not have a reasonable expectation of privacy in their bank records simply because they voluntarily share such information with bank employees, Justice Brennan wrote that "the disclosure . . . is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account."[71] To live a normal life, there is little, if any, choice except to use modern technology. It would be nonsensical to say that users forfeit their rights due to the third-party doctrine and doing so would allow the government to entirely circumvent the Fourth Amendment. Mirroring Justice Brennan's sentiment regarding the use of cell phones in *Miller*, the *Carpenter* Court wrote that "[o]nly the few without cell phones could escape this tireless and absolute surveillance."[72]

Therefore, the Court was resoundingly clear in its holding that the third-party doctrine does not bar an individual from asserting Fourth Amendment protection in their CSLI data, which "provides an intimate window into a person's life."[73] A notable divergence from past rulings that the sharing of information destroyed any claim for Fourth Amendment protections, *Carpenter* was certainly a step in the right direction for privacy rights in the modern age. *Carpenter* is groundbreaking because although the defendant "shared" his location with his wireless carriers, the third-party doctrine does not preclude him from raising a Fourth Amendment violation.[74] Unfortunately, the Court explicitly stated that its holding was "very narrow," and outside the CSLI realm, it did not otherwise disturb the third-party doctrine.[75]

69. *Carpenter*, 138 S. Ct. at 2220 (quoting Riley v. California, 573 U.S. 373, 385 (2014)).
70. 425 U.S. 435, 450 (1976) (Brennan, J., dissenting).
71. *Id.* at 451 (Brennan, J., dissenting).
72. *Carpenter*, 138 S. Ct. at 2218.
73. *Id.* at 2217, 2219.
74. *Id.* at 2213, 2219.
75. *Id.* at 2221.

Notwithstanding the narrow holding, the *Carpenter* majority recognizes that the Court's reasoning potentially applies to much of the technology that is routinely used in both personal and professional contexts but declined to extend it further in the interest of "tread[ing] carefully."[76] It is conceivable that the Supreme Court will expand its holding in *Carpenter* to include other similar forms of technology in the future. The Court's description of a cell phone as being so ubiquitous that it is virtually a "'feature of human anatomy'"[77] applies to *many* modern gadgets. For example, consider a smart watch. Smart watches are quickly gaining pervasive popularity throughout the United States, with twenty-one percent of Americans using a smart watch or fitness tracker as of 2019.[78] Additionally, Smart watches arguably contain more personal and private information than cell phones and unlike cell phones, are *constantly worn* to track personal data such as the user's heart rate, blood oxygen level, location, miles run, etc.[79] This data is continuously analyzed by third-party providers such as Garmin and Apple services.[80] Despite this, under the current application of the *Katz* test, it is uncertain whether seizing smart watch data qualifies as a Fourth Amendment search or not. As it stands, it is unclear whether the government could seize a person's smart watch without a warrant—clearly an unreasonable result, considering the large volumes of highly personal information stored on such devices.[81] Arguing that avoiding the use of such technology to escape government intrusion would be similarly absurd. Due to increasing reliance on modern technology, it is impossible to completely avoid routing personal data through a third-party like Google or Verizon. However, this routing of personal data is still clearly the type of "voluntary" sharing that the third-party doctrine was designed to address.

If *Carpenter* is expanded to cover all devices with the same pervasiveness as cell phones, this type of information, despite being "voluntarily" shared, must also be protected. Even *Smith* recognized that

76. *Id.* at 2220.

77. *Id.* at 2218 (quoting Riley v. California, 573 U.S. 373, 385 (2014)).

78. Emily A. Vogels, *About One-in-Five Americans Use a Smart Watch or Fitness Tracker,* PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/fact-tank/2020/01/09/about-one-in-five-americans-use-a-smart-watch-or-fitness-tracker/ [https://perma.cc/88KY-FAVG].

79. The *Carpenter* majority mentions that cell phones are compulsively carried around into both public and private residences. *Carpenter*, 138 S. Ct. at 2218. Cell phones are inevitably put down when the user sleeps, but smart watches are designed to be worn at all times and even measure a user's sleep. *See* Lauren Fountain, *Best Sleep Trackers*, SLEEP FOUND. (updated Feb. 10, 2023), https://www.sleepfoundation.org/best-sleep-trackers [https://perma.cc/ZC3S-6Z5T].

80. *See generally* Fountain, *supra* note 79.

81. *See generally* William Kendall, *"Outrunning" The Fourth Amendment: A Functional Approach to Searches of Wearable Fitness Tracking Devices*, 43 S. ILL. U. L. J. 333 (2019).

individuals do not voluntarily disclose certain types of information.[82] The Court's holding in *Carpenter* is a significant step towards recognizing that the scales have tipped too far in favor of law enforcement interests and that the Court must reconsider the *Katz* test considering evolving technology. *Katz* revealed the Supreme Court's willingness to amend the "search" test to adapt to modern times and technology. *Carpenter* has only reinforced the Court's willingness.

What does this all come down to? The third-party doctrine in its current form and application is now untenable. As opposed to being used as an independent basis for denying Fourth Amendment protections, it should be relegated to its original purpose as a mere consideration within the subjective prong.[83]

IV. THE PROPER APPLICATION OF THE *KATZ* TWO-PRONG TEST

A. The Subjective Prong Must Be Preserved

Why keep the subjective prong? What can the subjective prong do that the objective prong cannot? The Supreme Court should restore the subjective prong to its original strength because it can be an invaluable tool to determine whether a legitimate privacy interest exists, as it is easy to fall victim to hindsight bias when conducting a Fourth Amendment analysis. It is also easy to determine that if the government found incriminating evidence, the search must have been valid or that a person who did not think he was being private would not have done the crime in a certain place. In hindsight, when performing a *Katz* analysis, it is easy for a court to say: "of course he had a reasonable expectation of privacy in that phone booth." However, reality proves that it is not that simple.

The problem is not with the subjective prong itself, but with the third-party doctrine. Its pseudo-replacement of the subjective prong has become increasingly problematic over time. If the *Carpenter* Court had accepted the government's argument that cell phone users "share" information with third parties, then it can use the same logic to sidestep Fourth Amendment protections and perform suspicion-free searches. While perhaps sufficient at one time, the rationale of the third-party doctrine is outdated, and the Court must revert to the original formulation of the *Katz* test. While disclosures to a third party still must be considered, they need to be analyzed under the *subjective* prong.

82. Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

83. *See* Katz v. United States, 389 U.S. 347, 361-62 (1967).

The subjective prong must be restored because it adds a much-needed voice to the equation—that of the individual. The Fourth Amendment is meant to protect people in places where they should feel secure. If the subjective prong is abandoned, the only test for what constitutes a search will be what "society is willing to deem reasonable." The problem is that courts, not society, determine what society is willing to accept as reasonable. This gives judges too much latitude and leads to inconsistent interpretations of what constitutes a "reasonable" expectation of privacy. The Supreme Court Justices have noted that the judiciary's role is not to legislate, but to interpret the Constitution, and that the "[Framers] were loath to leave too much discretion in judicial hands."[84] Moreover, determining what constitutes a "search" is no trivial matter. A judicial decision of whether an individual had a legitimate expectation of privacy in a given case has far-reaching repercussions for the entire nation such that a court holding thus can determine when our belongings can be searched without a warrant and when we may or may not invoke a Fourth Amendment protection. Thus, some safeguard against pure judicial discretion or overreach is necessary.

B. Cases That Properly Applied the Katz Test

Jim Harper, a prominent Fourth Amendment scholar, cites *Kyllo* as an example of the Supreme Court focus on the correct inquiry: the reasonableness of the government's actions.[85] In *Kyllo*, the Court held that the government's use of a thermal imager to measure the relative heat of Kyllo's house constituted a search.[86] According to Harper, the Court's reasoning hinged solely on whether the government's method of obtaining information was reasonable.[87] He emphasized Justice Scalia's conclusion that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.'"[88] As Harper sees it, the government's action was unreasonable because it used a special, high-tech device, and such intrusive action amounts to a search, regardless of the individual's subjective expectations of privacy.

However, Harper's understanding of the Court's analysis is incomplete. The Court did address the defendant's subjective expectation of privacy, just as Harlan intended, and performed a proper two-pronged analysis. The *Kyllo*

84. Crawford v. Washington, 541 U.S. 36, 67 (2004).
85. Harper, *supra* note 36, at 1383.
86. Kyllo v. United States, 533 U.S. 27, 34-35 (2001).
87. Harper, *supra* note 36, at 1383.
88. *Id.* at 1397 (quoting *Kyllo*, 533 U.S. at 40).

Court emphasized the importance of "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[89] It explained that in *Katz*, the defendant was protected by the Fourth Amendment because he "justifiably relied" on the privacy of the telephone booth.[90] In *Kyllo*, the Court first examined the defendant's subjective expectation of privacy before analyzing the objective reasonableness of the government conduct. The location of the information obtained by the government greatly informed the Court's conclusion that a search occurred. The Framers placed a high value on privacy in one's home, and accordingly, any government action that intrudes on an individual's privacy in that sacred area is much more likely to be protected by the Fourth Amendment.

Smith is another example of the Court properly applying the two-prong analysis. The *Smith* Court explicitly described the *Katz* test as "two discrete questions."[91] The Court first analyzed the reasonableness of the government's installation of the pen register.[92] After deciding that the pen register was minimally intrusive, the Court considered whether the defendant had a subjective expectation of privacy in the numbers dialed in his home.[93] In fact, the *Smith* opinion focuses virtually exclusively on the defendant's subjective expectation of privacy.

When analyzing the overall objective reasonableness of the expectation of privacy, courts should and do consider the reasonableness of government action. The original inquiry into the reasonableness of the governmental action has been swallowed by the objective prong. The unreasonableness of government action – such as the use of advanced technology in *Kyllo* – should be considered as a *factor*, not a dispositive element. In addition to the reasonableness of the government's action, the Supreme Court should formally adopt other criteria for defining what constitutes a search, so that the outcome is more predictable and uniform.

C. Considerations for Maintaining the Framers' Intent

Several factors were identified by the *Carpenter* Court as "basic guideposts" in Fourth Amendment cases and should be considered when applying the subjective prong. The Court emphasized that "the Amendment seeks to secure 'the privacies of life' against 'arbitrary power . . . a central

89. *Kyllo*, 533 U.S. at 31.
90. *Id.* at 32-33.
91. Smith v. Maryland, 442 U.S. 735, 740 (1979).
92. *Id.* at 741.
93. Katz v. United States, 389 U.S. 347, 351 (1967).

aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'"[94]

A common concern regarding the *Katz* test is that the subjective prong will be presumptively met because no criminal defendant will concede that they lacked a subjective expectation of privacy, destroying their Fourth Amendment claim. Another concern is that it is difficult to disprove a person's subjective expectation of privacy because the expectation exists within the defendant's head and can never be shown conclusively. These concerns stem from the inherent misunderstanding of the subjective prong. Much like the elements of premeditation required to show the requisite mens rea for first-degree murder, the subjective expectation of privacy prong is not met by an actual showing of a subjective expectation; rather it is met by the outward manifestation of privacy expectations, established by the *Katz* Court and Justice Harlan in his concurrence when describing the subjective prong. Justice Harlan explicitly stated that a person who knowingly reveals information to a third-party has defeated his subjective expectations of privacy.[95]

After all, a person cannot argue in good faith that their information is still private after knowingly revealing it to a third party. The voluntary disclosure of information to a third party is a physical manifestation of a *lack* of subjective expectation of privacy. So, what is an affirmative manifestation of a subjective expectation of privacy? In *Katz,* the defendant made several. In particular, the Court highlighted that he entered the phone booth and *closed the door behind him*, showing that he sincerely believed that his conversation would be private and free from governmental intrusion.[96]

The Supreme Court must clarify how to properly apply the *Katz* test by emphasizing its holdings in *Katz* and *Kyllo* as examples to be emulated, in which both prongs are analyzed as distinct inquiries. To illustrate, consider a hypothetical scenario in which an individual asserts that a warrantless search of his Ring Doorbell violates the Fourth Amendment.[97] The Court should first analyze the alleged violation under the subjective prong. A relevant question is whether the individual manifested a subjective expectation of privacy in the footage recorded by his Ring Doorbell. Courts

94. Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

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

96. *Id.* at 352.

97. A Ring Doorbell is a wireless instrument that starts recording when any motion is detected at the user's door. Its primary function is for home safety. *See generally* Matt Burgess, *All the Data Amazon's Ring Cameras Collect About You*, WIRED (Aug. 5, 2022, 7:00 AM), https://www.wired.com/story/ring-doorbell-camera-amazon-privacy/ [https://perma.cc/9HR3-3EKH].

should consider whether the defendant took any actions to keep the footage private, such as storing the video files on a password-protected computer. Whether the individual shared the information with a third party should merely be a factor to be considered alongside other considerations within the subjective prong. Courts should also assess whether the sharing was automatic and essential for the device to function, and whether the individual was truly aware of the extent of the sharing.

The Court should next separately analyze whether society is willing to recognize such a subjective expectation of privacy—if it exists in this scenario—as reasonable by considering a few different factors. The location of the search is one such important consideration. Certain areas are more likely to be private than others. One's home is certainly a constitutionally protected area, whereas public areas are less likely to be protected. Courts should consider the intrusiveness of the government's action and whether the action "shocks the conscience."[98] The more outrageous the government action, the less likely society is to deem the action as reasonable. Another important consideration is whether a rational person would expect privacy in that particular object or piece of information.

Ideally, a bright-line standard is needed to quickly determine what would constitute a search. Law enforcement officers are best able to perform their duties when they are not struggling to determine whether a warrant is required. Unfortunately, technological advancements, by their very nature, preclude the adoption of bright-line rules such as the "trespass doctrine."[99] Privacy goalposts will continue to shift, and a bright-line rule will quickly become outdated. The Court acknowledged this as early as 1979 in *Miller*, when it stated that courts "must examine the nature of the *particular* documents sought to bde protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents."[100] This approach implies that the analysis into the existence of a legitimate expectation of privacy will depend, in large part, on the circumstances of each case. As the *Carpenter* Court did with CSLI data, a court can assist in determining which devices and situations constitute searches. However, for the foreseeable future, until the Supreme Court can establish a workable test,

98. Rochin v. California, 342 U.S. 165, 172 (1952) (holding that officer's conduct in forcibly pumping a suspect's stomach after a warrantless entry into his home shocked the conscience and violated due process rights).

99. United States v. Jones, 565 U.S. 400, 409 (2012) ("[Ihe Katz reasonable expectation of privacy test has been *added to*, not *substituted for*, the common-law trespassory test") (emphasis added).

100. United States v. Miller, 425 U.S. 435, 442 (1976) (emphasis added).

if law enforcement has any doubt whether to perform a search, it should do its best to obtain a warrant.[101]

V. CONCLUSION

Fourth Amendment search analysis is an evolving form of law that can result in confusing and unpredictable decisions. Much of the confusion surrounding what constitutes a "search" under the Fourth Amendment is attributable to the incorrect application of Justice Harlan's subjective reasonable expectation of privacy prong combined with the third-party doctrine. The third-party doctrine must be retired, and the Supreme Court must clarify the factors to be considered under each prong of Justice Harlan's test. The restrengthening of the subjective prong will preserve the Framers' intent to prevent unreasonable government intrusion in the face of evolving privacy expectations in the digital age.

101. Obviously, obtaining a warrant is simply not possible in many circumstances, such as in emergencies or as lawfully incident to arrest. These scenarios are not of the kind considered in this Note, which aims to address cases like those of *Carpenter* where law enforcement agents simply did not believe they needed to obtain a warrant. *See* Carpenter v. United States, 138 S. Ct. 2206, 2209 (2018). However, if law enforcement had obtained the CSLI through a valid warrant, the data would have been admissible without constitutional challenge.