

***Katz* Has Only One Step: The Irrelevance of Subjective Expectations**

Orin S. Kerr†

This Essay argues that the “subjective expectation of privacy” test from Katz v United States is a phantom doctrine. The test exists on paper but has no impact on outcomes. An empirical study of cases decided in 2012 indicates that the majority of judicial opinions applying Katz do not even mention the subjective-expectations test; opinions that mention the test usually do not apply it; and even when courts apply it, the test makes no difference to the results.

The subjective test acts as a phantom doctrine because of an overlooked doctrinal shift. A close reading of Justice John Marshall Harlan’s Katz concurrence suggests that the subjective test was originally intended to restate the holdings of the Supreme Court’s cases on invited exposure. Under those cases, an individual waives his Fourth Amendment rights by inviting others to observe his protected Fourth Amendment spaces. After Katz, however, the Supreme Court misunderstood this original design and recast those holdings as part of the objective test instead of the subjective test. This doctrinal shift quietly eliminated the role of the subjective test. The Supreme Court should abolish the subjective-expectations test to clarify and simplify Fourth Amendment law.

INTRODUCTION

Every student of criminal procedure knows that the *Katz* test for Fourth Amendment searches requires a two-part inquiry.¹ To establish a search under *Katz*, individuals must first demonstrate “an actual (subjective) expectation of privacy” and then show that “society is prepared to recognize [that expectation of privacy] as ‘reasonable.’”² The first part of the test is subjective, and the second part is objective. Both the subjective and

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¹ In this Essay, “the *Katz* test” refers to the two-part test for identifying whether a search has occurred that was introduced in Justice John Marshall Harlan’s concurring opinion in *Katz v United States*, 389 US 347 (1967). See id at 361 (Harlan concurring). The test was later adopted by the full Court. See *Smith v Maryland*, 442 US 735, 740 (1979).

² *Katz*, 389 US at 361 (Harlan concurring).

objective tests must be satisfied for a court to identify a Fourth Amendment search under *Katz*.³

Or so the courts say. But what if the courts are wrong?

This Essay argues that *Katz* is only a one-step test. Subjective expectations are irrelevant. A majority of courts that apply *Katz* do not even mention the subjective inquiry; when it is mentioned, it is usually not applied; and when it is applied, it makes no difference to outcomes. Further, this odd state of affairs is explained by a subtle and overlooked shift in Supreme Court doctrine in the 1970s and 1980s. The Court's decisions reclassified the subjective question as part of the objective test.⁴ The change left the subjective test a phantom doctrine; it is an empty shell of words that has no function other than to confuse. The Court should formally abolish the subjective test to make Fourth Amendment law more simple and clear.

This Essay's descriptive conclusions are based on a study of every case published in 2012 available in Westlaw's ALLCASES database that applied *Katz*—540 cases in all.⁵ In the study, only 43 percent of cases even mention the subjective-expectations test. Only 12 percent of cases apply the subjective test. And among the cases that apply the subjective test, there appear to be none in which the subjective inquiry controlled the outcome. No opinion held that the defendant satisfied the objective test but not the subjective test, which would have indicated that the subjective test changed the result. In a small number of cases—about 2 percent—the court held that the subjective test was not satisfied (and therefore no search occurred) without expressly reaching the objective test. But a review of those cases reveals that, in each case, the court used precedents and reasoning from the objective test and simply rephrased the inquiry as one of subjective expectations.

We are left with a puzzle: Why would the Supreme Court adopt a doctrine that has no impact on outcomes? The answer lies in a previously unrecognized shift in the Court's understanding of *Katz*. A close reading of Justice John Marshall Harlan's concurrence suggests that the subjective test originally was

³ Id. At least this is the case under the *Katz* test. A search can also be found under the trespass principles of *United States v. Jones*, 132 S. Ct. 945, 951–52 (2012) (“[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”).

⁴ See Part II.B.

⁵ See Part I.

meant to summarize precedents on exposure to third parties such as undercover agents and informants. The test did not actually measure subjective expectations. Instead, it reflected the notion that intentionally sharing information with someone relinquishes privacy in that information. Beginning in the 1970s, however, the Supreme Court recast this idea as an application of the reasonable-expectations prong, and specifically as the so-called third-party doctrine.⁶ The concept that exposure waives rights jumped doctrinal boxes from the subjective prong of *Katz* to the objective prong.

This doctrinal shift left the subjective test an empty shell. Because an individual must satisfy both parts of the test to establish a Fourth Amendment search, the replication of work in the two prongs ensures that the subjective test cannot alter outcomes. In some opinions, the Supreme Court has reinterpreted the subjective test to instead assess actual subjective expectations—that is, whether the individual believed police access was likely. But the Court has also recognized that this interpretation is problematic and that reliance on true subjective expectations would be improper. The subjective test is irrelevant under either interpretation. Either it is irrelevant because it merely replicates the objective test, or it is irrelevant because the Supreme Court has suggested that courts should ignore it when it might actually alter outcomes.

Despite its irrelevance, the subjective element of *Katz* has lived on in the Supreme Court's cases. It is dutifully repeated but never closely analyzed. The Supreme Court should abolish the subjective-expectations test and make clear that the *Katz* test has only one step. Doing so would make the law less confusing. It would also help clarify that the scope of *Katz* is a normative question rather than a descriptive claim about what people actually expect.

This Essay proceeds in two parts. First, it introduces an empirical study of the *Katz* test to show that the subjective-expectations test is irrelevant in practice. Second, it traces the history of the *Katz* test to show how doctrinal evolution has rendered this test a phantom doctrine.

⁶ See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich L Rev 561, 567–70 (2009).

I. A STUDY OF THE SUBJECTIVE-EXPECTATIONS TEST

To understand the subjective-expectations test, a study was conducted of every case that applied *Katz* in 2012 available in Westlaw's ALLCASES database.⁷ The study began with case law that included the phrases "expectation of privacy" and "Fourth Amendment," which yielded 1,131 cases. Those cases were then read and reduced to a dataset of 540 cases that applied the *Katz* expectation-of-privacy test.

The study focused on three primary questions: First, when courts discuss the *Katz* test, how often do they mention both the subjective and objective tests? Second, when courts actually apply the *Katz* test, how often do they apply the subjective test? Third, when they apply the subjective test, how often is it outcome determinative?

A. Mentioning the Subjective and Objective Tests

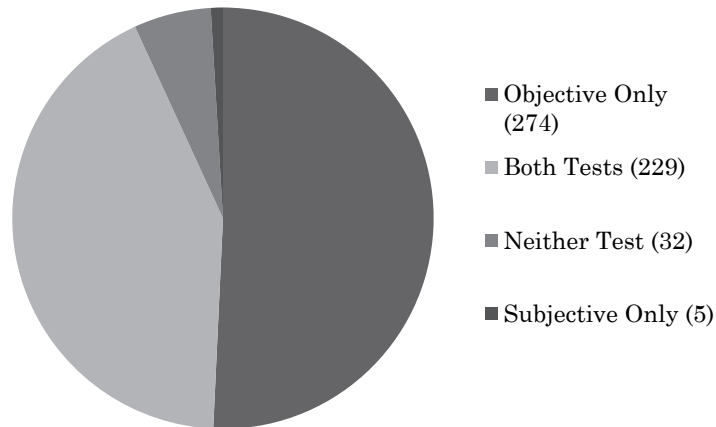
Every case in the dataset was first coded for whether it mentioned the subjective test, the objective test, or both. The focus at this stage was on how the authoring judge articulated the *Katz* test. A case was deemed to have mentioned the subjective test if it used the word "subjective" at any point in describing or applying the expectation-of-privacy inquiry. A case was deemed to have mentioned the objective test if it used the words "objective," "reasonable," or "legitimate" in describing the applicable doctrine.

The results indicate that a slight majority of *Katz* applications, 57 percent (306/540), did not mention the subjective test. In contrast, the objective test was mentioned in 93 percent of cases (503/540). Six percent of *Katz* applications (32/540) mentioned neither the objective nor subjective tests; in most of these instances, the court merely referred to an "expectation of privacy" generally, without more detail.⁸ In five cases, 1 percent of the total, the court mentioned the subjective test but not the objective test. Figure 1 summarizes the breakdown of cases mentioning or not mentioning the subjective and objective parts of the *Katz* test.

⁷ The calendar year 2012 was selected because it was the last complete year in the database at the time that the study began.

⁸ It generally appeared that these cases applied the objective test, although they did not use the labels associated with the objective test—"reasonable," "objective," or "legitimate."

FIGURE 1. MENTIONING THE SUBJECTIVE AND OBJECTIVE TESTS



B. Applying the Subjective and Objective Tests

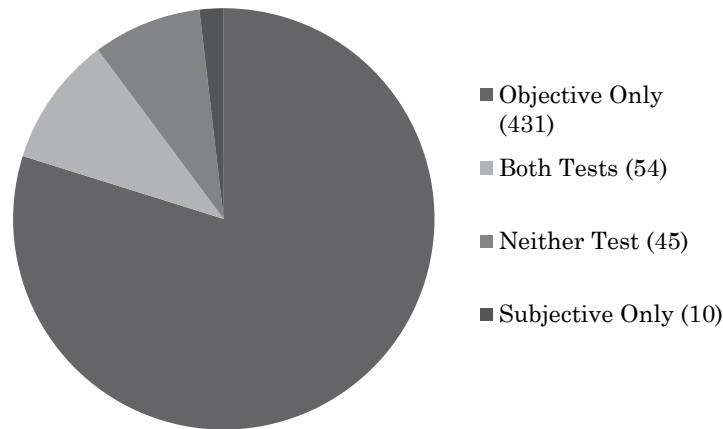
The study next considered how opinions applied the subjective and objective tests. The focus here was the court's expression of a legal conclusion about whether a subjective or objective expectation of privacy had been established under *Katz*.⁹

In 80 percent of the cases (431/540), the court applied only the objective test and did not apply the subjective test. In another 10 percent of the cases (54/540), the court applied both the subjective and objective tests. In 8 percent of the cases (45/540), the court applied neither test; in these instances, the court usually collapsed *Katz* into a generalized inquiry of privacy expectations. Finally, in 2 percent of the cases (10/540), the court applied only the subjective test and not the objective test. These results are summarized in Figure 2 below. The 45 cases that applied neither test did not specify either an objective or subjective test. Many simply described the test as whether the defendant had an "expectation of privacy."¹⁰ As a practical matter, those cases appear to have applied the objective test but not used the specific words "objective," "reasonable," or "legitimate."

⁹ The focus on conclusions rather than analysis made the coding simpler but also introduced the possibility of typographical errors altering the data. This problem is discussed below. See Part I.C.

¹⁰ See, for example, *State v Grice*, 735 SE2d 354, 359 (NC App 2012); *State v Gardner*, 984 NE2d 1025, 1028 (Ohio 2012); *McMillan v Stoll*, 2012 WL 707117, *3 (ND Ill).

FIGURE 2. APPLYING THE SUBJECTIVE AND OBJECTIVE TESTS



In short, courts applied the subjective-expectation-of-privacy test only rarely. In roughly nine out of ten cases, courts applied *Katz* without even considering whether the defendant had satisfied the subjective test.

C. Outcomes of Applying the Tests

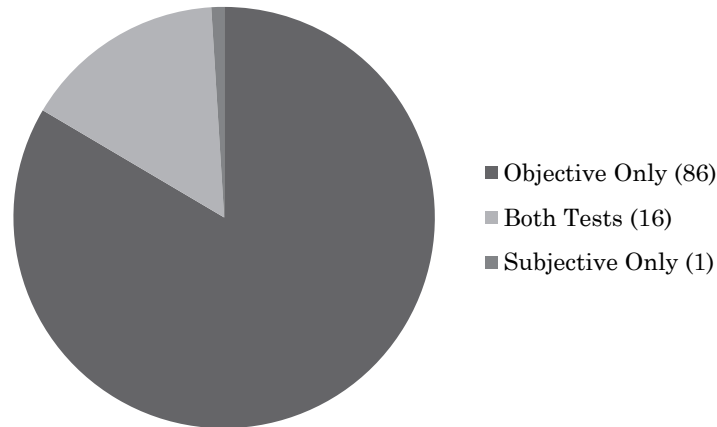
The study's final inquiry considered how courts applied the subjective and objective tests in the subset of cases that ultimately ruled that a search had or had not occurred under the *Katz* test.¹¹ Here the dataset was limited to the cases that clearly applied either or both of the tests and reached a result as to whether a search had occurred.¹² Within that dataset, 103 cases ruled that a search had occurred and 392 ruled that no search had occurred.

Within the subset of the 103 cases ruling that a search had occurred, 83 percent (86/103) applied only the objective test, found that it was satisfied, and did not reach the subjective test. By contrast, 16 percent (16/103) applied both tests and found them both satisfied. Further, 1 percent (1/103) applied only the subjective test, found that it was satisfied, and did not reach the objective test. These results are summarized in Figure 3.

¹¹ Applications of the trespass test introduced during the study period in *Jones*, 132 S Ct at 950–51, were not included.

¹² This dataset thus excluded the forty-five cases that did not clearly apply either a subjective or objective test.

FIGURE 3. TESTS APPLIED WHEN A SEARCH OCCURRED

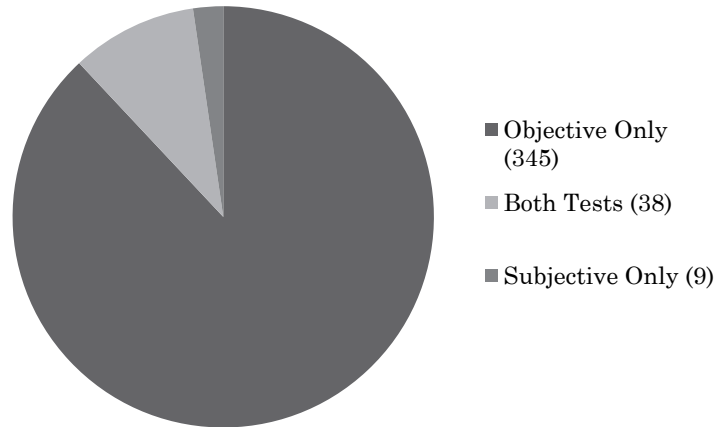


This is a striking result. The *Katz* test requires that the individual satisfy both the subjective and objective tests before a search will be found. When the objective test was satisfied, however, courts normally did not even consider the subjective test before announcing that a search had occurred. Further, the one case coded as applying only the subjective test before ruling that a search had occurred likely did so due only to a typographical error.¹³

In the subset of the 392 cases ruling that no search had occurred under *Katz*, 88 percent (345/392) applied only the objective test, found that it was not satisfied, and did not reach the subjective test. Ten percent (38/392) applied both tests. Further, in 2 percent of the cases (9/392), the court applied only the subjective test, found that it was not satisfied, and did not reach the objective test. These results are summarized in Figure 4.

¹³ See *State v Hayes*, 809 NW2d 309, 314–15 (ND 2012) (considering whether the defendant had standing to challenge a home search). Under *Rakas v Illinois*, 439 US 128 (1978), the standing inquiry is answered by the *Katz* test. See *id.* at 143 (relying on *Katz* to define the scope of the interest protected by the Fourth Amendment). *Hayes* concluded that, because the deed to the house was in the defendant's name, she paid the home's property taxes, and she used to live there, "she enjoyed a subjective expectation of privacy in [the house], and as a result, she has standing to contest the warrantless search." *Hayes*, 809 NW2d at 315. The court presumably meant to say that Hayes enjoyed an objective expectation of privacy, not a subjective expectation of privacy.

FIGURE 4. TESTS APPLIED WHEN NO SEARCH OCCURRED



It is helpful to look more closely at two subsets of cases depicted in Figure 4. The first subset consists of the thirty-eight cases in which courts applied both tests and ruled that no search had occurred. Within this subset, twenty-eight cases held that there was neither a subjective nor an objective expectation of privacy. The subjective test did not change the outcome in these cases because the result for subjective and objective expectations was the same. In the remaining ten cases, the court held that there was a subjective expectation of privacy but not a reasonable expectation of privacy. Because the absence of a reasonable expectation of privacy doomed the effort to establish a search, subjective expectations played no role in the ultimate outcome. Finally, zero cases held that there was a reasonable expectation of privacy but no subjective expectation of privacy. These would have been cases in which the subjective test controlled outcomes. No such cases were found.

The final subset consists of the nine cases that applied the subjective test, ruled that no search had occurred, and did not reach the objective inquiry. Of the nine cases, four involved identical passages from pro se prisoner cases in one district that misquoted a controlling Supreme Court case to state its conclusion as a subjective inquiry instead of an objective inquiry.¹⁴ Two

¹⁴ See *Strange v Kentucky*, 2012 WL 3637646, *4 (WD Ky); *Higgs v Easterling*, 2012 WL 692610, *10 (WD Ky); *Patton v Kentucky*, 2012 WL 3096618, *3 (WD Ky); *Tramber v Bolton*, 2012 WL 2912265, *2 (WD Ky). Each of these cases contains an identical passage

of the cases involved computers voluntarily shared with third parties; in those cases, the courts found that no Fourth Amendment rights had been violated after relying on a mix of subjective and objective arguments.¹⁵ In one case, the court's phrasing of the test as subjective was likely an error; the court applied precedents and concepts of the objective test before stating the outcome as an application of the subjective test.¹⁶ Finally, the last two cases held that an individual lacked a subjective expectation of privacy in factual contexts in which courts routinely hold that individuals lacked an objective expectation of privacy or consented to the search.¹⁷

relying on *Hudson v Palmer*, 468 US 517 (1984), for the view that an inmate lacks Fourth Amendment rights in his prison cell. The relevant passage in *Hudson* exclusively concerns the reasonable-expectation-of-privacy test. See id at 525–26 (“[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”). The common passage in the four opinions misleadingly uses ellipses to create the impression that *Hudson* was based on the subjective-expectations test. See, for example, *Strange*, 2012 WL 3637646 at *4, quoting *Hudson*, 468 US at 526 (claiming that *Hudson* held that “a prisoner does not possess ‘any subjective expectation of privacy . . . in his prison cell’”). The error was presumably inadvertent.

¹⁵ The first decision, *United States v Coates*, 462 Fed Appx 199 (3d Cir 2012), was difficult to code. The defendant invited a police officer to look at his phone to see threatening texts that he had received. Id at 201. The officer testified that, while attempting to manipulate the cell phone and simultaneously keep his attention on the defendant, he inadvertently found child pornography on the phone. Id. The court held that the defendant waived his privacy rights by inviting the officer to look through his phone. Id at 203–04. The opinion does not make clear whether it was decided under the subjective test, the objective test, or consent doctrine. It arguably invokes all three. See id at 203 (describing in detail the defendant's conduct and concluding that his behavior was not characteristic of “an individual expecting to maintain privacy”). However, it was coded as resting primarily on the subjective test.

In *United States v Meister*, 2012 WL 252447 (MD Fla), the defendant left his computer at a shop to be repaired and approved a transfer of files from one computer to another. Id at *1. During the transfer, the computer-repair employee observed child pornography. Id. The court held that the defendant lacked a subjective expectation of privacy in the files and also suggested, without so holding, that there was no reasonable expectation of privacy. See id at *6–7.

¹⁶ See *United States v Pittman-Wright*, 2012 WL 1815599, *11–12 (ND Cal).

¹⁷ See *Bordley v State*, 46 A3d 1204, 1208, 1214–18 (Md App 2012) (holding that an individual locked out of his hotel room lacked a subjective expectation of privacy in the room, but relying on case law interpreting the reasonable-expectation-of-privacy test); *Evans v Skolnik*, 2012 WL 760902, *2–3 (D Nev) (holding that a defendant who was recorded on prison phones while speaking with his lawyer lacked a subjective expectation of privacy in the conversation). *Evans* is puzzling because the analysis is very brief and relies on a record not explained in the opinion. However, prison phones are ordinarily monitored, and the notice of monitoring establishes consent even for attorney-client communications. See *United States v Novak*, 531 F3d 99, 103 (1st Cir 2008) (O'Connor sitting by designation).

D. *Katz* Is a One-Step Test

The results of the study suggest that the subjective prong of *Katz* is irrelevant. A majority of cases applying *Katz* did not mention subjective expectations. Only 12 percent of *Katz* cases purported to apply the subjective test.¹⁸ Only 2 percent of *Katz* cases claimed to hinge their analysis on the subjective test.¹⁹ And in each of those cases in the study, the court's reliance on subjective expectations appeared to be a mistake or at least a result that courts could otherwise express using the objective part of *Katz*. The hunt for a case that relied on the subjective test in an outcome-determinative way came up empty. Based on the cases analyzed in the study, subjective expectations appear to play no outcome-determinative role.

II. HOW THE OBJECTIVE TEST CAME TO DISPLACE THE SUBJECTIVE TEST

We are left with the puzzle of why the Supreme Court would adopt a doctrinal test that makes no difference in outcomes. Why bother? This Part argues that the answer lies in a post-*Katz* shift in Fourth Amendment doctrine. At the time of *Katz*, the subjective and objective tests each had a significant and independent purpose: the objective test addressed what spaces could receive Fourth Amendment protection, and the subjective test considered whether an individual had waived his privacy rights in an otherwise-covered space by inviting outsiders to observe him. To establish Fourth Amendment protection, the individual needed to show both that the government invaded a protected space under the objective test and that the space was not open to outsiders under the subjective test.

This original meaning of the two-part test was difficult to parse, however, and later decisions failed to appreciate it. Instead, later decisions addressed both of these inquiries under the objective test. The expansion of the objective test displaced the subjective test. The subjective test is irrelevant today because the objective prong of the test now does the work originally intended for the subjective test. The two inquiries collapsed into one. Understanding this shift requires a close study of Justice Harlan's concurrence in *Katz*, followed by a brief analysis of post-*Katz* doctrine.

¹⁸ See Figure 2.

¹⁹ See Figure 2.

A. The Original Understanding of the Subjective-Expectations Test

To understand the changing role of the subjective test, we need to start with a close reading of the concurring opinion in *Katz* that introduced it. The *Katz* majority ruled that using a microphone taped to a phone booth to listen in on a target's call was a Fourth Amendment search requiring a warrant.²⁰ The cryptic reasoning of the majority opinion inspired Harlan to add a brief concurrence.²¹ Although Harlan wrote only for himself, his opinion deserves close scrutiny because a majority of the Court later adopted his formulation.²²

Harlan began by summarizing his understanding of the majority's reasoning. First, he understood the majority opinion to hold "that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, 232 U.S. 383, and unlike a field, *Hester v. United States*, 265 U.S. 57, a person has a constitutionally protected reasonable expectation of privacy."²³ Harlan then addressed the broader question of how to know when a person has Fourth Amendment rights in a particular place. He explained his test in three sentences:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. *Hester v. United States*.²⁴

Each sentence plays a specific role. The first articulates the two-part inquiry; the second explains the subjective test; and the third explains the objective test.

²⁰ *Katz*, 389 US at 353.

²¹ See id at 361 (Harlan concurring).

²² See *Smith v Maryland*, 442 US 735, 740 (1979).

²³ *Katz*, 389 US at 360 (Harlan concurring).

²⁴ Id at 361 (Harlan concurring).

It is challenging to identify precisely what Harlan intended the subjective test to mean for two reasons. First, Harlan announced the test but cited no authority for it. Second, the language that Harlan used to express the subjective test can be interpreted in multiple ways. Focusing on the words “actual (subjective) expectation” and “intention” might suggest that the test requires a person to actually anticipate privacy. On the other hand, focusing on the words “exhibited” and “exposes” might suggest that the test requires a person to hide his private spaces from outsiders. The former interpretation focuses on thoughts, while the latter focuses on deeds.

We can solve this puzzle by starting with a critical clue: Harlan expressed the test as an “understanding of the rule that has emerged from prior decisions.”²⁵ Taking Harlan at his word, he did not intend to create a new test from whole cloth. Instead, he was synthesizing case law existing at the time of *Katz*. The state of Fourth Amendment case law in 1967 can help fill in the missing context and explain the subjective test.

In 1967, there were two distinct lines of cases on what constituted a Fourth Amendment search. The first group consisted of the protected-area cases, which identified the spaces that could receive Fourth Amendment protection. Insides of homes could receive protection,²⁶ for example, while conversations in open fields could not.²⁷ *Katz* itself was a protected-area case. Harlan read the majority opinion as classifying a phone booth as a space that could receive Fourth Amendment protection like a home and unlike a field.²⁸

The second set of cases involved voluntary exposure of protected spaces. In these cases, government agents observed areas that normally would receive Fourth Amendment protection under the protected-area cases. However, the agents observed those areas either by invitation or in contexts in which the area was exposed to public view. The key question was whether the exposure relinquished Fourth Amendment protection.

²⁵ *Id.* (Harlan concurring).

²⁶ See, for example, *Silverman v United States*, 365 US 505, 511–12 (1961) (holding that use of a “spike mike” touching the wall of a home violated the Fourth Amendment because “at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion”).

²⁷ See, for example, *Hester v United States*, 265 US 57, 59 (1924).

²⁸ See *Katz*, 389 US at 360 (Harlan concurring).

Several of the voluntary-exposure cases had considered the use of “secret agents.”²⁹ In those cases, criminals had admitted undercover agents or informants into their homes, offices, and hotel rooms and willingly shared information with them about their crimes on the assumption that the guests would not betray their trust.³⁰ The Court had uniformly held that no search occurred because a person who exposed his space to an agent had voluntarily relinquished Fourth Amendment protection.³¹ Notably, the secret-agent cases were fresh at the time of *Katz*. The Court had decided three such cases in the immediately preceding Term,³² and Harlan himself had authored a decision reaffirming the use of secret agents to record private conversations just a few years earlier.³³

Although *Katz* was a protected-area case, the government’s brief in *Katz* reminded the justices of the voluntary-exposure cases. A footnote in the brief explained that “not all observations of matters occurring in a ‘constitutionally protected area’ are prohibited by the Fourth Amendment.”³⁴ The government cited two cases for support. First, in *United States v Lee*,³⁵ the Court had “found no illegal search where cases of liquor were observed in plain view on the open deck of a boat.”³⁶ Second, in *McDonald v United States*,³⁷ the Court had “apparently found no illegal search in the observations made by police officers who peeked through an open transom” in a hotel room.³⁸ As described in the government’s brief, these cases echo the basic principle of the secret-agent cases: the government does not commit a search

²⁹ See Note, *Judicial Control of Secret Agents*, 76 Yale L J 994, 995 (1967).

³⁰ See, for example, *Hoffa v United States*, 385 US 293, 302 (1966); *Lewis v United States*, 385 US 206, 210–11 (1966); *Osborn v United States*, 385 US 323, 325–27 (1966); *Lopez v United States*, 373 US 427, 438–39 (1963); *On Lee v United States*, 343 US 747, 749 (1952).

³¹ See, for example, *Lewis*, 385 US at 211.

³² See generally *Hoffa*, 385 US 293; *Lewis*, 385 US 206; *Osborn*, 385 US 323.

³³ See *Lopez*, 373 US at 439 (“[T]he risk that petitioner took in offering a bribe to [a secret agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.”).

³⁴ Brief for the Respondent, *Katz v United States*, Docket No 35, *14 n 6 (US filed Sept 22, 1967) (available on Westlaw at 1967 WL 113606) (“Government Brief”).

³⁵ 274 US 559 (1927).

³⁶ Government Brief at *14 n 6 (cited in note 34). See also *Lee*, 274 US at 563 (“[The] search, if any, of the motorboat at sea did not violate the Constitution But no search on the high seas is shown.”).

³⁷ 335 US 451 (1948).

³⁸ Government Brief at *14 n 6 (cited in note 34), citing *McDonald*, 335 US at 455, 458.

when an agent observes matters inside a protected area that has been exposed to outside observation.³⁹

The two lines of search cases explain Harlan's two-part test. The objective test summarized the protected-area cases, and the subjective test summarized the voluntary-exposure cases. As originally intended, the two parts of Harlan's test each did independent work. The objective test asked whether the nature of the space invaded by the government was one that society was willing to recognize as private. On the other hand, the subjective test asked whether the individual took steps to make objectively protected spaces open to outside observation and thus yielded privacy rights against that invited observation. For a Fourth Amendment search to occur, a government agent had to observe a space protected under the protected-area cases without exposure or invitation.

From this perspective, the subjective test from Harlan's concurrence simply restated the following passage from the *Katz* majority opinion:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210; *United States v. Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁴⁰

This passage expresses the subjective inquiry as an exposure test. The *Katz* majority cited two cases as authority: *Lewis v. United States*,⁴¹ one of the secret-agent cases; and *Lee*, the case involving the plain view of contraband on a boat that the government cited in its brief.⁴² Harlan's subjective test tracks the same concept. Harlan's opinion just lacks the citations to the exposure and secret-agent case law to make the reference clear.⁴³

³⁹ See Government Brief at *14 n 6 (cited in note 34) (noting that the petitioner could not object to testimony based on what an agent "overheard by the 'naked ear' while lawfully in the hotel room immediately next door"). See also *Lewis*, 385 US at 211 ("But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.").

⁴⁰ *Katz*, 389 US at 351-52.

⁴¹ 385 US 206 (1966).

⁴² See Government Brief at *14 n 6 (cited in note 34).

⁴³ That missing link may be found in Harlan's dissent in *United States v. White*, 401 US 745 (1971). In *White*, Harlan announced a new approach that went beyond "the search for subjective expectations" and would overturn the secret-agent cases. *Id.* at 786 (Harlan dissenting).

This perspective suggests that what we call the “subjective” part of *Katz* was not intended to be about actual subjective expectations. Contrary to the label, the test does not evaluate an individual’s prediction of what will happen next.⁴⁴ Rather, the subjective test focuses on whether the individual took steps that “exhibited” an expectation of privacy—that is, whether the individual took objective measures to block the public or government from observing the information at issue.⁴⁵ In this way, the subjective test is akin to a consent doctrine. Whereas people normally have Fourth Amendment rights in their private spaces, they give up those rights when they consent to have others enter their private spaces and observe what occurs inside. Charlie Katz satisfied this part of the test because he entered the phone booth and closed the door behind him to place the call.⁴⁶ Closing the door blocked normal efforts to overhear the conversation, exhibiting a plan to keep the phone booth a private space for the duration of the call.⁴⁷

B. Post-*Katz*: The Supreme Court Recasts the Subjective Inquiry as Part of the Objective Test

Although we can now appreciate the connection between the subjective test and the Court’s exposure cases, that link is admittedly difficult to see absent a close study of the relevant history and context. Nor was it clear when *Katz* was freshly decided. Some contemporaneous interpretations of Harlan’s subjective test suggested the connection, but others did not.⁴⁸ And most importantly, when later Supreme Court majorities adopted Harlan’s formulation, they did so without looking carefully at the nature of the subjective test. Those opinions simply

Harlan rejected reliance on subjective expectations in *White* because he had concluded that a warrant was needed even when a person voluntarily exposed his conversations to an undercover agent. See *id.* at 785–87 (Harlan dissenting). Harlan’s *White* dissent thus directly links the subjective test and the secret-agent cases.

⁴⁴ This is not a novel observation. See, for example, Wayne R. LaFare, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1(c) at 583 n 95 (West 5th ed 2012), quoting Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 NYU L Rev 725, 743–44 (1985).

⁴⁵ LaFare, 1 *Search and Seizure* at § 2.1(c) at 583 n 95 (cited in note 44).

⁴⁶ See *Katz*, 389 US at 352.

⁴⁷ See *id.* See also *id.* at 361 (Harlan concurring).

⁴⁸ Compare Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 NYU L Rev 968, 982–83 & n 89 (1968) (suggesting the link), with *United States v Grogan*, 293 F Supp 45, 47 (MD Ala 1968) (not suggesting the link).

assumed that the subjective test was genuinely subjective. They assumed that the subjective test asks whether the individual actually expected his information to remain private.⁴⁹

The result was a subtle but important doctrinal shift. When the Court considered how the Fourth Amendment applied to secret agents and exposed spaces after *Katz*, opinions failed to recognize that such questions were supposed to be resolved under the subjective test. Instead, the Court analyzed these problems under the objective test. The switch appears inadvertent rather than deliberate. But its effect was to expand the objective test and displace the terrain that originally would have been covered by the subjective test.

Three cases show the evolution: *United States v White*,⁵⁰ *Smith v Maryland*,⁵¹ and *Maryland v Macon*.⁵² The shift began with *White*, a post-*Katz*, secret-agent case involving a criminal who divulged his crimes to an informant wearing a recording device.⁵³ In his controlling plurality opinion, Justice Byron White rearranged the roles of the subjective and objective tests. To Justice White, the subjective inquiry considered “actual expectations” of whether individuals “know [or] suspect that their colleagues have gone or will go to the police.”⁵⁴ So construed, criminals must have an actual expectation of privacy in their conversations about their crimes: “Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us.”⁵⁵ Justice White instead construed the problem of secret agents as a question of “what expectations of privacy are constitutionally justifiable”⁵⁶—that is, what was reasonable under the objective test. White concluded that an actual expectation that a person will not be recorded is not constitutionally justifiable because a person always assumes the risk that he is speaking with someone who will report the conversation to the police.⁵⁷

⁴⁹ See notes 53–65, 67, and accompanying text.

⁵⁰ 401 US 745 (1971).

⁵¹ 442 US 735 (1979).

⁵² 472 US 463 (1985).

⁵³ *White*, 401 US at 746–47 (White) (plurality). The Court had not yet adopted Harlan’s two-part formulation at the time of *White*. The Court would not do so definitively until *Smith*, eight years later. See *Smith*, 442 US at 740.

⁵⁴ *White*, 401 US at 751–52 (White) (plurality).

⁵⁵ *Id.* (White) (plurality).

⁵⁶ *Id.* at 752 (White) (plurality) (quotation marks omitted).

⁵⁷ *Id.* (White) (plurality).

The Court echoed this new understanding of the subjective test in *Smith*, which considered whether installation of a pen register at the phone company in order to record numbers dialed from a suspect's home phone constituted a search.⁵⁸ The majority assumed that the subjective test measured what a person actually expected. "Although subjective expectations cannot be scientifically gauged," the *Smith* Court explained, "it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."⁵⁹ Telephone users "typically know" that the numbers that they dial are conveyed to the phone company.⁶⁰ Despite these ruminations, the Court ultimately assumed that the defendant subjectively expected privacy and applied the objective test instead.⁶¹ Relying on the secret-agent cases, including *White*, *Smith* held that a person had no legitimate expectation of privacy in information voluntarily turned over to third parties.⁶² By disclosing information to the phone company, a telephone user assumed the risk that the phone company would disclose the information to the police.⁶³

Macon completed the transition. An undercover agent entered a bookstore, browsed, and purchased two obscene magazines.⁶⁴ The question in the case was whether entering the store and observing the magazines constituted a search of the store.⁶⁵ Under the secret-agent cases, the answer would be "no" because the store had invited the public inside to browse. In the language of Harlan's *Katz* concurrence, the store had "expose[d]" its contents "to the 'plain view' of outsiders" and thus failed to exhibit an actual expectation of privacy.⁶⁶ *Macon* reached the same result by applying the objective test instead. Although the store owner might have actually expected that the authorities would not learn about the obscene magazines for sale, the opinion reasoned, that expectation was not reasonable when "the public was invited to enter and to transact business."⁶⁷

⁵⁸ *Smith*, 442 US at 736.

⁵⁹ *Id.* at 743.

⁶⁰ *Id.*

⁶¹ See *id.* at 743–44.

⁶² *Smith*, 442 US at 743–44.

⁶³ See *id.* at 744–45.

⁶⁴ *Macon*, 472 US at 465.

⁶⁵ *Id.* at 467–69.

⁶⁶ *Katz*, 389 US at 361 (Harlan concurring).

⁶⁷ *Macon*, 472 US at 469.

These cases reveal a dramatic shift in the Court's understanding of the subjective test. In Harlan's original formulation, a person who shared his information or space with others failed to exhibit an actual expectation of privacy. Observation by a government agent in these circumstances was not a search because the defendant failed the subjective test. In *White, Smith*, and *Macon*, however, the Court adopted a purely subjective understanding of the subjective test. The subjective inquiry came to rest on whether a person actually anticipated privacy, which can be answered only by going inside the person's mind. Whether government observation of shared information or space constitutes a search became an interpretation of the objective test, specifically the so-called third-party doctrine.⁶⁸

To be clear, not every Supreme Court case applying *Katz* adopts the purely subjective interpretation of the subjective test. Some suggest a purely subjective approach,⁶⁹ while others seem more true to Harlan's original formulation.⁷⁰ Nonetheless, cases such as *White, Smith*, and *Macon* effectively merged the original focus of the subjective test with the objective test.

C. The Doctrinal Shift Makes the Subjective Test a Phantom Doctrine

The Court's doctrinal move rendered the subjective test irrelevant in two ways, which reflect the two prevailing understandings of the subjective test in the lower courts. Most lower courts recite the purely subjective version of the subjective test found in *White, Smith*, and *Macon*.⁷¹ On the other hand, a minority of lower courts use Harlan's original formulation.⁷² In the cases from 2012 discussed in Part I, courts applying the subjective test described it as requiring a person to "exhibit" or "manifest" an expectation of privacy in only 19 percent of the cases (12/64). In contrast, courts described the subjective test using

⁶⁸ See Kerr, 107 Mich L Rev at 588–90 (cited in note 6). In that article, I argued that the Court should have viewed third-party disclosure as a question of consent. See *id.* I now see that the proper way to frame this consent principle within *Katz* is through the subjective prong of the test.

⁶⁹ See, for example, *Safford Unified School District No 1 v Redding*, 557 US 364, 374–75 (2009); *California v Greenwood*, 486 US 35, 39–40 (1988).

⁷⁰ See, for example, *Bond v United States*, 529 US 334, 338 (2000).

⁷¹ See Part II.B.

⁷² See Part II.B.

the purely subjective standard in 81 percent of the cases (52/64).⁷³

Under either understanding, however, the subjective test is irrelevant. When lower courts apply the subjective test using the original “exhibition” formulation, they end up repeating the same inquiry under both tests. Under precedents such as *White*, *Smith*, and *Macon*, the exhibition requirement is now part of the objective inquiry. A person who does not exhibit a subjective expectation of privacy necessarily has no reasonable expectation of privacy either. In that case, the subjective test cannot alter outcomes because the same analysis occurs under both tests.

When courts interpret the subjective test using the purely subjective understanding, the test becomes irrelevant in a different way. At first blush, it might seem that a test precluding Fourth Amendment protection when a search is anticipated would exert a powerful influence on outcomes. But such an understanding turns the subjective test into an absurdity. Professor Anthony Amsterdam pointed out this problem shortly after *White* was decided:

An actual, subjective expectation of privacy obviously has no place . . . in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual’s claim to fourth amendment protection. If it could, the government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.⁷⁴

If the subjective test is truly subjective, then Amsterdam is surely right. A purely subjective standard would let the fox guard the constitutional henhouse.

⁷³ Identifying whether a court applied the subjective test using the original understanding of Harlan’s formulation or using the *White-Smith* notion of actually expecting privacy is a difficult judgment call and often impossible to make with confidence. An application was coded as applying a subjective standard if it described the test as requiring a person to “have,” “show,” “demonstrate,” “harbor,” “profess,” or “evince” a subjective expectation of privacy. An application was coded as applying the original Harlan formulation if the court described the test as requiring the individual to exhibit or manifest a subjective expectation of privacy.

⁷⁴ Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn L Rev 349, 384 (1974).

The Supreme Court responded to this problem by indicating that the subjective inquiry should be suspended when it would produce such undesirable results. Recall that *Smith* adopted the purely subjective view of the subjective test.⁷⁵ In a footnote, *Smith* instructed that “of course” the subjective test should not be considered in some cases.⁷⁶ If the government announced that warrantless home searches would shortly commence, or refugees from totalitarian countries expected the government to tap their phones, individuals would not subjectively expect privacy but would still deserve Fourth Amendment protection:

In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the Fourth Amendment protection was. In determining whether a “legitimate expectation of privacy” existed in such cases, a normative inquiry would be proper.⁷⁷

Pause to appreciate the irony. After *Smith* misconstrues the subjective test to ask a purely subjective question, the footnote announces that the subjective test should be ignored in precisely those cases in which the misconstrued test would make a difference.⁷⁸

The Court arguably went further in a footnote in *Hudson v Palmer*,⁷⁹ a subsequent case holding that inmates cannot establish Fourth Amendment rights in prison cells.⁸⁰ Citing the plurality and dissenting opinions in *White*, the Court noted in *Hudson* that it had “always emphasized” the objective test instead of the subjective test.⁸¹ *Hudson* construed this emphasis as a “refusal to adopt a test of ‘subjective expectation’”—a refusal that it described as “understandable” because “constitutional rights are generally not defined by the subjective intent of those

⁷⁵ See notes 58–63.

⁷⁶ *Smith*, 442 US at 740 n 5.

⁷⁷ *Id.*

⁷⁸ The papers at the Library of Congress of *Smith*’s author, Justice Harry Blackmun, indicate that this footnote was added at the request of Justice John Paul Stevens. See Library of Congress Manuscript Division, *Harry A. Blackmun Papers, 1913–2001*, Supreme Court File, 1918–1999, Case File 1970–1994, Box 297, 78-5374 at 35–42.

⁷⁹ 468 US 517 (1984).

⁸⁰ *Id.* at 526.

⁸¹ *Id.* at 525 n 7, citing *White*, 401 US at 751–52 (*White*) (plurality) and *White*, 401 US at 768, 786 (Harlan dissenting).

asserting the rights.”⁸² “The problems inherent in such a standard are self-evident,” the Court wrote, citing the footnote in *Smith* discussed above.⁸³

The *Smith* and *Hudson* footnotes explain why lower courts ignore the subjective test in its purely subjective form. Because *Katz* requires an individual to satisfy both tests, the subjective test can impact outcomes only when an individual has established a reasonable expectation of privacy but the evidence shows that he subjectively did not expect privacy. But those are precisely the circumstances in which the *Smith* and *Hudson* footnotes direct courts to ignore the subjective test.

In sum, the evolution of Supreme Court doctrine has rendered the subjective test pointless under both the original and the purely subjective understandings. When courts use the original understanding of the subjective test, it becomes irrelevant because it merely repeats work now done by the objective test. And when courts use the purely subjective understanding, the test becomes irrelevant because the Supreme Court has directed courts to ignore the test when it would actually make a difference. Either way, the subjective test cannot alter outcomes. No wonder most lower courts ignore it.

CONCLUSION

Although the Supreme Court says that *Katz* is a two-part test, the subjective prong has become a phantom doctrine. Most opinions applying *Katz* do not mention it; opinions that mention the test usually do not apply it; and when courts apply it, the test makes no difference to outcomes. As a practical matter, the *Katz* test is only one step. The objective test is the only one that matters.

The Supreme Court’s own case law has caused this strange result. As originally crafted by Justice Harlan, the subjective test did important and independent work. But later decisions of the Court misunderstood Harlan’s test and merged the work of the subjective test into the objective test. That shift has left the subjective test with no work to do and no outcomes to change.

The sensible resolution is for the Supreme Court to formally abolish the subjective test. Its existence on paper merely causes confusion. At first blush, the phrase “subjective expectations of

⁸² *Hudson*, 468 US at 525 n 7 (citations omitted).

⁸³ *Id.*, citing *Smith*, 442 US at 740–41 n 5.

privacy” sounds like it must hinge on the privacy that individuals actually anticipate. The phrase tricks the unwary into thinking that Fourth Amendment protection hinges on predictions. But it does not, and it should not. *Katz* instead rests solely on the scope of legitimate expectations of privacy. It is a normative inquiry that subjective expectations do not and should not answer.