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The Real Problem with Katz Circularity

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THE REAL PROBLEM WITH *KATZ* CIRCULARITY

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ABSTRACT

The Fourth Amendment protects people against "unreasonable searches" by police. To operationalize this protection, courts must have a workable definition of a search. Since 1967, the Supreme Court has used the two-step Katz *test as a primary measure of when a search has occurred. Under* Katz*, a court will find that something has been subject to search when (1) the individual in question has a subjective expectation of privacy in that thing and (2) such an expectation of privacy would be reasonable. From early on, commentators have decried the* Katz *test as circular and have urged courts to adopt something else. This essay explains what the circularity worry really amounts to: the worry is about courts using improperly reduced expectations of privacy as a reason to withhold Fourth Amendment protection. This worry is much broader than most commentators have seen, and this broader framing allows one to deflect recent concerns that* Katz *circularity (more narrowly construed) is a myth. With the 'circularity' worry properly understood, the essay offers a way to deal with it: courts could simply drop Step One of* Katz*.*

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Katz v. United States[1] is one of the preeminent cases in Fourth Amendment law. *Katz* famously offers a test for determining whether some government action counts as a search and thus is subject to Fourth Amendment scrutiny. In hornbooks and casebooks, in courtrooms and classrooms, *Katz* is said to be a two-step test.[2] According to that test, conduct counts as a search only if (1) the conduct infringes upon a person's subjective expectation of privacy and (2) expectations of privacy in the given situation would be reasonable.

Scholars and courts have raised worries about the first step. For some critics, a key problem is that Step One acts as a third wheel: in actual cases, this step is always found to have been satisfied,[3] so talking about suspects' subjective expectations is always "irrelevant"[4] or "meaningless."[5] This third wheel concern is thought pedestrian compared to the sexier problem of *circularity*.[6]

The circularity concern is a beautiful example of legal scholars speaking elliptically. As explained below, the circularity concern is best understood as a worry about individuals' subjective expectations of privacy being improperly reduced. Subjective expectations can, in principle, be improperly reduced by courts[7] or by the political branches of government.[8] When those possibilities are entertained, the term circularity often crops up. This is the narrow, traditional circularity worry. Of course, government is not the only actor who might reduce our expectations of privacy. Subjective expectations of privacy can also be improperly reduced by private actors who surveil us, like spying employers[9] and tech companies who track us on and off the web.[10] As demonstrated below, subjective expectations of privacy can be improperly reduced by still other things like mental illness, gullibility, dislocation, and youth.[11] Indeed, the range of improper influences is potentially wide, so wide that it might seem like there should be a Step Zero of *Katz*. This Step Zero would determine whether a suspect's subjective expectations were formed under bad conditions.

Instead of introducing a *Katz* Step Zero, this essay actually advocates for eliminating Step One, leaving only Step Two. Step One of *Katz*—asking

1. 389 U.S. 347 (1967).

2. In talking of the *Katz* test, I refer to Justice Harlan's concurrence, which is the controlling precedent, not the opinion from the majority. Smith v. Maryland, 442 U.S. 735, 740–41 (1979).

3. Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 122 (2015).

4. *Id.*; Amitai Etzioni, *Eight Nails in* Katz*'s Coffin*, 65 CASE W. L. REV. 413, 421 (2014).

5. Ric Simmons, *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L. J. 1303, 1312–13 (2002).

6. *Id.* (stating meaninglessness is less important than circularity).

7. Etzioni, *supra* note 4, at 413 ("individual . . . expectations of privacy depend on judicial rulings").

8. Simmons, *supra* note 5, at 1313.

9. Etzioni, *supra* note 4, at 417.

10. *Id.* at 416.

11. *See infra* Part III.

whether a suspect expects privacy—tracks something important only when combined with what I have called Step Zero. *Katz* Step Zero asks if the suspect's expectations formed under the appropriate conditions. However, that two-part inquiry can actually just be folded into, or reduced to, Step Two—asking whether expecting privacy in a given situation would be reasonable. I will even show that textbook cases in which Step One seems to track something important all on its own can be reduced to Step Two.

Even the shortest essays can often benefit from a roadmap. This essay begins, in Part I, by defining *Katz* circularity and explaining that it is traditionally understood as a problem with government improperly reducing suspects' subjective expectations of privacy. Part II offers some reasons to think that this concern is not so concerning. If those reasons convince, one might be led to think that *Katz* circularity is a nonproblem and that Step One of *Katz* can be saved. Part III disabuses the reader of those two thoughts. Granting that the arguments from Part II succeed, Part III offers new reasons to worry about improperly reduced expectations of privacy. Part IV explains why the best solution to these new problems—as well as the old problem—is jettisoning Step One of *Katz* and just relying on Step Two. Finally, in Part V, I conclude.

The upshot of this essay is a new and simple test for determining whether government conduct is a Fourth Amendment search. In short, government conduct is a search any time government uncovers that over which it would be reasonable to expect privacy.

I. DEFINING *KATZ* CIRCULARITY

In this Part, I define "*Katz* circularity," or at least the variety of it at issue in this essay. In the course of defining the concept, I investigate what most commentators traditionally find troubling about this phenomenon. As I explain, no one is concerned with circularity per se.

The term "*Katz* circularity" is tossed about often.[12] It names at least three different concepts. First, *Katz* is said to be circular because the test calls on courts to determine an individual's subjective expectations of privacy to figure out whether to scrutinize government behavior, but it turns out that government behavior might influence the individual's subjective expectations of privacy.

12. *See, e.g.*, Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (1979); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1195 (1987); Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B. U. L. REV. 699, 715 (1992); Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60–61 (2001); Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 AM. U. L. REV. 1381, 1392 (2008); Christine S. Scott-Hayward et al., *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age?*, 43 AM. J. CRIM. L. 19, 25–26 (2015).

Call this *individual attitudinal circularity*.[13] The circle here is that expectations are influenced by the very thing that they are supposed to govern.

When government affects expectations, it may well do so in an improper way. As one scholar imagines, "[s]uppose the President announces that all telephone conversations will henceforth be monitored."[14] In this hypothetical, an individual suspect would, in turn, no longer expect privacy in her phone calls. If this happened, government could listen in on those calls, and such conduct would not be a Fourth Amendment search at all and would get no oversight from the courts. This type of circularity is the primary focus of this essay, but it is important to distinguish two other forms.

Katz is also said to be circular because of one way to operationalize Step Two. Step Two of *Katz* calls on courts to determine "what society is prepared to regard as reasonable."[15] There are many ways to construe this idea.[16] On one construal, Step Two asks courts to make a sociological judgment about what most people in American society would expect to be private.[17] Accordingly, those society-wide beliefs might be influenced by government behavior, just as with the individual case. Call this *societal attitudinal circularity*.

Finally, *Katz* is sometimes called circular or tautological because of a different way of operationalizing Step Two. Instead of making Step Two a sociological inquiry, one could understand that step as calling for a court to provide its own unfettered normative judgment about what is reasonable.[18] If one does that, something like a circle emerges. On this normative construal of Step Two, it is reasonable to expect privacy if and only if the court finds it reasonable to have expected privacy. Tests like that appear to offer no independent purchase on what would satisfy the standard.[19] Call this *doctrinal circularity*.[20]

13. Though the distinction appears in many places, Kahn-Fogel provides an especially clear distinction between attitudinal and doctrinal circularity. Nicholas A. Kahn-Fogel, Katz, Carpenter, *and Classical Conservatism*, 29 CORNELL J. L. & PUB. POL'Y 95, 104 (2019). The foregoing discussion borrows from that analysis and adds to it by further distinguishing individual and societal versions of attitudinal circularity.

14. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 106 (2008).

15. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (". . . 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.'").

16. *See* Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504–05 (2007).

17. Jim Harper, *The Fourth Amendment and Data: Put Privacy Policies in the Trial Record*, 43 CHAMPION 32, 33 (July 2019).

18. Kerr calls this "the policy model" of Fourth Amendment protection. Kerr, *supra* note 16, at 519.

19. Judge Posner, among others, have lodged this complaint. Posner, *supra* note 12, at 188.

20. Here again, I follow Kahn-Fogel, *supra* note 13.

With these nomenclature issues resolved, let us return to our subject—government influencing someone's subjective expectations of privacy—what I have called individual attitudinal circularity. Individual attitudinal circularity (henceforth *Katz* circularity) is not problematic by itself. Trouble comes when government acts in ways that *reduce* an individual's subjective expectations of privacy. Nearly all cases in the literature about *Katz* circularity feature government announcing or enacting totalitarian plans, ensuring that nobody believes they have a moment of respite from surveillance.[21] If the extensive writing on *Katz* is any guide, it seems that nobody worries about government acting in ways that *increase* individuals' subjective expectations of privacy. What is more, not *all* reductions in subjective expectations are troubling. *Miranda* warnings are designed to reduce individuals' subjective expectations of privacy: people are told not to expect their utterances to police to remain private, that these could be used against them.[22] All of this reveals that the traditional concern of *Katz* circularity is a concern about government *improperly reducing* an individual's subjective expectations of privacy.

II. NOT SO TROUBLING AFTER ALL?

Having established that the traditional worry about *Katz* circularity is really a fear that government will improperly reduce individuals' subjective expectations, this part will offer—though not endorse—two reasons why *Katz* circularity is less troubling than some have assumed. First, recent empirical work claims that *Katz* circularity does not exist. Second, even if it does exist, courts have adequate tools to deal with it.

Professors Kugler and Strahilevitz have recently authored a groundbreaking empirical paper, arguing that *Katz* circularity does not exist.[23] They do so by looking at popular responses to *Riley v. California*, a 2014 cell phone search incident to arrest case.[24] Specifically, the authors asked respondents questions about what the Constitution allows and what arrestees would reasonably expect police to do.[25] The respondents were questioned in four waves: one group two

21. Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (imagining a world where "the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry"); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1973–1974) (imagining that "the government could diminish each person's subjective expectation of privacy merely by announcing halfhourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance"); Rubenfeld, *supra* note 14, at 106 ("Suppos[ing] the President announces that all telephone conversations will henceforth be monitored").

22. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

23. Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747 (2017).

24. Riley v. California, 573 U.S. 373, 378 (2014).

25. Kugler & Strahilevitz, *supra* note 23, at 1777.

weeks before the opinion was handed down, another group two weeks after the opinion came down, yet another group one year after the decision, and a final group two years post-decision.[26] What the authors found is that there was some small effect of the decision on attitudes shortly after the opinion, if the respondent had heard of the case, but this faded after a year.[27] In layfolk's terms: Supreme Court decisions do not move people's expectations of privacy long term.[28]

It is important not to over-read the result. This is just one study. Moreover, the decision in question did not further restrict privacy rights. Sure, the *Katz* circularity crowd generally predicts that government action will shift expectations of privacy, but the prediction could be modified to claim that a circularity effect is way more likely when government restricts privacy rights. The Kugler and Strahilevitz result does not disparage that modified version of the theory.[29] Finally, the authors studied a decision from the Supreme Court, not the President or some other organ of government whose actions might garner more, and longer-lasting, attention. Nonetheless, we have some reason to doubt that *Katz* circularity is a real phenomenon.

The second reason not to worry about *Katz* circularity is that, if it happened, there are doctrinal tools to deal with it. First, when *Katz* circularity was first contemplated by the Supreme Court, the Court explicitly said that, if circularity ever obtained, it would ignore Step One of the *Katz* test.[30] Second, the Court's Fourth Amendment jurisprudence already has another place where it effectively deals with another sort of circularity, namely police-created exigent circumstances. This will take a little time to unpack. Under the exigent circumstances doctrine, police are allowed to perform suspicionless searches when certain kinds of emergencies arise.[31] The exigent circumstances doctrine stands as an exception to both the warrant requirement and the probable cause requirement. The Court, however, recognized that police conduct can create the very emergencies that, in turn, justify these exceptions to warrants and probable cause. This is then a kind of circularity. In response to this possibility, the Court held in *Kentucky v. King* that police may not conduct a suspicion-less search when they create the emergency in an improper manner.[32] In other words, when police create exigencies by improper means, the courts will behave as if there

26. *Id.* at 1776.

27. *Id.* at 1799.

28. To be clear, Kugler and Strahilevitz were testing the presence of societal attitudinal circularity, not individual attitudinal circularity. Still, if there is no society-wide effect, it is hard to imagine how there could be a discernible individual effect.

29. Of course, Kugler and Strahilevitz would be free to suggest this modification is totally ad hoc.

30. Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

31. Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).

32. Kentucky v. King, 563 U.S. 452, 462 (2011).

was no exigency at all. Similarly, the Court could say about *Katz* circularity that if the government improperly brings about diminished expectations of privacy, the courts will behave as though the person did not have diminished expectations of privacy.

III. RESTRICTING PRIVACY WITHOUT GOVERNMENT HELP

The previous part offered some reasons why *Katz* circularity may not be so worrisome. Empirical evidence suggests that government will not be able to affect our expectations very much. Also, courts have devised means of dealing with circularity, if it should arise. This part urges more expansive reflection on the problem that *Katz* circularity poses. The problem is bigger than government. All manner of things might improperly reduce someone's subjective expectations of privacy.

Some commentators have already raised the issue that various private parties may actively seek to reduce our expectations of privacy. When an employer informs employees that it will monitor their emails and calls made with company-provided electronics, the employees may come to expect less privacy with respect to their electronic communications.[33] When a website announces that it will track all users' online activity, the users may come to expect less privacy in their web browsing.[34] Some tech companies even monitor one's offline activity, if one relies on geospatial location services, like Google Maps.[35] In that case, individuals, who must rely on such technology to navigate the modern world (literally), may come to expect less privacy with respect to their comings and goings. If expectations do diminish, government could capitalize on this.[36] In a slogan, we don't have to worry about Big Brother when we have Google.

Above, I offered two reasons to assuage fears about government diminishing our expectations of privacy. One reason was that social science suggests that government cannot diminish our expectations very much, and the other reason

33. *See* Marissa A. Lalli, *Spicy Little Conversations: Technology in the Workplace and A Call for A New Cross-Doctrinal Jurisprudence*, 48 AM. CRIM. L. REV. 243, 253 (2011).

34. Lan Hang & James Chadwick, *Internet Privacy: A Tale of Two Cookies*, 33 BRIEF 48, 49–50 (2004).

35. Todd Haselton, *Google Maps Keeps a Detailed Record of Everywhere You Go—Here's How to Stop it*, CNBC (Jan. 16, 2020), https://www.cnbc.com/2020/01/16/how-to-stop-google-maps-from-tracking-and-saving-your-location.html [https://perma.cc/2MVT-88QY].

36. Katz v. United States, 389 U.S. 347, 361 (1967). Currently, government must rely on Step Two of *Katz* to get any of the aforementioned information without Fourth Amendment scrutiny. Essentially, the government must argue that it is not reasonable for individuals to expect privacy in whatever they turn over to third-parties, a doctrine that many members of the Court increasingly find unpalatable. In a world where private parties warp individuals' subjective expectations, the third-party doctrine need not to be invoked. If people no longer expect privacy, there is no need to reach *Katz* Step Two.

was that courts have ways of dealing with governments that try to diminish expectations of privacy. Those reasons are unavailable when we face private entities that could potentially diminish our expectations of privacy. First, there is no private entity analogue of the Kugler and Strahilevitz paper, so we do not know whether people's expectations of privacy are moved by the behavior of private entities. Second, if private entities can distort our expectations of privacy, courts have no obvious doctrinal tricks to counteract that.

So far, I have argued that the heart of the worry about *Katz* circularity is really a worry about someone—whether government or a private entity—improperly reducing individuals' subjective expectations of privacy with the consequence that the individuals will, in turn, get less Fourth Amendment protection. In the last bit of this part, I suggest ways that an individual might come to expect little privacy where this result has nothing to do with government or private entities trying to reduce anyone's privacy.

Consider the following hypotheticals:

Paranoia

Alex has paranoid personality disorder. Alex believes without evidence that the government is spying on him at his home. He tells this to anyone who will listen. Alex, therefore, has no subjective expectations of privacy in what he says at home. In fact, Alex, under the delusion that police are listening to every word he says, likes making up stories to send police on wild goose chases. On one occasion, Alex makes up a story about killing a young person in a remote patch of forest, burying them, and leaving a distinctive wound on the victim's forehead. Unbeknownst to Alex, a young person really was killed in just that way, and the police really are spying on him! Alex is then arrested for the murder, and when Alex moves to exclude evidence of what he has said, the court rules that he had no subjective expectations of privacy.

Gullibility

Bethany has recently watched a movie with her friend Callie. The movie, though fictional, employs all the tired tropes of found footage films, and it claims that the government is watching everyone's every move. Callie, merely to get a laugh, tells Bethany that the movie's claims are all true. Bethany, who is exceedingly gullible, believes her friend. Bethany posts all over her social media what she has just 'learned.' Callie, who is too cool for social media, never sees this and has no opportunity to correct the mistake. Some of Bethany's posts go viral, and members of local police see them. Though she has done nothing to occasion criminal suspicion, police may now surveil Bethany with no Fourth Amendment scrutiny because she has no subjective expectations of privacy.

Dislocation[37]

Darnell has been smuggled out of his home country, which is effectively run by a mafia. The official government which proclaims the standard list of liberal

37. This modifies a hypothetical case from Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

> freedom is very weak. In Darnell's homeland, he has no expectations of privacy with respect to any aspect of his life. The mafia controls just about everything. Darnell's country is very poor, and its citizens know very little about other countries and their mores. As a result, Darnell, who is now in the United States, does not know that, in his new country, he enjoys protection against unreasonable searches of say, his backpack. In fact, Darnell suspects that the new country is no different than the old and suspects that powerful people, including police officers, could rifle through his backpack at any time. Because of his suspicions, arguably, nothing that happens to Darnell can be a Fourth Amendment search.

These examples are admittedly farfetched, but the point each makes is very real.[38] Our expectations can be shaped by things aside from the government or private entities trying to reduce those expectations. People may develop diminished expectations of privacy due to mental illness or misapprehending certain facts about the world. In those cases, it seems unfair for courts to hold that the individuals, for some very unfortunate reason, have no right against unreasonable searches.

Even without misapprehension or unfortunate circumstance, some people might have diminished expectations of privacy. Consider the case of small children. If we can accurately discern their beliefs, it would not be surprising to learn that they have limited expectations of privacy. There will certainly be a point at which the very young do not understand the concept of privacy; *a fortiori*, they do not expect privacy at that point. Even after gaining a rudimentary understanding of privacy, many children only have a modicum of privacy. In a good home, they are constantly monitored by others. Reasonably then, children will have little expectation of privacy. Yet, it seems strange to think that children have severely reduced or no Fourth Amendment rights, especially since children can and do get tried for crimes.[39]

38. Though not much more farfetched than the early examples scholars have used to motivate *Katz* circularity.

39. Jon Burstein, *Teen Sentenced to 28 Years in Prison*, CHI. TRIB. (July 28, 2001), https://www.chicagotribune.com/sns-brazill-story.html [https://perma.cc/2PCH-K99U] (reporting a 28-year sentence imposed upon a 14-year-old for murder); Stephanie Chen, *Boy, 12, Faces Grown Up Murder Charges*, CNN (Mar. 15, 2010), https://www.cnn.com/2010/CRIME/02/10/pennsylvania.young.murder.defendant/?hpt=C1 [https://perma.cc/9GLE-DHSQ] (reporting a possible life sentence for an 11-year-old); Lindsey Bever, *It Took 10 Minutes to Convict 14-year-old George Stinney Jr. It Took 70 years After His Execution to Exonerate Him.*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution/ [https://perma.cc/984K-779N] (reflecting on the execution of a later-exonerated 14-year-old for murder); Eileen Kelley, *Judge Decides Life Sentence is Warranted for Joshua Phillips in Maddie Clifton's Shocking Death*, THE FLA. TIMES-UNION (Nov. 17, 2017), https://www.jacksonville.com/news/public-safety/2017-11-17/judge-decides-life-sentence-warranted-joshua-phillips-maddie-clifton-s [https://perma.cc/Y3CC-Q6U6] (reporting the reinstatement of a sentence to life imprison for a murder committed at age 14); Aimee Green, *Thurston Shooter Kip Kinkel's 112-year Prison Term is Constitutional,*

IV. THE NORMATIVE IRRELEVANCE OF SUBJECTIVE EXPECTATIONS

Thus far, this essay has offered a variety of ways, beyond government misdeeds, that an individual might find her subjective expectations of privacy improperly reduced. In these cases, it would be unfair for courts to allow government to capitalize on these improper reductions and, accordingly, to afford the individual no protection against unreasonable searches. It might seem that the essay is stumping for a *Katz* Step Zero, where a court would ask whether the individual's expectations, whatever they are, were formed in an improper way. Such a test, presumably, would instruct courts to ignore the actual expectations if they were improperly reduced. In this final part of the essay, I explain why the better approach is just to fully jettison any concern with subjective expectations of privacy in the first place.

To show why all we need is Step Two, I rely on a simple deductive argument.[40] In the universe of cases where Step One is outcome-determinative,[41] Step One can either return plausible results (i.e., results we can accept about whether someone should get Fourth Amendment protection) or implausible results (e.g., *Katz* circularity cases or some of the other cases from above). If Step One returns plausible results, one could arrive at those same results with Step Two. If Step One returns implausible results, one could correct the problem either with a Step Zero or just Step Two. The conclusion is that, in all cases, Step Two is sufficient.

When does Step One return plausible results? When teaching *Katz* to students, I often try to make Step One intuitive by offering an example like the following.

> *Public Pipe*
>
> Suppose that a man is walking down the public sidewalk at midday, openly smoking his crackpipe. The man, fully in public, has no expectations that his behavior is private. He just does not care because he is so high. Should police have to get a warrant in order to use the evidence of the man publicly smoking?

The example is meant to convince students of Justice Harlan's point that when someone has no subjective expectation of privacy in their activity, it seems

High Court Rules, THE OREGONIAN (May 10, 2018), https://www.oregonlive.com/pacific-northwest-news/2018/05/school_shooter_kip_kinkels_112.html [https://perma.cc/C8MU-PRKV] (reporting that the court upheld the 112-year sentence imposed on a 15-year-old).

40. To be precise, it is a disjunctive elimination argument, the underlying structure of which is the following:

1. A or B
2. If A, then C
3. If B, then C
4. Therefore, C.

41. Step One is outcome-determinative only when someone fails Step One.

odd to afford the activity Fourth Amendment protection. While the example serves my purpose of getting students to see why anybody would *think* they care about subjective expectations of privacy, the example is actually misleading. The real reason why the crackpipe guy's behavior should get no Fourth Amendment protection is that it would be unreasonable to expect privacy in such circumstances. In other words, one can get to the right result just by employing Step Two of *Katz*.

To vindicate Harlan's point, one would need an example in which (a) it seems reasonable to expect privacy, (b) the person lacks the expectation, and (c) it still seems like the person deserves no Fourth Amendment protection. Nothing checks all three boxes. All cases that satisfy (a) and (b) are instances of *Katz* circularity or other improper reductions of the individual's expectations, and therefore cannot satisfy (c). Another way to see the point, nothing can satisfy (a) and (c). If it seems reasonable to expect privacy in a situation, it will *not* seem like the situation deserves no Fourth Amendment scrutiny.

Rumination on *Public Pipe* shows that Step Two of *Katz* can get the same result as Step One anytime Step One returns a plausible result.

What about the cases in which Step One returns an implausible result? Implausible results happen in *Katz* circularity cases and other cases when a person's expectations have been improperly reduced. To deal with those potentialities, either a court could begin with an inquiry about whether the expectations were improperly reduced (a Step Zero strategy) or the court could just ask whether it would be reasonable to expect privacy in a given situation (a Step Two strategy). These amount to the same thing, and one can see that by revisiting a hypothetical case from above.

In *Paranoia*, Alex does not expect privacy at home because of his mental illness. A court could devise a rule providing that, where lowered expectations of privacy stem from mental illness, the court will impute to the suspect the relevant higher expectations of privacy. Such a rule would enable the court to provide folks like Alex with some protection against unreasonable searches. However, this purpose would just as easily be served by a court finding that it is reasonable to expect privacy in one's home, without any inquiry into what Alex expects and why he expects it.

V. CONCLUDING REMARKS

Nearly a half century ago, one commentator boldly proclaimed, "[a]n actual, subjective expectation of privacy obviously has no place in . . . a theory of what the [F]ourth [A]mendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection."[42] This essay has tried to supply further support for an idea that truly should be obvious.

42. Amsterdam, *supra* note 21, at 384.

I have argued that the two-step *Katz* test should be refashioned into a single step test, asking only whether the government action intrudes upon something a person would reasonably regard as private. In this way, I have added to an argument offered by Orin Kerr. Professor Kerr has claimed that, as a matter of fact, a suspect's subjective expectations of privacy are irrelevant to judges.[43] Judges simply pay no attention to these details, despite the explicit exhortation by the *Katz* test that judges pay close attention to subjective expectations of privacy. If my essay is successful, it offers a compelling apologia for judicial behavior.

Some readers, after reading along to this point, may find themselves unable to accept my proposal because I have not offered a detailed picture about how *Katz* Step Two should ideally operate. A full answer is beyond the scope of this project because this project is supposed to be neutral with respect to the proper gloss on Step Two of *Katz*. One can plug in one's preferred theory about when expecting privacy would be reasonable. My claim here is just that the best theory of Step Two—whatever it is—should govern whether a Fourth Amendment search has occurred.

Of course, there is one asterisk. To explain this asterisk, it may help to review another argument from Orin Kerr. In his article, *Four Models of Fourth Amendment Protection*, Kerr articulates four models that the Supreme Court employs to decide whether something gets Fourth Amendment protection.[44] The four models are the probabilistic model (how likely are others to have found this),[45] the private facts model (whether particularly private facts are revealed),[46] the positive law model (whether property law or other law creates expectations of privacy),[47] and the policy model (just whether it would be good to give the relevant thing Fourth Amendment protection).[48] Kerr argues that the Court rightly mixes all four models,[49] but this interpretive claim is irrelevant for our purposes. I am most interested in the fact that Kerr distills four coherent models of the content of Step Two. Each of these is fine, and I happen to think, along with Kerr, that some admixture of approaches is soundest. Kerr leaves out a fifth possible approach, a purely sociological approach. On such an approach, we would gloss Step Two as protecting just what people—individually or collectively—currently expect to be private. This understanding is obviously deficient because of *Katz* circularity. That then is my asterisk: my essay's proposal is neutral about the proper gloss of *Katz* Step Two, except insofar as it bars a purely sociological approach to the content of *Katz* Step Two. A

43. Kerr, *supra* note 3, at 122.
44. Kerr, *supra* note 16, at 506.
45. *Id.* at 508–12.
46. *Id.* at 512–15.
47. *Id.* at 516–19.
48. *Id.* at 519–22.
49. Kerr, *supra* note 16, at 525.

sociological approach would fail because, as this paper has maintained, with respect to the Fourth Amendment and its protections, subjective expectations of privacy are normatively irrelevant.