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Search and Seizure - Fourth Amendment Protection and the Expectation of Privacy in the Home of Another: When Is a Guest Really Not a Guest - Minnesota v. Carter

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SEARCH AND SEIZURE—Fourth Amendment Protection and the Expectation of Privacy in the Home of Another: When is a Guest Really not a Guest? *Minnesota v. Carter*, 525 U.S. 83 (1998).

INTRODUCTION

Based on a tip from an informant who had walked by a ground-floor apartment and saw the occupants bagging white powder, Jim Thielen, an Eagan, Minnesota, police officer, went to the apartment complex.[1] Once there, in order to get close enough to view the activities inside, he left the common sidewalk, crossed over the lawn, climbed behind some bushes and situated himself approximately twelve-to-eighteen inches from the window.[2] Thielen observed the packaging for several minutes by looking through a gap in a closed Venetian blind.[3] He then left to contact police headquarters so that affidavits for a search warrant could be prepared.[4]

The three people inside were Wayne Thomas Carter, Melvin Johns, and the apartment's lessee, Kimberly Thompson.[5] When Carter and Johns left the apartment they got into a Cadillac that was later stopped by Eagan police officers.[6] The officers had been instructed to stop the Cadillac if the suspects tried to drive away.[7] The police ordered both Carter and Johns to get out of the vehicle.[8] When one officer opened the door to let Johns exit, he saw a black zippered pouch and a handgun on the floor.[9] The officers arrested Carter and Johns.[10] The next day, after receiving a signed search warrant, the officers searched the vehicle.[11] Inside the police discovered a scale, pagers, and forty-seven grams of cocaine contained in plastic baggies.[12]

A subsequent search of the apartment, pursuant to a warrant, revealed cocaine residue on the kitchen table.[13] The officers also found baggies that were like the ones seized from the Cadillac.[14] Thielen identified Carter as the person placing the white mixture on the table and putting it in piles,

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1. Minnesota v. Carter, 525 U.S. 83, 85 (1998).
2. Minnesota v. Carter, 569 N.W.2d 169, 171 (Minn. 1997).
3. *Carter*, 525 U.S. at 85.
4. *Id.*
5. *Carter*, 569 N.W.2d at 172.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Carter*, 525 U.S. at 86.
14. *Id.*

Johns as the person placing the powder into baggies, and Thompson as the person cutting the ends off the baggies and putting them into piles.[15] The police later learned that Carter and Johns lived in Chicago and came to Thompson's apartment for the sole purpose of bagging the cocaine. The two had never been to the apartment before, and they were there for only two and one-half hours.[16]

The State charged Carter and Johns with conspiracy to commit controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree.[17] The two moved to suppress the evidence obtained from the car and apartment and to suppress incriminating statements made after arrest.[18] They contended that Officer Thielen's initial observation of them bagging the cocaine was an unreasonable and warrantless search that violated their Fourth Amendment rights.[19] Therefore, the evidence was inadmissible as "fruit of the poisonous tree."[20] The Minnesota trial court denied the motion to suppress and both Carter and Johns were convicted of state drug offenses.[21] The Minnesota Appeals Court affirmed the convictions in separate appeals.[22] A divided Minnesota Supreme Court reversed, holding that the two had "legitimate expectations of privacy in the invaded place."[23]

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15. *Carter*, 569 N.W.2d at 173.
16. *Carter*, 525 U.S. at 86.
17. *Id.* at 86.
18. *Id. See* Respondent's Brief at 4, Minnesota v. Carter, 525 U. S. 83 (1998) (No. 97-1147), Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. *Id.* A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. *Id.* Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter, and Thompson had packaged the cocaine at Thompson's apartment. *Id.* He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle. *Id.*
19. *Carter*, 525 U.S. at 86.
20. *Id. See* Michael Pitts, *Investigation and Police Practices*, 86 GEO. L.J. 1339, 1339 (1998). Evidence obtained through violations of the Fourth Amendment cannot be introduced by the prosecution at trial due to the exclusionary rule. *Id.* If admitted, reversal is necessary unless error was harmless beyond a reasonable doubt. *Id.* The Fourth Amendment is generally asserted by criminals in motions to suppress evidence. *Id.* Courts are reluctant to strictly enforce Fourth Amendment violations because of the societal costs of letting criminals escape punishment through the exclusionary rule. *Id.* Judges are loathe to suppress evidence especially when serious crimes are involved and will uphold questionable police conduct in order to admit important evidence. *Id. See* L. Timothy Perrin, et al., *If It's not Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 671-74 (1998). The exclusionary rule allows criminals to return to society either through non-prosecution or non-conviction because evidence has been suppressed. *Id.* Criticism of the rule and its high societal costs have resulted in the Supreme Court carving out exceptions leaving the rule battered and eroded. *Id.* It remains, however, the central remedy to deter police misconduct. *Id.* The rule's erosion diminishes all people's rights. *Id.* When courts legitimize questionable or illegal police conduct they limit protections guaranteed under the Fourth Amendment. *Id.* It is ironical that when courts do this they are tightening the scope of Constitutional rights while attempting to elude the rule the Supreme Court made to protect these same rights. *Id.*
21. *Carter*, 525 U.S. at 86.
22. *Id.* at 87.
23. *Id.*

In making its decision, the United States Supreme Court had to consider an important question: Did Thielen's peering into Thompson's apartment constitute an unreasonable search under the Fourth Amendment?[24] The Court reversed the Minnesota Supreme Court's decision.[25] It held that in order to claim Fourth Amendment protection, "a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable."[26] The Supreme Court found that Carter and Johns had no legitimate expectation of privacy in Thompson's apartment.[27]

This case note explores the development of the Supreme Court's approach to the issue of the expectation of privacy when one is in the home or dwelling of another, and whether this gives rise to protection under the Fourth Amendment. It also examines the weaknesses of the *Carter* opinion and discuss its implications for future Fourth Amendment cases.

BACKGROUND

The Fourth Amendment of the United States Constitution guarantees, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches. . . . "[28] The Amendment gives the judiciary the power to protect a person's freedom and privacy from governmental intrusion.[29] The language of the Fourth Amendment is broadly stated creating interpretive challenges.[30] Courts must balance the interests of the individual against those of the government.[31] Application of the Fourth Amendment has not been easy and there has been a continuing evolution of its jurisprudence over the last thirty years.[32] The Supreme Court has often issued vague rules and varying doctrines regarding the Fourth Amendment because the concept of privacy is open to diverse definitions.[33]

Reasonable Expectations of Privacy

The Supreme Court's recent approach suggests a narrowing of the range of protected privacy rights and an increase in its deference to the gov-

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24. Donald Dripps, *Visiting Drug Dealers, Peeping Toms, and the Fourth Amendment*, 34 JOURNAL OF THE ASS'N OF TRIAL LAWYERS OF AMERICA, 86, 86 (1998).
25. *Carter*, 525 U.S. at 91.
26. *Id.* at 88.
27. *Id.* at 91.
28. U.S. CONST. amend. IV.
29. Gerald Ashdown, *The Fourth Amendment and the Legitimate Expectation of Privacy*, 34 VAND. L. REV. 1289, 1290 (1981).
30. *Id.* at 1290.
31. *Id.*
32. J. Richard Broughton, *"Business Curtilage" and the Fourth Amendment: Reconciling Katz with the Common Law*, 23 DEL. J. CORP. L. 513, 514 (1998).
33. *Id.*

ernment to gather evidence.[34] For example, the Court found that a homeowner had no expectation of privacy in his trash left at the curb of his house;[35] the Court has allowed aerial surveillance of private residence backyards;[36] and the Court allowed government officials to determine phone numbers dialed from home phones.[37]

Fourth Amendment analysis centers around the notion of "a reasonable expectation of privacy."[38] The Amendment addresses only two issues—searches and seizures.[39] What constitutes a search is based on reasonable expectations of privacy in the place of the search or the property seized.[40] If an item is in plain view, even if it is in a home or office, it is not protected by the Fourth Amendment."[41] However, what a person attempts to preserve as private, even if accessible to the public, may be afforded Fourth Amendment protection.[42] When analyzing a Fourth Amendment issue, it must be established whether or not the party had a reasonable expectation of privacy that was encroached upon.[43]

Expectations of Privacy in the Home

Rarely has it been an issue whether a homeowner has an expectation of privacy in his own home. The Supreme Court, since the enactment of the Fourth Amendment, has recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the

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34. Jana Nestlerode, *Re-"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59, 101 (1993).

35. *See* California v. Greenwood, 486 U.S. 35, 40 (1988). The Supreme Court concluded that, "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* However, the Justices found it irrelevant that a city ordinance prohibited Greenwood from disposing of his garbage in any other way than leaving it on the curb for the city trash collectors. *Id.*

36. *See* California v. Ciraolo, 476 U.S. 207, 213 (1986). The Supreme Court held that the warrantless observation of a backyard within the curtilage of the home was not unreasonable. *Id.* The Court reasoned that, "in an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. *Id. See* Florida v. Riley, 488 U.S. 445, 450-51 (1989). The defendant moved to suppress evidence, seized marijuana plants, based on aerial observations by police in a helicopter 400 feet above his greenhouse. *Id.* The Court held that the defendant could not "reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." *Id.* In *United States v. Santana*, 427 U.S. 38, 42 (1976), the defendants moved to suppress heroin and marked money seized by the police at the time of arrest. The Court held that while the defendant was standing in the dooorway of her house, this was a public place, and she was not in an area where she had any expectation of privacy. *Id.*

37. United States v. Merriwether, 917 F.2d 955, 958-59 (6th Cir. 1990).

38. Stephen Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 908 (1997).

39. *Id.* at 925.

40. *Id.* at 934.

41. Katz v. United States, 389 U.S. 347, 351-52 (1967).

42. *Id.*

43. Jones, *supra* note 38, at 908.

Republic."[44] This concept is also embedded in the text of the Amendment: "The right of the people to be secure in their persons, houses, papers, and effects. . . ."[45]

Historically, the Fourth Amendment protected real and personal property rights from arbitrary searches and seizures, which was a great concern in the eighteenth century.[46] From the eighteenth century to the latter part of the twentieth century the Court's analysis of the Fourth Amendment focused primarily on property rights.[47] This changed with the Court's landmark decision in *Katz v. United States*.[48] In *Katz*, the Court rejected property-based theories and shifted to privacy as the principle upon which Fourth Amendment protection was premised.[49]

The petitioner in *Katz* was charged with gambling by sending betting information by phone to Miami and Boston from Los Angeles, violating a federal statute.[50] The government introduced evidence obtained by FBI agents who had attached an electronic listening and recording device to the outside of a public telephone booth.[51] The Court held that the government's activities violated the privacy upon which the petitioner relied while using the phone, constituting a search and seizure under the Fourth Amendment.[52]

Justice Harlan, in a concurring opinion in *Katz*, articulated a two-part test as to when Fourth Amendment protection would be given.[53] First, a person has to have a subjective expectation of privacy in the invaded place, and second, society needs to recognize that expectation as reasonable.[54] If either prong of the test is not met, there is no Fourth Amendment issue nor an improper search or seizure.[55] Since *Katz*, the Fourth Amendment is no longer limited to protection from physical trespass, but extends to all areas where an individual could reasonably expect privacy.[56]

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44. Oliver v. United States, 466 U.S. 170, 178 (1984).

45. U.S. CONST. amend. IV.

46. This concern was based on the colonists' experience with writs of assistance and their memories of general warrants that were used in England. Writs of assistance allowed local sheriffs to forcibly enter colonist's homes to search for smuggled goods. General warrants allowed officials in England to forcibly enter homes and search for seditious publications. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, § 5.03 at 69-70 (2nd ed. 1997).

47. *Id.*

48. 389 U.S. 347 (1967).

49. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307, 320 (1998).

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

51. *Id.*

52. *Id.* at 358.

53. *Id.* at 361 (Harlan, J. concurring).

54. *Id.*

55. Walter M. Hudson, *A Few New Developments in the Fourth Amendment*, 1999 ARMY LAWYER 25, 25 (1999).

56. *See* DRESSLER, *supra* note 46, § 7.02 at 84-85. Fourth Amendment analysis is divided into two historical periods. The first ended in 1967 with the Court's decision in *Katz*. Prior to *Katz*, based on the

Nearly forty years ago in *Jones v. United States,* the Court determined whether the Fourth Amendment rights of a defendant had been violated when federal officers (who had a warrant) searched the apartment to which he had access.[57] The officers found and seized narcotics and narcotics paraphernalia.[58] The defendant had clothing in the apartment, had stayed there for a night, and had a key to the apartment, but he lived elsewhere.[59] The defendant moved for the district court to suppress the evidence as it was the product of an illegal search.[60] He contended that the warrant was issued without a showing of probable cause.[61] The government disputed his standing to make this motion. The District Court and the Court of Appeals found he did not have standing to raise the legality of the search because he was merely a guest of the apartment owner.[62]

The Supreme Court held that the search of the apartment violated the defendant's Fourth Amendment rights.[63] The Court reasoned that because the accused had a legal right to be in the apartment, he had standing to raise the question of an improper search.[64] The Court stated that "anyone 'legitimately on the premises' where a search occurs may challenge its legality."[65]

The Court rejected the "legitimately on the premises" doctrine of *Jones* in its 1978 decision in *Rakas v. Illinois*.[66] The Court concluded that "legitimately on the premises" was too broad a measurement for Fourth Amendment rights.[67] The petitioners in *Rakas* were convicted of armed robbery.[68] At trial, the prosecution submitted evidence that the police had seized when they searched the automobile in which the petitioners had been passengers.[69]

Court's decision in Boyd v. United States, 116 U.S. 616 (1886), the Fourth Amendment did not apply unless there was a physical intrusion or trespass into a constitutionally protected are. *Id. See also,* Bradley W. Foster, *Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment*, 56 J. AIR. L. & COM. 719, 727 (1991) (Fourth Amendment protection extended to all areas where a person has an expectation of privacy).

57. 362 U.S. 257, 259 (1960).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 259-60.
63. *Id.* at 265.
64. *Id.* at 267.
65. *Id.*
66. 439 U.S. 128 (1978).
67. *Id.* at 141-142. The Court stated:

> [f]or example, applied literally this statement [legitimately on the premises] would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search." *Id.*

68. *Id.* at 129.
69. *Id.*

Neither petitioner owned the automobile nor asserted ownership of the seized articles.[70] On appeal, the Court denied their motion to suppress the evidence because of an unlawful search and seizure.[71] The Court concluded that a person needing only to be "legitimately on the premises" in order to challenge the validity of the search of a dwelling could not be taken beyond the facts of the *Jones* case."[72]

Justice White, in dissent, took the view that if "legitimately on the premises" was rejected, a bright line test to measure Fourth Amendment rights was foregone for a less certain analysis based on whether the facts presented gave rise to a legitimate expectation of privacy.[73] The majority rejected this by stating that the phrase, "'legitimately on the premises' has not been shown to be an easily applicable measure of Fourth Amendment rights[74] so much as it has proved to be simply a label placed by the courts on results which have not been subjected to careful analysis."[75]

The most recent case in which the Supreme Court looked into the expectation of privacy of a person in the home of another was *Minnesota v. Olson*. The Court held that Olson's arrest violated his Fourth Amendment rights because it was made after a warrantless and nonconsensual entry into a residence where he was an overnight guest.[76] Olson assisted in the armed robbery of a Minnesota Amoco gas station by driving the getaway car.[77] The police received information that he was staying in the upper unit of a duplex that was the residence of two women.[78] Police surrounded the unit, called one of the women, and told her to send the suspect out.[79] They heard a male voice say, "tell them I left," at which point the officers entered the residence without permission and arrested Olson.[80]

The Court concluded that his status as a guest gave him a legitimate expectation of privacy in his host's home.[81] The Court reasoned that staying overnight with others is a social custom that is recognized as valuable in our

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70. *Id.*
71. *Id.*
72. *Id.*
73. Rakas v. Illinois, 439 U.S. 128, 156 (1978) (White, J., dissenting).
74. Lower court decisions have applied the bright line test with varying results. See Holloway v. Wolff, 482 F.2d 110, 112 (Cal. 1973)(holding that defendant had standing to object to search of a third person's bedroom because he was in the bedroom at the time of the search even though he did not show that he had permission to be in the bedroom or had ever been in the bedroom before); Northen v. United States, 455 F.2d 427, 430 (Cal. 1972)(holding that defendant did not have standing to object to a search of a roommate's bedroom because he could not show he had permission to enter the bedroom, even though he was in the apartment at the time of the search).
75. *Rakas*, 439 U.S. at 146-47.
76. 495 U.S. at 93.
77. *Id.*
78. *Id.*
79. *Id.* at 94.
80. *Id.*
81. *Id.* at 98.

society.[82] The Court held that, "although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.[83] Society expects at least as much privacy in these places as in a telephone booth . . . expectations of freedom from intrusion are recognized as reasonable."[84] The Court found that if an overnight guest is in a home with permission, and the host is willing to share his house and privacy with the guest, then the guest has a legitimate expectation of privacy.[85]

PRINCIPAL CASE

The Supreme Court reversed the Minnesota Supreme Court's decision in an opinion delivered by Chief Justice Rehnquist.[86] The Court found that the Minnesota Supreme Court's analysis of privacy under the doctrine of standing was inappropriate.[87] The Court had expressly rejected that doctrine in *Rakas* over twenty years ago.[88] In *Rakas*, the defendant could not show that his rights, rather than those of another, were violated.[89] The Court stated that, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[90] The Court found that, "a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable, i.e., one which has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[91]

The majority indicated that the text of the Fourth Amendment suggests that people are only protected in "their" houses.[92] However, the Court has held that in some situations a person can have a legitimate expectation of privacy when he or she is a guest in the home of another.[93] In *Minnesota v. Olson*,[94] the Court found that the defendant's status as an overnight guest

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82. *Id.* at 94.
83. *Id.* at 98.
84. *Id.* at 99.
85. *Id.*
86. Concurring with Justice Rehnquist were Justices Scalia, Kennedy, and Breyer, with Justices Ginsburg, Stevens and Souter dissenting. *Carter*, 525 U.S. at 84.
87. *Id.*
88. Rakas v. Illinois, 439 U.S. 128, 138 (1979). In *Rakas*, the petitioners were convicted of armed robbery. At trial, evidence of a sawed-off rifle and rifle shells was introduced. *Id.* The police seized these articles during a search of the petitioners' car. *Id.* Neither owned the car nor asserted that they owned the rifle or shells taken by the officers. *Id.* The Appellate Court of Illinois held that the petitioners lacked standing and denied their motion to suppress the evidence. *Id.* The Supreme Court granted *certiorari*. *Id.* at 129-30.
89. *Id.* at 131.
90. *Id.* at 138.
91. *Id.* at 142-43.
92. The Constitutional phrase is, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. CONST. amend. IV.
93. *Carter*, 525 U.S. at 89.
94. 495 U.S. 91 (1990).

was sufficient to show he had Fourth Amendment protection.[95] In the instant case, the Court found that the respondents were obviously not overnight guests, they did not have a previous relationship with Thompson, and the apartment was only a place for them to conduct business.[96]

The Court reasoned that property used for commercial purposes is different than that of personal residential property.[97] It stated, "an expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."[98] The Court indicated that while the respondents were in a 'home,' it was not their home.[99] The Court has found that in some cases a worker can claim ownership over his own workspace, but in this situation, the respondents had no significant connection with the apartment.[100] The Court went on to state that if an overnight guest typifies a person who can claim Fourth Amendment protection, and a person merely "legitimately on the premises" typifies one who cannot, then the *Carter* case was somewhere in between.[101] The Court concluded that the commercial nature of the transaction, the short time on the premises, and the lack of any previous connection with the homeowner made Carter's and Johns' more like persons merely permitted on the premises.[102] Therefore, the Court held that any search conducted did not violate their Fourth Amendment rights.[103]

While four justices concurred in the opinion, their interpretations differed. Justice Scalia, joined by Thomas, believed that the decision by the Court accurately applied recent case law, including *Olson*.[104] He did not focus on "a legitimate expectation of privacy," which he considered a fuzzy standard, but looked at whether a search or seizure covered by the Fourth Amendment had occurred.[105] Relying on history and a textual analysis of the Fourth Amendment, Justice Scalia found that the respondents were not in "their house," and therefore had no Fourth Amendment protection. [106]

While Justice Kennedy agreed with the dissent that a guest has a reasonable expectation of privacy in a host's house, he found that Carter and Johns established, "nothing more than a fleeting and insubstantial connec-

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95. *Id.* at 96-97.
96. *Carter*, 525 U.S. at 90.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 90-91 (Scalia, J. concurring).
101. *Id.* at 91.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 97. The text of the amendment states: "The right of the people to be secure in *their* persons, houses, papers, and effects against unreasonable searches and seizures." U.S. CONST. amend. IV (emphasis added).

tion with Thompson's home."[107] As a result, they could not be considered guests in Thompson's home and had no expectation of privacy in it.[108] Justice Breyer focused on whether an "unreasonable search" had occurred.[109] He concluded that it had not, reasoning that Officer Thielen stood outside the apartment's "curtilage" when he made his observations.[110]

In her dissent, Justice Ginsburg stated that:

> The Court's decision undermines not only the security of short-term guests, but also the security of the home resident herself [*sic*]. In my view, when a homeowner or lessor personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures.[111]

Justice Ginsburg argued that individuals should be able to choose whom they allow into their homes.[112] Guests should have the same expectation of privacy as the host because they have been invited.[113] Justice Ginsburg reasoned that previous decisions by the Court indicated that people have reasonable expectations of privacy in their homes because of their ability to consciously exclude others.[114] Justice Ginsburg indicated that Fourth Amendment decisions should reflect the prerogatives of being able to include and exclude people from one's home.[115] Justice Ginsburg's concern was that the decision in *Carter* would tempt police to pry into private residences in order to find evidence that guests possess, knowing that the guest would not be able to raise a Fourth Amendment claim.[116]

Justice Ginsburg contended that if an overnight guest had a reasonable expectation of privacy in the home of another, then the logic should extend to short-term guests as well.[117] Justice Ginsburg concluded that:

> In sum, when a homeowner chooses to share the privacy of her home and her company with a short-term guest, the twofold re-

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107. *Id.* at 102 (Kennedy, J., concurring).
108. *Id.*
109. *Id.* at 104 (Breyer, J., concurring).
110. *Id.* For a discussion of curtilage, *see* United States v. Dunn, 480 U.S. 294, 302 (1987), where the Supreme Court held that a barn and the area around it was outside the protected curtilage of the suspect's ranch so that the observation of the barn did not constitute a search of the curtilage in violation of the Fourth Amendment.
111. *Id.* at 106 (Ginsburg, J., dissenting). Joining Justice Ginsburg were Justices Stevens and Souter.
112. *Id.* at 107.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

> quirement 'emerging from prior decisions' has been satisfied: Both host and guest 'have exhibited an actual (subjective) expectation of privacy; that 'expectation [is] one [our] society is prepared to recognize as reasonable.'[118]

Justice Ginsburg argued that the Court's obligation was to produce coherent results in Fourth Amendment cases, and the decision in the instant case veered sharply from *Katz*.[119] Justice Ginsburg stated that when we enter the home of another to engage in a common endeavor, we should be protected from warrantless searches.[120]

ANALYSIS

The Court's application of the "reasonable expectation of privacy" standard in Fourth Amendment cases has often been disturbing. It allows the Court to narrow Fourth Amendment protections depending upon how it chooses to apply the concepts of "reasonable" and "privacy."[121] Reasonable, while being objective, is a word with which principled analysis can be avoided, and privacy is an amorphous concept that can be widely interpreted.[122] The reasonable expectation of privacy test articulated by Justice Harlan in *K*atz is simple to remember, but difficult to apply.[123] In the criminal procedure context, reasonableness is a flexible standard but it is ambiguous, easy to manipulate, and can allow for inconsistent results.[124] Many scholars have concluded that Fourth Amendment jurisprudence is a "mess," and that trying to uncover the confusing and unwieldly state of the search and seizure doctrine is "fanciful."[125] As one professor quipped, "all searches and seizures must be grounded in probable cause, but not on Tuesdays."[126]

Under *Katz*, careful analysis is needed in determining when a visitor has a reasonable expectation of privacy in the home of another.[127] The home is the most sacred area protected by the Fourth Amendment.[128] It receives this revered status not because it is a structure in which a person lives, but because of society's expectation of its sanctity.[129] Notably, the Court, while recognizing the sanctity of the home and the privacy rights therein, has used

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118. *Id.* at 109.
119. *Id.* at 111.
120. *Id.*
121. Jones, *supra* note 38, at 914; Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 794 (1999).
122. Luna, *supra* note 121, at 794; Jones, *supra* note 38, at 914.
123. Jones, *supra* note 38, at 914.
124. Luna, *supra* note 121, at 794.
125. *Id.* at 799.
126. *Id.*
127. Jones, *supra* note 38, at 958-59.
128. *Id.* at 957.
129. *Id.* at 957-58.

the sovereignty of the home to both invalidate and uphold laws.[130] This inconsistency seems even greater considering the Court's reverence for the home.[131] It has often made statements such as the home is, "the last citadel of the tired, the weary, and the sick."[132] The Court also stated that, "preserving the sanctity of the home, the one retreat to which men and women can repair from the tribulations of their daily pursuits, is surely an important value."[133] When a guest is invited into a home, is in the presence of the host, and is engaged in a common activity with the host, custom implies that the guest has acquired a reasonable expectation of privacy in that home.[134]

The holding in *Minnesota v. Carter* provides another example of the Court's inconsistent application of the reasonable expectation of privacy standard. While its decisions in the area of privacy expectations in the home of another are few, it missed an opportunity in *Carter* to provide a bright line rule for lower courts to follow.

Overnight Guest versus Short-Term Guest

Justice Rehnquist, writing the opinion of the Court, relied on *Olson*.[135] In *Olson*, the Court held that the "status as an overnight guest is alone sufficient to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."[136] The decision in *Olson* is troubling because while it holds that an overnight guest has reasonable expectations of privacy in the home of another, it leaves open for interpretation whether a short-term guest would have the same expectation.

The *Carter* opinion creates even more questions. If Carter and Johns had been spending the night at the apartment, would they then have had an automatic expectation of privacy? Under *Olson* they would, but should they? How long does one have to know someone before they can be a legitimate guest? At some point would Carter's and Johns' activities in the apartment have become private rather than commercial?[137]

Had the majority truly applied the *Katz* test, the decision in *Carter* would likely have been different. As in *Katz*, Carter and Johns conducted

130. Luna, *supra* note 121, at 799. While the following cases present First Amendment issues, they illustrate the Court's inconsistency in viewing the home and the privacy contained therein. *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994), where a municipal ordinance that prohibited homeowners from displaying signs was invalidated. *See* Frisby v. Schultz, 487 U.S. 474, 476-77 (1988), where an ordinance prohibiting picketing before a private home was upheld.

131. *Id.* at 854.

132. *Frisby*, 487 U.S. at 484.

133. *Id.*

134. Dripps, *supra* note 24, at 86-87.

135. Minnesota v. Olson, 495 U.S. 91, 93 (1990).

136. *Id.* at 96-97.

137. Hudson, *supra* note 55, at 29.

illegal business and attempted to make their actions private.[138] They entered Thompson's apartment and purposely closed the blinds.[139] Katz entered a public phone booth to conduct his business and the Court concluded that, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[140] The Court held that the government's activities in listening in and recording Katz's conversation violated the privacy upon which he relied upon while using the phone.[141] The Court held that an unreasonable search under the Fourth Amendment had occurred.[142] Justice Stewart, writing the majority opinion in *Katz*, stated that, "no less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment."[143]

Certainly, when Carter and Johns made the effort to go inside the apartment and close the blinds they were entitled to assume that their activities would be free from police observation. Based on *Katz*, Thielen's peering in and observing Carter's and Johns' activities could easily have been viewed by the Court as violating the privacy upon which they relied while using the apartment. While it can be contended that Officer Thielen's peering did not constitute a "search" because what a person knowingly exposes to the public is not protected by the Fourth Amendment, Carter and Johns did not knowingly expose themselves to Officer Thielen.[144] Officer Thielen had to climb behind bushes, position himself close to the window, and then had to look through a small hole in the blind to observe Carter's and John's activities.[145] The Court could easily have found that Carter and Johns had a reasonable expectation of privacy in Thompson's apartment, and that it was one that society would recognize as reasonable. Because courts are reluctant to suppress valuable evidence, the Court's failing to find an expectation of privacy in this case is not surprising.[146]

A Guest's Status Should Not Matter

The dissent correctly recognized that a guest should share his host's shelter against unreasonable searches and seizures whether the guest is there for conversation or commercial purposes.[147] Focusing on the unique importance of the home as the most essential bastion of privacy recognized by the

138. *Carter*, 525 U.S. at 85.
139. *Id.*
140. Katz v. United States, 389 U.S. 347, 351 (1967).
141. *Id.* at 347.
142. *Id.*
143. *Id.* at 352.
144. *Id.* at 351.
145. *Carter*, 525 U.S. at 85.
146. Perrin, *supra* note 20, at 674.
147. *Carter*, 525 U.S. at 106 (Ginsburg, J., dissenting).

law, Justice Ginsburg cited *United States v. Karo*.[148] In *Karo* the Court held that, "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant.[149] The Justice also relied on *Payton v. New York*,[150] where the Court stated that, "the Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bound by the unambiguous physical dimensions of an individual's home."[151] Justice Ginsburg reasoned that if an overnight guest gains a reasonable expectation of privacy in a host's home, the logic of that decision should extend to shorter-term guests as well,[152] which it should.

Justice Ginsburg's position is that if a homeowner chooses to share the privacy of her home with a guest, the expectation of privacy should also extend to the guest because this association is valued.[153] Finally, the Justice voiced a valid concern that the majority did not consider. That is, the majority's decision could easily tempt police into prying into private residences without warrant in order to find incriminating evidence against the guests. Because they are mere guests, they would not be able to raise Fourth Amendment claims.[154] For example, suppose a person is a suspected criminal. All the police would have to do is wait until that person enters a house or apartment where they know s/he does not live, being free at that point to conduct a warrantless search. This situation is frightening. The police would have everything to gain and nothing to lose by conducting searches of private residences. In a society that values privacy, this is unacceptable.

Shortcomings of the Carter Decision

The majority's interpretation of the "reasonable expectation of privacy" standard fosters a fact-dependent analysis of Fourth Amendment issues, allowing for continued variations on the scope of Fourth Amendment protection.[155] Its decision adds confusion in clarifying Fourth Amendment adjudication when visitors are in the home of another. As Justice Scalia stated in his concurring opinion, "in my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those 'actual (subjective) expectation[s] of privacy' 'that society is prepared

148. United States v. Karo, 468 U.S. 705, 714 (1984).
149. *Id.*
150. Payton v. New York, 445 U.S. 573 (1980).
151. *Id.* at 589.
152. *Carter*, 525 U.S. at 109 (Ginsburg, J., dissenting).
153. *Id.*
154. *Id.* at 108.
155. Hudson, *supra* note 55, at 29.

to recognize as reasonable,' bear an uncanny resemblance to those expectations of privacy this Court considers reasonable."[156]

In applying the standard, a better question in determining the subjective expectation of privacy would be: Who possesses the residence, and does that person intend to afford their guests the sanctity of their home and the long established privacy right that goes with it? If yes, then the host and his guest should have the right to exclude the government from unreasonable searches and seizures because both prongs of *Katz* would be met.

Further, the *Carter* opinion raises the question of what the police do and do not know at the time of a search, and whether this knowledge should ultimately affect whether seized evidence is admissible or inadmissible at trial. The exclusionary rule is the remedy for Fourth Amendment violations.[157] Any evidence gathered in violation of the amendment is excluded from trial in order to discourage police misconduct.[158] It does not make sense that the Court in *Carter* created rules that require the relationship between the householder and guest to be post-examined. That is, rather than determining later that the guest was not an overnight guest or that he did not previously know the homeowner, it would be more appropriate to look at what the officer knew of the relationship prior to the time of the search. How could Officer Thielen have known that Carter and Johns were not overnight guests when he observed them bagging the white powder? Maybe they had spent the previous night in the apartment. Should Officer Thielen's actions be excused and the evidence included by what the police learned later—that they were not overnight guests, they did not know Thompson, and they stayed only a short-time. Is this fair? While the Court stated that it did not have to decide whether Officer Thielen's observations constituted a search because Carter and Johns had no legitimate expectation of privacy in Thompson's apartment,[159] officer knowledge at the time of the search is an important issue that needs to be addressed.

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156. *Carter*, 525 U.S. at 97 (Scalia, J. concurring).

157. Ed Aro, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B. U. L. REV. 111, 136-37 (1990).

158. *Id.* at 388. *See* L. Timothy Perrin, *It is Broken: Breaking the Inertia of the Exclusionary Rule*, 26 PEPP. L. REV. 971, 971 (1999). The exclusionary rule was originally created by the Supreme Court and became applicable in state courts in 1961. *See* Aro, supra note 156, at 136-37. The objective of the rule is to deter police misconduct by excluding evidence that the government acquires in violation of a defendant's constitutional rights. Because the exclusionary rule can allow guilty defendants to escape punishment, it has received substantial criticism and federal courts have continually limited its scope. *Id.* Narrowing of the rule, however, can lead to the diminution of peoples' rights and many scholars have suggested alternative remedies for Fourth Amendment violations. *Id. See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 99 ILL. L. REV. 363, 363 (1999). Professor Slobogin suggests the remedy should be damages brought directly against police officers and departments, deterring Fourth Amendment violations and encouraging the use of warrants. *Id. See* Alan Dalsass, *Options: An Alternative Perspective on Fourth Amendment Remedies*, 50 RUTGERS L. REV. 2297, 2297 (1998), where a hybrid model using liquidated tort-type damages and the exclusionary rule was proposed to achieve deterrence.

159. *Carter*, 525 U.S. at 91.

Implications for State and Federal Courts

Unfortunately, the *Carter* decision does not help courts in making Fourth Amendment decisions when others are invited into the homes of another. The Court established no bright line rule. In fact, courts must grapple with even more issues. When does an activity constitute a private versus commercial undertaking? At what point does a guest have an actual subjective expectation of privacy in the home of another? Until the Supreme Court is willing to set a firm course in this area, lower court decisions will continue to be inconsistent.

Two recent cases illustrate this point. The facts were similar in each case. The appellants were in the homes of friends when the police entered and found them in possession of drugs. Both courts relied on *Carter* in making their decisions but they came to opposite conclusions. In *United States v. Rodriguez*,[160] the U.S. Court of Appeals for the Ninth Circuit interpreted the Supreme Court's holding in *Carter* to mean that ordinary social or business guests do not have expectations of privacy in the homes of others.[161] Because Rodriquez was in a friend's apartment when police entered and found him with methamphetamine, the court concluded that he had no expectation of privacy there.[162] Therefore, his Fourth Amendment rights were not violated.[163] The court affirmed Rodriguez's conviction.[164]

In *Morton v. United States*, the District of Columbia Court of Appeals held that Morton did have a legitimate expectation of privacy in the home of a friend even though he had no ownership interest in the residence and did not live there.[165] Its analysis centered around Justice Kennedy's (the fifth justice whose vote was decisive in *Carter*) concurring opinion.[166] It stated, "of key importance is that the majority opinion depended on the concurrence of Justice Kennedy, who joined the opinion expressly because "its reasoning" was consistent with [his] view that almost all social guests have a legitimate expectation, and hence protection against unreasonable searches in their host's home."[167] Five justices agreed that guests have expectations of privacy in a host's home.

In the instant case, Justice Kennedy said, "most, if not all, social guests legitimately expect that, in accordance with social custom, the homeowner will exercise her discretion to include or exclude others for the guest's bene-

160. No. 98-10075, 1999 U.S. App. LEXIS 3350, at *2 (9th Cir. Feb. 26, 1999).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. 734 A.2d 178, 179 (D.C. Cir. 1999).
166. *Id.*
167. *Id.*

fit."[168] He went on to say that "in this respect, the dissent must be correct that reasonable expectations of the owner are shared, to some extent, by the guest . . . as a general rule, social guests will have an expectation of privacy in their host's home.[169] Justice Kennedy indicated that Carter and Johns were not social guests because they had established nothing more than a fleeting and insubstantial connection with Thompson's home and could not claim an expectation of privacy there.[170] The Court of Appeals found that the opinion of Justice Kennedy had to be taken seriously.[171] It concluded that nothing in Justice Kennedy's opinion suggested that he would require an *Olson* (overnight guest) showing for a defendant to claim Fourth Amendment protection. The court stated, "our attempt to read the 'tea leaves' of how the Supreme Court would decide this case must be guided by that recognition."[172]

The court concluded that Morton's connection with his friend's house was enough to show that he was more than "simply permitted on the premises."[173] He had known his friend for ten years and had frequently visited his house.[174] The court found that unlike the situation in *Carter*, Morton had a previous relationship with the householder—he had been to the house before. The fact that Morton entered the house directly after selling drugs, the court felt, allowed for the conjecture of a "commercial" link but nothing more.[175] Interestingly, as in *Carter*, Morton had been in the householder's premises an extremely short time—five minutes.[176] The court did not comment on this. In conclusion the court stated, "following the common thread in the various opinions in *Carter* that at least social guests of the host generally have a legitimate expectation of privacy, we hold that the appellant met his burden of showing that he had a protectible [*sic*] interest in the house . . .

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168. *Carter*, 525 U.S. at 99 (Kennedy, J., concurring).
169. *Id.*
170. *Id.*
171. Morton v. United States, 734 A.2d 178, 182 (D.C. App. 1999). The court in Morton stated that Kennedy's analysis, "suggested that, as a general rule, social guest will have an expectation of privacy in their host's home." *Id.* at 181. The court felt that Kennedy only joined the majority in *Carter* because their opinion was consistent with his view of social guests having expectations of privacy in the host's home. *Id.* at 182. The four member minority would have concluded that Carter had an expectation of privacy in Thompson's apartment because he was invited into it by the host and it would not matter how long he stayed or what he did there. *Id.* The court in Morton thought it was key that the majority opinion in *Carter* depended on Kennedy's concurrence, who joined the opinion expressly because it was consistent with his view of social guests. *Id.* Because Kennedy found Carter to be a non-guest, he joined the majority opinion. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 179.

the evidence obtained as a result of entry should have been suppressed."[177] The court reversed Morton's conviction.[178]

The United States Court of Appeals for the Ninth Circuit attempted to draw a bright line result from *Carter*: The overnight guest has an expectation of privacy while the ordinary guest does not. The United States Court of Appeals for the District of Columbia focused on the elements of the decision, choosing to avoid altogether the short-term guest issue. These cases demonstrate that decisions among the lower courts will continue to be inconsistent regarding guests and their ability to claim Fourth Amendment violations. *Carter* was a poor test case for helping determine when people have expectations of privacy when they are invited into the homes of others because it creates more questions than it answers. The Court was ill-advised to grant it *certiorari*.

CONCLUSION

The Fourth Amendment bans "unreasonable searches and seizures" by police or the State to protect society's treasured value of privacy and its need for security. Its interpretation depends upon the weight one gives to the values it protects.[179] Because protection is often asserted, as in the instant case, by those thought least worthy of it, the Court's application of the "reasonable expectation of privacy" appears to be aimed at limiting their rights, ultimately infringing on all peoples' rights.[180] There is no question that the government needs to gather evidence. However, all members of society should be protected from the bane of unreasonable searches and seizures when they are invited into the home of another. In Justice Louis Brandeis's words, the Fourth Amendment, "conferred, against the government, the right to be let alone—the most comprehensive of rights and the most valued by civilized men."[181] The dissent is correct. Regardless of whether we are overnight guests or not, we all—doctor, lawyer, tailor, cocaine bagger—have the right to be protected by the Fourth Amendment not only in our own homes, but in those of others as well.

GAY GEORGE

177. *Id.*
178. *Id.* at 182.
179. THE OXFORD COMPANION OF THE SUPREME COURT OF THE UNITED STATES 314 (Kermit L. Hall ed., 1992).
180. *Id.*
181. Olmstead v. United States, 277 U. S. 438, 478 (1928).