ARTICLES

BE MY GUEST: THE HIDDEN HOLDING OF MINNESOTA V. CARTER¹

by Edwin J. Butterfoss² and Mary Sue B. Snyder³

I. INTRODUCTION

On a late spring evening in an apartment complex in the St. Paul suburb of Eagan, Minnesota, Kimberly Thompson, Wayne Thomas Carter and Melvin Johns sat at the kitchen table in Thompson’s apartment, unaware that for fifteen minutes someone had been peering through a small opening in the drawn miniblinds of the apartment window observing their activities. The “peeping Tom” was Officer James Thielen, investigating a tip he had received moments earlier concerning the activities in the apartment. As predicted, Officer Thielen saw Thompson, Carter and Johns packaging cocaine. Based on these observations, Officer Thielen set in motion a series of events that led to the arrest and conviction of the occupants of the apartment. Carter and Johns challenged Officer Thielen’s activities as an unreasonable search in violation of the Fourth Amendment. The Minnesota Supreme Court upheld their claim, but the United States Supreme Court denied relief.

In Minnesota v. Carter⁴ the United States Supreme Court held that visitors in an apartment who were not overnight guests, but “essentially present for a business transaction and were only in the home a matter of hours,”⁵ had no legitimate expectation of privacy in the apartment and could not challenge police conduct that the Minnesota Supreme Court had held constituted an illegal search. Unlike many recent Fourth Amendment decisions by the Rehnquist Court rendered with unanimity or near unanimity,⁶ the Carter decision was five to four on the issue of whether the defendants enjoyed a legitimate expectation of privacy. The case spawned three concurrences and

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² Dean and Professor of Law, Hamline University School of Law; B.S., 1977, Miami University (Ohio); J.D., 1980, Georgetown University Law Center.
³ B.A., Carleton College; J.D., 1995, Hamline University School of Law.
⁴ 119 S. Ct. 469 (1998) [hereinafter in footnotes as Carter III].
⁵ Id. at 473.
⁶ Most, but not all, of these decisions were in favor of the government. See, e.g., Maryland v. Wilson, 519 U.S. 408 (1997) (holding that an officer making a traffic stop may order passengers out of car); Whren v. United States, 517 U.S. 806 (1996) (holding unanimously that the stop of a motorist based on the probable cause of a traffic violation is constitutional regardless of the subjective motivation of the officer to investigate other crimes); Ohio v. Robinette, 519 U.S. 33 (1996) (holding that the Fourth Amendment does not require a motorist to be advised that he is “free to go” before being asked for consent to search vehicle). But see Knowles v. Iowa, 119 S. Ct. 484 (1998) (holding that an Iowa statute authorizing a search incident to the issuance of a citation in lieu of an arrest violates the Fourth Amendment).
a dissent to the majority opinion. In this respect the decision is reminiscent of Warren Court decisions and even the early decisions of the Burger Court—but any similarity ends there.

The majority opinion in *Carter* was short in length and short on analysis. With little explanation, it denied the visitors’ claims of legitimate expectations of privacy, but offered little guidance for future cases involving visitors in homes. In future cases, courts will be tempted to characterize the defendants in *Carter* as short-term visitors (or worse yet, non-overnight visitors), point to the fact that these particular defendants were denied the right to challenge the search, and conclude that the rule of *Carter* is that short term visitors lack “standing.” But *Carter* is a case that requires careful vote counting. In the various *Carter* opinions, five Justices accepted the proposition that “almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host’s home.”

The question after *Carter* is whether this “hidden holding” will emerge, or whether, relying on Chief Justice Rehnquist’s majority opinion, lower courts will impose the opposite rule—that short term visitors have no expectation of privacy in their host’s home. Worse yet, lower courts may even conclude a bright line has been drawn to deny protection for visitors “whose head[s] never [touch] a pillow.”

*Carter* is the second case from Minnesota this decade in which the United States Supreme Court has addressed the issue of the expectations of privacy held by a visitor in an apartment. Nine years ago, in *Minnesota v. Olson*, the Court held that an overnight guest had a legitimate expectation of privacy in his host’s home. In *Olson* the Court drew a bright line in favor of overnight guests, stating that its holding “merely recognizes the everyday expectations of privacy that we all share.” The *Olson* Court recognized that “[s]taying overnight in another’s home is a long-standing social custom that serves functions recognized as valuable by society.” The Court in *Carter* was unwilling to extend similar protection to visitors engaged in a purely commercial transaction who spent a relatively short period of time on the premises and lacked any previous connection to the lessee. The shortcoming of the Court’s decision is not only in the result, but also in its failure to provide any guidance as to when a guest who is not staying overnight can claim a legitimate expectation of privacy.

This Article first examines the *Carter* case in detail, including the opinions of the state courts and the briefs and oral argument in the United States Supreme Court, before turning to the Court’s decision. The Article highlights the importance of Justice Kennedy’s concurring opinion and explains

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10. *Id.* at 98.
11. *Id.*
the "hidden holding" of the case, raising the question of whether lower courts will apply the correct rule from the case. The Article argues that the Court's denial of the defendants' claim of a reasonable expectation of privacy, combined with its failure to provide guidance as to when non-overnight visitors in homes will have the ability to challenge a search of that home, increases the danger that lower courts will impose a presumption against short-term guests having an expectation of privacy in their host's home. The Article emphasizes that although a narrow interpretation of the rights of non-overnight visitors is the path favored by several Justices, it does not command a majority, and urges lower courts to take care to apply the correct rule from *Carter*, one that broadly interprets the rights of short term visitors and avoids drawing a line at overnight guests.

The Article then briefly examines the United States Supreme Court's "standing" jurisprudence prior to *Carter*, providing background for the analysis of the decision. The Article argues that the majority's ruling, that the defendants had no reasonable expectation of privacy, undervalues expectations of interpersonal privacy of citizens in a free society, unfairly diminishes legitimate expectations of privacy in a wide variety of relationships the Court labels as "business" or "commercial," and overextends the reach of the "legitimately on the premises" category of visitors to deny protection for certain relationships that deserve better. The Article asserts the Minnesota Supreme Court was better able to put aside the illegal nature of the conduct involved and avoid deciding important privacy issues based on labels. The Minnesota court's decision provided a workable rule that was consistent with United States Supreme Court precedent and recognized and protected the "everyday expectations of privacy that we all share."  

II. *STATE V. CARTER:* THE STATE COURT DECISIONS

In *Minnesota v. Carter* Officer James Thielen approached the window of a ground-floor apartment and peeked through a gap in the closed blinds to investigate a tip from an informant that three individuals were bagging cocaine in the apartment. He observed the individuals bagging the cocaine and notified headquarters, where officers began preparing affidavits for a search warrant. When two of the individuals, Carter and Johns, left the apartment building, entered a car, and started to leave, they were arrested. Based on evidence discovered in the vehicle, and in the apartment during a search pursuant to a warrant issued after the vehicle search, they were charged with various controlled substance offenses.

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13. 569 N.W.2d 169 (Minn. 1997).
15. *See id.* at 471.
16. *See id.*
17. *See id.*
Following the arrests, the police learned that Carter and Johns were from Chicago, and "had come to the apartment for the sole purpose of packaging the cocaine."\textsuperscript{19} They had never been to the apartment before and stayed in the apartment for approximately two and a half hours.\textsuperscript{20} They had given the lessee one-eighth of an ounce of cocaine in exchange for the use of the apartment.\textsuperscript{21}

Carter and Johns moved to suppress all evidence discovered in the apartment and the car, as well as statements they made, arguing that Officer Thielen's initial observation of their activities in the apartment was an unreasonable search in violation of the Fourth Amendment.\textsuperscript{22} The trial court denied the motion, holding that the defendants had presented no evidence to establish "standing" to contest the search, and that as short duration callers they lacked the reasonable expectation of privacy necessary to challenge the officer's conduct.\textsuperscript{23} The trial court also ruled the officer's conduct did not constitute a search.\textsuperscript{24}

Following the suppression motion, the defendants proceeded with separate counsel. After each was convicted, they pressed separate appeals. Carter's appeal was decided first. In that case, the Minnesota Court of Appeals agreed with the trial court.\textsuperscript{25} The appeals court noted that a defendant was required to show more than he was simply "legitimately on the premises."\textsuperscript{26} The court noted that staying overnight was sufficient to create a reasonable expectation of privacy under \textit{Minnesota v. Olson},\textsuperscript{27} but such an expectation could also be established by guests who did not stay overnight.\textsuperscript{28} However, the court found Carter's presence fell short of what was required; the court refused to accept Carter's assertion that he was a social guest, ruling that such a claim was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs."\textsuperscript{29} This evidence "defeat[ed] the 'legitimate expectation of privacy' standard" and meant the defendant's presence at the apartment was insufficient to give him standing.\textsuperscript{30}

When the court decided Johns' appeal, it noted its decision in \textit{Carter} and declined to address Johns' "standing" claim. Deciding the case on the merits, the court ruled Officer Thielen "acted reasonably by walking up to the window and making the initial glance inside and by continuing to look in

\begin{itemize}
\item \textsuperscript{19} Id. at 471.
\item \textsuperscript{20} See id.
\item \textsuperscript{21} See \textit{id.} at 471-72.
\item \textsuperscript{22} See \textit{Carter II}, 119 S. Ct. at 472.
\item \textsuperscript{23} See \textit{id.} at 472.
\item \textsuperscript{24} See \textit{id.}
\item \textsuperscript{25} See \textit{State v. Carter}, 545 N.W.2d 695 (Minn. Ct. App. 1996) [hereinafter in footnotes as \textit{Carter I}].
\item \textsuperscript{26} Id. at 697 (citing \textit{Rakas v. Illinois}, 439 U.S. 128, 142 (1978)). For a discussion of the Rakas decision, see infra notes 134-58 and accompanying text.
\item \textsuperscript{27} 495 U.S. 91 (1990).
\item \textsuperscript{28} See \textit{Carter I}, 545 N.W.2d at 698 (citing \textit{Overline v. State Comm'r of Pub. Safety}, 406 N.W.2d 23 (Minn. Ct. App. 1987)).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\end{itemize}
the window in an attempt to corroborete the informant’s story.”

On appeal, the Minnesota Supreme Court treated the cases as companion cases and reversed the Court of Appeals in both, holding the defendants had standing to challenge the legality of Officer Thielen’s actions and that his observation rose to the level of a search that was unreasonable under the state and federal constitutions. As to the first issue, under the heading of “Standing,” the Minnesota court recognized that a defendant must allege a violation of his individual rights, rather than the rights of a third party. Quoting Rakas v. Illinois, the court explained the question turns on a “determination of whether the disputed search . . . has infringed an interest of the defendant which the Fourth Amendment was designed to protect.” Such an interest exists when “the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”

The court then turned to the question before it: whether the defendants had a legitimate expectation of privacy in the apartment they were visiting.

The Minnesota court answered the question by applying the test from Justice Harlan’s concurrence in Katz v. United States: a defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is “one that society is prepared to recognize as reasonable.”

The court easily found the defendants had a subjective expectation of privacy by virtue of being inside the apartment of an acquaintance with the doors shut and the blinds drawn. As usual, the more difficult question was whether the defendants’ expectation was the type society is prepared to recognize as reasonable. On that issue, the court stated that a close reading of Olson revealed the Supreme Court does not require a person to establish his or her status as either a guest or an overnight guest before that person can prove a legitimate expectation of privacy in a location that is

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32. See State v. Carter, 569 N.W.2d 169 (Minn. 1997), rev’d, 119 S. Ct. 469 (1998). See also State v. Johns, 569 N.W.2d 180 (Minn. 1997), rev’d, 119 S. Ct. 469 (1998). The Minnesota Supreme Court issued a full opinion in Carter II, and in Johns simply noted that “[t]he facts and legal issues are identical in both cases” and that “[b]ased on our reasoning in the companion case of State v. Carter, the decision of the Court of Appeals is reversed.” Johns, 569 N.W.2d at 181.
33. See Carter II, 569 N.W.2d at 171.
34. See id. at 174 (citing Jones v. United States, 362 U.S. 257, 261 (1960)). For a discussion of Jones, see infra notes 117-25 and accompanying text.
37. See id.
searched. Instead, the person must establish only that under the totality of the circumstances, the person’s subjective expectation was the type of expectation that “society is prepared to recognize as ‘reasonable.’”

The court read Olson as recognizing an expectation of privacy as legitimate not merely because the defendant was a guest, but because the defendant’s status as a guest “was the type of longstanding social custom that serves functions recognized as valuable by society.” Looking to the stipulated facts—that the apartment’s leaseholder allowed the defendants into her apartment to package cocaine in exchange for one-eighth ounce of cocaine, that the leaseholder and the defendants worked together to package the cocaine, that the defendants remained inside the apartment for two and a half hours, and that one defendant wore bedroom slippers while inside the apartment—the court held that although these facts probably failed to establish the defendants as “guest[s]” of the lessee, they were nevertheless sufficient to prove that the defendants possessed a legitimate expectation of privacy in the apartment.

This conclusion was based largely on the fact that the defendants were in the apartment with permission and were engaged in a common task with the lessee. To the Minnesota Supreme Court, it was irrelevant whether the defendants were classified as visitors, invitees, or business partners of the lessee. The label that accurately defined the relationship was not determinative. Instead, the court focused on whether the relationship was of the type society recognized as valuable. And while the court realized “society does not recognize as valuable the task of bagging cocaine,” it nevertheless concluded “society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity.” Therefore, the court held that the defendants had “standing” to challenge Officer Thielen’s actions. The State sought review in the United States Supreme Court, which agreed to hear the case.

40. Carter II, 569 N.W.2d at 175 (quoting Katz, 389 U.S. at 361).
41. Id.
42. See id. at n.7. The court was careful to make clear that its decision did not turn on the type of footwear the defendant was wearing.
43. See id. at 176.
44. Carter II, 569 N.W.2d at 176.
45. See id.
III. MINNESOTA V. CARTER: THE UNITED STATES SUPREME COURT DECISION

A. The Briefs

In the United States Supreme Court, all the parties agreed that the precise issue facing the Court was whether the defendants could demonstrate they enjoyed a reasonable expectation of privacy in the apartment, and that the determination of this issue depended on whether the subjective expectation of privacy the defendants arguably harbored was one society was willing to recognize as reasonable or legitimate.

I. The State’s Argument

The State argued the Court should make this determination by applying "a balancing test based on the totality of the circumstances." In the State’s view, this analysis should emphasize the defendants’ lack of connection to the place searched and the illegal nature of the activities conducted there to deny the defendants the ability to challenge the police conduct:

In the case at hand, Carter and Johns have not presented any evidence of ownership or other property interest in the apartment. [Defendants] have not presented any evidence demonstrating any prior contact with the apartment or that they had spent considerable time at the apartment. Carter and Johns have not presented any evidence that they had personal effects within the apartment or any evidence regarding their ability to control access to the apartment. Most importantly, Carter and Johns have not demonstrated that the activities that they were engaged in were intended to be protected by the Fourth Amendment.

According to the State, the Minnesota Supreme Court’s conclusion that “society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity” overemphasized the relationship of the defendants to the leaseholder, rather than the property, and underemphasized the illegal nature of the activities in which they were engaged. If allowed to stand, the State argued, the Minnesota court’s decision “will let a guest or invitee stand in the same shoes as the owner or leaseholder of the property for purposes of determining whether the guest or invitee has stand-

49. Id. at 15-16.
50. Id. at 11 (quoting State v. Carter, 569 N.W.2d 169, 176 (1997)). This is the interpersonal privacy that several commentators feel deserves to be emphasized.
51. Id.
ing to challenge a search under the Fourth Amendment.\textsuperscript{52} The result, according to the State, would be that all that "will be necessary for a defendant to demonstrate is that he is present at the time of the search and engaged in a common task with the property possessor"--a result much too close to the "legitimately on the premises" standard rejected by \textit{Rakas v. Illinois}.\textsuperscript{53} The State agreed with Justice White's conclusion in \textit{Minnesota v. Olson} that "to hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share,"\textsuperscript{54} and argued this analysis requires courts to examine "the nature and purpose for a person's presence" in another's dwelling in determining the reasonableness of a defendant's privacy interest under the Fourth Amendment.\textsuperscript{55} The State argued that the Minnesota Court had "totally ignored this important analysis" in reaching the "absurd conclusion" that society would recognize as important a person's interest in engaging in an unlawful activity in the premises of another.\textsuperscript{56}

2. The Defendants' Argument

The defendants agreed they needed to show a subjective expectation of privacy and that the expectation was reasonable in light of ""longstanding social custom[s] that serve functions recognized as reasonable by society.""\textsuperscript{57} They argued the State had waived any argument that the defendants did not have a subjective expectation of privacy and, in the alternative, that the defendants had clearly demonstrated a subjective expectation of privacy.\textsuperscript{58} As to the second part of the inquiry, the defendants stated that the "history, purpose, and application of the Fourth Amendment by [the United States Supreme] Court establish that [defendants] had a legitimate expectation of privacy in a home in which they were social guests."\textsuperscript{59} The defendants refuted the State's contention that their expectations of privacy could not be legitimate because they were engaged in an unlawful activity by explaining that ""[t]he makers of the Constitution were fully aware that the Fourth Amendment would protect all citizens, even those who might be engaged in illegal activities such as the possession of contraband or smuggled goods."\textsuperscript{60} The defendants argued that precedent supported the Minnesota Supreme Court's conclusion that they ""had a legitimate expectation of privacy as social guests in another person's home.""\textsuperscript{61} They emphasized the

\textsuperscript{52} Petitioner's Brief at 11, \textit{Carter III} (No. 97-1147).
\textsuperscript{54} Petitioner's Brief at 11, \textit{Carter III} (No. 97-1147) (quoting Minnesota v. Olson, 495 U.S. 91, 98 (1990)). For a discussion of Olson, see infra notes 159-67 and accompanying text.
\textsuperscript{55} Petitioner's Brief at 18-19, \textit{Carter III} (No. 97-1147).
\textsuperscript{56} Id. at 19.
\textsuperscript{57} Respondents' Brief at 6-7, \textit{Carter III} (No. 97-1147) (quoting Olson, 495 U.S. at 98).
\textsuperscript{58} See id. at 7. Defendants argue the State had waived any claim that the defendants lacked a subjective expectation of privacy by failing to assert such a claim in the Minnesota Court or in the State's petition for certiorari. \textit{See generally} id.
\textsuperscript{59} Id. at 10.
\textsuperscript{60} Respondent's Brief at 13-14, \textit{Carter III} (No. 97-1147).
\textsuperscript{61} Id. at 14 (citing Katz v. United States, 389 U.S. 347 (1967); Rakas v. Illinois, 439 U.S. 128 (1978); Olson, 495 U.S. at 91).
special protections afforded the home and relied on *Olson* as extending the protections to house guests of homeowners. The defendants argued that the social customs and norms recognized in *Olson* that led to protection for overnight guests were equally applicable to shorter term guests.

3. *Amicus Briefs*

The United States, in an amicus brief, argued that "invitees other than overnight guests" are "more similarly situated to a person who is simply legitimately on the premises," the standard rejected in *Rakas*, and do not have an expectation of privacy that society is willing to recognize as legitimate. The government distinguished non-overnight guests because they generally are not given a substantial "measure of control over the premises" and normally do not harbor any expectations that the host will exclude others on the guest's behalf. In the case before the Court, the government accused the Minnesota Supreme Court of assessing the value of the relationship between the defendants and the lessee "at so high a level of generality that its conclusions were incongruous."

The American Civil Liberties Union (ACLU) filed an amicus brief in support of the Minnesota Supreme Court’s ruling. The ACLU argued there was no basis for a bright line rule denying non-overnight guests an expectation of privacy in their host’s home. The ACLU brief pointed to historical evidence supporting the conclusion that "the practice of inviting guests or visitors into a home was an established social custom by the time the Fourth Amendment was ratified." This justified the conclusion that guests and invitees have a legitimate expectation of privacy in the home of their hosts, an expectation that can not be defeated simply by a showing that they were engaging in illegal activity.

B. *Oral Arguments*

At oral argument, the Justices struggled to find an appropriate place to draw a line among visitors to a home. There seemed to be agreement that the distinction could not turn on the legality of the activity being engaged in, although the State of Minnesota insisted it should be a factor. The State argued for a totality of the circumstances, multi-factor approach, but the

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62. See id. at 18 (citing *Olson*, 495 U.S. at 98-99).
63. See id. at 20-21.
65. Id. at 17 (quoting *Olson*, 495 U.S. at 99).
66. Id. at 21. The government recognized the importance of "framing." For a discussion of the concept of "framing." see infra notes 21-21 and accompanying text.
67. See Brief for the American Civil Liberties Union, the Minnesota Civil Liberties Union, and the National Association of Criminal Defense Lawyers at 16, *Carter III* (No. 97-1147).
68. See id.
69. Id. at 8.
70. See id. at 13-16.
72. See id. at 7.
Justices seemed uneasy with such an ambiguous test. The Solicitor General retreated from the rule he had proposed in his brief drawing a bright line at overnight guests, and suggested instead a “functional equivalent of a member of the household test,” based on the frequency of visits and the level of control over the premises. The Justices also explored a suggestion by Justice O’Connor that the distinction should be business invitees versus social guests. The Justices seemed to want to provide protection for lunch visitors and poker-playing friends, but not the pizza delivery person, appliance repair person, or the Avon lady. Defendants’ counsel appeared to agree with those conclusions, but could not suggest an easy standard by which to categorize the different individuals.

C. The Decision

1. The Majority Opinion - Chief Justice Rehnquist

Chief Justice Rehnquist delivered the opinion of the Court, which was joined by Justices O’Connor, Scalia, Thomas, and Kennedy. The opinion did not draw any of the lines suggested in the briefs or at oral argument and provided very little guidance for future cases. After setting forth the facts, the Court stated that the question before it was a matter of substantive Fourth Amendment law rather than an issue of “standing” as it had been analyzed by the Minnesota Supreme Court. The Court emphasized that the Fourth Amendment protection against unreasonable searches and seizures is a personal right, and reaffirmed the standard of Rakas, that the “capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”

The Court noted that the text of the Amendment “suggests that its protections extend only to people in ‘their’ houses,” a cause taken up with more vigor by Justice Scalia in his concurrence, but went on to note that the Court had held that “in some circumstances a person may have a legitimate expectation of privacy in the house of someone else.” The Court cited Olson as an example, and explained that by holding “that an overnight guest had the sort of expectation of privacy that the Fourth Amendment pro-

73. See, e.g., id. at 10 (“I find the totality of the circumstances test pretty vague”), id. at 18 (“Well, it seems to me that what you’re suggesting is what we might call a multifactor test, and it may be almost impossible to avoid it . . . .”); Transcript of Oral Argument at 46-47, Carter III (No. 97-1147) (“But police officers, as Justice Breyer indicated, have to have some kind of clear lines to follow, and so the totality of the circumstances doesn’t work very well”).
74. Id. at 21-22.
75. See id. at 18-19.
76. See id. at 55.
77. See Carter III, 119 S. Ct. at 471.
78. See generally id.
79. See id. at 472 (citing Rakas, 439 U.S. at 139-40).
80. Id. at 473 (quoting Rakas, 439 U.S. at 143).
81. Carter III, 119 S. Ct. at 474-75 (Scalia, J., concurring). For a discussion of Justice Scalia’s concurring opinion, see infra notes 224-38 and accompanying text.
82. Carter III, 119 S. Ct. at 473.
The Court was simply recognizing "the everyday expectations of privacy that we all share." The Court quoted Olson for the proposition that:

[s]taying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society . . . From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.

The Court contrasted the status of an overnight guest with someone who "is merely present with the consent of the householder," citing the Rakas Court's express repudiation of the Jones v United States standard, which permitted "anyone legitimately on the premises where a search occurs" to challenge its validity. The Court noted that the defendants "were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours," that there was "no suggestion that they had a previous relationship with [the lessee], or that there was any other purpose to their visit," "nor was there anything similar to the overnight guest relationship in Olson to suggest a degree of acceptance into the household." Chief Justice Rehnquist characterized the apartment as "simply a place [for these defendants] to do business." While not going so far as to draw a line between social or overnight guests and business invitees, the Court noted that "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes than residential property." The Court cited New York v. Burger for the proposition that "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.

Nevertheless, the Court resisted drawing a bright line at business invitees. Instead, Chief Justice Rehnquist simply stated that the overnight guest in Olson and someone merely legitimately on the premises represented different ends of the expectation of privacy spectrum, and that "the present case is obviously somewhere in between," before explaining that the "purely commercial nature of the transaction . . . the relatively short period of time on the premises, and the lack of any previous connection between [defen-
dants] and the householder, all lead us to conclude that [defendants'] situation is closer to that of one simply permitted on the premises. 93

This "holding" leaves future defendants to wonder how much of a non-commercial nature their visit to another's home must involve, how long they must stay, and what previous connections they must have with the householder if they are to claim the protection of the Fourth Amendment. The correct answer--but one that may very well get lost--is that almost any visitor with a noncommercial purpose can claim the protection of the Fourth Amendment. For if the defendants were social guests, the majority would have lost a vote, and the four Justices who were willing to extend the protection even to the defendants in this case would have gained a fifth vote. Based on the "swing vote" of Justice Kennedy, a line has been drawn between social guests and business invitees. This raises two questions: will the line be noticed and followed, and does it make any sense?

2. The "Hidden Holding"

The five votes in favor of granting an expectation of privacy for virtually all social guests come from the dissenting opinion of Justice Ginsburg, 94 in which Justices Stevens and Souter joined, the opinion of Justice Breyer, 95 concurring in the judgment, and Justice Kennedy's concurring opinion. 96

a. Justice Ginsburg

In the first paragraph of her opinion, Justice Ginsburg explained her view that "when a homeowner or lessor 97 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 or seizures." 98 Justice Ginsburg made it clear that she was not advocating reviving the "legitimately on the premises" test of Jones, 99 nor would her rule 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." 100 Justice Ginsburg also stressed that she was addressing "only the case of the homeowner who chooses to share the privacy of her home and her company with a guest, and would not reach classroom hypotheticals like the milkman or pizza deliverer." 101

93. Id.
94. See id. at 481 (Ginsburg, J., dissenting).
95. See id. at 480 (Breyer, J., concurring).
96. Carter III, 119 S. Ct. at 478 (Kennedy, J., concurring).
97. Justice Ginsburg apparently meant "lessee," presumably intending to address the particular situation before the Court.
98. See Carter III, 119 S. Ct. at 481.
99. Id. (quoting Jones, 362 U.S. at 267).
100. Id. (quoting Rakas, 439 U.S. at 142).
101. Id. at 481-82.
To Justice Ginsburg, the analysis was relatively simple: "Through the host's invitation, the guest gains a reasonable expectation of privacy in the home."\(^{102}\) *Olson* had recognized this in the case of an overnight guest and "[t]he logic of that decision extends to shorter term guests as well."\(^{103}\) Justice Ginsburg recognized that "[v]isiting the home of a friend, relative, or business associate, whatever the time of day, serves functions recognized as valuable by society,"\(^{104}\) and that "[o]ne need not remain overnight to anticipate privacy in another's home."\(^{105}\) To Justice Ginsburg, "when a homeowner chooses to share the privacy of her home and her company with a short-term guest," both the "host and guest 'have exhibited an actual (subjective) expectation of privacy' that 'society is prepared to recognize as reasonable.'"\(^{106}\) *Olson* taught that the illegality of the host-guest conduct is irrelevant\(^{107}\) and *Katz* provided the benchmark for extending protection in the case of the defendants in *Carter*: "I do not agree that we have a more reasonable expectation of privacy when we place a business call to a person's home from a public telephone booth on the side of the street . . . than when we actually enter that person's premises to engage in a common endeavor."\(^{108}\)

**b. Justices Breyer and Kennedy**

The two additional votes in favor of a general rule extending an expectation of privacy to social guests came from Justice Breyer and Justice Kennedy. In the first sentence of his opinion, Justice Breyer stated that he "agree[d] with Justice Ginsburg that the [defendants] can claim the Fourth Amendment’s protection,"\(^{109}\) but concurred in the judgment because he did not believe the officer’s conduct amounted to a search. Justice Kennedy stated in his opinion that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home."\(^{110}\) He joined the majority opinion because he was unwilling to characterize the defendants in *Carter* as guests. Justice Kennedy pointed out that the defendants had established "nothing more than a fleeting and insubstantial connection" with the owner’s home, and used it "simply as a convenient processing station, their purpose involving nothing more than the mechanical act of chopping and packing a substance for distribution."\(^{111}\) He stressed that the record contained no evidence that the defendants had engaged in confidential communications with the lessee about their transac-

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102. *Carter III*, 119 S. Ct. at 482.
103. *Id.* (citing *Olson*, 495 U.S. at 91). Justice Ginsburg extended this protection as much to protect the privacy of the owner as of the guest.
104. *Id.* (quoting *Olson*, 495 U.S. at 98).
105. *Id.*
106. *Carter III*, 119 S. Ct. at 482-83 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).
107. See *id.* at 483 (citing *Olson*, 495 U.S. at 93-94).
108. *Id.* at 483-84 (citing *Katz*, 389 U.S. at 333).
109. *Id.* at 480 (Breyer, J., concurring).
111. *Id.* at 479.
tion or that they had been to the apartment previously. He also noted they left the apartment even before their arrest and that the Minnesota Supreme Court had acknowledged the defendants “could not be fairly characterized as [the lessee’s] ‘guests.’”112 In most other cases, Justice Kennedy apparently would be willing to join the four other Justices and recognize short term visitors as guests and extend to them a reasonable expectation of privacy.113 However, this “hidden holding” of Carter is unlikely to be recognized by lower courts, and short term guests likely will not fare well in their attempts to claim a reasonable expectation of privacy in their host’s home.

IV. THE SUPREME COURT’S “STANDING” JURISPRUDENCE

Current United States Supreme Court “standing” law begins with the Court’s decision in Rakas v. Illinois,114 but traces its origins to the Court’s earlier decision in Katz v. United States,115 and is influenced by an even earlier case, Jones v. United States.116

A. Jones v. United States

In Jones federal officers executing a search warrant discovered narcotics and narcotics paraphernalia in a bird’s nest in an awning just outside a window of the apartment in which Jones was staying.117 When Jones moved to suppress the evidence, the government challenged his standing on the basis that he had not claimed ownership of the seized items, nor did he have “an interest in the apartment greater than that of an ‘invitee or guest.’”118 Jones testified “that his home was elsewhere, that he paid nothing for the use of the apartment, that [the lessee] had let him use it ‘as a friend,’”119 that he had a suit and shirt at the apartment, and “that he had slept there ‘maybe a night.’”120 The lessee had been away for about five days at the time of the search.121

The Supreme Court found that Jones had standing on two grounds. First, the Court created a rule of “automatic standing” for individuals charged with a possessory offense,122 a rule it later repudiated in United States v. Salvucci.123 In addition, the Court held that Jones “had a sufficient interest in the premises to establish him as a ‘person aggrieved’ by the search.”124 Recognizing that lower courts generally had denied standing to

112. Id. (citing Carter II, 569 N.W.2d at 175-76).
113. See id.
118. Id. at 259.
119. Id.
120. Id.
121. See Jones, 362 U.S. at 264.
122. 448 U.S. 83 (1980).
123. Jones, 362 U.S. at 265.
guests and invitees, the Court rejected basing standing decisions on “subtle distinctions” from the common law of property, “such as those between ‘lessee,’ ‘licensee,’ ‘invitee’ and ‘guest.’”124 Instead, the Court ruled “that anyone legitimately on the premises where a search occurs may challenge its legality.”125

B. Katz v. United States126

Seven years later, the Court decided Katz. The issue in that case was whether a search had occurred, rather than whether Mr. Katz had “standing” to contest the search. However, when the Court later eliminated “standing” as a separate inquiry in Rakas, it adopted the “reasonable expectation of privacy” standard of Katz as the standard for determining who may challenge police conduct—the old “standing” inquiry.

Katz held that police conduct in intercepting Mr. Katz’s phone conversation with his bookmaker by placing a listening device atop a phone booth constituted a search under the Fourth Amendment.127 In doing so, Katz changed the inquiry concerning whether a search occurred from a question of property interests to a question of privacy. Best known for the “notoriously unhelpful”128 admonition that the Fourth Amendment “protects people, not places,”129 Katz established that “the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”130 The Court held that the

Government activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.131

In later cases, the United States Supreme Court adopted the test set forth in Justice Harlan’s concurrence to determine whether a search had occurred. Justice Harlan articulated the rule as imposing a “twofold requirement” that a person demonstrate “an actual (subjective) expectation of privacy and . . . that the expectation be one that society is prepared to recognize as ‘reasonable.’”132 When the Rakas Court changed the rules of standing, it

124. Id. at 266.
125. Id. at 267.
127. See id. at 359.
130. Id. at 355.
131. Id.
132. Id. at 360-61 (Harlan, J., concurring).
brought Katz—not a “standing” case—to center stage.

C. Rakas v. Illinois

In Rakas a police officer received a report of a robbery of a clothing store and stopped a car which he thought might be the getaway car. A search of the car revealed a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front seat. Two passengers in the auto who were charged with the crime moved to suppress the evidence discovered during the search of the car. When Rakas was heard, Jones was the controlling law. Thus, the defendants could demonstrate “standing” to challenge a search either through automatic standing, if they were charged with a possessory offense, or by demonstrating that they were “legitimately on the premises” that had been searched. The defendants in Rakas were not charged with a possessory offense, and therefore relied on the fact that they were “legitimately on the premises” that had been searched. The first thing the Rakas Court did, however, was change the rules.

After reaffirming the holding of Jones and other cases that “Fourth Amendment rights are personal rights that may not be asserted vicariously,” the Court considered whether “it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant’s Fourth Amendment claim.” It decided that “the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.” The Court went on to explain the import of its new approach:

Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

This approach naturally led the Court to the Katz “legitimate expectation of privacy” test to make this determination. Although many com-
mentators have complained that dropping the “standing” rubric simply causes unnecessary confusion, the idea that a citizen’s ability to challenge a search should be based on that individual’s reasonable expectations of privacy has met with wide acceptance. The disagreement has centered on the determination that the defendants in Rakas—the passengers in the car—had no such expectation of privacy.

The Rakas Court determined that once the inquiry was focused on the substantive issue of whether a particular individual’s reasonable expectation of privacy had been invaded, the “legitimately on the premises” test of Jones could no longer control. That test would permit “casual visitors” with no connection to the premises, and no expectation of privacy there, to challenge the conduct of the police. Instead, courts should determine whether the individuals seeking to challenge the search had a reasonable expectation of privacy. In perhaps the most criticized portion of the opinion, the Court declared that the defendants in Rakas failed this test because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.” Of course, the defendants had no reason to do so, since the controlling standard when their case was heard was simply whether they were legitimately on the premises. Nevertheless, the Court rejected the defendant’s request to have the case remanded to provide them the opportunity to make such a showing. The Court’s refusal to remand had two effects. First, it opened the Court to scathing criticism from the dissent and commentators. More importantly, it led courts to read Rakas as adopting a bright line rule that passengers in cars have no legitimate expectations of privacy.

Justice White wrote a dissenting opinion, which was joined by three other Justices. He accused the majority of returning to the pre-Katz standard that protected property, not privacy. Justice White reminded the majority that the “primary object of the Fourth Amendment [is]... the protection of privacy.” To Justice White, it was important, perhaps conclusive, that the defendants “were in a private place with the permission of the owner.” He found it hard to understand the majority view that this fact was not sufficient to establish a legitimate expectation of privacy, and criti-

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145. See Rakas, 439 U.S. at 142.
146. See id.
147. Id. at 148.
148. See id. at 130 n.1. Such a showing may have been possible since the ex-wife of one of the passengers was the owner and driver of the car. In Carter, one defendant has now made a similar claim, that the lessee was his girlfriend.
149. See Alschuler, supra note 144, at 13; Coombs, supra note 144, at 1629 n.161.
150. See Rakas, 439 U.S. at 156 (White, J., dissenting). Justice White was joined by Justices Brennan, Marshall, and Stevens. See id.
151. See id. at 156-57.
152. Id. at 160 (quoting Cardwell v. Lewis, 417 U.S. 583, 589 (1974)).
153. Id. at 164-65 (White, J., dissenting).
cized the majority for failing to explain what would be sufficient. In Justice White’s view, “it is hard to imagine anything short of a property interest that would satisfy the majority.”\textsuperscript{154} He wondered “how is the Court able to avoid answering the question why presence in a private place with the owner’s permission is insufficient?”\textsuperscript{155} He went on to state that

[t]he Court’s holding is contrary not only to our past decisions and the logic of the Fourth Amendment but also to the everyday expectations of privacy that we all share . . . . If the owner of the car had not only invited petitioners to join her but had said to them, “I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own,” then apparently the majority would reverse. But people seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem.\textsuperscript{156}

Justice White was concerned not only that the Court’s holding failed to adequately address the interests the Fourth Amendment was designed to protect, but also that it failed to provide law enforcement officials a bright line rule between the protected and unprotected individuals, and as a result would “ensnare defendants and police in needless litigation over factors that should not be determinative of Fourth Amendment rights.”\textsuperscript{157} Justice White’s fondness for bright lines would play an important role when the question of legitimate expectations of privacy moved inside the home, securing Justice White a fifth (sixth, and seventh) vote and the opportunity to make his views on expectations of privacy the law in \textit{Minnesota v. Olson}.\textsuperscript{158}

\textbf{D. \textit{Minnesota v. Olson}}\textsuperscript{159}

In \textit{Olson}, police officers in search of a suspect in a gas station robbery

\textsuperscript{154} \textit{Rakas}, 439 U.S. at 165. Even the Court’s attempt to draw a more narrow line—explaining “[t]hat this is not to say that such visiorses could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search”—did not survive long. Two years later, in \textit{Rawlings v. Kentucky}, 448 U.S. 98 (1980), the Court ruled that the defendant could not challenge the search of a purse of a woman companion, even though the Court assumed the woman had given the defendant permission to store the drugs in her purse, and the defendant claimed that his ownership of the property seized entitled him to challenge the search. Despite its footnote in \textit{Rakas} suggesting ownership might make a difference, when faced with a defendant-owner the Court stated: “While the petitioner’s ownership of the drugs is undoubtedly one fact to be considered in this case, \textit{Rakas} emphatically rejected the notion that ‘arsene’ concepts of property law ought to control the ability to claim the protection of the Fourth Amendment.” \textit{Rawlings}, 448 U.S. at 105-06.

As described by Professor Alschuler:
\textit{Rakas} had emphasized the defendants’ failure to allege ownership of the property seized, and it had said that an owner of property would “in all likelihood” have standing to challenge its search or seizure “by virtue of [his] right to exclude.” Accordingly, the defendant in \textit{Rawlings} said to the Supreme Court, “I am the owner.” And the Court responded, “Mr. Rawlings, don’t be arcane.”

\textit{Alschuler, supra} note 144, at 13.

\textsuperscript{155} \textit{Rakas}, 439 U.S. at 165.

\textsuperscript{156} \textit{Id.} at 167.

\textsuperscript{157} \textit{Id.} at 168.

\textsuperscript{158} 495 U.S. 91 (1990).

\textsuperscript{159} \textit{Id.}
and homicide captured the suspect by making a warrantless entry into an apartment where they had probable cause to believe the suspect was staying. On appeal to the United States Supreme Court, the state argued that Olson did not have a sufficient interest in the apartment to challenge the search. The state offered a twelve-factor test to determine whether a dwelling is a “home” and entitled to protection. Justice White, now writing for the majority, quickly dismissed the test: “Aside from the fact that it is based on the mistaken premise that a place must be one’s ‘home’ in order for one to have a legitimate expectation of privacy there, the State’s proposed test is needlessly complex.”

To Justice White, the issue was far simpler: “We need go no further than to conclude, as we do, that Olson’s status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.”

To Justice White, the facts of the case were very similar to those in Jones, and the distinctions urged by the State—that Olson was never left alone in the duplex or given a key—were not sufficient to change the result. Instead, Justice White explained, “[t]o hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the everyday expectations of privacy that we all share.”

In fact, Justice White viewed Olson as little different from Rakas. Olson was in a private place with permission of the owner. Therefore, holding that he enjoyed a legitimate expectation of privacy merely recognized the “everyday expectations of privacy that we all share,” the same everyday expectations that, Justice White believed, demanded a finding that the passengers in Rakas enjoyed such a right. By emphasizing Olson’s status as an overnight guest and drawing a bright line in favor of overnight guests, Justice White avoided the question of whether non-overnight guests enjoyed such an expectation. Although there can be little doubt that Justice White believed non-overnight guests enjoyed such an expectation (he thought the passengers in Rakas did), he likely narrowed the question to overnight guests in order to achieve the necessary votes to write the majority opinion.

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160. See id. at 93-94.
161. See id. at 96.
162. See id. at 96 n.4. The twelve factors proposed by the State were:
   (1) the visitor has some property rights in the dwelling;
   (2) the visitor is related by blood or marriage to the owner or lessor of the dwelling;
   (3) the visitor receives mail at the dwelling or has his name on the door;
   (4) the visitor has a key to the dwelling;
   (5) the visitor maintains a regular or continuous presence in the dwelling, especially sleeping there regularly;
   (6) the visitor contributes to the upkeep of the dwelling, either monetarily or otherwise;
   (7) the visitor has been present at the dwelling for a substantial length of time prior to the arrest;
   (8) the visitor stores his clothes or other possessions in the dwelling;
   (9) the visitor has been granted by the owner exclusive use of a particular area of the dwelling;
   (10) the visitor has the right to exclude other persons from the dwelling;
   (11) the visitor is allowed to remain in the dwelling when the owner is absent; and
   (12) the visitor has taken precautions to develop and maintain his privacy in the dwelling.
163. Olson, 455 U.S. at 96.
164. Id. at 96-97.
165. See id. at 97-98.
166. Id. at 98.
The Rakes Court had stated that the result in Rakes—that the passengers had no legitimate expectation of privacy—would have been the same even "in an analogous situation in a dwelling place." Justice White needed to prevent the situation in Olson from being characterized as "Rakes in a dwelling place." Since the Rakes Court had affirmed the result in Jones granting protection to an overnight guest, Justice White was able to characterize the situation of an overnight guest as one that was not analogous to the passengers in Rakes, leaving the battle over non-overnight guests to another day. Unfortunately, when that day arrived, Justice White was no longer on the Court.

V. ANALYSIS

Minnesota v. Carter demonstrates a Court more concerned with limiting the reach of the exclusionary rule than with seriously recognizing citizens' reasonable expectations of privacy and protecting the everyday expectations that we all share. If the Court had been concerned with honestly and accurately assessing and protecting these expectations, Carter should have been an easy case to decide in favor of the defendants.

In Rakes v. Illinois the Court explained that the Katz v. United States decision is to provide guidance in determining citizens' reasonable expectations of privacy. But an objective comparison of Katz with Carter should lead to a result different from the one reached by the Court. Chief Justice Rehnquist explained that "the purely commercial nature of the transaction . . . the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder" all led the Court to deny a reasonable expectation of privacy. But a careful reading of Katz suggests that none of these factors should have prevented a finding that the defendants did have a reasonable expectation of privacy.

In Carter, Chief Justice Rehnquist characterized the apartment as "simply a place [for these defendants] to do business." That was also true of the telephone booth in Katz—it was simply a place for Mr. Katz to do business. And, like Carter, the business Mr. Katz engaged in was an illegal one. Chief Justice Rehnquist explained that "property used for commercial purposes is treated differently for Fourth Amendment purposes" and quoted New York v. Burger for the proposition that "[a]n expectation of

172. See Rakes, 439 U.S. at 143 (citing Katz, 389 U.S. 347 (1967)).
174. Id.
175. Of course, it could have been more; it could have been a place Mr. Katz chose to make a personal phone call, but the same is true of the apartment in Carter—the apartment could have been a place the defendants chose to spend the night.
privacy in commercial premises... is different from, and indeed less than, a
similar expectation in an individual's home.  However, Chief Justice
Rehnquist's reliance on *Burger* is misplaced. *Burger* addressed the issue of
whether a warrant was needed for an administrative search of a commercial
property. The quoted language refers to the lesser expectation of privacy the
owner enjoys vis-a-vis the government and how this affects the determina-
tion of whether the search is a reasonable one. The question in *Carter*
was whether the owner had agreed to share her expectation of privacy, whatever
it may have been, with another person; how great that expectation is vis-a-vis
the government is relevant only to the issue of whether government con-
duct intruding on that expectation is reasonable. That is the question the
Court addressed in *Burger*. Justice White criticized the Court for making the
identical analytical misstep in *Rakas*, when the Court cited the lower
expectation of privacy citizens enjoy in vehicles as a basis to deny any
expectation of privacy for the passengers.  

The lower expectation of privacy the Court assigns to commercial
property or automobiles should not both reduce the privacy expectations of
the owner and at the same time make it more difficult for the owner to share
those expectations with another. In fact, arguably the opposite is true. If the
owner enjoys a lower expectation of privacy, the owner might be willing to
share it with others with whom the owner has a less-well-established rela-
tionship. For example, one might agree to share a ride, and their expecta-
tions of privacy, with someone on a long distance automobile trip more
readily than one would invite someone into one's home to share their expec-
tations of privacy.

The commercial aspect of the defendants' relationship to the lessee also
seemed important to Justice Kennedy. It prevented the defendants from
qualifying as social guests and thereby gaining an expectation of privacy
under Justice Kennedy's rule. Justice O'Connor explored the distinction
between business invitees and social guests at oral argument and the State
of Minnesota agreed it was important to draw that line. Although the Court's
opinion did not explicitly adopt this distinction, Justice Kennedy's concern
with labels, contrary to the teachings of the Court's prior decisions, meant
the result in the case turned on a label. Because the defendants could not, in
Justice Kennedy's view, qualify as "guests," they were denied the protection
of the rule he espoused, "that almost all social guests have a legitimate
expectation of privacy, and hence protection against unreasonable searches,
in their host's home."

Chief Justice Rehnquist also pointed to the relatively short period of

178.  See *Rakas*, 439 U.S. at 158 (White, J., dissenting).
179.  See id. at 148.
time the defendants spent on the premises and the lack of any previous connection between the defendant and the leaseholder as factors leading the Court to deny them an expectation of privacy. But again, Mr. Katz was in the phone booth very briefly and with only one purpose—to transact illegal business. The *Katz* Court explained that Mr. Katz was entitled to assume his conversation was private because he “sought to exclude” uninvited ears when he occupied the booth, shut the door behind him and paid his toll to place a call. This is precisely what Mr. Carter and Mr. Johns did. They sought to exclude the uninvited eye by moving inside the apartment, closing the door and drawing the blinds. The *Katz* Court obviously did not intend to limit its rationale to a phone booth. Instead, the Court analogized Mr. Katz’s circumstances to other situations that seem to answer the question in *Carter*: “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.” Chief Justice Rehnquist might argue the lack of any previous relationship between the defendants and the lessee prevents them from qualifying under the *Katz* hypothetical of a person in a *friend’s* apartment. But even if the defendants’ only relationship with the lessee was that they paid her (with cocaine) for the use of the apartment, they look very similar to the person who pays to sit in the back of a taxicab, or pays the phone company to use a phone. The type of currency involved should not alter the nature of the relationship or diminish the significance of the fact that payment was made. In *Carter*, the Court seemed to dismiss the idea that a person can buy an expectation of privacy. But the *Katz* Court found “paying the toll” a compelling factor in Mr. Katz’s situation. It is unlikely the result in *Katz* would have been different if Mr. Katz had asked an acquaintance if he could use her phone to make a call, or if he had paid someone other than the telephone company for the privilege of using a phone.

The basic flaw in the Court’s analysis in *Carter* is its fear of retreating to the “legitimately on the premises” test of *Jones*. As a result, the Court extended the reach of that category of visitors to include too many situations, or at least to allow too many situations to be tainted by it. The real concern of the Court in *Rakas* was to eliminate from the *Jones* standard those individuals who did not share in the homeowner’s expectation of privacy—the pizza delivery person or appliance repair person—the same characters that seemed to concern the Court at oral argument in *Carter*. This suggests a far more limited role for the “legitimately on the premises” cate-

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183. See id. at 473-74.
185. The fact that they were unsuccessful does not change the expectation of privacy issue—Mr. Katz was also unsuccessful although it might have been important in deciding the second issue, which the Court did not reach.
187. See id.
188. *Jones*, 362 U.S. at 267.
189. See *Rakas*, 439 U.S. at 142.
gory than the Court has given it.

In *Carter*, Chief Justice Rehnquist explained that "[i]f we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely 'legitimately on the premises' as typifying those who may not do so, the present case is obviously somewhere in between."190 His "analysis" then suggests that the categories at either end of this scale extend toward the middle, with each category capturing a roughly equal share of the variety of situations that may arise. The Chief Justice denied defendants an expectation of privacy because their situation was "closer to that of one simply permitted on the premises."191 This ignores the fact that in many situations, often only a small step away from the "legitimately on the premises" category, owners are willing to share the expectation of privacy they enjoy in their home.

In his dissent in *Rakas*, Justice White pointed out that the majority apparently would have granted the passengers an expectation of privacy if the owner of the car had not simply invited the defendants to join her, but had said to them, "'I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own.'"192 But as Justice White explained, "[p]eople seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem."193 Rather than mechanically deciding whether a situation is marginally closer to one end of the "shared expectations of privacy" scale than the other, the Court should ask whether it has before it a situation where the owner likely was inviting the guests to share in her expectations of privacy, even though she did not say so explicitly, because people seldom do. This was the situation in *Carter*. Not only did the lessee grant the defendants permission to use the apartment to engage in an activity for which they needed privacy, the lessee joined them in their endeavor. Viewed from the perspective of either the defendants or the lessee, it seems obvious they had an expectation of privacy and that expectation should have been protected.

Chief Justice Rehnquist quoted with approval *Olson*’s analysis of the guest’s perspective: "‘From the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.’"194 The same can be said for the defendants in *Carter*. It seems apparent they were seeking privacy when they made arrangements to use the apartment. Although they were not staying overnight, the defendants clearly expected that they and their possessions would not be disturbed by anyone but their host and those their host allowed

191. Id.
193. Id.
inside. Especially since the lessee joined the defendants in their task, they were justified in feeling some assurance that she appreciated the need for privacy during their stay, and would not allow virtually anyone, and certainly not the police, into the apartment.

Chief Justice Rehnquist emphasized that while the holding of Jones remained valid, its statement that "anyone legitimately on the premises where a search occurs may challenge its legality," was expressly repudiated in Rakas. But the Rakas Court's concern was with the casual visitor, not with every non-overnight visitor. The Rakas Court explained its reluctance to apply the Jones "legitimately on the premises" standard:

For example, applied literally, this statement 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.

These scenarios do not remotely approach the situation in Carter. Yet Chief Justice Rehnquist concluded that the defendants' situation was closer to this scenario than to that of the overnight guest in Olson. The Minnesota Supreme Court's analysis was more realistic. The Minnesota court recognized that the expectation of privacy of the defendant in Olson was deemed legitimate because allowing individuals to stay overnight "is a long-standing social custom that serves functions recognized as valuable by society." It correctly concluded that "although society does not recognize as valuable the task of bagging cocaine ... society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal."

The "common task" test of the Minnesota Supreme Court recognizes the everyday expectations of privacy that we all share, without extending protection to the casual visitor that concerned the Court in Rakas. Engaging in a common task with the owner or leaseholder should be enough to gain an expectation of privacy; visitors should not bear the additional burden of demonstrating that they are also "closer" to an overnight guest than to one simply permitted on the premises. Every day homeowners and leaseholders intend to share their expectations of privacy with individuals who stay not

195. Id. (quoting Jones, 362 U.S. at 267).
196. See id. (citing Rakas, 439 U.S. 128 (1978)).
197. Rakas, 439 U.S. at 142.
198. Carter II, 569 N.W.2d at 175 (quoting Olson, 495 U.S. at 98).
199. Id. at 174.
overnight, but only for a matter of hours. The Justices of the United States Supreme Court seemed to recognize this during oral arguments, but ignored it in their opinion. It should be sufficient that a visitor’s situation is one where a court can conclude the leaseholder meant to include him in her right to privacy granted by the United States Supreme Court, and likely would have so stated, except that “people seldom say such things.” Instead, the Court in Carter exploited the fact that “people seldom say such things” to treat two individuals who had been in the apartment for a significant amount of time and engaged in a common task with the owner as no more connected to the lessee and the premises than a repair person who enters the house for a very brief time to fix the homeowner’s phone, but not to share her expectations of privacy.201

From the lessee’s perspective, if society values interpersonal privacy, individuals invited in for extended periods of time to engage in common tasks or activities must be recognized as sharing the privacy expectations of the lessee. Professor Mary Coombs has argued that the “expectation of privacy” standard of Katz has not lived up to its promise to “replace arcane notions of property law with a standard more sensitive to the complex realities of life.”202 The problem, she asserts, is that “courts have applied a narrow, individualistic conception of privacy rooted in the right to exclude others”203 and ignored the importance of shared privacy. She explains that “[t]he reason we protect the legal right to exclude others is to empower the owner to choose to share his home or other property with his intimates.”204 However, “recogniz[ing] the owner’s choice only when it is embodied in a legal document or in a formal relationship renders it nearly nugatory.”205 Professor Coombs points out that when “people choose to share their things with another person, legal rights seem unimportant.”206 She explains that the United States Supreme Court’s application of its “reasonable expectation of

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200. See Rakas, 439 U.S. at 145. Justice Kennedy constructed a hypothetical that illustrates this in a drug dealing scenario:

If respondents here had been visiting twenty homes, each for a minute or two, to drop off a bag of cocaine and were apprehended by a policeman wrongfully present in the nineteenth home, or if they had left the goods at a home where they were not staying and the police had seized the goods in their absence, we would have said that Rakas compels rejection of any privacy interest respondents might assert.

Carter III, 119 S. Ct. at 479 (Kennedy, J., concurring). But Justice Kennedy failed to see the distinction between stopping by to deliver cocaine and being invited in by the leaseholder to prepare the cocaine for delivery, with the leaseholder participating in that activity. Instead, Justice Kennedy stated that similar to the hypothetical he constructed, Rakas compelled the rejection of respondents’ claim in the case before the Court because “respondents have established no meaningful tie or connection to the owner, the owner’s home, or the owner’s expectation of privacy.” Id.

201. At oral argument, one Justice suggested that a distinction could be drawn based on the “notion of common enterprise.”

[That is, it seems to me, something intuitively different about three people sitting around a table, in this case packaging cocaine, and on the other hand the individual who comes in to fix the telephone, who really is admitted to do a job and is not engaged in a concerted activity with the homeowner.

Transcript of Oral Argument at 11-12, Carter III (No. 97-1147).


203. Id. at 1594. In Carter III, the State of Minnesota cited the inability of the defendants to exclude others as a factor that counted against the defendants’ claim of a reasonable expectation of privacy. See Transcript of Oral Argument at 10, Carter III (No. 97-1147).

204. Coombs, supra note 144, at 1618.

205. Id.

206. Id.
privacy” test in Rakas and Rawlings “assumes that expectations of privacy stem only from narrowly conceived property rights or other specifically articulated relationships . . . . It assumes, absent explicit proof to the contrary, that people do not share.” As a result, the Court is “blind to much day to day human interaction, and its jurisprudence ignores concerns that grow out of relationships that are not readily articulated.”

This is precisely what happened in Carter. The Minnesota Supreme Court was able to put aside the illegal nature of the activity the defendants were engaged in and recognize that the lessee intended to share her privacy with the defendants in much the same way people do every day and which society recognizes as valuable. But Chief Justice Rehnquist focused on the lack of any previous relationship with the lessee and the lack of “anything similar to the overnight guest relationship in Olson to suggest a degree of acceptance into the household.” To him, the apartment was “simply a place [for these defendants] to do business.” He did not see a specific property right or a clearly articulated relationship upon which to justify an expectation of privacy.

Professor Coombs explains that judicial decisions in this arena depend on “the way courts frame the facts with respect to time, place and generality.” As soon as “these frames are imposed, the legal doctrine appears capable of providing relatively predictable outcomes.” Courts generally prefer narrow frames, in part because they “are more precise, more particularized, more `rigorous.'” A narrow frame generally is less protective of privacy claims of secondary parties, such as visitors to a home or apartment. Professor Coombs argues a “wide angle” is necessary to appropriately protect shared privacy, and that courts fail to recognize that the use of narrow frames is “often false to the parties’ expectations and the manner in which those expectations are formed.”

The power of framing is evident in Carter. The State of Minnesota complained that the Minnesota Supreme Court overvalued the relationship between the defendants and the lessee rather than focusing on the defendants’ relationship to the property. The Solicitor General argued that the Minnesota Supreme Court considered the relationship at “so high a level of generality that its conclusions were incongruous.” The government wanted a narrower frame, one that would focus on the defendants as drug dealers rather than as individuals engaged in a common endeavor with the

207. Id. at 1631.
208. Coombs, supra note 144, at 1631.
210. Id. at 473.
211. Coombs, supra note 144, at 1632.
212. Id.
213. Id. at 1634.
214. See id. at 1635.
216. See Petitioner’s Brief at 11, Carter III (No. 97-1147).
lessee of the apartment. The government got the frame it wanted in the first sentence of the opinion when Chief Justice Rehnquist set the scene: “Respondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine.” Justice Kennedy followed suit, focusing on the defendants’ use of “Thompson’s house simply as a convenient processing station, their purpose involving nothing more than the mechanical act of chopping and packing a substance for distribution.” This was especially crucial in Justice Kennedy’s opinion because he was willing to grant “almost all social guests” a “legitimate expectation of privacy” in their host’s home. The power of framing suggests that visitors who are not engaged in criminal activity might be viewed differently and prevail. But, of course, non-criminals will not find themselves challenging the introduction of evidence at a suppression hearing. As Justice Frankfurter has explained, it is one of the unfortunate features of the Fourth Amendment that we must depend on not very nice people to assert our rights. That being so, the expectations of privacy of citizens in others’ homes are in danger.

The United States Supreme Court seems unable to recognize the difference between granting entry to a delivery person to deliver pizza or a repair person to repair an appliance, and inviting a friend, relative or acquaintance in to share a meal, play a card game or participate in a book club. That failure threatens our ability to enjoy our privacy outside our own homes and limits our ability to share the privacy of our homes with others. Or perhaps, if our friends make a habit of reading United States Supreme Court decisions, we may begin receiving stilted invitations from those who wish to include us in the privacy of their homes. These friends will know that they have to talk in ways “people seldom do” and make explicit that they are granting “a temporary possessory interest in [their homes] so that [we] will share the right to privacy that the Supreme Court says that [they] own.”

Of course, if the “hidden holding” of Carter emerges, guests like those described above will enjoy protection without a stilted invitation. Justice Kennedy asserted that he would provide protection to virtually all social guests, as presumably would the four Justices who voted to grant the defendants protection in Carter. It is unclear, however, how guests will con-

218. *Carter III*, 119 S. Ct. at 471. Professor Coombs finds a notable example of framing in Justice Blackmun’s dissent in *Hardwick v. Bowers*, 478 U.S. 186 (1986), where he states: “This case is no more about a fundamental right to engage in homosexual sodomy,” as the court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the right to be let alone.” *Id.* at 2848 (Blackmun, J., dissenting) (citations omitted).

Another recent notable example of framing can be found in Justice White’s majority opinion in *Jacobson v. United States*, 503 U.S. 540 (1992), a case in which the defendant was charged with purchasing child pornography but alleged entrapment by the government. Justice White began the facts by stating: “In February 1984, petitioner, a 56-year-old veteran turned farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore,” leaving little doubt about the outcome of the case.


220. *Id.* at 478.

221. *See United States v. Rabenowitz*, 339 U.S. 56 (1950) (Frankfurter, J., dissenting). “[S] is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *Id.* at 59.

vince Chief Justice Rehnquist that their situation is more like Olson, and it is clear that anyone who is not an overnight guest will not get protection from Justices Scalia and Thomas.\textsuperscript{224} Much as this Article argues that Carter, properly analyzed, is an easy case and one in which the defendants should have prevailed, Justice Scalia believes that if the case were “analyzed under the text of the Constitution as traditionally understood” it is “not remotely difficult.”\textsuperscript{225} To Justice Scalia, the possessive “their” in the Fourth Amendment is the key to the issue. He acknowledges “the phrase ‘their . . . houses’ in this provision is, in isolation, ambiguous” in that it could mean “their respective houses, so that the protection extends to each person only in his own house”\textsuperscript{226} and it could also mean “‘their respective and each other’s houses,’ so that each person would be protected even when visiting the house of someone else.”\textsuperscript{227} But he concludes that

it is not linguistically possible to give the provision the latter, expansive interpretation with respect to ‘houses’ without giving it the same interpretation with respect to the nouns that are parallel to ‘houses’—‘persons . . . papers, and effects’—which would give me a constitutional right not to have your person unreasonably searched,\textsuperscript{228}

a conclusion he finds “so absurd that it has to my knowledge never been contemplated.”\textsuperscript{229} Thus, in his view, “[t]he obvious meaning of the provision is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.”\textsuperscript{230} He admits, however, that “this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple.”\textsuperscript{231} He recognizes that “people call a house ‘their’ home when legal title is in the bank, when they rent it, and even when they merely occupy it rent-free -- so long as they actually live there.”\textsuperscript{232} He also recognizes, and apparently would not change (although he calls it the absolute limit), the protection that the Court has extended to an overnight guest in another’s home.\textsuperscript{233} He argues that while “it is plausible to regard a person’s overnight lodging as at least his ‘temporary’ residence, it is entirely impossible to give that characterization to an apartment that he uses to package cocaine.”\textsuperscript{234} He states that “[defen-
dants] here were not searched in ‘their . . . hous[e]’ under any interpretation of the phrase that bears the remotest relationship to the well understood meaning of the Fourth Amendment.”

But once Justice Scalia is willing to go beyond the actual homeowner or lessee, it is not clear why the text demands the line be drawn where he suggests. He derides the dissent for arguing that the Court should “ignore this clear text and four-century-old tradition and apply instead the notoriously unhelpful” Katz test. He counters with the argument that “the only thing the past three decades have established about the Katz test . . . is that, unsurprisingly, those ‘actual (subjective) expectations of privacy’ ‘that society is prepared to recognize as “reasonable,”’ . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” Of course, one could argue that any “plain meaning of the text” test would result in plain meanings that bear an uncanny resemblance to the meaning Justice Scalia considers plain—or more cynically, to the meaning that results in the denial of protections of citizens’ Fourth Amendment rights.

VI. CONCLUSION

In Minnesota v. Carter the United States Supreme Court had the opportunity to recognize the expectations of privacy of short-term visitors as legitimate. At least five Justices were willing to provide protection beyond the “overnight guest” bright line rule of Minnesota v. Olson and include “almost all social guests.” Unfortunately for the defendants in Carter, although Justice Kennedy favored a rule of broad protection for social guests, he was unable to see past the defendants’ illegal behavior and recognize their expectations of privacy. Unfortunately for the rest of us, past experience suggests that the “hidden holding” of Carter—that as a general rule social guests have a legitimate expectation of privacy in their host’s home—likely will stay hidden. Because the majority opinion provides little guidance for future cases, lower courts will be inclined to focus on the result in the case to fashion a rule denying expectations of privacy to most short term visitors. The result will be a “standing” jurisprudence that undervalues expectations of interpersonal privacy and fails to recognize that “much of what is important in human life takes place in a situation of shared privacy.”

This Article has argued that the Minnesota Supreme Court was better
able to factor out the illegal nature of the defendants' conduct and put aside labels in order to craft a workable rule that recognized and protected the everyday expectations that we all share. As this Article goes to print, the Minnesota Supreme Court has requested briefs addressing whether the defendants' expectations of privacy in this case should be protected under the State Constitution. For the citizens of Minnesota, there is hope that their everyday expectations of privacy will be recognized as legitimate when they invite neighbors, relatives and friends into their homes to share a meal, play a game of cards, discuss politics or otherwise attempt to share their privacy. For citizens in other states who rely on the United States Supreme Court to protect their privacy, new privacy shades on their windows might be in order.