Case Notes

Minnesota v. Carter and the Undermining of the Fourth Amendment

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I. Introduction

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[1] Thus begins the Fourth Amendment of the U.S. Constitution. If one is to believe the Supreme Court, its recent decision in *Minnesota v. Carter*[2] was a relatively easy application of established law to the facts of the case.[3] However, the Court was closely split,[4] and the dissent was vigorous and well-reasoned. These two factors suggest that the majority disposed of the case too readily. Indeed, the opinion of the Court is flawed in several ways. The rule announced by the majority has problems relating to consistency, logic, and practical results in future cases.

II. Facts of the Case

Officer James Thielen of Eagan, Minnesota went to an apartment building in response to information from a confidential informant who was not personally known by the officer.[5] The informant told the officer that, while walking by a

1. U.S. CONST. amend. IV.

2. 119 S. Ct. 469 (1998). Decided December 1, 1998. Under SUP. CT. R. 12.4, this decision applied as well to the companion case of *Minnesota v. Johns*.

3. To be sure, the Court did not explicitly say that *Carter* was an easy case. Nevertheless, the opinion of the Court was relatively short, with little reference to the arguments made by the dissent. Since the Court was divided, and the dissent was vigorous, it seems reasonable to conclude that the majority simply viewed this case as an easy one, thus making treatment of any counter-arguments of little benefit. Of course, another conclusion is possible. Reading the case from a practical standpoint, one almost cannot help reaching the conclusion that the majority was more concerned with ensuring the convictions of the respondents stood, than with creating a rule that would serve as a useful guide for both courts and police in the future, or with ensuring that the Fourth Amendment remained intact in the wake of the decision.

4. The case was decided 6-3 in favor of affirming the conviction of the respondents. However, on the issue of whether Fourth Amendment protection was potentially available to the respondents, the Court split 5-4 against extending such protection. Justice Breyer agreed with Justice Ginsburg's dissent that the respondents could claim Fourth Amendment protection. *Carter*, 119 S. Ct. at 480 (Breyer, J., concurring in the judgment). However, Justice Breyer concurred in the judgment because he felt that Officer Thielen's actions did not constitute an "unreasonable search," *Id.* an issue which the majority did not reach in light of their decision that the Fourth Amendment was not available to the respondents. *Id.* at 474.

5. *Id.* at 471.

window of a ground-level or partially below-ground-level[6] apartment, he had witnessed people in the apartment bagging a "white powder"; he also advised the officer that he believed the people he had seen were driving a blue Cadillac, and that they had a gun.[7] Officer Thielen then looked into the same window through a gap in the closed window blind; for approximately fifteen minutes, he observed Respondents Wayne Carter and Melvin Johns, as well as the lessee of the apartment, "bagging" cocaine.[8] The officer relayed his observations to his headquarters, which began the process of obtaining a search warrant for the apartment and the Cadillac.[9] Meanwhile, Carter and Johns left the apartment, put "items" into the Cadillac, and began to drive away.[10] Shortly thereafter, police stopped the Cadillac and ordered the respondents out of the car; when police opened the passenger door to let out Johns, they observed a black zippered pouch and a loaded handgun in the floor of the vehicle.[11] In a subsequent search of the vehicle, the police discovered approximately 47 grams of bagged cocaine, along with a scale and pagers.[12]

After arresting the respondents and seizing the car, police returned to the apartment and arrested the lessee.[13] In the apartment, police found cocaine residue on the kitchen table, as well as plastic "baggies" like the ones in which the cocaine discovered in the Cadillac was bagged.[14] After the arrest, Officer Thielen identified the respondents and the lessee of the apartment as the people whom he had observed packaging the cocaine.[15] The police later learned that Carter and Johns lived in Chicago, that they had come to the apartment for the "sole purpose" of bagging the cocaine, that they were in the apartment for approximately two and one-half hours,[16] and that they had given the lessee one-

6. There is some ambiguity as to whether the apartment was partially subterranean or an ordinary ground-level apartment, as reflected in the opinion of the Court and the transcript of oral argument. *Compare* Carter, 119 S. Ct. at 471, *with* Minnesota v. Carter, 1998 WL 714447, at *33 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument of Bradford Colbert on behalf of the respondents). This issue is pertinent to just how extraordinary the actions of the officer and the informant were "namely, just how low they had to stoop" in order to enable them to see through the window. *See infra* note 7.

7. Petitioner's Brief, at *3, 4, Minnesota v. Carter, 119 S. Ct. 469 (1998) (No. 97-1147). At oral argument, the attorney for the respondents questioned the nature of the informant's observations into the apartment. *Carter*, 1998 WL 714447, at *31-56 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of respondents). While this could potentially raise an issue of a violation of the state Peeping Tom statute, or an issue concerning the reasonableness of the officer's actions, such issues are beyond the scope of this paper. *See Carter*, 1998 WL 714447, at *43 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of respondents).

8. Respondent's Brief at *2, Carter (No. 97-1147).

9. Petitioner's Brief at *3, Carter (No. 97-1147).

10. *Id.*

11. *Carter*, 119 S. Ct. at 471.

12. *Id.*

13. *Id.* The lessee of the apartment was not a party to the appeal in *Carter* or its companion case, *Johns*.

14. *Id.*

15. *Id.*

16. It is unclear why the Court viewed this length of time as an established fact. *See Carter*, 119 S. Ct. at 471. At oral argument, one Justice asked about this issue, and the attorney for the State of Minnesota conceded that the record of the case was silent as to exactly how long the respondents were in the apartment. *Carter*, 1998 WL 714447, at *9 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument of James C. Backstrom on behalf of the petitioner). The two and one-half hours is an absolute minimum; Officer Thielen was approached by the informant at 8 p.m., and the respondents left the apartment at 10:30 p.m. Respondent's Brief at 1, Carter (No. 97-1147). The record was apparently silent as to when Carter and Johns actually arrived.

eighth of an ounce of cocaine in exchange for allowing the respondents to use the apartment for the purpose of packaging the cocaine.[17]

III. Decisions and Analyses of the Lower Courts

Respondents Carter and Johns were charged with controlled substance crimes.[18] They moved to suppress evidence obtained from searches of the apartment and automobile, as well as incriminating statements they had made after arrest.[19] They argued that Officer Thielen's observation of their activities through the apartment window was an unreasonable search under the Fourth Amendment, and that all evidence obtained as a result of this was inadmissible as "fruit of the poisonous tree," because the evidence would not have been obtained but for Thielen's initial search.[20] The trial court held that Fourth Amendment protection was unavailable to Carter and Johns because they were temporary out-of-state visitors, rather than overnight social guests as in *Minnesota v. Olson*.[21] The trial court further held that Officer Thielen's actions did not constitute a search within the meaning of the Fourth Amendment.[22] After trial, Carter and Johns were each convicted on both charged counts.[23]

In Carter's appeal to the Minnesota Court of Appeals, that court affirmed, arguing that Carter did not have "standing" to challenge the police officer's actions because Carter's claim "that he was predominantly a social guest" 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."[24] In a separate appeal, the same court affirmed Johns' conviction, interestingly without addressing the standing issue.[25] The Minnesota Supreme Court reversed the convictions of both Carter and Johns by a 4-3 vote, asserting that they had standing to claim Fourth Amendment protection because they could legitimately expect privacy in the location where the officer searched.[26] The court held that society recognizes the right of property owners (and leaseholders) to invite others "into the privacy of their homes to conduct a common task," regardless of

17. *Id.* at 471-72. The conclusion that Carter and Johns were there for the "sole purpose" of bagging cocaine was disputed by the respondents, whose attorney argued that evidence showed that they may have been social guests as well. *Carter*, 1998 WL 714447, at *50 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of respondents). *See also infra* note 24.

18. The specific charges for each defendant were "conspiracy to commit controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree." *Carter*, 119 S. Ct. at 472.

19. *Id.*

20. *Id.*

21. *Id.* (citing Minnesota v. Olson, 495 U.S. 91 (1990)).

22. *Id.*

23. *Id.*

24. *Id.* (quoting State v. Carter, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996)). The comment about "only evidence" may not be entirely accurate; the respondents contend that the fact that one of them was wearing slippers, and that Carter may have had a key to the apartment, indicates that they were likely there for more than just the business purpose. Respondent's Brief at *4, *Carter* (No. 97-1147); *Carter*, 1998 WL 714447, at *50 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of respondents). Moreover, the fact that Carter and Johns were there for at least two and one-half hours suggests that it is possible that they were there for a purpose other than merely the drug activity, depending on how long it takes to bag 47 grams of cocaine.

25. State v. Johns, No. C9-95-1765, 1996 WL 310305, at *1, *2 (Minn. Ct. App., June 11, 1996).

26. State v. Carter, 569 N.W.2d 169, 175 (Minn. 1997).

the value of the illegal drug activity.[27] The Minnesota Supreme Court further held that Officer Thielen's actions amounted to an unreasonable search under the Fourth Amendment.[28]

IV. Decision and Analysis of the Supreme Court

The United States Supreme Court, per Chief Justice Rehnquist, reversed the decision of the Minnesota Supreme Court, thereby affirming the convictions of Carter and Johns.[29] The Court began its analysis by rejecting, as inconsistent with prior Supreme Court precedent, the theoretical framework of "standing" within which the Minnesota courts conducted their analysis; rather, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[30] Therefore, for a defendant to claim Fourth Amendment protection, she must show that she personally and reasonably expected privacy in the place searched; further, the reasonableness of this expectation must have as its source a concept outside of the Fourth Amendment, such as in "real or personal property law or [in] understandings that are recognized and permitted by society."[31]

The Court then turned more directly to the Fourth Amendment. While the text of the Amendment protects the "right of the people to be secure in their persons [and] houses," the Court noted that a person may have a "legitimate expectation of privacy in the house of someone else" in some circumstances.[32] For example, the Court has extended Fourth Amendment protection to overnight social guests, arguing that this "merely recognizes the every day expectations of privacy that we all share," that a social guest "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."[33] Similarly, the Court has held, in *Jones v. United States*, that a defendant was entitled to Fourth Amendment protection when he was given use of a friend's apartment, had clothing at the apartment, and had stayed there "may be a night."[34] Nevertheless, the *Carter* Court noted that the holding in *Jones* that "anyone legitimately on the premises where a search occurs may challenge its legality" was repudiated by *Rakas v. Illinois*.[35] From this, the Court concluded in *Carter* that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."[36] Thus, because there was no evidence that the respondents were overnight guests, or that they had a previous relationship with the lessee of the apartment, and because the evidence showed

27. *Id.* at 176.
28. *Id.* at 176-79.
29. *Carter*, 119 S. Ct. at 474.
30. *Id.* (quoting Rakas v. Illinois, 439 U.S. 128, 139-40 (1978)).
31. *Carter*, 119 S. Ct. at 472 (quoting *Rakas*, 439 U.S. at 143-44).
32. U.S. CONST. amend. IV; *Carter*, 119 S. Ct. at 473.
33. *Olson*, 495 U.S. at 98-99.
34. Jones v. United States, 362 U.S. 257, 259 (1960).
35. *Carter*, 119 S. Ct. at 473 (quoting *Jones*, 362 U.S. at 267, and citing *Rakas*, 439 U.S. 128). *Rakas* held that "legitimate presence on the premises . . . cannot be deemed controlling." *Rakas*, 439 U.S. at 148.
36. *Carter*, 119 S. Ct. at 473.

that they were in the apartment simply for business, the Court held that Carter and Johns were not subject to Fourth Amendment protection.[37]

The Court made much in their opinion of the distinction between property used for commercial purposes and residential property; the Court noted that, while this was a home in which Carter and Johns were engaged in their illegal (business) activities, it was not *their* home.[38] The Court admitted nonetheless that a worker may be able to claim Fourth Amendment protection in her workplace.[39] However, the Court found that "there is no indication that respondents in this case had nearly as significant a connection to [the lessee's] apartment as the worker in *O'Connor* had to his own private office."[40] From these discussions, the Court concluded that the situation in *Carter* fell somewhere in between the circumstances of an overnight guest and those of one merely legitimately on the premises.[41] Because of 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," the Court concluded that the circumstances in *Carter* were more like those of the person merely legitimately present than those of the overnight guest, and thus "that respondents had no legitimate expectation of privacy."[42] The Court closed its opinion with the observation that their holding in *Carter* made it unnecessary for the Court to decide whether Officer Thielen's actions constituted a search.[43]

V. Criticism of *Minnesota v. Carter*

The Court's decision in *Carter* is flawed in three ways. First, the decision is inconsistent with prior Fourth Amendment jurisprudence. Second, the Court eschews logic in its analysis of the case. Finally, *Carter* creates a rule which leads to bad results. Depending on the situation, police will either be unable to determine when they are violating the Fourth Amendment, or will misuse the power that *Carter* now gives them. While these faults in the Court's reasoning do not necessarily mean that the result (as opposed to the reasoning) is wrong, they strongly suggest that such is the case.

The first mistake in the Court's reasoning is the departure from established Fourth Amendment law, despite the fact that the majority implies that it is following precedent. The Court committed this error in more than one way. First, the Court found that Carter and Johns did not have a legitimate

37. *Id.* at 473-74. This comment was made in the context of the Court's conclusion that Carter and Johns' relationship with the lessee did not "suggest a degree of acceptance into the household," as in *Olson*. *Id.* at 473.

38. *Id.* at 474.

39. *Id.* (citing O'Connor v. Ortega, 480 U.S. 709 (1987)).

40. *Carter*, 119 S. Ct. at 474.

41. *Id.*

42. *Id.*

43. *Id.* Indeed, it is noteworthy that, among the majority, the dissent, and the concurrence in the judgment, only Justice Breyer (concurring in the judgment) addressed this issue at any length. The dissenting justices presumably felt that the police had conducted a search within the meaning of the Fourth Amendment, because they did not concur in the judgment. But they did not discuss the point, instead addressing only the issue at the heart of the majority's decision, whether Fourth Amendment protection was available to Carter and Johns.

expectation of privacy.[44] This was because of their status as brief (predominantly) business guests in an apartment leased by someone else.[45] The inconsistency here is with, *inter alia*, *Katz v. United States*.[46] In *Carter*, the Court refused to extend Fourth Amendment protection to guests in an apartment who had been there for at least several hours. In *Katz*, the Court did extend such protection, in that case to a man making a call from a telephone booth to place a gambling wager.[47] As Justice Ginsburg, dissenting, observed 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."[48] Thus, the majority's conclusion that Carter and Johns had no legitimate expectation of privacy conflicts with the precedent established in *Katz*.

The *Carter* Court is further inconsistent with precedent in relying on *Rakas*. The majority relies on *Rakas* in its analysis of the reasonableness of Carter and Johns' expectation of privacy, citing the proposition that the expectation must be judged by reference to what is permitted by society.[49] This is problematic because the *Rakas* Court cites a burglar in the home of someone else as an example of an unreasonable expectation of privacy.[50] The activities of the defendants in *Carter* certainly were not like those of a burglar, for Carter and Johns, regardless of the illegality of their drug packaging, were invited into the home in which they worked. Another reason suggesting that the majority misplaced their reliance on *Rakas* is the factual situation of that case. *Rakas* involved the search of an automobile after a traffic stop.[51] The tone and wording used by the majority in *Carter* suggests that they were merely following precedent established by *Rakas*.[52] However, because of the disparate fact patterns, reaching a similar result in *Carter* would extend the rationale of the decision in *Rakas* to homes. Such a dramatic extension should not be made without a rationale.[53]

The opinion of the Court is also flawed logically. One example of this is the Court's discussion of the distinction between commercial and residential. Alternatively, this distinction can be described as business versus social. The use of these two distinctions interchangeably confounds the concepts of premises (i.e., the nature or zoning of a property) and purposes (i.e., how a

44. *Id.*
45. *Id.* at 473.
46. 389 U.S. 347 (1967).
47. *Id.* at 348, 359.
48. *Carter*, 119 S. Ct. at 483-84 (Ginsburg, J., dissenting) (footnote omitted) (citation omitted).
49. *See Rakas*, 439 U.S. at 143 n.12.
50. *Id.*
51. *Id.* at 130. The Court held that the defendants failed to show that they had a legitimate expectation of privacy in the glove compartment or the area under the seat of the vehicle in which they were passengers, and thus that they could not challenge a search of those areas. *Id.* at 130, 148.
52. *Carter*, 119 S. Ct. at 472, 473.
53. The *Rakas* Court noted that they were not deciding whether a car and home were analogous under Fourth Amendment analysis. *Rakas*, 439 U.S. at 148. Indeed, the *Rakas* Court pointed out that other cases stood for the proposition that the two are not analogous. *Rakas*, 439 U.S. at 148 (citing United States v. Chadwick, 433 U.S. 1 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974) (plurality opinion)). Because the *Carter* Court relies on *Rakas* in reaching its decision, it should have stated that these two are analogous under the Fourth Amendment, and why.

property is used). Here, the commercial versus residential dichotomy corresponds to the concept of premises, while the social versus business dichotomy relates to the idea of purposes. This ambiguity is notable when the Court declares that "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes than residential property."[54] The Court follows that statement with a quote from *New York v. Burger*: "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."[55] The problem with this ambiguity is that it prevents the creation of a reliable rule. If a distinction is not made, one cannot know whether the appropriate test is the extent to which the premises are commercial, or the degree to which usage is for a business purpose. This ambiguity enabled the Court to affirm the conviction of the *Carter* respondents. Moreover, it creates an unfortunate situation in which the rule can be applied differently depending on the subconscious whims and prejudices of five justices. That is, the ambiguity allows equally cogent arguments to be made on either side of a case, because each argument is based on a different understanding of the rule. Thus, the Supreme Court can reach a decision based on the predilections of the justices, because the ambiguity in the rule prevents the reaching of one definite result by examining the rule.

A quick illustration will better reveal the fallacy of the majority. Hypothesize a businesswoman who occasionally brings work home to finish there. Assume her home has a study which she uses predominantly for such work. Few would argue that this woman may not claim Fourth Amendment protection while working in her study. In fact, the circumstances suggest that she deserves at least as much protection as, if not more than, a businessman working in his office *at work*. The Court has extended the shield of the Fourth Amendment to just such a case.[56] Yet the rule announced by the majority in *Carter* is vague enough that it would appear to allow a police officer to peer into the study with impunity, even when no business guest is present.[57] Such a rule has traveled far down the path of undermining the Fourth Amendment.

Indeed, for the prohibition on unreasonable searches and seizures to retain much meaning, the rule should not cover such cases for other reasons. Many people work at least occasionally at home, particularly with the increased popularity of "telecommuting." Moreover, from an originalist perspective, to the extent that commerce was conducted at the time of the Framers of the Constitution, such commerce was frequently done at home.

Similarly, the use by the majority of the distinction between social and business purposes as a meaningful dividing line contradicts common sense. The Court employs this distinction in order to demonstrate the supposed lack of a reasonable[58] expectation of privacy on the part of the respondents.[59] Unless one

54. *Carter*, 119 S. Ct. at 474. Here, "commercial *purposes*" (emphasis added) contrasts with "residential *property*" (the premises concept).

55. *Id.* (quoting New York v. Burger, 482 U.S. 691, 700 (1987)) (internal quotation marks omitted). Note that the *Burger* Court did not equivocate, using the concept of premises with respect to both the commercial and the residential. Thus, absent additional analysis, this quote cannot serve as precedent for the proposition cited by the majority in *Carter*.

56. *See O'Connor*, 480 U.S. at 716-17.

57. It is noteworthy here that Carter and Johns were engaged in their business task as a common endeavor with the resident of the apartment. *Carter*, 119 S. Ct. at 471.

58. One may assert that there is an ambiguity with the discussion of both "reasonable" and "legitimate" expectations of privacy. This is the fault of the Court. The majority mostly refers to

bases this conclusion on the illegality of the conduct,[60] this argument simply makes no sense.[61] Obviously, Carter and Johns expected privacy in the apartment. Otherwise, they would have bagged the cocaine on the street. Moreover, it is certainly reasonable for one to expect privacy in an apartment with the window blinds closed. Thus, the majority's rule has stripped the phrase "expectation of privacy" of all reasonable meaning, because many people who really do reasonably expect privacy will not be afforded it under this rule.

Another logical fault in the analysis of the Court is their reliance on "overnight" as a dividing line as to which social guests deserve protection. The Court cites *Olson* for the proposition that this protection extends to such a case because of the vulnerability of people when they sleep.[62] If this is the rationale for drawing a line here, then protection would not extend to overnight guests who are awake at the time of the search. If one still wants to shield such guests under the Fourth Amendment, then non-overnight guests who have been in a residence for many hours should be protected. And if they are protected, there is no really good reason not to protect three-hour guests from unreasonable searches and seizures. One may conclude that this area is hopelessly muddled, and that no good dividing line can be created. But as past precedent suggests, and as the remainder of this paper will suggest by implication, a more reliable dividing line falls between those who do, and those who do not, reasonably expect privacy, without regard to the legality of the conduct.

The final logical flaw made by the majority stems from its reliance on one's ability to exclude others from the premises as a factor in determining the reasonableness of an expectation of privacy. This idea follows logically from the purpose of the Fourth Amendment itself, as well as from the Court's rationale in recognizing that overnight guests as a category deserve to be included under the penumbra of the Fourth Amendment. But as the dissent notes, "The power to exclude implies the power to include."[63] Unless people are to be isolationist, the two must necessarily go together. Indeed, as Mary Coombs noted, "One reason we protect the legal right to exclude others is to empower the owner [or lessee] to choose to share his home or other property with his intimates."[64] Similarly, the dissent wrote that "one of the main rights attaching to property is the right to share its shelter, its comfort and its privacy with others." Our Fourth Amendment decisions should reflect these

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"legitimate" expectations of privacy. *Carter*, 119 S. Ct. at 472-73. However, some of the precedent concerning expectations of privacy refers to "reasonable." *Katz*, 389 U.S. at 361.

59. *Carter*, 119 S. Ct. at 472-74.

60. It of course would make little sense to consider the illegality of the conduct in connection with Fourth Amendment analysis. As a practical matter, Fourth Amendment issues generally arise only when a person is on trial for a crime. If illegality of the conduct were taken into account, the Fourth Amendment would be rendered void.

61. Indeed, even the attorney for the State of Minnesota was confused by the idea of the social versus business distinction possibly providing a meaningful dividing line. At oral argument, he made the following comment: "[W]hen the home is converted for business purposes, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, or a car. . . . [B]ut that's not to say that business visitors don't have the rights of privacy." *Carter*, 1998 WL 714447, at *12-*13 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of petitioner).

62. *Carter*, 119 S. Ct. at 473 (quoting *Olson*, 495 U.S. at 98-99).

63. *Carter*, 119 S. Ct. at 482 (Ginsburg, J., dissenting).

64. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1618 (1987).

complementary prerogatives."[65] In other words, if Fourth Amendment protection is based in part on an argument deriving from a resident's power to exclude, the power to include which arises by inference should largely necessitate the extension of protection to those who have been included within one's home. However, the majority's rule in *Carter* ignores the exclusion-to-inclusion inference. This undermines the expectation of privacy, and renders one's ability to exclude largely meaningless.

Moreover, even if the argument concerning the exclusion-to-inclusion inference is unconvincing, various factors point to the fact that the defendants may have had the power to exclude others from the apartment, thus providing a rationale for extending to them Fourth Amendment protection. The illegality of the transaction of course indicates that the respondents would desire privacy for their conduct. Based on this, there is a good possibility that they would arrange an agreement, even if informally, with the lessee for them (the respondents) to be able to choose who is admitted to the apartment, and who excluded. Furthermore, the slippers and possible key may suggest such a relationship with the lessee as may give Carter and Johns a reasonable belief that they could take the place of lessee in determining who could enter the apartment and who could not.[66] Thus, for both practical and logical reasons, the Court's reasoning is flawed with respect to the ability to exclude.

The final type of error made by the majority is practical. This is that the rule announced by the Court will lead to bad results. First, police now will not have guidelines which they can consider before conducting a search. In other words, they will not be able to ask beforehand, "Will evidence from this search be upheld in court?," or "Should I be conducting this search?" The reason for this is that, in situations like that in *Carter*, police will not often know whether occupants of a house are guests or residents, and if they are guests, whether they are business or social, overnight or not. Indeed, the State of Minnesota conceded this point at oral argument.[67] Thus, while police should be able to determine the limits of what they are to do, the *Carter* rule lets police do what they want, only to let the courts sort it out later. Police should have more reliable guidelines by which to choose what they may permissibly search. Moreover, the remedy of exclusion of evidence obtained in violation of the Fourth Amendment does not nullify the injury caused by police violating a person's rights.

The second practical result is even more dangerous than the first. Under the majority's rule, police will be able to search with impunity whenever they acquire knowledge that a non-social or non-overnight guest is present, because they will know that Fourth Amendment protection is not available to these guests. As Eulis Simien noted, "if the police have no probable cause, they have everything to gain and nothing to lose if they search under circumstances where they know that at least one of the potential defendants . . ." will not be able to challenge the evidence on Fourth Amendment grounds because she is not an

65. *Carter*, 119 S. Ct. at 482 (Ginsburg, J., dissenting) (quoting Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 13 (1983).

66. *See supra* note 24.

67. *Carter*, 1998 WL 714447, at *7 (U.S. Oral Arg., Oct. 6, 1998) (No. 97-1147) (oral argument on behalf of petitioner).

overnight social guest.[68] This not only undermines the security of guests, but also that of the resident herself (unless she chooses never to admit guests), thereby undermining the Fourth Amendment. As Justice Ginsburg noted in dissent, a resident "places her own privacy at risk" when she invites in others, "uncertain whether the duration of their stay, their purpose, and their 'acceptance into the household' will earn protection."[69] Moreover, the *Carter* Court's rule also creates an inequity among defendants, when after a search is made without regard to the status of the occupants of the apartment, some defendants may be able to argue believably, though falsely, that they had a social purpose and were intending to stay overnight. Fourth Amendment jurisprudence should not tolerate such poor and inequitable results.

VI. Conclusion

The opinion of the Court in *Minnesota v. Carter* is replete with flaws of logic, consistency, and practical results. The rule promulgated by the majority leads at best to unpredictable results. At worst, it undermines "indeed, nullifies" the protection which the Fourth Amendment is supposed to provide. Though the primary purpose of this paper was to point out the faults in the Court's analysis, a quick and simple solution may be easily proposed. Even the following rule, though perhaps not perfect, would be more desirable: Fourth Amendment protection should extend to anyone who exhibits an actual, subjective expectation of privacy under circumstances which make such an expectation reasonable, with this reasonableness being governed largely by common sense and precedent. Though this rule may need fine-tuning, it has the benefit of keeping with the spirit and wording of the Fourth Amendment, while additionally providing greater predictability and equitable results.

68. Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 539 (1988).

69. Carter, 119 S. Ct. at 482 (Ginsburg, J., dissenting) (quoting *id.* at 473 (opinion of the Court) (referring to *Olson*, 495 U.S. 91) (1990)).