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SHUT THE BLINDS AND LOCK THE DOORS—IS THAT ENOUGH?: THE SCOPE OF FOURTH AMENDMENT PROTECTION OUTSIDE ONE'S OWN HOME

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Abstract: The Fourth Amendment was designed to be a barrier that protects citizens from unreasonable government intrusion and surveillance. However, for the Amendment to grant meaningful protection, the rules that govern the scope of that protection must supply guidance to police and citizens. While the Fourth Amendment unquestionably protects people in their own homes, the scope of the Amendment's protection outside the home is not clear. In *Rakas v. Illinois*, the U.S. Supreme Court held that courts should define the scope of Fourth Amendment protection by considering sources outside of the Fourth Amendment. While *Rakas* provides guidance to courts, it does not provide guidance to police and citizens. *Minnesota v. Carter* exemplifies this problem. In *Carter*, the Court relied on three of the sources identified in *Rakas* to develop a test to define the scope of privacy for guests and applied this test to hold that short-term business guests should not expect privacy, no matter what precautions they take to ensure their privacy. Police, however, will find the Court's test impossible to apply in the field, and if they try to apply it, a great risk exists that they will violate citizens' Fourth Amendment rights. This Comment urges the Court to adopt a test that first focuses on the precautions people take to ensure their privacy and then asks whether a reasonable person would find that those precautions should have been adequate to ensure privacy. This test would better protect privacy because it would provide clear guidance to both police and citizens.

Using marked currency, an officer conducting an undercover drug bust purchased two bags of cocaine from Lloyd Morton.[1] After the sale, a second officer saw Morton enter a row house less than two blocks away. Within five minutes, police knocked on the door of the house and entered without waiting for permission. They saw Morton in the kitchen, arrested him, searched him, and brought him outside where the purchasing officer identified Morton as the seller. The search yielded only unmarked currency.

Morton claimed that the officers' entry into the house violated his Fourth Amendment rights and moved to suppress the unmarked currency as fruits of that illegal entry. At the suppression hearing, Morton established that although he did not live at the house, he frequently visited as a family friend and was an invited guest the day of his arrest.

The trial court denied Morton's motion because under the Fourth Amendment, Morton was "no more than a . . . visitor to the dwelling"

1. The following facts are taken from *Morton v. United States*, 734 A.2d 178 (D.C. 1999).

and should not have expected privacy.[2] A divided appeals court reversed. The two-judge majority held that Morton's status as an invited guest who visited with "the regularity of a family member" meant that he had achieved a sufficient degree of acceptance in the household and could reasonably expect privacy there.[3] The dissenting judge argued that Morton's visit to drop off the profits of a drug sale should not warrant Fourth Amendment protection.[4] Neither the majority nor the dissent explained how police could have assessed Morton's relationship with his host or his reasons for visiting before police entered the house.

The *Morton* court focused its debate on the U.S. Supreme Court's decision in *Minnesota v. Carter*,[5] which held that short-term business guests should not expect privacy in their host's home.[6] The *Carter* majority reached this conclusion by developing a balancing test to determine when people have reasonable expectations of privacy outside their homes.[7] At one end of the spectrum are overnight guests who can reasonably expect privacy in their host's home.[8] At the other end are people legitimately on the premises without any further connection to those premises, such as a delivery person, who should not expect privacy.[9] To determine whether guests should expect privacy when they are not spending the night but do have some connection to the premises, the Court held that lower courts should consider the guests' use of the premises, their relationship to the host, and the length of their stay.[10] The Court developed this test by following *Rakas v. Illinois*,[11] in which it held that the scope of Fourth Amendment protection "must have a source outside of the Fourth Amendment."[12] The *Rakas* majority and Justice Powell, who concurred, identified five such sources—the *Rakas* sources.[13] In *Carter*, the Court considered three of the *Rakas* sources:

2. *Id.* at 185 (Kern, J., dissenting).

3. *Id.* at 182. The government requested that the court not consider whether exigent circumstances justified the search. *See id.* at 179.

4. *See id.* at 188 (Kern, J., dissenting).

5. 525 U.S. 83 (1998).

6. *See id.* at 91.

7. *See id.* at 90–91.

8. *See id.* at 89.

9. *See id.* 89–90.

10. *See id.* at 91.

11. 439 U.S. 128 (1978).

12. *Id.* at 143 n.12.

13. See *infra* notes 40–46 and accompanying text for a complete list of the *Rakas* sources.

property interest in the premises, use of the premises, and societal understandings.[14] The *Carter* Court did not address another *Rakas* source, namely the precautions people take to ensure privacy. By ignoring this source, the Court's ruling implicitly makes the precautions short-term business guests take to ensure privacy irrelevant because even if the defendants in *Carter* had taken every precaution possible, the Court still would not have had to address the defendants' precautions.

This Comment argues that the *Carter* test and the *Rakas* sources provide insufficient guidance to police and private citizens and thus fail to protect Fourth Amendment rights. Police cannot apply the *Carter* test or use the *Rakas* sources because officers in the field have little ability to obtain the necessary information. Citizens cannot rely on the *Carter* test or *Rakas* sources because those standards are confusing and do not rely on factors that citizens would expect to protect privacy. When assessing people's privacy expectations, courts instead should look exclusively at the precautions people take to ensure privacy and then ask whether a reasonable person would conclude that those precautions should have ensured privacy. Such a test would better protect Fourth Amendment rights because it would provide guidance to police investigating crimes and citizens seeking to exercise their Fourth Amendment rights.

Part I of this Comment describes the rules the U.S. Supreme Court has developed to enforce the Fourth Amendment, including the sources identified in *Rakas v. Illinois*, which the Court has used to determine the scope of Fourth Amendment protection outside the home. Part II describes the facts of *Minnesota v. Carter* and the Court's application of the *Rakas* sources in that case. Part III criticizes the *Rakas* sources and the Court's application of those sources in *Carter* and proposes an alternative test that better protects Fourth Amendment rights.

14. *See Carter*, 525 U.S. at 88, 91.

I. REASONABLE EXPECTATIONS OF PRIVACY OUTSIDE THE HOME: THE FIVE *RAKAS* SOURCES

The Fourth Amendment[15] was designed to protect citizens from unreasonable police intrusion. To ensure that the government respects citizens' Fourth Amendment rights, courts exclude evidence from trial that is gathered in violation of those rights. However, excluding evidence from trial exacts a high social cost, and therefore courts will exclude evidence only from the trials of people whose own rights were violated. To determine when someone has a Fourth Amendment right outside of the home, courts look to sources outside of the Fourth Amendment—the *Rakas* sources.

A. The Court Enforces Fourth Amendment Rights Through Fourth Amendment Tests and the Exclusionary Rule

While the Fourth Amendment's language expressly condemns all unreasonable searches and seizures, the U.S. Supreme Court has recognized that the Amendment serves the broader purpose of protecting a person's right to live in reasonable security, free from government intrusion or surveillance.[16] However, the Fourth Amendment does not provide total freedom from government intrusion. The Amendment's prohibition against only "unreasonable searches and seizures" means that courts must strike a balance between the duty of the government to secure an orderly society and the risk that unreasonable surveillance will erode people's expectations of privacy.[17] When police are conducting a search during a criminal investigation, courts generally require that they have probable cause and obtain a search warrant before they conduct the search.[18] Probable cause exists when the known facts and circumstances

15. The Fourth Amendment states:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

16. *See* Payton v. New York, 445 U.S. 573, 585–86 & n.24 (1980).

17. *See* United States v. United States Dist. Court, 407 U.S. 297, 314–15 (1972).

18. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995). If the government is conducting a search for non-law-enforcement purposes, different rules apply. *See id.* The Court has also recognized a number of exceptions to the warrant requirement. Some of these exceptions, such as the

would cause a reasonable person to believe a search will reveal evidence of a crime.[19]

1. A Fourth Amendment Test Must Be Easy for Police and Citizens to Apply

For the Fourth Amendment to serve its purpose of protecting privacy, the U.S. Supreme Court has repeatedly noted "the virtue of providing clear and unequivocal guidelines to the law enforcement profession."[20] To provide guidance for police, the Court has held that it should develop a doctrine that relies on familiar standards easily applied by police in the performance of their duties.[21] The Court has found that highly sophisticated rules relying on minute distinctions will be "literally impossible" for officers to apply.[22] While striving to provide guidance, at times the Court has rejected complex tests containing "a highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts . . . [that require] the drawing of subtle nuances and hairline distinctions"[23] because such tests are too difficult for police to apply and allow for unequal and arbitrary enforcement.[24]

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car exception and the heavily-regulated-business exception, stem from the *Rakas* sources and are discussed below. *See infra* notes 55, 57–59, and accompanying text. Other exceptions stem from concerns such as officer and civilian safety, and a discussion of those exceptions is beyond the scope of this Comment. Justice Scalia and some commentators have suggested that the long list of exceptions to the warrant requirement has vitiated that requirement. *See* California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) (listing over 20 recognized exceptions to warrant requirement); John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. Crim. L. & Criminology 1105, 1108–10 (1989) (suggesting that rather than relying on warrant requirement as default rule, Court first determines what "predicate" is required for search, only one of which is probable cause and warrant). However, because this Comment is concerned with situations when a court is determining whether a person can even object to a search, the debate of whether the exceptions to the warrant requirement has consumed the rule is also beyond the scope of this Comment.

19. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

20. California v. Acevedo, 500 U.S. 565, 577 (1991) (citing Minnick v. Mississippi, 498 U.S. 146, 151 (1990); Arizona v. Roberson, 486 U.S. 675, 682 (1988)) (internal quotations omitted); *see also* New York v. Belton, 453 U.S. 454, 458 (1981).

21. *See Belton*, 453 U.S. at 458.

22. *Id.* (internal quotations omitted); *see also* Illinois v. Andreas, 463 U.S. 765, 772–73 (1983).

23. Oliver v. United States, 466 U.S. 170, 181 (1984) (internal quotations omitted); *see also* Minnesota v. Olson, 495 U.S. 91, 96 (1990) (rejecting Minnesota's proposed 12-part test to determine if dwelling qualifies as home).

24. *See Oliver*, 466 U.S. at 181.

At the same time, citizens should know when the Fourth Amendment protects their activities. Thus, the Court has held that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[25] A workable standard also protects citizens by reducing the risk that police will erroneously violate citizens' Fourth Amendment rights.[26]

2. *The Exclusionary Rule*

If police conduct a warrantless search when circumstances require a warrant, that search violates the Fourth Amendment and is illegal.[27] To give citizens recourse, the Court developed the exclusionary rule,[28] which excludes from admission at trial evidence that was gathered in violation of the Fourth Amendment, even if the evidence is relevant and reliable.[29] The Court limited the high social cost of excluding this relevant evidence by holding that Fourth Amendment rights are personal and only those people whose own rights were violated may invoke the exclusionary rule.[30]

While this limit on the exclusionary rule does not cause much confusion about the scope of Fourth Amendment protection when the contested search was of a person's own home,[31] the limit does create problems identifying the scope of protection outside the home. Originally, the Court used the doctrine of standing to enforce the personal nature of the Amendment's protection.[32] To have standing, criminal defendants had to prove that an illegal search caused them an "injury in fact" and that they were asserting their own rights, not someone else's.[33] Defendants who merely established that admission of illegally obtained evidence would prejudice them at trial, but could not establish that their own Fourth Amendment rights had been violated, did not have standing.[34]

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25. Katz v. United States, 389 U.S. 347, 359 (1967); *see also Belton*, 453 U.S. at 459–60.

26. *See Andreas*, 463 U.S. at 773.

27. *See* Illinois v. Rodriguez, 497 U.S. 177, 183 (1990).

28. *See id.*

29. *See* United States v. Leon, 468 U.S. 897, 907 (1984); *see also* Rakas v. Illinois, 439 U.S. 128, 137 (1978).

30. *See Rakas*, 439 U.S. at 133–34.

31. *See, e.g.*, Payton v. New York, 445 U.S. 573, 585 (1980).

32. *See Rakas*, 439 U.S. at 138. The standing doctrine and the *Rakas* sources apply to searches of the home as well.

33. *See id.* at 139.

34. *See id.* at 134.

B. Rakas *and the Sources That Define the Scope of Fourth Amendment Protection*

In *Rakas*, the Court abandoned standing because it recognized that, after *Katz v. United States*,[35] the existing Fourth Amendment doctrine allowed only people with reasonable expectations of privacy to benefit from the exclusionary rule, and thus the existing doctrine assured that people could successfully assert only their own rights.[36] This made the task of analyzing standing at a suppression hearing redundant.[37] The Court instead held that trial courts should apply the test developed in *Katz*,[38] which requires a court to make two determinations: "[F]irst[,] that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[39]

The *Rakas* Court identified reasonable expectations of privacy as the key factor in the *Katz* test.[40] To determine reasonable expectations of privacy, the *Rakas* Court instructed that lower courts must look to sources outside of the Fourth Amendment.[41] These sources are (1) property interests,[42] (2) the way people use a location,[43] (3) societal understandings,[44] (4) the intent of the Framers,[45] and (5) people's precautions to ensure privacy.[46] If people do not have a reasonable expectation of privacy, police action—however egregious—will not violate their Fourth Amendment rights.[47]

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35. 389 U.S. 347 (1967).

36. *See Rakas*, 439 U.S. at 133.

37. *See id.*

38. *See id.* at 143 (citing Katz v. United States, 389 U.S. 347 (1967)).

39. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation omitted).

40. *See Rakas*, 439 U.S. at 143 n.12. For clarity and to distinguish between this question and the separate societal-understandings source, *see infra* notes 66–75 and accompanying text, this Comment will phrase this key factor as "reasonable expectations of privacy" rather than "expectations of privacy society is prepared to recognize as reasonable."

41. *See Rakas*, 439 U.S. at 143 n.12.

42. *See id.* at 152–53 (Powell, J., concurring).

43. *See id.* (Powell, J., concurring).

44. *See id.* at 143 n.12.

45. *See id.* at 152–53 (Powell, J., concurring).

46. *See id.* (Powell, J., concurring).

47. *See* United States v. Payner, 447 U.S. 727, 735 (1980) ("[T]he interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the

In *Rakas*, the Court held that police did not violate defendant Rakas's Fourth Amendment rights when they searched a car in which he was a backseat passenger because Rakas did not assert he had a property interest in the car and because he had no legitimate interest in the area searched—the glove compartment and under the passenger-side front seat.[48] Because Rakas was not entitled to expect privacy in the car, the Court held that it was not necessary to determine if the search violated someone else's Fourth Amendment rights.[49] Since *Rakas* the Court has repeatedly relied on one or more of the *Rakas* sources to define the scope of Fourth Amendment protection.

1. Property Interests

The first *Rakas* source is people's property interests in the location searched.[50] While property interests grant the most protection to people in their homes, property interests in other enclosed locations[51] also grant broad protection. *Rakas* developed this source by relying in part on *Alderman v. United States*,[52] where the Court held that police recording conversations at a business would violate the business owner's Fourth Amendment right even if the owner was not present during the recording.[53] More recently, the Court left open the possibility that car owners might have a sufficient expectation of privacy in their car so that the Fourth Amendment may protect their interests in that car even if someone else borrows it.[54]

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victim of the challenged practices."). For a discussion of *Payner*, see *infra* notes 124–29 and accompanying text.

48. *See Rakas*, 439 U.S. at 148.

49. *See id.* at 150.

50. Ownership is not required before people can reasonably expect privacy in a location. *See* Mancusi v. DeForte, 392 U.S. 364, 367 (1968).

51. In contrast, an open field will not warrant Fourth Amendment protection. *See* Oliver v. United States, 466 U.S. 170, 183–84 (1984).

52. 394 U.S. 165 (1967).

53. *See id.* at 176.

54. *See* United States v. Padilla, 508 U.S. 77, 82 (1993) (holding that membership in conspiracy will not automatically give any member reasonable expectation of privacy in car, but remanding to district court to determine if ownership of car would be sufficient). On remand, the district court found that the owners' rights were violated. *See* United States v. Padilla, 111 F.3d 685, 686 n.1 (1997).

2. *The Way a Person Uses a Location*

The way people use a location will often be a source for defining the scope of Fourth Amendment protection in that location. The Fourth Amendment protects the home and its surrounding curtilage because people use such locations for intimate activities associated with private everyday life.[55] On the other hand, open fields receive no Fourth Amendment protection because they do not provide settings for the intimate activities the Amendment was intended to protect.[56] Similarly, people should expect less privacy at a location used for business purposes when the government regulates this workspace or when people share their workspace with coworkers or the public.

The Fourth Amendment allows for warrantless inspections of a narrowly defined class of heavily regulated businesses, and therefore people who work in these businesses should expect less privacy.[57] For example, in *New York v. Burger*,[58] the Court held that a warrantless inspection of Burger's junkyard by police was permissible because four criteria were met: (1) the government regulated junkyards heavily, (2) a substantial government interest supported this regulation, (3) a warrantless inspection was necessary to further this regulatory scheme, and (4) the statute's inspection plan advised Burger of possible searches and limited the discretion of police.[59] If these four criteria are not met, the Court has held that this warrant exception does not apply.[60]

People who do not have exclusive control over their workspace also should expect decreased privacy rights. If a business is open to the public, police do not need a warrant to enter and search any area the public may enter.[61] If a coworker has access to a person's workspace,

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55. *See* California v. Ciraolo, 476 U.S. 207, 212 (1986). The Court has also applied the use source in other situations. For example, the Court grants Fourth Amendment protection for luggage because people use luggage to transport their personal belongings. *See* Arkansas v. Sanders, 442 U.S. 753, 765 (1979); United States v. Chadwick, 433 U.S. 1, 11 (1977). Conversely, motor vehicles—even motor homes—receive a lower level of Fourth Amendment protection because they are traditionally used for transportation, not for shelter. *See* California v. Carney, 471 U.S. 386, 394 (1985).

56. *See Oliver*, 466 U.S. at 179. But see *Florida v. Riley*, 488 U.S. 445, 452 (1989), where the plurality, while upholding an aerial search, noted that police did not observe any intimate details during the search.

57. *See* New York v. Burger, 482 U.S. 691, 702 (1987).

58. 482 U.S. 691 (1987).

59. *See id.* at 702–03.

60. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978).

61. *See* Maryland v. Macon, 472 U.S. 463, 469 (1985).

that person cannot complain if the coworker consents to a police search.[62] However, access by coworkers does not mean police can search private areas absent consent,[63] and this protection is not diminished even for government employees.[64] Moreover, the cases where the Court has applied these workplace rules all involved commercial premises, not private homes being used for business purposes.[65]

3. *Societal Understandings*

The Court has also looked to the concept of societal understandings as a source of Fourth Amendment protection.[66] Thus, it has announced that society understands that the home,[67] the curtilage around the home,[68] and the workplace[69] are places deserving Fourth Amendment protection. The Court has explained how it determined societal understandings in only two cases.

In *United States v. Jacobsen*,[70] the Court concluded that because Congress made certain drugs illegal, society understands that people have no expectation of privacy in the possession of illegal drugs.[71] The

62. *See* Mancusi v. DeForte, 392 U.S. 364, 369–70 (1968). In fact, police could probably conduct a lawful search without a warrant if they receive consent from a coworker whom police reasonably believe has authority over a workspace. *See* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (holding police may conduct search with consent from someone police reasonably think has authority to consent).

63. *See DeForte*, 392 U.S. at 369–70.

64. *See* O'Connor v. Ortega, 480 U.S. 709, 717 (1987). In *O'Connor*, the Court ruled that if Ortega's governmental employer had a legitimate, work-related reason for searching Ortega's office, then the search did not violate Ortega's Fourth Amendment rights. *See id.* at 726. The Court expressly distinguished work-related searches from searches conducted during criminal investigations. *See id.* at 716–17.

65. *See* New York v. Burger, 482 U.S. 691 (1987) (junkyard); *O'Connor*, 480 U.S. 709 (government office); *Macon*, 472 U.S. 463 (store); *Barlow's, Inc.*, 436 U.S. 307 (electrical and plumbing installation business); *DeForte*, 392 U.S. 364 (union office).

66. This source is distinct from the broader question of what expectations of privacy society is prepared to recognize as reasonable.

67. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 178 (1984). *But see supra* notes 56–65 and accompanying text.

68. *See Oliver*, 466 U.S. at 178–79; *cf.* United States v. Dunn, 480 U.S. 294, 300 (1987).

69. *See, e.g.*, *O'Connor*, 480 U.S. at 716; Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986); *Oliver*, 466 U.S. at 178 n.8.

70. 466 U.S. 109 (1984).

71. *See id.* at 123.

Court did not create a *per se* rule that laws always equate with societal understandings, but it also did not explain when laws would.[72]

In *Minnesota v. Olson*,[73] the Court looked to social customs to determine societal understandings.[74] The Court held that because staying overnight at a friend's home is a deeply rooted social custom and because society expects hosts to respect their guests' privacy, society understands that overnight guests may reasonably expect privacy.[75] The Court did not explain whose social customs reflect societal understandings.

4. The Framers' Intent

The Court has also evaluated the Framers' intent when determining Fourth Amendment protections outside the home.[76] To determine the Framers' intent, the Court has looked to statements made when the Amendment was adopted,[77] the practices of the English colonial government that inspired the American Revolution,[78] and contemporaneous common-law opinions and treatises.[79] For example, in *United States v. Chadwick*,[80] the Court noted that the commands of the Fourth Amendment grew out of the colonists' rejection of the English writs of assistance that allowed English soldiers broad discretion to search for smuggled goods inside and outside the home.[81] Therefore, the Court held that police needed a warrant to search Chadwick's footlocker, even though they seized it from him in front of a train station rather than from his home.[82] The Court has also relied on the Framers' intent to find that people have reasonable expectations of privacy at the workplace[83] and in private offices.[84]

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72. *See, e.g.*, *Dow*, 476 U.S. at 232 (holding that "[s]tate tort law does not define the limits of the Fourth Amendment"); *Oliver*, 460 U.S. at 183–84.

73. 495 U.S. 91 (1990).

74. *See id.* at 99–100.

75. *See id.*

76. *See* Rakas v. Illinois, 439 U.S. 128, 153 (1978) (citing United States v. Chadwick, 433 U.S. 1, 7–9 (1977)).

77. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 176–77 (1984).

78. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 7–9 (1977).

79. *See, e.g.*, Payton v. New York, 445 U.S. 573, 590–97 (1980).

80. 433 U.S. 1 (1977).

81. *See id.* at 7–8.

82. *See id.* at 15–16.

83. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978). *But see supra* notes 56–65 and accompanying text.

5. Precautions to Ensure Privacy

The last *Rakas* source the Court has considered when determining the scope of Fourth Amendment protection is the precautions people take to ensure privacy. When people outside the home take affirmative precautions to ensure their privacy, the Court will consider these precautions when evaluating their expectations of privacy.[85] However, if people leave something in plain view—even inside the home—they should not expect that item to remain private.[86] Additionally, when they share their privacy with another person, they assume the risk that the person will compromise that privacy to the police.[87]

In *Katz v. United States*,[88] Justice Harlan found Katz's precautions "critical" when concluding that police had violated Katz's Fourth Amendment rights.[89] Police had recorded Katz's conversation in a public phone booth from which he was transmitting wagering information.[90] Because he had shut the phone booth door and paid the toll, Justice Harlan found that Katz was entitled to assume that no one would intercept his calls.[91]

While adequate precautions can create privacy, the Court has also used people's lack of sufficient precautions to find that people should not reasonably expect privacy. Two related doctrines encompass the Court's opinions in this area: plain view and assumption of risk.

a. Plain View

The *Katz* Court, while not the first to employ the plain-view doctrine, clearly stated the doctrine's underlying premise that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[92] The Court has taken an expansive approach to the plain-view doctrine, stating that people must

84. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 355 (1977).

85. *See Chadwick*, 433 U.S. at 6–9.

86. *See infra* notes 92–101 and accompanying text.

87. *See infra* notes 102–30 and accompanying text.

88. 389 U.S. 347 (1967).

89. *Id.* at 361 (Harlan, J., concurring). The Court developed the *Katz* test from Justice Harlan's concurring opinion.

90. *See id.* at 348.

91. *See id.* at 361 (Harlan, J., concurring). The majority also found Katz's precaution gave him a reasonable expectation of privacy. *See id.* at 353.

92. *Id.* at 351.

take precautions to keep items out of view from any area the public could reasonably be expected to travel.[93] Thus, in *California v. Ciraolo*,[94] the Court acknowledged that a gardener who erected a six-foot-tall outer fence and a ten-foot-tall inner fence around his house had a reasonable expectation that no one at street level would see the "unlawful agricultural pursuits" in his backyard.[95] Nevertheless, the Court held that police had not violated his Fourth Amendment rights when they flew an airplane over his property and observed marijuana plants.[96] The gardener should not have expected privacy because "[a]ny member of the public flying in [public] airspace who glanced down could have seen everything that these officers observed."[97]

The plain-view doctrine also applies to items police find when conducting a lawful search.[98] During a lawful search, police may seize evidence discovered in plain view, even if the item seized is not listed on the search warrant.[99] However, the incriminating character of an item not listed in a warrant must be immediately apparent.[100] If police see an unlisted item in plain view and merely have a hunch that it is contraband, they must get a new warrant covering the suspicious item before they can inspect or seize it.[101]

b. Assumption of Risk

"[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."[102] Such information is analogous

93. *See* Florida v. Riley, 488 U.S. 445, 449–50 (1989). A majority of the Court rejected an even more expansive test that would have held that items were in plain view if police could see items while standing in a place they could legally be. *See id.* at 454 (O'Connor, J., concurring); *id.* at 465 (Brennan, Marshall, Stevens, and Blackmun, JJ., dissenting).

94. 476 U.S. 207 (1986).

95. *Id.* at 211.

96. *See id.* at 215.

97. *Id.* at 213–14. See also *Riley*, 488 U.S. at 451, where the plurality found that a homeowner did not have a reasonable expectation of privacy in his greenhouse because police could see into it though a large gap in the greenhouse roof when they flew over the greenhouse in a helicopter.

98. *See* Horton v. California, 496 U.S. 128, 135 (1990).

99. *See id.* at 135, 141.

100. *See* Arizona v. Hicks, 480 U.S. 321, 325 (1987).

101. *See id.*

102. United States v. Jacobsen, 466 U.S. 109, 117 (1984).

to evidence in plain view, and any claim to privacy is forfeited.[103] There are three ways people assume the risk of diminishing their privacy rights when they share their privacy with another person: permitting joint access to another person,[104] temporarily entrusting items to another person,[105] or permanently entrusting items to another person.[106]

Joint access limits people's expectations of privacy because they assume the risk that the other person may expose their secrets to the government[107] or give the government access to a private area.[108] However, the mere fact that people permit another person joint access does not mean they have "thrown open [private] areas . . . to the warrantless scrutiny of Government agents."[109] The other person must voluntarily cooperate with the government.[110] Therefore, in *Mancusi v. DeForte*,[111] the Court held that because DeForte shared a large union office with several other union members, he had no Fourth Amendment claim if another union member looked through his papers or consented to a police search.[112] Nevertheless, this joint access did not mean that police could conduct a warrantless search without the consent of DeForte's officemates.[113]

People's expectations of privacy change when they temporarily entrust items to another person. Case law has established that police may not open a sealed package or container without a warrant,[114] but when people entrust a package to another person, they assume the risk that the other person may open the package and report its contents to the government.[115] Once this other person has reported the package's contents, these contents are like items in plain view and the owner has

103. *See* Illinois v. Andreas, 463 U.S. 765, 771–72 (1983).
104. *See infra* notes 107–13 and accompanying text.
105. *See infra* notes 114–22 and accompanying text.
106. *See infra* notes 124–29 and accompanying text.
107. *See* United States v. White, 401 U.S. 745, 749 (1971).
108. *See* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).
109. Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978).
110. *See* United States v. Karo, 468 U.S. 705, 716 n.4 (1984).
111. 392 U.S. 364 (1968).
112. *See id.* at 369–70.
113. *See id.*
114. *See* United States v. Jacobsen, 466 U.S. 109, 120 n.17 (1984).
115. *See id.* at 117.

lost any expectation of privacy.[116] However, police may not influence the other person's original decision to open the package.[117]

Although the Fourth Amendment protects all sorts of packages from police searches, regardless of the method of packaging,[118] people who turn unpackaged items over to another person should not expect any privacy in those items.[119] In *Rawlings v. Kentucky*,[120] Rawlings placed a large volume of unpackaged drugs in an acquaintance's purse moments before police detained them and illegally searched the purse.[121] The Court held that Rawlings should not have expected privacy in the purse because by simply stashing his drugs in the purse without doing more, Rawlings had not taken even "normal precautions to maintain his privacy."[122]

Finally, people should not expect privacy in items they give to another person, even if that other person promises to keep the items secret.[123] For example, in *United States v. Payner*,[124] the Internal Revenue Service (IRS) hired a private investigator to help it gain access to papers in a bank official's briefcase, including papers that led to evidence eventually used at trial against Payner.[125] This investigator enlisted a female associate who cultivated a relationship with the bank official and tricked him into leaving his briefcase at her apartment while they went to dinner.[126] During this dinner, the investigator entered the apartment, took the briefcase to an IRS-recommended locksmith to open it, and then allowed an IRS agent to photograph all of the papers in the briefcase.[127] The investigator then returned the briefcase to the apartment.[128] The U.S.

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116. *See id.*; Illinois v. Andreas, 463 U.S. 765, 771 (1983).

117. *See Jacobsen*, 466 U.S. at 115 & n.10.

118. *See* Robbins v. California, 453 U.S. 420 (1981) (holding marijuana wrapped in green plastic was sufficiently packaged to warrant Fourth Amendment protection), *overruled on other grounds*, United States v. Ross, 456 U.S. 798 (1982).

119. *See* Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980).

120. 448 U.S. 98 (1980).

121. *See id.* at 100–01.

122. *Id.* at 105–06.

123. *See* United States v. Payner, 447 U.S. 727, 735 (1980); *see also* United States v. Miller, 425 U.S. 435 (1976) (holding bank depositor had no Fourth Amendment protection in bank records, despite bank privacy laws, because depositor had voluntarily given this information to bank).

124. 447 U.S. 727 (1980).

125. *See id.* at 730.

126. *See id.* at 738–40 (Marshall, J., dissenting).

127. *See id.* at 740–41 (Marshall, J., dissenting).

128. *See id.* at 741 (Marshall, J., dissenting).

Supreme Court ruled that the evidence discovered on account of these stolen papers should not have been excluded from Payner's trial because the papers did not belong to Payner and the IRS had obtained the evidence without violating Payner's Fourth Amendment rights.[129]

In 1972, Justice Douglas wrote that the Fourth Amendment and its warrant clause served as "a barrier against intrusions by officialdom into the privacies of life."[130] A quarter of a century later, when the Court decided *Minnesota v. Carter*, the *Rakas* sources defined the strength of this barrier outside of the home.

II. THE COURT'S ANALYSIS OF THE *RAKAS* SOURCES IN *MINNESOTA V. CARTER*

A. The Facts

On May 15, 1994, an informant told Officer Jim Thielen that he had just observed through a ground-floor apartment window some people bagging drugs.[131] The informant pointed at the window and told the officer what type of car the people bagging the drugs drove.[132] Officer Thielen then walked to within a foot of the window and peered through the drawn venetian blinds.[133] To get to this window, the officer had to walk behind some bushes to an area where people at the apartment stored their bicycles.[134] Through a gap in the blinds, Officer Thielen observed three people bagging a white powdery substance.[135] These three people were later identified as Wayne Carter, Melvin Johns, and Kimberly Thompson.[136]

When Carter and Johns drove away from the apartment two-and-a-half hours later, police relied on Officer Thielen's observations as probable cause to stop the car.[137] In the car, police found forty-seven grams of cocaine.[138] Police eventually learned that Carter and Johns were

129. *See id.* at 735.

130. United States v. United States Dist. Court, 407 U.S. 297, 332 (1972) (Douglas, J., concurring).

131. *See* Minnesota v. Carter, 525 U.S. 83, 103 (1998) (Breyer, J., concurring).

132. *See id.*; State v. Carter, 569 N.W.2d 169, 172 (Minn. 1997), *rev'd*, 525 U.S. 83.

133. *See Carter*, 525 U.S. at 103 (Breyer, J., concurring).

134. *See id.* (Breyer, J., concurring); *Carter*, 569 N.W.2d at 172.

135. *See Carter*, 525 U.S. at 103 (Breyer, J., concurring).

136. *See id.* at 86.

137. *See id.* at 85.

138. *See id.*

from another state and had paid Thompson one-eighth of an ounce of cocaine to use her apartment to package their cocaine.[139]

After a two-day pretrial suppression hearing, the trial court ruled that Carter and Johns did not have standing[140] to object to Officer Thielen's "search" through the window.[141] The Minnesota Court of Appeals affirmed the trial court's ruling, but the Minnesota Supreme Court reversed.[142] In 1998, the U.S. Supreme Court granted certiorari.[143]

B. The Carter *Majority Used Three* Rakas *Sources to Develop a Test to Determine Reasonable Expectations of Privacy Outside the Home*

In *Carter*, the Court used three *Rakas* sources—property interests, societal understandings, and use of the location—to create a multi-factor balancing test for determining reasonable expectations of privacy outside the home.[144] Applying this test, the Court held that Carter and Johns had no reasonable expectation of privacy because they were short-term business guests.[145]

The Court first determined that under the property-interest source, people do not have reasonable expectations of privacy simply because they are in "a home" because "the Fourth Amendment protects people, not places."[146] Instead, some other source must provide a reasonable expectation of privacy in the place invaded.[147] The Court then used the societal-understandings source to set out two situations where people's expectations of privacy were clear.[148] In one situation, people legitimately on the premises but with no other connection to the premises should not

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139. *See id.* at 86.

140. Although the U.S. Supreme Court ruled in *Rakas* that courts should not use the doctrine of standing at suppression hearings, *see supra* notes 35–39 and accompanying text, other courts routinely invoke the term. *See, e.g.*, People v. Cartwright, 85 Cal. Rptr. 2d 788, 793 n.8 (1999) (noting that "the term [standing] has demonstrated a vampiric persistence" and the U.S. Supreme Court has been unable to "drive a stake through its heart").

141. *See* State v. Carter, 569 N.W.2d 169, 173 (Minn. 1997), *rev'd*, 525 U.S. 83.

142. *See id.*

143. *See* Minnesota v. Carter, 523 U.S. 1003 (1998) (mem.).

144. *See Carter*, 525 U.S. at 87–91.

145. *See id.* at 91.

146. *Id.* at 88 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

147. *See id.* (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978); Rawlings v. Kentucky, 448 U.S. 98, 106 (1980)).

148. *See id.* at 89–90.

reasonably expect privacy.[149] In another situation, overnight guests should reasonably expect privacy.[150] The Court then developed three factors for courts to use to evaluate guests' expectations when guests have some connection to the premises but are not staying the night.[151] First, courts should consider how guests are using the premises.[152] Business uses create a lesser expectation of privacy than personal uses.[153] Next, courts should consider how long the guests have been on the premises.[154] In *Carter*, two-and-a-half hours was too short to grant any protection for Carter and Johns.[155] Finally, courts should consider the relationship between the host and the guests asserting Fourth Amendment protection.[156] Some previous connection between the guest and host must exist.[157] Under this test, the Court concluded that Carter and Johns had no reasonable expectation of privacy in Thompson's apartment because there was no evidence that they were regular visitors, they had only been at the apartment for two-and-a-half hours, and they were using the apartment "simply [as] a place to do business."[158] Therefore, the Court held it did not need to inquire whether Officer Thielen's search was legal.[159]

C. *The Three Concurrences Also Used the* Rakas *Sources*

Three Justices wrote concurrences in *Carter* and also relied on the *Rakas* sources in reaching their conclusions. Justice Kennedy applied the societal-understandings source to determine that social guests, but not short-term business guests, should reasonably expect privacy.[160] Carter

149. *See id.* (citing Jones v. United States, 362 U.S. 257, 259 (1960), *as limited by* Rakas v. Illinois, 439 U.S. 128, 142 (1978)).

150. *See id.* at 89 (citing Minnesota v. Olson, 495 U.S. 91, 98 (1990)).

151. *See id.* at 90.

152. *See id.* at 90–91.

153. *See id.* (citing New York v. Burger, 482 U.S. 691 (1987)).

154. *See id.* (citing O'Connor v. Ortega, 490 U.S. 709, 716–17 (1987)).

155. *See id.* at 91.

156. *See id.* at 90.

157. *See id.*

158. *Id.*

159. *See id.*

160. *See id.* at 99, 102 (Kennedy, J., concurring). Justice Kennedy also joined the majority's opinion. However, as noted by the dissent, which also applied the societal-understandings source, a majority of the Court found that almost all social guests would have a reasonable expectation of privacy in a host's home. *See id.* at 109 n.2 (Ginsburg, J., dissenting). While some courts applying

and Johns should not have reasonably expected privacy because they were business guests using the apartment as a temporary processing station, and there was no evidence that they engaged in confidential communications with Thompson.[161] Justice Scalia reasoned that the Framers did not intend the Fourth Amendment's protection to extend to guests not staying overnight.[162] To discern this intent, Justice Scalia looked to several state constitutions written before the Bill of Rights, common-law treatises, and common-law cases, including *Semayne's Case*.[163] Based on these sources, he determined that the Amendment's protection for "their . . . houses" meant "their respective houses" and therefore did not cover casual guests.[164] Justice Breyer argued that Carter and Johns had taken insufficient precautions to ensure their privacy.[165] He therefore concurred with the majority's result, even though he agreed with the dissent's reasoning.[166] Relying on *Florida v. Riley*,[167] Justice Breyer reasoned that because other residents of the apartment complex stored bicycles in the area immediately in front of the window through which Officer Thielen looked, Thielen made his observations from an area regularly traveled by members of the public.[168] Therefore, "[t]he precautions that the apartment's dwellers took to maintain their privacy would have failed in respect to an ordinary passerby standing in that place [where Officer Thielen stood]."[169] The Justices' selective

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Carter have recognized that social guests have a reasonable expectation of privacy, *see, e.g.*, Morton v. United States, 734 A.2d 178, 181 (D.C. 1999), other courts applying *Carter* have held that neither social nor business guests can expect privacy in others' homes. *See, e.g.*, United States v. Rodriguez-Lopez, No. 98-10075, 1999 WL 109632 (9th Cir. Feb. 26, 1999) (unpublished opinion).

161. *See id.* at 102 (Kennedy, J., concurring). Presumably, Thompson, Carter, and Johns wanted to keep their activities secret, and it can easily be inferred that they spoke about their activities while in the apartment. Justice Kennedy did not cite any facts that suggest otherwise.

162. *See id.* at 97 (Scalia, J., concurring). Although Justice Scalia joined the majority's opinion, he described the *Katz* test as a "self-indulgent test" that had no foundation in the plain language of the Fourth Amendment. *Id.* (Scalia, J., concurring). Because the *Rakas* sources are used to apply the *Katz* test, Justice Scalia was not applying a *Rakas* source. Nevertheless, his analysis of the Framers' intent is identical to the analysis courts would use to apply the Framers' intent as a *Rakas* source.

163. *See id.* at 92–96 (Scalia, J., concurring).

164. *Id.* at 92 (Scalia, J., concurring).

165. *See id.* at 104 (Breyer, J., concurring).

166. *See id.* at 103 (Breyer, J., concurring). The dissent argued society understands that all guests who engage in common endeavors with their hosts should reasonably expect privacy. *See id.* at 107–11 (Ginsburg, J., dissenting).

167. 488 U.S. 445 (1989); *see also supra* note 93.

168. *See Carter*, 525 U.S. at 104 (Breyer, J., concurring).

169. *Id.* (Breyer, J., concurring).

application of the *Rakas* sources and their use of subjective information in those applications in the various *Carter* opinions highlight the problems with the *Rakas* sources.

III. THE COURT SHOULD FORMULATE A TEST THAT RELIES ON OBJECTIVE INFORMATION

The Court should abandon the *Rakas* sources and the test developed in *Carter* because neither protects Fourth Amendment rights. The *Rakas* sources may have assisted the Court in determining the scope of Carter's and Johns' Fourth Amendment rights after a two-day suppression hearing, but these sources do not provide guidance to police or citizens, and therefore fail to serve the Amendment's broader purpose of protecting people's right to remain free from government intrusion or surveillance.

Several of the sources do not provide guidance to police or citizens. Police about to conduct a search do not have access to the information they need to apply the complex analyses some of these sources require. Likewise, the *Rakas* sources provide no guidance to citizens because several of the sources do not rely on information citizens would equate with privacy. Although some of the sources provide guidance in some situations, police and citizens have no way of knowing which of the sources a court will apply and therefore cannot rely on any one source.

Carter exemplifies the problem with the *Rakas* sources. By selectively applying the sources, the *Carter* Court was able to change substantially its analysis of two *Rakas* sources (property interest and use) and completely ignore a third (precautions to ensure privacy). The test the Court then developed with the *Rakas* sources is highly complicated and neither police nor citizens will be able to apply it.

The *Rakas* sources and presumably the *Carter* test are designed for courts to use at suppression hearings.[170] However, the Court itself has recognized that police and citizens need to know the scope of Fourth Amendment protection before a search occurs.[171] By the time of a suppression hearing, police have already invaded someone's privacy and if that invasion was not sanctioned by the Fourth Amendment, the Amendment's goal of protecting people from unwarranted government surveillance and intrusion has failed. The Court should therefore discontinue use of the *Rakas* sources, abandon the *Carter* test, and

170. *See* Rakas v. Illinois, 439 U.S. 128, 133 (1978).

171. *See supra* notes 20–26 and accompanying text.

instead develop a test that police can apply with information they have in the field and that relies on information citizens equate with privacy.

A. The Rakas *Sources Fail to Provide Meaningful Guidance to Police or Citizens*

Taken as a whole, the *Rakas* sources fail to provide guidance to either police or citizens and therefore fail to protect Fourth Amendment rights. Police cannot properly utilize the property interest source unless they know ahead of time what property interests people have in a location. Thus, when police pulled over the car in *Rakas*,[172] they had no way of knowing that Rakas did not own the car. Moreover, the owner of the car was driving,[173] and obviously this search may have invaded her privacy as well.

How a place is used by a person cannot provide guidance to police or citizens when courts consider actual use rather than intended use. Police can often discern the way a location should be used before they conduct a search. Likewise, citizens should know that certain areas, because of how they are traditionally used, would not provide privacy. For example, the Supreme Court cases concerning searches of businesses involved commercial premises[174] that by their nature should have alerted police and citizens that privacy expectations should be lower. However, when the Court considers people's actual use of a location, this source is significantly less helpful because police will rarely know how a person is actually using an enclosed location.[175]

The societal-understandings source provides no guidance to police or citizens because it is unclear what this source really is. As noted above,[176] the Court has not defined what this term means, when it will be defined by laws, or whose social customs it encompasses. Without such definition, the Court can manipulate the source to mean whatever the Court desires.

Defining the scope of Fourth Amendment protection by looking to the Framers' intent dramatically threatens privacy because this "intent" is

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172. *See Rakas*, 439 U.S. at 130.

173. *See id.*

174. *See supra* note 65 and accompanying text.

175. For example, in *Florida v. Riley*, 488 U.S. 445, 452 (1989), when upholding police's aerial search of Riley's greenhouse, the plurality noted that police did not observe any intimate details associated with the home during this search. The dissent wondered whether the Court's opinion would have changed if police had observed Riley and his wife in an intimate embrace. *See id.* at 463 (Brennan, J., dissenting). Police could not predict such an intimate encounter.

176. *See supra* notes 66–75 and accompanying text.

unknowable and inherently malleable. Even documents like the Federalist Papers are the words of only three men, not the entire nation. Moreover, there is little chance anyone besides lawyers and historians have any guess as to what the Framers thought. Certainly, police and citizens are not considering such ideas when they consider whether someone should or should not expect privacy.

Unlike the other four *Rakas* sources, police and citizens can gauge what precautions should ensure privacy without the aid of a suppression hearing. However, this source still fails to protect privacy because there is no guarantee the Court will apply this source. The Court has not applied all five *Rakas* sources in every case; rather, the Court has applied only those sources that served its purpose. Thus, even if the precautions source could provide guidance in a particular situation, the Court may well choose to ignore that source. Even some of the other sources, such as the use source, or even the property-interest source, could potentially provide guidance to police and citizens in some situations if there were any guarantee the Court would apply them. However, police and citizens will never know if the Court will choose to ignore any particular source. Thus, when the criminal defendant in *Oliver v. United States*[177] built a fence, put up a no-trespassing sign, and posted a guard to protect his marijuana crop on land he owned, he expected privacy.[178] His precautions on the land he owned, however, failed to give him Fourth Amendment protection because the Court opted not to apply the property-interest or precautions sources.[179] It relied instead on three other *Rakas* sources: the way a location is used, societal understandings, and the Framer's intent.[180] These sources all suggested that Oliver did not have a reasonable expectation of privacy in his marijuana field.[181] *Oliver* illustrates how the Court's selective application of the *Rakas* sources prevents any of the sources from providing guidance.

Police and citizens need to know the scope of Fourth Amendment protection before police conduct a search. The *Rakas* sources cannot fulfill this need because several of the *Rakas* sources rely on information that will become available only at a suppression hearing and because police and citizens cannot know which sources a court will apply.

177. 466 U.S. 170 (1984).

178. *See id.* at 173.

179. *See id.* at 182–84.

180. *See id.* at 178.

181. *See id.* at 177–81.

Therefore, courts should not use the *Rakas* sources to define the scope of Fourth Amendment protection.

B. The Holding in Carter *Exemplifies the Problems with the* Rakas *Sources*

The shortcomings of the *Carter* case are threefold. First, the Court substantially changed the application of two *Rakas* sources, property interest and use, and ignored a third, precautions to ensure privacy. Second, the Court's application of two other sources—societal understandings and Framers' intent—highlights and amplifies the problems with those sources. Finally, the Court's new test relies almost exclusively on information police cannot know until after a search has occurred, which is too late to protect citizens' privacy.

1. The Carter *Court Redefined the Property-Interest Source*

The *Carter* Court redefined the property-interest source by misapplying the Court's prior decisions and ignoring Carter and Johns' property interest in Thompson's apartment. *Carter* will make it even more difficult for police about to conduct a search because they must now determine not only if a person has a property interest in a premises, but also whether that property interest is sufficient to create reasonable expectations of privacy before police can determine if they need a warrant.

First, the *Carter* Court disregarded the true meaning of *Katz*'s famous phrase, "the Fourth Amendment protects people, not places,"[182] by holding that this phrase means the Fourth Amendment does not protect people simply because they are in someone's home.[183] This conclusion does not follow from *Katz*, where the Court held that people could expect privacy outside of their own homes, even in a public phone booth, simply by taking adequate precautions.[184] If the *Carter* Court had given this phrase its true meaning, it would have looked at the precautions Carter and Johns took, rather than focusing solely on the fact that Carter and Johns did not live at Thompson's apartment.

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182. Katz v. United States, 389 U.S. 347, 351 (1967).

183. *See* Minnesota v. Carter, 525 U.S. 83, 88 (1998). *But see* Minnesota v. Olson, 495 U.S. 91, 96 & n.5 (1990) (using this quote from *Katz* to reject Minnesota's position as being based on "the mistaken premise that a place must be one's 'home' in order for one to have a legitimate expectation of privacy").

184. *See Katz*, 389 U.S. at 352 (shutting door and paying toll were adequate precautions).

Second, the Court misapplied the holdings of *Rakas v. Illinois*[185] and *Rawlings v. Kentucky*.[186] In those cases, once the Court had determined that Rakas and Rawlings did not have property interests in the areas searched, the Court held that Rakas and Rawlings should not have reasonably expected privacy because they took inadequate precautions.[187] The *Carter* Court ignored this second step; once it found that Carter and Johns were not staying overnight at Thompson's apartment, it ended its analysis.[188] The Court never even addressed the fact that Carter and Johns had temporarily rented Thompson's apartment.[189] This selective reasoning is irreconcilable with the Court's analyses in *Rakas* and *Rawlings*.

In *Rakas*, the Court explained why Rakas had no privacy expectation in the invaded place by comparing Rakas to house guests it discussed in two hypotheticals.[190] In the first hypothetical, the Court noted that a casual guest in a host's kitchen who had never visited the basement should not expect privacy in the basement.[191] A second hypothetical guest who had just walked into a home should not expect privacy anywhere in the house.[192] The first hypothetical house guest had not taken precautions to ensure his privacy in the basement and the second had not taken precautions to ensure his privacy anywhere in the house.[193] These two hypotheticals imply that the first guest could reasonably expect privacy in the kitchen. Carter and Johns closely resemble this first guest because they were at Thompson's apartment for over two hours and, ironically, were bagging cocaine in her kitchen.[194] The *Carter* Court simply ignored the role the hypotheticals played in *Rakas*.

185. 439 U.S. 128 (1978).

186. 448 U.S. 98 (1980).

187. *See infra* notes 189–96 and accompanying text.

188. *See Carter*, 525 U.S. at 90.

189. They had paid Thompson one-eighth of an ounce of cocaine to use her apartment. *See id.* at 86. This amount of cocaine would have a street value of over $100. *See* Interview with Daniel Kinnicutt, Deputy Prosecutor with the Pierce County Prosecuting Attorney's Office Drug Unit, in Tacoma, Wash. (May 1999).

190. *See Rakas*, 439 U.S. at 148–49. Because Rakas was riding in a getaway car from a bank robbery, which is a criminal enterprise, the "guests" the Court refers to in *Rakas* must be business guests.

191. *See id.* at 142.

192. *See id.*

193. *See id.* at 142, 149–50 (citing Katz v. United States, 389 U.S. 347 (1967)).

194. *See Carter*, 525 U.S. at 104 (Breyer, J., concurring).

In *Rawlings,* just as in *Rakas*, the key factor was Rawlings' failure to take adequate precautions to protect his drugs from detection rather than his lack of ownership in the purse in which he stored those drugs.[195] The Court ruled that Rawlings could not have reasonably expected his drugs to remain private when he stored them in an acquaintance's purse, especially because he had no right to exclude others from that purse.[196] Unlike Rawlings, Carter and Johns never abandoned their drugs, and they took the precautions of locking the door and shutting the blinds, albeit not very effectively.

The *Carter* Court's manipulation of these three cases to define how property interests give people reasonable expectations of privacy exemplifies why the Court should not rely on the property-interest source. First, the Court relied heavily on the fact that Carter and Johns were only short-term business guests, but Officer Thielen could not have known that two of the people he would see through Thompson's window did not live at the apartment, were not social guests, or were not planning to spend the night. Second, because the Court ignored the fact that Carter and Johns had a property interest in the apartment,[197] the opinion suggests that certain property interests do not warrant protection but does not define what these inferior property interests are.[198] Finally, by ignoring its evaluations of the precautions-to-ensure-privacy source in *Katz*, *Rakas*, and *Rawlings*, the *Carter* Court implied that those precautions are irrelevant. These precautions, however, often provide the only objectively perceivable information police have about the privacy expectations of people inside a structure.

2. *The* Carter *Court Redefined the Use Source by Considering Carter's and Johns' Actual Use of Thompson's Apartment*

Carter holds that people using any premises for business purposes should not expect any privacy if they do not have a significant

195. *See* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

196. *See id.*

197. *See supra* note 189.

198. *See, e.g.*, United States v. Gordon, 168 F.3d 1222, 1226–27 (10th Cir. 1999) (applying *Carter* and holding Gordon did not have reasonable expectation of privacy in motel room for which he had paid and possessed key because room was not registered under his name, he had been in room for only few minutes before police entered, and he was using room for business purposes—selling drugs).

connection to that premises.[199] The consideration of actual use will prevent police from properly applying this source because if the premises is not a commercial space,[200] police will have no readily available means of learning how people are using it.

For the *Carter* Court to reach its conclusion, it had to manipulate the holdings in *New York v. Burger*[201] and *O'Connor v. Ortega*.[202] The Court interprets *Burger*'s statement that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home,"[203] to mean expectations are lower anytime people are using any location, even a home, for business purposes.[204] This literal interpretation ignores the context in which the Court made the original statement. In *Burger*, the Court allowed a warrantless inspection of Burger's junkyard only because the junkyard qualified as a heavily regulated business and a statute permitted warrantless searches.[205] The lower expectations of privacy in the commercial setting mentioned in *Burger* most likely reflect that society would never accept a statute allowing warrantless searches of the home but would accept such a statute governing commercial spaces.[206] Moreover, without such a statute in place, the Court has not permitted warrantless searches of private workspaces.[207] The holding in *Carter* conflicts with *Burger* because *Carter* allows searches of workplaces without a warrant, without a statute, and without probable cause.

The *Carter* Court also should not have applied *O'Connor v. Ortega*[208] because *O'Connor* is inapposite to *Carter*. *O'Connor* involved a search by an employer, which the Court held would be permissible only if the search was conducted for work-related purposes.[209] The *O'Connor* Court

199. *See Carter*, 525 U.S. at 91.

200. *See supra* note 65 and accompanying text.

201. 482 U.S. 691 (1987).

202. 480 U.S. 709 (1987). See *supra* note 64 for a discussion of this case.

203. *Burger*, 482 U.S. at 700.

204. *See Carter*, 525 U.S. at 90.

205. *See supra* notes 57–60 and accompanying text.

206. Citizens would not allow the government to pass a statute that would permit warrantless searches of any location. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) (holding warrantless searches under OSHA are impermissible because such searches are not necessary to further OSHA regulation, and therefore heavily-regulated-business exception does not apply).

207. *See supra* notes 56–65 and accompanying text.

208. 480 U.S. 709 (1987).

209. *See id.* at 712–14, 716–17.

expressly distinguished an employer's work-related search from a search by police conducting a criminal investigation.[210] Because police conducted the search in *Carter* as part of a criminal investigation, the holding in *O'Connor* should not apply. By applying the holding of *O'Connor* to a criminal search, the Court greatly expanded the situations where police may conduct a warrantless workplace search.

After *Carter*, police cannot rely on the distinction between commercial and noncommercial premises and must determine whether the worker has a "significant" connection before they conduct a search.[211] This ruling creates uncertainty in the law and does not follow from the Court's past decisions.

3. *The Court's Use of Societal Understandings and Framers' Intent Demonstrates Why the Court Should Not Rely on These Sources*

The *Carter* Court's analysis of societal understandings and Framers' intent demonstrates why neither police nor citizens can rely on these sources when trying to determine the scope of Fourth Amendment protection. The societal-understandings source relies on information police will not know before they conduct a search. The *Carter* majority, interpreting *Minnesota v. Olson*,[212] held that society understands that overnight guests have reasonable expectations of privacy only because these guests are vulnerable when they sleep.[213] For police to apply this holding, they will have to know whether a guest is intending to stay the night.[214]

Justice Kennedy's concurrence further demonstrates that the societal-understandings source provides no guidance to police because his

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210. *See id.* The Fourth Amendment was at issue because the employer was the government and the employee filed a civil suit. *See id.* at 712–14.

211. *See, e.g.*, United States v. Marcias-Treviso, 42 F. Supp. 2d 1206, 1212–14 (D.N.M. 1999) (applying *Carter* and holding Marcias-Treviso did not have reasonable expectation of privacy in garage he rented from his brother because he had not slept in garage and was using it for business purposes—fixing cars).

212. 495 U.S. 91 (1990).

213. *See* Minnesota v. Carter, 525 U.S. 83, 90 & n.* (1998).

214. *See id.* at 107–09 (Ginsburg, J., dissenting) (arguing that staying overnight should not be deciding factor); *see also* Taylor v. State, 995 S.W.2d 279, 280, 282 (Tex. Crim. App. 1999) (holding Taylor did not have reasonable expectation of privacy at friend's house because, although he was at this house from 11 p.m. to 6 a.m., he did not sleep so he was more like "a friend visiting during the day" than an "overnight guest"); Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. Mem. L. Rev. 907, 964 (1997) (criticizing *Olson* because it requires police to determine whether guests intend to stay overnight).

opinion turns on Carter's and Johns' subjective intentions. Justice Kennedy found that society understands that almost all social guests should reasonably expect privacy in a host's home.[215] Carter and Johns, however, should not have reasonably expected privacy because they were at Thompson's apartment for short-term business purposes.[216] Under this analysis, guests' expectations of privacy depend on whether they are visiting for business or pleasure.[217] It is unrealistic to expect police to determine what people's motives for visiting are before conducting a search, and it is unwise to develop a test that turns on such subjective information.

The debate in *Carter* between Justice Scalia and Justice Kennedy over the Framers' intent emphasizes why the Court should also abandon this source. As noted above, Justice Scalia found, based in part on *Semayne's Case*, that the Framers did not intend to grant Fourth Amendment protection to guests not spending the night.[218] Justice Kennedy challenged this interpretation by asserting that the meaning of *Semayne's Case* was in dispute and by pointing out that the case was a civil case.[219] Whatever *Semayne's Case* may mean, one thing is unquestionable: neither police nor citizens are going to join this debate when trying to determine the scope of Fourth Amendment protection. The Framers' intent, like the vague concept of societal understandings, is not something that ordinary people equate with privacy and therefore should not be part of a Fourth Amendment test.

4. *The* Carter *Court Abandoned the One Useful* Rakas *Source: People's Precautions to Ensure Privacy*

Prior to *Carter*, even in cases where the Court found that people had no property interest in locations searched, the Court considered people's

215. *See Carter*, 525 U.S. at 99 (Kennedy, J., concurring).

216. *See id.* at 102 (Kennedy, J., concurring).

217. *See, e.g.*, Morton v. United States, 734 A.2d 178 (D.C. 1999) (applying *Carter*, majority held Morton had reasonable expectation of privacy at friend's home because of degree of acceptance in home, while dissent argued Morton did not have reasonable expectation of privacy because he had gone to friend's home to deposit drug profits).

218. *See Carter*, 525 U.S. at 92–96 (Scalia, J., concurring).

219. *See id.* at 100–01 (Kennedy, J., concurring); *see also The Supreme Court, 1998 Term—Leading Cases*, 113 Harv. L. Rev. 200, 271–73 (1999) (criticizing Justice Scalia's Framers' intent analysis as inconsistent with common law and as already rejected by the Court in *Steagald*).

precautions to ensure privacy.[220] Without addressing Carter and Johns' precautions to ensure privacy, the *Carter* Court ruled that it did not need to determine if a search had occurred, even though Carter and Johns had a property interest in Thompson's apartment.[221] It is implicit in the Court's decision not to address these precautions that Carter and Johns could not have taken any precautions that would have given them a reasonable expectation of privacy. By ignoring Carter and Johns' property interest in Thompson's apartment, the Court created substantial doubt as to whether business people renting space for a short period of time can ever reasonably expect privacy. In essence, the *Carter* opinion makes people's expectations of privacy in temporary workspaces similar to privacy expectations in open fields.[222] It does not matter if people have paid for privacy, taken all the precautions possible, and not shared their privacy with anyone. They simply should not expect privacy. By ignoring the precautions to ensure privacy taken in *Carter*, the Court abandoned the one *Rakas* source that provided objective guidance to police and citizens. The abandonment was particularly hasty because, as demonstrated by Justice Breyer, the Court could have relied on Carter and Johns' insufficient precautions to reach the same conclusion that Carter and Johns should not have reasonably expected privacy.[223]

5. *The* Carter *Test Fails to Protect Fourth Amendment Values Because It Relies Almost Exclusively on Information Police Cannot Gain Before They Conduct a Search*

Justice Rehnquist's test in *Carter* creates great uncertainty as to whether the Fourth Amendment will protect people from police intrusion outside the home. An insightful critique of a similar test can be found in Justice Rehnquist's dissenting opinion in *Steagald v. United States*,[224] where he wrote:

> The genuinely unfortunate aspect of [the majority's holding] . . . is the increased uncertainty imposed on police officers in the field . . . who must confront variations and permutations of this factual situation on a day to day basis. They will . . . have to weigh

220. *See supra* notes 184–99 and accompanying text.

221. *See supra* note 189 and accompanying text.

222. *See supra* notes 51, 56, and accompanying text.

223. *See supra* notes 166–69 and accompanying text.

224. 451 U.S. 204 (1981).

> the time during which a suspect . . . has been in the building, whether the dwelling is the suspect's home, how long he has lived there, whether he is likely to leave immediately and a number of equally imponderable questions. Certainty and repose, as Justice Holmes said, may not be the destiny of man, but one might have hoped for a higher degree of certainty in this one narrow but important area of the law than is offered by [the majority's] decision.[225]

Rather than create certainty and repose, Justice Rehnquist's holding in *Carter* does the exact opposite. The *Carter* test turns on the time during which suspects have been in the building, whether it is their home, and a number of equally imponderable questions such as how the suspect is using the building and what the suspect's relationship is with the host.[226] Officer Thielen knew none of this information before he looked through Thompson's window, and after he looked, the apartment dwellers' privacy was already invaded.

B. The Proposed Test: Precautions to Ensure Privacy and the Reasonable Person's Evaluation of Those Precautions

Rather than relying on information that is first learned at a suppression hearing, courts should use a two-prong test that police and citizens can apply before a search occurs. Courts should first look at what precautions people have taken to ensure their privacy and then grant Fourth Amendment protection if the reasonable person would find that those precautions should have ensured privacy. Because this test relies on objective information, police and citizens will be able to apply the test as easily as the courts.

While this proposed test sounds similar to the two-part *Katz* test,[227] the proposed test is more directed and therefore will result in more uniform application. The first prong of the *Katz* test required a person to have a subjective expectation of privacy. The usefulness of this prong was limited because people challenging searches could always say they expected privacy. The first prong of the proposed test requires people to demonstrate their expectations by taking precautions to prove they expected privacy. These precautions are objective facts that people and

225. *Id.* at 231 (Rehnquist, J., dissenting).

226. *See* Minnesota v. Carter, 525 U.S. 83, 90–91 (1998).

227. *See supra* note 39 and accompanying text.

police can evaluate not only in court, but more importantly before a search occurs. This first prong encompasses the plain view doctrine.[228]

The second prong of the proposed test makes a subtle, but fundamental, change from the second prong of the *Katz* test. By asking whether the reasonable person would expect people's precautions to ensure privacy actually to protect their privacy, the proposed test avoids the *Katz* test's vague concept of "expectation of privacy . . . society is prepared to recognize as reasonable."[229] The Court could always find that society did not recognize an expectation of privacy as reasonable, but the Court will not so easily be able to say that the reasonable person thought someone's precautions should have failed. Moreover, a reasonable person would never think someone's precautions should have failed because of a 400-year-old case or because society does not value a particular relationship or custom.

This reasonable-person requirement makes the test more than a plain-view test because there are certain situations where the reasonable person would not think people could take adequate precautions to ensure privacy. This test would adopt the rules the Court has developed for searches of commercial premises[230] and the assumption-of-risk doctrine[231] because the reasonable person would expect that the more people share their privacy with others, the less privacy they should expect.

The proposed test will better protect the goals of the Fourth Amendment because it provides clear guidance to citizens and police. All people need to do is put themselves in the shoes of the reasonable person and evaluate the precautions that have been taken. This analysis relies entirely on objective information that is immediately available outside of the courtroom. For example, in *Carter*, the reasonable person would not have expected the apartment dwellers' precautions to have ensured privacy because Officer Thielen made his observations from an area frequented by the public.

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228. *See supra* notes 92–101 and accompanying text.

229. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (internal quotation omitted).

230. *See supra* notes 56–65 and accompanying text.

231. *See supra* notes 102–29 and accompanying text.

V. CONCLUSION

Commentators first viewed the *Katz* decision as a potentially broad expansion of people's right to privacy.[232] One commentator went as far as to argue, "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not."[233] Although that commentator's answer was a resounding no,[234] the Court's use of the *Rakas* sources to apply *Katz* has ensured that *Katz* did not provide a sweeping increase in privacy rights.[235] So long as acts remain illegal even when people carry them out in private homes, police must be able to investigate those acts. If the Fourth Amendment is to protect people's privacy from police conducting these investigations, people must do their part and draw the blinds when they want privacy. Asking any less would give people Fourth Amendment protection when they have not exhibited an actual expectation of privacy.

However, the Court's application of the *Rakas* sources to develop the test in *Carter* goes too far. By refusing to address Carter and Johns' precautions to ensure privacy, the Court abandoned the one source police and citizens could objectively evaluate before a search occurs and before someone's rights have been violated. Courts should instead apply a test that evaluates these precautions and asks whether the reasonable person would expect these precautions to ensure privacy. This would allow people to know when the Fourth Amendment protects their privacy and would allow police to carry out their duties without trampling on innocent people's rights. The Court's holding in *Carter* provides no such guidance to police and puts into serious question whether people should ever expect privacy outside their homes.

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232. *See, e.g., The Supreme Court: 1967 Term*, 82 Harv. L. Rev. 63, 190 (1968) (suggesting Court's protection of phone booth will call for "re-examination of areas previously declared 'absolutely unprotected'").

233. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974).

234. *See id.* at 404.

235. *See supra* notes 92–101 and accompanying text.