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Standing Under State Search and Seizure Provision: Why the Minnesota Supreme Court Should Have Rejected the Federal Standards and Instead Invoked Greater Protection Under its Own Constitution in State v. Carter

Rebecca C. Garrett
University of Maine School of Law

STANDING UNDER STATE SEARCH AND SEIZURE PROVISION: WHY THE MINNESOTA SUPREME COURT SHOULD HAVE REJECTED THE FEDERAL STANDARDS AND INSTEAD INVOKED GREATER PROTECTION UNDER ITS OWN CONSTITUTION IN *STATE V. CARTER*

STANDING UNDER STATE SEARCH AND SEIZURE PROVISION: WHY THE MINNESOTA SUPREME COURT SHOULD HAVE REJECTED THE FEDERAL STANDARDS AND INSTEAD INVOKED GREATER PROTECTION UNDER ITS OWN CONSTITUTION IN *STATE V. CARTER*

I. INTRODUCTION

In *State v. Carter*,[1] the Minnesota Supreme Court considered whether a criminal defendant had "standing"[2] to challenge an alleged search under the Fourth Amendment and Article 1, Section 10 of the Minnesota Constitution. The defendant moved to suppress[3] evidence obtained by a police officer who had peered in the window of an apartment where the defendant was participating in a drug-packaging operation with the apartment's leaseholder.[4] A divided court held that the defendant had a legitimate expectation of privacy in the apartment.[5] Therefore, the defendant had standing to challenge the legality of the police officer's observations pursuant to the Fourth Amendment[6] of the United States Constitution, and Article 1, Section 10[7] of the Minnesota Constitution.[8] The court concluded that the police officer's observations constituted an unreasonable search.[9]

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1. 569 N.W.2d 169 (Minn. 1997), *rev'd*, Minnesota v. Carter, 119 S.Ct. 469 (1998).

2. Fourth Amendment standing issues are not based on the traditional standing doctrine of Article III of the Constitution. Rather, the Fourth Amendment standing requirement is specific to the Fourth Amendment and requires a party to assert her own rights in order to challenge an alleged search. Compare *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (determining that Article III requires plaintiffs to demonstrate the sufferance of an injury sufficient to warrant judicial intervention), with *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980) (rejecting the "automatic standing" rule and requiring the party challenging the legality of a search to establish that she was the victim of an invasion of privacy to bring suit).

3. In Fourth Amendment cases, the defendant raises the standing issue by filing a motion to suppress evidence. *See* FED. R. CRIM. P. 12(b)(3).

4. *See* State v. Carter, 569 N.W.2d at 173.

5. *See id.* at 176.

6. The Fourth Amendment provides in its entirety:

> The right 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.

7. Article 1, Section 10 is virtually identical to the Fourth Amendment. *See* MINN. CONST. art. I, § 10.

8. *See* State v. Carter, 569 N.W.2d at 176.

9. *See id.* at 178-79. In *State v. Carter*, the court applied an analysis to the fact pattern at three levels. First, the court analyzed whether the defendant had standing to challenge the alleged search. *See id.* at 173-76. The court then analyzed whether the government agent's actions constituted a search. *See id.* at 176-78. Finally, the court determined whether the search was unreasonable. *See id.* at 178-79. This Note will only directly address the standing issue.

Recently, the United States Supreme Court reversed the Minnesota Supreme Court's decision, and held that the defendant did not have a legitimate expectation of privacy at the apartment.[10] The Court justified this determination by focusing on the defendant's status as a temporary guest and the fact that he was at the premises solely for commercial purposes.[11] As a result, the Court denied him standing to challenge whether the police officer's observations constituted an unreasonable search.[12]

The Court's decision in *Minnesota v. Carter* and the Minnesota Supreme Court's faulty analysis under the federal standards indicate that state courts should abandon the Court's Fourth Amendment jurisprudential standards. This Note will specifically address the Minnesota Supreme Court's decision in *Carter,* and how the court's analysis is illustrative of a problem that has developed with the federal Fourth Amendment standing requirement.[13] The United States Supreme Court currently applies a privacy-based analysis to determine whether a defendant can challenge an alleged search.[14] The analysis is two-fold; the Court requires a defendant to demonstrate that she had a legitimate expectation of privacy in the invaded place and that society recognizes the expectation as reasonable.[15] In like manner, whether a visitor has a legitimate expectation of privacy at another property possessor's premises is measured by the relationship between the host and the guest and whether society recognizes that relationship as reasonable.[16]

Adhering to the federal standards, the Minnesota Supreme Court applied the latter standard in *Carter* and, as a result, was placed in the tenuous position of

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10. *See* Minnesota v. Carter, 119 S.Ct 469, 474 (1998).

11. *See id.* at 473-74.

12. *See id.*

13. *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 367 (1998) (criticizing courts and commentators for overlooking the premise that the Fourth Amendment acts negatively, to exclude the intrusion of government agents, and provides an affirmative right to privacy); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 706 (1998) (recognizing doubt in the academic field regarding whether privacy is an adequate measure for protecting Fourth Amendment values); Scott E. Sundby, *"Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) (discussing the inadequacies of privacy as the standard for assessing government intrusions under the Fourth Amendment); Kent M. Williams, Note, *Property Rights Protection Under Article 1, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1257 (1991) (considering whether Minnesota courts should construe Article 1, Section 10 to protect property interests as well as privacy interests).

14. *See* United States v. Padilla, 508 U.S. 77, 79-81 (1993); Minnesota v. Olson, 495 U.S. 91, 98 (1990); United States v. Dunn, 480 U.S. 294, 315 (1987) (Brennan, J., dissenting); California v. Ciraolo, 476 U.S. 207, 211-12 (1986); Smith v. Maryland, 442 U.S. 735, 740-41 (1979); Rakas v. Illinois, 439 U.S. 128, 143 (1978); Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

The Supreme Court's historical and current treatment of the clause "and no Warrants shall issue, but upon probable cause," U.S. CONST. amend. IV., is beyond the scope of this Note.

15. *See* Rakas v. Illinois, 439 U.S. at 143 (stating that *Katz v. United States* provides guidance in analyzing Fourth Amendment cases. *See* 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing that a person must have "exhibited an actual (subjective) expectation of privacy and . . . that the expectation be one that society is prepared to recognize as 'reasonable'").

16. *See* Minnesota v. Olson, 495 U.S. at 99-100.

addressing why society should value the relationship between the leaseholder and the defendant, when their relationship was centered around an illegal activity.[17] Explaining that society values a leaseholder's right to engage in a "common task" with a guest,[18] the court produced a result that comports with the purpose of the Fourth Amendment.[19] The court's reliance on the privacy-based standard, however, is misguided. In following the Supreme Court's standards, the court focused on the defendant's illegal activities instead of the police officer's intrusive actions.[20] Among other things, this approach jeopardizes the broader aims of the Fourth Amendment: to protect a person's right to be secure from an unwarranted governmental intrusion.[21]

This Note will criticize the Minnesota Supreme Court's analysis in *Carter*, concluding that the court should have discarded the privacy-based standard. This analysis will integrate the recent United States Supreme Court reversal of *State v. Carter*, and the Author intends to demonstrate the increasing subjectivity of Fourth Amendment jurisprudence in the area of guest cases. Thus, instead of following the Supreme Court's standards, the Minnesota Supreme Court should have analyzed the facts in *Carter* under its own state constitutional search and seizure provision, thereby adopting a standing rule that is textually based and supported by the purpose of the Fourth Amendment.[22]

Part II of this Note provides a brief survey of the significant developments in the area of Fourth Amendment jurisprudence. This endeavor begins with a review of the framers' intentions for enacting the amendment. Next, the Author explores how the United States Supreme Court first grounded Fourth Amendment protections in common law property foundations.[23] Then, in the 1960s the Court adopted "automatic standing" for defendants raising Fourth Amendment violations.[24] In the 1970s, the Court rejected the automatic standing rule and subsequently developed the current analytical framework for Fourth Amendment determinations: a privacy-based analysis accompanied by a reasonableness balancing test that has endured for thirty years and is currently the primary means for delineating Fourth Amendment protections.[25]

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17. *See* State v. Carter, 569 N.W.2d 169, 176 (Minn. 1997).

18. *See id.*

19. *See* discussion *infra* Part II.A.

20. *See* State v. Carter, 569 N.W.2d at 173.

21. *See* discussion *infra* Parts II.A., IV.

22. *See, e.g.*, Jones v. United States 362 U.S. 257 (1960). In *Jones*, the Supreme Court determined that by simply filing a motion to suppress evidence, the defendant had standing. *See id.* at 264. To hold otherwise, the Court reasoned, would be putting the defendant in a position where he or she would have to produce evidence that the state could later use as a basis for conviction. *See id.* This constitutional dilemma is a "counterposition of Fourth Amendment protection against the Fifth Amendment's privilege against self-incrimination." Commonwealth v. Sell, 470 A.2d 457, 461 (Pa. 1983).

The Court later explicitly rejected the automatic standing rule, relying on a subsequent Court ruling prohibiting the government from using a defendant's suppression hearing testimony as an admission in its case. *See* Rakas v. Illinois, 439 U.S. at 133-34 (citing Simmons v. United States, 390 U.S. 377, 389 (1968)).

23. *See* discussion *infra* Part II.B.

24. *See* Jones v. United States, 362 U.S. 257 (1960).

25. *See supra* notes 14 and 15 and accompanying text.

Part IV integrates the background information with the facts of the subject case, as presented in Part III, to demonstrate how the Minnesota Supreme Court's application of the privacy-based standard to the facts in *Carter* produced a correct result, albeit based on a poorly reasoned analysis. This Note suggests that the Minnesota Supreme Court's reliance upon privacy as the measure of Article 1, Section 10 rights, and derivatively in the context of Fourth Amendment rights, as illustrated by *Carter*, no longer adequately defines the proper limits on government intrusions. Furthermore, a review of fairly recent federal and state court decisions supports the contention that the Minnesota Supreme Court should provide greater protection to its alleged possessory crimes defendants by expanding the protections under its own constitution.

This Note concludes that until the Supreme Court affords criminal defendants adequate protection under the Fourth Amendment, state courts generally should broaden protections under their own constitutions. That is, instead of basing standing on a person's privacy interest, state courts should simply require a defendant to prove that she was a guest at the time of the search in order to challenge an alleged government intrusion. This approach evidences a return to the framers' intentions and the Court's initial standards, while at the same time providing an adequate measure for search and seizure protections.

II. BACKGROUND

A. The Framers' Intent

The Fourth Amendment was created to protect persons from indiscriminate searches and seizures of private property by government agents.[26] Its purpose took root in the genesis of the American Revolution.[27] The years leading up to the Revolution were marked by the colonists' fears of, and aversions to, the British entering their homes and searching for contraband.[28] As explained by the Supreme Court, the Fourth Amendment was created as a specific reaction to "the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods."[29]

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26. *See* Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 602 n.82 (1998) (explaining how the British writ of assistance permitted customs officials to "enter and go into any house, shop, cellar, warehouse or room or other place, and in case of resistance, to break open any doors, chests, trunks and other packages, there to seize and from thence to bring, any kinds of goods or merchandise whatsoever, prohibited and uncustomed") (citing NELSON BERNARD LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1937)).

For a comprehensive discussion of the substantive origins of the Fourth Amendment, see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393 (1995).

27. *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (acknowledging the history that gave rise to the Fourth Amendment as marked by abuses profoundly "felt by the Colonies as to be one of the potent causes of the Revolution").

28. *See* Hemmens, *supra* note 26.

29. *See* Frank v. Maryland, 359 U.S. 360, 363 (1959).

B. Property-Based Approach

The Supreme Court initially defined the interests secured by the Fourth Amendment primarily in terms of property rights.[30] In so doing, the Court limited Fourth Amendment protections to property interests by requiring defendants to show an ownership or possessory interest in a searched or seized object in order to prove a violation.[31] Adhering to a very literal interpretation of the Fourth Amendment, the Court defined a search in terms of whether a person's property rights were violated by a government agent's intrusion of a material entity—"persons, houses, papers, and effects."[32]

C. Privacy-Based Approach

During the mid-twentieth century, the property-based approach was deemed to be an insufficient approach to Fourth Amendment cases. Among other things, the approach failed to take into consideration the right of a person to be secure from a search while visiting another property owner's premises. For example, in *Jones v. United States*,[33] the Court rejected the property-based approach and in-

30. *See* Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the Supreme Court held that the government had violated the defendant's Fourth Amendment rights by serving him with a subpoena to produce an invoice for the contents of a shipment in the defendant's possession and by retaining the goods. The government's actions constituted a violation, the Court maintained, because the defendant had a superior property interest in the seized goods. *See id.* at 637.

31. *See* United States v. Jeffers, 342 U.S. 48 (1951); Taylor v. United States, 286 U.S. 1 (1932).

32. *See* Olmstead v. United States, 277 U.S. 438 (1928). The Supreme Court recognized that "[t]he well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will." *Id.* at 463 (citing U.S. CONST. amend. IV).

33. 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980). In *Jones*, the defendant was charged with a two-count indictment after the government found narcotics in the apartment where he was staying as a guest. *See* Jones v. United States, 362 U.S. at 258-59. He filed a motion to suppress the evidence and the government opposed the defendant's standing because he had failed to allege either an ownership of the seized articles or a property interest in the apartment. *See id.* at 259.

The Court in *Jones* based its holding, in part, on the dilemma faced by a criminal defendant: should a criminal defendant claim that he possessed the contraband in order to assert standing and thereby essentially admit to the crime, or, should the defendant remain silent and forego this possible defense? The *Jones* court explained:

> Ordinarily . . . it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, . . . but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

Id. at 261-62.

stead granted a defendant "automatic standing" to challenge the constitutionality of the search of an apartment where he had been visiting at the time of the government agent's intrusion.[34] Because he was a guest, the Court determined that the defendant was "legitimately on [the searched] premises" and accordingly granted him standing to challenge the government action.[35]

Whether a criminal defendant was granted "automatic standing" therefore hinged upon whether the criminal defendant was legitimately on the searched premises, a rather low burden to satisfy. The Court rationalized that requiring a criminal defendant to prove possession of contraband would put her in the tendentious position of essentially making an admission to a crime in order to challenge an alleged Fourth Amendment violation.[36] Thus, the Court announced the rule known as "automatic standing":

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. [The criminal defendant's] conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice, to sanction such squarely contradictory assertions of power by the Government.[37]

The Court further held that the government agent's intrusive action had violated the defendant's right to privacy at the premises.[38] The *Jones* "automatic standing" rule was later discarded by the Court,[39] however, and it has been replaced by the privacy-based standard.

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34. *See id.* at 267.

35. *See id.* The Supreme Court explicitly rejected the earlier property ownership requirement:

> [I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.... Distinctions such as those between "lessee," "licensee," "invitee" and "guest," often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Id. at 266.

36. *See id.* at 261-62.

37. *Id.* at 263-64 (announcing rule and stating that "the same element in this prosecution which has caused a dilemma... eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged").

38. *See id.* at 261.

39. *See* Rakas v. Illinois, 439 U.S. 128, 133 (1978) (discarding the "automatic standing" rule); United States v. Salvucci, 448 U.S. 83 (1980).

In the landmark case, *Katz v. United States*,[40] the Court eliminated the notion that strict concepts of property law define Fourth Amendment protections.[41] By announcing that "the Fourth Amendment protects people,"[42] and not places, the Court effectively linked the Fourth Amendment's core protections to a person's privacy interests. Thus, a person's property interest no longer controlled a government agent's right to invade a place.[43] The Court in *Katz* additionally clarified the determination that Fourth Amendment standing issues are not decided solely upon the presence or absence of a physical intrusion into an enclosure.[44]

In his widely cited concurrence,[45] Justice Harlan, in *Katz*, effectuated a two-fold requirement for establishing standing based on a person's privacy rights.[46] To be granted standing, a person must demonstrate an "actual (subjective) expectation of privacy" in the place searched. Additionally, a person must demonstrate an "expectation of privacy" that society is prepared to recognize as "reasonable."[47] To date, Justice Harlan's privacy-based standard generally governs whether a court will grant standing to a person challenging a search under the Fourth Amendment.[48]

Since its decision in *Katz*, the Supreme Court has reinforced the notion that property rights are not a central concern in Fourth Amendment cases by formally rejecting the *Jones* "legitimately on the premises" test.[49] The Court adopted Justice Harlan's *Katz* test without concern over the self-incrimination problem posed to the *Jones* Court because in *Simmons v. United States*[50] the Court had recently determined that a criminal defendant's testimony given in support of a motion to suppress could not be admitted as evidence of guilt.[51] The Court reasoned that otherwise, the admitted testimony could later be used to incriminate the defendant.[52] This dilemma could result in the infringement of the defendant's Fifth

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40. 389 U.S. 347 (1967). In *Katz*, the Court considered whether or not to exclude evidence that the government had obtained by installing an electronic listening and recording device on the outside of a telephone booth. *See id.* at 348. Arguing that the defendant's rights had not been violated because the surveillance technique did not physically penetrate the telephone booth from which the defendant placed his calls, the government failed to persuade the Court that the defendant's expectation of privacy from governmental intrusion was unreasonable. *See id.* at 351-52.

41. *See id.* at 353.

42. *Id.*

43. *See id.* (citing Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967)).

44. *See id.*

45. *See supra* notes 14 and 15 and accompanying text.

46. *See* Katz v. United States, 389 U.S. at 360-62 (Harlan, J., concurring).

47. *See id.* at 361.

48. *See supra* notes 14 and 15 and accompanying text.

49. *See* Rakas v. Illinois, 439 U.S. 128, 135 (1978); United States v. Salvucci, 448 U.S. 83 (1980). The defendants in *Rakas* challenged the police officers' search of a car in which the defendants were passengers in order to exclude the evidence of a rifle and ammunition that had been used in an armed robbery. *See* Rakas v. Illinois, 439 U.S. at 130. The Court rejected the defendants' argument that they were legitimately on the premises. *See id.* at 132. Instead, the Court held that the *Jones* test was "overbroad" and determined that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139.

50. 390 U.S. 377 (1968).

51. *See id.* at 389-90.

52. *See id.* at 391.

Amendment right against self-incrimination. Thus, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[53]

With the self-incrimination dilemma eliminated by the Court in *Simmons*, the Court subsequently imposed a higher burden of proof on a defendant attempting to establish standing. In *United States v. Salvucci*,[54] the Court formally abolished the automatic standing rule:

> To conclude that a prosecutor engaged in self-contradiction in *Jones*, the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so. . . . We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.[55]

As a result of the Court's holding in *Salvucci*, defendants are no longer granted automatic standing under the federal standards. Instead, standing depends upon "whether the disputed search . . . has infringed an interest of the defendant that the Fourth Amendment was designed to protect."[56] The Court continues to apply the *Katz* analytical framework to Fourth Amendment cases to answer this query.[57]

The Court's interpretation of the Fourth Amendment has indisputably moved from an interpretation protecting only property rights to one protecting only privacy rights. For example, in *Minnesota v. Olson*,[58] the Court held that an overnight guest had a reasonable expectation of privacy at another property owner's premises.[59] Applying the *Katz* test to the facts of the case, the Court determined that the defendant's status as an overnight guest was sufficient to prove that he had a legitimate expectation of privacy in the premises that society recognized as reasonable.[60] In making its determination, the Court analyzed the relationship between the host and the guest.[61] Because a host would most likely respect his or her guest's right to privacy, the Court granted the defendant standing to challenge the warrantless arrest.[62] The Court produced a just result in *Olson*. In *Carter*, however, the Minnesota Supreme Court inappropriately extended the *Olson* standards and consequently was led astray.

III. THE *CARTER* DECISION

In *State v. Carter*,[63] the defendant, Wayne Thomas Carter filed a motion to suppress evidence claiming that a police officer had unlawfully obtained the evi-

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53. *See id.* at 394.
54. 448 U.S. 83 (1980).
55. *See id.* at 90-92.
56. *See* Rakas v. Illinois, 439 U.S. at 140.
57. *See supra* note 14 and accompanying text.
58. 495 U.S. 91 (1990).
59. *See id.* at 96-97.
60. *See id.*
61. *See id.* at 99-100.
62. *See id.* at 100.
63. 569 N.W.2d 169 (Minn. 1997).

dence by peering into the apartment where the defendant allegedly had been engaging in a drug-packaging operation.[64] After applying the *Katz* analytical framework to the facts of the case, the district court determined that the defendant did not have standing to challenge the police officer's observations because the defendant failed to prove that his expectation of privacy in the apartment was based upon understandings that were "recognized and permitted by society."[65] Furthermore, the district court held that the police officer's observations did not constitute an unreasonable search because he had made his observations from an area where the defendant did not have a reasonable expectation of privacy.[66] Thus, the district court denied, based on insufficiency of the evidence, the defendant's motion.[67]

The court of appeals affirmed the district court's decision and held that the defendant did not have standing to challenge the police officer's observations.[68] Because the defendant was not an "overnight guest" and had only been at the premises for business purposes, the court of appeals determined that he was not entitled to have standing.[69]

On appeal, the Minnesota Supreme Court reversed and granted the defendant standing to challenge the constitutionality of the police officer's observations.[70] In making its determination, the Minnesota Supreme Court applied the *Katz* analytical framework to the facts in *Carter*.[71] Because the defendant was inside the apartment with the doors shut and the blinds drawn, the court held that he had a subjective expectation of privacy.[72] Whether society recognized the defendant's expectation of privacy as reasonable posed a more difficult question to the court.

Although the court of appeals had relied on the Supreme Court's analysis in *Olson* in making its determination that the defendant did not have standing because he was not an "overnight guest,"[73] the Minnesota Supreme Court interpreted the Court's holding in *Olson* differently. By looking at the Court's history of rejecting arcane distinctions between terms like "guest" and "invitees"[74] and its re-

64. *See id.* at 173. After an informant tipped him off, the police officer approached the apartment window and observed the defendant, the leaseholder of the apartment, and another man measuring and bagging a white substance at the kitchen table. As these people attempted to drive out of a nearby parking lot, the police apprehended the defendant and the third man without first obtaining a warrant. The evidence confiscated from the vehicle consisted of one duffel bag containing a digital gram scale dusted with cocaine residue. *See id.*

65. *See id.*

66. *See id.* The district court subsequently convicted the defendant for conspiring to commit a controlled-substance crime in the first degree, and aiding and abetting a controlled-substance in the first degree. *See id.*

67. *See* State v. Carter, 545 N.W.2d 695, 697 (Minn. Ct. App. 1996) (noting that the district court relied solely on the evidence presented by the defense proving only that the defendant was an out-of-state resident and that he had only been at the apartment for a short period of time on the day of his arrest).

68. *See id.* at 698.

69. *See id.* at 697. *But see* Minnesota v. Olson, 495 U.S. 91 (1990) (granting standing).

70. *See* State v. Carter, 569 N.W.2d 169, 176 (Minn. 1997).

71. *See id.* at 174-76.

72. *See id.* at 174.

73. *See* Minnesota v. Olson, 495 U.S. at 98 (1990).

74. *See* Jones v. United States, 362 U.S. 257, 266 (1960) (stating that distinctions between terms like "'invitee' and 'guest' ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards").

luctance to base an individual's standing on whether the individual was "legitimately on [the] premises,"[75] the Minnesota Supreme Court determined that the court of appeals had applied the wrong standing analysis.[76] Instead of identifying a person's status as a "guest" or as an "overnight guest," the proper inquiry, according to the Minnesota Supreme Court, is whether, under the totality of the circumstances, a person's "subjective expectation of privacy" is the type that "society is prepared to recognize as 'reasonable.'"[77]

The Minnesota Supreme Court determined that the Court granted standing to the defendant in *Olson* based on the notion that a host respects his or her guest's right to privacy.[78] Applying this reasoning to the facts in *Carter*, the legitimacy of the defendant's expectation of privacy hinged upon whether his status in relation to his host was the type that served a function that is recognized as valuable by society.[79] The court analyzed the relationship and concluded:

> Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that [the defendant] had standing to bring his motion to suppress the evidence gathered as a result of [the police officer's] observations.[80]

Because the defendant had a legitimate expectation of privacy in the apartment and the police officer had taken "extraordinary measures" to make his observations, the court held that the police officer's actions constituted a search.[81] Finally, the court held that without probable cause and a search warrant, the police officer had conducted an unreasonable search.[82]

IV. ANALYSIS OF THE *CARTER* DECISION

Despite the inadequacies of the privacy-based standard, the Minnesota Supreme Court produced a just result in *Carter*. Society values the right of property possessors to invite guests to their premises to engage in a common task. Furthermore, by determining that the defendant had standing to challenge the constitutionality of the police officer's observations, the court promoted the purpose of the Fourth Amendment to protect a person's right to be secure in a home from an unwarranted governmental intrusion.[83]

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75. *See* Rakas v. Illinois, 439 U.S. 128, 147 (1978) (rejecting blind adherence to the phrase "legitimately on [the] premises" based on its "superficial clarity").

76. *See* State v. Carter, 569 N.W.2d at 174-75.

77. *See id.* at 175.

78. *See id.*

79. *See id.*

80. *Id.* at 176.

81. *See id.* at 176-78. The court found that the defendant manifested his expectation of privacy in the apartment by taking precautions to keep his activities private. *See id.* at 177. In contrast, the police officer had to take great measures to observe the interior of the apartment. He left the public sidewalk, crossed the adjacent lawn, climbed over some bushes, and placed his face 12 to 18 inches from the window to peer between the gaps of the blinds. *See id.* at 178.

82. *See id.* at 178-79.

83. *See supra* notes 26-29 and accompanying text.

Nevertheless, by adopting the federal standards and relying on the United States Supreme Court's privacy-based standard, the Minnesota Supreme Court produced a just result that is supported by a weak foundation. The Minnesota court's analysis is flawed because it focuses on the leaseholder's right to engage in an activity and thereby extend protections to the defendant.[84] Thus, whether the defendant had standing hinged upon whether his status in relation to his host served a function recognized as valuable by society.[85] The court explained that even though society does not value the activity of drug packaging, it does value the right of a property owner to invite a guest onto her premises in order to engage in a common task, despite the illegality of the activity.[86]

This analysis is critically flawed for several reasons. First, by relying on the privacy-based standard to determine standing, the court overlooked the primary purpose of the Fourth Amendment. That is, the amendment is not based on notions of privacy, rather it is based on the right of a person to exclude: the proper analytical measure to protect a person's right to be secure.[87] Instead of analyzing the defendant's relationship to the leaseholder,[88] therefore, the court should have focused on the police officer's intrusive actions. By measuring the defendant's protections in this manner, the court would have conducted an analysis that properly secures Fourth Amendment protections.

Next, the privacy-based standard is an inadequate measure of Fourth Amendment protections because it has no textual support in the language of the amendment. The standard also leaves the malleable concept of privacy to the subjective interpretation of court majorities, as demonstrated by the court in *Carter*.[89] The court could have declined to extend standing to the defendant in *Carter* because society does not value the activity of drug smuggling.[90] In fact, the dissent in *Carter* opined that the defendant should have been denied standing based partly on his involvement in an illegal activity.[91] The disagreement among the justices on

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84. *See* State v. Carter, 569 N.W.2d at 176.

85. *See id.*

86. *See id.*

87. *See* U.S. CONST. amend. IV. The amendment, in relevant part, provides: "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." *Id. See also* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (focusing on whether there is a "reasonable expectation of freedom from governmental intrusion"); Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").

88. *See* State v. Carter, 569 N.W.2d at 176.

89. *See* Clancy, *supra* note 13, at 339 (describing the variable nature of the privacy-based standard).

90. *See* United States v. Lockett, 919 F.2d 585 (9th Cir. 1990). *Lockett* involved the federal "knock and announce statute," 18 U.S.C. § 3109 (1988). *See id.* at 587. The Ninth Circuit applied the privacy-based analysis to determine whether the defendant had standing to challenge the police officer's intrusion into the apartment where he was engaging in a drug-packaging operation. *See id.* at 588. The court reasoned that the defendant did not have a reasonable expectation of privacy sufficient to challenge an unannounced police entry because he had been using the apartment for drug smuggling. *See id.*

Other jurisdictions have denied standing based on a defendant's participation in an illegal activity. *See, e.g.*, Commonwealth v. Price, 562 N.E.2d 1355 (Mass. 1990). *But see* State v. Keeling, 182 N.E.2d 60, 67-68 (Ohio Misc. 1962) (standing is not affected by a defendant's participation in an illegal activity).

91. *See* State v. Carter, 569 N.W.2d at 179-80 (Stringer, J., dissenting). The dissent also noted the defendant's status as a "brief" and "transient visitor" at the apartment. *See id.* at 180.

this particular issue illustrates the highly subjective, and therefore problematic nature of the Court's privacy-based standard.[92]

Additionally, to deny standing to a defendant based on her participation in an illegal activity is antithetical to the purpose of the Fourth Amendment. The cognizable intent of the framers was to secure a person from an unwarranted governmental intrusion.[93] The framers intended to provide indiscriminate protection, despite a person's participation in an illegal activity.[94]

Furthermore, there is no evidence in the history and purpose of the Fourth Amendment that a person's expectation of privacy hinges on their abstention from an illegal activity. Instead, the Fourth Amendment should be interpreted broadly to err on the protective side.[95] Curiously, the Minnesota Supreme Court's reliance on the privacy-based standard to protect a person's privacy rights has produced an analysis that could result in compromising Fourth Amendment protections,[96] as illustrated by the dissent in *Carter*.[97]

The recent Supreme Court holding in *Minnesota v. Carter*[98] provides further evidence that the privacy-based standard is an inadequate measure of Fourth Amendment protections. First, Chief Justice Rehnquist, writing for the Court, denied the defendant standing based on the short duration of his stay at the apartment and the commercially based purpose of his visit; in other words, his participation in packaging cocaine.[99] By focusing on the defendant's privacy-based expectation, the Court unjustifiably also focused on the defendant's illegal activities.

Also, the justices' various concurring and dissenting opinions in *Minnesota v. Carter* lend further support to the proposition that the privacy-based standard is damagingly subjective. Justice Scalia filed a concurring opinion, suggesting that the threshold question in Fourth Amendment cases should be simply whether a search has occurred.[100] By framing the inquiry in this manner, courts can avoid applying what Justice Scalia referred to as "the fuzzy standard of 'legitimate expectation of privacy.'"[101]

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92. *See* Sundby, *supra* note 13, at 1758 (stating that the privacy-based analysis produced an amendment that rises and falls "in both scope and protection based upon how the notion of privacy fare[s] in the Court and within society as a whole").

93. *See supra* notes 26-29 and accompanying text.

94. *See* Hemmens, *supra* note 26.

95. *See* Arizona v. Hicks, 480 U.S. 321, 329 (1987) ("[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.").

96. *See* United States v. Smith, 783 F.2d 648, 650 (6th Cir. 1986) (denying standing because defendant failed to meet the burden of establishing that his presence was not unlawful). *See also* Melvin Gutterman, Note, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 670-71 (1988) (criticizing the *Katz* analysis because it led to a trend in the reduction of Fourth Amendment protections).

97. *See* State v. Carter, 569 N.W.2d at 179-80 (Minn. 1997) (Stringer, J., dissenting).

98. 119 S.Ct. 469 (1998).

99. *See id.* at 473.

100. *See id.* at 474 (Scalia, J., concurring).

101. *Id.* Justice Scalia concluded that this did not constitute a search because the apartment was not the defendant's residence. *See id.* at 477 (adhering to a very literal constitutional interpretation).

Joining the opinion of the Court, Justice Kennedy agreed with the Chief Justice that standing should be denied. He added that the defendant had failed to establish a "meaningful tie or connection to the owner, the owner's home, or the owner's expectation of privacy."[102] Discussing the facts surrounding Police Officer Thielen's actions, Justice Breyer suggested that the Court should focus not on the defendant's expectations, but rather analyze, and presumably prioritize, the "unreasonable search" component of the three-part inquiry under the Fourth Amendment.[103] On the other hand, Justice Ginsburg, writing for the dissent,[104] noted the sanctity of the home and advocated for the protection of guests who are invited by the homeowner to "share the privacy of her home and her company with a guest."[105]

The manner in which the Supreme Court came down in *Minnesota v. Carter* illustrates the subjective nature of the privacy-based standard. Furthermore, after this decision, there are many issues regarding Fourth Amendment "guest" cases left unanswered. Chief Justice Rehnquist's opinion provides only that the facts were not sufficient in this case to meet the privacy-based standing requirement. The dissent's conclusive standard that guests are deserving of Fourth Amendment protections, absent exigent circumstances,[106] is a better approach. This approach not only provides guidance to state and federal courts, but it adequately measures a host's and her guest's protections against invasions into the home. That is, protection is based on the host-guest relationship and precludes an analysis of the purpose of the visit which needlessly raises a level of subjectivity with reviewing judges. In conclusion, this Author's suggested test is simply an extension of the Court's grant of protection in *Minnesota v. Olson* to an overnight guest in order to avoid the pitfalls of the privacy-based standard.

V. FEDERAL AND STATE SUPPORT FOR GREATER PROTECTION UNDER THE MINNESOTA CONSTITUTION

A. Federal Support

Recent developments at the federal level would support Minnesota's rejection of the privacy-based standard. First, the Fourth Amendment was specifically created to protect against unwarranted intrusions into the home, what Justice Ginsburg in *Minnesota v. Carter* referred to as "the most essential bastion of privacy recognized by the law."[107] Thus, a guest should share the same protection as her host. Not only is Justice Ginsburg's approach more easily applied by the lower courts, but it is textually supported and provides adequate protection against governmental intrusions.

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102. *See id.* at 479 (Kennedy, J., concurring).

103. *See id.* at 480 (Breyer, J., concurring).

104. Justices Stevens and Souter joined Justice Ginsburg in her dissenting opinion. *See Minnesota v. Carter*, 119 S.Ct. at 480-84 (Ginsburg, J., dissenting).

105. *See id.* at 481-82. The dissent declined to address "classroom hypotheticals like the [visitation of the home by] the milkman or pizza deliverer." *Id.* at 482 (alteration in original).

106. For example, the dissent noted the hypothetical milkman or pizza deliverer. *See id.* at 482.

107. *See id.* at 481 (quoting United States v. Karo, 468 U.S. 705, 714 (1984)). Justice Kennedy also stated that he thought all social guests should have standing, absent commercial guests. *See id.* at 479.

Next, prior to the Supreme Court's decision in *Minnesota v. Carter*, the Court had acknowledged, in part, that the privacy-based approach may be inadequate at defining Fourth Amendment protections. In *Alderman v. United States*,[108] for example, the Court reaffirmed the framers' intentions that the Fourth Amendment's purpose is to protect the security of both persons and property.[109] In his dissenting opinion in *California v. Ciraolo*,[110] Justice Powell recommended that the Court adjust the privacy-based standard so that a court determines standing by analyzing whether the government action has intruded upon the defendant's reasonable expectation of privacy, rather than by measuring a person's expectation of privacy in terms of what society deems is reasonable.[111] By framing the inquiry in this manner, Justice Powell reasoned, the analysis would include both considerations of the framers' intentions, and "our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[112]

B. State Support

In addition to some of the Supreme Court justice's criticisms, a small number of states have implied additional protections in their own constitutions to criminal defendants.[113] By essentially granting defendants "automatic standing" to challenge the constitutionality of governmental actions,[114] these states have greatly broadened the protections of their own unreasonable search and seizure provisions. Instead of analyzing a defendant's expectation of privacy, a court that has adopted automatic standing focuses on the government agent's alleged "search."[115] This approach furthers the broader aim of the Fourth Amendment to protect a person's right to be secure from unwarranted governmental intrusions.

Over the last twenty years, the highest courts in nine states have adopted a rule under their own state search and seizure provision that is more similar to the *Jones*

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108. 394 U.S. 165 (1969).

109. *See id.* at 175.

110. 476 U.S. 207 (1986). In *Ciraolo*, a divided Court denied a defendant's motion to suppress evidence because a police officer's warrantless aerial observation of the defendant's cultivated marijuana plants was not unreasonable under the Fourth Amendment. *See id.* at 209-10, 213-14. Strictly applying a *Katz* analysis, the Court determined that although the defendant had a reasonable expectation of privacy in his backyard, his expectation of privacy was unreasonable because his backyard was visible from a public vantage point. *See id.* at 213-14. Explaining that the defendant's backyard was within the curtilage of the home, Justice Powell dissented claiming that "[a]t the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* at 220 (alteration in original) (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).

111. *See id.* at 218-20.

112. *Id.* at 220 (quoting Oliver v. Unites States, 466 U.S. 170, 178 (1984)).

113. *See* Williams, *supra* note 13, at 1268 n.53 (collecting cases where states have adopted an automatic standing rule). *See, e.g.*, State v. Owen, 453 So.2d 1202 (La. 1984); Commonwealth v. Amendola, 550 N.E.2d 121 (Mass. 1990); State v. Settle, 447 A.2d 1284 (N.H. 1982); State v. Alston, 440 A.2d 1311 (N.J. 1981); People v. Millan, 508 N.E.2d 903 (N.Y. 1987); State v. Tanner, 745 P.2d 757 (Or. 1987); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983); State v. Wood, 536 A.2d 902 (Vt. 1987); State v. Simpson, 622 P.2d 1199 (Wash. 1980).

114. Automatic standing simply refers to a court granting a criminal defendant standing because he has filed a motion to suppress evidence. *See* cases cited *supra* note 22.

115. *See, e.g.*, Commonwealth v. Roland, 701 A.2d 1360, 1362-63 (Pa. Super. Ct. 1997) (granting defendant automatic standing and accordingly analyzing police officer's "search").

automatic standing rule than the *Katz* privacy-based standard.[116] By so doing, these states have functionally lowered the burden of proof that a criminal defendant must bear to allege a search violation. Using this approach, these state courts focus more on the alleged search and reasonableness of the search, rather than on the Court's deficient and non-textually-based privacy standard.

One of the problems in this recent trend at the state level, however, is that the states have not adopted uniform standards. That is, although most of the states have rejected the privacy-based standard under *Katz*, there is no consensus regarding the burden of proof that a criminal defendant must bear to attain "automatic standing." Each state defines "automatic standing" using its own terms, thereby creating confusion as to what the term "automatic standing" means.

For example, in *State v. Owen*,[117] the Supreme Court of Louisiana recognized the federal jurisprudential privacy rule that governs standing under the Fourth Amendment, but invoked its own constitution to resolve the case's search issue.[118] In making its determination, the court noted that "although defendants do not have standing under the [F]ourth [A]mendment absent a showing of a reasonable expectation of privacy in the area searched, they have standing under [the state constitution]."[119] As long as a defendant is "adversely affected" by an alleged unconstitutional search, the Louisiana Supreme Court will grant a defendant standing to challenge the admissibility of the evidence seized.[120]

In *Commonwealth v. Amendola*,[121] the Supreme Judicial Court of Massachusetts, similar to the court in *State v. Owen*, referenced the federal standards pursuant to searches and the *Jones* court reasoning.[122] The *Amendola* court concluded that the principal concerns of the *Jones* court remained valid, "despite the current Supreme Court's shift in thinking."[123] Thus, pursuant to Article 14 of the Massa-

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116. *See* cases cited *supra* note 113.

117. 453 So.2d 1202 (La. 1984). The criminal defendants filed motions to suppress physical evidence that had been seized pursuant to a warrantless search of a residence owned by a third party. *See id.* at 1203. The case appeared before the Supreme Court of Louisiana after the defendants were denied standing by the trial court. *See id.* The facts of the case provide that several police officers knocked, and then entered the third party's trailer after a victim of an armed robbery and assault reported the whereabouts of one of the perpetrators. *See id.* at 1203-04. The owner of the trailer knowingly consented to the search of the premises, and the officers discovered items that belonged to the victim. *See id.* at 1204.

118. *See id.* at 1205. Louisiana's search and seizure provision provides, in relevant part: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. . . . Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." LA. CONST. art. 1, § 5.

119. State v. Owen, 453 So.2d at 1205.

120. *See id.*

121. 550 N.E.2d 121 (Mass. 1990). The facts in *Amendola* are strikingly similar to those found in *Carter*. In *Amendola*, the criminal defendant filed a motion to suppress items found in two automobiles when he was faced with a potential conviction of possession of cocaine and marijuana. *See id.* at 121. The officer involved in the case was tipped off by an informant that a drug transaction was to take place in a shopping center parking lot. After observing a transaction between several parties, the police officer approached one of the men and later searched the car, discovering a packet of white powder and what appeared to be marijuana. *See id.* at 122. Likewise, a search of the defendant's car resulted in the police officer's discovery of a balance scale and a white powder (later identified as cocaine). *See id.*

122. *See also* discussion *supra* note 33.

123. *See* Commonwealth v. Amendola, 550 N.E.2d at 125.

chusetts Declaration of Rights,[124] the court announced its adoption of the overruled *Jones* automatic standing rule.[125] The court qualified its adoption of the *Jones* rule, however, stating that "[w]hile we consider it unnecessary to discard completely expectation-of-privacy analysis for the purposes of this case, we do recognize the risks in over-emphasizing such a manipulable standard while losing sight of other important considerations, such as those which animate the automatic standing rule."[126] The court established the rule that "[w]hen a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence."[127] Furthermore, the Supreme Judicial Court of Massachusetts limited the application of this rule to cases involving automobile searches and house searches and left other fact patterns where possession crimes are at issue to a case-by-case analysis.[128]

State v. Settle[129] concerned the denial of a suppression motion brought by a criminal defendant challenging the legality of a warrantless search of the premises of a third party. Invoking its own constitution,[130] the Supreme Court of New Hampshire affirmatively concluded that the language of the state constitution *requires* that "automatic standing" be "afforded to all persons within the State of New Hampshire who are charged with crimes in which possession of any article or thing is an element."[131] The court reasoned that cases decided by the United States Supreme Court represent the application of only "the minimum standards required in order to satisfy the Fourth Amendment's proscription against unreasonable searches."[132] Furthermore, the court in *Settle* recognized the Supreme Court's rationale behind eliminating the automatic standing rule,[133] but regardlessly stated:

> [A] strong argument in support of automatic standing may be made on the very simple and practical premise that—for the benefit of law enforcement, the trial courts, and the trial bar—that class of persons who may assert rights against unlawful searches and seizures should be clearly defined. . . . The protection of

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124. Article 14 provides in relevant part: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his house, his papers, and all his possessions . . . ." MASS. CONST., art. 14.

125. *See* Commonwealth v. Amendola, 550 N.E.2d at 125.

126. *See id.* at 126.

127. *See id.*

128. *See id.* at 126 n.4.

129. 447 A.2d 1284 (N.H. 1982). In *Settle*, police received the information that the defendant was storing his guns at a third party's make-shift hut. They entered the hut, which did not have a latch, observed the guns, and then proceeded to obtain a search warrant. *See id.* at 1285.

130. New Hampshire's search and seizure provision provides:

> Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places . . . are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation . . . and with the formalities, prescribed by law.

N.H.CONST. pt. I, art. 19.

131. *See* State v. Settle, 447 A.2d at 1286 (emphasis added).

132. *See id.* (quoting People v. Brisendine, 531 P.2d 1099, 1110 (1975)).

133. *See supra* notes 22 and 33 and accompanying text.

constitutional rights and effective law enforcement will be better aided by a simpler, less fact-specific test."[134]

The Supreme Court of New Jersey, in *State v. Alston*,[135] also adopted the *Jones* rule in a case where the defendant was charged with an offense in which the possession of seized evidence at the time of the contested search was an essential element of guilt.[136] Stating that automatic standing is a salutary rule, the court criticized the use of a standing requirement as being wasteful.[137] Similarly, the Court of Appeals of New York determined that constructive possession of a weapon by a defendant was a sufficient predicate to give the defendant standing to challenge the search of a passenger compartment of a taxicab in which he was riding.[138]

The Supreme Court of Oregon recognized the burdensome nature of a special search and seizure standing requirement and determined that "[t]here is no issue of [a] defendant's standing to challenge [an] unlawful search. A criminal defendant always has standing to challenge the admission of evidence introduced by the state."[139] Invoking the protections of the Oregon constitution,[140] the court stated that "the term 'standing' should be used only in the narrow sense of capacity to make a legal challenge."[141] Furthermore, the court rejected the notion that whether

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134. State v. Settle, 447 A.2d at 1287. The court then explained how the "legitimate expectation of privacy doctrine" beleaguers the judicial process. The New Hampshire Supreme Court further explained "[a] recent First Circuit case that wrestled with the fact that the [privacy-based] analysis might lead to differentiating among an object tied up in a rain slicker, one that is wrapped in a slicker, and one merely lying under the slicker. *See id.* (citing United States v. Weber, 668 F.2d 552, 561-62 (1st Cir. 1981) (Coffin, C.J., dissenting in part)). Furthermore, the court in *Settle* pointed out the impracticality of the *Katz* analysis as it applies to the "policemen on the street" who attempt to interpret and apply the test. *See id. But see* State v. Alosa, 623 A.2d 218, 220-22 (N.H. 1993) (declining to extend the automatic standing doctrine to a case where the defendant was not charged with possession).

135. 440 A.2d 1311 (N.J. 1981). *Alston* is a classic automobile search case. After successfully apprehending a speeding car, the police in *Alston*, while peering in the window of the vehicle, noticed shotgun shells in the open glove compartment. *See id.* at 1313. Upon closer inspection, the police recovered a sawed-off shotgun from the vehicle and subsequently arrested the passengers. *See id.* at 1314.

136. *See id.* at 1319-20.

137. *See id.* at 1320. The court stated that "[t]he automatic standing rule is a salutary one which protects the rights of defendants and eliminates the wasteful requirement of making a preliminary showing of standing in pretrial proceedings involving possessory offenses, where the charge itself alleges an interest sufficient to support a Fourth Amendment claim." *Id.* (citing United States v. Salvucci, 448 U.S. 83, 97 (1980)).

138. *See* People v. Millan, 508 N.E.2d 903 (N.Y. 1987). *But see* People v. Ochsner, 159 A.D.2d 435, 436 (N.Y. App. Div. 1990) (applying "expectation of privacy" analysis to the facts of the case because the defendant's crime involvement arose not only from a weapons charge, but because of information that he might have been involved in an armed robbery).

139. State v. Tanner, 745 P.2d 757, 759 (Or. 1987). In *State v. Tanner*, the defendant moved to suppress evidence uncovered by the police during an invalid warranted search of the defendant's premises. *See id.* at 757-58.

140. The relevant state search and seizure provision provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

OR. CONST. art. I, § 9 (1998).

141. *See* State v. Tanner, 745 P.2d at 759.

an interest is constitutionally protected hinges on whether the activity concerns contraband, rather than stolen property.[142] Curiously, after making these statements the court proceeded to apply an analysis based partly on privacy rights.[143] However, the Oregon court, unlike the Minnesota Supreme Court, recognized that an individual's right[144] to privacy was correctly measured by the individual's right to exclude a government agent's intrusion.[145]

Rejecting the Court's abolition of the automatic standing rule, the Supreme Court of Pennsylvania recognized automatic standing for possessory crime defendants in *Commonwealth v. Sell*.[146] In resolving a dispute between the superior court and the court of common pleas, the Pennsylvania Supreme Court first recognized its right to interpret its state constitution more liberally than the Court has interpreted the Constitution.[147] Next, the court invoked its own search and seizure provision[148] and determined that the purpose of Article I, section 8 had not changed

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142. *See id.* The court in *Tanner* recognized the paradox raised by the Court in *Jones* whereby a possessory crimes defendant may implicate him/herself in a crime by raising the motion to suppress. *See id.* at 759 n.3.

143. *See id.* at 760-63.

144. The *Tanner* court recognized the difference between interpreting the state constitution to protect an individual's *right* to privacy, rather than their *expectation* of privacy under the state constitution. *See id.* at 762 n.7 (emphasis added). It is interesting how the court applied a strict constructionist approach to the nature of the right invaded, while at the same time implying a privacy interest into the text of the state constitution.

145. *See id.* at 762. *Cf.* United States v. Katz, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) (introducing the notion that privacy rights are measured in terms of what society deems is reasonable).

The manner in which the *Tanner* court openly rejects a standing requirement for criminal defendants to challenge evidence allegedly obtained by an illegal search while at the same time applying a partial privacy-based analysis is puzzling. The *Tanner* court's analysis is more justifiable than the Minnesota Supreme Court's analysis in *Carter* because the privacy right is preserved in terms of the individual's right to exclude the government—the proper measure to protect an individual's right to be secure.

146. 470 A.2d 457 (Pa. 1983). In *Sell* a local police department executed a search warrant to search an amusement arcade for firearms stolen after a robbery. *See id.* at 458-59. As a result of the search, the police recovered a number of said firearms. The defendant, a partner in the arcade business, was not present at the time of the search and therefore sought to exclude the evidence via a motion to suppress. *See id.* at 459.

147. *See id.* The *Sell* court relied on commentary by Justice Brennan:

> [T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

Id. (quoting Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)).

148. Article I, section 8 of the Pennsylvania Declaration of Rights states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8.

from its original purpose which was "to guarantee protection from unreasonable governmental intrusion."[149]

Thus, the Pennsylvania Supreme Court declined to extend the *Katz* analytical framework, and instead agreed with the New Jersey Supreme Court's holding in *State v. Alston*[150] in its adherence to the automatic standing rule.[151] In conclusion, the court remained convinced "that ownership or possession of the seized property is adequate to entitle the owner or possessor thereof to invoke the constitutional protection of Article I, section 8 by way of a motion to suppress its use as evidence."[152]

In *State v. Wood*,[153] the Vermont Supreme Court made the similar argument that current Fourth Amendment jurisprudence is inconsistent with the original purpose of the state's search and seizure provision. The court added that the plain meaning of its state provision supported a return to the automatic standing rule.[154] In conducting its analysis, the court first criticized the current federal standards as curtailing the "function of the judiciary by focusing on the defendant's ability to present a challenge rather than on the challenge itself, and by unduly limiting the class of defendants who may invoke the right to be free from unlawful searches and seizures."[155]

The Vermont Supreme Court then invoked its search and seizure provision and stated that "the right of the people 'to hold themselves, their houses, papers, and possessions, free from search and seizure' . . . premises the protected right upon an objectively defined relationship between a person and the item seized or place searched, as opposed to a subjective evaluation of the legitimacy of the person's expectation of privacy in the area searched."[156] Therefore, the Vermont Supreme Court declared that a possessory crimes defendant need only "assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing."[157] Noting that the court in *State v. Settle* criticized the federal standards as providing little guidance,[158] the *Wood* court determined that its standard, based on the possessory interest test, is easier to apply "because it is based on an objective inquiry into the relationship between the suspect and the item to be seized or the place searched."[159]

Finally, the Washington Supreme Court was critical of the federal standards in *State v. Simpson*.[160] Interestingly, in this case the *Simpson* court stated that the

149. *See* Commonwealth v. Sell, 470 A.2d at 467.

150. 440 A.2d 1311 (N.J. 1981), discussed *supra* notes 135-37.

151. *See* Commonwealth v. Sell, 470 A.2d at 468. The court noted that the Supreme Court's "current use of the 'legitimate expectation of privacy' concept needlessly detracts from the critical element of unreasonable governmental intrusion." *See id.*

152. *See id.* at 469 (citing State v. Alston, 440 A.2d 1311 (N.J. 1981).

153. 536 A.2d 902 (Vt. 1987). In *State v. Wood*, the defendant claimed that the trial court erred in denying his motion to suppress the product of a warrantless search of his trailer and nearby vehicles by state police officers. *See id.* at 902-03. The vehicles were implicated in a theft of stolen motorcycles. *See id.*

154. *See id.* at 904.

155. *See id.* at 908.

156. *See id.* (citing State v. Alston, 440 A.2d 1311, 1319 (N.J. 1981)).

157. *See id.*

158. 447 A.2d 1284 (N.H. 1982).

159. *See* State v Wood, 536 A.2d at 909.

160. 622 P.2d 1199 (Wash. 1980). In *Simpson*, the criminal defendant sought to suppress evidence obtained by police officers who searched the stolen vehicle he had been driving after they had put the defendant in jail. *See id.* at 1202-03.

Supreme Court's holding in *Simmons v. United States*[161] inadequately provided protection against the self-incrimination dilemma because a prosecutor could still use a defendant's suppression hearing testimony to impeach her at trial.[162] Therefore, the court determined that the state constitution must be used to assign a "right to assert a violation of privacy as a result of impermissible police conduct at least in cases where, as [in *State v. Simpson*], a defendant is charged with possession of the very item which was seized" to obviate the self-incrimination dilemma.[163] Thus, the Washington Supreme Court adopted a possessory interest automatic standing rule and provided greater protection against the self-incrimination dilemma. The court raised an interesting loophole in the *Simpson* case and offered a compelling reason for courts to grant automatic standing when a defendant is charged with a possessory crime.

Although an analysis of the states that have rejected the privacy-based standard reveals the inconsistency in standards being applied by the states, it is clear that all of these states have agreed that the federal Fourth Amendment jurisprudential standards are inadequate. That is, many state courts have recognized that the privacy-based standard is not textually-based and does not adequately guarantee Fourth Amendment protections. These courts criticize the privacy-based standard as being too fact specific;[164] easily manipulable;[165] wasteful;[166] an inadequate measure of search and seizure protections;[167] an aberrant standard that is not textually based;[168] overly burdensome and focused on the wrong party.[169]

V. RECOMMENDATION

The Minnesota Supreme Court has followed the Court's privacy-based standards in lock and step fashion over the last thirty years.[170] Before then, the Minnesota Supreme Court, like the Court, held that the enjoyment of property rights was inherent in Minnesota's Bill of Rights.[171] In none of its recent decisions, however, has the Minnesota Supreme Court expanded the protections afforded by Article 1, Section 10.[172]

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161. 390 U.S. 377 (1968).

162. The *Simpson* court stated that "without automatic standing, a defendant will ordinarily be deterred from asserting a possessory interest in illegally seized evidence because of the risk that statement [sic] made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment." State v. Simpson, 622 P.2d at 1206.

163. *See id.*

164. *See supra* note 134 and accompanying text.

165. *See supra* note 126 and accompanying text.

166. *See supra* note 137 and accompanying text.

167. *See supra* note 145 and accompanying text.

168. *See supra* note 149 and accompanying text.

169. *See supra* note 159 and accompanying text.

170. *See* State v. Bryant, 177 N.W.2d 800 (Minn. 1970) (adopting *Katz* reasonable expectation of privacy approach); State v. Tungland, 281 N.W.2d 646 (Minn. 1979) (adhering to the Court's decision in *Rakas*); State v. Guy, 298 N.W.2d 45 (Minn. 1980) (following *Salvucci*).

171. *See* Thiede v. Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944) (recognizing inherent property rights).

172. *See* Williams, *supra* note 13, at 1272 (noting that the Minnesota Supreme Court has not yet considered whether the state's constitution independently protects a person's property and privacy rights against government intrusions).

The Minnesota Supreme Court can broaden its search and seizure protections because Article 1, Section 10 may be interpreted more broadly than the United States Supreme Court's interpretations of the Fourth Amendment.[173] The Minnesota Supreme Court has yet to seriously consider, however, whether its constitution provides defendants of possessory crimes with greater protection under its search and seizure provision.[174] The *Carter* decision illustrates the court's reluctance to adopt a more protective standard.[175]

A strict adherence to the Court's privacy-based standard is misguided. The Minnesota Supreme Court's faulty reasoning in *Carter* is merely one illustration of the deficiencies of the Court's standards. Just as the property-based approach has become obsolete,[176] so has the privacy-based standard become inadequate at securing Fourth Amendment protections. The Minnesota Supreme Court, therefore, should follow the handful of states that have recently rejected the Court's privacy-based standard. Not only is the Minnesota Supreme Court authorized to interpret its constitution more broadly than the Court's interpretations, but recent federal and state decisions support the notion that the court adopt a rule that is more similar to the *Jones* automatic standing rule. By so doing, the Minnesota Supreme Court can afford defendants greater protection against governmental intrusions.

As a number of state courts have pointed out, state courts should carefully consider whether to apply the Court's privacy-based standard introduced by Justice Harlan in *Katz*. Although the *Jones* "legitimately on the premises" standing rule may not be encompassing enough for state courts to apply to all fact patterns raised under the rubric of search and seizure provisions, a standing rule that is less fact-specific and burdensome would result in better protection against intrusive governmental action.

Therefore, until the United States Supreme Court resolves the inadequacies of the Fourth Amendment standards, state courts would greatly benefit from invoking their own constitutions and adopting a rule more similar to the *Jones* automatic standing rule. Because the Court resolved the self-incrimination dilemma in *Simmons*, state courts should provide standing for all guests alleging a search. Justice Ginsburg's analysis of the facts in *Carter* addresses the "guest" situation correctly and only leaves open the issue of the fleeting visitors of a home.[177] This

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173. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (recognizing the states' powers to interpret their own constitutions more broadly than the Supreme Court's interpretations). *See also* Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

Because the framers of Article 1, Section 10 of the Minnesota Constitution essentially enacted a provision identical to the federal counterpart, there is an argument that the framers intended the two provisions to be similarly interpreted. *See* Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94, 99 n.6 (Minn. 1979) (recognizing that "where a constitutional or statutory provision is taken from another state . . . the construction placed upon it by the court of that state is presumed to be adopted with the provision"). This presumption is not controlling, however. *See* Pruneyard Shopping Center v. Robins, 447 U.S. at 81.

174. *See* State v. Willis, 320 N.W.2d 726, 727 (Minn. 1982) (refusing to consider whether the court should adopt automatic standing).

175. *See* State v. Carter, 569 N.W.2d 169 (Minn. 1997), *rev'd*, 119 S. Ct. 469 (1998).

176. *See supra* Part II.B.

177. *See* Minnesota v. Carter, 119 S.Ct. 469, 481-82 (1998).

approach is more harmonious with the framers' intentions and the early case law under the Fourth Amendment and also affords greater protection against government intrusions. Also, by adopting this uniform standard, state courts could avoid the current confusing situation where each state is rendering its own definition of the term "automatic standing." Finally, and most important, this Author's proposed approach more adequately measures the right guaranteed under the Fourth Amendment and state search and seizure provisions: the "right of the people to be secure."[178]

Rebecca L. Garrett

178. *See* U.S. CONST. amend. IV.