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Monitoring of Beeper Signal Emanating from Private Residence Violates Fourth Amendment Rights of Those Who Have an Expectation of Privacy in the Home.

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CASENOTES

CRIMINAL LAW—Search and Seizure—Monitoring of Beeper Signal Emanating From Private Residence Violates Fourth Amendment Rights of Those Who Have an Expectation of Privacy in the Home

United States v. Karo,
__ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

In August 1980, James Karo, Richard Horton, and William Harley ordered fifty gallons of ether from a government informant, Carl Meuhlenweg.[1] Meuhlenweg informed a Drug Enforcement Administration (DEA) agent that the ether was intended for use in the extraction of cocaine from imported clothing.[2] Based on this information, the DEA was granted a court order to install an electronic tracking device in one of the cans of ether, which led them to four residences and two commercial storage facilities.[3] As a result of information gathered through electronic surveillance and visual observations during a five-month period, a search warrant was obtained to enter the last home in which the beeper was monitored;[4] upon its

1. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3300, 82 L. Ed. 2d 530, 537 (1984).

2. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537.

3. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537 (government given consent by informant to substitute government-owned can equipped with beeper).

4. *See id.* at __, 104 S. Ct. at 3300-01, 82 L. Ed. 2d at 537-38. On September 20, 1980, the DEA observed Karo pick up the ether from the informant and then followed him to his residence. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537 (agents used both visual and electronic surveillance in following Karo). Later that day, relying on the homing device, the agents ascertained that the cans of ether had been moved to the home of Horton. *See* United States v. Karo, 710 F.2d 1433, 1437 (10th Cir. 1983), *rev'd,* __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). Two days later, the beeper signal indicated the car was relocated at Horton's father's home. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3300, 82 L. Ed. 2d 530, 537 (1984). Again, the agents had not visually observed the move, but relied on the beeper to locate the ether's whereabouts. *See* United States v. Karo, 710 F.2d 1433, 1437 (10th Cir. 1983), *rev'd,* __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). The following day, monitoring of the beeper revealed the ether had been moved from Horton's father's residence

execution, the DEA confiscated cocaine and laboratory equipment.[5] This evidence was used to charge Karo, Horton, Harley, Michael Steele, and Evan Roth with conspiracy to possess and distribute cocaine.[6] The district court granted a motion to suppress the confiscated evidence based on the determination that the government's affidavits supporting the order to install the beeper were based on intentional misrepresentations.[7] The United States appealed the decision to the Court of Appeals for the Tenth Circuit which affirmed the lower court with the exception of one defendant.[8] The Supreme

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to a commercial storage locker facility. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3300, 82 L. Ed. 2d 530, 537 (1984). The ether was observed during the installation of a tone alarm in the locker, whereupon visual surveillance ceased. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537. The alarm failed and agents were advised by the manager that the contents had been removed by Horton. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537. The agents then tracked the ether with a direction finder to a second storage facility and detected the odor of ether coming from locker 15, which was rented by Horton and Harley. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537. On February 6, 1981, the DEA agents observed, through the video camera, Gene Rhodes and an unidentified woman remove the cans of ether and place them into Horton's truck. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 537-38 (Rhodes and companion were visually observed and electronically tracked by beeper surveillance to Rhodes' residence). Later that day, upon leaving Rhodes' driveway, the ether was followed to a home rented by Horton, Harley, and Michael Steele. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 538. Beeper monitoring was used to determine that the can remained in the home. The next day agents observed the windows open on a cold day, indicating ether was being used. *See id.* at __, 104 S. Ct. at 3301, 82 L. Ed. 2d at 538.

5. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. at 3296, 3301, 82 L. Ed. 2d 530, 538 (1984).

6. *See id.* at __, 104 S. Ct. at 3301, 82 L. Ed. 2d at 538. The respondents, except Rhodes, were charged with violating 21 U.S.C. § 841(a)(1), which reads in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, . . . a controlled substance . . . ." *See id.* at __, 104 S. Ct. at 3301, 82 L. Ed. 2d at 538. The respondents, including Rhodes, were also indicted for conspiracy to possess under the following provision: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3301, 82 L. Ed. 2d 530, 538 (1984).

7. *See* United States v. Karo, 710 F.2d 1433, 1435 (10th Cir. 1983), *rev'd*, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). The government claimed the misrepresentations were necessary to protect the confidential status of its informant and told the judge issuing the installation order that the informant was actually a target of the investigation. *See* Respondent's Brief at 2-4, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). The district court found the evidence was tainted because it was the product of an unauthorized installation and monitoring of a beeper. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3301, 82 L. Ed. 2d 530, 538 (1984).

8. *See id.* at __, 104 S. Ct. at 3301, 82 L. Ed. 2d at 538. Rhodes was found to not have a legitimate expectation of privacy in any of the areas illegally monitored by the beeper. *See* United States v. Karo, 710 F.2d 1433, 1441 (10th Cir. 1983), *rev'd*, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

Court granted the government's writ of certiorari to determine if the warrantless installation, with the owner's consent, of an electronic tracking device inside a container of ether violated fourth amendment protection of the subsequent owner of the container, and whether the warrantless monitoring of the beeper which had entered a private area constituted a fourth amendment violation to the occupants of that area.[9] Held—*Reversed.* The installation of a beeper into a container with the consent of the owner does not require a warrant with regard to subsequent owners,[10] but the warrantless monitoring of the beeper in a private residence violates the occupants' expectation of privacy guaranteed by the fourth amendment.[11]

The fourth amendment safeguards individuals from unreasonable searches and seizures by requiring that a warrant be issued based on probable cause before a search or seizure can be conducted.[12] Probable cause determinations are to be made by a neutral and detached magistrate, and searches

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9. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3301, 82 L. Ed. 2d 530, 538-39 (1984).

10. *See id.* at __, 104 S. Ct. at 3302, 82 L. Ed. 2d at 540.

11. *See id.* at __, 104 S. Ct. at 3305, 82 L. Ed. 2d at 543-44.

12. *See* U.S. CONST. amend. IV. The fourth amendment reads:

> 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.

Id. The fourth amendment was designed to prevent the abuses of general searches and writs of assistance suffered by American citizens while under English rule. *See* Boyd v. United States, 116 U.S. 616, 622-32 (1885). *See generally* Amsterdam, *Perspectives On The Fourth Amendment,* 58 MINN. L. REV. 349, 362 (1974) (purpose of fourth amendment safeguards citizens from historical abuses). The Supreme Court has defined search and seizure: "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *See* United States v. Jacobsen, __ U.S. __, __, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984). Probable cause has been defined as "whether at the moment [of either arrest or warrant application] the facts and circumstances within their [(police or magistrate's)] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *See* Beck v. Ohio, 379 U.S. 89, 91 (1964). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2 (1977 & Supp. 1984) (examination of development and application of probable cause). The probable cause requirement protects the citizen against intrusions based solely on the discretion of police officers. *See, e.g.,* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (fourth amendment imposes reasonable standard on law officials' discretion); Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (probable cause standard represents necessary accommodation between individual's rights and state's duty to control crime); United States v. United States District Court, 407 U.S. 297, 316 (1972) (probable cause requirement prevents baseless searches). *See generally* Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. PITT. L. REV. 227, 243-56 (1984) (discussing difficulties in concept of probable cause).

conducted without a warrant are presumed unreasonable.[13] Although adhering to a preference for warrants, the United States Supreme Court has recognized limited exceptions to this requirement.[14] In order to benefit from the protection provided by the fourth amendment, an individual must establish a reasonable expectation of privacy in the place searched or the thing seized.[15] To guarantee the citizen will not suffer from fourth amendment

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13. *See* Johnson v. United States, 333 U.S. 10, 14-15 (1948) (fourth amendment protection ensured by requiring neutral and detached magistrate to determine if evidentiary inferences justify search). The Supreme Court has demonstrated a preference for search warrants. *See, e.g.,* New York v. Belton, 453 U.S. 454, 457 (1981) (first principle of fourth amendment is police must have approval of magistrate before search); Mincey v. Arizona, 437 U.S. 385, 395 (1978) (warrantless four day search of murder scene unreasonable); Katz v. United States, 389 U.S. 347, 357 (1967) (searches not conducted with approval of magistrate per se unreasonable, subject only to few exceptions). In addition to establishing probable cause, the warrant must satisfy particularity requirements in its description of things to be searched or seized. *See, e.g.,* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979) (warrant cannot leave to discretion of police what items to seize); Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971) (where warrant fails to mention particular object, fourth amendment violation results); Marron v. United States, 275 U.S. 192, 196 (1927) (requirement that warrant particularly describe things to be seized prevents general searches). *See generally* Bloom, *The Supreme Court and Its Purported Preference for Search Warrants,* 50 TENN. L. REV. 231, 231-70 (1983) (discussion of Supreme Court's fluctuating warrant requirements).

14. *See* Welsh v. Wisconsin, __ U.S. __, __, 104 S. Ct. 2091, 2100, 80 L. Ed. 2d 732, 745 (1984) (nighttime entry into home absent exigent circumstances and without warrant violates fourth amendment); United States v. Ramsey, 431 U.S. 606, 619 (1977) (border search reasonable absent probable cause); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of suspect justifies warrantless entry); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (voluntary consent can justify warrantless search); Chimel v. California, 395 U.S. 752, 763 (1969) (police may search, without warrant, immediate area in control of arrested person); Carroll v. United States, 267 U.S. 132, 153-56 (1925) (probable cause that car contains criminal evidence and exigent circumstances due to car's mobility justify warrantless search). Brief detentions and frisks are also permitted without a warrant. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (officer may conduct frisk based upon reasonable suspicion); *see also* Note, *Criminal Law—Search and Seizure—Michigan v. Long,* 15 ST. MARY'S L.J. 443, 445 n.14 (1983). *See generally* Special Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982,* 71 GEO. L.J. 339, 369-97 (1982) (overview of warrantless searches).

15. *See, e.g.,* Oliver v. United States, __ U.S. __, __, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225-26 (1984) (no legitimate expectation in open field); Illinois v. Andreas, __ U.S. __, __, 103 S. Ct. 3319, 3325, 77 L. Ed. 2d 1003, 1040 (1983) (individual cannot have expectation of privacy in container of contraband); Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (fourth amendment protection attached when person's reasonable expectation of privacy violated). The reasonable expectation analysis is a subjective belief on the part of the individual which society would recognize as reasonable. *See id.* at 361. This analysis has been used by the courts to determine if there has been a violation of fourth amendment protection. *See* J. HALL, SEARCH AND SEIZURE § 2.6, .7 (1982) (discussion of Supreme Court's application of two-pronged test proposed in Katz). *See generally* Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1298-1301 (1981) (discussion of development of expectation of privacy).

violations, evidence obtained in disregard of the individual's rights cannot be used to obtain a conviction.[16]

During the era in which government electronic surveillance technology was still in its infancy, the Supreme Court required an actual physical intrusion into a constitutionally protected area before a fourth amendment violation would occur.[17] This analysis was presented in *Olmstead v. United States,*[18] which held that where a wiretap was installed, in the absence of a trespass, there was no search[19] and that conversations, as intangible items, were incapable of being seized.[20] The possibility that technology might soon outgrow the protection provided under the trespass doctrine was forecasted

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16. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 347 (1974) ("rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment"); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence obtained in violation of fourth amendment inadmissible in state courts); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence seized in violation of constitutional protection should not be used in federal courts). *See generally* J. HALL, SEARCH AND SEIZURE § 20.2 (1982) (development and application of exclusionary rule). The Court has recently recognized exceptions to this exclusionary rule. *See* United States v. Leon, __ U.S. __, __, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677, 692 (1984) (exclusionary rule no avail when officers gather evidence in good faith reliance of invalid search warrant); Massachusetts v. Sheppard, __ U.S. __, __, 104 S. Ct. 3424, 3428, 82 L. Ed. 2d 737, 744 (1984) (officer's reasonable belief that magistrate issued valid warrant precludes exclusionary rule application upon evidence seized from warrant's execution). To benefit from the exclusionary rule, one must have standing to object to the admissibility of the evidence. *See, e.g.,* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (defendant did not have expectation of privacy in companion's purse; therefore, could not object to evidence unlawfully seized from it); Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (passengers in automobile cannot invoke exclusionary rule to suppress evidence seized from glove compartment and under seat); Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (right to claim exclusionary rule depends upon reasonable expectation of privacy in thing searched and not upon property right). *See generally* Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones,* 18 AM. CRIM. L. REV. 387, 390-95 (1981) (comprehensive study of standing and proposals for new test). The exclusionary rule does not apply to evidence that indirectly derives from an illegal search and seizure. *See, e.g.,* Nix v. Williams, __ U.S. __, __, 104 S. Ct. 2501, 2512, 81 L. Ed. 2d 377, 387 (1984) (body would inevitably have been discovered; therefore, evidence pertaining to its discovery admissible despite being fruit of illegal confession); Rawlings v. Kentucky, 448 U.S. 98, 110 (1980) (confession resulting from illegal detention admissible if voluntary); United States v. Ceccolini, 435 U.S. 268, 279 (1978) (live testimony derived from illegal search admissible based on attenuation from tainted search).

17. *See, e.g.,* Silverman v. United States, 365 U.S. 505, 512 (1961) (intrusion of microphone into protected area constituted fourth amendment violation); Goldman v. United States, 316 U.S. 129, 135 (1942) (detectaphone placed against office wall not trespass; evidence from overheard conversations admissible); Olmstead v. United States, 277 U.S. 438, 466 (1928) (wiretap installed in basement of office building did not constitute physical invasion required for fourth amendment violation).

18. 277 U.S. 438 (1927).

19. *See id.* at 457.

20. *See id.* at 466.

in Justice Brandeis' dissenting opinion in *Olmstead.*[21] With the advent of sophisticated electronic surveillance technology,[22] the Supreme Court rejected the trespass concept of fourth amendment protection in *Katz v. United States.*[23] The majority in *Katz,* holding the fourth amendment "protects people and not simply areas,"[24] instated the "expectation of privacy" test and abandoned the requirement of physical intrusion in order to determine a search.[25] In applying the *Katz* test, courts have relied on Justice Harlan's concurring opinion which sets forth a two-fold analysis of an individual's expectation of privacy.[26] First, an individual is required to have a subjective expectation of privacy; second, this expectation must be one "that society is prepared to recognize as 'reasonable.' "[27] With the emergence of the *Katz* reasonable expectation of privacy concept, the lower courts set about resolving the various constitutional issues arising from the installation and moni-

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21. *See id.* at 474 (Brandeis, J., dissenting). Justice Brandeis argued:

> The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping [sic]. Ways may some day [sic] be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences at home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

Id. at 474.

22. *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 1.01 (1977) (discussion of capabilities of electronic surveillance devices); *see also* Note, *Anthropotelemetry: Dr. Schwitzgebel's Machine,* 80 HARV. L. REV. 403, 408 (1966) (discussion of possible privacy problems evolving from use of electronic surveillance).

23. *See* 389 U.S. 347, (1967).

24. *See id.* at 353. The Court held: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citation omitted). *Katz* also held that intangible things, such as conversations, could be seized. *See id.* at 353.

25. *See id.* at 351-53. The listening device was attached without a warrant. *See id.* at 356. *Katz* held that the government's attachment of a listening device to the exterior of a telephone booth violated the occupant's fourth amendment protection because a person who enters a public phone booth and closes the door behind him has an expectation that his conversations will remain private. *See id.* at 352.

26. *See, e.g.,* Illinois v. Andreas, __ U.S. __, __, 103 S. Ct. 3319, 3323, 77 L. Ed. 2d 1003, 1010 (1983) (threshold question is whether one had expectation of privacy in container's contents); Smith v. Maryland, 442 U.S. 735, 736-37 (1979) (recognized Harlan's expectation of privacy analysis and applied it to hold that suspect did not have an expectation of privacy in telephone numbers dialed from his home); Terry v. Ohio, 392 U.S. 1, 9 (1968) (where one exhibits reasonable expectation of privacy, he should be protected from unreasonable government intrusion) (quoting Katz v. United States, 389 U.S. 347, 361 (1967)). *See generally* Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461, 1472 (1977) (critique on application of expectation of privacy test as applied to beeper cases).

27. *See* United States v. Katz, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

toring of beepers.[28]

Beepers, also known as beacons or transponders, are electronic signaling devices used to determine the location of items to which the beepers are attached.[29] These devices have been used to investigate a variety of criminal activities and have been attached to an assortment of objects.[30] From the outset of litigation involving these devices, the circuits developed discernible philosophies in confronting the issues before them.[31] In examining these de-

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28. *See* Case Comment, *Electronic Tracking Devices and the Fourth Amendment—United States v. Michael,* 16 GA. L. REV. 197, 200 n.19 (1981) (extensive citation of cases utilizing reasonable expectation of privacy approach to resolve electronic tracking problems).

29. *See, e.g.,* United States v. Butts, 710 F.2d 1139, 1142-43 (5th Cir.) (may be described as "miniature, battery-powered radio transmitter" which emits signals to directional finder), *rev'd on other grounds,* 727 F.2d 1514 (5th Cir. 1983); United States v. Lewis, 621 F.2d 1382, 1387 (5th Cir. 1980) (beeper conveys information which could normally only be gathered through visual observation and allows authorities to find object if they lose sight of it), *cert. denied,* 450 U.S. 935 (1981); United States v. Hufford, 539 F.2d 32, 33 (9th Cir.) (beeper not a recording device and therefore does not transmit conversation), *cert. denied,* 429 U.S. 1002 (1976). *See generally* Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461, 1462-1508 (1977) (general discussion on electronic beepers and their role in law enforcement). One form of beeper emits an altered signal when the package in which it is placed is opened. *See* United States v. Emery, 541 F.2d 887, 888 (1st Cir. 1976).

30. *See* United States v. Butts, 729 F.2d 1514, 1515 (5th Cir. 1984) (beeper installed inside airplane); United States v. Michael, 645 F.2d 252, 255 (5th Cir. 1981) (beeper placed on exterior of van), *cert. denied,* 454 U.S. 590 (1981); United States v. Braithwaite, 709 F.2d 1450, 1452 (11th Cir. 1983) (beeper placed in drum of chemicals). *See generally* Note, *Criminal Procedure—Search and Seizure—Beeper Monitoring and the Fourth Amendment: What Has Knotts Wrought?* 58 TUL. L. REV. 849, 849 n.1 (1984) (discussion of articles to which beepers have been attached).

31. *Compare* United States v. Hufford, 539 F.2d 32, 34 (9th Cir.) (beepers placed in drum of caffeine and on battery of car not a search), *cert. denied,* 429 U.S. 1002 (1976) *and* United States v. Miroyan, 577 F.2d 489, 491-92 (9th Cir.) (monitoring of airplane in public airspace not a search), *cert. denied,* 439 U.S. 896 (1978) *with* United States v. Holmes, 521 F.2d 859, 864 (5th Cir. 1975) (installation of beeper on automobile is a search) *and* United States v. Moore, 562 F.2d 106, 113 (1st Cir.) (government must have warrant to monitor container in home and must have probable cause to monitor beeper in vehicle), *cert. denied sub nom.* Bobisink v. United States, 435 U.S. 926 (1977). The circuits' holdings became identifiable as rulings accumulated. *See* Note, *Finders Keepers, Beepers Weepers: United States v. Knotts—A Realistic Approach to Beeper Use and the Fourth Amendment,* 27 ST. LOUIS U.L.J. 483, 488-97 (1983) (traces developments of circuits' holdings in beeper cases). The First Circuit seems to indicate a preference for search warrants. *See* United States v. Moore, 562 F.2d 106, 111 (1st Cir.) (distinguishing warrant requirement in regards to contraband and non-contraband items), *cert. denied,* 435 U.S. 926 (1977). The Fifth Circuit has narrowed its view regarding fourth amendment protection and the beeper issues. *Compare* United States v. Michael, 645 F.2d 252, 257 (5th Cir.) (reasonable suspicion justifies attachment of beeper to van), *cert. denied,* 454 U.S. 950 (1981) *with* United States v. Holmes, 521 F.2d 859, 867 (5th Cir. 1975) (failure to procure warrant prior to beeper attachment to car fourth amendment violation). The Ninth Circuit generally finds no fourth amendment implication in the installation and use of beepers. *See* United States v. Hufford, 539 F.2d 32, 34 (9th Cir.) (installation and monitoring of beeper not a search under fourth amendment), *cert. denied,* 429 U.S. 1002 (1976). For a

cisions, it is evident there is disagreement among the circuits as to whether the use of beepers represents fourth amendment activity.[32] Most courts use a bifurcated analysis, treating the installation and monitoring of beepers as separate issues.[33] Installation determinations have revolved around the degree of intrusion involved in the attachment of the monitoring device,[34] the

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review of conflicting holdings among the circuits, see Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 KY. L.J. 987, 989-99 (1978-1979); Note, *Finders Keepers, Beepers Weepers: United States v. Knotts—A Realistic Approach to Beeper Use and the Fourth Amendment,* 27 ST. LOUIS U.L.J. 483, 488 (1983) (overview of diversity in holdings regarding beeper jurisprudence); Case Comment, *Electronic Tracking Devices and the Fourth Amendment—United States v. Michael,* 16 GA. L. REV. 197, 200-212 (1981) (circuit by circuit history of beeper cases).

32. *Compare* United States v. Lewis, 621 F.2d 1382, 1388 (5th Cir. 1980) (installation of beeper, even if never activated, possible violation of fourth amendment), *cert. denied,* 450 U.S. 935 (1981) *and* United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980) (beeper placed in drum of chemicals is search and seizure and must satisfy fourth amendment) *with* United States v. Dubrofsky, 581 F.2d 208, 212 (9th Cir. 1978) (beeper which indicates when package opens not a search) *and* United States v. Bruneau, 594 F.2d 1190, 1193 (8th Cir.) (monitoring of transponder to follow plane not a search within fourth amendment), *cert. denied,* 444 U.S. 847 (1979). *See generally* Note, *Constitutional Law—Search and Seizure—United States v. Knotts,* 10 WM. MITCHELL L. REV. 319, 321 (1983) (comparison of circuits' decisions).

33. *See, e.g.,* United States v. Michael, 645 F.2d 252, 258 (5th Cir.) (installation of beeper on exterior of van minimal intrusion, less than stop and frisk, and monitoring did not violate defendant's expectation of privacy), *cert. denied,* 454 U.S. 950 (1981); United States v. Bruneau, 594 F.2d 1190, 1194 (8th Cir.) (adopts "bifurcated analytical framework" to determine if installation and monitoring of transponder in airplane violates fourth amendment rights), *cert. denied,* 444 U.S. 847 (1979); United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978) (if installation constitutional then court must evaluate monitoring to determine if there has been infringement of reasonable expectation of privacy). *But see, e.g.,* United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (court only addressed installation in determining validity of warrant; attachment of beeper on any vehicle in public does not require warrant); United States v. Frazier, 538 F.2d 1322, 1325 (8th Cir. 1976) (installation only issue raised in beeper case involving "bumper beeper" and was justified on exigent circumstances), *cert. denied,* 429 U.S. 1046 (1977); United States v. Holmes, 521 F.2d 859, 864 (5th Cir. 1975) (court concerned only with installation in holding attachment of beeper on motor vehicle a search). For a discussion of the courts' bifurcated approach, see Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 KY. L.J. 987, 990-98 (1978-1979) (discussion of divergent approaches to installation and monitoring). *See generally* Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461, 1465-68 (1977) (examines installation and monitoring issues).

34. *See* United States v. Michael, 645 F.2d 252, 258 (5th Cir.), *cert. denied,* 454 U.S. 950 (1981). After receiving a tip that the defendant was purchasing large quantities of precursor chemicals to manufacture illegal drugs, a DEA agent attached a beeper to the exterior of a van; the installation was held to be such a minor intrusion that no seizure occurred. *See id.* at 258; *see also* United States v. Moore, 562 F.2d 106, 111 (1st Cir.) (reasonableness of search depends on balancing government's interest with intrusion of privacy), *cert. denied sub nom.* Bobisink v. United States, 435 U.S. 926 (1977). *But cf.* United States v. Bailey, 628 F.2d 938, 940 (6th Cir. 1980) (fourth amendment will not overlook de minimis intrusions that result in violation of expectations of privacy). The minimal intrusion concept derives its credence from Caldwell

expectation of privacy in the object attached with the beeper,[35] and whether the attachment fell within recognized exceptions to the warrant requirement.[36] The courts permit most installations to be conducted without a warrant; however, if agents obtain a warrant, they risk having it later declared defective.[37] After deciding any alleged installation violations, the courts determine if the monitoring of the beeper intruded on a reasonable expectation of privacy.[38]

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v. Lewis, 417 U.S. 583 (1974), which provides that "[a] car has little capacity for escaping public scrutiny [since] [i]t travels [through] public thoroughfares where [both] its occupants and its contents are in plain view." *See id.* at 590.

35. *See, e.g.,* United States v. Bailey, 628 F.2d 938, 943 (6th Cir. 1980) (attachment of beeper inside chemical container under government's control did not violate reasonable expectation of privacy of defendants); United States v. Lewis, 621 F.2d 1382, 1388 (5th Cir. 1980) (defendants had no privacy interest in drum when they took possession, and, therefore, chemicals placed in beeper-fitted drum was not a search), *cert. denied,* 450 U.S. 935 (1981); United States v. Perez, 526 F.2d 859, 863 (5th Cir.) (person has no reasonable expectation of privacy in item received for exchange of heroin), *cert. denied,* 429 U.S. 846 (1976). For a comprehensive discussion of cases using the reasonable expectation of privacy test, see Case Comment, *Electronic Tracking Devices and the Fourth Amendment—United States v. Michael,* 16 GA. L. REV. 197, 200 & n.20 (1981). *See generally* Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 KY. L.J. 987, 989-90 (1978-1979). Analysis of beeper problems can be divided into three categories: (1) court finds a violation of reasonable expectation of privacy; (2) no violation of reasonable expectation of privacy exists; and (3) fourth amendment requirements are satisfied by other occurrences. *See id.* at 989-90.

36. *See* United States v. Sheikh, 654 F.2d 1057, 1071 (5th Cir. 1981) (beeper placed in package of heroin justifiable since customs agents opened package pursuant to border search), *cert. denied,* 455 U.S. 991 (1981); *see also* United States v. Frazier, 538 F.2d 1322, 1325 (8th Cir. 1976) (beeper attached to automobile to foil extortion scheme justified under exigent circumstances), *cert. denied,* 429 U.S. 1046 (1977). The courts have rejected arguments that an owner could not consent to the installation of a beeper because the defendant had a contract right in the item installed. *See, e.g.,* United States v. Lewis, 621 F.2d 1382, 1388 (5th Cir. 1980) (rejects defendant's contentions that, under business code, title passed to purchaser at time goods were identified by contract and held that U.C.C. only determines contract rights, not fourth amendment rights), *cert. denied,* 450 U.S. 935 (1981); United States v. Abel, 548 F.2d 591, 592 (5th Cir.) (informal agreement between owner of plane and defendant did not preclude owner from granting consent for beeper installation), *cert. denied,* 431 U.S. 956 (1977); United States v. Stephenson, 490 F. Supp. 619, 621-22 (E.D. Mich. 1979) (rejects defendant's assertion that U.C.C. § 2-501(1) and Michigan statutory law gave defendant a property interest in can of chemicals).

37. *See* United States v. Bailey, 628 F.2d 938, 945 (5th Cir. 1980) (warrant defective for lack of termination date; placement of beeper in chemical container fourth amendment violation); *see also* United States v. Cofer, 444 F. Supp. 146, 149 (W.D. Tex. 1978) (warrant which authorized agent to install beeper inside plane did not authorize agent to break into private property to attach beeper). *See generally* Note, *United States v. Knotts: The Electronic Beeper and the Unwary Traveler,* 10 OHIO N.U.L. REV. 549, 552 n.33 (1983) (list of warrantless installation approvals); Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461, 1464 (1977) (overview of courts' permission for and general practice of warrantless installations).

38. *See* United States v. Lewis, 621 F.2d 1382, 1387-88, (5th Cir. 1980) (to resolve issues

The courts have been far from agreement as to whether, or in what circumstances, the monitoring of a beeper triggers fourth amendment activity.[39] In dismissing alleged fourth amendment violations, some courts have held there is no expectation of privacy in movements exposed to the public,[40] or in the possession of contraband.[41] To justify holding that monitoring is not a search, other courts have compared it with enhanced senses or equated it with public observations.[42] Frequently, the lower courts have addressed the issue of admissibility of evidence when government agents lose contact with the beeper's signal or abandon visual surveillance after monitoring has

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in "swamp of beeper law," threshold question of installation must be answered before determining if tracking beeper is fourth amendment violation).

39. *Compare* United States v. Brock, 667 F.2d 1311, 1321-22 (9th Cir. 1982) (because beeper emanating from cabin revealed minimal information as to location of can, only slight intrusion and no search within fourth amendment), *cert. denied,* __ U.S. __, 103 S. Ct. 1271, 75 L. Ed. 2d 493 (1983) *and* United States v. French, 414 F. Supp. 800, 804 (W.D. Okla. 1976) (monitoring not search or seizure under fourth amendment) *with* United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980) (beeper monitoring of can of chemicals from storage room constituted search) *and* United States v. Miroyan, 577 F.2d 489, 492 (9th Cir.) (monitoring of airplane not a search), *cert. denied,* 439 U.S. 896 (1978). *See generally* Note, *Criminal Procedure—Search and Seizure—Beeper Monitoring and the Fourth Amendment: What Has Knotts Wrought?,* 58 TUL. L. REV. 849, 852-54 (1984) (circuits' analyses of monitoring issue).

40. *See, e.g.,* Bruneau v. United States, 594 F.2d 1190, 1197 (8th Cir.) (no reasonable expectation of privacy in movements of airplanes because monitored for safety purposes), *cert. denied,* 444 U.S. 847 (1979); United States v. Clayborne, 584 F.2d 346, 350 (10th Cir. 1978) (less expectation of privacy in clandestine laboratory because open to outside view and accessible to public); United States v. Hufford, 539 F.2d 32, 34 (9th Cir.) (if beeper legally installed, monitoring of automobile in public indistinguishable from visual surveillance), *cert. denied,* 429 U.S. 1002 (1976). *But see* United States v. Bailey, 628 F.2d 938, 949 (6th Cir. 1980) (Keith, J., concurring) (individual should be able to move about without worrying about government monitoring movement); United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975). In *Holmes,* the court held:

> A person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be "alone" in his car when he enters it and drives away.

Id. at 866.

41. *See* United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978) (since package was contraband and border search authorized installation, subsequent monitoring merely augmented officers' senses and did not constitute search); United States v. Emery, 541 F.2d 887, 890 (1st Cir. 1976) (no expectation of privacy in cocaine discovered by customs agents).

42. *See* United States v. Michael, 645 F.2d 252, 258 (5th Cir.) (expectation of privacy in movements diminished in automobile; beeper only helped in surveillance), *cert. denied,* 454 U.S. 950 (1981); United States v. Hufford, 539 F.2d 32, 34 (9th Cir.) (no distinction between use of beeper and visual surveillance aids, such as binoculars, tracking dogs, and spotlights), *cert. denied,* 429 U.S. 1002 (1976). *See generally* Note, *Electronic Tracking Devices and Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses,* 9 LOY. U. CHI. L.J. 227, 245 (1977) (discussion of courts' comparison of monitoring with enhanced senses).

occurred in a protected area.[43] Whether such a monitoring of a private area is indeed a search protected by the fourth amendment has been the dividing line among the circuits.[44]

The United States Supreme Court rendered its first decision involving beeper monitoring in *United States v. Knotts.*[45] In *Knotts,* the Supreme Court held that monitoring of a beeper in a can of chloroform was not a search and seizure deserving of fourth amendment protection and, thus, did not infringe on the defendant's expectation of privacy.[46] The Court reasoned that monitoring the beeper while it was being transported by automobile to the defendant's cabin was allowable under the diminished expectation of privacy associated with automobiles; monitoring of the container as it remained outside the cabin was permissible under the open fields doctrine.[47] The Court did not address the issue of installation because it was not

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43. *See, e.g.,* United States v. Bernard, 625 F.2d 854, 856 (9th Cir. 1980) (agents lost contact with beeper placed in container at supply company, but later located it by signal emitting from private residence); United States v. Clayborne, 584 F.2d 346, 349-50 (10th Cir. 1978) (beeper placed in container, monitored in home, then contact lost and reestablished in laboratory); United States v. Cofer, 444 F. Supp. 146, 148 (W.D. Tex. 1978) (beeper implanted in plane, monitoring lost for over a month, and when rediscovered, customs agents unable to ascertain its identity due to number of beepers in air). *See generally* Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461, 1464 & n.17 (1977) (use of beepers and function in investigations).

44. *Compare* United States v. Bernard, 625 F.2d 854, 860-61 (9th Cir. 1980) (monitoring of house invaded no expectation of privacy) *and* United States v. Clayborne, 584 F.2d 346, 351 (10th Cir. 1978) (monitoring laboratory did not violate expectation of privacy) *with* United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980) (monitoring of private area is search) *and* United States v. Moore, 562 F.2d 106, 113 (1st Cir.) (monitoring of house requires warrant), *cert. denied sub nom.* Bobisink v. United States, 435 U.S. 926 (1977). *See generally* Note, *Finders Keepers, Beepers Weepers: United States v. Knotts—A Realistic Approach to Beeper Use and the Fourth Amendment,* 27 ST. LOUIS U.L.J. 483, 497 (1983) (discussion of *Katz* test applied when beepers enter private house).

45. *See* __ U.S. __, __, 103 S. Ct. 1081, 1087, 75 L. Ed. 2d 55, 64 (1983).

46. *See id.* at __, 103 S. Ct. at 1087, 75 L. Ed. 2d at 64.

47. *See id.* at __, 103 S. Ct. at 1085, 75 L. Ed. 2d at 62. Activities which take place in open fields are not protected by the fourth amendment. *See* Hester v. United States, 265 U.S. 57, 59 (1924). For an in depth discussion of *Knotts* and its application of the open fields doctrine, see Note, *United States v. Knotts: The Electronic Beeper and the Unwary Traveler,* 10 OHIO N.U.L. REV. 549, 555-57 (1984). The Court compared the monitoring with enhanced sensory abilities. *See* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1086, 75 L. Ed. 2d 55, 63 (1983) (nothing prohibits police from augmenting their senses by scientific means). For a critique of the enhanced perception rationale, see Note, *Finders Keepers, Beepers Weepers: United States v. Knotts—A Realistic Approach to Beeper Use and the Fourth Amendment,* 27 ST. LOUIS U.L.J. 483, 500-01 (1983) (*Knotts* confuses government agents about need to get warrant). *See generally* Note, *Beeper Monitoring and the Fourth Amendment: What Has Knotts Wrought?,* 58 TUL. L. REV. 849, 859-62 (1984) (criticizing *Knotts* as turning fourth amendment analysis into protection of places not people).

challenged.[48]

The lower courts have differed in their interpretations of the *Knotts* decision; some courts welcomed the decision to help resolve the beeper issues,[49] while another found a way to distinguish *Knotts.*[50] In recent cases, however, courts have invariably addressed an issue different from that in *Knotts,* monitoring a beeper which had entered a private place.[51] Without any clear-cut guidance regarding the installation of beepers or subsequent monitoring in private areas, the lower courts could only speculate as to how the Supreme Court would resolve these issues.[52]

In *United States v. Karo,*[53] the Supreme Court held that a third party's consent was valid to allow the *installation* of a beeper in a container under his possession, and the subsequent transfer of the can to its purchasers did not trigger fourth amendment concerns.[54] The Court also held that the warrantless *monitoring* of a residence was a search and violated the fourth amendment rights of those with a privacy interest in the residence.[55] The Court, however, found the evidence seized from the last monitored home pursuant to a search warrant should not be suppressed because the DEA had acquired sufficient untainted information to support a finding of probable

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48. *See* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1085, 75 L. Ed. 2d 55, 60 (1983).

49. *See* United States v. Butts, 710 F.2d 1139, 1145-46 (5th Cir. 1983) (*Knotts* clarifies "beeper jurisprudence" by applying bifurcated approach and focusing on aspect of monitoring), *rev'd on other grounds,* 729 F.2d 1514 (5th Cir. 1984). *Butts* interpreted *Knotts* as holding the monitoring would only be permissible if the beeper was legally installed. *See id.* at 1146; *see also* United States v. Emanuel, 572 F. Supp. 1215, 1217 (S.D. Tex. 1983) (follows *Butts* interpretation of *Knotts* that installation may taint monitoring).

50. *See* United States v. Taylor, 716 F.2d 701, 706 (9th Cir. 1983) (*Knotts* does not answer issue of installation or monitoring within private residence; therefore, court looked to decisions within its circuit to resolve issues). One court avoided applying *Knotts* because of a lack of standing. *See* United States v. Braithwaite, 709 F.2d 1450, 1454 (11th Cir. 1983).

51. *See, e.g.,* United States v. Cassity, 720 F.2d 451, 454 (6th Cir. 1983) (beeper monitoring of chemical containers in three separate homes); United States v. Taylor, 716 F.2d 701, 704 (9th Cir. 1983) (beeper in box of chemicals monitored in two residences); United States v. Karo, 710 F.2d 1433, 1437 (10th Cir. 1983) (beeper monitoring occurred in four residences), *rev'd on other grounds,* __ U.S. __, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1984).

52. *See* United States v. Butts, 729 F.2d 1514, 1517 (5th Cir. 1984) (*Knotts* intentionally left unanswered question of installation and how it should be addressed); United States v. Cassity, 720 F.2d 451, 454-55 (6th Cir. 1983) (*Knotts* cannot control issue of private residence monitoring and does not reduce expectation of privacy). *See generally* Note, *United States v. Knotts: The Electronic Beeper and the Unwary Traveler,* 10 OHIO N.U.L. REV. 549, 562 (1984) (Supreme Court has yet to resolve installation issue).

53. __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

54. *See id.* at __, 104 S. Ct. at 3302, 82 L. Ed. 2d at 539-40 (transfer of can only created potential for search).

55. *See id.* at __, 104 S. Ct. at 3303, 82 L. Ed. 2d at 541 (monitoring allowed agents to obtain information not exposed to public).

cause in its warrant affidavit.[56] Justice White, writing for the majority, upheld the installation by finding that the purchasers had no expectation of privacy in the containers at the time of the beeper placement.[57] The *transfer* of the can to the buyers was not a fourth amendment violation because the transfer conveyed no information to the DEA that would violate a privacy interest;[58] furthermore, the mere presence of the beeper did not interfere with any possessory interest of the subsequent owners.[59] In addressing the *monitoring* of the residence, Justice White reiterated the Court's desire to protect the sanctity of the home.[60] The majority held steadfast to the warrant requirement and rejected the government's argument that it should be allowed to monitor beepers in private residences whenever it suspects criminal activity.[61]

Justice Stevens, writing a separate opinion in which Justices Brennan and Marshall joined, only agreed with the majority's holding that monitoring a beeper which has entered a private residence was a search deserving of

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56. *See id.* at __, 104 S. Ct. at 3305-07, 82 L. Ed. 2d at 545 (warrant could be obtained without using beeper information). The Court allowed admission of the evidence obtained from the final house monitored because it found enough untainted information gathered by visual observations to support probable cause for the warrant. *See id.* at __, 104 S. Ct. at 3305-07, 82 L. Ed. 2d at 544-45.

57. *See id.* at __, 104 S. Ct. at 3301, 82 L. Ed. 2d at 539 (DEA installed beeper in their own can then switched it with consent of informant). The issue presented to the Court reads: "[W]hether installation of a beeper in a container of chemicals with the consent of the original owner constitutes a search or seizure within the meaning of the Fourth Amendment when the container is delivered to a buyer having no knowledge of the presence of the beeper . . . ." *Id.* at __, 104 S. Ct. at 3299, 82 L. Ed. 2d at 536.

58. *See id.* at __, 104 S. Ct. at 3302, 82 L. Ed. 2d at 539 (at most, transfer represented potential for invasion of privacy).

59. *See id.* at __, 104 S. Ct. at 3302, 82 L. Ed. 2d at 540 (mere occupation of space by beeper did not violate fourth amendment).

60. *See id.* at __, 104 S. Ct. at 3303, 82 L. Ed. 2d at 541 (searches conducted inside home presumed unreasonable unless exigent circumstances exist). The Court equated the beeper with an agent secretly inside the home looking for the ether. *See id.* at __, 104 S. Ct. at 3303, 82 L. Ed. 2d at 541. The Court found *Knotts* distinguishable since, in that case, the claim that monitoring took place inside a residence was not presented to the Court. *See id.* __, 104 S. Ct. at 3303, 82 L. Ed. 2d at 540.

61. *See id.* at __, 104 S. Ct. at 3304-05, 82 L. Ed. 2d at 542-43 (unsupervised monitoring would diminish privacy of home, and requiring neutral and detached magistrate to approve monitoring would protect citizens from abuse). The Court stated that although the government would not be able to identify the place where the search would occur, this should not preclude it from obtaining a warrant. *See id.* at __, 104 S. Ct. at 3305, 82 L. Ed. 2d at 543-44. The government contended the warrant requirement is inapposite to monitoring because the scope of the search is already limited to minimal information; agents do not know in advance where monitoring might occur to be able to describe places to be searched and advance notice to a suspect would defeat the goals of surveillance. *See* Petitioner's Brief at 41-43, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

fourth amendment protection.[62] He disagreed with the majority's finding that the transfer of the beeper-laden container did not constitute an infringement of the respondent's possessory rights.[63] This disagreement was premised upon the belief that what a person keeps from public view is deserving of fourth amendment protection.[64] The opinion pointed to the fact that, from the time the container entered Karo's house, it was concealed from public view and could not be relocated without the use of the beeper.[65] Justice Stevens found that, because the beeper allowed the DEA to learn the whereabouts of an item hidden from public view, there was a search.[66] In conclusion, Justice Stevens stated that government agents should be required to procure a warrant prior to the installation of a beeper on the property of a private citizen.[67]

The holdings of the *Karo* Court can hardly be viewed as surprising in light

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62. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3310, 82 L. Ed. 2d 530, 550 (Stevens, J., concurring in part & dissenting in part).

63. *See id.* at __ n.2, 104 S. Ct. at 3311 n.2, 82 L. Ed. 2d at 550 n.2 (Stevens, J., concurring in part & dissenting in part). The attachment of the beeper resulted in an assertion of dominion and control over the container which resulted in a seizure. *See id.* at __, 104 S. Ct. at 3311, 82 L. Ed. 2d at 551 (Stevens, J., concurring in part & dissenting in part); *see also* United States v. Jacobsen, __ U.S. __, __, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984) (seizure occurs upon interference with possessory interest).

64. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3311-14, 82 L. Ed. 2d 530, 551-54 (1984) (Stevens, J., concurring in part & dissenting in part); *see also* Katz v. United States 389 U.S. 347, 351 (1967) (what person exposes to public not protected by fourth amendment).

65. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3312, 82 L. Ed. 2d 530, 553 (1984) (Stevens, J., concurring in part & dissenting in part). The fact that the container was carried on the public roads did not reveal the container's location, as it remained concealed from view in the trunk. *See id.* at __, 104 S. Ct. at 3312, 82 L. Ed. 2d at 553 (Stevens, J., concurring in part & dissenting in part).

66. *See id.* at __, 104 S. Ct. at 3314, 82 L. Ed. 2d at 554 (Stevens, J., concurring in part & dissenting in part). In refuting the majority's findings that no privacy interest is infringed until the government begins monitoring, Stevens drew the analogy that "[a] bath tub is a less private area when the plumber is present even if his back is turned." *See id.* at __, 104 S. Ct. at 3314, 82 L. Ed. 2d at 554 (Stevens, J., concurring in part & dissenting in part). Stevens admonished the majority for conducting a de novo review of the record to justify the admission of the evidence seized during the final search since the issue was not before the court. *See id.* at __, 104 S. Ct. at 3314, 82 L. Ed. 2d at 555 (Stevens, J., concurring in part & dissenting in part).

67. *See id.* at __, 104 S. Ct. at 3314, 82 L. Ed. 2d at 555 (Stevens, J., concurring in part & dissenting in part). Stevens agreed with the majority's denouncement of Justice O'Connor's concurrence as being so narrow as to leave nothing of fourth amendment protection. *See id.* at n.9, 104 S. Ct. at 3313 n.9, 82 L. Ed. 2d at 554 n.9 (Stevens, J., concurring in part & dissenting in part). Justice O'Connor proposed that in order for the homeowner to have a privacy interest in a container brought into his home, he must be able to control the movements of the container in public and have sufficient interest in the container to consent to its search. *See id.* at __, 104 S. Ct. at 3307-10, 82 L. Ed. 2d at 545-49 (O'Connor, J., concurring in part).

of many decisions of the circuit courts.[68] The upholding of the installation of a beeper based on consent is well established in the lower courts.[69] The Supreme Court lays to rest the argument that one has a reasonable expectation to receive property coming into his possession free of electronic transmitting devices.[70] The *Karo* Court's holding regarding the installation, however, must be limited to its facts, as the majority does not address in general the installation of beepers.[71] By relieving the government of the burden of obtaining a warrant when a beeper is installed with the permission of the possessory owner,[72] but requiring a warrant for subsequent beeper monitoring in private areas,[73] the Court has placed the government in a precarious position.[74] A significant number of beeper cases involve the installation of beepers into precursor chemical containers.[75] Often the government

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68. *See, e.g.,* United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980) (electronic surveillance of personal property located in private areas is search and must comply with fourth amendment); United States v. Moore, 562 F.2d 106, 114 (1st Cir.) (evidence inadmissible if gathered from monitoring of beeper located in house), *cert. denied sub nom.* Bobisink v. United States, 435 U.S. 926 (1977); United States v. Hufford, 539 F.2d 32, 34 (9th Cir.) (no expectation of privacy in drums in possession of chemical company), *cert. denied,* 429 U.S. 1002 (1976).

69. *See, e.g.,* United States v. Bernard, 625 F.2d 854, 856 (9th Cir. 1980) (supply house's consent to keep chemical drum with installed beeper); United States v. Bruneau, 594 F.2d 1190, 1194 (8th Cir.) (owner's consent to install transponder on plane precluded fourth amendment violation), *cert. denied,* 444 U.S. 847 (1979); United States v. Devorce, 526 F. Supp. 191, 199-200 (D. Conn. 1981) (consent of car rental company valid for installation of beeper), *aff'd sub nom.* United States v. Lombardo, 697 F.2d 299 (2d Cir. 1982); *see also* Petitioner's Brief at 18-19, United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

70. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3302, 82 L. Ed. 2d 530, 539 (1984). The right to receive property free from beepers has been advocated in the lower courts. *See, e.g.,* United States v. Butts, 729 F.2d 1514, 1521-22 (5th Cir. 1984) (Goldberg, J., dissenting) (citizens should reasonably expect beepers will not be present in private areas); United States v. Karo, 710 F.2d 1433, 1438 (10th Cir. 1983) (legitimate expectation of privacy interest that property coming into possession will not be carrying beepers), *rev'd,* __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984); United States v. Bailey, 628 F.2d 938, 943 n.7 (6th Cir. 1980) (government should not be able to sell property containing beepers).

71. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3301-02, 82 L. Ed. 2d 530, 539-40 (1984).

72. *See id.* at __, 104 S. Ct. at 3300, 82 L. Ed. 2d at 540. Consent is recognized as an exception to the warrant requirement. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

73. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530, 543-44 (1984) (search of house requires warrant).

74. *See* Petitioner's Brief at 42-43, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (government runs risk of committing illegal search because it cannot control beeper from entering private area).

75. *See, e.g.,* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1083, 75 L. Ed. 2d 55, 60 (1983) (beeper placed in drum of ether); United States v. Cassity, 720 F.2d 451, 453 (6th

agents lose eye contact with the beeper or choose to abandon visual observation and rely solely on electronic surveillance.[76] Invariably, most of these containers enter constitutionally protected areas.[77] Under the holding in *Karo,* once the government locates the beeper by monitoring a private area, it has committed a fourth amendment violation.[78] Occasionally, DEA agents have protected themselves from the *Karo* holding by procuring warrants for the installation of beepers in chemical containers.[79] By limiting the warrant requirement to monitoring, however, *Karo* will create problems with government agents conducting the routine "precursor chemical investigation" where the monitoring device is installed without a warrant, visual contact is lost or abandoned, and electronic surveillance is initiated after the device has entered a constitutionally protected area.[80]

The guidelines in *Karo* place the government in the dilemma of choosing among the following options when it wishes to monitor a beeper without a warrant obtained before installation: (1) apply for a warrant to monitor the

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Cir. 1983) (beepers placed in cans of chemicals); United States v. Taylor, 716 F.2d 701, 704 (9th Cir. 1983) (beeper implanted in box of chemicals).

76. *See, e.g.,* United States v. Knotts __ U.S. __, __, 103 S. Ct. 1081, 1083, 75 L. Ed. 2d 55, 60 (1983) (officers ceased visual surveillance); United States v. Brathwaite, 709 F.2d 1450, 1452 (11th Cir. 1983); (agents abandoned visual observations); United States v. Hufford, 539 F.2d 32, 33 (9th Cir.) (agents used beeper to relocate pickup truck), *cert. denied,* 429 U.S. 1002 (1976).

77. *See, e.g.,* United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980) (entered apartment complex and storage room); United States v. Clayborne, 584 F.2d 346, 350 (10th Cir. 1978) (house and laboratory); United States v. Stephenson, 490 F. Supp. 619, 620-21 (E.D. Mich. 1979) (garage and residence).

78. *See,* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530, 543-44 (1984). Monitoring of a beeper concealed from public view presents a serious threat to privacy of the home and must be checked by the fourth amendment. *See id.* at __, 104 S. Ct. at 3304, 82 L. Ed. 2d at 542.

79. *See, e.g.,* United States v. Taylor, 716 F.2d 701, 704 (9th Cir. 1983) (DEA agent obtained warrant to install beeper in box of chemicals); United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980) (magistrate authorized installation of beeper in drum of chemicals); United States v. Lewis, 621 F.2d 1382, 1385 (5th Cir. 1980) (magistrate granted order to install beeper in drum of chemicals after probable cause determination), *cert. denied,* 450 U.S. 935 (1981). Warrants have also been used in the attachment of beepers to other items. *See* United States v. Devorce, 526 F. Supp. 191, 193 (D. Conn. 1981) (magistrate approval of beeper installed in rental car), *aff'd sub nom.* United States v. Lombrado, 697 F.2d 299 (2nd Cir. 1982); United States v. Cofer, 444 F. Supp. 146, 149 (W.D. Tex. 1978) (warrant used to attach beeper to airplane).

80. *See, e.g.,* United States v. Cassity, 720 F.2d 451, 454 (6th Cir. 1983) (monitoring revealed container had been moved to another residence); United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980) (beeper signal lost, then relocated in apartment building); United States v. Stephenson, 490 F. Supp. 619, 620 (E.D. Mich. 1979) (beeper monitoring revealed container had been moved to residence).

beeper;[81] (2) continue monitoring without a warrant only while it is exposed to public view;[82] (3) continue monitoring the beeper and, if the beeper enters a private area, argue that a warrant exception existed due to exigent circumstances;[83] or (4) monitor the beeper illegally and wait for it to enter a public area.[84] The obvious ramification of the *Karo* decision is that courts can no longer justify the monitoring of a private residence based on the lawful installation of a beeper.[85]

The majority recognized the government's contentions that the requirement of a warrant prior to the monitoring of a private area would, in effect, force the government to get a warrant for every monitoring.[86] This being

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81. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3304, 82 L. Ed. 2d 530, 542 (1984) (warrant required to search home).

82. *See id.* at __, 104 S. Ct. at 3303, 82 L. Ed. 2d at 542 (monitoring of beeper in public area does not require warrant).

83. *See id.* at __, 104 S. Ct. at 3305, 82 L. Ed. 2d at 544. The lower courts have recognized exigent circumstances as a justification for monitoring. *See* United States v. Shovea, 580 F.2d 1388, 1388 (10th Cir.), *cert. denied,* 440 U.S. 908 (1978); *see also* United States v. Frazier, 538 F.2d 1322, 1324 (8th Cir. 1976), *cert. denied,* 429 U.S. 1046 (1977). Exigent circumstances, however, are rarely applicable due to the length of most electronic surveillance investigations. *See, e.g.,* United States v. Cassity, 720 F.2d 451, 454 (6th Cir. 1983) (over two months of surveillance); United States v. Brock, 667 F.2d 1311, 1314-15 (9th Cir. 1982) (over four months of surveillance); United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980) (over two months of surveillance).

84. *See* United States v. Karo, __ U.S. __, __ & n.7, 104 S. Ct. 3296, 3305-07 & n.7, 82 L. Ed. 2d 530, 544-45 & n.7 (1984). The Court held that the tainted monitoring of Karo's house was cured when the beeper was rediscovered in the second storage facility. *See id.* at __, 104 S. Ct. at 3306, 82 L. Ed. 2d at 545. The Court reasoned that since the beeper did not reveal what locker it was coming from, there was no search. *See id.* at __, 104 S. Ct. at 3306, 82 L. Ed. 2d at 545. From the warehouse, the agents were able to visually observe the ether being transported to its final destination. *See id.* at __, 104 S. Ct. at 3306-07, 82 L. Ed. 2d at 544-45. The majority emphasizes the fact that monitoring the warehouse was not dependent on the earlier monitoring; therefore, it was permissible. *See id.* at __, 104 S. Ct. at 3306, 82 L. Ed. 2d at 545. This analysis has been used by at least one circuit court to admit evidence resulting from monitoring. *See* United States v. Clayborne, 584 F.2d 346, 349 (10th Cir. 1978) (since beeper signal was lost after it was monitored emanating from house, subsequent relocation was result of independent effort and was not tainted). *But see* United States v. Stephenson, 490 F. Supp. 613, 624 (E.D. Mich. 1979) (monitoring of house was "one connected transaction" with prior monitoring of different house; therefore, defendant could suppress evidence).

85. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3303, 82 L. Ed. 2d 530, 540 (1984) (although installation found legal, Court looks to monitoring to determine fourth amendment violations); *cf.* United States v. Sheikh, 654 F.2d 1057, 1071 (5th Cir. 1981) (lawful attachment pursuant to border search, coupled with fact goods were contraband, justified monitoring package within home), *cert. denied,* 455 U.S. 991 (1982); United States v. Botero, 589 F.2d 430, 432 (9th Cir. 1978) (beeper placed in package by customs agents lawful; fact that beeper revealed when package opened was minimal intrusion); United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978) (installation lawful by customs agents, monitoring of package inside house not a search).

86. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530,

the case, privacy interests of the public would be better served if a warrant was required prior to the attachment of the beeper.[87] A modification of the particularity requirements for the warrant would have to be implemented due to the unique characteristics of unforeseeability and lack of control over the beepers' destinations .[88] The majority already indicated a willingness to modify the warrant application process for beeper installations and left the door open for a redetermination of the standards for warrant authorization.[89]

The requirement for warrant authorization prior to installations of the beeper would protect the *suspected* citizen from indiscriminate monitoring without judicial supervision.[90] This would not be difficult because of the requirement for similar investigation techniques comparable to beeper installations.[91] This modified warrant application has been proposed and should include: (1) names of the suspects; (2) description of the suspected criminal activity; (3) reasons for need to monitor; (4) description of object of installation; (5) suspected places where monitoring will occur; and (6) termination date for the monitoring period.[92] The modification requirement is even

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543 (1984). The government contends since they have no control over where the beeper will go, the Court is requiring a warrant prior to every monitoring. *See id.* at __, 104 S. Ct. at 3305, 82 L. Ed. 2d at 543.

87. *See id.* at __, 104 S. Ct. at 3314, 82 L. Ed. 2d at 555 (Stevens, J., concurring in part & dissenting in part).

88. *See* Petitioner's Brief at 42, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (due to inability to control movement of beeper, would be impossible to satisfy particularity requirement).

89. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530, 543-44 (1984). The Court indicated it might rule on reducing the warrant requirement for monitoring beepers to reasonable suspicion in a later decision. *See id.* at __ n.5, 104 S. Ct. at 3305 n.5, 82 L. Ed. 2d at 544 n.5. One circuit has already allowed the attachment of a beeper based on reasonable suspicion. *See* United States v. Michael, 645 F.2d 252, 257 (5th Cir. 1981), *cert. denied,* 454 U.S. 950 (1982).

90. *See* Respondent's Brief at 25, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

91. *See* 18 U.S.C. § 2516 (1982) (authorizes Attorney General to request order to install wiretap from federal judge). Among the requirements for application are: (1) full and complete fact statement which describes alleged offense and description of place where communication interception will occur; (2) identity of subjects of investigation; (3) whether other investigation techniques have been attempted; and (4) time period needed for surveillance. *See id.* § 2518(1)(a)-(d). The judge determines probable cause if he finds evidence will be gained by the surveillance, normal investigative procedures would not be productive, and there is probable cause that facilities sought to be taped will be used by the suspect. *See id.* § 2518(3)(a)-(d).

92. *Compare* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3505, 82 L. Ed. 2d 530, 543 (1984) (Justice White proposes following warrant requirements: time limit, description of object of installation, and reasons government wants to monitor) *with* Respondent's Brief at 23, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (requirements for warrant should include: (1) names of suspects; (2) violations of law; (3)

more compelling, considering a citizen has no way of knowing when he is being searched.[93] The government's right to install a beeper in an object destined for a citizen's possession should not turn on such esoteric grounds as the lack of a possessory interest when the installation transforms the citizen into a broadcast station.[94]

The Supreme Court has already established that the government may monitor a vehicle on public roads,[95] but what happens should that vehicle enter a private garage?[96] Without a prior warrant authorizing the monitoring of a private area, the government is caught in the snare of *Karo*.[97] A warrant requirement for all installations would serve a dual purpose: it would protect citizens from non-judicially sanctioned monitoring and would allow the government authorities to utilize all the evidence obtained from the electronic surveillance.[98]

Another unresolved issue exists when a beeper-laden object enters the possession of a third party not named in the warrant.[99] This predicament can only be reconciled by balancing the interests of law enforcement concerns

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summary of anticipated installation and monitoring; (4) termination date for monitoring period).

93. *See* Respondent's Brief at 24, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 530 (1984) (without warrant requirement, citizens' only knowledge of search of premises would be if government chose to use evidence against them). The government also commits a search when it monitors a home and discovers the beeper has been moved. *See* United States v. Karo, __ U.S. __, __ n.8, 104 S. Ct. 3296, 3313 n.8, 82 L. Ed. 2d 530, 553 n.8 (1983) (Stevens, J., concurring in part & dissenting in part).

94. *See, e.g.,* United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980) (government's consent to installation terminates upon transfer to citizen); United States v. Clayborne, 584 F.2d 346, 349 (10th Cir. 1978) (fact that citizen had no rights in object at time not relevant after he later took possession); United States v. Moore, 562 F.2d 106, 111 (1st Cir. 1977) (legal situation at installation not relevant when citizen took possession without knowledge of beeper), *cert. denied sub nom.* Bobisink v. United States, 435 U.S. 926 (1978); *see also* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1087, 75 L. Ed. 2d 55, 65 (1983) (Brennan, J., concurring) (there should not be constitutional difference between planting monitoring device on citizen or selling him property containing beeper).

95. *See* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1085, 75 L. Ed. 2d 55, 62 (1983).

96. *See* United States v. Michael, 645 F.2d 252, 272 (5th Cir.) (beeper signal continues when citizen's car enters private property; therefore, comparison to visual observations would cease at that point) (Godbold, J., dissenting), *cert. denied,* 454 U.S. 950 (1981).

97. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530, 543-44 (1984).

98. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (fourth amendment protection guaranteed by neutral and detached magistrate determining probable cause); *see also* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530, 543-44 (1984) (warrant will prevent abuse and should be required before monitoring private area).

99. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3300, 82 L. Ed. 2d 530, 537 (1984) (beeper moved from Karo's house to home of Horton).

and the protection of privacy expectations.[100] In such situations, monitoring of the initial transfer to the third party could be justified under an exigent circumstances approach.[101] However, if more extensive monitoring is desired, authorities most take their information before a magistrate for a warrant authorizing continued monitoring.[102] *Katz* stands for the premise that "the Fourth Amendment protects people, not places,"[103] but the Supreme Court makes its determinations of the constitutionality of the monitoring based on whether the beeper monitoring took place in automobiles, open fields, cabins, homes, storage facilities, and lockers.[104] A warrant requirement prior to the installation of monitoring devices would ensure a citizen that his right to remain free from searches would not depend on where he chooses to take his property.[105] Furthermore, a warrant requirement would quell the fears that American society would exist under a surveillance state.[106]

The protection provided by the fourth amendment is ensured by the war-

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100. *See, e.g.,* United States v. Place, __ U.S. __, __, 103 S. Ct. 2637, 2642, 77 L. Ed. 2d 110, 118 (1983) (court must balance importance of governmental interests with intrusion on individuals); United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (public has compelling interest to prohibit drug trafficking); United States v. Michael, 645 F.2d 252, 259 (5th Cir.) (balancing governmental interest to stop drug manufacturing with minimal intrusion on citizen), *cert. denied,* 454 U.S. 950 (1981); *see also* Petitioner's Brief at 35-38, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (emphasizing reasons government interests outweigh invasion on individual's privacy).

101. *See, e.g.,* Chambers v. Maroney, 399 U.S. 42, 51 (1970) (warrantless search of car allowable due to mobility); Johnson v. United States, 333 U.S. 10, 13-15 (1947) (exceptional circumstances justify warrantless search); Carroll v. United States, 267 U.S. 132, 134 (1924) (vehicles which can move out of jurisdiction can be searched without probable cause).

102. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3304, 82 L. Ed. 2d 530, 542-43 (1984).

103. *See* United States v. Katz, 389 U.S. 347, 351 (1967).

104. *See* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1085, 75 L. Ed. 2d 55, 62 (1983). A person traveling in an automobile has a reduced expectation of privacy. *See id.* at __, 103 S. Ct. at 1085-86, 75 L. Ed. 2d at 62. The movement of a monitored object outside of areas in which an individual maintains an expectation of privacy has been compared to activity conducted in open fields. *See id.* at __, 103 S. Ct. at 1086, 75 L. Ed. 2d at 64 (beeper not monitored within cabin). In *Karo,* the Court stated that monitoring a beeper inside a home would require a warrant, while the monitoring of a warehouse was not a search within the fourth amendment. *See* United States v. Karo, __ U.S. __, __, 104 S. Ct. 3296, 3305-06, 82 L. Ed. 2d 530, 543-45 (1984).

105. *See* Respondent's Brief at 23-24, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 530 (1984) (warrant requirement for installations would keep government monitoring in check).

106. *See* United States v. Bobisink, 415 F. Supp. 1334, 1339 (D. Mass. 1976) (beeper could allow authorities to establish "1984" network which could monitor each citizen's movements), *vacated sub nom.* United States v. Moore, 562 F.2d 106 (1st Cir.), *cert. denied,* 435 U.S. 929 (1977). *But see* United States v. Knotts, __ U.S. __, __, 103 S. Ct. 1081, 1086, 75 L. Ed. 2d 55, 63 (Court rejects allegation that government would be capable of continuous sur-

rant requirement. The installation and monitoring of beepers represents a threat to the privacy rights of the public. While *Karo* recognizes the intrusion that monitoring presents, it fails to resolve the problems resulting from the installation and monitoring of the devices by not requiring a warrant prior to the installation of a beeper on property destined to come within the possession of the unsuspecting citizen. Furthermore, by failing to establish standards for the warrant authorizing the monitoring, the Court has left the problems of satisfying the particularity requirements to the imagination of the lower courts. In addition, the decision fails to address the problems confronting law enforcement officials when the beeper passes from the possession of the suspect to the subsequent transferee. These shortcomings leave the utilization of electronic surveillance devices in a state of confusion, which will likely force the United States Supreme Court to reexamine the inherent problems associated with beepers in the future.

Steven J. Berry

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veillance without judicial intervention). The concept of society existing under constant surveillance was a prediction of George Orwell's *1984*:

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system . . . was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

See Respondent's Brief at 25 & n.19, United States v. Karo, __ U.S. __, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (quoting G. ORWELL, 1984 (1949)). *See generally* Comment, *Fourth Amendment Implications of Electronic Tracking Devices,* 46 U. CIN. L. REV. 243, 251 (1977) (recognizes possibility of Orwellian society).