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Constitutional Law—Search And Seizure—No Fourth Amendment Implications Raised by the Monitoring of an Electronic Tracking Device Installed in a Car Traveling onto Private Property from a Public Roadway—United States v. Knotts, 103 S. Ct. 1081 (1983)

CASE NOTES

Constitutional Law—Search and Seizure—NO FOURTH AMENDMENT IMPLICATIONS RAISED BY THE MONITORING OF AN ELECTRONIC TRACKING DEVICE INSTALLED IN A CAR TRAVELING ONTO PRIVATE PROPERTY FROM A PUBLIC ROADWAY—*United States v. Knotts,* 103 S. Ct. 1081 (1983).

The right of persons to be free from unreasonable search and seizure is one of the most important rights under the Constitution. Historically, the Framers felt that the fourth amendment[1] would protect United States citizens from the various abuses to which they were subjected under the English system.[2] Although "the Framers were men who focused on the wrongs of that day . . . [they] intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[3] The fourth amendment confers "as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[4]

As technology has progressed, law enforcement agencies have made

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1. U.S. CONST. amend. IV. The fourth amendment states in full:

> 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 seized.

Id.

2. An early commentator stated:

> This provision [the fourth amendment] seems indispensible to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution. Although special warrants upon complaints under oath, stating the crime, and the party by name, against whom the accusation is made, are the only legal warrants, upon which an arrest can be made according to the law of England; yet a practice had obtained in the secretaries' office ever since the restoration, (grounded on some clauses in the acts for regulating the press) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene, or seditious libels, as were particularly specified in the warrant. When these acts expired, in 1694, the same practice was continued in every reign, and under every administration, except the last four years of Queen Anne's reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming, or describing any person in special.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 709-10 (Boston 1833).

3. United States v. Chadwick, 433 U.S. 1, 9 (1977).

4. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

increasing use of electronic devices in conducting investigations.[5] While use of these electronic devices has improved the effectiveness and efficiency of law enforcement, their use has posed serious threats to fourth amendment values.[6] Consequently, courts are faced with the legal question of whether the use of electronic devices by the government constitutes a search within the meaning of the fourth amendment. The use of electronic devices constitutes a "search" when it intrudes upon a person's "legitimate expectations of privacy."[7] Determining whether a person's expectation of privacy is "legitimate" presents the courts with the philosophical question of whether the constitutional protections of privacy must or should diminish with technological innovations in surveillance.[8]

The circuit courts' answers to these questions have been disparate.[9]

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5. *See* Case Comment, *Electronic Tracking Devices And The Fourth Amendment*—United States v. Michael, 16 GA. L. REV. 197, 197 (1981) [hereinafter cited as Case Comment, *Electronic Tracking*]. *See generally* Note, *Anthropotelemetry: Dr. Shwitzgebel's Machine,* 80 HARV. L. REV. 403 (1966); Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment,* 86 YALE L.J. 1461 (1977) [hereinafter cited as Note, *Tracking Katz*]; Recent Developments, *Does Installation of an Electronic Tracking Device Constitute a Search Subject to the Fourth Amendment?*, 22 VILL. L. REV. 1067 (1977).

6. *See* Note, *Tracking Katz, supra* note 5, at 1461. One author asserted:

> [T]he police engage in a vast range of activities affecting a broad spectrum of citizens' interests in a complex variety of ways. If we were to start from scratch in defining and regulating police practices with a due regard for those citizens' interests, we would want first to decide what powers should be given to the police and then to limit each power according to its nature, to the interests it potentially affects, and to the abuses foreseeable in its exercise. But a very large part of the activities of the police are not specifically authorized by law; the activities are simply conducted by the police in the discharge of their broad general duties to enforce the law and keep the peace. Legislative and executive limitation of the practices has been 'minor to the point of non-existence.' The consequence has been not only that the fourth amendment has been flung into the breach but that the Supreme Court is strongly cautioned to keep its contours fluid, so as to maintain extensibility over the unexpected. In simpler terms, the Court never knows what the police will come up with next. In recent years, of course, rapid technological advances and the consequent recognition of the 'frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society' have underlined the possibility of worse horrors yet to come.

Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 386 (1974).

7. *Cf.* Smith v. Maryland, 442 U.S. 735, 740 (1979) ("This Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action.").

8. *See* United States v. Knotts, 662 F.2d 515, 517 (1981), *rev'd in part,* 103 S. Ct. 1081, 1083 (1983); United States v. Bruneau, 594 F.2d 1190, 1196 (8th Cir.), *cert. denied,* 444 U.S. 847 (1979).

9. For a discussion of the conflicts among the circuits with regard to the fourth amendment implications raised by the government's use of beepers in investigations, see Marks & Bately, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions,* 67 KY. L.J. 987, 990-97 (1978); Case Comment, *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, 483-97 (1983) [hereinafter cited as Case Comment, *Finders Keepers*]; Case Comment, *Electronic Tracking*, *supra* note 5, at 200-13.

The circuits have developed their own approaches for determining whether installation and subsequent monitoring of an electronic tracking device, commonly known as a beeper,[10] violates the fourth amendment. The Ninth Circuit has held that under most circumstances installing and monitoring beepers has no fourth amendment implications.[11] Conversely, the Fifth Circuit has held that the use of beepers incurs the full extent of fourth amendment protection.[12] Other courts have found themselves between these two extremes.[13]

With this uncertainty and confusion among the circuits, the Supreme Court recently examined for the first time the fourth amendment implications raised by the use of a beeper.[14] In *United States v. Knotts,*[15] the Court held that the monitoring of a beeper to ascertain the arrival of a car from a public roadway onto private property did not constitute a

10. A beeper is a small, battery powered radio transmitter which broadcasts recurrent signals at a set frequency to reveal location and movement. It is placed on, or in, vehicles and packages to allow tracing and movement through public and private areas for long distances and extended periods of time with reduced chances of discovery. *See* Carr, *"Electronic Beepers,"* 4 SEARCH & SEIZURE L. REP. 1 (April 1977); Note, *Tracking Katz, supra* note 5, at 1461. Should the trail ever be lost, the beeper may still enable recovery of it. Carr, *supra,* at 1. Since beepers neither transmit speech nor intercept communications, they are not a wiretap under Title III of the Omnibus Crime Control Act. *See* J. CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE 50 (1980); Carr, *supra,* at 1.

11. *See* United States v. Brock, 667 F.2d 1311 (9th Cir. 1982); United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied,* 429 U.S. 1002 (1976).

12. *See* United States v. Holmes, 521 F.2d 859, 861 (5th Cir. 1975), *aff'd en banc by an equally divided court,* 537 F.2d 227 (5th Cir. 1976).

13. A number of courts permit warrantless use of beepers under certain circumstances. *See* United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *vacating* United States v. Bobisink, 415 F. Supp. 1334 (D. Mass.), *cert. denied,* 435 U.S. 926 (1976) (no warrant required where there is probable cause); United States v. Michael, 645 F.2d 252 (5th Cir.), *cert. denied,* 454 U.S. 950 (1981) (no warrant required where there is reasonable suspicion to believe crime has been committed).

14. United States v. Knotts, 103 S. Ct. 1081 (1983). It is interesting to note that prior to *Knotts,* the Supreme Court had denied certiorari to several other cases challenging the constitutionality of electronic beeper surveillance. The Court issued only memorandum decisions in Michael v. United States, 622 F.2d 744 (5th Cir. 1980), *reh'g en banc,* 645 F.2d 253 (5th Cir.), *cert. denied,* 454 U.S. 950 (1981); Houlihan v. Texas, 551 S.W.2d 719 (Tex. Crim. App.), *cert. denied,* 434 U.S. 955 (1977); United States v. Abel, 548 F.2d 591 (5th Cir.), *cert. denied,* 431 U.S. 956 (1977); and United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied,* 429 U.S. 1002 (1976).

The Court rendered an opinion in its denial of an application for a stay pending disposition of a petition for certiorari in Miroyan v. United States, 577 F.2d 489 (9th Cir.), *cert. denied,* 439 U.S. 896, *application for stay pending disposition of petition for certiorari denied*, 439 U.S. 1338 (1978). In *Miroyan,* the Ninth Circuit affirmed the convictions of co-defendants for drug-related offenses. Evidence supporting the convictions had been gathered by means of a beeper attached to an airplane traveling between the United States and Mexico. Both the installation of the beeper and its subsequent monitoring were challenged. 577 F.2d at 492. The beeper had been attached to an aircraft with its owner's consent and later rented by the co-defendants for illicit purposes. The Ninth Circuit ruled that it did not need to consider the issue of whether probable cause or reasonable suspicion justified

search.[16] The Court did not pass on the constitutionality of the beeper's installation.[17]

Leroy Knotts was convicted of conspiracy to manufacture controlled substances.[18] Suspicion was first aroused when the 3M Company notified the Minnesota Bureau of Criminal Apprehension that a former employee, Triston Armstrong, had stolen chemicals from 3M which could be used to manufacture illegal drugs.[19] After he left his employment with 3M, Armstrong began purchasing similar chemicals from the Hawkins Chemical Company. Investigators, using visual surveillance, discovered that Armstrong purchased chemicals and delivered them to Darryl Petschen.[20]

Narcotics officers received permission from the Hawkins Chemical Company to install an electronic beeper inside a five gallon container of chloroform.[21] The container was sold to Armstrong. After the sale, narcotics officers followed the car in which Armstrong had placed the chloroform, using visual surveillance and monitoring the signals sent by the beeper.[22] Armstrong proceeded to Petschen's house, where the container was transferred to Petschen's car. Narcotics officers maintained visual and electronic surveillance as Petschen traveled eastward across the Minnesota border into Wisconsin. During the trip, Petschen made "evasive maneuvers," ending the officers' visual surveillance.[23] The officers temporarily lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter, picked it up again. When the signal was picked up, its stationary location was a cabin occupied by

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the installation and tracking since the consent of the owner provided adequate justification. *Id.* at 429-39.

The Supreme Court found no "square conflict" among the circuit courts that would justify granting certiorari and denied Miroyan's petition on that basis. *Miroyan,* 439 U.S. at 1339. In the eyes of the Court, *Miroyan* was consistent with the third-party consent exception to the warrant requirement developed by the Fifth Circuit in United States v. Cheshire, 569 F.2d 887 (5th Cir. 1978), and United States v. Abel, 548 F.2d 591 (5th Cir.), *cert. denied,* 431 U.S. 956 (1977). *See* 439 U.S. at 1342. Also, since there was no treatment of the issue of probable cause in *Miroyan,* the Court stated that there was no disagreement between the Ninth and First Circuits. *Id.* at 1343. In United States v. Moore, 562 F.2d 106 (1st Cir. 1976), the First Circuit held that probable cause was required to justify a warrantless beeper installation.

15. 103 S. Ct. 1081 (1983).

16. *Id.* at 1087.

17. *See id.* at 1084 n.**; *infra* note 29.

18. Knotts was convicted of violating 21 U.S.C. § 846. He was charged along with two co-defendants, Darryl Petschen and Triston Armstrong. Petschen was jointly tried and convicted with Knotts in district court. Armstrong pled guilty and testified for the government at trial. 103 S. Ct. at 1083.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Knotts in a secluded area of Wisconsin.[24] After three days of intermittent visual surveillance, the officers secured a search warrant and discovered a fully operable clandestine drug laboratory in the cabin. The chloroform containing the beeper was located outside the cabin under a barrel.[25]

At trial, Knotts moved to suppress the seized evidence, alleging that the monitoring of the beeper signals constituted an illegal search. His motion was denied.[26] Knotts' district court conviction[27] was reversed by the Eighth Circuit Court of Appeals which held that the monitoring of the beeper constituted an illegal search.[28] The Supreme Court granted certiorari to address whether the monitoring of the signal constituted a search.[29]

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24. *Id.* at 1084.

25. *Id.*

26. *Id.*

27. *Id.* Co-defendant Petschen was also found guilty in District Court. Triston Armstrong had pled guilty and testified for the government. *Id.* at 1083.

28. *Id.* at 1084. Petschen's conviction was not overturned by the Eighth Circuit. United States v. Knotts, 662 F.2d 515, 518 (1981), *cert. denied sub nom.* Petschen v. United States, 102 S. Ct. 2964 (1982).

29. *Knotts,* 103 S. Ct. at 1084. Fourth amendment issues are raised by the initial installation of a beeper in addition to monitoring of the beeper signal. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.7, at 418 (1978). A recent Fifth Circuit case acknowledged that *Knotts* "clarified the present state of 'beeper jurisprudence' " in that "the *Knotts* Court employed a bifurcated analytical framework for examining the Fourth Amendment implications of beeper use, separating the installation or attachment of the tracking device from the monitoring of its signals." United States v. Butts, No. 82-1260 (5th Cir. Aug. 1, 1983). Although the *Knotts* Court may have recognized installation and monitoring as two distinct questions, it did not address the fourth amendment issues raised by the installation of the beeper. 103 S. Ct. at 1084 n**. Counsel for Knotts did not challenge the warrantless installation of the beeper, suggesting in oral argument that his client did not have standing to raise the installation issue. *Id.*

The Court's failure to address the installation issue means confusion will remain among the circuits with regard to the fourth amendment implications raised by the initial installation of a beeper. Virtually all the electronic tracking device cases that have come before the courts have involved beepers installed without a warrant. *But cf.* United States v. Bailey, 628 F.2d 938 (6th Cir. 1980) (installation and monitoring of beeper were unconstitutional because warrant failed to include termination date); United States v. Pretzinger, 542 F.2d 517, 519 (9th Cir. 1976) (warrant was obtained prior to installation of beeper; court said warrant was unnecessary).

Where the installation has been accomplished without a warrant, the resolution of the fourth amendment issues turns on whether there are sufficient grounds to justify the warrantless attachment. The First Circuit recognized an automobile exception in United States v. Moore, 562 F.2d 106, 111-12 (1st Cir. 1977). The existence of probable cause for government agents to believe that an offense has or is about to be committed was held to be adequate justification for a warrantless installation. *Id.* at 113. The Eighth Circuit addressed this issue in United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976). The court held that "exigent circumstances" were sufficient to justify the minimal intrusion into the defendant's fourth amendment rights occasioned by the installation of a "bumper beeper." *Id.* at 1325. Two years after *Frazier,* the Tenth Circuit held in United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), that probable

The Supreme Court in *Knotts* applied the reasonable expectation of privacy test to determine whether the monitoring of the beeper constituted a search within the meaning of the fourth amendment.[30] The test developed out of the Court's decision in *Katz v. United States.*[31] Traditionally, the Supreme Court's analysis of fourth amendment search and seizure issues has focused upon whether the government committed an actual physical trespass.[32] The validity of searches and seizures by elec-

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cause and exigent circumstances supported the warrantless installation of a beeper used to track an automobile. Finally, in United States v. Michael, 645 F.2d 252 (5th Cir. 1981), the Fifth Circuit held that mere reasonable suspicion, a less stringent standard than probable cause, was sufficient to support the warrantless installation of a beeper in a rental van.

Another context in which fourth amendment issues are raised with regard to installation of the beeper involves the effect of an owner's consent to the warrantless installation. Typically, this circumstance arises when a defendant derivatively comes into possession of a bugged object. A so-called third-party consent requirement was employed in United States v. Abel, 548 F.2d 591 (5th Cir.), *cert. denied,* 431 U.S. 956 (1977). This Fifth Circuit case involved the warrantless installation of an electronic tracking device in an airplane which was piloted between the Bahamas and Florida. Since the beeper had been placed on the plane with the owner's express consent, the court upheld the constitutionality of the attachment. 548 F.2d at 592. Treatment of this issue by the other circuits has varied. In a case similar to *Abel,* the Ninth Circuit used a two-part analysis that contrasted the constitutional significance of monitoring the signal. United States v. Miroyan, 577 F.2d 489, 492 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978). Moreover, when the Eighth Circuit addressed the third-party consent rule in *Knotts,* it implied that the rule might be predicated upon the contractual theory of caveat emptor. *See Knotts,* 662 F.2d at 517 n.2. Caveat emptor is translated as "let the buyer beware." It is a common law maxim expressing the rule that the "buyer purchases at his peril." BALLENTINE'S LAW DICTIONARY 183 (3d ed. 1969). The Supreme Court in *Knotts* did not allude to the Eighth Circuit's caveat emptor argument. Justice Brennan, in his concurrence, remained unconvinced that the court of appeals' footnote effectively disposed of the installation issue. "The Government is not here defending against a claim for damages in an action for breach of warranty; it is attempting to justify the legality of a search conducted in the course of a criminal investigation." *Knotts,* 103 S. Ct. at 1088 (Brennan, J., concurring). Most recently, the Tenth Circuit held:

> The consent of one owner to leave a beeper installed cannot suffice to continue the installation once the item belongs to someone else anymore than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search a suitcase after it comes under the ownership of another.

United States v. Karo, 710 F.2d 1433, 1438-39 (10th Cir. 1983).

30. *Knotts,* 103 S. Ct. at 1085.

31. 389 U.S. 347 (1967).

32. In the early years of electronic surveillance, the warrantless use of an electronic device to eavesdrop was permitted if no physical trespass was committed. *See* Olmstead v. United States, 277 U.S. 438 (1928) (no fourth amendment violation resulting from wiretaps when government agents did not actually enter defendants' residences to perform wiretap); Case Comment, *Electronic Tracking, supra* note 5, at 197. *Olmstead* set the stage for a line of cases from which the concept of a constitutionally protected area subject to fourth amendment protections evolved. *See id.* at 198; *see, e.g.,* Silverman v. United States, 365 U.S. 505 (1961) (penetration of "spike mike" through party's wall held to be unconstitutional search because of trespassory physical entry); Goldman v. United States, 316 U.S. 129 (1942) (listening device placed against partition and used to monitor conversation in

tronic surveillance was determined by reference to property rights. The *Katz* decision shifted the analytical emphasis from property-based analysis to an analysis of the individual's expectations of privacy.[33] The *Katz* Court articulated the following rule: "[W]hat a person knowingly exposes to the public, even in his own home, 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."[34] Under this rule, use of electronic surveillance constitutes a search when it discloses matters which a person "justifiably" regards as private.[35]

The reasonable expectation of privacy test used by the *Knotts* Court was drawn from Justice Harlan's concurring opinion in *Katz.*[36] Harlan's concurrence was an attempt to limit the majority's departure from precedent and to inject personal intentions and social norms into the determination of fourth amendment protection.[37] The test developed from Harlan's opinion involves a twofold requirement. Before fourth amendment protection will be afforded, it must be established "that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[38]

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next room held not to violate fourth amendment because no trespass occurred at time conversations were overheard).

33. In *Katz,* government agents attached an electronic listening device to the outside of a public telephone booth without obtaining a warrant. They listened to and recorded defendant Katz's calls. Those calls were introduced at his trial. He was charged with transmitting wagering information. Katz contended that the recordings had been obtained in violation of his fourth amendment rights. 389 U.S. at 348. Katz argued that the booth from which he placed his calls was a constitutionally protected area; the government maintained that it was not. *Id.* at 351. The Supreme Court rejected the parties' formulation of the issues. The *Katz* Court stated: "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the fourth amendment protects people, not places." *Id.* The Court extended fourth amendment protection because "[t]he Government's activities in electronically listening to and recording [Katz's] words violated the privacy upon which he justifiably relied while using the telephone booth . . . ." *Id.* at 353. According to the Court, one who occupies a telephone booth "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352.

34. *Id.* at 350-51.

35. *See id.* at 353.

36. *See id.* at 361 (Harlan, J., dissenting).

37. Note, *Tracking Katz, supra* note 5, at 1471.

38. *Katz,* 389 U.S. at 369 (Harlan, J., dissenting). In a footnote in Rakas v. Illinois, 439 U.S. 128 (1978), the Supreme Court provided an illustration of the test's application:

> Obviously . . . a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognized as 'legitimate.' [The burglar's] . . . presence is wrongful; his expectation is not one that society is prepared to recognize as 'reasonable.'

Applying this test, the *Knotts* Court drew a distinction between a person's expectation of privacy in the movements and location of an automobile on a public roadway and the expectation of privacy within a dwelling.[39] The Court acknowledged that Knotts, as the owner of the cabin, "undoubtedly had the traditional expectation of privacy within his dwelling insofar as the cabin was concerned."[40] Conversely, the Court noted, "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."[41] Petschen's exit from public roadways onto Knotts' property was openly visible to the public.[42] Thus, Knotts had no reasonable expectation that the arrival of Petschen onto his property was a private matter.[43]

Knotts did not object to this analysis.[44] Rather, he argued that the electronic monitoring involved more than merely ascertaining the arrival of Petschen's vehicle onto his property.[45] The circuit court had agreed with Knotts. According to the court of appeals, Knotts' cabin "was not found by watching or tracing the public progress of Petschen in his car."[46] The government agents lost sight of Petschen.[47] They also lost the signal being transmitted by the beeper.[48] When the agents were again able to monitor the signal, the canister containing the beeper was stationary, on Knotts' property,[49] and out of public view.[50] Monitoring of the beeper was thus held to have invaded Knotts' legitimate expectation of privacy "in the kind and location of objects out of view on his land."[51]

The Supreme Court was unpersuaded by Knotts' argument and the lower court's reasoning.[52] The Court viewed the argument as a revival of the fourth amendment analysis applied in pre-*Katz* search and seizure cases, which defined a search as a physical trespass into constitutionally protected areas. Knotts' expectation of privacy alone was deemed dispositive of the fourth amendment issue. The Court stressed the "limited

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Id. at 143 n.12.

39. *See Knotts,* 103 S. Ct. at 1085.

40. *Id.*

41. *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

42. *See id.*

43. *See id.*

44. *See* Brief for Respondent at 18, United States v. Knotts, 103 S. Ct. 1081 (1983).

45. *See id.*

46. United States v. Knotts, 662 F.2d 515, 518 (1981), *rev'd in part,* 103 S. Ct. 1081 (1983).

47. *Knotts,* 662 F.2d at 516.

48. *Id.*

49. *Id.*

50. *Id.* at 518.

51. *Id.*

52. *See Knotts,* 103 S. Ct. at 1087.

use" that the government agents made of the signals from the beeper.[53] The Court noted that nothing in the record showed reliance on the beeper after the signal indicated the chloroform container had ended its automotive journey on Knotts' property.[54] Apparently, the record reflected that the beeper was not used to determine the precise location of the chloroform container on Knotts' premises.[55] The beeper was used only to determine that the container was on Knotts' property.[56] This fact could have been determined by visually observing Petschen entering Knotts' property with the container in his car. Use of the beeper merely augmented the government agents' vision. Petschen's arrival on Knotts' property could have been observed by anyone.[57] The Court ultimately rejected Knotts' argument stating: "Just as notions of physical trespass based on the law of real property were not dispositive in *Katz* [wherein the Court established that the fourth amendment protects people not places] . . . neither were they dispositive in *Hester v. United States* [wherein the Court established the open fields doctrine]."[58]

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53. *See id.*

54. *Id.*

55. This contention was put forth in the government's brief. *See* Brief for Appellant at 26, United States v. Knotts, 103 S. Ct. 1081 (1983).

56. *See id.*

57. *See id.* The Supreme Court stated:

> When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Knotts, 103 S. Ct. at 1085.

58. *Knotts*, 103 S. Ct. at 1087. The Court stated that "no reasonable expectation of privacy extended to the visual observation of Petschen's automobile arriving on [Knotts'] premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.' " This reference to open fields drew criticism in two concurring opinions. *See, e.g., id.* at 1087-88 (Brennan, J., concurring) (Blackmun, J., concurring). Justice Blackmun asserted that the *Knotts* case did not concern the open fields doctrine. *Id.* at 1088. He regarded reference to the open fields doctrine as unnecessary for the decision. *Id.* According to Blackmun, the most important cases dealing with the open fields doctrine had already been accepted by the Court for argument and plenary consideration. *Id.* (citing Florida v. Brady, 406 So. 2d 1093 (Fla. 1981), *cert. granted,* 102 S. Ct. 2266 (1982); Oliver v. United States, 686 F.2d 356 (6th Cir. 1982) (en banc), *cert. granted,* 103 S. Ct. 812 (1983)). Blackmun concluded:

> It would be unfortunate to provide either side in these granted cases with support, directly or by implication, for its position, and I surely do not wish to decide those cases in this one. Although the Court does not indicate its view on how such cases should be decided, I would defer all comments about open fields to a case that concerns that subject and in which we have the benefit of briefs and oral argument.

Id. at 1088.

The "open fields doctrine" was first enunciated in Hester v. United States, 265 U.S. 57 (1924), where the Court held that fourth amendment protection did extend to open fields. *Id.* at 59. The Court in Olmstead v. United States, 277 U.S. 438 (1928), began to retract from its rigid position in *Hester.* In *Olmstead,* the Court held that fourth amendment protection was available if the house or curtilage were physically invaded. *Id.* at

Although it is the first beeper case to be decided by the Supreme Court, *Knotts* is by no means a watershed case. *Knotts* produces a narrow holding based on fine distinctions of fact. The Court first narrowed its inquiry to the fourth amendment issues raised by the monitoring of the beeper and did not consider issues raised by the installation of the beeper.[59] Second, the Court framed the issue in accordance with the government's position. As noted above, the government's position was that the use of a beeper to assist in surveillance of a motor vehicle traveling on public roadways was at issue.[60] On the other hand, Knotts contended that the issue before the Court involved monitoring of a noncontraband item on private property out of public view.[61] Having adopted the government's position, the Court had little trouble resolving the case. It is difficult to refute that one could not reasonably expect his movements on public roadways to remain private.[62]

Knotts thus established that electronic monitoring of movement on a public roadway does not invade a reasonable expectation of privacy.[63]

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466. In Katz v. United States, 389 U.S. 347 (1967), the Court stated that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52. Since *Katz,* some courts have applied a reasonable expectation of privacy test to the open fields doctrine, further limiting the rigid rule enunciated in *Hester. See* Comment, *Katz In Open Fields,* 20 AM. CRIM. L. REV. 485, 485 (1983).

Since courts have not uniformly applied *Katz* to the open fields doctrine Blackmun's admonishment becomes all the more apparent. It is necessary for the Court to reconcile confusion only after the issue is properly before the Court. For an excellent discussion of the disparate effect *Katz* has had on the open fields doctrine, see *id.*

59. *Knotts,* 103 S. Ct. at 1084 & n.**.

60. *See* Brief for Appellant at 21-24, United States v. Knotts, 103 S. Ct. 1081 (1983).

61. *See* Brief for Respondent at 18, United States v. Knotts, 103 S. Ct. 1081 (1983).

62. Other courts have ruled that people who commit acts in public, such as flying and driving, may be monitored because they have no reasonable expectation of privacy from visual surveillance. *See* United States v. Michael, 622 F.2d 744 (5th Cir.), *reh'g en banc,* 645 F.2d 252, 257-58 (5th Cir.) (diminished expectation of privacy when travelling in auto on public roads), *cert. denied,* 454 U.S. 950 (1981); United States v. Bruneau, 594 F.2d 1190, 1196-97 (8th Cir.) (no legitimate expectation of privacy while traveling in public air space), *cert. denied,* 444 U.S. 847 (1979); United States v. Hufford, 539 F.2d 32, 33 (9th Cir.) (no reasonable expectation of privacy in drums of caffeine hauled over public roads), *cert. denied,* 429 U.S. 1002 (1976). *But see* United States v. Holmes, 521 F.2d 859, 864 (5th Cir. 1975) (person does not necessarily lose his expectation of privacy while in public) *reh'g en banc,* 537 F.2d 227 (5th Cir. 1976); Note, *Tracking Katz, supra* note 5, at 1994. One commentator has stated:

> A traveler in public may be seen by many people, and his location at any given point may be known. It is also possible that reasonably curious persons might follow him for relatively brief periods and short distances. But continuous tailing by one person for a long distance or time is unlikely. An individual may thus be entitled to rely on the privacy of his "route," even if segments of it are exposed. When a beeper is used to track an individual's route by continuous and lengthy monitoring, the individual's privacy may thus be invaded though he took no apparent steps to protect it.

Id.

63. *See Knotts,* 103 S. Ct. at 1085-86.

On the other hand, the Supreme Court acknowledged that one has the traditional expectation of privacy in his dwelling.[64] By implication, *Knotts* stands for the premise that monitoring of an item in a person's dwelling would constitute an invasion of that person's reasonable expectation of privacy.[65]

Knotts will do little to clarify recurring conflicts among the circuits with regard to fourth amendment implications raised by the use of electronic tracking devices. Confusion will persist because *Knotts* merely joins the precedent of resolving fourth amendment issues with the reasonable expectation of privacy test.[66] The courts have consistently applied the same test, but the focus of the inquiry whether a person has a reasonable expectation of privacy has varied among them. In *Knotts,* the focus was on the location of the item containing the beeper.[67] Other courts have focused on the nature of the item containing the beeper.[68] Under this approach, a person does not have a legitimate expectation of privacy in a piece of property to which he is not entitled possession.[69] Such prop-

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64. *Id.* at 1085.

65. *See id.*

66. The test to determine reasonableness is whether society is prepared to recognize a person's movements on public roads as reasonable. This test is relativistic. It would be difficult to determine empirically that which society would recognize as reasonable. One commentator stated:

> Courts must draw inferences from social practices, and they must assess the social functions served by specific privacy interests. From these general evaluations they must then determine where, in specific instances, to draw the line beyond which a warrant is required.
>
> Two kinds of privacy interests are likely to be deemed reasonable: those that are commonly asserted, and those that, though less frequently claimed, nevertheless play a significant role in the social order. Both the prevalence and the importance of privacy interests, however, are inevitably matters of degree. Thus, the 'reasonable expectation' standard compels courts to decide the degree of social solidarity or significance sufficient to raise a Fourth Amendment claim. For this decision, the test applies no objective referent. Instead, courts tend to weigh particular privacy interests against other values, such as the need for effective law enforcement. The weights assigned to each competing value ultimately depend upon the judges' own principles and priorities.

Note, *Tracking Katz, supra* note 5, at 1473-74.

67. The Supreme Court stated in *Knotts*: "The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways." 103 S. Ct. at 1085.

68. *See* United States v. Pringle, 576 F.2d 1114-19 (5th Cir. 1978); United States v. Moore, 562 F.2d 106, 111 (1st. Cir. 1977), *cert. denied,* 435 U.S. 926 (1978); United States v. Perez, 526 F.2d 859, 863 (5th Cir.), *cert. denied,* 429 U.S. 846 (1976); United States v. Emery, 541 F.2d 887 (1st Cir. 1976).

69. *See* United States v. Pringle, 576 F.2d 1114, 1118-19 (5th Cir. 1978) (insertion of beeper into package of mail containing heroin and subsequent monitoring did not constitute a search); United States v. Emery, 541 F.2d 887, 890 (1st Cir. 1976) (beeper inserted in bag of cocaine and tracked to defendant's apartment did not violate defendant's reasonable expectation of privacy); United States v. Perez, 526 F.2d 859 (5th Cir.), *cert. denied,* 429 U.S. 846 (1976) (no reasonable expectation of privacy when undercover agents barter television equipped with beeper in exchange for heroin); United States v. French, 414 F.

erty may be monitored regardless of its location without being considered a search under the fourth amendment.[70] The Ninth and Tenth Circuits have taken yet another approach to the legitimate expectation of privacy issue. Their approach has focused on the single intrusion that a beeper makes irrespective of location or nature of the item.[71] The Tenth Circuit has held that the slight intrusion of a beeper does not constitute an impressionable search.[72]

The reasonable expectation of privacy test has little prescriptive value. It is likely that courts will continue to take divergent paths in framing and resolving fourth amendment issues raised by the use of beepers. By reaffirming the use of this test,[73] the *Knotts* Court did little to resolve confusion among the circuits.

Additionally, *Knotts* leaves unanswered questions involving the fourth amendment implications raised by the initial installation of the beeper.[74] In addressing only the fourth amendment issues raised by monitoring of the beeper, the Court left unresolved the grounds sufficient to justify warrantless installation of a beeper and the requirements for standing to challenge installation.[75] In those situations where monitoring of a beeper has constituted a search, there remains the open question of what must be done or what circumstances must be present to satisfy the fourth amendment standard of reasonableness.

As long as the use of electronic surveillance by law enforcement agencies continues, criminal appeals challenging beeper installation and monitoring will continue. The Court will no doubt soon be called upon to

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Supp. 800 (W.D. Okla. 1976) (beeper placed on packages of marijuana violated no reasonable expectation of privacy).

70. No one can have a "legitimate expectation of privacy in substances which they have no right to possess at all." United States v. Moore, 562 F.2d 106, 111 (1st Cir. 1977).

71. *See* United States v. Clayborne, 584 F.2d 346, 350-51 (10th Cir. 1978); United States v. Bernard, 625 F.2d 854, 860-61 (9th Cir. 1980); United States v. Dubrofski, 581 F.2d 208, 211-12 (9th Cir. 1978). In *Clayborne,* the Tenth Circuit affirmed the defendant's conviction of conspiracy to manufacture a controlled substance. The court held that a slight intrusion resulting from a warrantless placement of an electronic tracking device in a container of ether, which resulted in locating a laboratory in a commercial building, was not per se a violation of the fourth amendment. *See Clayborne,* 584 F.2d at 350-51. The court stated: "The use of the beeper with a laboratory was vastly different from the use of the recording device in the telephone booth in *Katz.* The invasion in *Katz* was of great magnitude in comparison with the intrusion here (a beeper)." *Id.*

72. *See supra* note 71.

73. At least two commentators have suggested alternative approaches to the reasonable expectation of privacy test in determining the fourth amendment implications raised by the use of beepers. *See* Note, *Tracking Katz, supra* note 5, at 1477-96 (advocating return to standards articulated by majority in *Katz* in fourth amendment privacy analysis); Case Comment, *Finders Keepers, supra* note 9, at 501-06.

74. The *Knotts* Court stated: "We note that while several Courts of Appeals have approved warrantless installation we have not before and do not now pass on the issue." 103 S. Ct. at 1084 n** (citations omitted).

75. *See supra* note 29.

resolve the questions left unanswered in *Knotts* and will again have to confront the inconsistencies and confusion fostered by the reasonable expectation of privacy test. *Knotts* will not provide much guidance.

Constitutional Law—FIRST AMENDMENT OVERRIDES MUNICIPAL ATTEMPT TO ZONE ADULT BOOKSTORES AND THEATERS—*Alexander v. City of Minneapolis,* 698 F.2d 936 (8th Cir. 1983).

In recent years several municipalities have attempted to prevent community deterioration by enacting zoning ordinances designed to restrict the location of adult bookstores and theaters.[1] Government interest in controlling crime and preventing property devaluation[2] often has clashed with the right to distribute non-obscene sexually oriented material.[3] To survive constitutional scrutiny, a zoning ordinance which curtails public access to adult entertainment must be narrowly drawn and further a substantial and compelling governmental interest. If the ordinance imposes any content limitations on the purveyors of adult entertainment, or if it restricts the public's right to patronize such entertainment in any significant way, it will be found unconstitutional.[4]

1. *See* Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Hart Book Stores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied,* 447 U.S. 929 (1980); Kacar, Inc. v. Zoning Hearing Bd. of Allentown, 60 Pa. Commw. 582, 432 A.2d 310 (1981); Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978) (en banc).

2. In Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit Court of Appeals invalidated an ordinance which in effect allowed adult theaters to operate only in areas of zones for light and heavy industry. These areas included swamps, warehouses, and railroad tracks. *Id.* at 1209. In Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981), the city enacted an ordinance which prohibited the placement of an adult theater within 500 feet of an establishment licensed to sell liquor, a church or a school, or within 250 feet of a residential zone. The owner of the only adult bookstore in the city was prohibited from doing business because no location existed which was not within 500 feet of the theater. *Id.* at 96. The Sixth Circuit Court of Appeals struck down the ordinance. *Id.* at 98. "Keego Harbor does not merely disperse adult theatres within its jurisdiction but effectively bans them." *Id.*

3. A leading constitutional law scholar has written, "Any government action aimed at communicative impact is presumptively at odds with the first amendment. For if the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . .'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 581 (1978) (quoting Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972)). The government must have a valid justification for enacting an ordinance which would have an impact on protected communication such as nonobscene adult entertainment.

4. *See* Schad v. Mt. Ephraim, 452 U.S. 61 (1981). The court in *Schad* quoted Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), for the following proposition:

> [A] zoning ordinance can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest. . . . [T]he onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the