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Fourth Amendment--of Warrants, Electronic Surveillance, Expectations of Privacy, and Tainted Fruits

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FOURTH AMENDMENT—OF WARRANTS, ELECTRONIC SURVEILLANCE, EXPECTATIONS OF PRIVACY, AND TAINTED FRUITS

United States v. Karo, 104 S. Ct. 3296 (1984).

I. INTRODUCTION

In *United States v. Karo*,¹ the United States Supreme Court held that government agents who, without a warrant, monitored a beeper² in a private residence had violated the fourth amendment rights of those who had a justifiable interest in the privacy of the residence.³ The Court, however, held that the Tenth Circuit Court of Appeals should not have suppressed evidence that the agents had seized subsequent to the initial violation of respondents' constitutional rights.⁴ The Court ruled that the government agents later had obtained sufficient untainted information apart from the initial search and seizure to furnish probable cause for a search warrant.⁵ Although the Court followed precedent and found that the agents had infringed respondents' fourth amendment rights, the Court departed from its former reverence for the protection of constitutional rights and its abhorrence of illegally obtained evidence and found that the evidence was untainted.⁶

This Note will examine why the Court found that agents who, without a warrant, monitored a beeper attached to a can of noncontraband in a private residence violated fourth amendment rights against search and seizure.⁷ The Note will analyze the Court's ruling that mere attachment of an electronic beeper to a can containing

¹ 104 S. Ct. 3296 (1984).

² Brief for Respondents Karo, Roth and Steele at 5-6, *United States v. Karo*, 104 S. Ct. 3296 (1984). A beeper is a radio transmitting device that emits signals. The beeper can be followed by a person with a receiver that picks up the signals that the beeper emits. Neither the briefs nor the record indicate how far the beeper signal travels.

³ 104 S. Ct. at 3303.

⁴ *Id.* at 3307.

⁵ *Id.*

⁶ See *infra* notes 195-98 and accompanying text.

⁷ 104 S. Ct. at 3303.

noncontraband did not violate fourth amendment rights.⁸ Finally, the Note will explore the Court's holding that certain evidence that government agents obtained after they had violated respondents' fourth amendment rights was not tainted by the agents' illegal conduct.⁹

II. BACKGROUND

A. THE KATZ TEST

Until the Court in *Katz v. United States*¹⁰ delineated a new test to determine whether government agents have violated a person's fourth amendment rights, electronic surveillance did not violate a defendant's fourth amendment rights in criminal proceedings. Government agents violated fourth amendment rights only if they bodily seized the defendant, physically invaded the defendant's home, or seized the defendant's personal property.¹¹ The Court in *Olmstead v. United States*¹² held that government agents who had tapped the defendant's private telephone line did not violate the fourth amendment because the government had accomplished the wiretapping without a physical trespass.¹³ In *Olmstead*, the agents tapped the defendant's telephone line through the telephone company lines and recorded the defendant's conversations.¹⁴ The agents committed no trespass on the defendant's property.¹⁵ The Court held that the agents had not committed a search and seizure under the fourth amendment because the agents did not enter the defendant's private residence or office.¹⁶

The Court in *Goldman v. United States*¹⁷ and in *On Lee v. United States*¹⁸ clarified that a physical encroachment on a constitutionally protected area was necessary for a fourth amendment violation. In *Goldman*, government agents had placed a detectaphone on a wall in order to listen to the defendant's private conversation in an adjoin-

⁸ *Id.* at 3302.

⁹ *Id.* at 3307.

¹⁰ 389 U.S. 347 (1967).

¹¹ *Id.* at 364-74 (Black, J., dissenting). Justice Black, however, maintained that according to the plain meaning of the words of the fourth amendment, electronic surveillance is neither a search nor a seizure.

¹² 277 U.S. 438 (1928).

¹³ *Id.* at 464.

¹⁴ *Id.* at 456-57.

¹⁵ *Id.* at 457.

¹⁶ *Id.* at 464.

¹⁷ 316 U.S. 129 (1942).

¹⁸ 343 U.S. 747 (1952).

ing room.¹⁹ The Court specifically declined to overrule *Olmstead* and found that no physical trespass had occurred; therefore, the agents' actions did not violate the defendant's fourth amendment rights.²⁰

In *On Lee*, government agents equipped an informer, a friend of the defendant, with a transmitting device.²¹ The informer visited the defendant's laundry and engaged him in conversation. During the conversation, Lee made damaging admissions transmitted to and heard by the agents who later testified against Lee at his trial.²² The Court analogized the informer's actions to eavesdropping on a conversation and concluded that no constitutional violation had occurred because the informer, who entered Lee's laundry with Lee's permission, had not trespassed on Lee's property.²³

The Court, however, eventually recognized the new contingencies of search and seizure that advancing electronic technology had thrust upon modern society. Initially, in *Silverman v. United States*,²⁴ the Court declined to consider the looming questions about the "frightening paraphernalia" of the electronic age, and declined to overrule *Olmstead* because *Silverman* involved a physical trespass and, therefore, was inapposite to *Olmstead*.²⁵ In *Silverman*, government agents had penetrated a wall with a spike and had connected the spike with the heating system of a home; this physical intrusion became a conduit through which to hear private conversations inside the home.²⁶ The Court found that the physical intrusion of the spike violated the fourth amendment.²⁷

In *Lopez v. United States*,²⁸ the Court maintained its weakening position that search and seizure within the meaning of the fourth amendment required a physical intrusion. The Court found that an Internal Revenue agent did not violate the defendant's fourth amendment rights when he carried concealed electronic equipment to record the defendant's words and later used the recording as evidence against the defendant.²⁹ Justice Brennan wrote a dissenting opinion that the Court would later adopt in *Katz v. United States*:

¹⁹ *Goldman*, 316 U.S. at 131. A detectaphone is a telephonic apparatus with an attached microphone transmitter, used for listening secretly.

²⁰ *Id.* at 135.

²¹ *On Lee*, 343 U.S. at 749.

²² *Id.* at 749-50.

²³ *Id.* at 751-53.

²⁴ 365 U.S. 505 (1961).

²⁵ *Id.* at 509.

²⁶ *Id.*

²⁷ *Id.* at 511.

²⁸ 373 U.S. 427 (1963).

²⁹ *Id.* at 440.

There is a qualitative difference between electronic surveillance . . . and conventional police stratagems The latter do not so seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or being betrayed by an informer or deceived as to the identity of one with whom one deals is . . . inherent in the conditions of human society But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy Electronic surveillance . . . makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.³⁰

The Court in *Katz v. United States*³¹ overruled *Olmstead* and *Goldman* and set up a new test for the determination of whether a fourth amendment privacy interest has been infringed. The new test expanded the fourth amendment to protect modern contingencies not within the purview of the old test.³² In *Katz*, government agents had attached a "listening and recording device to the outside of the telephone booth" in which the defendant placed calls.³³ The Court found that "the Fourth Amendment protects people, not places,"³⁴ and held that because an individual has a reasonable expectation of privacy in a telephone booth, the agents had committed a search and seizure under the fourth amendment.³⁵ The fact that the electronic device did not actually penetrate the wall of the booth no longer had any constitutional significance.³⁶

Justice Harlan's concurring opinion in *Katz* contained the specific words that became the new standard for the determination of whether the government has violated an individual's fourth amendment right against search and seizure.³⁷ Justice Harlan addressed the question of what exact protection the fourth amendment affords the people that it protects: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the actual expectation be one that society is prepared to recognize as 'reasonable.'"³⁸ Persons expect to have privacy in their homes; if they manifest no intention to keep

³⁰ *Id.* at 465-466 (Brennan, J., dissenting).

³¹ 389 U.S. 347 (1967).

³² Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157-64 (1977).

³³ 389 U.S. at 348.

³⁴ *Id.* at 351.

³⁵ *Id.* at 353.

³⁶ 389 U.S. at 353.

³⁷ See F. INBAU, CASES AND COMMENTS ON CRIMINAL PROCEDURE 435-37 (2d ed. 1980).

³⁸ 389 U.S. at 353 (Harlan, J., concurring). One commentator has foreseen a problem with the subjective expectation of privacy of this test. A government, to reduce its

"objects, activities, or statements" to themselves and expose these things to public view, however, the individuals have no expectations of privacy in these items.³⁹ Justice Harlan did not define the prior decisions that engendered this twofold requirement, although he alluded to *Weeks v. United States*⁴⁰ and *Hester v. United States*.⁴¹ The Court subsequently adopted the *Katz* test to determine when a reasonable expectation of privacy may be found.⁴²

In *United States v. Knotts*,⁴³ the Court further defined the parameters of a reasonable expectation of privacy. In *Knotts*, the Court found that a person who travels in an automobile on public highways has no reasonable expectation of privacy because the automobile and its occupants are in plain view and are open to public scrutiny.⁴⁴ The Court a year earlier had expanded the automobile exclusion in *United States v. Ross*⁴⁵ and held that the exception includes the government's right to search closed packages and containers found during a search of the automobile.⁴⁶ A person has no reasonable expectation that government agents will not search closed packages and containers that they find in an automobile; if probable cause justifies the automobile's search, it justifies the search of everything in the vehicle that may contain the object of the search.⁴⁷

B. THE EXCLUSIONARY RULE

After the Supreme Court promulgated the *Katz* test and eliminated physical trespass as a necessary element to a fourth amendment violation, the Court clarified that evidence obtained pursuant to a fourth amendment violation must be inadmissible in court. In *Alderman v. United States*,⁴⁸ the Court focused on this exclusionary

citizens' subjective expectation of privacy could simply announce searches, thus taking away any subjective expectation of privacy. See *supra* note 32.

³⁹ *Id.*

⁴⁰ 232 U.S. 383, 390 (1914) (a United States marshal cannot search a person's home without a warrant).

⁴¹ 265 U.S. 57, 58 (1924) (an individual's actions outside of his home and in clear view of anyone who might look defeat any claim of fourth amendment rights).

⁴² See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983).

⁴³ 460 U.S. 276 (1983).

⁴⁴ *Id.* at 281.

⁴⁵ 456 U.S. 798 (1982).

⁴⁶ *Id.* at 822.

⁴⁷ *Id.* at 825.

⁴⁸ 394 U.S. 165 (1969). The Court addressed the question of who has standing to assert the protection of fourth amendment rights. In *Alderman*, the government agents had placed electronic recording equipment in one of the defendants' place of business. The questions were whether the overheard conversation was relevant to the prosecution's case and whether the defendant whose business was "bugged" had standing to

rule, a rule that had its genesis in *Weeks v. United States*⁴⁹ and *Mapp v. Ohio*.⁵⁰ Justice White stated that the Court would apply the exclusionary rule by weighing the costs to society of releasing guilty individuals against the benefits to the defendant of suppressing the evidence:

The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.⁵¹

The Court explicated the boundaries of the exclusionary rule in *United States v. Calandra*⁵² and concluded that the courts should apply the rule only in cases where the rule would function as an effective remedy.⁵³ Thus, a defendant would have standing to suppress evidence only in cases where, *but for* the unlawful search, government agents could not have obtained the evidence in question.⁵⁴

III. FACTS

The Drug Enforcement Administration (DEA) charged James Karo, Richard Horton, William Harley, Michael Steele, Evan Roth, and Gene Rhodes with conspiracy to possess cocaine with the intent to distribute it in violation of 21 U.S.C. § 846;⁵⁵ the DEA also charged all of the defendants except Roth with possession of cocaine with the intent to distribute it in violation of 21 U.S.C. § 841

object to the evidence obtained by the eavesdropping when the defendant was not present during, nor a party to, the conversations. The Court held that the defendant did not have standing to suppress the evidence. *Id.* at 170.

⁴⁹ 232 U.S. 383, 393-94 (1914) (the government could not use letters seized during an unwarranted search of the defendant's house as evidence against the defendant).

⁵⁰ 367 U.S. 643 (1961) (material confiscated in an unwarranted search is inadmissible as evidence because the government had violated the defendant's fourth amendment rights).

⁵¹ 394 U.S. at 174-75.

⁵² 414 U.S. 338, 348 (1974) (the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 104 S. Ct. at 3301. 21 U.S.C. § 846 states: "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 in the offense, the commission of which was the object of the attempt or conspiracy."

(a)(1).⁵⁶

In August 1980, DEA agents in Albuquerque, New Mexico, learned through Carl Muhlenweg, an informant, that Karo, Horton, and Harley had ordered ten cans of ether from Muhlenweg. Muhlenweg alleged that the three respondents planned to use the ether to extract cocaine from clothing that had been imported to the United States.⁵⁷ The government obtained a court order that authorized the installation and monitoring of a beeper⁵⁸ in one of the cans of ether.⁵⁹ With the informant's consent, the agents substituted their can, which contained the beeper, for one of the ten cans that Muhlenweg was to supply to the three respondents, and painted the cans a uniform color.⁶⁰

On September 20, 1980, agents using visual and beeper surveillance observed Karo collect the cans from Muhlenweg and followed Karo as he delivered the cans to his own residence.⁶¹ Later that day, Karo moved the cans to Horton's house without visual detection, but agents monitoring the beeper located the cans at Horton's house.⁶² Agents confirmed the presence of the cans of ether at Horton's house when they smelled the ether from the sidewalk in front of the house.⁶³ Two days later, agents determined through monitoring the beeper that the defendants had moved the ether to Horton's father's house.⁶⁴ The next day, the agents followed the beeper signal to a commercial self-storage facility in Albuquerque. Agents located the precise locker that contained the ether by detecting the odor of the ether, and the facility's management confirmed that Horton and Harley had rented the locker.⁶⁵

On October 8, 1980, agents obtained court permission to install an entry tone alarm on the locker door and, while doing so,

⁵⁶ 21 U.S.C. § 841 (a)(1) states: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

⁵⁷ 104 S. Ct. at 3300. Neither the record nor the briefs indicate whether respondents imported the clothing.

⁵⁸ See *supra* note 2.

⁵⁹ 104 S. Ct. at 3300; Brief for the United States at 5, *United States v. Karo*, 104 S. Ct. 3296 (1984). The original warrant issued contained falsified information regarding the informant, allegedly to protect the informant's identity from discovery. Brief for the United States at 4 n.3.

⁶⁰ 104 S. Ct. at 3300.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

observed cans of ether inside.⁶⁶ The alarm malfunctioned, however, and did not alert the agents when Horton and Harley removed the ether from the locker. The manager of the storage facility informed the agents that the defendants had removed the ether.⁶⁷

Three days later, the agents followed the beeper signal to another Albuquerque storage facility where they detected the liquid's odor and discovered the cans in locker 15.⁶⁸ The agents obtained a court order and installed a video camera on the wall that focused on locker 15.⁶⁹

On February 6, 1981, agents using the camera observed Rhodes and an unidentified woman remove the cans from locker 15.⁷⁰ Horton and the woman loaded the cans into Horton's pick-up truck. Through both visual and beeper surveillance, agents followed the truck to Rhodes' residence; Rhodes parked the truck in the driveway.⁷¹

Later that day, agents followed the truck to a house in Taos, New Mexico, that Horton, Harley, and Steele had rented.⁷² Agents visually surveyed the house and monitored the beeper to ascertain the presence of the ether.⁷³ The agents suspected that the occupants were using the ether because all of the windows of the house were open even though it was a cold and windy day.⁷⁴

On February 8, the agents applied for and received a warrant to search the residence in Taos.⁷⁵ The warrant was based in part on evidence that the agents secured by monitoring the beeper.⁷⁶ The warrant was executed on February 10. Agents seized cocaine and laboratory equipment and arrested Horton, Harley, Steele, and Roth.⁷⁷

Before trial in the Federal District Court of the District of New Mexico, respondents filed a joint motion to suppress the evidence taken from the Taos house on the grounds that the warrant was invalid because the agents had based it on the fruits of an unlawful

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 3301.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* The ether had been moved to seven different locations over a period of four and one-half months.

beeper surveillance.⁷⁸ The district court granted the respondents' motion and concluded that the initial warrant was invalid because it had contained deliberate misrepresentations;⁷⁹ the evidence, therefore, was the fruit of an unlawful search.⁸⁰ The district court rejected the government's subsequent motion to reconsider the suppression ruling because the agents failed to secure a valid warrant for the installation and monitoring of the beeper.⁸¹

The Court of Appeals for the Tenth Circuit affirmed the suppression order, but excepted evidence against respondent Rhodes and ruled that Rhodes had no privacy interest in the Taos residence.⁸² The appeals court rejected the government's argument that, given the facts of *Karo*, respondents did not have a reasonable expectation of privacy that the cans of ether would not be searched, and held that the agents' warrantless monitoring of the beeper had violated the respondents' fourth amendment rights.⁸³

The government petitioned the Supreme Court for certiorari and raised two questions: whether warrantless installation of the beeper had violated respondents' fourth amendment rights, and whether warrantless monitoring of the beeper in a home or private area had violated respondents' fourth amendment rights.⁸⁴

IV. THE SUPREME COURT DECISION

In *Karo*, the Supreme Court reversed the decision of the court of appeals.⁸⁵ The Court, through Justice White,⁸⁶ held that the agents had violated respondents' fourth amendment rights by monitoring the cans of ether while the cans were in private areas.⁸⁷ The Court, however, also held that the DEA agents' monitoring of the beeper before the defendants brought the cans of ether to the second warehouse had not contributed to the discovery of the cans at

⁷⁸ *Id.*

⁷⁹ Brief for the United States at 2, *United States v. Karo*, 104 S. Ct. 3296 (1984).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *United States v. Karo*, 710 F.2d 1433, 1441 (10th Cir. 1983), *rev'd*, 104 S. Ct. 3296 (1984).

⁸³ 710 F.2d at 1439.

⁸⁴ 104 S. Ct. at 3301.

⁸⁵ *Id.* at 3307.

⁸⁶ *Id.* at 3299. Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Blackmun and Powell. Justices Rehnquist and O'Connor joined in parts I, II, and IV. Justices Brennan, Marshall, and Stevens joined in part III. Justice O'Connor filed an opinion in which Justice Rehnquist joined, concurring in part and concurring in the judgment. Justice Stevens filed an opinion in which Justices Brennan and Marshall joined, concurring in part and dissenting in part.

⁸⁷ *Id.* at 3302.

the second warehouse.⁸⁸ The agents, therefore, had not tainted that particular use of the beeper with prior illegality.⁸⁹ Thus, Justice White concluded that the second affidavit for a warrant had contained sufficient untainted information to furnish probable cause for the issuance of a warrant and that the court of appeals should not have suppressed the evidence seized in the Taos house with respect to any of the respondents.⁹⁰

The Court first addressed whether the agents legally had installed the beeper without a warrant, but with Muhlenweg's consent. Justice White concluded that the agents placing the beeper in the can of ether had not violated the respondents' fourth amendment rights to freedom from warrantless searches and seizures.⁹¹ The Court reasoned that the DEA had owned the can, the DEA had dominion over the can, and even if Muhlenweg had owned the can, no violation of fourth amendment rights occurred because the agents had affixed the beeper to the can with Muhlenweg's consent.⁹²

In contrast to the Supreme Court's conclusion, the court of appeals found that a violation of respondents' fourth amendment rights had occurred at the moment of transfer of the can from Muhlenweg to Karo.⁹³ The Court, however, rejected this finding and found that at the moment of transfer, agents were not searching the can; thus, the transfer of an unmonitored beeper does not infringe upon anyone's rights.⁹⁴ An unmonitored beeper conveys no information, and thus invades no expectation of privacy that society considers reasonable.⁹⁵ The Court reasoned that the transfer of the can was not a seizure because the agents had not interfered with possession of the can.⁹⁶ According to Justice White, the court of appeals' argument failed because if the unmonitored beeper that the agents had affixed to the can violated the respondents' constitutional rights, then any object affixed to any can, merely because it occupies space, would violate the fourth amendment at the moment that a new possessor acquired the can.⁹⁷ The Court, therefore, con-

⁸⁸ *Id.* at 3306.

⁸⁹ *Id.*

⁹⁰ *Id.* at 3306-07.

⁹¹ *Id.* at 3302.

⁹² *Id.* at 3301. See *infra* note 184 and accompanying text. It is not clear how the Court can conclude this without even considering the possibility that Karo owned the can.

⁹³ *Karo*, 710 F.2d at 1441.

⁹⁴ 104 S. Ct. at 3302.

⁹⁵ See *supra* notes 29-41 and accompanying text.

⁹⁶ 104 S. Ct. at 3302.

⁹⁷ *Id.* The Court implies that an unmonitored electronic tracking device is similar to "any object, regardless of its nature" *Id.*

cluded that the agents infringed no fourth amendment interest by installing the beeper in the can of ether.⁹⁸

Justice White then considered whether the agents had violated a fourth amendment privacy interest by monitoring the beeper.⁹⁹ He compared *Karo* with *United States v. Knotts*.¹⁰⁰ In *Knotts*, federal agents, acting without a warrant, affixed a beeper to a can of chloroform and monitored the beeper; they monitored the beeper on public roads, not while the can was in a private residence.¹⁰¹ The agents obtained no information from the beeper surveillance that they could not have gathered by visual surveillance.¹⁰² The Court in *Knotts* held that because an individual has no reasonable expectation of privacy while on public roads,¹⁰³ the agents did not invade the defendant's fourth amendment privacy interests.¹⁰⁴

The *Karo* Court noted that in *Knotts*, agents had not invaded the defendant's privacy interest because the agents did not monitor the beeper in a private residence.¹⁰⁵ The Court considered whether the agents' monitoring of the beeper in *Karo*'s private residence and storage lockers, areas not open to visual surveillance, violated the defendants' fourth amendment rights.¹⁰⁶ Justice White decided that such monitoring does violate the fourth amendment because searches and seizures in private areas without a warrant are "presumptively unreasonable."¹⁰⁷ *Karo*, therefore, is consistent with *Knotts*.¹⁰⁸ Any information that the agents obtained with the beeper in *Knotts* could have been obtained visually. In *Karo*, however, the agents' monitoring of the beeper while the beeper was inside the Albuquerque house and storage lockers revealed facts that the agents could not have learned by visual observation.

The Court rejected the government's contention that agents can monitor beepers that are located in private areas if they suspect that the inhabitants will commit a crime,¹⁰⁹ and held that although warrantless searches are per se unreasonable, three exceptions exist: searching an individual in an automobile on the open road;

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 460 U.S. 276 (1983). See *supra* notes 42-44 and accompanying text.

¹⁰¹ 460 U.S. at 278-79.

¹⁰² *Id.* at 285.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 104 S. Ct. at 3303.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 3304.

searching private property with the consent of the owner; and searching in exigent circumstances.¹¹⁰ None of these exceptions applied to the facts of *Karo*.¹¹¹

The government argued that because agents have difficulty in obtaining warrants and because attachment of a beeper to a can is a miniscule invasion of privacy, then on the facts of *Karo*, the agents did not need a warrant to monitor the beeper.¹¹² Justice White, however, did not find these arguments compelling.¹¹³ The Court emphasized that warrants are the prerogative of the court, not of the police.¹¹⁴ Also, suspected drug dealers are not less entitled to the protection of the fourth amendment than are other suspected offenders.¹¹⁵ The Court believed that a stringent warrant requirement assures society that beepers will not be abused by the police.¹¹⁶ The government argued that this stringent position regarding warrants would lead to a plethora of warrant applications.¹¹⁷ The Court responded that the likelihood of a large number of warrants is no reason not to obtain one when necessary.¹¹⁸ Moreover, the government's argument failed because the DEA agents obtained a warrant to install the beeper in the can of ether, albeit falsely.¹¹⁹

Justice White disposed of the government's argument that the agents did not need a warrant because of the particularity requirement of the fourth amendment.¹²⁰ The amendment provides that "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."¹²¹ The government argued that to fulfill this requirement, the agents in *Karo* would have had to specify the exact geographic location of the beeper, an impossible feat in *Karo*.¹²² The Court disagreed and found that the agents could have described the object in which the beeper would be hidden, the surrounding circumstances, and the

¹¹⁰ *Id.* The Court did not define exigent circumstances in the *Karo* opinion. But see *infra* note 185 and accompanying text.

¹¹¹ 104 S. Ct. at 3303.

¹¹² *Id.* at 3304-05.

¹¹³ *Id.* at 3305.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ U.S. CONST. amend. IV.

¹²² 104 S. Ct. at 3305.

length of time involved in the search.¹²³ In the Court's view, this information would have satisfied the particularity requirement.¹²⁴

After the Court found that the DEA agents had violated respondents' fourth amendment rights, it turned to a consideration of whether the evidence was tainted.¹²⁵ Justice White stipulated that the warrant to search the Taos house was valid if the Court found sufficient untainted evidence was presented in the warrant affidavit to establish probable cause for the second warrant.¹²⁶ The Court decided that the agents could have secured the warrant without the beeper that had located the cans of ether. Justice White asserted:

The movement of the ether from the first warehouse was undetected, but by monitoring the beeper the agents discovered that it had been moved to the second [warehouse]. No prior monitoring of the beeper contributed to this discovery; using the beeper for this purpose was thus untainted by any possible prior illegality.¹²⁷

According to Justice White, the monitoring of the second warehouse was not an illegal search because the beeper revealed only the approximate location of the ether and not the precise locker in which the respondents had stored the ether.¹²⁸ After removing the ether from the second warehouse, the respondents traveled with the can only on public highways and were not vulnerable to illegal search. Thus, from the second warehouse to the Taos house, the agents' monitoring of the beeper did not invade the respondents' constitutional rights. The agents had not tainted the evidence that they had seized at the Taos house. The magistrate therefore should not have suppressed the evidence with respect to any of the respondents.¹²⁹

Justice O'Connor concurred with Justice White in a separate opinion¹³⁰ that was ambiguous and not related to the facts of *Karo*. Justice O'Connor wrote that the privacy interests that agents invade when they activate a beeper are much narrower than the Court had implied in its opinion.¹³¹ Justice O'Connor applied the Court's reasoning in *United States v. White*¹³² to *Karo* and determined that a

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 3306.

¹²⁸ *Id.*

¹²⁹ *Id.* at 3307.

¹³⁰ *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

¹³¹ *Id.*

¹³² 401 U.S. 745 (1971) (a homeowner has no reasonable expectation that a guest in his home will not be wired with a tape recorder to tape the homeowner's conversation with the guest).

homeowner has no reasonable expectation that a guest in his home will not bring a can containing a concealed beeper into the home.¹³³

Justice O'Connor found flawed the Court's holding that the can owner controls the privacy interest of the homeowner.¹³⁴ The Court indicated that as long as the can owner gives agents consent to put a beeper in the can, the homeowner has no reasonable expectation of privacy when the can owner brings the can into the home.¹³⁵ Yet, if the can owner does not consent to the placement of the beeper on the can, the homeowner's privacy interest is invaded when agents monitor the beeper within his home.¹³⁶

Justice O'Connor found the Court's reasoning unsound because she considered it inconsistent with *Rawlings v. Kentucky*.¹³⁷ In *Rawlings*, the Court held that when police searched a woman's purse within her home, her male companion, who owned the drugs found in the purse, lacked standing to challenge the search as an invasion of his fourth amendment rights because he had no legitimate expectation in the privacy of another person's closed purse, even though he owned the contraband inside.¹³⁸ Justice O'Connor concluded that agents do not necessarily invade a homeowner's privacy rights when they search a closed container that belongs to another without the container owner's consent.¹³⁹

According to Justice O'Connor, a homeowner's expectations of privacy cannot depend on an invitee's status.¹⁴⁰ For example, a homeowner's expectation that a can in his home is beeper-free cannot depend on whether the can owner believes that the can is or is not beeper-free.¹⁴¹ A homeowner's expectations of privacy are either inherently reasonable or unreasonable; the status of the guest as an unknowing carrier of surveillance equipment or as a government informant does not change the reasonableness of that expectation.¹⁴² Justice O'Connor did not explicitly apply this principle to the facts of *Karo*; the logical conclusion of her assertion, however, is

¹³³ 104 S. Ct. at 3307 (O'Connor, J., concurring in part and concurring in the judgment).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 448 U.S. 98 (1980).

¹³⁸ *Id.* at 105-106.

¹³⁹ 104 S. Ct. at 3308 (O'Connor, J., concurring in part and concurring in the judgment). In a footnote, Justice White said that this argument is "inapposite" to *Karo* because in *Rawlings*, the agents did not search the male companion in his own home. *Id.* at 3304 n.4.

¹⁴⁰ *Id.* at 3308 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁴¹ *Id.*

¹⁴² *Id.*

that the agents did not invade respondents' privacy interests because respondents had no reasonable expectation that their cans of ether were beeper-free.

Justice O'Connor posited a narrower test to determine who can assert a fourth amendment violation.¹⁴³ The test would turn on the defendant's "interest" in the container in which agents placed the beeper. If a homeowner permits a guest to bring the guest's can inside the home, the homeowner thereby relinquishes any expectation of privacy involving the can.¹⁴⁴ To have any expectation of privacy, the homeowner must own the can or must control the can's movements. In *Karo*, the homeowners and locker renters gave up any expectation of privacy in the cans of ether when they allowed others to bring the cans inside the homes or lockers.¹⁴⁵

Justice O'Connor promulgated her test for three reasons.¹⁴⁶ First, the homeowner and the can owner have overlapping privacy interests when the can is brought inside the home. The homeowner has a privacy interest in his home, but not in the can. The homeowner, therefore, lacks standing to complain when agents search the can;¹⁴⁷ only the can owner can complain. Second, if privacy interests overlap, the homeowner and the can owner share power to consent to a search. Either owner may give consent to a search and may extinguish the other's right to claim that the government has invaded a privacy interest.¹⁴⁸ Third, when the can owner's privacy interest falls within the homeowner's privacy interest (i.e., when the can is inside the home, and the agents search the can without searching the home), agents do not invade the homeowner's privacy interest.¹⁴⁹ In this instance, the homeowner lacks the power to give consent to agents to search the container. Justice O'Connor concluded that, "[a] person's right not to have a container tracked by means of a beeper depends both on his power to prevent visual observation of the container and on his power to control its location, a power that can usually be inferred from a privacy interest in the container itself."¹⁵⁰ Justice O'Connor implied that in *Karo*, the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Justice O'Connor apparently based this argument on the assumption that respondents did not own the can of ether, despite their cash payment for it.

¹⁴⁶ 104 S. Ct. at 3308-09 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁴⁷ *Id.* at 3309 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Justice O'Connor's implication is that agents search only the can and not the home when they monitor a beeper concealed in a can while it is within the home.

¹⁵⁰ *Id.* at 3310 (O'Connor, J., concurring in part and concurring in the judgment).

agents did not invade respondents' privacy interests because the defendant homeowners lacked standing to assert a privacy interest.¹⁵¹ They lacked standing because they did not own the can containing the beeper; the agents did not invade respondents' privacy interests by monitoring the beeper even while the beeper was in respondents' homes.¹⁵² Because the agents had the consent of the true owner of the can to affix the beeper, the true can owner's consent to the beeper's presence had extinguished the homeowner's power to claim that the agents had invaded their privacy interests.¹⁵³ In addition, when the can was inside the private residences, the agents searched the cans but not the homes, so the agents did not invade the homeowner's privacy interests.¹⁵⁴

In a separate opinion, Justice Stevens disagreed with the Court's finding that the agents' attachment of the beeper to the can of ether had not violated a privacy interest and that no search had occurred when the agents attached the beeper to the can.¹⁵⁵ A search occurs when an expectation "that society is prepared to consider reasonable is infringed."¹⁵⁶ A seizure occurs when a "meaningful interference" with a possessory interest is present.¹⁵⁷ Attachment of a beeper to personal property, therefore, is both a search and a seizure.¹⁵⁸ Attachment of the beeper constitutes a seizure because it infringes on an exclusionary right to private property; in attaching the beeper to the can, the government agents converted the property to their own use.¹⁵⁹ According to Justice Stevens, the interference was meaningful because the beeper absolutely changed the character of the can.¹⁶⁰ When the agents attached the beeper to the can, the government was "in the most fundamental sense . . . asserting 'dominion and control' over the property—the power to use the property for its own purposes."¹⁶¹ Asserting dominion and control over an individual's property constitutes a seizure.¹⁶²

Justice Stevens then set forth the Court's test to determine which expectations of privacy should receive the fourth amendment

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3310 (Stevens, J., concurring in part and dissenting in part).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 3310-11 (Stevens, J., concurring in part and dissenting in part).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 3311 (Stevens, J., concurring in part and dissenting in part).

¹⁶¹ *Id.*

¹⁶² *Id.*

protection.¹⁶³ When a person exposes his property to the public, he has no expectation of privacy; when a person conceals his property, his property remains private and subject to fourth amendment protection.¹⁶⁴ All concealed private property is worthy of protection.¹⁶⁵

"A homeowner has a reasonable expectation of privacy in the contents of the home," including the property of others that is in the home.¹⁶⁶ The homeowner's privacy interest, however, does not obscure the can owner's privacy interest when the can owner conceals the can in the homeowner's home.¹⁶⁷ In *Karo*, the agents monitored the beeper in a home where the respondents had concealed the container from public view and thereby learned facts that they could not have obtained without use of the beeper:

Once the container went into Karo's house, the agents thereafter learned who had the container and where it was only through use of the beeper. The beeper alone told them when the container was taken into private residences and storage areas, and when it was transported from one place to another.¹⁶⁸

The illegal search began the moment that Karo took the can into his house and concealed it.¹⁶⁹ Thereafter, the respondents did not expose the can to public view.¹⁷⁰ As a private citizen, Karo had the right to assume that agents had not infested his property with "bugs."¹⁷¹ Justice Stevens disagreed with the Court's theory that the agents invaded no privacy interest until they actually monitored the beeper.¹⁷² That view, he said, came from looking at the incident from the government's viewpoint, not from that of the private citizen whose privacy is at stake.¹⁷³ The expectation of privacy is com-

¹⁶³ *Id.* at 3311-12 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 3312 (Stevens, J., concurring in part and dissenting in part) (citing *United States v. Ross*, 456 U.S. 798, 822 (1982)). Justice Stevens declared:

A constitutional distinction between worthy and unworthy containers would be improper . . . [T]he central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few items of clothing in a paper bag or a knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Id.

¹⁶⁶ 104 S. Ct. at 3312 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁷ *Id.* at 3312-13 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁸ *Id.* at 3313 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁹ *Id.* at 3314 (Stevens, J., concurring in part and dissenting in part).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 3314 (Stevens, J., concurring in part and dissenting in part).

¹⁷³ *Id.*

promised at the moment the invasion occurs.¹⁷⁴

Justice Stevens concluded by attacking Justice White's *de novo* examination of the record and determination that the agents obtained sufficient information independent of the beeper to furnish probable cause to justify issuance of the second warrant for the search in Taos.¹⁷⁵ He emphasized that neither the defense nor the prosecution had raised this question in the petition for certiorari and that the parties had neither briefed nor had an opportunity to argue the issue.¹⁷⁶ Justice Stevens posited a resolution: to answer the two questions before the Court and to remand the issue of evidence to the trial court, thereby giving the parties the opportunity to argue this issue.¹⁷⁷

V. ANALYSIS

The Supreme Court in *Katz* found that the fourth amendment protects the conversations of an individual using a public telephone.¹⁷⁸ In *Karo*, respondents clearly exhibited an actual subjective expectation of privacy when they kept the containers of ether in private homes and in rented private storage lockers.¹⁷⁹ Certainly, an individual who conceals a container in a home exhibits no less of a subjective expectation of privacy than an individual who uses a public telephone booth. The Court correctly found that the fourth amendment protected respondents' acts of concealing the cans of ether.¹⁸⁰ If society considers an individual's expectation of privacy in a telephone booth reasonable, it should consider even more reasonable an expectation that a concealed container carrying noncontraband will not be "bugged" by electronic equipment.

The essence of the Court's holding in *Karo*, however, is that the break in surveillance before the agents located the ether containers in the second warehouse insulated all later surveillance from a reasonable expectation of privacy.¹⁸¹ The Court appears to have made this conclusion for two reasons: first, because under *Knotts*, respondents' traveling on public roads extinguished a reasonable expectation of privacy thereafter; and second, because the agents' illegal acts of monitoring the beeper in private areas theoretically did not

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 3314-15 (Stevens, J., concurring in part and dissenting in part).

¹⁷⁸ *Katz v. United States*, 389 U.S. 347 (1967). See *supra* notes 30-42 and accompanying text.

¹⁷⁹ *Karo*, 104 S. Ct. at 3300.

¹⁸⁰ 104 S. Ct. at 3303.

¹⁸¹ *Id.* at 3306-07.

"contribute" to the agents electronically locating the beeper at the second warehouse. There are crucial fallacies in both arguments.

First, the beeper was monitored at various points throughout the respondents' journey. The fact that respondents carried the concealed can on public roads, and at that time had no reasonable expectation that agents would not search their vehicle, should not extinguish respondents' fourth amendment rights during the periods when they were in private areas protected by the fourth amendment. If traveling on public roads extinguishes fourth amendment protection in private areas, government agents will be given too much discretion. Agents could reason that they can monitor private areas without a warrant if it appears likely that the inhabitants will thereafter travel on public roads; the agents could thus redress their warrantless monitoring.¹⁸²

Second, the plurality's contention that prior monitoring of the beeper did not "contribute" to the discovery of the beeper at the second warehouse defies logic and staggers the imagination. Each monitoring of the beeper was part of a sequence. Each movement of the cans of ether from one location to the next comprised segments of the cans' complete journey from Muhlenweg to the Taos house. Several of those segments were tainted by the agents' illegal monitoring of private areas. Only by imagining that the cans' movement from Muhlenweg to the second warehouse did not occur can the Court assert that the tainted segments did not lead to the evidence that the agents found in the Taos house. If those movements had not occurred, the agents never would have found themselves in the vicinity of the second warehouse and thus able to locate the beeper's signal. The agents' prior illegal actions therefore necessarily "contributed" to the discovery of the evidence and necessarily tainted the evidence seized at the Taos residence.

The government agents legally could have searched respondents' concealed private property only if they had obtained a valid search warrant. This conclusion raises two questions: first, whether the cans of ether were the respondents' private property; second, whether the warrant the agents did obtain was valid.¹⁸³ If the cans were respondents' private property, the fourth amendment requires that absent the owners' consent to a search, the agents would have to obtain a search warrant to search the cans.

¹⁸² *United States v. Karo*, 710 F.2d at 1441 n.6. The appellate court noted that "[l]aw enforcement officials could simply create a lapse by periodically turning off the monitoring device; police would have unfettered discretion in determining when to monitor the inside of private residences"

¹⁸³ See *infra* notes 199-206 and accompanying text.

The Court in *Karo* did not address the question of who owned the can of ether at the moment the agents installed the beeper. The Court assumed that the can belonged to either the DEA or to the informant, Muhlenweg. This analysis simply is not logical because Horton, Harley, and Karo purchased the ether, each paying \$1,000.00 for all of the cans.¹⁸⁴ Illustratively, if *G* gives to *M* a can to sell to *K*, when *M* sells the can to *K*, the can belongs to *K*. Neither *G* nor *M* have any possessory interest in the can. Neither the consent of *G* nor the consent of *M* can validate the placement of an object in the can. Because only *K* has a possessory interest, *K* alone could give consent to *G* to install an electronic device in his can of ether.

The government agents did not have the owners' consent to place the beeper in the can; thus, how could the Court justify not requiring the agents to obtain a valid warrant for the attachment of the beeper? The Court consistently has recognized that warrants are necessary to validate a search inside a home absent exigent circumstances.¹⁸⁵ In his dissent in *Olmstead*, Justice Brandeis asserted that any time government actions were "unjustifiable," they intruded on the individual's privacy and thus violated the fourth amendment.¹⁸⁶ Justice Douglas, in his concurring opinion in *Silverman*, stated that the Court should not match irrelevant facts, but should consider whether the government invaded a citizen's privacy.¹⁸⁷ If government agents invaded a citizen's privacy and if the agents had not obtained a search warrant as required by the fourth amendment, the government cannot convict the defendant.¹⁸⁸ In *Katz*, the Court held that "searches conducted outside the judicial process, without prior approval by [a] judge . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established . . . expectations."¹⁸⁹

Justice Marshall, dissenting in *Ross*, outlined the reasons for requiring a warrant: "it limits police power over the individual and prevents unjustified searches; it prevents a *post hoc* coloring of rea-

¹⁸⁴ Brief of Respondents Harley and Horton In Opposition at 4-5 n.2., *United States v. Karo*, 104 S. Ct. 3296 (1984).

¹⁸⁵ See, e.g., *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15 (1948); *Agnello v. United States*, 269 U.S. 20 (1925). Exigent circumstances include response to an emergency, hot pursuit, and goods in the process of destruction or about to be removed from the jurisdiction. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

¹⁸⁶ *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

¹⁸⁷ *Silverman v. United States*, 365 U.S. 505, 512-13 (Douglas, J., concurring).

¹⁸⁸ *Id.* at 513 (Douglas, J., concurring).

¹⁸⁹ 389 U.S. at 357.

sonableness that was not present at the time of the search; and, it reassures the public of the orderly process of law.”¹⁹⁰ The Court in *Karo* necessarily had to find that the attachment of the beeper to the can of ether did not violate the fourth amendment in order to preempt the warrant requirement of the fourth amendment.

Justice Stevens’ opinion in *Karo* correctly questioned the Court’s assumption that a beeper does not compromise privacy rights until it is monitored.¹⁹¹ Justice Stevens reasoned that the invasion of privacy occurred the moment that the agents attached the beeper to the can. The attachment completely changed the nature of the can and infringed upon respondents’ privacy right.¹⁹² The agents “usurped” a citizen’s private property for the government’s use.¹⁹³ Government agents do not affix beepers to objects unless they intend to monitor the beepers. It is an eminently reasonable expectation that a can containing noncontraband will not have a beeper attached to it. A beeper is not an object that will sit unobtrusively on the side of the can and that will not infringe upon a person’s privacy interests. An electronic beeper is a powerful invasive instrument that the government can use to track a private citizen’s every movement. Government agents should have to obtain a valid warrant before they are allowed to affix such an instrument to a private citizen’s property.¹⁹⁴

The Court in *Karo* incorrectly applied the exclusionary rule. The *Alderman* Court’s cost/benefit balancing test for admitting or excluding evidence indicated that the archetypal fact pattern for exclusion of evidence exists when, *but for* the illegal search, government agents would not have obtained the evidence.¹⁹⁵ The Court in *Karo* ignored the *Alderman* test; *Karo* has the archetypal fact pattern that excludes evidence.¹⁹⁶ The agents never would have obtained any evidence in *Karo* without the use of the beeper. All the fruits in *Karo* are tainted. The Court should have excluded all the evidence.¹⁹⁷ The Court in *Karo* legitimized the agents’ illegal conduct and implied that the government can use unlawful means against an individual to obtain evidence. As a result, law enforcement officers will have less incentive to adhere to fourth amendment

¹⁹⁰ United States v. Ross, 456 U.S. at 829 (Marshall, J., dissenting).

¹⁹¹ 104 S. Ct. at 3310-11 (Stevens, J., concurring in part and dissenting in part).

¹⁹² *Id.* at 3311 (Stevens, J., concurring in part and dissenting in part).

¹⁹³ *Id.*

¹⁹⁴ See U.S. v. Lopez, 373 U.S. 427, 446-65 (Brennan, J., dissenting) (discussing the rationale of the search warrant requirement as it applies to electronic surveillance).

¹⁹⁵ 394 U.S. at 174-75.

¹⁹⁶ See *supra* notes 61-76 and accompanying text.

¹⁹⁷ See *supra* notes 48-54 and accompanying text.

requirements.¹⁹⁸

Furthermore, in *Karo*, the Court answered a question that was not before it when it found that the evidence seized in the Taos house was untainted.¹⁹⁹ As Justice Stevens pointed out, neither party had the opportunity to argue the issue.²⁰⁰

Courts frequently consider on appeal questions that were not presented below.²⁰¹ The Supreme Court has considered such issues on the theory that it may do so when the issue has been briefed, is properly before the Court, and is urged as an alternative to *support* a judgment.²⁰² In *Karo*, however, not only was the question of the validity of the Taos warrant not properly before the Court, it was offered *against*, not in support of, the judgment below. In finding certain evidence untainted, the Court assumed the validity of the affidavit for the Taos warrant.²⁰³ Yet the parties had not litigated that issue at any level of the *Karo* proceedings.²⁰⁴ Indeed, the Taos affidavit contained false and misleading information. For example, the affidavit asserted incorrectly that the informant had offered "large amounts of information in the past" regarding drug dealing, and that the agents were investigating an amphetamine manufacturing conspiracy rather than a cocaine extracting operation.²⁰⁵ The

¹⁹⁸ See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393-96 (1983). Former Justice Stewart identifies and responds to four criticisms of the exclusionary rule: (1) *The high cost to society when guilty persons are set free*. Stewart answers by saying that the rule rarely affects the outcome of a case. The fourth amendment, not the exclusionary rule, must be blamed if evidence must be excluded. The gravity of the sanction is likely to increase its deterrent effect on law enforcement officers. (2) *The rule does not deter police from acting illegally*. Stewart's response is that the dramatic increase in the number of search warrants issued since the development of the rule indicates its deterrent effect. (3) *The rule benefits defendants disproportionately to the degree that their rights were violated*. Stewart finds this criticism unconvincing because the purpose of the exclusionary rule is to preserve fourth amendment guarantees and not to compensate the victim. (4) *Innocent victims of search and seizure derive no benefit from the rule; the rule compensates only alleged criminals*. Stewart finds the rule necessary despite the fact that it is not a sufficient remedy to cover both alleged criminals and innocent victims. Innocent victims still have a right of action in damages. *Id.*

¹⁹⁹ 104 S. Ct. at 3306.

²⁰⁰ *Id.* at 3314 (Stevens, J., concurring in part and dissenting in part). See *supra* notes 175-77 and accompanying text.

²⁰¹ See, e.g., *City of Revere v. Mass. General Hospital*, 103 S. Ct. 2979 (1983).

²⁰² See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The Court noted that when the question is urged in *support* of the lower court's judgment, it may be appropriate to remand the case "when attention has been focused on other issues" and when the lower court has not expressed its views on a controlling question. *Id.*

²⁰³ 104 S. Ct. at 3314 (Stevens, J., concurring in part and dissenting in part).

²⁰⁴ Respondents' Petition for Rehearing at 5, *United States v. Karo*, 104 S. Ct. 3296 (1984).

²⁰⁵ *Id.* at 5-6.

district court had found many of the assertions in the Taos affidavit "as phony as a three dollar bill."²⁰⁶

Thus, the decision in *Karo* has serious implications for honest law enforcement. On the basis of the decision in *Karo*, DEA agents will have little concern for the accuracy of their allegations when they make future applications for warrants.

VI. CONCLUSION

The Supreme Court in *United States v. Karo* followed precedent and ruled that the warrantless monitoring of a beeper in a can that contained noncontraband while the can was located in private areas violated the fourth amendment. Individuals who conceal their property in private areas have a reasonable expectation that their actions will remain private and that concealed containers containing noncontraband will not surreptitiously carry electronic surveillance equipment. Government agents may not attach electronic equipment to private property to monitor the electronic signal while the property is in private homes unless they have a warrant validated by an objective magistrate.

The Court, however, did not follow precedent in its additional holdings in *Karo*: that attachment of the beeper to the can was not a search and seizure, and that evidence that the agents had obtained only by means of the beeper was untainted. Attaching a beeper to an individual's private property changes the nature of the property and infringes on the exclusive possessory right of the property owner. Evidence obtained only by means of an illegal search is tainted and cannot be used in a court of law.

The Supreme Court has gone too far in *Karo*. The result is an untenable encroachment on the individual's fourth amendment protections against search and seizure. Additionally, the most formidable remedy by which to secure that fourth amendment protection—the exclusionary rule—has become a hollow shell.

DAWN WEBBER

²⁰⁶ *Id.* at 2.