



Summer 2009

## **GPS, the Fourth Amendment, and the New Mexico Constitution**

Shannon Sherrell

### **Recommended Citation**

Shannon Sherrell, *GPS, the Fourth Amendment, and the New Mexico Constitution*, 39 N.M. L. Rev. 667 (2009).

Available at: <https://digitalrepository.unm.edu/nmlr/vol39/iss3/10>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: [www.lawschool.unm.edu/nmlr](http://www.lawschool.unm.edu/nmlr)

# GPS, THE FOURTH AMENDMENT, AND THE NEW MEXICO CONSTITUTION

SHANNON SHERRELL\*

## I. INTRODUCTION

In 1984, George Orwell depicted a government watching its citizens with a telescope that picked up “[a]ny sound . . . above the level of a very low whisper . . . [and] so long as [the citizens] remained within the field of the vision which the metal plaque commanded, [they] could be seen as well as heard.”<sup>1</sup> This vivid imagery epitomizes people’s fear of a society run by a “big brother” government. Although constitutional protections guard against governmental intrusion, advancements in technology have caused tension with these protections.<sup>2</sup>

One technology that has grown in popularity in recent years is a Global Positioning System device (GPS),<sup>3</sup> which provides continuous, highly accurate, and reliable positioning and timing information to its users.<sup>4</sup> GPS has been particularly useful to drivers, who can use it as a navigation tool,<sup>5</sup> and to law enforcement officials, who can put a GPS device on the underside of a vehicle and later remove the device and download the vehicle’s itinerary, thus eliminating the need for continuous visual surveillance of the vehicle.<sup>6</sup>

Police officers’ warrantless installation and monitoring of a GPS device raises the question of whether such conduct violates constitutional prohibitions of unreasonable searches.<sup>7</sup> Currently, only the Fourth Amendment to the U.S. Constitution

---

\* Class of 2010, University of New Mexico School of Law. Many thanks to Professor Bay for his insights and suggestions, and the *New Mexico Law Review* editors for their time and effort. I would also like to thank my parents and Charles for their advice and support.

1. GEORGE ORWELL, 1984, at 4 (Harcourt, Brace & Co. 1949).

2. Although this article addresses Global Positioning System (GPS), another technology that causes tension with the protections that guard against governmental invasion is cell phones. Most people use cell phones, and law enforcement’s use of cell phone tracking has raised questions about governmental intrusion. See generally Derek P. Richmond, Comment, *Can You Find Me Now?—Tracking the Limits on Government Access to Cellular GPS Location Data*, 16 COMM. L. CONCEPTS 283 (2007). Although warrantless cell phone tracking and warrantless GPS tracking raise similar concerns, this article does not address warrantless cell phone tracking because several of the issues that it raises are beyond the scope of this article.

3. Tenison Craddock, Note, *The Limitations on Police Regarding GPS Tracking Devices: A Necessary Hindrance?*, 9 COMP. L. REV. & TECH. J. 505, 512 (2005) (“Around the world the use of GPS devices is becoming more widespread, and most countries are allowing police to track people without any hindrance at all.”).

4. April A. Otterberg, Note, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court’s Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 665 (2005).

5. *What Is GPS?*, <http://scign.jpl.nasa.gov/learn/gps1.htm> (last visited Apr. 20, 2009).

6. Dorothy J. Glancy, *Privacy on the Open Road*, 30 OHIO N.U. L. REV. 295, 317 (2004). For example, in a recent case, officers attached GPS devices to the vehicles of a man who was suspected of murdering his daughter. *State v. Jackson*, 76 P.3d 217, 220–21 (Wash. 2003). Data from one of the GPS devices showed that the suspect had driven to a storage location, and then to a remote site where the vehicle remained stationary for forty-five minutes. *Id.* at 221. Using this information, investigators discovered his daughter’s body in a shallow grave at the remote site. *Id.*

7. Kevin Keener, *Personal Privacy in the Face of Government Use of GPS*, 3 I/S: J.L. POL’Y FOR INFO. SOC’Y 473, 474–75 (2007); see also USA Today.com, *In Criminal Cases, GPS Units Can Mark the Scene of the Crime*, [http://www.usatoday.com/tech/news/techinnovations/2008-08-28-gps-evidence-crimes\\_N.htm](http://www.usatoday.com/tech/news/techinnovations/2008-08-28-gps-evidence-crimes_N.htm) (last visited Jan. 24, 2009) (stating that “[l]aw enforcement sometimes uses secretly planted GPS devices to monitor suspects . . . [t]he practice, often done without a warrant or court order, has been criticized by privacy advocates who argue that it is unconstitutional”).

and equivalent state constitutional provisions provide possible limits to the warrantless use of GPS.<sup>8</sup>

Several U.S. Supreme Court cases have addressed whether the warrantless use of advanced forms of technology, such as beepers and thermal imagers, violates the Fourth Amendment's prohibition of unreasonable searches.<sup>9</sup> Most federal courts have applied these Supreme Court decisions in their determination of whether law enforcement's warrantless use of electronic devices is a search, and thus subject to the Fourth Amendment.<sup>10</sup> The decisions from state courts are split,<sup>11</sup> with some following federal precedent by allowing warrantless use of GPS, while others provide enhanced protection under their state constitutions by requiring law enforcement to obtain a warrant.<sup>12</sup>

The split in state courts reflects differing logical syllogisms. Federal courts, and state courts that follow federal precedent, use the same three-part syllogism. First, police may obtain information that is open to public perception without violating the Fourth Amendment or equivalent provisions in state constitutions. Second, information obtained through surveillance with a GPS device is information available to public perception. Therefore, surveillance with a GPS device does not violate the Fourth Amendment or equivalent state provisions.<sup>13</sup>

State courts that choose to provide greater protection as a matter of state constitutional law employ a different three-part syllogism as the premise for their decisions. First, a warrant is required for police surveillance that obtains information not open to public perception. Second, police surveillance with a GPS device obtains information that is not open to public perception. Therefore, police are required to obtain a warrant before conducting surveillance with a GPS device.<sup>14</sup>

When the issue arises in New Mexico, the state courts will have to choose between the two modes of reasoning underlying these competing syllogisms. This comment discusses which path the New Mexico courts should follow.<sup>15</sup> Under the interstitial approach to constitutional interpretation that the New Mexico Supreme Court has adopted, a state court could justify its divergence from federal precedent based on structural differences between New Mexico and the federal government, an argument that the federal precedents are flawed, or distinctive state characteristics.<sup>16</sup> This comment will explain how a GPS device operates,<sup>17</sup> and will examine the protections provided by the Fourth Amendment.<sup>18</sup> It will then analyze federal and state precedent dealing with GPS devices and the search and seizure constitu-

---

8. Keener, *supra* note 7, at 475.

9. *See infra* Part III.B.

10. *See infra* Part III.C. This comment also discusses a federal case that suggests departure from these Supreme Court cases might be warranted in the face of warrantless use of GPS. *See infra* note 85.

11. *See infra* Part III.D.

12. *See infra* Part III.D.

13. *See, e.g.*, *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

14. *See, e.g.*, *State v. Jackson*, 76 P.3d 217 (Wash. 2003); *State v. Peters*, 546 So.2d 829 (La. Ct. App. 1989).

15. *See infra* Parts IV, V.

16. *See infra* Part V.

17. *See infra* Part II.

18. *See infra* Part III.A.

tional provisions.<sup>19</sup> New Mexico courts should follow federal precedent because under the interstitial analysis divergence from federal precedent is not justified, as structural differences do not exist, federal analysis is not logically flawed, and the distinctive characteristics in New Mexico law are not compelling enough to validate departure.<sup>20</sup>

## II. BACKGROUND ON GPS

In order to better comprehend case law concerning GPS, it is important to understand how both GPS devices and tracking beepers operate. Tracking beepers (not to be confused with personal pagers that are sometimes called beepers)<sup>21</sup> were precursors to GPS devices.<sup>22</sup> These beepers operated by periodically broadcasting a signal over a short distance.<sup>23</sup> The beeper's location could be tracked by monitoring the strength of the signal, which allowed the police to track vehicles.<sup>24</sup> If the officers lost a vehicle they were tracking through visual surveillance, they could drive around until they picked up the beeper's signal, and then follow the signal to the location of the vehicle.<sup>25</sup> However, the use of beepers by law enforcement has now been replaced with more advanced technology, such as that used in GPS devices.<sup>26</sup>

A GPS device operates through a radionavigation system that provides users with reliable positioning, navigation, and timing services.<sup>27</sup> The system consists of three parts: satellites orbiting the Earth; control and monitoring stations on Earth; and the GPS receiver.<sup>28</sup> As of this date, there are twenty-four satellites that broadcast signals which are picked up and identified by the GPS receivers.<sup>29</sup> Control and monitoring stations track the GPS satellites, upload updated navigational data, and maintain the satellites' health.<sup>30</sup> The GPS receiver obtains signals from the satellites and uses the information to calculate a three-dimensional location consisting of latitude, longitude, and altitude, and includes the time.<sup>31</sup>

GPS devices serve many purposes, such as tracking and forecasting the movement of a shipment, and providing increased efficiency for vehicles driving on roadways by calculating a faster route.<sup>32</sup> Private individuals use GPS devices for

---

19. See *infra* Parts III–V.

20. See *infra* Part VI.

21. A pager is a device that displays a number. For example, a person may call another person's pager and enter a number, which will then be displayed on the pager. See Julie J. McMurry, *Privacy in the Information Age: The Need for Clarity in the ECPA*, 78 WASH. U. L.R. 597, 606 n.55 (2000).

22. Jeff Welty, *GPS Tracking Devices and the Fourth Amendment* 1 (2008), available at <http://www.sog.unc.edu/programs/crimlaw/GPS%20Tracking%20Devices%20and%20the%20Fourth%20Amendment.pdf> (last visited Feb. 17, 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Global Positioning System: Serving the World*, <http://www.gps.gov/> (last visited Jan. 24, 2009).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

navigation in their vehicles, or even to map out hikes.<sup>33</sup> GPS devices also assist police officers' abilities to solve crimes.<sup>34</sup> In a recent case, prosecutors used data from a suspect's personal GPS device, which he used in his vehicle for navigational purposes, to pinpoint the suspect's location on the morning that several of his family members were killed.<sup>35</sup> Although GPS may be useful to law enforcement, several privacy advocates have expressed concern over the increased ability of the police to intrude into people's lives.<sup>36</sup>

### III. BACKGROUND ON THE FOURTH AMENDMENT, FEDERAL CASES, AND STATE CASES

#### A. *The Fourth Amendment*

One possible limit on law enforcement's use of GPS is the Fourth Amendment, which provides a right for people to be secure against unreasonable searches in their "persons, houses, papers, and effects."<sup>37</sup> A search occurs if a government officer's action infringes on a person's expectation of privacy that society is prepared to consider reasonable.<sup>38</sup> This test encompasses a two part inquiry: (1) whether the person had a subjective expectation of privacy, and (2) whether the person's subjective expectation of privacy is one that society recognizes as reasonable.<sup>39</sup>

As well as protecting people from unreasonable searches, the Fourth Amendment imposes a warrant requirement. It states that the prohibition against unreasonable searches "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>40</sup> Searches are presumed unreasonable and invalid under the Fourth Amendment unless they are based upon probable cause,<sup>41</sup> or are executed pursuant to a valid warrant.<sup>42</sup> How-

33. NPR.org, *GPS Goes Mainstream*, <http://www.npr.org/templates/story/story.php?storyId=17611103> (last visited Apr. 16, 2009).

34. *In Criminal Cases, GPS Units Can Mark the Scene of a Crime*, [http://www.usatoday.com/tech/news/techinovations/2008-08-28-gps-evidence-crimes\\_N.htm](http://www.usatoday.com/tech/news/techinovations/2008-08-28-gps-evidence-crimes_N.htm) (last visited Jan. 24, 2009); see *supra* note 6.

35. FoxNews.com, *Small GPS Devices Help Prosecutors Win Convictions*, <http://www.foxnews.com/story/0,2933,413041,00.html> (last visited Mar. 27, 2009).

36. See CNN.com, *Is GPS High-tech Crime Fighting Tool or Big Brother*, <http://www.cnn.com/2008/CRIME/08/18/gps.tracking/index.html> (last visited Jan. 24, 2009).

37. U.S. CONST. amend. IV.

38. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

39. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This two part inquiry is a fact-specific determination. *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (stating that the "Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"). For example, in *Katz v. United States* the U.S. Supreme Court found that a man had a reasonable expectation of privacy in an enclosed public telephone booth. *Katz*, 389 U.S. at 360 (Harlan, J., concurring). The defendant had a subjective expectation of privacy in his telephone conversation conducted from a public telephone booth because when he occupied the booth he shut the door behind him. *Id.* The Court also found that society would recognize that an enclosed telephone booth is a temporarily private place, and that the momentary occupant's expectations of privacy are reasonable. *Id.*

40. U.S. CONST. amend. IV.

41. Probable cause is a reasonable ground for belief of guilt. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). It merely requires that the facts available to the officer would "warrant a man of reasonable caution in that belief." *Carroll v. United States*, 267 U.S. 132, 162 (1925).

42. *Warrantless Searches and Seizures*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 39, 39-40 (2008); see also *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) ("The Fourth Amendment generally requires police to secure a

ever, there are several exceptions to the warrant and probable cause requirements.<sup>43</sup> These exceptions include investigatory stops,<sup>44</sup> searches incident to a valid arrest,<sup>45</sup> searches justified by exigent circumstances,<sup>46</sup> consent searches,<sup>47</sup> searches of vehicles,<sup>48</sup> inventory searches,<sup>49</sup> border searches,<sup>50</sup> and searches at sea.<sup>51</sup> Also, the Fourth Amendment's prohibition against unreasonable searches does not apply to activities that occur in public space.<sup>52</sup>

The Framers drafted the Fourth Amendment to protect an aspect of personal privacy that they considered fundamental to individual liberty—the freedom from unwarranted intrusion by the government.<sup>53</sup> The Fourth Amendment's prohibitions originally applied only to federal officers; however, the Fourteenth Amendment incorporated the prohibitions to state actors.<sup>54</sup> Although the Fourth Amendment protects citizens against unreasonable searches from both federal and state actors, it does not provide a general constitutional right to privacy.<sup>55</sup> The Supreme Court has held that such a general right to privacy is left largely to the law of the individual states.<sup>56</sup>

The Fourth Amendment offers citizens protection from governmental intrusions in areas where they have a reasonable expectation of privacy. If a motorist has a reasonable expectation of privacy in his vehicle, then the Fourth Amendment will apply to law enforcement's warrantless attachment of a GPS device to his vehicle's

warrant before conducting a search.”). For a warrant to be valid it must be filed and supported in good faith by the law enforcement officer and based on reliable information showing probable cause to search; it must be issued by a neutral magistrate, and state specifically the place to be searched. *United States v. Leon*, 468 U.S. 897, 923 (1984).

43. *Katz*, 389 U.S. at 357.

44. *See Terry v. Ohio*, 392 U.S. 1 (1968).

45. *See Jones v. United States*, 357 U.S. 493, 499 (1958).

46. *See McDonald v. United States*, 335 U.S. 451, 456 (1948) (stating that a warrant is not required if the “exigencies of the situation made that course imperative”).

47. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (recognizing that the Fourth Amendment recognizes a valid warrantless search of a premises when police obtain the voluntary consent of an occupant).

48. *See generally Carroll v. United States*, 267 U.S. 132 (1925) (recognizing an exception to the warrant requirement for searches of vehicles). The warrant exception stems from exigent circumstances because of the inherent mobility of vehicles, and the reduced expectation of privacy that stems from the pervasive regulation of automobiles. *Warrantless Searches*, *supra* note 42, at 97–98.

49. *See generally South Dakota v. Opperman*, 428 U.S. 364 (1976).

50. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977).

51. *Warrantless Searches*, *supra* note 42, at 40.

52. *Otterberg*, *supra* note 4, at 663–64; *see also United States v. Knotts*, 460 U.S. 276, 281 (1983) (stating that no expectation of privacy extended to visual observation of an automobile's movements on the highway or the movements of objects in open fields); *Oliver v. United States*, 466 U.S. 170, 178 (1984) (reaffirming that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”).

53. *Otterberg*, *supra* note 4, at 665; *see also Harris v. United States*, 331 U.S. 145, 150 (1947) (stating that the Supreme Court has “consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment are to be regarded as the very essence of constitutional liberty” (citations omitted)) *overruled in part as recognized in Chimel v. California*, 395 U.S. 752 (1969).

54. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (stating that the Fourth Amendment's right to privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment); *see also Timothy Joseph Duva, You Get What You Pay for . . . and So Does the Government: How Law Enforcement Can Use Your Personal Property to Track Your Movements*, 6 N.C. J.L. & TECH. 165, 173 (2004).

55. *Katz v. United States*, 389 U.S. 347, 350 (1967) (stating that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy’”); *see also John S. Ganz, It's Already Public: Why Federal Officers Should Not Need Warrants to Use GPS Vehicle Tracking Devices*, 95 J. CRIM. L. & CRIMINOLOGY 1325, 1333 (2005).

56. *Katz*, 389 U.S. at 350–51; *see also Ganz*, *supra* note 55, at 1333.

bumper.<sup>57</sup> The Fourth Amendment will also apply to warrantless monitoring of a GPS device if the motorist has a reasonable expectation of privacy in the movements of his vehicle.

### B. Background on Supreme Court Cases

Although the Supreme Court has not addressed law enforcement's warrantless use of GPS, lower federal courts have applied Supreme Court cases involving other forms of electronic technology to GPS cases.<sup>58</sup> These cases distinguish the warrantless use of electronic devices to obtain information exposed to public perception from their warrantless use to obtain information contained in protected premises, such as a dwelling.<sup>59</sup> In *United States v. Knotts* the Court held that law enforcement's warrantless use of a beeper was not a search because it only obtained information already exposed to the public; whereas in *Kyllo v. United States* the Court found that law enforcement's warrantless use of a thermal imager<sup>60</sup> was an unconstitutional search because it revealed information about the interior of a residence.<sup>61</sup>

This distinction has driven most courts' acceptance of law enforcement's warrantless use of GPS.<sup>62</sup> By applying the *Knotts* analysis, courts have held that because the information obtained with GPS is already exposed to public perception, the warrantless use of GPS is not an unreasonable search.<sup>63</sup>

The case that would develop into *Knotts* began when agents placed a beeper in a container of chemicals that they suspected would be stolen and used to make

---

57. Several defendants have also made the argument that the attachment of a GPS device on their vehicle is an unconstitutional seizure, and courts have addressed this argument in various ways. Under federal law, a seizure occurs when there is some meaningful interference with a person's possessory interests in property. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). One court has held that the attachment of electronic devices on the undercarriage of a vehicle was not a seizure because the defendant did not present any evidence that the devices deprived him of dominion and control of the vehicle, or caused damage to the electronic components of his vehicle, thus not meaningfully interfering with his possessory interest in the vehicle. See *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999). Another court has found that the attachment of a beeper is a seizure because the owner of property has a right to exclude others, including the government, from the property and when the government attaches an electronic monitoring device to the property it infringes on the exclusionary right; such an invasion is a meaningful interference with possessory rights as the character of the property is "profoundly different when infected with an electronic bug than when it is entirely germ free." See *United States v. Garcia*, No. 05-CR-155-C, 2006 WL 298704 (W.D. Wisc. Feb. 3, 2006).

58. Glancy, *supra* note 6, at 348; see also, e.g., *McIver*, 186 F.3d at 1125. These cases can be analogized to GPS cases, and the application of these cases is valid.

59. Compare *United States v. Knotts*, 460 U.S. 276, 277-78 (1983) with *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001).

60. A thermal imager is a device which detects infrared radiation and converts the radiation into images based on relative warmth. *Kyllo*, 533 U.S. at 29-30.

61. See *Knotts*, 460 U.S. at 281-82; *Kyllo*, 533 U.S. at 40.

62. See, e.g., *McIver*, 186 F.3d at 1125-26 ("Illegal activities conducted on government land open to the public which may be viewed by any passing visitor or law enforcement officer are not protected by the Fourth Amendment because there can be no reasonable expectation of privacy under such circumstances. We are mindful that a person can have a reasonable expectation of privacy in a hotel room, a cabin, or an enclosed tent on public lands.").

63. See, e.g., *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007) (stating that "mere tracking of a vehicle on public streets by means of a similar though less sophisticated device (a beeper) is not a search").

drugs,<sup>64</sup> and later picked up the beeper signal to ascertain the suspect's location.<sup>65</sup> The defendant challenged the evidence the agents found at the suspect's location, arguing that it was obtained by an unconstitutional search.<sup>66</sup>

The Court used the two-part reasonable expectation of privacy inquiry to determine whether the warrantless use of the beeper violated the Fourth Amendment.<sup>67</sup> In analyzing the subjective expectation of privacy, the Court found that the surveillance principally amounted to following a vehicle on public streets.<sup>68</sup> The Court stated that people had a lesser expectation of privacy in a motor vehicle because vehicles have little capacity for escaping public scrutiny, and because they travel through public areas where their occupants and contents are in plain view.<sup>69</sup> It found that society would not recognize an expectation of privacy in a vehicle's travels as reasonable because a person's movement on the streets is open to public perception.<sup>70</sup> Since visual surveillance from public places along the driving route would have revealed all the facts of the case, the Court stated that nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with science and technology such as beepers.<sup>71</sup> The Court held that the officers did not conduct a search because monitoring the beeper's signal did not invade any legitimate expectation of privacy.<sup>72</sup>

Two subsequent Supreme Court cases held that law enforcement cannot use an electronic device without a warrant if the device reveals information about the interior of a residential dwelling because a person has an expectation of privacy in his residence.<sup>73</sup> In *United States v. Karo* the Court found that an unreasonable search occurred when law enforcement's warrantless use of a beeper revealed information about the interior of a residence.<sup>74</sup> The Court stated that private residences are places that people normally expect to be free of warrantless governmental intrusion,<sup>75</sup> and that monitoring an electronic device that is inside a residence reveals critical facts about the interior of the premises that could not be obtained without a warrant.<sup>76</sup> It distinguished *Knotts* because the beeper used in *Knotts* did not tell the authorities anything about the interior of the residence.<sup>77</sup> However, in *Karo*, the agents verified by monitoring the beeper, that the container was located in the residence and that it remained there while they sought a war-

---

64. *Knotts*, 460 U.S. at 277–78. The agents then followed a vehicle carrying the container by maintaining visual surveillance and by monitoring the beeper. *Id.* at 278. However, they stopped visual pursuit after the defendant began driving evasively. *Id.*

65. *Id.* at 278. The agents relied on the location of the beeper signal to obtain a search warrant. *Id.* at 279. In executing the warrant, they found a drug lab. *Id.*

66. *Id.*

67. *Id.* at 281.

68. *Id.*

69. *Id.* at 281–82.

70. *Id.* at 282.

71. *Id.*

72. *Id.*

73. *See, e.g., United States v. Karo*, 468 U.S. 705 (1984).

74. *Id.* at 715–16. In that case, law enforcement agents monitored the location of a beeper placed in a container of chemicals as it moved through several locations, including private residences. *Id.* at 708–10.

75. *Id.* at 715.

76. *Id.*

77. *Id.*

rant.<sup>78</sup> This led the Court to hold that the evidence obtained from the beeper was inadmissible because the beeper showed information that was not obtainable by visual surveillance.<sup>79</sup>

Another case that illustrates this principle is *Kyllo v. United States*, where the Court held that law enforcement's warrantless use of a thermal imager to explore the details of a residence was an unreasonable search.<sup>80</sup> The Court reached this conclusion by acknowledging that there is a reasonable expectation of privacy in a residence.<sup>81</sup> It stated that using sense-enhancing technology to obtain information about the interior of a residence that could not otherwise have been obtained was "a search—at least where (as here) the technology in question is not in general public use."<sup>82</sup> The Court held that technological surveillance is a search, and presumptively unreasonable when law enforcement uses a device not available for general public use to explore a home's details that could not have previously been obtained without physical intrusion.<sup>83</sup> Therefore, the Court found that the information obtained by the thermal imager was the product of an unreasonable search.<sup>84</sup>

Both *Kyllo* and *Karo* show that a warrant is needed when a sense-enhancing technology is used to obtain information regarding the interior of a residence, while *Knotts* shows that a warrant is not needed when sense-enhancing technology is used to obtain information that is open to public perception. The holdings of these cases have been applied by federal courts to numerous cases involving sense-enhancing technology, such as GPS.

### C. Background on Federal Cases

Most federal courts have upheld law enforcement's warrantless installation and monitoring of GPS on suspects' vehicles.<sup>85</sup> Although these courts have utilized va-

---

78. *Id.* at 710.

79. *Id.* at 716–18.

80. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001). Thermal imagers detect the infrared radiation that is emitted by most objects but that is invisible to the naked eye. *Id.* The imager converts the radiation into visual images based on the relative warmth of objects. *Id.* at 29–30. In *Kyllo*, government agents used a thermal imager to scan a suspect's triplex because they thought he was growing marijuana, which usually requires high intensity lamps. *Id.* at 29. The scan of the defendant's residence showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the house and were substantially warmer than the neighboring homes. *Id.* at 30. Based on this scan, the agents concluded that the suspect was using high intensity lamps to grow marijuana in his house, and a search of the house proved that they were correct. *Id.*

81. *Id.* at 34.

82. *Id.* (citations omitted).

83. *Id.* at 34–35, 40.

84. *Id.* at 40.

85. See, e.g., *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999); *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981). *United States v. Berry* is one case that differs from other federal court cases. 300 F. Supp. 2d 366 (D. Md. 2004). This case did not decide whether modern GPS constitutes a search and seizure because all the evidence the government sought to admit was obtained under a court order, which rendered the evidence admissible. *Id.* at 368. However the court did discuss in dicta the possible reasons why GPS might need to be treated differently. *Id.* at 367–68. One of the differences that the court found between a beeper and a GPS device was that a beeper was unsophisticated and merely emitted an electronic signal the police could pick up with a receiver, whereas GPS technology is much more sophisticated. *Id.* Beepers placed on vehicles merely help the police stay in contact with the vehicle that they are actively tailing. *Id.* at 368. The court also stated that the Supreme Court's analysis may not cover GPS because unlike a beeper, GPS is a substitute for surveillance. *Id.* Unlike beepers, GPS does not keep the information in real time; it stores the data in its memory, and the police can download the data. *Id.* The court stated that GPS records electronically what police could do if they tailed around the clock and that the Su-

rious lines of reasoning, the basis of the opinions is that information obtained from GPS is available to public perception.<sup>86</sup> An individual does not have a reasonable expectation of privacy with such information; therefore, these courts have found that the use of GPS was not a search.<sup>87</sup>

Several courts have found that a suspect does not have a reasonable expectation of privacy in his vehicle because his vehicle is open to public inspection.<sup>88</sup> In *United States v. Michael*, the Fifth Circuit Court of Appeals found that the Fourth Amendment's protection against unreasonable searches was not violated when law enforcement agents placed a beeper on the suspect's vehicle and monitored the beeper, partly because there was a lesser expectation of privacy in a vehicle than in other property.<sup>89</sup> In *United States v. McIver*, the Ninth Circuit Court of Appeals held that law enforcement's placement of GPS on the undercarriage of a vehicle was not a search because the defendant did not produce any evidence showing that he intended to shield the undercarriage of his vehicle from inspection by others.<sup>90</sup> In the absence of such intent, there was no reasonable expectation of privacy, and therefore the installation of a tracking device was not an unreasonable search.<sup>91</sup>

Other federal courts have found that the warrantless use of a technological device does not constitute an unreasonable search because the same information could have been gathered through visual surveillance.<sup>92</sup> In *McIver*, the Ninth Circuit Court of Appeals stated that a U.S. Forest Service officer's warrantless use of surveillance cameras which recorded the defendants cultivating marijuana did not violate the defendants' rights under the Fourth Amendment.<sup>93</sup> The court stated that "[w]e reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective 'mechanical eye' to continue the surveillance."<sup>94</sup> Similarly, in *United States v. Garcia*, the Seventh Circuit Court of Appeals held that use of a GPS device was not a search under the Fourth Amendment when law enforcement installed a GPS device on the suspect's vehicle and later retrieved the device to obtain information

---

preme Court may conclude that GPS technology is so intrusive that the police must obtain a court order before using it. *Id.* This case was decided by a district court in Maryland. Maryland is in the Fourth Circuit, which has not yet addressed whether law enforcement's warrantless use of a GPS device constitutes a search.

86. See *infra* text accompanying notes 88–97. One federal court has stated that the government does not need a warrant to obtain information that is open to public perception from a GPS device because a person has no reasonable expectation of privacy in that information. However, when police obtain data that is not open to public perception from a GPS device, such as data from a parking garage, the evidence must be suppressed. *United States v. Jones*, 451 F. Supp. 2d 71, 87–88 (D.D.C. 2006).

87. See, e.g., *Garcia*, 474 F.3d at 997.

88. See, e.g., *Michael*, 645 F.2d at 257–59.

89. *Id.* The court found that "a car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Id.* at 257.

90. *McIver*, 186 F.3d at 1123, 1126–27.

91. *Id.* at 1127.

92. See *Garcia*, 474 F.3d at 997; see also *Michael*, 645 F.2d at 258 (holding that a law enforcement officer's warrantless use of a beeper was not a violation of Fourth Amendment rights because the monitoring simply aided the officers in the performance of lawful surveillance). Another case, *United States v. Moran*, also demonstrates this reasoning. In *Moran*, the Northern New York District Court held that there was no search when law enforcement gathered information from a GPS device attached to the suspect's vehicle because the officers could have gained the same information through visual surveillance of the vehicle as it traveled on public roadways. *United States v. Moran*, 349 F. Supp. 2d 425, 467 (N.D.N.Y. 2005). Therefore the court found that the defendant did not have a reasonable expectation of privacy in the whereabouts of his vehicle. *Id.*

93. *McIver*, 186 F.3d at 1124–26.

94. *Id.* at 1125 (citing *United States v. Knotts*, 460 U.S. 276, 284 (1983)).

about the vehicle's travel history.<sup>95</sup> The court found that tracking a suspect through the use of transmitted coordinates is equivalent to police surveillance.<sup>96</sup> It held that because police surveillance is not a search, tracking a suspect through the use of transmitted coordinates was not a search either; therefore, the court affirmed the denial of defendant's motion to suppress.<sup>97</sup>

By applying the syllogism developed in *Knotts*, federal courts have provided reasoned analysis that may be persuasive to state courts.<sup>98</sup> Although state courts are free to adopt the federal courts' reasoning, they are also free to conduct their own analysis regarding the protections offered under state constitutional law.

#### D. Background on State Court Cases

States are free to provide more protections or rights under their own constitutions than are provided under the Federal Constitution.<sup>99</sup> While some state courts have followed federal cases involving GPS and beepers,<sup>100</sup> other state courts have provided greater protection under the search provisions of their constitutions than is offered under the Federal Constitution.<sup>101</sup> These courts have held that a warrant is required before law enforcement can utilize an electronic device such as a GPS receiver or beeper.<sup>102</sup> These cases might provide some guidance to New Mexico courts in their decision whether to depart from federal precedent.

##### 1. States Where Warrantless GPS Use Is Not a Search

Several state courts have held that law enforcement officers do not need to obtain a warrant before installing and monitoring a GPS device on a suspect's vehicle.<sup>103</sup> These courts have found the syllogism that federal courts use persuasive.<sup>104</sup> For example, in *People v. Gant*, a New York county court prefaced a discussion of whether the defendant had a reasonable expectation of privacy in his vehicle, or vehicle's whereabouts, with an analysis of *Knotts*.<sup>105</sup> The court found that New York case law had similarly established a diminished expectation of privacy inherent in automobiles because they are open to public perception and subject to various laws and regulations, and thus held that the New York Constitution did not require law enforcement to obtain a warrant before installing and monitoring a GPS device on a suspect's vehicle.<sup>106</sup>

Another court has applied this syllogism to determine that the warrantless attachment of a GPS device is not a search.<sup>107</sup> In *Osburn v. State*, the Nevada Supreme Court considered the defendant's argument that the attachment of the

---

95. *Garcia*, 474 F.3d at 995, 997.

96. *Id.* at 997.

97. *Id.* at 997, 999.

98. *See supra* text accompanying notes 88–97.

99. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983).

100. *See, e.g., Osburn v. State*, 44 P.3d 523 (Nev. 2002).

101. *See, e.g., State v. Jackson*, 76 P.3d 217 (Wash. 2003).

102. *See, e.g., State v. Peters*, 546 So.2d 829 (La. Ct. App. 1989).

103. *See infra* text accompanying notes 105–110.

104. *See infra* text accompanying notes 105–110.

105. *People v. Gant*, 802 N.Y.S.2d 839, 846–47 (N.Y. Co. Ct. 2005).

106. *Id.* at 847–48.

107. *See, e.g., Osburn v. State*, 44 P.3d 523 (Nev. 2002); *see also People v. Zichwic*, 94 Cal. App. 4th 944, 955–56 (Cal. Ct. App. 2001) (stating that “it does not amount to a search to examine the undercarriage, to

device was an unreasonable search under the Nevada Constitution; however, it found the analysis in *McIver* convincing, and held that there was no search because the defendant did not have a reasonable expectation of privacy.<sup>108</sup> The majority held that the defendant did not have a subjective expectation of privacy in the bumper of his vehicle because the vehicle was parked in plain view on the street, and he had not taken any steps to shield the vehicle from the public's inspection.<sup>109</sup> The court also held that he did not have an objective expectation of privacy because the exterior of the vehicle was open to public view and susceptible to casual inspection.<sup>110</sup>

These cases have recognized that a suspect does not have a reasonable expectation of privacy in his vehicle,<sup>111</sup> because of the public's ability to observe a vehicle.<sup>112</sup> They are examples of state courts that have accepted the syllogism used by federal courts, and followed federal precedent.<sup>113</sup>

## 2. States Where Warrantless GPS Use Is an Unreasonable Search

Several state courts have held that police are required to obtain a warrant before monitoring the movements of a GPS device installed on a suspect's vehicle.<sup>114</sup> These courts have rejected the syllogism used by federal courts. Instead, they have found that information obtained by a GPS device, such as a vehicle's movements, or a vehicle itself, is not open to public perception.<sup>115</sup> As a result, these courts have held that warrantless use of a GPS device is an unreasonable search.<sup>116</sup>

One court has held that law enforcement's use of an electronic tracking device poses a serious threat to a citizen's expectation of privacy unless the use is carefully

touch it, to attach a tracking device, so long as a police officer has done so from a place where the officer has a right to be").

108. *Osburn*, 44 P.3d at 526. In its analysis the court considered two diverging lines of cases, as shown by *McIver*, and a state case which will be discussed in the next section, *State v. Campbell*. *Id.* at 525–26. The court agreed with the analysis in *McIver*. *Id.* at 526.

109. *Id.* at 526.

110. *Id.*

111. See *supra* text accompanying notes 105–110.

112. See, e.g., *Osburn*, 44 P.3d at 526.

113. See, e.g., *Davidson v. State*, 249 S.W.3d 709, 727 (Tex. App. 2008) (stating that the defendant did not have a reasonable expectation of privacy in the movements of her vehicle); *People v. Gant*, 802 N.Y.S.2d 839, 845–48 (N.Y. Co. Ct. 2005) (denying defendant's motion to suppress evidence obtained as the result of a GPS device because the defendant did not establish that he had a legitimate expectation of privacy in a vehicle traveling on a public roadway); *People v. Zichwic*, 94 Cal. App. 4th 944, 956 (Cal. Ct. App. 2001) (recognizing that the Supreme Court has concluded that monitoring electronic signals does not amount to a search when the information provided could be obtained through visual surveillance).

114. See *infra* text accompanying notes 117–149; see also *Biddle v. State*, No. CRIM. A. 05-01-1052, 2006 WL 1148663 (Del. Super. Feb. 16, 2006), a case which draws on the reasoning of these state court cases. *Biddle* is a criminal case in which the state prosecuted a person who put a GPS tracking device on another person's vehicle. *Id.* at \*1. The Delaware Superior Court found that a person has an expectation of privacy in his vehicle. *Id.* at \*2. The court found the reasoning of several cases persuasive. *Id.* One of the cases the court found persuasive was *People v. Lacey*, where the court had found that use of GPS required physical intrusion into a person's effects. *Id.* Another case that the court found persuasive was *State v. Jackson*, where the court held that the installation and monitoring of a GPS device was a search under the Washington Constitution because such a device was intrusive into people's private affairs, leading the court to rule that a warrant was required. *Id.*

115. See *infra* text accompanying notes 117–149.

116. See *infra* text accompanying notes 117–149.

monitored by procedural protections like warrant requirements.<sup>117</sup> In *State v. Peters*, the First Circuit Court of Appeal of Louisiana stated that the state constitution provided greater protection for individual rights than the Fourth Amendment.<sup>118</sup> The court stated that in order to protect the defendants' privacy interest, police should obtain a warrant before using an electronic device.<sup>119</sup> Because the officers had obtained a warrant, the court held the motion to suppress was rightly denied.<sup>120</sup>

Another court has held that a warrant may be required before law enforcement can use GPS because public policy suggests that people should be free from a "big brother" type of government.<sup>121</sup> In *People v. Lacey*,<sup>122</sup> the New York Nassau County Court stated that attaching a GPS to a vehicle amounts to a search.<sup>123</sup> New York has conflicting case law, because two New York county courts, *Lacey* and *Gant*, have reached opposite conclusions regarding the legality of police use of GPS.<sup>124</sup> The court in *Lacey* supported its conclusion with public policy.<sup>125</sup> It quoted Cicero's statement that "the good of the people is the highest law," which the court found was ensured through the Fourth Amendment and its counterpart in the New York Constitution.<sup>126</sup> The court declared that individuals must be given the constitutional protections necessary to maintain their freedom from a "big brother" society,<sup>127</sup> and that a person must feel secure that his movements will not be tracked unless law enforcement has obtained a warrant.<sup>128</sup> Although the court acknowledged that a person has a diminished expectation of privacy in his automobile, it stated that merely parking a vehicle on a public street should not give law enforcement the unfettered right to tamper with the vehicle by attaching a tracking device without a warrant.<sup>129</sup> Therefore, public policy might support the argument that law enforcement's warrantless use of GPS is unconstitutional.

117. *State v. Peters*, 546 So.2d 829 (La. Ct. App. 1989). In that case, the defendants appealed the denial of a motion to suppress evidence obtained from surveillance of their vehicles with electronic tracking devices. *Id.* at 830.

118. *Id.* at 834.

119. *Id.*

120. *Id.*

121. *People v. Lacey*, 3 Misc.3d 1103(A), \*7-8 (N.Y. Co. Ct. 2004).

122. This case has negative history because of a federal court case that construed the Fourth Amendment differently. *See United States v. Moran*, 349 F. Supp. 2d 425, 467 (N.D.N.Y. 2005). There has also been a subsequent state case in New York that has drawn a different conclusion than *People v. Lacey*. *See People v. Gant*, 802 N.Y.S.2d 839, 848 (N.Y. Co. Ct. 2005).

123. However, the court found that there was no search at issue in the case because the defendant did not prove that he had a legitimate expectation of privacy in the vehicle on which the GPS device was installed because he was not the owner of the vehicle, and therefore the GPS was not installed on his property. *Lacey*, 3 Misc.3d at \*10. The court found that because the defendant was not the owner he lacked standing to contest the installation of the GPS on the vehicle and its use in leading to his arrest. *Id.*

124. This conflicting case law appears to have been recently resolved. In *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009), the New York Court of Appeals held that the New York Constitution requires police to obtain a warrant before installing and monitoring a GPS device on a vehicle because the "massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the [defendant's slight] expectation of privacy [in his vehicle]." *Id.* at 1201.

125. *Lacey*, 3 Misc.3d at \*7.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at \*7-8. The court came to this conclusion after reviewing existing case law at the time of the opinion, including *Berry*, *McIver*, *Campbell*, and *Jackson*.

Another court has found that warrantless use of a technological device by the police would significantly impair a person's freedom from scrutiny.<sup>130</sup> Although this case dealt with warrantless use of a radio transmitter instead of a GPS device, it is recognized as a leading case, and several courts cite this case in their analysis of whether to depart from federal precedent.<sup>131</sup> In *State v. Campbell*, the Supreme Court of Oregon considered the state's two arguments in favor of the warrantless use of the radio transmitter, and rejected each in turn.<sup>132</sup> The first argument was that the defendant's privacy interests were not infringed upon because the transmitter only disclosed information that any member of the public could have legitimately observed.<sup>133</sup> This was rejected because the police had found it impossible to follow the defendant's vehicle through visual surveillance.<sup>134</sup> The second argument was that even if the transmitter enhanced the abilities of the police, the defendant did not have a privacy interest outside of protected premises.<sup>135</sup> The court rejected this argument because it could not be faithful to the principles underlying the constitutional prohibition of unreasonable searches and still conclude that such surveillance was not a search.<sup>136</sup> This type of surveillance, if engaged in at the discretion of the government, would significantly interfere with the people's freedom from scrutiny, the protection of which underlies the prohibition of unreasonable searches in the Oregon Constitution.<sup>137</sup> Accordingly, the court held that the use of the radio transmitter to locate the defendant's automobile was a search.<sup>138</sup>

Another court has found that the nature and extent of information that can be obtained by a GPS device makes it unduly intrusive; therefore, law enforcement's warrantless use of a GPS device constitutes an unreasonable search.<sup>139</sup> In *State v. Jackson*, the Washington Supreme Court found that the state constitution provided more protections than the Fourth Amendment,<sup>140</sup> stating that law enforcement's use of a particularly intrusive surveillance method may constitute an unreasonable search.<sup>141</sup> The court noted that the nature and extent of information obtained by the police concerning a person's associations, contacts, finances, or activities were relevant in deciding whether the surveillance method was particularly intrusive.<sup>142</sup> The court distinguished a GPS device from visual surveillance in several ways.<sup>143</sup> First, when a GPS device is attached to a vehicle, law enforcement officers do not

---

130. *State v. Campbell*, 759 P.2d 1040, 1041 (Or. 1988).

131. See, e.g., *State v. Jackson*, 76 P.3d 217, 222–24 (Wash. 2003); *Osburn v. State*, 44 P.3d 523, 525–26 (Nev. 2002).

132. *Campbell*, 759 P.2d at 1045–49. In that case, the police attached a radio transmitter to a suspect's vehicle, and followed the signal to the suspect's location, where he appeared to be burglarizing a residence. *Id.* at 1041–42. Following his indictment for burglary, the defendant moved to suppress the evidence obtained from the use of the radio transmitter, alleging that the attachment and monitoring of the device violated his rights under the Oregon Constitution. *Id.* at 1042.

133. *Id.* at 1044–45.

134. *Id.* at 1045.

135. *Id.*

136. *Id.* at 1049.

137. *Id.* at 1048.

138. *Id.* at 1049.

139. *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003).

140. *Id.*

141. *Id.*

142. *Id.* at 222–23.

143. *Id.* at 223–24.

have to follow the vehicle, and therefore, GPS provides a technological substitute for visual tracking.<sup>144</sup> Second, GPS devices can be placed on vehicles for a long period of time, while it is unlikely that a law enforcement agency can successfully maintain uninterrupted surveillance throughout several weeks.<sup>145</sup> Third, there is a significant possibility that the information obtained from a GPS device can intrude into private affairs because the device can obtain information about whether the suspect went to casinos, political party meetings, or similar activities.<sup>146</sup> The court held that citizens have a right to be free from the governmental intrusion that occurs when law enforcement uses a GPS device, regardless of reduced privacy expectations because of advances in technology.<sup>147</sup> Because of the possibility that a GPS device may obtain information that cannot be obtained through visual surveillance, the court found that GPS devices were unduly intrusive.<sup>148</sup> Therefore, the court held that under the Washington constitution, law enforcement was required to obtain a warrant before installing and monitoring a GPS device on a suspect's vehicle.<sup>149</sup>

These state courts have been more concerned with privacy rights than the state courts which have followed federal precedent. Instead of relying on the proposition that the warrantless use of GPS is not a search because GPS obtains information that is open to public perception, these courts have recognized that police use of GPS raises privacy concerns. These courts have then imposed a warrant requirement on law enforcement's use of GPS in order to protect those privacy concerns. These differing approaches to law enforcement's use of GPS show varying views of the purpose of constitutional prohibitions of unreasonable searches and seizures. One approach seems to interpret the prohibitions as meant to protect a person in areas where he has a reasonable expectation of privacy. The other approach seems to interpret the prohibitions as meant to protect a person's privacy. These conflicting interpretations of constitutional prohibitions of unreasonable searches and seizures are an underlying reason for the divergence in courts' treatment of law enforcement's warrantless use of GPS.

#### IV. BACKGROUND ON NEW MEXICO CASE LAW

Because a challenge to law enforcement's warrantless use of a GPS device would constitute a matter of first impression in New Mexico, a consideration of precedent will help determine how a New Mexico court should treat this issue.<sup>150</sup> It

---

144. *Id.* at 223.

145. *Id.*

146. *Id.* at 222–23.

147. *Id.* at 224.

148. *Id.* at 223–24. During this discussion, the court did not cite any federal precedent. The only case discussed in this article that the court cited was *Campbell*. See *id.* at 223–24.

149. *Id.* The court found that the installation of the device in this case was within the Washington Constitution because it was installed under valid warrants. *Id.* at 231. The analysis of the court in *Jackson* is flawed because law enforcement's warrantless use of GPS is not more intrusive than visual surveillance. Although the use of GPS is more cost-effective than visual surveillance, a GPS device obtains the same information that could be obtained through visual surveillance. Both modes of tracking allow police to obtain information about a person's private affairs and activities. Because a GPS device obtains the same information that could be obtained through visual surveillance, it is misleading to characterize a GPS device as more intrusive.

150. This article will consider cases such as *State v. Gomez*, *State v. Cardenas-Alvarez*, *State v. Bolton*, *State v. Bomboy*, and *State v. Weidner*.

is necessary to determine how much protection New Mexico's search and seizure provision, article II, section 10, provides. New Mexico courts do not treat article II, section 10 and the Fourth Amendment exactly alike, and have already read article II, section 10 as more expansive than the Fourth Amendment.<sup>151</sup> Article II, section 10 may provide future expansions of New Mexico constitutional protections if the litigants show that there is a reason for the court to diverge from federal precedent.<sup>152</sup> In order to determine how New Mexico courts should address warrantless use of a GPS device, this comment conducts an analysis of whether departure from federal precedent can be justified.<sup>153</sup>

Article II, section 10 of the New Mexico Constitution states that:

[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.<sup>154</sup>

New Mexico courts have adopted federal precedent's definition of a search, defining it as a governmental action that intrudes on an area or object in which a person has a reasonable expectation of privacy.<sup>155</sup> When the governmental action constitutes a search, New Mexico case law, like federal case law, requires law enforcement to obtain a warrant before conducting the search unless the circumstances fall within an established exception to the warrant requirement.<sup>156</sup> The recognized exceptions are exigent circumstances, consent, searches incident to arrest, plain view, inventory searches, open fields, and hot pursuit.<sup>157</sup>

Throughout most of the twentieth century, New Mexico courts followed federal precedent when interpreting the New Mexico Constitution, and did not independently construe the parallel provision of the state constitution.<sup>158</sup> However, beginning in the 1960s and 70s this approach was abandoned, and New Mexico courts began to interpret the New Mexico Constitution independently, and to provide more liberty or protection than was mandated by the Federal Constitution.<sup>159</sup> In *State v. Gomez* the New Mexico Supreme Court recognized this trend and adopted an approach to constitutional analysis, called the interstitial approach, to help lower courts decide when they should provide more liberty than was mandated by

151. See *infra* text accompanying notes 158–168; see also generally *State v. Attaway*, 117 N.M. 141, 151, 870 P.2d 103, 113 (1994) (stating that “the New Mexico constitution requires law enforcement personnel to knock and announce their authority when executing a warrant”); *State v. Gutierrez*, 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993) (stating that the good faith exception which allows evidence obtained under an invalid warrant to be admitted is incompatible with the New Mexico Constitution).

152. See *infra* text accompanying note 167.

153. See generally *State v. Gomez*, 1997-NMSC-006, 932 P.2d 1 (addressing the three reasons which justify a departure from federal cases).

154. N.M. CONST. art. II, § 10. The Fourth Amendment and article II, section 10 are very similar despite differences in phrasing. One notable difference is that while the New Mexico Constitution protects persons, papers, homes, and effects, the Fourth Amendment protects persons, houses, papers, and effects. Compare N.M. CONST. art. II, § 10 (emphasis added) with U.S. CONST. amend. IV (emphasis added).

155. *State v. Cleave*, 2001-NMSC-031, ¶ 11, 33 P.3d 633, 636.

156. *State v. Morgan*, 2008-NMCA-160, ¶ 8, 197 P.3d 1079, 1082.

157. *State v. Duffy*, 1998-NMSC-014, ¶ 61, 967 P.2d 807, 824 (citations omitted).

158. *State v. Gomez*, 1997-NMSC-006, ¶¶ 16–17, 967 P.2d 1, 6–7.

159. *Id.*

the Federal Constitution.<sup>160</sup> Under the interstitial approach the court considers the state constitutional question if the asserted right is not protected under the Federal Constitution.<sup>161</sup> This approach varies greatly from the former lock-step approach to constitutional interpretation, where if the Federal Constitution did not provide protection of an asserted right, the state courts would follow the federal precedent without independently interpreting the parallel provision of the New Mexico Constitution.<sup>162</sup> There are three steps to the interstitial approach. First, the state court should determine whether the asserted right is protected under the Federal Constitution.<sup>163</sup> If the Federal Constitution protects the asserted right, then the state court should not reach the state constitutional claim.<sup>164</sup> However, if the Federal Constitution does not protect the asserted right, the state court should take the second step, which is an examination of the state constitutional claim.<sup>165</sup> In the state court's examination it takes the third step, which is a consideration of the reasons that would justify a departure from federal cases.<sup>166</sup> The three reasons the court may diverge from federal case law are "flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."<sup>167</sup> The New Mexico Supreme Court chose to adopt the interstitial approach because it found that "[w]hen federal protections are extensive and well-articulated, state court decisionmaking that eschews . . . reliance on . . . federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide."<sup>168</sup>

#### A. Structural Differences

Structural differences exist when "there are specific textual differences between the state constitution and the federal Constitution,"<sup>169</sup> or when a federal decision is based on concerns, such as federalism, which do not constrain a state court's consideration of its own constitution.<sup>170</sup>

Two New Mexico cases exemplify how a court should perform a structural differences analysis. In *State v. Woodruff*,<sup>171</sup> the New Mexico Supreme Court found that there were not specific textual differences in the "right to counsel" provisions in the New Mexico Constitution and the Federal Constitution,<sup>172</sup> and, thus, there were not structural differences to justify a departure from Federal Sixth Amend-

160. *Id.* ¶¶ 20–21, 932 P.2d at 7–8. New Mexico previously treated article II, section 10 as being in lock-step with the Supreme Court's interpretation of the Fourth Amendment, even treating the two provisions interchangeably. *Id.* ¶ 35, 932 P.2d at 11. However, New Mexico no longer follows in lock-step with the U.S. Supreme Court interpretation of the Fourth Amendment in dealing with the interpretation of article II, section 10 of the New Mexico Constitution. *Id.* ¶¶ 20–21, 932 P.2d at 7–8.

161. *Id.* ¶ 19, 932 P.2d at 7.

162. *Id.* ¶ 16, 932 P.2d at 6.

163. *Id.* ¶ 19, 932 P.2d at 7.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* ¶¶ 18, 21, 932 P.2d at 7.

169. *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 51, 25 P.3d 225, 246–47 (citations omitted).

170. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶¶ 20–21, 163 P.3d 476, 483.

171. *State v. Woodruff*, 1997-NMSC-061, ¶ 15, 951 P.2d 605, 609.

172. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 51, 25 P.3d at 246–47 (Baca, J., concurring).

ment precedent.<sup>173</sup> In *Montoya v. Ulibarri*, the New Mexico Supreme Court found that there was a sufficient reason to depart from federal precedent that did not recognize freestanding innocence claims brought by habeas petitioners because the principles of federalism that informed the U.S. Supreme Court's decision did not constrain the state court's determination of the protections offered by the New Mexico Constitution.<sup>174</sup> The court found that principles of federalism led the U.S. Supreme Court to balance the rights of the petitioner to be free from unlawful confinement against the state's interest in comity and finality.<sup>175</sup> However, the court realized that it was not constrained by the concerns of federalism in interpreting its own constitution; instead, it was obligated to protect the state's sovereignty.<sup>176</sup> The court found that an interest in protecting the credibility of the state judiciary was intrinsic in state sovereignty,<sup>177</sup> and recognized that ensuring the accuracy of criminal convictions is necessary to maintaining the credibility of the judiciary.<sup>178</sup> Thus, because of the state interest in ensuring accuracy, and because state courts are unconstrained by the principles of federalism in their interpretation of the state constitution, the court found that there was sufficient reason to depart from the federal precedent.<sup>179</sup>

These cases provide context for whether there are structural differences that might justify a state court's protection of a right under article II, section 10 that the Fourth Amendment does not protect.

### B. Flawed Federal Analysis

Flawed federal analysis might also justify a state court's departure from federal precedent. Federal analysis can be flawed if:<sup>180</sup> (1) the federal court has not carefully considered the situation and has not justified its actions;<sup>181</sup> (2) the analysis used by the federal court is not similar to analysis used by New Mexico cases;<sup>182</sup> (3) the analysis is "impractical" because it does not have a reasonable basis;<sup>183</sup> (4) the federal court has acted in a way that causes tension with its previous pronounce-

---

173. *Id.* The Federal Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." *Id.* (citing U.S. CONST. amend. VI). The New Mexico Constitution states that "[i]n all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel." N.M. CONST. art. II, § 14.

174. *Montoya*, 2007-NMSC-035, ¶¶ 20–21, 163 P.3d at 483.

175. *Id.* ¶ 20, 163 P.3d at 483.

176. *Id.* ¶ 21, 163 P.3d at 483.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See, e.g., State v. Baca*, 2004-NMCA-049, 90 P.3d 509.

181. *Id.* ¶ 31, 90 P.3d at 519–20 (stating that federal analysis was not flawed because the Supreme Court considered the special needs of a situation and justified an exception to usual warrant and probable cause requirements).

182. *Id.* ¶ 32, 90 P.3d at 520.

183. *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 50, 25 P.3d 225, 246 (stating that in *Gomez* the court "concluded that the reasoning underlying the automobile exception, which requires probable cause to search a vehicle is impractical because if 'there is no reasonable basis for believing an automobile will be moved or its search will otherwise be compromised by delay,' then there is no reason for not obtaining a warrant").

ments, for example when a court adopts a position that it had disavowed in earlier decisions;<sup>184</sup> or (5) the legal profession has criticized the decision.<sup>185</sup>

In *State v. Ochoa* the New Mexico Court of Appeals critiqued the analysis of a U.S. Supreme Court case, *Whren v. United States*.<sup>186</sup> *Whren* held that a pretextual traffic stop was not prohibited by the Fourth Amendment.<sup>187</sup> The court of appeals found that *Whren* had suffered from widespread criticism because many scholars, lawyers, and journalists had vociferously assailed the decision as legally incorrect, technically flawed, and fundamentally unfair.<sup>188</sup> *Whren* had also dismissed the Supreme Court's "own prior statements expressing hostility toward police pretext."<sup>189</sup> Because *Whren* was widely acknowledged as poorly reasoned and legally incorrect, and because it seemed to conflict with the U.S. Supreme Court's prior statements, the New Mexico Court of Appeals found the federal analysis to be flawed.<sup>190</sup> Therefore, the court justified its departure from federal law.<sup>191</sup>

These principles provide guidance for state courts, and help courts determine when federal analysis is so flawed that they may choose to diverge from the federal analysis. A state court may not hold that federal analysis is flawed simply because it disagrees with the analysis; instead, the federal analysis must be logically implausible, impractical, or unjustified.

### C. Distinctive State Characteristics

Distinctive state characteristics exist when there is a "sufficiently developed body" of New Mexico case law.<sup>192</sup> The distinctiveness of state case law must be compelling in order to justify a departure from federal precedent.<sup>193</sup> For example, in *State v. Granville*, the New Mexico Court of Appeals found that distinctive state characteristics justified a departure from federal case law which held that police may conduct a warrantless search of garbage set out for collection.<sup>194</sup> Distinctive characteristics existed because previous cases had interpreted article II, section 10 as providing greater protections for privacy, and because these cases had emphasized a preference for a warrant requirement.<sup>195</sup>

184. *Id.* ¶ 50, 25 P.3d at 246 (explaining that the U.S. Supreme Court had adopted a bright line rule when it adopted the automobile exception, and that this bright line rule caused tension with the U.S. Supreme Court's pronouncements that had disavowed bright line rules in favor of emphasizing the fact-specific nature of the reasonableness inquiry).

185. *State v. Ochoa*, 2009-NMCA-002, ¶ 13, 206 P.3d 143, 148, *cert. granted*, 2008-NMCERT-12, 203 P.3d 103, *cert. quashed*, 2009-NMCERT-11, 225 P.3d 794.

186. *Whren v. United States*, 517 U.S. 806 (1996).

187. *Ochoa*, 2009-NMCA-002, ¶¶ 12–13, 206 P.3d at 148–49.

188. *Id.* ¶ 13, 206 P.3d at 148 (citations omitted).

189. *Id.* ¶ 14, 206 P.3d at 149.

190. *Id.* ¶ 12, 206 P.3d at 148.

191. *Id.*

192. *State v. Pittman*, 2006-NMCA-006, ¶¶ 14, 25, 127 P.3d 1116, 1120, 1123 (finding that departure from federal precedent was warranted because there was a sufficiently developed body of New Mexico case law); *see also* *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 14–15, 25 P.3d 225, 230–31 (finding that New Mexico had distinctive state characteristics upon an examination of New Mexico case law).

193. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 35, 25 P.3d at 239 (Baca, J., concurring) (stating that New Mexico courts can depart from federal constitutional principles when compelling reasons require departure).

194. *State v. Granville*, 2006-NMCA-098, ¶¶ 11, 24, 142 P.3d 933, 937, 940–41.

195. *Id.* ¶19, 142 P.3d at 939.

To determine whether New Mexico has distinctive state characteristics, this comment will discuss the amount of protection provided to motorists under the New Mexico Constitution. Although there seem to be two competing interpretations regarding the amount of protection provided to motorists, recent decisions support the proposition that New Mexico courts are now less willing to provide motorists with an extra layer of protection.<sup>196</sup> These recent decisions appear to restrict an earlier line of cases which offer motorists an extra layer of protection against unreasonable searches as a distinctive state characteristic.<sup>197</sup> The idea of an extra layer of protection is connected to a motorist's expectation of privacy in his vehicle. When New Mexico courts offered an extra layer of protection, they recognized that a person's expectation of privacy doesn't decrease when he enters his automobile.<sup>198</sup> However, the recent cases where the courts were less willing to offer motorists an extra layer of protection signal that New Mexico courts are less willing to recognize that a person has an expectation of privacy in his vehicle. This shift might be explained by a change in the New Mexico Supreme Court's personnel.<sup>199</sup>

The line of case law that offered motorists an extra layer of protection as a state characteristic developed over several decades.<sup>200</sup> One early case, *State v. Sutton*, did not involve motorists, but it laid the foundation for later cases that provided motorists an extra layer of protection under the New Mexico Constitution.<sup>201</sup> In *Sutton*,<sup>202</sup> the New Mexico Court of Appeals implicitly rejected the federal bright-line "open fields" exception<sup>203</sup> to the warrant requirement, thus offering New Mexico citizens more protection under article II, section 10 than was offered by the Federal Constitution.<sup>204</sup> Instead of the "open fields" exception, the court gravitated towards the more fact-specific inquiry of a reasonable expectation of privacy.<sup>205</sup> The court stated that under its interpretation of the New Mexico Constitution there was a possibility that the differences in custom and terrain in New Mexico at the time the state constitution was adopted gave rise to particular expectations of privacy.<sup>206</sup> For example, the framers of the New Mexico Constitution might have thought that a person should have an expectation of privacy in a large rural lot.<sup>207</sup> New Mexico courts have previously shown some discomfort with the concept of "open fields," and have held that the "open fields" doctrine is not a talismanic solution.<sup>208</sup> The court recognized that New Mexico courts have used the reasonable

---

196. See *infra* text accompanying notes 235–247.

197. See *infra* text accompanying notes 202–219.

198. See *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 25 P.3d 225, 231.

199. See *infra* text accompanying notes 212, 217.

200. See *infra* text accompanying notes 202–219.

201. See *infra* text accompanying notes 202–209.

202. See *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991) *modified on other grounds* by *State v. Gomez*, 1997-NMSC-006, 932 P.2d 1.

203. The "open fields" exception states that an individual does not have a legitimate expectation that open fields will remain free from warrantless intrusion from law enforcement officers. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

204. *Sutton*, 112 N.M. at 455, 816 P.2d at 524.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (citations omitted).

expectation of privacy inquiry instead of the “open fields” doctrine.<sup>209</sup> In *Sutton*, albeit in dicta, the court implicitly rejected use of the bright-line “open fields” exception, and instead expounded the idea that courts should use the more fact-specific inquiry of a reasonable expectation of privacy.<sup>210</sup> By gravitating towards the more fact-specific inquiry, the court offered more protection for New Mexico citizens under article II, section 10 than was offered by the bright-line exception under the Federal Constitution.

The New Mexico Supreme Court applied this enhanced protection against unreasonable searches to motorists in *State v. Gomez* and *State v. Cardenas-Alvarez*.<sup>211</sup> In *Gomez* the court rejected the automobile exception, which permitted a warrantless search of a lawfully stopped automobile, and instead adopted a more fact-specific standard of exigent circumstances.<sup>212</sup> The court declared that “[i]n accordance with the principles underlying Article II, Section 10 and the cases over the last seven years interpreting that provision independently from its federal counterpart, we announce today that a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances.”<sup>213</sup> The court defined exigent circumstances as an emergency situation requiring fast action to prevent imminent danger to a person’s life, serious damage to property, a suspect’s imminent escape, or destruction of evidence.<sup>214</sup> The court stated that the officers would be required to obtain a warrant absent a reasonable belief that the vehicle would be moved.<sup>215</sup> By rejecting the automobile exception and adopting the exigent circumstances inquiry, the court offered motorists an extra layer of protection from unreasonable searches.<sup>216</sup> This was confirmed in *State v. Cardenas-Alvarez*,<sup>217</sup> where the court held that the New Mexico Constitution demands that when a Border Patrol agent detains a person after asking the person’s immigration and citizenship status, the agent must have a reasonable suspicion of criminal activity.<sup>218</sup> The court offered enhanced protection under the New Mexico Constitution because *Gomez* confirmed that article II, section 10 is broader than its federal counterpart and specifically applied broader protection to motorists.<sup>219</sup> Therefore, in the years following *Gomez*, New Mexico courts continued to construe the New Mexico

209. *Id.*

210. See *supra* text accompanying notes 202–209.

211. See *infra* text accompanying notes 212–219.

212. *State v. Gomez*, 1997-NMSC-006, ¶¶ 34–35, 932 P.2d 1, 10–11. In this case, police officers were called to a party disturbance. *Id.* ¶ 4, 932 P.2d at 4. The officers observed Gomez attempting to hide something in his vehicle. *Id.* ¶ 5, 932 P.2d at 4. The officer observed marijuana on the console and seat. *Id.* ¶ 6, 932 P.2d at 4. He opened the car door and searched the vehicle, which led to the recovery of LSD. *Id.* The court concluded that the officer reasonably believed that exigent circumstances justified the warrantless search. *Id.* ¶ 46, 932 P.2d at 13. This case was authored by Justice Ransom, and was joined by Justices Baca and Serna; Justices Franchini and Minzer concurred.

213. *Id.* ¶ 39, 932 P.2d at 12.

214. *Id.*

215. *Id.* ¶ 44, 932 P.2d at 13.

216. *Id.* ¶ 38, 932 P.2d at 11–12.

217. *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 20, 25 P.3d 225, 233. Justice Franchini authored the opinion, Justices Minzner and Maes concurred, Justice Serna specially concurred, and Justice Baca concurred in the result.

218. *Id.*

219. *Id.* ¶ 15, 25 P.3d at 231.

Constitution as offering broader protection to motorists than the Federal Constitution.<sup>220</sup>

However, another recent line of cases suggests that New Mexico is less willing to offer an extra layer of protection.<sup>221</sup> One of the early cases in this line, *State v. Bolton*, was decided before *Sutton*, *Gomez*, and *Cardenas-Alvarez* applied extra protection against unreasonable searches to motorists.<sup>222</sup> *State v. Bolton* stood for the proposition that a suspect does not have a reasonable expectation of privacy in the underside of his vehicle when the underside is open to public view.<sup>223</sup> In *Bolton*, law enforcement agents stopped the defendants at a roadblock.<sup>224</sup> During the stop an agent saw that the vehicle's fuel lines did not run to the rear gas tank.<sup>225</sup> Based on this observation, the agents searched the gas tank and found cocaine.<sup>226</sup> This case involved the "open view" exception to the warrant requirement, which states that a law enforcement officer does not conduct a search when the officer makes an observation that any member of the public had a right to make.<sup>227</sup> The New Mexico Court of Appeals found that the defendants did not have a reasonable expectation of privacy because they did not exhibit a subjective expectation of privacy by attempting to conceal the underside of the vehicle or absence of fuel lines.<sup>228</sup> The court also found that such an expectation of privacy would not be reasonable because the public may observe the underside of the vehicle.<sup>229</sup> For example, service station personnel, and people who retrieve dropped objects, freely observe this part of the vehicle.<sup>230</sup> Therefore, the court found that the agent's observations of the underside of the vehicle were lawful and did not constitute an unreasonable search.<sup>231</sup>

The underlying premise of *Bolton* is that it might be difficult for a motorist to establish a reasonable expectation of privacy in his vehicle.<sup>232</sup> Several recent cases have applied this principle, and have restricted *Gomez* and *Cardenas-Alvarez* by being less willing to offer motorists an extra layer of protection.<sup>233</sup> These cases have been less willing to provide motorists with the extra layer of protection discussed in *Gomez* and *Cardenas-Alvarez*.<sup>234</sup> One of these cases is *State v. Weidner*, where the court of appeals upheld an officer's seizure of methamphetamine in the defendant's vehicle.<sup>235</sup> The court found that the court in *Gomez* had anticipated that the exigent circumstances inquiry would justify a warrantless search in the majority of

220. See *supra* text accompanying notes 217–219.

221. See *infra* text accompanying notes 223–247.

222. See *infra* text accompanying notes 223–231.

223. *State v. Bolton*, 111 N.M. 28, 42, 801 P.2d 98, 112 (Ct. App. 1990). This opinion was authored by Judge Hartz, Judge Apodaca concurred, Judge Minzner concurred specially.

224. *Id.* at 31, 801 P.2d at 101.

225. *Id.* at 32, 801 P.2d at 102.

226. *Id.*

227. *Id.* at 40, 801 P.2d at 110.

228. *Id.* at 42, 801 P.2d at 112.

229. *Id.*

230. *Id.*

231. *Id.* at 40, 801 P.2d at 110.

232. See *supra* text accompanying notes 223–231.

233. See *infra* text accompanying notes 235–247.

234. See *infra* text accompanying notes 235–247.

235. *State v. Weidner*, 2007-NMCA-063, ¶ 17, 158 P.3d 1025, 1031.

cases.<sup>236</sup> The court also found that the inherent mobility of a vehicle supported the existence of the requisite exigency.<sup>237</sup> This stands in direct contrast to *Gomez*, where the court rejected the automobile exception, in part because it disagreed with the inherent mobility justification of the automobile exception.<sup>238</sup> While *Weidner* reinforces the statement in *Gomez* that exigent circumstances will justify a warrantless search in most cases, it also weakens the general rule of *Gomez* that the New Mexico Constitution provides an extra layer of protection to motorists because *Weidner* relies on the inherent mobility of a vehicle to justify a warrantless search of the vehicle, an idea which *Gomez* rejected.

Another case that showed an unwillingness to offer motorists the extra layer of protection as discussed in *Gomez* and *Cardenas-Alvaraz* is *State v. Bomboy*.<sup>239</sup> In *Bomboy*, the court stated that a person does not have a reasonable expectation of privacy in a highly visible object.<sup>240</sup> In *Bomboy*, the court considered whether the defendant had a privacy interest in the interior of his vehicle.<sup>241</sup> The court seemed to narrow the interpretation of a person's expectation of privacy in his vehicle.<sup>242</sup> In its analysis of whether the defendant had a reasonable expectation of privacy, the court relied upon the "plain view" exception and stated that it failed to see how the defendant could have a subjective expectation of privacy when he placed methamphetamine in a highly visible area.<sup>243</sup> The court also stated that even if the defendant had a subjective expectation of privacy, society would not recognize this expectation as reasonable because the placement of the methamphetamine was conspicuous.<sup>244</sup> The court realized that a person might have heightened privacy interests under certain circumstances.<sup>245</sup> However, the court found that a heightened expectation of privacy does not apply with equal force to automobiles.<sup>246</sup> It stated that the New Mexico Court of Appeals had read its opinion in *Gomez* too broadly; although *Gomez* recognized greater protections for motorists under the New Mexico Constitution, it did not expressly equate a vehicle with a home for search and seizure purposes.<sup>247</sup> The holding that a person does not have a reasonable expectation of privacy in a highly visible object, and the explicit language chastising the court of appeals, weakened the broad rule from *Gomez*.

Although there are two diverging interpretations regarding the amount of protection the New Mexico Constitution provides to motorists, recent decisions suggest that New Mexico courts are less willing to provide motorists with an extra

---

236. *Id.*

237. *Id.* ¶ 15, 158 P.3d at 1030–31.

238. Compare *State v. Gomez*, 1997-NMSC-006, ¶ 44, 932 P.2d 1, 13 (stating that a warrant is required if there is not a reasonable basis for believing that a vehicle will be moved) with *Weidner*, 2007-NMCA-063, ¶ 15, 158 P.3d at 1030–31 (stating that the inherent mobility and the fact that the defendant was still sitting behind the wheel supported the existence of the requisite emergency).

239. See *infra* text accompanying notes 241–247.

240. *Weidner*, 2007-NMCA-063, ¶ 10, 158 P.3d at 1047–48.

241. *State v. Bomboy*, 2008-NMSC-029, ¶ 9, 184 P.3d 1045, 1047. Justice Chavez authored the opinion, and Justices Serna, Maes, Bosson, and Daniels concurred.

242. *Id.*

243. *Id.* ¶ 10, 184 P.3d at 1047–48.

244. *Id.*

245. *Id.* ¶ 11, 184 P.3d at 1048 (stating there is a heightened expectation of privacy in one's home).

246. *Id.* ¶ 12, 184 P.3d at 1048.

247. *Id.*

layer of protection.<sup>248</sup> This shift might be the result of the changing personnel in New Mexico courts. For example, only one justice who contributed to *Gomez* and two justices who contributed to *Cardenas-Alvarez* are still on the New Mexico Supreme Court.<sup>249</sup>

## V. INTERSTITIAL ANALYSIS

A New Mexico state court will have to follow the steps prescribed in *Gomez* when it addresses whether the use of GPS is an unreasonable search under the New Mexico Constitution.<sup>250</sup> Upon conducting the interstitial analysis, this comment concludes that a New Mexico state court should not depart from federal precedent because none of the three reasons given in *Gomez* justify a departure in this situation.

### A. Structural Differences

Under the *Gomez* analysis of structural differences, a court should determine whether there are textual differences between the Fourth Amendment and article II, section 10.<sup>251</sup> The phrasing of these two provisions differs slightly; while the New Mexico Constitution protects persons, *homes*, papers, and effects, the Fourth Amendment protects persons, *houses*, papers, and effects.<sup>252</sup>

The framers of the New Mexico Constitution may have used the word “homes” instead of “houses” because they intended to offer more protection against unreasonable searches than the Federal Constitution.<sup>253</sup> A home is defined as a place where a person lives at a particular time; whereas, a house is defined as a building used as a dwelling.<sup>254</sup> Home may be construed more broadly than house because the place a person lives may include a vehicle, which could not constitute a dwelling.<sup>255</sup> Because a “home” offers more protection against unreasonable searches than a “house,” the textual differences between the Fourth Amendment and article II, section 10 are more than just linguistic differences. Therefore, although in *Woodruff*, the court found that there were not textual differences between the New Mexico Constitution and the Federal Constitution, in this matter there are textual differences which might justify a departure from federal cases.

248. See *supra* text accompanying notes 235–247.

249. See *supra* text accompanying notes 212, 217.

250. See *supra* text accompanying notes 160–167.

251. See *supra* text accompanying notes 169–173. The federal precedent is not based on principles, such as federalism. Thus, a state court does not need to analyze whether departure is warranted because it is not similarly constrained by such principles.

252. See *supra* text accompanying notes 37 and 154.

253. See *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991) (stating that “the difference in wording between the federal and state constitutions is some evidence that the state constitutional provision may be interpreted to provide broader protection than the federal [constitutional provision]”).

254. See WEBSTER’S NEW WORLD DICTIONARY 670–71, 680 (David B. Guralnik ed., Simon & Schuster 1982).

255. A person who lived in his vehicle would have a strong argument that the New Mexico Constitution offered him protection against warrantless GPS use. The counterargument would be that at the time the New Mexico Constitution was adopted in the early 1900s, vehicles were not widely available, which implies that the Framers did not intend to offer protection to a person living in his vehicle. However, regardless of the Framers’ intent, the definition of the word “home” does include a vehicle. Therefore, a person should arguably be free from unreasonable searches in his vehicle if he lives in it.

However, the argument that textual differences justify a departure is unpersuasive. In *State v. Sutton*, the New Mexico Supreme Court considered the possibility that textual differences may be evidence that article II, section 10 provides more protection than the Fourth Amendment.<sup>256</sup> The dictum in *Sutton* suggests that the framers of the New Mexico Constitution meant to provide protection against governmental intrusion in rural lots. However, there is no New Mexico authority which suggests that the broader protection would be extended to vehicles. New Mexico case law differentiates between a home and a vehicle, just as federal case law differentiates between a house and a vehicle.<sup>257</sup> This suggests that the differences between “homes” and “houses” do not affect a person’s expectation of privacy in his vehicle,<sup>258</sup> and that in the context of law enforcement’s warrantless installation and monitoring of GPS on suspects’ vehicles, the textual differences between the Fourth Amendment and article II, section 10 are inconsequential. As in *Woodruff*, where there were not structural differences that justified a departure from federal precedent because the New Mexico and Federal Constitutions were textually similar, the textual similarities between the Fourth Amendment and article II, section 10 demonstrate that there are not structural differences. Therefore, structural differences do not justify a departure from federal precedent.<sup>259</sup>

### B. Flawed Federal Analysis

A court should consider whether federal cases have been widely criticized and acknowledged as unsound and legally incorrect, and whether they cause tension with federal precedent, in its consideration of flawed federal analysis under *Gomez*.<sup>260</sup>

Although it is undisputed that *Knotts*, and federal courts’ application of *Knotts*, have been criticized, the question under flawed federal analysis is whether the criticism warrants a departure from the federal cases.<sup>261</sup> Of the scholarly articles that address GPS, many express concern about the possibility for intrusion into personal privacy.<sup>262</sup> These scholars have criticized the application of the *Knotts* analysis to GPS because GPS can be distinguished from beepers.<sup>263</sup> Arguably, beepers are passive because they simply emit electronic pulses which can be picked up and

256. See, e.g., *Sutton*, 112 N.M. 229, 816 P.2d 518.

257. See *infra* text accompanying note 258.

258. Compare *State v. Ryon*, 2005-NMSC-005, ¶ 13, 108 P.3d 1032, 1039 (stating there is a constitutional difference between searches of, and seizures in, houses and vehicles that stems from the mobile nature of a vehicle) with *State v. Bomboy*, 2008-NMSC-029, ¶¶ 11–12, 184 P.3d 1045, 1048 (stating that the defendant did not have a legitimate expectation of privacy in the methamphetamine which was highly visible in his vehicle, and distinguishing the situation with the vehicle from the heightened expectation of privacy in one’s home—a heightened expectation of privacy that does not apply with equal force to vehicles).

259. An argument that structural differences justify divergence from federal precedent is the least persuasive argument, when compared with a flawed federal analysis argument, and a distinctive state characteristics argument. There are no principles such as federalism, which would justify a departure from Fourth Amendment precedent, and the wording of article II, section 10 and the Fourth Amendment is similar.

260. See *infra* Part V.B.

261. For example, the criticism cannot simply reflect a difference of opinion; the criticism must reflect the faulty logic and impracticability of the federal analysis. See *supra* text accompanying notes 180–191.

262. See, e.g., William A. Herbert, *No Direction Home: Will the Law Keep Pace with Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery?*, 2 I/S: J.L. & POL’Y FOR INFO. SOC’Y. 409, 409–17 (2006) (discussing concern over employers’ ability to utilize tracking devices to monitor employees).

263. Otterberg, *supra* note 4, at 693.

followed,<sup>264</sup> whereas, GPS devices collect continuous real time information regarding a person's location and offer a detailed description of a person's movements.<sup>265</sup> Critics also argue that unlike beepers, which aid visual surveillance, GPS allows law enforcement to catalogue data revealed through one's location, such as one's preferences, friends, associations, and habits.<sup>266</sup> A GPS device enables law enforcement to collect a magnitude of data that would not be feasible through mere visual surveillance,<sup>267</sup> or through law enforcement's use of a beeper. One scholar has also argued that GPS technology highlights the need for the Fourth Amendment to offer protection even within a public space.<sup>268</sup>

This scholarly criticism questions courts' application of *Knotts*, and argues that it is not properly applied because of the differences between GPS and beepers. As in *Ochoa*,<sup>269</sup> where the court recognized that *Whren* faced criticism from academics, lawyers, and journalists as being legally incorrect, several academics and lawyers criticize application of the *Knotts* analysis as legally incorrect because of the differences between the capabilities of the beeper analyzed in *Knotts* and the capabilities of GPS.

Although the application of *Knotts* has been critiqued, it is not widely criticized as unreasoned and logically inconsistent, as was *Whren*. The court in *Ochoa* recognized that *Whren* was vociferously assaulted by lawyers, scholars, and journalists as being legally incorrect, and unsound.<sup>270</sup> In contrast, the criticism of the application of *Knotts* does not allege that the application consists of unsupported logical premises.<sup>271</sup> Critics do not attack the underlying legal assertion that police may obtain information that is open to public perception without conducting a search that is part of the legal syllogism used by federal courts. Instead, they attack the underlying factual assertion that GPS obtains information that is not open to public perception. Critics argue that through GPS, law enforcement is able to obtain information about a person's associations and habits; however, this argument is flawed because data obtained through a GPS device is information that is open to public perception and could also be obtained through visual surveillance. Whether knowledge of a person's attendance at a political meeting is obtained through visual surveillance or from a recorded address catalogued in a GPS device, the information obtained is the same. Even though it is true that it would be unwieldy and costly to perform continual visual surveillance, cost-effective use of GPS does not change the fact that the information could be obtained through visual surveillance.<sup>272</sup> Because information that can be obtained by visual surveillance is by definition open to public perception, the critics have failed to show that the factual premise is faulty. Therefore, unlike the court in *Ochoa*, which recognized that

---

264. Ganz, *supra* note 43, at 1328.

265. Otterberg, *supra* note 4, at 663.

266. *Id.*

267. *Id.*

268. *Id.* at 694.

269. State v. Ochoa, 2009-NMCA-002, ¶ 13, 206 P.3d 143, 148–49.

270. See *supra* text accompanying notes 185–191.

271. See, e.g., People v. Lacey, 3 Misc.3d 1103(A) (N.Y. Co. Ct. 2004); Otterberg, *supra* note 4, at 694.

272. There is a difference between law enforcement using a GPS device to obtain information that could not have been obtained through visual surveillance, such as information that reveals details about the inside of a protected premises. See *supra* note 86.

*Whren* was flawed because it has been widely criticized as legally unsound, the legal syllogism underlying the application of the *Knotts* analysis has not been recognized as unsound. It is unlikely that application of the *Knotts* analysis can be regarded as widely criticized as legally unsound. Thus, criticism of the *Knotts* analysis should not lead a New Mexico court to conclude that the analysis is flawed.<sup>273</sup>

A court should also consider whether federal courts' application of *Knotts* causes tension with federal precedent in its determination of whether federal analysis is flawed. The warrantless use of GPS might cause tension with the purpose of the Fourth Amendment because GPS devices are intrusive. Federal courts have recognized that the purpose of the Fourth Amendment is to protect an aspect of personal privacy, namely the freedom from unwarranted intrusion by the government.<sup>274</sup> A state court case, *Jackson*, demonstrates the possible tension between federal courts' acceptance of law enforcement's warrantless use of GPS and the purpose of the Fourth Amendment.<sup>275</sup> Although the court in *Jackson* was interpreting the Washington Constitution, which has been interpreted more broadly than the Fourth Amendment, both search and seizure provisions had the purpose of protecting people against unwarranted governmental intrusion, so for this purpose *Jackson* is analogous. In *Jackson*, the court noted that GPS devices were intrusive because the device could obtain a large amount of information about a person, such as information about the person's associations, finances, and activities.<sup>276</sup> As a result, the warrantless use of GPS conflicted with citizens' interest in freedom from unreasonable government intrusion.<sup>277</sup> Therefore, the court held that citizens had a right to be free from the kind of governmental intrusion that occurred when law enforcement used a GPS device without a warrant.<sup>278</sup> As *Jackson* demonstrates, the intrusiveness of a GPS device may cause tension with the purpose of the Fourth Amendment. Thus, by finding that law enforcement's warrantless use of GPS is not a search, federal courts may have created tension with the purpose of the Fourth Amendment. This is similar to *Ochoa*, which found that the Supreme Court's analysis in *Whren* was flawed, partly because it made prior statements of the Court irrelevant. The tension caused by the intrusiveness of GPS might justify a New Mexico court's departure from federal cases.

Alternatively, federal courts' application of *Knotts* does not conflict with previous Supreme Court pronouncements. In *Ochoa*, the New Mexico Court of Appeals recognized that when *Whren* allowed pretextual traffic stops, it dismissed previous Supreme Court statements condemning police pretext.<sup>279</sup> *Ochoa* implies that the

---

273. New Mexico should adopt the *Knotts* analysis for GPS cases, even though *Knotts* is a beeper case, because the underlying premise is analogous. In both situations, the information gathered through the electronic device is information that is open to public perception.

274. See *Harris v. United States*, 331 U.S. 145, 150 (1947) (stating that the Supreme Court has "consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment are to be regarded as the very essence of constitutional liberty") (citations omitted) *overruled in part as recognized in* *Chimel v. California*, 395 U.S. 752 (1969); *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997) (stating the purpose of the Fourth Amendment's requirement of reasonableness is to preserve the degree of respect for a person's privacy).

275. See *supra* text accompanying note 147.

276. See *supra* text accompanying note 142.

277. See *supra* text accompanying note 148.

278. See *supra* text accompanying notes 148–149.

279. See *supra* text accompanying notes 185–191.

contradiction must be considered on a specific textual level, not on a general principles level. It is easier to find a conflict when two general principles are considered, such as the intrusiveness of GPS, and the protection of the Fourth Amendment against governmental intrusion. However, in accordance with *Ochoa*, a court must consider whether federal courts' application of *Knotts* causes a textual conflict with Supreme Court precedent. The federal courts' application of *Knotts* does not cause this type of textual contradiction. Instead, these courts have followed the Supreme Court's interpretation of the Fourth Amendment. *Garcia, McIver*, and *Moran* rely on *Knotts* to support their holdings that law enforcement's warrantless use of GPS to track a person's movements on open roads is not an unreasonable search.<sup>280</sup> Unlike *Ochoa*, where the court found that *Whren* was flawed because it contradicted the Supreme Court's previous pronouncements, federal courts' application of the *Knotts* analysis does not contradict previous statements from the Supreme Court. Instead, federal courts' application of the *Knotts* analysis shows reliance on Supreme Court pronouncements; therefore, the federal cases' analysis is not flawed.<sup>281</sup>

Federal courts' application of the *Knotts* analysis has been critiqued, but it has not suffered widespread criticism. Also, the argument that GPS conflicts with the purpose of the Fourth Amendment is not persuasive because it utilizes a very broad and general pronouncement of federal law in its attempt to show a contradiction; the court in *Ochoa* considered contradictions narrowly, focusing on textual contradictions.<sup>282</sup> The argument that warrantless GPS use does not conflict with previous Supreme Court pronouncements is more persuasive because it considers contradictions in narrow terms, like *Ochoa*.<sup>283</sup> Thus, neither widespread criticism, nor tension with federal precedents, justifies a departure from federal cases.

### C. Distinctive State Characteristics

The *Gomez* analysis of distinctive state characteristics requires a court to consider the development of New Mexico case law.<sup>284</sup> New Mexico case law may justify a departure from federal cases because New Mexico courts have interpreted the state constitution to provide more protection for motorists than the Federal Constitution provides.<sup>285</sup>

Over the years New Mexico courts have developed a body of case law that recognizes an extra layer of protection for motorists as a distinctive state characteristic. The court in *Gomez* has been described as dismissing "the notion that an

280. In contrast, if there were a court of appeals case that held that law enforcement could use GPS to track a person's movements through private residences, it would specifically contradict Supreme Court precedent because the Court has said in *Kyllo* and *Karo* that law enforcement may not use technology in this manner.

281. This article chose to address the most plausible arguments for flawed federal analysis. However, for other possible arguments that federal analysis is flawed, see *supra* text accompanying notes 180–185.

282. See *supra* Part V.B.

283. See *supra* Part V.B.

284. See *infra* Part V.C.

285. See *supra* text accompanying notes 202–219; *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 225 P.3d 225, 231 (stating that when the court in *Gomez* rejected the federal automobile exception to the warrant requirement, the supreme court dismissed the notion that a person lowers his expectation of privacy when he enters his automobile, and in doing so the court elected to provide motorists with an extra layer of protection from unreasonable searches and seizures which is not available under the Federal Constitution).

individual lowers his expectation of privacy when he enters an automobile, and elect[ing] instead to provide motorists with a 'layer of protection' from unreasonable searches and seizures that is unavailable at the federal level."<sup>286</sup> Several courts, including the court in *Cardenas-Alvarez*, have cited *Gomez* for the proposition that an extra layer of protection from unreasonable searches involving vehicles is a distinctive state characteristic of New Mexico case law.<sup>287</sup> Because a developed body of case law constitutes a distinctive state characteristic, these cases would support that conclusion. This characteristic might warrant a departure from federal precedent because unlike federal law, which suggests that a person has a diminished expectation of privacy in his vehicle, these cases seem to suggest that the New Mexico Constitution recognizes that a person's expectation of privacy does not diminish simply because of his presence in a vehicle. Thus, a state court might hold that this distinctive state characteristic requires law enforcement to obtain a warrant before installing or monitoring a GPS device on a suspect's car.

A state court might also be persuaded that another body of case law supports the determination that distinctive state characteristics exist in New Mexico case law. *Sutton* and *Gomez* have demonstrated that New Mexico courts dislike bright-line exceptions to warrant requirements.<sup>288</sup> This rejection of bright-line doctrines might be a distinctive state characteristic. This characteristic would support departure from federal cases because the Court in *Knotts* mentioned the "open fields" doctrine in its decision. The antagonism toward the bright-line exceptions, and the recognition that the New Mexico Constitution provides motorists with an extra layer of protection might be distinctive state characteristics, which justify a court's departure from federal cases.

However, although New Mexico courts have stated that they offer an extra layer of protection for motorists,<sup>289</sup> recent case law in New Mexico is not sufficiently distinct from federal cases because it has retracted the extra protection offered to motorists.<sup>290</sup> Even during the period of time when New Mexico courts provided a broad extra layer of protection to motorists, another line of reasoning existed in *Bolton*, which recognized that a person did not have a reasonable expectation of privacy in any portion of his vehicle that was open to public perception. *Bolton* might likely lead a court to conclude that the attachment of a GPS device is not a search because it recognized that a person does not have a reasonable expectation of privacy in the underside of his vehicle, which is where GPS devices are traditionally attached. *Bolton* might also lead a court to conclude that not only does a person not have a reasonable expectation of privacy in any portion of his vehicle open to public perception, but a person also does not have a reasonable expectation of privacy regarding his vehicle's movements that are open to public perception. A court might come to this conclusion because as in *Bolton*, where the defendants did not conceal missing gas lines, a defendant cannot conceivably con-

---

286. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 25 P.3d at 231.

287. *Id.*; see also *State v. Pittman*, 2006-NMCA-006, ¶¶ 24–25, 127 P.3d 1116, 1122–23; *State v. Ochoa*, 2009-NMCA-002, ¶ 12, 206 P.3d 143, 148 (stating that the court departed from federal precedent because it found the federal analysis unpersuasive and because of New Mexico's distinctively protective standards for searches of automobiles).

288. See, e.g., *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991).

289. See *supra* text accompanying notes 202–219.

290. See *supra* text accompanying notes 235–247.

ceal the movements of his vehicle on public streets. A court might also, as in *Bolton*, find that it is not common to use the undercarriage of a vehicle for storage of private items; likewise, it is not common to consider a person's presence in a vehicle on public roads to be private. A court may conclude, as the court concluded in *Bolton*, that a person lacks a reasonable expectation of privacy in his vehicle and in the movements of his vehicle. This conclusion would be very similar to the findings of the federal cases.<sup>291</sup> Therefore, *Bolton* suggests that New Mexico case law is not sufficiently distinct from federal case law.

Several recent cases indicate that the line of reasoning in *Bolton* has gradually begun to supersede the interpretation that article II, section 10 provides motorists with an extra layer of protection.<sup>292</sup> Possibly due to recent personnel shifts, the New Mexico courts appear to be less willing to offer an extra layer of protection to motorists.

Although New Mexico case law purports to offer an extra layer of protection for motorists, it is unlikely that a court will find that a person has a reasonable expectation of privacy in his vehicle; therefore, the amount of protection offered under the state constitution and Federal Constitution are similar. The New Mexico Court of Appeals in *Weidner* has recently recognized that warrantless searches may be justified, in part because of the inherent mobility of a vehicle.<sup>293</sup> Therefore, warrantless use of GPS may be justified by the inherent mobility of a vehicle. In *Bomboy*, the New Mexico Supreme Court rejected the argument that a person had a reasonable expectation of privacy in something that was fully visible to the public.<sup>294</sup> Similarly, a person might not have a reasonable expectation of privacy in his vehicle's movements that are open to public perception. In *Bomboy*, the New Mexico Supreme Court also stated that automobiles do not garner the same protection as homes for purposes of article II, section 10.<sup>295</sup> The difference between a vehicle and a home is that a vehicle is open to public perception while a home is not. This implies that New Mexico courts would not find that a person has a reasonable expectation of privacy in his vehicle. This conclusion is very similar to the analysis in federal cases.<sup>296</sup> These cases support the conclusion that New Mexico's case law regarding motorists is becoming more similar to federal Fourth Amendment cases dealing with motorists. Therefore, New Mexico case law is not sufficiently distinct to warrant a departure from federal cases because of distinctive state characteristics.

## VI. CONCLUSION

Technology pervades every aspect of our lives.<sup>297</sup> Certain forms of technology, such as GPS devices, are used by the police to help solve crimes. Because many

---

291. See, e.g., *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999).

292. See, e.g., *State v. Weidner*, 2007-NMCA-063, ¶ 15, 158 P.3d 1025, 1030–31.

293. See *id.*

294. See *supra* text accompanying notes 241–244.

295. See *supra* text accompanying notes 245–247.

296. See, e.g., *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

297. Courts have considered whether the use of several forms of technology, such as GPS, violate citizen's constitutional rights. However, a court has never considered the effect of all of these technologies in concert. This is what makes the use of these technologies disturbing. The Fourth Amendment was designed to protect American citizens from governmental intrusion, and the use of all of these technologies could have the

police officers have used GPS devices without first obtaining a warrant, there have been several challenges to the warrantless use of GPS under the Fourth Amendment, and the equivalent state constitutional provisions. Many federal courts, and several state courts, have decided that GPS devices obtain information that is available to public perception, and thus, have not found law enforcement's warrantless use of GPS devices to be a search. This comment indicates that a New Mexico court should follow federal precedent because neither structural differences, flawed federal analysis, nor distinctive state characteristics justify a state court's departure in this instance.<sup>298</sup>

---

effect of an intrusive government. At some point in the future, we should consider whether the concerted use of these technological devices intrudes on people's privacy.

298. *See supra* Part V.