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INTRODUCTION

The fourth amendment was originally adopted to protect against arbitrary invasions of an individual's privacy. The amendment's proscriptions, however, only pertain to governmental activities. Therefore, intrusive activity conducted by a private party does not fall within the ambit of the amendment.

It has been held, however, that a governmental search or seizure which follows a private party intrusion may, in some cases, violate the fourth amendment. The federal circuit courts have adopted varying analytical approaches to this issue. Some circuits have found that governmental invasions which follow private intrusions constitute fourth amendment activity while other circuits have held otherwise.

Recently, the Supreme Court determined that a governmental search which is preceded by a private party's intrusion does not fall within the fourth amendment's proscriptions. In United States v. Jacobsen, the Court held that the governmental activity at issue there did not constitute a search because the activity remained within the scope of the private search and did not infringe upon any legitimate expectation of privacy. The Court also found that an on-the-spot testing of a package's contents by a government agent was not tantamount to a fourth amendment search.

The Jacobsen decision may serve to eliminate any warrant or reasonableness requirement in most governmental searches following private activity. Moreover, the decision may endanger fourth amendment privacy interests through its blanket removal of a par-

1. See infra notes 10-11 and accompanying text.
2. See infra notes 62-76 and accompanying text.
3. See Burdeau v. McDowell, 256 U.S. 465 (1921). After closely examining the history of the fourth amendment, the Supreme Court concluded that the amendment's purpose was the prohibition of governmental activity only. Id. at 467.
4. See infra notes 72-82 and accompanying text.
5. See infra notes 83-102 and accompanying text.
7. Id. at 1663; see infra notes 113-28 and accompanying text.
8. See infra notes 35-38, 173-76 and accompanying text; see also Burkoff, Not so Private Searches and the Constitution, 66 CORNELL L. REV. 627 (1981) (exemption of
ticular testing technique from the fourth amendment’s scope.9

This note will discuss the development of the fourth amendment and the scope of its protection and application. Next, United States v. Jacobsen will be analyzed in light of Supreme Court precedent. Finally, the ramifications of Jacobsen’s holding will be presented. This note suggests that a more traditional fourth amendment analysis is preferable to the Jacobsen approach and would better preserve the fundamental interests which the fourth amendment protects.

BACKGROUND

The fourth amendment, as initially drafted10 and currently interpreted, prohibits unreasonable and arbitrary governmental privacy invasions. The first clause establishes the right to be secure against unreasonable searches and seizures.11 The second clause of the fourth amendment, the warrant clause, requires that the issuance of a warrant be supported by probable cause as to a specific person to be seized or place to be searched.12 The purpose of the warrant requirement stems from the need to have a neutral party define the scope of and authorize the intrusive activity.13

The fourth amendment proscribes physical invasions of protected property interests, whether tangible or intangible, in which an individual possesses a reasonable expectation of privacy.14

9. See infra notes 142-46, 184-87 and accompanying text.
10. American colonists drafted the fourth amendment in response to their abhorrence for the constant privacy invasions which resulted from the routine issuance of writs of assistance. Writs of assistance were general search warrants issued by justices of the peace which conferred additional powers upon constables. The writs were issued primarily so that the officers could effectively combat smuggling. For a detailed discussion of common law search and seizure principles, see Payton v. New York, 445 U.S. 573 (1980); 1 W.R. LaFAVE, SEARCH AND SEIZURE, § 1.1 (1978).
11. The fourth amendment provides:
   The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.
U.S. CONST. amend. IV.
12. Id.
13. See, e.g., Arkansas v. Sanders, 442 U.S. 751, 753 (1979) (Court stated that the magistrate monitors potentially intrusive activity and delineates the scope of approved search within the warrant); see also United States v. Chadwick, 433 U.S. 1, 9 (1977) (Court held that the function of the detached magistrate in issuing search warrants is to safeguard against hasty, aggressive police activity).
14. Historically, the fourth amendment protected property interests by proscribing
Although the Court has explicitly stated that the fourth amendment protects people, not places,\textsuperscript{15} it has consistently afforded full protection to privacy interests in private dwellings,\textsuperscript{16} telephone booths,\textsuperscript{17} sealed containers\textsuperscript{18} and first class mail.\textsuperscript{19} On the other hand, no reasonable expectation of privacy has been recognized in voluntary conversations,\textsuperscript{20} the placement of telephone calls,\textsuperscript{21} physical invasions of tangible private areas. Originally, the protected areas included only those physical areas specifically enumerated in the text of the fourth amendment. See, e.g., Silverman v. United States, 365 U.S. 505, 510-11 (1961). This narrow definition of protected privacy interests generally prompted a denial of fourth amendment protection to non-property areas. See, e.g., Goldman v. United States, 316 U.S. 129 (1942) (fourth amendment claim based upon the use of a dictaphone was denied since no trespass was alleged); Olmstead v. United States, 277 U.S. 438 (1928) (no fourth amendment protection against police tapping defendant's home absent physical invasion); Hester v. United States, 265 U.S. 57, 59 (1924) (distinctions made between open fields and "persons, houses, papers and effects").

In the landmark decision of Katz v. United States, 389 U.S. 347 (1967), the Supreme Court declared that an individual's privacy rights extend beyond the concept of property interests to encompass all areas, whether tangible or intangible, in which an individual has a reasonable expectation of privacy. Katz involved a fourth amendment violation based upon an FBI surveillance of a public phone booth. The Supreme Court declared that the "Fourth Amendment protects people, not places," and that people have a legitimate expectation of privacy with respect to telephone conversations conducted in private phone booths. Id. at 351. Although the new privacy analysis of Katz appeared to broaden the fourth amendment's scope, its ultimate result may be to substantially reduce its reach. See Amsterdam, Perspectives on the Fourth Amendment, 58 MINN L. REV. 349, 460 (1974) (if Katz expectation analysis is applied in an unrestrained manner there may be less protection for defendant); see also Cardwell v. Lewis, 417 U.S. 533 (1974) (no fourth amendment violation resulted from police activity of scraping paint from the defendant's car). For a discussion of Katz and the reasonable expectation of privacy standard see, e.g., Note, A Reconsideration of the Katz Expectation of Privacy, 76 MICH. L. REV. 154 (1977).

\textsuperscript{15} Katz, 389 U.S. at 351; see supra note 14.

\textsuperscript{16} See, e.g., Steagald v. United States, 451 U.S. 204 (1981) (sanctity of a private dwelling may not be disturbed by execution of an arrest warrant issued in pursuit of person other than the home owner); Payton v. New York, 445 U.S. 573 (1980) (warrantless invasion into a clearly defined privacy zone such as a home constitutes a fourth amendment violation).

\textsuperscript{17} See, e.g., Katz v. United States, 389 U.S. 347 (1967) (a person placing a call from a telephone booth possesses a reasonable expectation of privacy in the conversation conducted within the booth).

\textsuperscript{18} See, e.g., Arkansas v. Sanders, 442 U.S. 753 (1979) (the search of private property must generally be both reasonable and pursuant to a warrant); United States v. Chadwick, 433 U.S. 1 (1977) (letters and sealed packages are protected by the fourth amendment).

\textsuperscript{19} See, e.g., United States v. Van Leeuwen, 397 U.S. 249 (1970) (postal authorities permitted to detain a package for 29 hours for purposes of obtaining a warrant).

\textsuperscript{20} See, e.g., United States v. White, 401 U.S. 745 (1971) (electronic surveillance of voluntary conversations between defendant and an informant does not result in fourth amendment violation); Hoffa v. United States, 385 U.S. 293 (1966) (defendant's trust in an accomplice does not create a legitimate expectation of privacy which would be infringed by the accomplice's delivery of incriminating information to the government).
banking records and open fields. The Court has developed a two-step test for determining whether an individual possesses a reasonable expectation of privacy in a seized item. First, an individual must have an actual, subjective expectation of privacy. Second, this subjective expectation must be one which society recognizes as "reasonable." Existing customs, social policies and

21. See, e.g., Smith v. Maryland, 442 U.S. 735 (1979). There the Court concluded that governmental use of a pen register device did not violate the fourth amendment. Id. at 745-46. The Court held that the governmental conduct was not a search because no reasonable expectation of privacy exists on numbers dialed from a particular telephone. Id.

22. See, e.g., United States v. Miller, 425 U.S. 435 (1976), where the Court found that no legitimate expectation of privacy exists in the contents of banking documentation. The Court based its holding upon two primary considerations. First, the information, which was voluntarily conveyed to the bank in the ordinary course of business, was accessible to all bank employees. Thus, making the information available to a third party created a risk of disclosure to the government or other parties. Id. at 443. Second, the nature of the documents, as instruments of commercial transactions, manifests the absence of any secrecy expectation with relation to their contents. Id. at 442. See infra notes 28-30 and accompanying text for discussion of the Miller case.

But see Illinois v. Jackson, 116 Ill. App. 3d 430, 452 N.E.2d 85 (1983). The Illinois approach conflicts with that of Miller. In Jackson the court held that by issuing a grand jury subpoena to an Illinois bank, the state violated defendant's constitutional right to privacy under the Illinois Constitution. The Illinois Supreme Court refused to deem the transfer of banking information to the bank a waiver of a privacy expectation in the contents of the records. Id. at 435, 452 N.E.2d at 89.

23. See, e.g., Oliver v. United States, 104 S. Ct. 1735 (1984). The Court ruled that society recognizes no expectation of privacy in open fields, whether or not "no trespassing" signs are posted. Id. at 1742-43. The public may view open land notwithstanding the owner's placement of signs upon the property. Id. at 1741. Thus, the fourth amendment does not protect an individual against a governmental search of open fields. Only areas immediately adjacent to a home, known as the "curtilage," deserve fourth amendment protection. Id. at 1742.

24. Katz, 389 U.S. at 361 (Harlan, J., concurring). The subjective expectation appears to be minimally important to the overall privacy analysis as a result of the recognition of its obvious practical vulnerabilities. For example, a public announcement by the government denying a privacy interest in a particular place or object effectively destroys the subjective privacy expectation. Amsterdam, supra note 14, at 384. See also United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), where Justice Harlan, the originator of the two-step analysis, conceded that the objective privacy considerations supersede any assessment of subjective expectations.

The subjective tests have nevertheless been consistently incorporated into the analysis. United States v. Walter, 447 U.S. 649 (1980) (consignor of a secure package possessed as great a privacy expectation as the owner of a locked suitcase); United States v. Chadwick, 433 U.S. 1 (1977) (respondents manifested an expectation that contents would remain free from public examination by putting personal belongings inside a double-locked footlocker). But see United States v. White, 401 U.S. 745 (1971) (whether or not a particular defendant relied on the discretion of a companion does not enter into the consideration of a privacy expectation).

25. Katz, 389 U.S. at 361; see also Payton v. New York, 445 U.S. 573 (1980) (the fourth amendment protects homes because a "reasonable" expectation of privacy is asso-
norms determine which privacy expectations are reasonable.\textsuperscript{26}

The Court will deny fourth amendment protection when it concludes that no reasonable subjective expectation of privacy is involved.\textsuperscript{27} For example, in United States v. Miller,\textsuperscript{28} the Supreme Court declared that a bank depositor has no protectible fourth amendment interest in bank records. The Court reasoned that a person cannot subjectively expect that what he knowingly tells a third party will, in every case, remain secret.\textsuperscript{29} It also emphasized that no objective privacy expectation exists to protect against the risk that information relayed to another may be eventually given to the government.\textsuperscript{30}

Once it has been found that the fourth amendment protects a particular area in a specific case, the government’s conduct should be examined to determine whether that activity infringed upon the privacy interest.\textsuperscript{31} Where no reasonable expectation of privacy is infringed upon, the governmental conduct is not a fourth amendment search or seizure.\textsuperscript{32} Recently, in United States v. Place,\textsuperscript{33} the Court considered whether subjecting luggage to a canine sniff test for contraband was a “search.” The Court found that no search had transpired in light of the minimally intrusive nature of the test and the narrow scope of the information revealed by the test.\textsuperscript{34} If it is established that a fourth amendment search or seizure has occurred, the activity must be examined to determine whether the

\begin{thebibliography}{10}
\bibitem{26} United States v. White, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting) (privacy expectations reflect the customs and values of the existing society); see also A. Westin, \textit{Privacy and Freedom} 131 (1967) (each society’s political system contributes to the balancing of privacy interests, surveillance needs and the level of disclosure required).

\bibitem{27} See, e.g., Cardwell v. Lewis, 417 U.S. 533 (1974). In holding that a fourth amendment violation did not occur because a police officer scraped paint from the defendant’s car, the Court stated that the activity did not infringe upon any expectation of privacy. \textit{Id.} at 591-92.

\bibitem{28} 425 U.S. 435 (1976).

\bibitem{29} \textit{Id.} at 442.

\bibitem{30} \textit{Id.} The depositor takes the risk that the financial information he reveals to the bank may be relayed to the government. The risk remains notwithstanding the depositor’s reliance on the discretion of the third party to maintain the established confidence. \textit{Id.}

\bibitem{31} See, e.g., 1 W. R. LaFave, \textit{supra} note 10, at § 2.1 (law enforcement practices do not fall within the scope of the fourth amendment unless they are either a search or seizure within the meaning of the amendment); Amsterdam, \textit{supra} note 14, at 388 (governmental activity which is not a fourth amendment search or seizure need not be reasonable).

\bibitem{32} See \textit{supra} note 27.

\bibitem{33} 103 S. Ct. 2637 (1983).

\bibitem{34} \textit{Id.} at 2644.
\end{thebibliography}
fourth amendment's normal proscriptions against unreasonable and warrantless searches and seizures apply\textsuperscript{35} or whether a judicially recognized exception to these proscriptions exists.

Traditionally, the Court has held that searches and seizures conducted without the issuance of a warrant are unreasonable unless the activity falls within one of the well-delineated exceptions to the warrant requirement.\textsuperscript{36} The Court in the past has recognized, however, that certain searches and seizures, conducted without probable cause, which do not fall within one of the exceptions, may not violate the fourth amendment if the conduct is "reasonable." Under this view, the reasonableness of a search or seizure depends upon the nature of the governmental interest at stake and the intrusiveness of the activity.\textsuperscript{37} A balancing of those competing interests permits the Court to uphold reasonable searches and seizures conducted without probable cause.\textsuperscript{38}

\textit{Exceptions to the Warrant Requirement}

The Court has created several exceptions to the warrant requirement. Some well-established exceptions include search incident to a lawful arrest,\textsuperscript{39} search authorized by consent,\textsuperscript{40} hot pursuit,\textsuperscript{41} the

\footnotesize{\textsuperscript{35} See, e.g., Arkansas v. Sanders, 442 U.S. 753, 758 (1979) (under normal circumstances, a fourth amendment search must be reasonable and pursuant to a warrant); 1 W.R. LAFAVE, supra note 10, at § 2.1 (traditionally the fourth amendment requires that a search must only be conducted pursuant to a warrant).}

\footnotesize{\textsuperscript{36} See, e.g., Katz v. United States, 389 U.S. 347 (1967). "[S]earches conducted outside the judicial process without prior approval by judge or magistrate are \textit{per se} unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions." \textit{Id.} at 357; see also New York v. Belton, 453 U.S. 454 (1981) (in certain exigent situations the warrant requirement is not enforced); Mincey v. Arizona, 437 U.S. 385 (1978) (unless an exception to the warrant requirement applies, the search or seizure is \textit{per se} unreasonable); United States v. Jeffers, 342 U.S. 48 (1951) (magistrate's prior approval of search or seizure may only be circumvented in exceptional situation); Agnello v. United States, 269 U.S. 20 (1925) (warrantless search of a home is unlawful absent a search incident to arrest situation or the existence of any other exception).}

\footnotesize{\textsuperscript{37} See Camara v. Municipal Court, 387 U.S. 523 (1967). In \textit{Camara}, the inspection by a municipal health inspector was scrutinized to determine whether the purpose of the inspection justified the scope of the intrusion. The Court balanced the need for administrative searches against the degree of the intrusion and concluded that the significant public interests at stake outweighed the intrusiveness of the searches. \textit{Id.} at 537. Thus, area inspections were deemed to be "reasonable" under the fourth amendment. \textit{Id.} at 538.}

\footnotesize{\textsuperscript{38} See 1 W.R. LAFAVE, supra note 10, at § 2.1.}

\footnotesize{\textsuperscript{39} See, e.g., New York v. Belton, 453 U.S. 454 (1981) (upholding the search of the entire automobile, including all compartments and clothing items); Chimel v. California, 395 U.S. 752 (1969) (police officer may search the area within immediate control of the arrestee for weapons or evidence of a crime).}

\footnotesize{\textsuperscript{40} See, e.g., United States v. Karo, 104 S. Ct. 3296 (1984) (no fourth amendment
automobile exception,\textsuperscript{42} plain view observation,\textsuperscript{43} and customs searches.\textsuperscript{44} These exceptions were formulated partially in response to the determination by the Court that not all warrantless searches are unreasonable.\textsuperscript{45}

One exception to the warrant requirement, the "plain view" doctrine, requires that the initial governmental intrusion be justified and that the subsequent search or seizure be based upon probable cause to associate an item which is in "plain view" with criminal interest infringed by the installation of a beeper in cans of ether delivered to the defendant where the seller consented to the installation); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (a finding of consent requires determination that the individual voluntarily acquiesced to the search upon examination of all the circumstances).

41. See, e.g., Warden v. Hayden, 387 U.S. 294 (1967) (police may enter a home and conduct a warrantless search if in hot pursuit of an armed suspect).

42. See, e.g., United States v. Ross, 456 U.S. 798 (1982) (warrantless search of defendant's car upheld notwithstanding the fact that the defendant was under arrest and in custody); Chambers v. Maroney, 399 U.S. 42 (1970) (Court first recognized that a warrantless search of an automobile may be reasonable in certain circumstances); see also Arkansas v. Sanders, 442 U.S. 751 (1979). There, the Court noted that the primary distinctions between the automobile and other private property are the inherent mobility of an automobile, which makes it impracticable to always obtain a warrant, and the diminished privacy expectation in automobiles. Id. at 761. The Court further recognized the fact that the automobile exception, along with the other well-established exceptions to the warrant requirement, provides for situations in which the societal costs of requiring a warrant, such as loss of evidence or danger to the officer, outweigh the reasons for prior judicial approval. Id. at 759-60. In subsequent Supreme Court decisions, however, the mobility focus was abandoned and the warrantless search of automobiles was justified by the diminished privacy expectation in cars. See, e.g., United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (owner of an automobile enjoys a limited privacy expectation because the car is used for transportation and the occupants and contents are visible); Robbins v. California, 453 U.S. 420, 425 (1981) (expectation of privacy in automobiles is diminished). The shift served to permit the liberal application of the exception, even in situations in which no possibility existed that the car would be driven into another jurisdiction or the evidence would be destroyed. See, e.g., United States v. Ross, 456 U.S. 798 (1982) (warrantless search of defendant's car at police headquarters upheld).

43. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971). According to the Coolidge Court, the plain view exception to the warrant requirement requires that the initial intrusion be justified. Id. at 468. In addition, the police must inadvertently discover the incriminating evidence and the object must immediately indicate to the police that it is contraband. Id. at 469. But see Texas v. Brown, 460 U.S. 730 (1983). In Brown, the Court approved of the application of the plain view exception when a police officer, while conducting a routine license check, shined a flashlight into a car interior. The officer observed and then seized a balloon containing contraband. The Court ruled that the establishment of probable cause to believe an item may be contraband may fulfill the "immediately apparent" requirement. Id. at 741. The Brown majority further noted that plain view is simply an extension of the justification for the initial intrusion rather than an independent exception to the warrant requirement. Id. at 738-39.

44. See, e.g., United States v. Ramsey, 431 U.S. 606, 621-22 (1977) (border search exception is based upon the long standing right of a sovereign to protect itself by examining articles entering the country).

45. See, e.g., Terry v. Ohio, 392 U.S. 1, 19-20 (1968); see supra notes 36-38 and accompanying text.
activity.\textsuperscript{46} Once justification for the initial intrusion and probable cause for the seizure are established, the plain view doctrine operates to destroy any previously existing privacy interest in the item.\textsuperscript{47}

The lawful discovery of contraband by customs agents similarly operates to destroy the expectation of privacy in the package, according to the Court in \textit{Illinois v. Andreas}.\textsuperscript{48} In \textit{Andreas}, a package containing marijuana was initially searched and resealed by airport customs agents, and then delivered to defendants under controlled conditions.\textsuperscript{49} The Court found no fourth amendment violation in light of the custom agents' initial justified observation of the marijuana and the controlled delivery of the package to defendant's place of residence.\textsuperscript{50}

The Court noted that both the plain view and customs search exceptions to the warrant requirement involve the destruction of an individual's expectation of privacy when the government legitimately finds to a certainty that a package contains contraband.\textsuperscript{51} The \textit{Andreas} Court found that the initial customs search justified the subsequent warrantless search and seizure of the package in the hallway of the defendant's home.\textsuperscript{52} According to the majority, the privacy expectation was not revived in light of the constant surveillance of the package by police.\textsuperscript{53} The \textit{Andreas} Court reasoned that the extinguished expectation of privacy remained so because of the high probability that no change of the package's contents oc-

\textsuperscript{46} Illinois v. Andreas, 103 S. Ct. 3319, 3324 (1983); see supra note 43.

\textsuperscript{47} Id. at 3324.

\textsuperscript{48} Id. at 3319.

\textsuperscript{49} Id. at 3321-22.

\textsuperscript{50} The "controlled delivery" consisted of the DEA agents' personal delivery of the package to defendant's residence, using a delivery van. The agents then entered the apartment building and, pursuant to defendant's instructions, placed the package directly outside defendant's door. \textit{Id.} at 3322. While one agent secured a search warrant, another maintained watch within the apartment building. The agent failed to keep a constant watch of defendant's apartment entrance. Before a warrant was obtained, the agent within the apartment building arrested the defendant after he attempted to leave the building with the shipping crate. \textit{Id.}

\textsuperscript{51} Id. at 3324.

\textsuperscript{52} Id. at 3323.

\textsuperscript{53} While admitting that the surveillance of the container was interrupted, the Court relied on the statistical probabilities regarding the chances that the container's content was altered before the second "search." \textit{Id.} at 3324. The Court further recognized that, although a previously destroyed expectation of privacy may be revived by an extended break in surveillance, such was not the case here because it was highly unlikely that the contents of the container had changed in light of the container's size, the brevity of the break in surveillance, and the unique characteristics of the container. \textit{Id.} at 3325.
curred. Therefore, no fourth amendment violation resulted.

**Exclusionary Rule**

To enforce the fourth amendment and to ensure the inviolability of legitimate privacy expectations, the Court fashioned the exclusionary rule. The rule requires the exclusion of illegally obtained evidence from judicial proceedings. Originally, the exclusionary rule primarily served to maintain judicial integrity by prohibiting convictions based upon conduct which violated constitutional mandates. Gradually, however, the courts used the rule to deter illegal police activity.

In recent years, the Court has shown some antipathy toward the social and judicial costs associated with excluding probative evidence. The Court has begun to restrict the application of the exclusionary rule by narrowly defining fourth amendment standing.

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54. The Court also stated that the "claim to privacy" in a container is lost when it is known to a certainty that the container holds contraband. Id. at 3323.
55. Id. at 3325.
56. The exclusionary rule was first adopted by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914). The exclusion of illegally seized evidence from judicial proceedings was precipitated by the need for a judicial device which would encourage compliance with the warrant and probable cause requirements. Id. at 392. The importance of protecting fourth amendment interests prompted the Court to apply the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961).
57. For a general discussion of the exclusionary rule, see, e.g., W. Ringel, Searches and Seizures, Arrests and Confessions § 1.3; see also Amsterdam, supra note 14, at 416 (suggesting an alternative method of protecting fourth amendment interests).
58. See, e.g., Elkins v. United States, 364 U.S. 206 (1960) (to preserve judicial integrity, government officials may not secure convictions of private persons by engaging in illegal activities themselves); Weeks v. United States, 232 U.S. 383 (1914) (to uphold a conviction based on illegally obtained evidence would contradict constitutional guarantees).
59. In Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), the Supreme Court for the first time created an exception to the application of the exclusionary rule in a situation where a defective warrant was the basis for a search. The Court concluded that suppressing evidence because of judicial error would not serve to deter unlawful police searches and seizures. Id. at 3428-29; see also Nix v. Williams, 104 S. Ct. 2501 (1984) (suppression of evidence would only undermine the adversary system); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926); Segura v. United States, 104 S. Ct. 3380 (1984). In Segura, the petitioner argued for the suppression of the evidence since his apartment was initially searched illegally. The illegal search revealed drug paraphernalia. The Court upheld a subsequent search which was conducted pursuant to a valid warrant since the warrant was secured on grounds entirely independent of the prior illegal search. Id. at 3391-92. The Court also emphasized the need for promoting effective police investigation. Id. at 3392.
60. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978). In Rakas, the defendants were denied standing to bring a fourth amendment claim based on the warrantless search of the automobile in which they were passengers. The Court reasoned that the defendants,
and by permitting governmental use of illegally obtained evidence in several situations. In addition, courts have broadly applied the private search doctrine.

_Private Searches_

The Supreme Court has consistently construed the fourth amendment as prohibitive of arbitrary invasions of privacy by governmental agents, not by private parties. This established exemption of private searches stems from the historical development of the amendment as well as practical considerations regarding the amendment's application. The framers drafted the fourth amendment in response to their abhorrence of the routine issuance of

possessing neither a "property nor possessory interest in the automobile," had no expectation of privacy in the automobile and, therefore, could not contest the warrantless search. _Id._ at 148. Similarly, in Rawlings v. Kentucky, 448 U.S. 98 (1980), petitioner was denied standing to contest the warrantless seizure of drugs found in the purse of an acquaintance. The Court did not consider the petitioner's ownership interest in the substance to be of any significance in determining the issue of standing. Instead, the Court focused upon the petitioner's privacy expectation in the purse in which the substance was found, concluding that since the petitioner did not have a legitimate expectation of privacy in the purse, he could not challenge the legality of the search. _Id._ at 104; see also United States v. Salvucci, 448 U.S. 83 (1980) (automatic standing not granted to defendant charged with a possessory offense).

61. See, e.g., United States v. Havens, 446 U.S. 620 (1980). The Court in _Havens_ found that the policies of the exclusionary rule would be furthered by forbidding the governmental use of illegally obtained evidence during its case-in-chief. _Id._ at 626. It also found, however, that disallowing the use of excluded evidence for impeachment purposes would perhaps only incrementally further the rule's end. Thus, evidence suppressed as the fruit of an unlawful search and seizure may be used during cross-examination to impeach defendant's false testimony. _Id._ at 627-28. Further, in United States v. Crews, 445 U.S. 463 (1980), it was held that although the exclusionary rule prohibits the use of evidence derived from the illegal activity, it does not operate to suppress evidence possessed by police prior to the inception of the illegality. In _Crews_, police had already linked the defendant with the crime. Thus, the in-court identification of a defendant need not be suppressed as the fruit of an illegal arrest. _Id._ at 477. Finally, in United States v. Calandra, 414 U.S. 338 (1974), it was held that the exclusionary rule would seriously impede the grand jury in its discovery process and that the deterrent effect on police misconduct which would result from excluding evidence from grand jury proceedings was negligible. _Id._ at 351. The police, aware that evidence will be suppressed during criminal proceedings, would not engage in illegal investigative activity solely for indictment purposes. _Id._ Thus, the exclusionary rule was held to be inapplicable during grand jury proceedings. _Id._ at 354.

62. See, e.g., Walter v. United States, 447 U.S. 649 (1980) (wrongful private search does not violate the fourth amendment); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (wife's voluntary delivery to police of evidence against her husband upheld and evidence admitted); United States v. Barry, 673 F.2d 912 (6th Cir. 1982) (agent of freight carrier may conduct a search free of fourth amendment implications); United States v. Edwards, 602 F.2d 458 (1st Cir. 1979) (airline employee's search of package did not violate of the fourth amendment notwithstanding federal law obligating air carriers to inspect packages).
writs of assistance which enabled governmental officials to indiscriminately search private dwellings for evidence of smuggling.\textsuperscript{63} Additionally, applying the amendment to private action and employing the exclusionary rule to suppress the fruits of the search or seizure would not further the currently recognized purpose of the fourth amendment: the regulation of police activity.\textsuperscript{64}

The private search doctrine, a firmly established principle of fourth amendment law, eliminates any fourth amendment analysis.\textsuperscript{65} The fourth amendment provides no protection against unreasonable, warrantless searches and seizures conducted by private parties.\textsuperscript{66} Incriminating evidence discovered by private parties is freely admissible in judicial proceedings.\textsuperscript{67} The courts have employed a private search analysis to admit evidence obtained through searches conducted by a freight company,\textsuperscript{68} an airline employee,\textsuperscript{69} a motel proprietor,\textsuperscript{70} and a college security officer.\textsuperscript{71}

\textsuperscript{63} See supra note 10 and accompanying text.
\textsuperscript{64} See, e.g., Comment, The Fourth Amendment Following Private Searches: Is There a Privacy Interest to Protect?, 52 U. Cin. L. Rev. 172, 176 (1983) (when the motive for a private search is not to obtain a criminal conviction, deterrence of neither the private party nor government agents will result from the exclusion of the evidence); see also 1 W.R. LAFAVE, supra note 10, at § 1.6. The exclusionary rule would not be functional in private search situations because a private entity seldom is induced to conduct searches in order to gather evidence against another individual. \textit{Id.} Also, the rule itself is premised upon the inequities associated with allowing police to profit from unconstitutional activity. \textit{Id.} But see Burkoff, supra note 8, at 636 (exclusion of evidence obtained during illegal private searches would deter law enforcement officers from remotely encouraging such private activity).

\textsuperscript{65} See, e.g., Burkoff, supra note 8, at 627-28.
\textsuperscript{67} See supra note 62 and accompanying text.

\textsuperscript{68} See, e.g., United States v. Pryba, 502 F.2d 391, 399 (D.C. Cir. 1974) (obscene films admissible against the defendant although federal agents viewed films without a warrant after a private carrier's agent opened the shipment); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1982) (no fourth amendment activity found regarding officer's warrantless opening of a package after being informed by freight agent that the package may contain contraband).

\textsuperscript{69} See, e.g., United States v. Blanton, 479 F.2d 327 (5th Cir. 1973) (airline employee's search of an unclaimed bag does not implicate fourth amendment protection); United States v. Echols, 477 F.2d 37 (8th Cir. 1973) (search of unclaimed baggage constituted a private search and was not a fourth amendment violation).

\textsuperscript{70} See, e.g., People v. Warner, 65 Mich. App. 267, 237 N.W.2d 284 (1975) (hotel clerk's monitoring of guest's telephone conversation held not to be a fourth amendment violation).

\textsuperscript{71} See, e.g., People v. Boettner, 80 Misc. 2d 3, 362 N.Y.S.2d 365 (Sup. Ct. 1974). There, the court held that evidence of contraband discovered during search of college rooms was admissible against the defendant even though the search by college employees was prompted by police. The state police had initially informed college officials that the defendant might possess marijuana.
However, the scope of the private search doctrine is not boundless.

A fourth amendment analysis may be triggered by the government's involvement in the private search through the use of inducement tactics, whether such involvement be direct or indirect.\textsuperscript{72} In addition, fourth amendment scrutiny may be warranted if the private party's conduct is accompanied by either simultaneous assistance by the government\textsuperscript{73} or, as in \textit{United States v. Jacobsen},\textsuperscript{74} a subsequent additional search.\textsuperscript{75}

The Supreme Court developed the analysis for cases involving governmental searches which follow private searches in \textit{Walter v. United States}.\textsuperscript{76} In \textit{Walter}, a private party opened a misdelivered box and discovered film contained in packages covered with suggestive drawings and obscene descriptions of each film.\textsuperscript{77} The private carrier delivered the carton to FBI agents, who subsequently viewed the film without obtaining a search warrant.\textsuperscript{78} The Court

\begin{itemize}
\item \textsuperscript{72} The private search doctrine does not apply to searches instigated by government agents. See, e.g., \textit{United States v. Newton}, 510 F.2d 1149 (7th Cir. 1975) (fourth amendment search was conducted where airline employees and government agents jointly opened luggage); \textit{United States v. Davis}, 482 F.2d 893 (9th Cir. 1973) (airport search was required by government as an anti-hijacking procedure); \textit{People v. Tarantino}, 45 Cal. 2d 590, 290 P.2d 505 (1955) (installation of a microphone in defendant's room by a private engineer hired by the district attorney violated the fourth amendment).
\item \textsuperscript{73} See, e.g., \textit{Lustig v. United States}, 338 U.S. 74 (1949). The \textit{Lustig} Court stated that whether the fourth amendment applies depends upon the share of the federal officer in the "total enterprise." \textit{Id.} at 79; see also \textit{United States v. Clegg}, 509 F.2d 605 (5th Cir. 1975) (telephone company supervisor was not acting as agent of government by monitoring phone calls where government had no prior knowledge of supervisor's activities); \textit{Corngold v. United States}, 367 F.2d 1 (9th Cir. 1966) (detective and private party joined in a search of defendant's apartment, thus violating the fourth amendment); \textit{Stapleton v. Superior Court}, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968) (search of car by credit card agents constituted fourth amendment activity since police were instrumental in planning search and were present while search took place). \textit{But see United States v. Burton}, 475 F.2d 469 (8th Cir. 1973) (search of luggage by airlines deemed to be a private search notwithstanding the FAA's directives); \textit{United States v. Valen}, 479 F.2d 467 (3d Cir. 1973) (airline freight company employee's search of two suitcases was outside the scope of the fourth amendment, even though the employee, on a prior occasion, had been compensated by the government for giving information to customs agents); \textit{Gold v. United States}, 378 F.2d 588 (9th Cir. 1967) (search of cartons, after FBI expressed suspicions with respect to their contents, held not to be fourth amendment activity since there was no explicit "request" that the manager search the carton).
\item \textsuperscript{74} 104 S. Ct. 1652 (1984).
\item \textsuperscript{75} See, e.g., \textit{United States v. Haes}, 551 F.2d 767 (8th Cir. 1977) (FBI viewing of films discovered during a private search constituted a fourth amendment search); \textit{United States v. Kelly}, 529 F.2d 1365 (8th Cir. 1976) (although the initial search was conducted without governmental involvement, the subsequent search by the government violated the fourth amendment).
\item \textsuperscript{76} 447 U.S. 649 (1980).
\item \textsuperscript{77} \textit{Id.} at 653.
\item \textsuperscript{78} \textit{Id.} at 652.
\end{itemize}
held that the search violated the fourth amendment because no warrant had been obtained. In defining the scope of the private search and its relation to the government’s activity, the Court determined that the viewing of the film by the government was a separate search because it exceeded the scope of the private search. Subsequent decisions in this area have implemented the Walter test by scrutinizing the governmental activity in light of the private search’s scope. However, no clearly defined interpretation of Walter has resulted.

For example, in United States v. Barry the United States Court of Appeals for the Sixth Circuit validated a warrantless governmental search and seizure of the defendant’s package and the subsequent testing of its contents. The government justified its search of the package on the grounds that the initial intrusion was a private search, and therefore exempt from the fourth amendment requirements. The court determined, however, that the Drug Enforcement Agency (“DEA”) agent unlawfully seized the package’s contents because the seizure occurred without a warrant and

79. Id. at 654.
80. Id. at 657. The Court derived this analysis from the general premise that the search’s scope must be limited to the realm of its authorization. Id. at 656-57. In employing this doctrine in the private search area, the Court noted: “If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party’s invasion of another person’s privacy.” Id. at 657.
81. Id. The Court stated that although the FBI agents may have lawfully possessed the suspicious packages of film, the authority to detain was not synonymous with the authority to search. Id. at 654. Because the private search merely frustrated the existing privacy interest in part, the governmental search infringed upon the remaining fourth amendment interest. Id. at 659.
82. See, e.g., People v. Adler, 50 N.Y.2d 730, 409 N.E.2d 888 (1980) (warrantless police search of a parcel initially searched by an airline employee upheld because the police did not go beyond the private search); State v. Glade, 61 Or. App. 723, 659 P.2d 406 (1983) (officer’s examination of a package initially opened by a private air freight agent upheld because it did not significantly expand the private search); State v. Morgan, 32 Wash. App. 764, 650 P.2d 228 (1982) (removal and testing of powder from a package previously opened by a private carrier agent exceeded the scope of the private search and thus violated the fourth amendment).
83. 673 F.2d 912 (6th Cir. 1982).
84. Id. at 915. The defendant argued that Federal Express’ search of the package was a governmental rather than a private search. In support of his assertion, the defendant argued that the carrier opened the parcel solely to search for drugs. Id. The defendant offered a memorandum prepared by an agent of the company which urged all employees to cooperate with the DEA in policing drug traffic. The memo included a warning to employees that they may not open suspicious packages unless their actions could be justified pursuant to company policy. Id. The court rejected the defendant’s argument by finding that the memorandum alone did not “cloak the company’s actions with a federal purpose,” and, in any case, the carrier’s agent discovered the contraband during the work-related event of repackaging a damaged shipment. Id.
no established exception to the warrant requirement applied.\textsuperscript{85}

The seizure was nonetheless upheld because the defendant had no reasonable expectation of privacy in the contraband at the time of the seizure.\textsuperscript{86} This finding was premised upon an assumption of risk rationale under which the defendant, by consigning his package to the private carrier, accepted any risk that the carrier might open the package.\textsuperscript{87} The defendant’s failure to adequately conceal the package’s contents was an additional basis for denying the defendant’s privacy expectation in the package.\textsuperscript{88}

The Sixth Circuit also concluded that the testing of the pills found inside the package did not constitute a search and therefore did not violate the fourth amendment.\textsuperscript{89} In so doing, the court rejected the defendant’s contentions that the facts in the case were analogous to those in \textit{Walter} and that the testing constituted a warrantless search in violation of the fourth amendment.\textsuperscript{90} The \textit{Barry} Court distinguished \textit{Walter} by noting that first amendment principles were at stake in \textit{Walter}.\textsuperscript{91} Another distinguishing factor stemmed from the difference in the scale of the respective investigative techniques. In \textit{Barry}, the DEA agent chemically tested a sample from the package, whereas in \textit{Walter} the governmental official viewed the films found in the shipment.\textsuperscript{92}

\textsuperscript{85} Id. at 916. The court interpreted Supreme Court precedent in the area of search and seizure law as calling for a two-fold analysis of the seizure. The evidence may only be suppressed if the governmental conduct was unlawful and the defendant’s fourth amendment rights were violated. Since the Sixth Circuit concluded that the second prong was not met because no privacy infringement occurred, it held that the evidence was admissible. The court rejected the government’s attempt to apply the plain view exception because the discovery of drugs by the federal agent was not inadvertent and no exigencies prevented the government from obtaining a warrant. \textit{Id.} at 918.

\textsuperscript{86} Id. at 919.

\textsuperscript{87} Id. The court stated that by delivering the package to the carrier for shipment, the defendant “relinquished all control” over its contents. According to the court, Barry should have been aware of the risk that his package may be opened; by consigning his package, he assumed that risk. \textit{Id.}

\textsuperscript{88} Id. The \textit{Barry} court found that the defendant failed to take adequate precautions to disguise the nature of the shipment. The defendant’s failure to conceal the Methaqualone was illustrated by the packaging of the substance: the contraband was enclosed in clear bottles labelled “Methaqualone.” \textit{Id.}

\textsuperscript{89} Id. at 919-20. The court categorized such chemical testing as a “perfunctory test” which was at most routine. The court did not expound on its method of determining whether or not an investigative technique is so significant as to constitute a search. \textit{Id.} at 920.

\textsuperscript{90} Id. Although the court distinguished \textit{Walter} on the first amendment protection of the films seized, it did not explain its distinction between first and fourth amendment analysis.

\textsuperscript{91} Id.
considered the former governmental activity to be less intrusive.\textsuperscript{93}

In contrast, under a similar factual situation, the United States Court of Appeals for the Eighth Circuit held that the government's search of a package and field test of its contents violated the fourth amendment. In \textit{United States v. Jacobsen},\textsuperscript{94} the private search revealed bags of powder and the government agent's search subsequently exposed the substance itself.\textsuperscript{95} Relying on \textit{Walter}, the Eighth Circuit concluded that the governmental activity exceeded the scope of the private search.\textsuperscript{96} According to the \textit{Jacobsen} court, the private searches in both \textit{Walter} and \textit{Jacobsen} merely frustrated the defendant's expectation of privacy and the subsequent government intrusions infringed upon each defendant's remaining privacy interest.\textsuperscript{97}

The Eighth Circuit further found that under \textit{Walter} the field test constituted an invalid warrantless search.\textsuperscript{98} The court compared the testing of the substance in \textit{Jacobsen} with the viewing of the film in \textit{Walter} and concluded that both activities significantly expanded the breadth of the initial private invasion.\textsuperscript{99} As separate searches, the government's conduct required prior judicial approval\textsuperscript{100} or the justification of an exception to the warrant requirement.\textsuperscript{101} The absence of a warrant or an exception to that requirement prompted the Eighth Circuit to exclude the evidence obtained in violation of the fourth amendment.\textsuperscript{102} In light of the conflict among the circuits and the importance of field tests in the enforcement of laws prohibiting narcotics, the Supreme Court granted certiorari in

\begin{itemize}
  \item \textsuperscript{93} \textit{Id}.
  \item \textsuperscript{95} 683 F.2d at 297.
  \item \textsuperscript{96} \textit{Id}. at 299.
  \item \textsuperscript{97} \textit{Id}.
  \item \textsuperscript{98} \textit{Id}. In both \textit{Walter} and \textit{Jacobsen} the only legitimate way to infer criminal activity would have been by viewing the objects with the unaided eye. The government agent in each situation employed artificial investigative techniques to determine the nature of the objects. \textit{Id}.
  \item \textsuperscript{99} \textit{Id}.
  \item \textsuperscript{100} \textit{Id}. The court stressed the importance of the warrant requirement, citing \textit{Coolidge v. New Hampshire}, 403 U.S. 443 (1971). It further stated that the enforcement of the warrant requirement should not be determined by examining the inconvenience to police in obtaining the warrant. The warrant requirement operates as a check on overly aggressive law enforcement officials. \textit{Id}.
  \item \textsuperscript{101} \textit{Id}. at 300. No exigent circumstances existed nor was the government justified by any exception to the warrant requirement. \textit{Id}.
  \item \textsuperscript{102} \textit{Id}.
\end{itemize}
Jacobsen. 103

UNITED STATES v. JACOBSEN

The Facts

In Jacobsen, a freight agent, following a company policy directive, opened a damaged package in order to assess the amount of damages. 104 The package contained a tube constructed out of silver duct tape. 105 Inside the tape, the employee discovered a series of four plastic bags. The innermost bag contained a white powdery substance. 106 The employee restored the tube and contents to their original positions within the box and notified the DEA of his findings. 107

Upon arrival, the DEA agent removed the tube from the box and took a sample of the substance from the plastic bags in order to conduct a field test of the powder. 108 After obtaining positive results from the test, the agent obtained a search warrant for the premises of the addressee of the package. Defendants were arrested in their home shortly after their receipt of the rewrapped package. 109

At the trial, the defendants moved to suppress the evidence, which was seized from the hallway outside their home by the DEA agent, as fruits of an illegal search. 110 In denying the motion, the district court took into account the magistrate’s assertion that the government’s search did not exceed the scope of the private search. 111 The Supreme Court reversed the Eighth Circuit’s hold-

104. United States v. Jacobsen, 683 F.2d 296 (8th Cir. 1982), rev’d, 104 S. Ct. 1652 (1984). According to the Eighth Circuit, the manager examined the contents of the package which was damaged in transit. Id. In the Supreme Court’s opinion, however, it was noted that a post-trial affidavit alleged that the suspicious nature of the package, rather than any damage, prompted the agent to examine its contents. 104 S. Ct. at 1657 n.10. Because the lower courts declined to recognize any governmental participation in the private search and the respondent failed to challenge this holding, the Supreme Court did not consider the issue. Id.
105. 104 S. Ct. at 1655.
106. Id.
107. Id.
108. Id. at 1654. The summary of the facts presented by the Supreme Court majority indicates that the DEA agent removed the tubes from the box and then the bags from the tube. Id. Justice White’s concurring opinion, however, indicates that the magistrate found that the “tube was in plain view in the box and the bags of white powder were visible from the end of the tube.” Id. at 1663 (White, J., concurring).
109. 683 F.2d at 298.
110. 104 S. Ct. at 1654.
111. 683 F.2d at 298.
ing that the government conduct violated the fourth amendment, finding that neither the government's reopening of the package nor the testing of the contents amounted to a fourth amendment search.\textsuperscript{112}

\textbf{The Majority Opinion}

The majority opinion, delivered by Justice Stevens, observed at the outset that a private carrier had initially opened the damaged package.\textsuperscript{113} Under the private search doctrine, no fourth amendment violation arose from the private party's activity.\textsuperscript{114} The majority then examined the governmental activity to determine whether any illegal search or seizure had transpired.

The Court first examined the opening of the box by the DEA agent to determine whether a fourth amendment search or seizure had occurred. The majority employed the analysis of \textit{Walter v. United States},\textsuperscript{115} comparing the scope of the private search to that of the governmental invasion.\textsuperscript{116} In so doing, it found that the agent's act of removing the tube from the box did not constitute a search because no reasonable expectation of privacy existed in the unsealed package.\textsuperscript{117} Further, the government had merely reaffirmed the findings of the private party; the agent's activity therefore remained within the scope of the private search.\textsuperscript{118} The Court stated that its decision would remain consistent whether or not the powder itself were plainly visible to the agent at the time he removed it from the box.\textsuperscript{119}

The Court next examined the government's taking of the package and its enclosed substance, to determine whether a fourth amendment seizure had occurred. Although the majority concluded that for fourth amendment purposes the government had seized the package and its contents, the seizure was deemed reasonable because Jacobsen's privacy interests had already been compro-

\begin{itemize}
  \item \textsuperscript{112} 104 S. Ct. at 1653; see supra notes 94-102 and accompanying text.
  \item \textsuperscript{113} 104 S. Ct. at 1657.
  \item \textsuperscript{114} \textit{Id.}; see supra note 62 and accompanying text.
  \item \textsuperscript{115} 447 U.S. 649 (1980); see supra notes 76-81 and accompanying text.
  \item \textsuperscript{116} 104 S. Ct. at 1657-58.
  \item \textsuperscript{117} \textit{Id.} at 1660. The Court also noted the fact that the package which had been previously opened remained unsealed as further support for denying any reasonable expectation of privacy in the package. \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} at 1659.
  \item \textsuperscript{119} \textit{Id.} The Court noted that even if the powdery substance itself were not in plain view, it was virtually certain that the package contained contraband. Thus, the government's inspection of the tube revealed no more to the agent than had been told to him by the private party. \textit{Id.} at 1660.
\end{itemize}
mised by the private search. The majority relied upon the high degree of certainty that the tube contained contraband as further justification for the warrantless seizure.

Finally, the majority addressed the testing of the drug by the DEA agent. The Court held that the testing was not a search proscribed by the fourth amendment because no reasonable expectation of privacy exists in illegitimate materials. The minimally intrusive nature of the testing further precluded any finding that a fourth amendment search had occurred.

The majority found this result to be dictated by United States v. Place, in which the Court had ruled that subjecting personal property to a dog sniff test was not tantamount to a fourth amendment "search." The Jacobsen majority viewed the Place test as analogous to the field test of the powdery substance. Since no privacy interest was invaded by testing a potentially illegal substance, and the field test would only reveal whether or not the substance was cocaine, no fourth amendment search took place.

In analyzing the field test in light of the fourth amendment's prohibition against unreasonable seizures, the Court balanced the degree of the intrusion with the nature of the governmental interests. The seizure of the substance for testing purposes was held reasonable in light of the minimal invasion of Jacobsen's property interest and the compelling governmental interest in policing drug traffic.

120.  Id. The majority saw the issue of whether the seizure was reasonable as directly related to the level of protection remaining in the package.  Id.
121.  Id. The Court compared the package to the balloon in Texas v. Brown, 460 U.S. 730 (1983), which had a distinctive character that spoke "volumes" as to its contents. 104 S. Ct. at 1661; see supra note 43.
122.  104 S. Ct. at 1661. The majority relied heavily upon the fact that the subjective privacy expectation of a criminal is not sufficient to justify a "legitimate" privacy expectation.  Id. at 1662.
123.  Id. at 1663.
125.  Id. at 2644-46; see supra notes 33-34 and accompanying text.
126.  Jacobsen, 104 S. Ct. at 1662. The majority relied heavily on the limited nature of the field test in holding that no search had occurred.  Id. The Court stated that if the results of the field test are positive, no privacy interest is infringed upon. Likewise, the majority averred that a negative result would then only reveal the absence of narcotics.  Id.
127.  Id. at 1662. The Court utilized the search analysis employed earlier in Place, where the Court validated a dog sniff test on the basis of the limited information revealed and the minimal intrusiveness of the test. In Jacobsen the Court also removed the field test from the ambit of the fourth amendment in light of the narrow scope of the test and the negligible character of the intrusion.  Id.
128.  Id. The Jacobsen Court relied on Cardwell v. Lewis, 417 U.S. 587 (1974), to support its determination that the testing of the powder did not implicate the fourth amendment search.
The Concurring Opinion

Justice White's concurring opinion focused on the majority's finding that regardless of whether the powdery substance was plainly visible to the agent beforehand, no fourth amendment search occurred when the DEA agent removed the contents of the box. Justice White also expressed concern with the broad application of the private search doctrine. The concurring opinion pointed out the existence of a judicially recognized privacy interest in closed containers and the impropriety of permitting probable cause alone to justify a warrantless search. The concurrence compared the plain view exception to the warrant requirement and the private search doctrine. In so doing, Justice White acknowledged the extinguishment of any privacy interest in a "plain view" item, but noted that a private search does not similarly destroy any privacy expectation. In Jacobsen, the government could not therefore search the package solely on the basis of the carrier's testimony. Although the carrier's information might establish probable cause for the issuance of a warrant, if the content of the package was not in plain view, a warrantless search would infringe upon Jacobsen's privacy expectation.
The concurrence further expressed concern about the practical implications of the majority's analysis. Justice White feared that as a result of the majority's findings, no legitimate expectation of privacy would remain in a package once a private party had conducted a search. The government would thus be free to conduct warrantless searches without prior judicial review to determine whether probable cause exists for such action.

The concurring opinion then addressed the proper test for governmental conduct following a private search. Justice White disagreed with the majority's interpretation of the Walter test. In so doing, Justice White discounted the significance of the language in Walter which appears to permit the government to imitate the private search without ever violating the fourth amendment. The concurrence noted that although Walter contained this troubling statement, that decision expressly refrained from deciding whether a violation would have occurred had the private party actually viewed the film before the police viewed it.

The Dissent

Justice Brennan, joined by Justice Marshall, also disagreed with the majority's expansion of the private search doctrine to include the DEA agent's activities. His dissent in Jacobsen reiterated Justice White's determination that the reopening of the package constituted a search if the contents were not in plain view. The dissent also scrutinized the testing of the powdery substance under the fourth amendment.

Although the dissent agreed with the majority that no search had occurred from testing the drug, the dissent wholly disagreed with the analysis upon which this finding was based. According to the dissent, the majority's analysis improperly excluded numer-

the government. However, precedent did not support the assertion that the agent may conduct a search "of the same or lesser scope as the private search" without a warrant.

Id. (White, J., concurring).
135. Id. at 1665-67 (White J. concurring).
136. Id. (White, J., concurring).
137. Id. (White, J., concurring).
138. Id. at 1666 (White, J., concurring). Although a private search may permit the government to reexamine the materials left in plain view by the private party invasion, the government may not exceed the scope of the private search without independent justification. Id. (White, J., concurring).
139. Id. (White, J., concurring).
140. Id. at 1667-72 (Brennan, J., dissenting).
141. Id. at 1667 (Brennan, J., dissenting).
142. Id. at 1668 (Brennan, J., dissenting).
ous testing, surveillance and investigative methods from the confines of the fourth amendment by finding that no search had occurred based solely upon the nature of the information revealed.\textsuperscript{143} Justice Brennan disagreed with the majority's validation of the testing procedure both in \textit{Jacobsen} and in \textit{United States v. Place}.\textsuperscript{144} He found that both cases potentially validate future surveillance techniques which will be able to uncover contraband in a home or on a passer-by without any physical invasion.\textsuperscript{145} In addition, such an approach ignores fundamental fourth amendment principles and well-established privacy expectation analysis.\textsuperscript{146}

The dissent asserted that a proper analysis requires the Court to examine a person's reasonable expectation of privacy in the item.\textsuperscript{147} The existence of an intrusion of a privacy expectation, in turn, depends upon the context in which the item is found, not solely the limited nature of the information revealed by the intrusion.\textsuperscript{148} Unless the warrantless search could be justified under an exception such as plain view,\textsuperscript{149} the activity would constitute a fourth amendment violation.\textsuperscript{150}

\section*{THE SEARCH OF THE PACKAGE}

\textit{Reasonable Expectation of Privacy Analysis}

The \textit{Jacobsen} majority's finding of an absence of any privacy expectation conflicts with the Court's previous decisions. For example, in denying the owner's subjective and objective privacy expectation, the Court relied on \textit{United States v. Miller}.

\textit{Miller} stands for the proposition that a third party may reveal information entrusted to him by another to the government, which may, in turn, use this information against the entruster.\textsuperscript{151} \textit{Jacobsen} inter-
interprets this to mean that a third party may reveal the contents of a package to the government, who may then seize the package and use its contents against the owner without implicating the fourth amendment.\textsuperscript{153} \textit{Miller}, however, is distinguishable on at least two grounds. In \textit{Jacobsen}, no information was voluntarily relayed to the private carrier; rather, a sealed package was merely entrusted to its care.\textsuperscript{154} In addition, in \textit{Miller}, the Court flatly refused to recognize any privacy expectation in bank documents,\textsuperscript{155} whereas in \textit{Jacobsen} the Court stated that an existing interest had been destroyed at the time of the private search.\textsuperscript{156}

The \textit{Jacobsen} Court thus implicitly sanctioned the assumption of risk rationale.\textsuperscript{157} Under the Sixth Circuit's theory, a reasonable man could not expect to remain free from governmental intrusion after delivery of the package to the carrier.\textsuperscript{158} Consistent with that approach, the Court in \textit{Jacobsen} focused on the privacy interest at the time of the private search, finding that private party activity destroyed any reasonable expectation of privacy.\textsuperscript{159} This approach conflicts, however, with the Supreme Court's decision in \textit{Walter v. United States}, which stated that the privacy expectation must be measured at the time of shipment.\textsuperscript{160}

Under the \textit{Walter} rationale, the package should have been protected by the fourth amendment because the owner possessed a reasonable expectation of privacy in its contents even after delivery to the carrier. Although a carrier may have been justified in examining accidentally damaged packages, the owner could not reason-

\begin{itemize}
\item[154.] See \textit{Jacobsen}, 104 S. Ct. at 1666 (White, J., concurring). Justice White differentiated between risks which are assumed by a person who voluntarily reveals secrets to another and a person whose possessions are subjected to a private search. See Amsterdam, supra note 14, at 406 (existence of risks should not permit the government to add to them by acting in a "constitutionally unconstrained manner"); Comment, supra note 94, at 240 (individual mailing a package manifests an expectation that the contents of the package will remain free from public viewing).
\item[156.] 104 S. Ct. 1652, 1659-60.
\item[157.] See supra notes 28-30 and accompanying text for an explanation of the assumption of risk concept.
\item[158.] See supra notes 87-88 and accompanying text.
\item[159.] See supra note 117 and accompanying text.
\item[160.] 447 U.S. 649, 658 (1980). The \textit{Walter} Court noted that at the time of shipment, the cartons were well wrapped and tightly sealed. Thus, as of the time of shipment, the defendant's full privacy expectation in the package remained intact. \textit{Id.} at 658. In \textit{Jacobsen}, it was noted that at the time of shipment, the package consisted of a box wrapped in paper, containing a tube made of silver duct tape covered with several newspapers. Within the tube were four zip-lock bags, the innermost bag containing a white powdery substance. 104 S. Ct. at 1655.
\end{itemize}
ably have expected the box to be opened at the time of shipment.\textsuperscript{161} The private party's search of the box, moreover, may have diminished the owner's privacy expectation in its contents. The government should not, however, have automatically been allowed to engage in warrantless activity unless a total frustration of the owner's interest had occurred.\textsuperscript{162}

\textit{Private Search Doctrine}

The Court's conclusion that the private party's examination of the package precluded fourth amendment protection is not compelling when contrasted with its decision in \textit{Illinois v. Andreas}.\textsuperscript{163} In \textit{Andreas}, the Court held that no fourth amendment search occurred when the government reopened a sealed package which had been previously searched by custom officials.\textsuperscript{164} In \textit{Andreas}, the initial invasion was justified by the authority of the customs agent to search packages and luggage for contraband.\textsuperscript{165} The customs search exception to the warrant requirement reflects the societal interests in policing drug traffic and confiscating concealed weapons.\textsuperscript{166} Because the general interest in protecting society from the dangers associated with contraband substantially outweighs the limited intrusion associated with brief a detention and customs search, the exception was developed by the courts.\textsuperscript{167}

In contrast, the initial private intrusion in \textit{Jacobsen} furthered no law enforcement policy, but was made for purposes of assessing the

\begin{itemize}
\item \textsuperscript{161} 447 U.S. at 658-59. The \textit{Walter} Court explicitly described the care with which the package had been wrapped to denote the person's subjective privacy expectations. \textit{See supra} note 160.
\item \textsuperscript{162} 447 U.S. at 659. The \textit{Walter} Court equated the interest possessed by a consignor of a sealed package with that of an owner of a locked suitcase. The unexpected opening of a package by a third party does not affect the consignor's expectation of privacy. \textit{Id.} at 658-59.
\item \textsuperscript{163} 103 S. Ct. 3319 (1983).
\item \textsuperscript{164} \textit{Id.} at 3325. The Court relied heavily on the assertion that the contents of the package remained undisturbed from the time of the custom search to the time of the second warrantless search. Since the initial customs search destroyed the reasonable privacy expectation, the Court concluded that the second search infringed on no privacy interest. \textit{Id.} at 3325; \textit{see supra} notes 48-55 and accompanying text.
\item \textsuperscript{165} \textit{See supra} note 52 and accompanying text.
\item \textsuperscript{166} \textit{See, e.g.}, Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (border searches valid means for United States to protect "territorial integrity"); Delaware v. Prouse, 440 U.S. 648, 656 (1978) (border patrol checkpoint operations valid in light of strong governmental interest in policing smuggling); United States v. Ramsey, 431 U.S. 606 (1977) (United States government has the right to inspect all goods entering the country).
\item \textsuperscript{167} \textit{See, e.g.}, United States v. Place, 103 S. Ct. 2637, 2642 (1983) (strong governmental interest in policing narcotics); United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (government has strong interest in protecting public against drug traffic).
\end{itemize}
package's damages. Further, the private carrier's ability to examine packages without fourth amendment scrutiny results from the principle that the fourth amendment only prohibits certain actions by government officials. In this context, in which the interests associated with customs searches are not at stake, the police should not be encouraged to engage in warrantless searches under the protection of an expanded private search doctrine.

Another distinguishing factor of Andreas relates to the events which followed the "justified" initial intrusion. In Andreas, the Court emphasized that the reopening of the package was preceded by a positive police identification of the drug, a controlled delivery and a period of continuous surveillance. In Jacobsen, however, the private party possessed mere suspicions about the discovered substance, and the reopening of the package by the DEA agent was based upon a tip from the carrier's agent. Although the tip could have supported a finding of probable cause, the Court had not previously eliminated the warrant requirement just because probable cause to believe a package contains contraband existed. The private search may serve to establish probable cause for agents to confiscate the package and obtain a warrant, but the private search doctrine does not exempt governmental activity from the warrant requirement of the fourth amendment. Thus, Andreas simply does not provide sound support for Jacobsen based upon an analogy between customs searches and private party searches.

Jacobsen's Interpretation of Walter v. United States

The Court further held that the DEA agent's conduct had not exceeded the scope of the private party's search and thus did not violate the fourth amendment. In so holding, the Court relied upon its prior decision in Walter v. United States. Walter established an analysis of governmental activity which compares the

168. See supra note 104 and accompanying text.
169. See, e.g., Burdeau v. McDowell, 256 U.S. 465 (1921). The Burdeau Court stated that it is clear from its origin and historical development that the fourth amendment only protects against governmental searches and seizures. Id. at 475; see also Boyd v. United States, 116 U.S. 616, 625-26 (1886) (the founding fathers formulated the fourth amendment to guard against governmental intrusions). See supra notes 62-103 and accompanying text for a discussion of the private search doctrine.
170. See supra notes 50-54 and accompanying text.
171. See supra notes 104-07 and accompanying text.
172. See supra notes 99-102, 132-34 and accompanying text.
173. See supra notes 116-19 and accompanying text.
scope of such activity with that of the private party. Walter does not, however, support Jacobsen’s determination that the government may emulate the private party’s actions without implicating the fourth amendment. The Walter Court acknowledged that the government may seize and reexamine contraband which remains in plain view following a private search. It also emphasized, however, that unless such a well-established exception existed, the warrant requirement still applied.176

Jacobsen, however, was not decided on the basis of such an exception. In fact, the majority stated that since the private carrier opened the package and found contraband, no privacy expectation was infringed regardless of whether the substance was in plain view.177 While it is clear that the government may seize contraband in plain view, the Court had not previously extended this rationale to deny an expectation of privacy in a package where the contents remained uncertain.178 Plain view visibility of the cocaine would have justified the government’s warrantless search because when contraband becomes readily apparent, the owner’s privacy expectation is destroyed.179 However, absent a plain view showing of the contraband, the government’s reopening of the unsealed package in Jacobsen qualifies as a fourth amendment search and requires a warrant.

The Field Test

In reviewing the DEA agent’s field test, the Court relied on

175. Id. at 657. When the results of a private search are in plain view to government agents, the government may justifiably reexamine the material. The reexamination may not, however, “exceed the scope of the private search unless [the government] has the right to make an independent search.” Id.

176. Id. at 653. The Court also stated that lawful possession of the boxes by the FBI does not automatically give them license to search the box without prior judicial approval. Id.

177. See supra note 119 and accompanying text.

178. See, e.g., Texas v. Brown, 460 U.S. 730, 739 (1983), where it was held that the plain view observation of contraband by an officer legitimately on the premises infringes upon no privacy interest since the owner merely retains possessory and ownership interests at best. Id.; see also Jacobsen, 104 S. Ct. at 1665 (White, J., concurring). The warrantless search of a container based upon probable cause violates the fourth amendment. It is clear that containers which conceal the contents from plain view are afforded full fourth amendment protection. Id. (White, J., concurring).

179. Jacobsen, 104 S. Ct. at 1665-66 (White, J., concurring) (government may seize item in plain view because once official is justifiably in a situation to observe object the owner’s privacy expectation is destroyed); Texas v. Brown, 460 U.S. 730, 738 (1983) (contraband found in plain view by officer may be seized without a warrant since no invasion of privacy occurs).
United States v. Place\textsuperscript{180} and found that the conduct did not constitute a search.\textsuperscript{181} The intrusion in Place, however, can be distinguished from that of Jacobsen. The chemical test conducted in Jacobsen of the examined contents of the package required the physical destruction of a portion of the substance.\textsuperscript{182} The canine sniff test in Place required no physical invasion or destruction of any substance.\textsuperscript{183}

Further, as the Jacobsen dissent pointed out, the overly broad holdings of both Jacobsen and Place pose serious threats to traditional fourth amendment principles by removing established limitations on the scope and type of permissible criminal investigations.\textsuperscript{184} Opponents of Place similarly claim that its expansive language threatens the integrity of the fourth amendment and may validate advanced law enforcement techniques of the future.\textsuperscript{185} Moreover, precluding certain techniques from the scope of the fourth amendment ignores the fact that such activity intrudes upon legitimate privacy expectations in situations where the test is inaccurate.\textsuperscript{186} An individual innocent of possessing contraband may repeatedly be subjected to physical searches and detention of his person and property without a fourth amendment remedy.\textsuperscript{187}

**IMPACT AND RECOMMENDATIONS**

The Supreme Court's holding in Jacobsen favors the policy of encouraging law enforcement activities.\textsuperscript{188} The circumvention of the fourth amendment requirements is, however, particularly detrimental to privacy interests in situations involving private searches because the intrusive activities of private parties are not constitutionally sanctioned in any way.\textsuperscript{189} While the Court has interpreted fourth amendment principles to accommodate existing policy con-

\begin{itemize}
\item \textsuperscript{180} 103 S. Ct. 2637 (1983).
\item \textsuperscript{181} 104 S. Ct. at 1662-63.
\item \textsuperscript{182} Id. at 1662-63.
\item \textsuperscript{183} Place, 103 S. Ct. at 2644.
\item \textsuperscript{184} See supra notes 142-46 and accompanying text.
\item \textsuperscript{185} See supra note 145 and accompanying text.
\item \textsuperscript{186} See, e.g., Note, Fourth Amendment — Limited Luggage Seizures Valid on Reasonable Suspicion, 74 J. CRIM. L. & CRIMINOLOGY 1225, 1244 (1983) (unless inaccuracies in dog sniff tests result in nondetection, innocent person may be subject to warrantless privacy invasions).
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Once it has been determined that a particular activity is not a fourth amendment search or seizure, the fourth amendment proscriptions become inapplicable and the government is free to act without a warrant. United States v. Jacobsen, 104 S. Ct. at 1669 (Brennan, J., dissenting).
\item \textsuperscript{189} See supra notes 62-71 and accompanying text.
\end{itemize}
siderations and societal trends, it is unlikely that the fourth amendment's scope will be expanded to protect against intrusive private action. Such an extension would be inappropriate given the amendment's historical development.

The danger inherent in the Jacobsen opinion is the possibility that the government's activity, whenever preceded by a private party's encroachment of another's privacy, would fully escape fourth amendment scrutiny. Such a "non-search" classification of government activity not only alleviates the need for a warrant, but also technically affords the government unbounded discretion to act in any fashion, reasonable or unreasonable.

A more appropriate analysis of governmental activity which follows a private party search requires an examination of the individual's subjective and objective privacy expectations under the facts of each particular case. If an individual possesses a reasonable expectation of privacy in a particular package, the opening of the package by the government should constitute a fourth amendment search. The government's activity should then be subject to the fourth amendment's warrant requirement, unless an exception to that rule applies.

The holding of Jacobsen with respect to the field test reveals a similar commitment to law enforcement. The use of the dissent's traditional fourth amendment analysis would provide greater protection of privacy interests by guaranteeing judicial scrutiny of all potentially intrusive law enforcement procedures. It is unlikely,

190. See supra note 59 and accompanying text.
191. See supra notes 10, 72 and accompanying text.
192. Jacobsen, 104 S. Ct. 1652, 1671 (1984) (Brennan, J., dissenting). Under the traditional approach, law enforcement techniques would be scrutinized in each situation so as to protect fourth amendment rights. Under the dissent's approach, if an individual possessed a reasonable expectation of privacy, the government's field test would be tantamount to a search. The search, however, could be found to be reasonable in light of its minimally intrusive nature.
193. See Jacobsen, 104 S. Ct. at 1670-71 (Brennan, J., dissenting); see also Note, supra note 186, at 1244. The commentator suggests that once an individual's privacy expectation has been assessed, the Terry standards would be more appropriate than the Place analysis. The activity constituting a search would be scrutinized on a case-by-case basis. Under Terry, the dogsniff test may withstand fourth amendment scrutiny if it is determined that the test, as a search, was justifiable and the intrusiveness was minimal. Id. at 1244; see also Katz and Dogs: Canine Inspections and the Fourth Amendment, 44 L.A. L. REV. 1093, 1106 (1984) (placing dog sniffs within the realm of the fourth amendment would facilitate judicial examination of reasonableness, which would include an analysis of the privacy interest, suspicion involved, intrusiveness and scope of sniff in each case).
194. See supra notes 39-45 and accompanying text.
195. See supra note 59; see, e.g., E. EBERLE, Prior Restraint of Expression Through
however, that the Court will abandon the current trend toward encouraging the employment of effective law enforcement techniques and avoiding unnecessary application of the exclusionary rule.\textsuperscript{196}

In the future, the Court may wisely choose to limit the holdings of \textit{Place} and \textit{Jacobsen} in recognition of the potential danger in cases involving the use of unforeseen sophisticated surveillance techniques.

\textbf{CONCLUSION}

In response to a conflict among the circuits with respect to the proper analysis of governmental searches which follow private searches, the Supreme Court granted certiorari in \textit{United States v. Jacobsen}. The Court’s broad holding removes virtually all governmental searches which follow on the heels of the private search from the fourth amendment’s scope. A traditional fourth amendment analysis would more appropriately scrutinize the activity without threatening the integrity of the amendment.

The \textit{Jacobsen} Court’s analysis of the field test may potentially be employed in future cases to validate other seemingly controlled types of investigative techniques which could adversely affect fourth amendment interests. Such techniques should not receive blanket exemptions from the fourth amendment’s strictures. The Court should examine the techniques on a case-by-case basis in light of the surrounding circumstances. Such an approach would provide more flexibility while preserving the integrity of the fourth amendment.

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\textit{the Private Search Doctrine}, 17 U. SAN FRAN. L. REV. 171, 197 (although private search doctrine poses threat to first amendment interests, the doctrine is nonetheless an accepted part of fourth amendment law); Note, \textit{supra} note 66, at 455 (the outdated approach of the courts in limiting fourth amendment scrutiny to governmental activity is stubbornly ad- hered to); Note, \textit{Private Searches and Seizures: United States v. Kelly and United States v. Sherwin}, 90 HARV. L. REV. 463 (current trend with respect to fourth amendment evinces desire to encourage effective law enforcement).

\textsuperscript{196} \textit{See supra} notes 59-64 and accompanying text.