THE PRIVATE-SEARCH DOCTRINE DOES NOT EXIST

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This Article advances the novel argument that there is no such thing as the Fourth Amendment's private-search doctrine. For nearly four decades, courts have invoked the doctrine to permit police to replicate, without a warrant, a prior search performed by a private third party. This Article contends that the doctrine rests on a fundamental misreading of the Supreme Court's seminal precedents and an untenable theory of Fourth Amendment privacy.

The Supreme Court has never announced a "private-search doctrine." It has addressed the fact pattern of private searches only twice, and not since 1984. The opinions in those two cases, *Walter v. United States* and *United States v. Jacobsen*, are notoriously unsettling and hard to judge. Yet courts and commentators have long interpreted those cases as holding that Fourth Amendment privacy is vitiated by the exposure of information to third parties, even when that exposure is the result of an unforeseeable and surreptitious search. Uncertainty over the bounds of the doctrine has resulted in the development of drastically different approaches to private searches, recently culminating in a federal circuit split.

Performing a close examination of the *Walter* and *Jacobsen* opinions, this Article demonstrates that those cases are best understood not as announcing a new Fourth Amendment doctrine—the private-search doctrine—but rather as extending an existing exception—the single-purpose container doctrine—into a new factual context. Correcting this decades-old mistake harmonizes many of the intuitions of lower courts regarding private searches while simultaneously resolving two circuit splits: the split over the private-search doctrine and a longstanding split over the application of the single-purpose container doctrine. Perhaps more importantly, this correction also sheds new light on the nature of Fourth Amendment privacy and the normative arguments for its protection.

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INTRODUCTION

In the fall of 1975, twelve inconspicuous packages were shipped by private carrier from St. Petersburg, Florida, to Atlanta, Georgia.[1] In Atlanta, the packages were erroneously routed to an unintended recipient, due partly to the shipper's use of fictitious pseudonyms.[2] Once opened, the packages revealed contents belied by their nondescript exteriors: over 800 reels of 8-millimeter film, many outwardly appearing to contain illicit homosexual pornography.[3] The FBI was notified and federal agents soon seized the films.[4] Sometime later, and without a warrant, the agents procured a projector and viewed the films to confirm their illegality.[5] Unknowable to the government agents, their act—a pornographic matinee in furtherance of a criminal investigation—would be the genesis of one of the most convoluted and misunderstood corners to the Fourth Amendment: the so-called "private-search doctrine."

For nearly forty years, the private-search doctrine has allowed government agents, without a warrant, to replicate an earlier-in-time search performed by a private party.[6] The doctrine purportedly "rests on the theory that once a private individual searches another's possessions, the owner's expectation of privacy has been destroyed."[7]

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1. *Walter v. United States*, 447 U.S. 649, 651 (1980) (plurality opinion).

2. *Id.* at 651 & n.1. The packages were addressed to "Leggs, Inc.," a reference to the intended recipient's nickname. *Id.* The packages were instead delivered to employees of L'Eggs Products, Inc., a maker of women's hosiery. *United States v. Sanders*, 592 F.2d 788, 790 (5th Cir. 1979).

3. *Walter*, 447 U.S. at 651–52.

4. *Id.* at 652.

5. *Id.* ("The record does not indicate exactly when they viewed the films.").

6. *See, e.g.*, Benjamin Holley, Note, *Digitizing the Fourth Amendment: Limiting the Private Search Exception in Computer Investigations*, 96 VA. L. REV. 677, 677–78 (2010) ("It is well-established that government agents may, without a warrant, re-create a search that was originally conducted by a private individual, so long as they do not exceed the scope of that original search.").

7. *Id.* at 681.

Once the expectation of privacy is destroyed, subsequent examination by government agents cannot amount to a "search," and no warrant is therefore required.[8] The Fourth Amendment is simply not implicated.

The private-search doctrine's seemingly simple rule has proven confounding in hard cases. Judicial responses to the doctrine have resulted in "widely varying approaches with dramatically different implications."[9] Several lower federal courts, wary of creating too large an end-run around the Fourth Amendment's protection of privacy, have crafted ad-hoc limitations to curtail the doctrine's applicability in certain situations.[10] Others have seized upon unclear or underdeveloped language in the Supreme Court's supposedly seminal opinions in order to distinguish away the most problematic fact patterns.[11]

In the past few years, these differences have fomented a split among federal circuit courts about how to apply the doctrine to searches of digital devices, such as cell phones and computers.[12] The Fifth and Seventh Circuits now endorse a "broad" rule that treats privacy in a digital device as entirely frustrated by a private search of any part of that device.[13] By contrast, the Sixth and Eleventh Circuits support a purportedly "narrow" rule that would limit the government's access to only those files actually viewed by a private searcher.[14]

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8. *See* discussion *infra* Section I.D.1. *See generally Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (announcing that a Fourth Amendment "search" occurs when the government invades an individual's reasonable expectation of privacy).

9. Holley, *supra* note 6, at 677; *see also infra* Section I.C.

10. *See, e.g.*, *United States v. Paige*, 136 F.3d 1012, 1020 (5th Cir. 1998) (explaining that when private searches implicate the privacy of the home, "consideration must be given to whether the activities of the home's occupants or the circumstances within the home at the time of the private search created a risk of intrusion by the private party that was reasonably foreseeable"); *United States v. Allen*, 106 F.3d 695, 698–99 (6th Cir. 1997) (suggesting in dicta that the private-search doctrine would not permit the government to replicate a prior private search of a home).

11. *See, e.g.*, *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009) ("This case is distinguishable from *Jacobsen* because neither the hotel room nor the backpack contained only contraband."); *United States v. Martin*, 157 F.3d 46, 55 (2d Cir. 1998) (distinguishing *Jacobsen* where government was informed of contraband in a package by the sender, then intercepted the package and searched it).

12. Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, WASH. POST: VOLOKH CONSPIRACY (May 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/ [https://perma.cc/KV9Q-NKX4].

13. Adam A. Bereston, Comment, *The Private Search Doctrine and the Evolution of Fourth Amendment Jurisprudence in the Face of New Technology: A Broad or Narrow Exception?*, 66 CATH. U. L. REV. 445, 457–60 (2016).

14. *Id.* at 460–63.

Despite this pervasive disagreement, both courts and scholars have failed to give the private-search doctrine sustained attention. There has been a "remarkable dearth of federal jurisprudence" on the internal logic of the private-search doctrine, even as courts continue to invoke it to uphold warrantless government action.[15] Academically, the decades-old doctrine boasts only a recent proliferation of student notes and the occasional mention in articles on other topics.[16] Because it deals with evidence previously exposed to third parties, criminal procedure scholars generally appear to assume that the private-search doctrine is simply a close relative of the third-party doctrine, the much-maligned rule that one cannot hold a reasonable expectation of privacy in information *voluntarily* exposed to third parties.[17] This assumption elides the fact that involuntary exposure of information, as occurs in private-search cases, may implicate distinct lines of doctrinal and theoretical argument. If the private-search doctrine is reduced to a singular rule about the government's access to "exposed" information, it may in fact pose a potentially greater threat to citizen privacy than even the third-party doctrine.

This Article makes the novel claim that the private-search doctrine does not exist. Lower federal or state courts trace the origins of the doctrine back to two supposedly "seminal" Supreme Court decisions, *Walter v. United States*[18] and *United States v. Jacobsen*.[19] Decided just four years apart—in 1980 and 1984, respectively—*Walter* and *Jacobsen* comprise the exclusive universe of high court jurisprudence on private searches. And yet neither case included an opinion purporting to

15. *See, e.g.*, *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001).

16. *See generally* Holley, *supra* note 6; Bereston, *supra* note 13; Joseph Little, Note, *Privacy and Criminal Certainty: A New Approach to the Application of the Private Search Doctrine to Electronic Storage Devices*, 51 U.C. DAVIS L. REV. 345 (2017); Thomas W. Nardi, Jr., Note, *Virtually Uncertain: The Fourth Amendment and Laptops in* United States v. Lichtenberger, 89 TEMP. L. REV. 781 (2017); Taylor J. Pfingst, Note, *Digitizing the Private Search Doctrine: Is a Computer a Container?*, 44 HASTINGS CONST. L.Q. 371 (2017); Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J. FORUM 326 (2017); Matthew A. Lupo, Note, *Privacy in the Digital Age: Preserving the Fourth Amendment by Resolving the Circuit Split over the Private-Search Doctrine,* 10 ALB. GOV'T L. REV. 414 (2017); John M. Walton III, Note, *Virtually Certain to Frustrate: The Application of the Private Search Doctrine to Computers and Computer Storage Devices*, 43 N. KY. L. REV. 465 (2016); Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 228–43 (2005); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 547–48 (2005).

17. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 n.5 (2009) ("A list of every article or book that has criticized the [third-party] doctrine would make . . . the world's longest law review footnote.").

18. 447 U.S. 649 (1980).

19. 466 U.S. 109 (1984).

announce a new, standalone Fourth Amendment rule. In fact, only one Supreme Court Justice used the words "private-search doctrine" and he did so in reference to a pre-existing set of precedents.[20] This Article performs a comprehensive examination of the *Walter* and *Jacobsen* opinions, as well as the case law from which they draw, to demonstrate that those cases are best understood as extending an established constitutional exception—the single-purpose container doctrine—into a novel context.

The private-search doctrine is thus revealed to be a historical mistake—an artifact of misreading two (admittedly convoluted) Supreme Court opinions that has snowballed into an undertheorized constitutional end-run. Correcting this longstanding mistake has multiple benefits for the Fourth Amendment. Viewing private-search cases through the lens of the single-purpose container exception not only resolves the circuit split over the proper interpretation of the private-search doctrine for digital devices, it harmonizes many of the intuitions about privacy that drove the fractured and divisive development of the doctrine in lower courts for decades. It also resolves a lingering circuit split over the correct interpretation of the single-purpose container exception, and may bring additional insights to bear on the existing and contentious debate over the third-party doctrine. Lastly, and perhaps most importantly, it offers some promise of much-needed coherence in our notions of Fourth Amendment privacy more generally.

The Article proceeds in three parts. Part I sets out the conventional account of the private-search doctrine—including its presumed origins and its implications for Fourth Amendment privacy. Part II then revisits the texts of *Walter* and *Jacobsen* to challenge the validity of the standard story. Emphasizing the plain-view principles at work in those cases, this Part explains how the private-search cases actually illustrate that Fourth Amendment privacy is intended to limit governmental action, even as it fails to insulate against private conduct. Part III concludes by exploring the advantages of this new insight for two related doctrines, the single-purpose container exception and the third-party doctrine, as well as the concept of constitutional privacy more broadly.

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20. *Id.* at 130 (White, J., concurring) (referring to the longstanding principle that the Fourth Amendment is not implicated when a private party volunteers information to police that was obtained during a private search).

I. THE STANDARD STORY

The standard story is that the private-search doctrine is a standalone constitutional doctrine allowing police to replicate an earlier search conducted by a private party.[21] Although the term "private-search doctrine" did not take hold until years later, the doctrine is said to have originated with two Supreme Court cases from the 1980s involving private-party searches of shipped packages, *Walter v. United States* and *United States v. Jacobsen*.[22] In both *Walter* and *Jacobsen*, federal agents had been alerted to contraband discovered during a prior, entirely private search.[23] Those agents then performed a warrantless search of their own sometime later. As you will see, the Supreme Court's opinions were far from clear. However, the popular takeaway from both cases was that the government was free to replicate a prior search so long as it does no more than what the private party did.[24]

This Part briefly summarizes the facts and reasoning of both *Walter* and *Jacobsen* before detailing the historical development of the doctrine in lower courts, including the extant circuit split and several judicially-crafted limitations designed to rein-in the doctrine's excesses. This Part also describes the theoretical and precedential context from which the standard story emerged, including the translation of compatible property-based doctrines into incompatible privacy-based doctrines as a consequence of *Katz v. United States*.[25] Lastly, it considers the costs and consequences of the conception of Fourth Amendment privacy entailed by this story.

A. Walter v. United States

William Walter, along with his co-defendant Arthur Sanders, jointly operated a network of adult bookstores and cinemas across the

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21. *See, e.g.*, Holley, *supra* note 6, at 677–78.

22. *Walter v. United States*, 447 U.S. 649 (1980) (plurality opinion); *United States v. Jacobsen*, 466 U.S. 109 (1984). As mentioned *supra*, at note 20, Justice White used the phrase "private-search doctrine" in his 1984 *Jacobsen* concurrence to refer to the principle that the government may benefit from the fruits of a private search. 466 U.S. at 130 (White, J., concurring). The phrase "private-search doctrine" did not re-appear in a federal reporter until 2001. *See United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001).

23. For the facts of these cases, see discussion *infra* Section I.A and I.B.

24. WAYNE R. LAFAVE, 1 SEARCH & SEIZURE § 1.8(b) at 382 (5th ed. 2012) (explaining that the subsequent government search must not be "significantly more intrusive or extensive than the earlier private search"); Kerr, *supra* note 16, 548 ("Further, in the case of a search by a private actor, government agents may view only the information viewed by the private actor unless they first obtain a warrant.").

25. 389 U.S. 347, 351–52 (1967).

U.S.[26] In 1975, one of Walter's store managers instructed another employee to ship twelve large cardboard boxes from St. Petersburg to Atlanta via Greyhound Express.[27] Those boxes were erroneously delivered to a business in suburban Atlanta.[28] Employees of the business opened the boxes and quickly ascertained the pornographic nature of their contents, due in part to suggestive drawings and explicit descriptions on the individual film packaging.[29] One employee opened a few reels of film and attempted (without success) to view the contents by holding the film strips up to a light.[30] The employees eventually notified the authorities and the films were turned over to FBI agents, who subsequently viewed them with a projector.[31] Walter and Sanders, along with two media companies that they operated, were tried and convicted for the interstate shipment of obscene material in violation of federal law.[32]

Walter's conviction reached the Supreme Court in the early months of 1980.[33] The central question presented to the Court was whether the government's warrantless projection of the films constituted a Fourth Amendment search.[34] The case reflected a collision between two sacrosanct propositions in criminal procedure: On the one hand, the Fourth Amendment does not prohibit the government's use of evidence or information volunteered by private parties, regardless of how it was privately obtained.[35] On the other hand, closed containers—such as the film boxes—are the paradigmatic repositories of private information, the very type of personal effect that the Fourth Amendment was enacted to protect, and therefore typically may not be opened without a warrant.[36] The Court resolved the conflict by finding that a search had occurred when the federal agents projected the films, that no exception applied, and that the contents of the films should have therefore been excluded from the criminal trial.[37]

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26. *United States v. Sanders*, 592 F.2d 788, 789–90, 795 (5th Cir. 1979).

27. *Id.* at 790.

28. *Walter v. United States*, 447 U.S. 649, 651 (1980) (plurality opinion).

29. *Id.* at 651–52.

30. *Id.* at 652 & n.2.

31. *Id.*

32. *Sanders*, 592 F.2d at 789–90.

33. *Walter*, 447 U.S. at 649.

34. *See* Brief for Petitioners at 4, *Walter v. United States*, 447 U.S. 649 (1980) (Nos. 79-67, 79-148).

35. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

36. *See Ex parte Jackson*, 96 U.S. 727, 733 (1878).

37. *Walter*, 447 U.S. at 654 (plurality opinion) ("It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.").

But the *Walter* Court was divided in its reasoning. Justice Stevens wrote the plurality opinion for just two members of the Court.[38] He began by noting that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent they had already been examined by third parties."[39] Stevens asserted, however, that "the Government may not *exceed the scope* of the private search unless it has the right to make an independent search."[40] The FBI agents projected the films precisely to obtain information that they did not already possess with sufficient certainty; confirming the pornographic contents of the films was necessary to obtain a conviction.[41] According to Stevens, "Since the additional search conducted by the FBI—the screening of the films—was not supported by any justification, it violated [the Fourth] Amendment."[42] Two other Justices concluded that the films should not have been viewed without a warrant for the simple reason that their contents, unlike their packaging, remained hidden from the agents' plain view.[43] The deciding vote for reversal was cast by Justice Marshall, who concurred in the judgment without joining an opinion.[44]

In *Walter*'s wake, judges and criminal procedure scholars throughout the country disagreed on the opinion's significance. Some lower courts saw *Walter* as establishing a novel restriction on government conduct—an aberrational exception to the principle that police can benefit from the fruits of private action. Skeptical that the government conducts a Fourth Amendment "search" when examining items voluntarily turned over to it, these courts viewed *Walter* as reflecting a heightened burden that only applies to searches that may implicate First Amendment concerns.[45] Other courts, by contrast,

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38. *Id.* at 651. Stevens's opinion was joined by Justice Stewart.

39. *Id.* at 656.

40. *Id.* at 657 (emphasis added).

41. *Id.* at 654 ("It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense.").

42. *Id.* at 659.

43. *Id.* at 660–61 (White, J., concurring). Justice White was joined by Justice Brennan.

44. *Id.* at 660 (Marshall, J., concurring).

45. *See, e.g.*, *United States v. Bonfiglio*, 713 F.2d 932, 938 (2d Cir. 1983) (describing the *Walter* Court as requiring "scrupulous exactitude" with the warrant requirement when the First Amendment is potentially implicated); *United States v. Barry*, 673 F.2d 912, 920 (6th Cir. 1982) ("*Walter* turned on the fact that the material seized was protected by the First Amendment."); *see also* Suzanne M. Berger, *Searches of Private Papers: Incorporating First Amendment Principles into the Determination of Objective Reasonableness*, 51 FORDHAM L. REV. 967, 982–83 (1983).

interpreted *Walter* as broadly reaffirming the sanctity of closed containers, even those containers turned over by private parties.[46]

B. United States v. Jacobsen

Any hope that *Walter* would eventually be overlooked or confined to its "bizarre" facts[47] was quickly dashed when the Supreme Court granted certiorari in *United States v. Jacobsen*.[48] *Jacobsen*, like *Walter*, involved the government's examination of the contents of a closed container that had been mailed via a common carrier.[49] The container, a cardboard box wrapped in plain brown paper, had been damaged in transit and then searched by Federal Express employees pursuant to company policy.[50] Unlike in *Walter*, the employees in *Jacobsen* exhaustively searched the package prior to contacting the government.[51] This was not hard; the package contained only a bag of white powder, which had been stuffed in a tube made of duct tape and covered by newspaper.[52] By the time DEA agents arrived on the scene, however, the employees had returned the powder to the tube and the tube to the box.[53]

The *Jacobsen* majority opinion, once again written by Justice Stevens, was inscrutable.[54] It began by repeating the well-known proposition that a Fourth Amendment "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is

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46. *See*, *e.g.*, *United States v. Norman*, 701 F.2d 295, 300 n.7 (4th Cir. 1983) (Murnaghan, C.J., concurring) (citing *Walter* for the proposition that the government's lawful possession of a container does not provide authority to search the container's contents); *United States v. Bush*, 647 F.2d 357, 369 n.17 (3d Cir. 1981) (citing *Walter* for the proposition that an officer's authority to possess a package is different from his or her authority to examine the contents); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 324 n.62 (1981).

47. *See Walter*, 447 U.S. at 651 (plurality opinion).

48. *United States v. Jacobsen*, 460 U.S. 1021 (1983) (cert. granted).

49. *See United States v. Jacobsen*, 466 U.S. 109, 111 (1984).

50. *Id.*

51. *Compare Walter*, 447 U.S. at 651–52 (describing how the employees examined the boxes and opened few boxes before contacting the government), *with Jacobsen*, 466 U.S. at 111 (describing how the employees extensively searched the boxes by cutting into them and thoroughly examining them before contacting the federal government).

52. *See id.*

53. *Id.*

54. Justice Powell's since-published papers reveal his thoughts on Justice Stevens's first draft: "Unnecessarily long and with citation of more marginal cases than in a Law Review article." Justice Powell's notes on *United States v. Jacobsen*, *in* LEWIS F. POWELL JR. ARCHIVES, http://scholarlycommons.law.wlu.edu/casefiles/201 [https://perma.cc/R3NB-9TQ8].

infringed."[55] Evoking the closed container line of cases, Stevens reiterated that lawful possession of a package does not provide government agents a right to search; "the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package."[56] Almost immediately, however, the opinion transitioned to focus on the conduct of the private employees. Describing their search of the package, Stevens wrote, "Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character."[57]

Justice Stevens then articulated the standard he had previously endorsed in his *Walter* plurality opinion: following a private search, "additional invasions of . . . privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search."[58] According to Stevens, this "standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities."[59] Once information is revealed by a private party, "the Fourth Amendment does not prohibit governmental use of the now nonprivate information."[60] Rather, Stevens said, the Fourth Amendment is implicated "only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."[61] Critically, the *Jacobsen* majority explained that, because "the Government could utilize the Federal Express employees' testimony concerning the contents of the package," the government's entry into the package and its re-examination of those contents did not allow it to gain any new information—it "merely avoid[ed] the risk of a flaw in the employees' recollection."[62]

In his influential criminal procedure treatise, Wayne LaFave described Justice Stevens's *Jacobsen* analysis as "somewhat unsettling and hard to judge."[63] Shortly after the case was decided, he offered the following pragmatist account of the Court's holding:

> It just may be that society is not prepared to so recognize the expectation which exists in a *Jacobsen*-type situation. After all, if the private searcher had simply left the container

55. *Jacobsen*, 466 U.S. at 113.
56. *Id.* at 114. S*ee generally Ex parte Jackson*, 96 U.S. 727, 733 (1878).
57. *Jacobsen*, 466 U.S. at 115 (citation omitted).
58. *Id.*
59. *Id.* at 117.
60. *Id.*
61. *Id.*
62. *Id.* at 119.
63. *See* LAFAVE, *supra* note 24, § 1.8(b), at 386.

> unwrapped, then the police scrutiny would have implicated no Fourth Amendment interests. Similarly, if the private person had first opened (or reopened) the container while the police were standing by, then again as a general matter it may be said that there is no Fourth Amendment interest infringed by police observation of that process. Because the private person *could* have done either of these, and most certainly *would* have done so had he had any inkling this would be necessary to ensure that his efforts to report criminal activity could be promptly acted upon by the police, it would seem strange if a different result were required as a Fourth Amendment matter simply because the private person happened to do some repackaging before the appearance of the police.[64]

LaFave, however, openly questioned how far this rationale could extend. He noted, for example, that

> it is to be doubted that if a private person searched the premises of another and then reported to police what he had found (instead of removing the evidence and handing it over to the police), that the police could then make a warrantless entry of those premises and seize the named evidence.[65]

C. The Circuit Split

Despite the opacity of its majority opinion, *Jacobsen* somehow put to rest the disagreements regarding *Walter*'s proper interpretation. In the years that followed, lower courts latched onto Justice Stevens proclamations in *Jacobsen* that the government's conduct following a private search must be tested by comparison to the "scope" of the prior search.[66] These courts distilled the Supreme Court's two private-search

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64. *Id.*

65. *Id.*

66. *See, e.g.*, *United States v. Gillespie*, 956 F.2d 1168 (9th Cir. 1992) ("[T]he Supreme Court held that a warrantless search by government agents did not violate the Fourth Amendment where the governmental search 'follow[ed] on the heels of a private [search],' and the governmental search did not greatly exceed the scope of the private one."); *United States v. Mithun*, 933 F.2d 631, 634 (8th Cir. 1991) ("[T]he holding in *Jacobsen* 'does not turn on whether the private party hands the package over to the government in a sealed or unsealed condition,' so long as the government's subsequent warrantless search does not 'exceed the scope of the [prior] private search.'"); *United States v. Clutter*, 914 F.2d 775, 779 (6th Cir. 1990) ("The question raised by the DEA agent's conduct, said the Court, was whether it amounted to an additional invasion of the defendant's privacy expectation beyond the scope of the private search."); *United States v. Smith*, 810 F.2d 996, 998 (10th Cir. 1987) ("[T]he Supreme Court instructed that when there has been a search by a private party, any

cases into a simplistic, singular rule: the government does not conduct a Fourth Amendment "search" so long as it does no more than what private parties had done before it. And this rule had intuitive coherence: In *Walter*, the federal agents conducted a search because they projected the films (something the private parties had been unable to do);[67] in *Jacobsen*, the container, tube, and white powder had been thoroughly searched by the Federal Express employees, meaning that the government did not offend the Constitution when it subsequently engaged in the same conduct.[68]

However, the simplicity of the private-search doctrine quickly proved challenging in its particulars. In the 1990s, several lower courts carved out exceptions to the private-search doctrine that applied when the private search involved a residence. The Supreme Court has long treated homes with particular reverence in the Fourth Amendment analysis, particular emphasizing the connection between privacy and protected intimacies.[69] Extending that tradition, the Fifth Circuit has held that police may not replicate private searches of homes unless the private search was reasonably foreseeable to the home's occupants.[70]

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additional invasion of privacy by the government 'must be tested by the degree to which they exceeded the scope of the private search.'").

67. *Walter v. United States*, 447 U.S. 649, 649 (1980) (plurality opinion).

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

69. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."); *Oliver v. United States*, 466 U.S. 170, 179 (1984) ("[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference . . . ."). *See generally* Jeanie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485 (2009). Moreover, both the home and heteronormative intimacy have played a substantial role in judicial accounts of privacy in non-search contexts, such as the right to contraception. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."). Many feminists have been critical of privacy precisely because it promotes the idea of private spaces—typically the home, a paradigmatic site of gendered abuse and indignity—as a privileged realm protected from government intervention. *See, e.g.*, MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 74–75 (2010); CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE & LAW 101 (1983) ("From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced.").

70. *United States v. Paige*, 136 F.3d 1012, 1020 (5th Cir. 1998) (explaining that, "when confronted with a police search of a home that goes no further than a previously-conducted private party search," "consideration must be given to whether

Although such a limitation has no basis in the Supreme Court's private-search jurisprudence, the Fifth Circuit feared that applying the private-search doctrine as "an inflexible rule" would "make the government the undeserving recipient of considerable private information of a home's contents."[71] The Eighth Circuit has considered adopting the same requirement, with at least one judge explicitly endorsing a "reasonably foreseeable" test precisely because "the home has long been afforded heightened protection against invasions of privacy."[72] The Sixth Circuit has taken the residential exception even further, simply refusing to extend the private-search doctrine to residential searches.[73]

More recently, courts have invoked agency principles to rein-in the private-search doctrine. These courts have held that private parties who are sufficiently motivated by the desire to help police should count as agents of the government when they conduct the initial private search.[74] As David Gray and Danielle Citron recently noted: "For a private party to be considered a state actor, the government does not need to be 'the moving force of the search.' . . . All that is necessary is some 'clear indic[ation] of the Government's encouragement, endorsement, and participation.'"[75] Perhaps the best example is the well-known case *Jarrett v. United States*.[76] *Jarrett* involved a computer hacker known as "Unknownuser" who discovered child pornography by installing Trojan Horse viruses on suspected individuals' computers.[77] After Unknownuser sent some initial evidence to the FBI, an agent thanked the hacker for his actions and noted, "If you want to bring other information forward, I am available."[78] The district court had concluded that this simple statement of encouragement transformed Unknownuser into a government agent.[79] Although the Fourth Circuit upheld the challenged search—in part because the communication had

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the activities of the home's occupants or the circumstances at the time of the private search created a risk of intrusion by the private party that was reasonably foreseeable").

71. *Id.* at 1021 n.11.

72. *United States v. Miller*, 152 F.3d 813, 816 (8th Cir. 1998) (Murphy, J., concurring) (internal citations omitted).

73. *United States v. Allen*, 106 F.3d 695, 698–99 (6th Cir. 1997).

74. *See, e.g.*, *United States v. D'Andrea*, 648 F.3d 1, 10 (1st Cir. 2011) ("This issue is important because a search carried out by a private party in conjunction with government efforts may no longer qualify as a private search immune from the Fourth Amendment.").

75. David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 135–36 (2013) (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989)).

76. 338 F.3d 339, 344 (4th Cir. 2003).

77. *Id.* at 341.

78. *Id.*

79. *See id.* at 347.

taken place seven months prior to the search at issue—even the appellate panel described the government's conduct as "close to the line."[80]

Today, the private-search doctrine arises most frequently in cases involving private searches of digital data.[81] Superficially, such cases are easily analogized to the Supreme Court's private-search precedents. For example, when a computer repair technician stumbles upon illicit material in the course of his work, one does not have to stretch to notice the similarities to *Jacobsen*.[82] However, the sheer quantity of information that can be stored in a digital "container" (be it a computer, cell phone, removable media, or cloud-hosted folder) complicates the analysis at a deeper level. The Supreme Court has indicated that digital devices may categorically implicate greater privacy concerns than physical objects.[83] At least one commentator has argued that these differences justify excluding digital devices from the ambit of the private-search doctrine entirely.[84]

In recent years, a circuit split has developed over how to interpret and apply the private-search doctrine to searches of digital containers. Most commentators divide lower federal court decisions into "broad" and "narrow" approaches.[85] The Fifth and Seventh circuits exemplify the broad approach. These courts contend that the privacy interest in a container is entirely frustrated whenever any part of the container is searched.[86] Accordingly, the government does not exceed the "scope"

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80. *Id.* at 346–47.

81. *See* Pfingst, *supra* note 16, at 371.

82. Holley, *supra* note 6, at 684 ("One of the most common factual situations giving rise to private search analysis in computer cases involves repair technicians who observe evidence of illegal activity—usually child pornography—while attempting to fix a client's computer.").

83. *See Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014).

84. *See* Dylan Bonfigli, *Get a Warrant: A Bright-Line Rule for Digital Searches Under the Private-Search Doctrine*, 90 S. CAL. L. REV. 307 (2017) (arguing that society's privacy interest in digital information outweighs any legitimate government interest in conducting warrantless searches).

85. *See, e.g.*, Bereston, *supra* note 13, at 457, 460–61.

86. *See, e.g.*, *United States v. Runyan*, 275 F.3d 449, 464–65 (5th Cir. 2001) ("Though the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, an individual's expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers. Thus, the police do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container."); *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012) ("We find that *Runyan*'s holding strikes the proper balance between the legitimate expectation of privacy an individual retains in the contents of his digital media storage devices after a private search has been conducted and the 'additional invasions of privacy by the government agent' that 'must be tested by the degree to which they exceeded the scope of the private search.'").

of a prior, private search by examining the same container more thoroughly or by inspecting more objects within the container than the private party had done.[87]

To see the broad approach to the private-search doctrine in action, consider the facts of *United States v. Runyan*.[88] There, the defendant's ex-wife broke into his home in order to retrieve some personal belongings.[89] In the course of searching for her property, the woman discovered a duffel bag containing pornography, a camera, Polaroid photographs, a vibrator, and various digital media.[90] She took the duffel bag and later returned to the home with a friend to retrieve a computer and assorted compact disks, floppy disks, and ZIP disks.[91] The ex-wife's friend viewed a number of the CDs and floppy disks, confirming that they contained child pornography.[92] The defendant's ex-wife provided the retrieved items to law enforcement agencies, who searched them thoroughly, including by viewing digital media that neither the defendant's ex-wife nor the friend had previously accessed.[93] The Fifth Circuit upheld the search, announcing that the police did not exceed the scope of the private search by viewing more files on the disks than had the private searcher.[94]

More recently, the Sixth and Eleventh Circuits have adopted a "narrow" approach to the private-search doctrine that more closely ties the permissible range of government conduct to the particular search conducted by the private party.[95] *United States v. Lichtenberger*[96] exemplifies this approach. Following the defendant's arrest for failing to register as a sex offender, the defendant's girlfriend hacked into his password-protected computer.[97] She eventually came upon images of

87. *See generally* Kerr, *supra* note 16, at 550 ("The foundational premise of the container cases is that opening a container constitutes a search of its contents; if a person has a reasonable expectation of privacy in the contents of a container, opening the container and seeing the contents violates that reasonable expectation of privacy.").

88. 275 F.3d 449 (5th Cir. 2001).

89. *See id.* at 453. Although the Fifth Circuit opinion does not specifically address the ownership of the property, it explained that the ex-wife climbed a fence surrounding the defendant's home and entered through a breakfast-room window.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 454.

94. *Id.* at 465 ("Because we find that the police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers, we accordingly determine that the police in the instant case did not exceed the scope of the private search if they examined more files on the privately-searched disks than Judith and Brandie had.").

95. Bereston, *supra* note 13, at 447.

96. 786 F.3d 478 (6th Cir. 2015).

97. *Id.* at 479.

child pornography and notified the police, who sent officers to her house to view the evidence.[98] At the officers' instruction, the defendant's girlfriend again accessed the computer and clicked on random thumbnail images to show the officers what she had found.[99] At trial, however, the woman testified that she was uncertain whether she had shown the officers the same images that she had previously viewed.[100] That uncertainty proved fatal to the government when the defendant's appeal reached the Sixth Circuit. Emphasizing the magnitude of the privacy interests at risk when searching electronic devices, the court concluded that the officers exceeded the scope of the girlfriend's search when they viewed images that she may not have viewed previously.[101]

When framed in this way, the circuit split over the private-search doctrine reduces to a disagreement about the appropriate unit for measuring the scope of the private search. The narrow approach to the doctrine views the private search in granular units—the government replicates a private search by viewing the same images or opening the same files on an electronic device. Doing more is constitutionally impermissible. By contrast, the broad approach treats entire devices as singular units whose privacy is vitiated by a private search of any magnitude. On this view, the government does not exceed the scope of the private search unless it extends its search to separate devices.

D. Conceptualizing Privacy in Private Searches

Despite the doctrinal disagreement in lower courts, both the broad and narrow approaches to the private-search doctrine rest on the same foundational conception of Fourth Amendment privacy. Both approaches hold that an individual's privacy interest in information is defeated the moment that information is exposed to a third party.[102] As the existence of a privacy interest is the threshold question for much

98. *Id.* at 479–80.

99. *Id.* at 480.

100. *Id.* at 481.

101. *Id.* at 491 ("In light of the information available at the time the search was conducted, the strong privacy interests at stake, and the absence of a threat to government interests, we conclude that Officer Huston's warrantless review of Lichtenberger's laptop exceeded the scope of the private search Holmes had conducted earlier that day, and therefore violated Lichtenberger's Fourth Amendment rights to be free from an unreasonable search and seizure.").

102. *E.g.*, Clancy, *supra* note 16, at 233 ("The reasoning behind this rule, generally speaking, is that the original private party search extinguishes any reasonable expectation of privacy in the object searched."); Holley, *supra* note 6, at 681 ("The second prong—scope—rests on the theory that once a private individual searches another's possessions, the owner's expectation of privacy has been destroyed.").

contemporary Fourth Amendment analysis, the third-party exposure effectively forecloses any challenge to the government subsequently obtaining and using the exposed (hence nonprivate) information. Counterintuitively, this seemingly draconian rule actually has its roots in the Supreme Court's seminal decision protecting personal privacy, *Katz v. United States*.[103] To better understand the conception of privacy entailed by the private-search doctrine, a detour through the unfulfilled promise of *Katz* is therefore instructive.[104]

1. *KATZ*: FROM PROPERTY TO PRIVACY

The text of the Fourth Amendment guarantees people security in their possessions—their "persons, houses, papers, and effects."[105] For the majority of this country's history, courts interpreted the Amendment, consistent with that text, as protecting citizens against governmental invasions of private property rights.[106] Standing to assert Fourth Amendment claims, for example, was a function of one's ownership interests in the property searched or seized.[107] Police surveillance that did not involve a physical trespass was effectively unconstrained.[108]

Katz v. United States promised a transformation of the Fourth Amendment's aims, from protecting property to safeguarding citizen

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103. 389 U.S. 347 (1967).

104. *See, e.g.*, Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1137–38 (2011) (noting that the reasonable expectation of privacy test "has not lived up to that promise for a variety of reasons, including the fact that the *Katz* test has been narrowly construed and has not easily adapted to new technologies.").

105. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

106. *United States v. Jones*, 565 U.S. 400, 406 (2012) ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government *trespass* upon the areas ('persons, houses, papers, and effects') it enumerates.") (emphasis added); *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004) ("It is generally agreed that before the 1960s, the Fourth Amendment was focused on the protection of property rights against government interference.").

107. *See* Kerr, *supra* note 106, at 818–19 (describing "the common law property distinctions that the lower courts . . . had followed to determine standing to challenge warrants.").

108. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 457, 466 (1928) (finding no Fourth Amendment violation in the absence of "a seizure of [the defendant's] papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."); *Goldman v. United States*, 316 U.S. 129, 135 (1942) (finding no Fourth Amendment violation when federal agents used a "detectaphone" to listen through an exterior wall of an office building).

privacy. The defendant, Charlie Katz, had been recorded by police while placing illegal bets from a public payphone in Los Angeles.[109] Police made the recording by attaching a microphone to the exterior of the phone booth, and thus defended their action on the grounds that they neither invaded a "constitutionally protected area"[110] nor recorded more than a determined eavesdropper might have heard.[111] Nevertheless, the *Katz* Court ordered the recording suppressed.[112]

Writing for the majority, Justice Stewart chastised the parties for mischaracterizing the constitutional inquiry:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[113]

Justice Harlan's concurrence framed the analysis more acutely:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy . . . would be unreasonable.[114]

Harlan's approach quickly caught on. After *Katz*, courts began to employ his two-part test to determine whether government surveillance

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109. *Katz v. United States*, 389 U.S. 347, 348 (1967).

110. Just six years prior to *Katz*, Justice Stewart summarized the Supreme Court's Fourth Amendment decisions as requiring "an unauthorized physical encroachment within a constitutionally protected area." *Silverman v. United States*, 365 U.S. 505, 510 (1961).

111. *Katz*, 389 U.S. at 351, 354.

112. *See id.* at 359.

113. *Id.* at 351–52.

114. *Id.* at 361 (Harlan, J., concurring).

amounts to a "search."[115] On this view, the Fourth Amendment protects every manifest expectation of privacy, provided society also considers the expectation reasonable.[116] This analysis has become so well established that the concept of "reasonable expectation of privacy" now permeates privacy discourses even in areas outside of the Fourth Amendment.[117]

The revolutionary promise of *Katz* was short-lived, however. The privacy rationale for limiting government surveillance almost immediately proved to be more fragile than the property rationale that it replaced.[118] "Despite the many citations to *Katz*'s 'reasonable expectations of privacy' test in the courts and in law reviews, there has been no case beyond wiretapping where application of the test has led to the protection of privacy."[119]

One key reason for this result is that, amidst announcing the Constitution's protection of privacy, the *Katz* majority and concurrence both casually asserted that "exposed" information is essentially unprotected. Justice Stewart disclaimed privacy in information that "a person knowingly exposes to the public,"[120] while Justice Harlan similarly reasoned that privacy would not be found in "objects, activities, or statements that [a defendant] exposes to the 'plain view' of outsiders."[121] By rejecting privacy in "exposed" information, the *Katz* court sowed the seeds to relocate much governmental surveillance outside of the Fourth Amendment altogether. Effectively, the *Katz* Court both announced the protection of privacy and, in the very same breath, laid out the arguments to defeat it.

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115. One of the reasons that the Harlan concurrence took center stage is that "the *Katz* majority provided no clear standards for future courts to apply." Luke M. Milligan, *The Real Rules of "Search" Interpretations*, 21 WM. & MARY BILL RTS. J. 1, 17 (2012).

116. Of course, government surveillance that does not intrude on a reasonable expectation of privacy remains unregulated by the Fourth Amendment, no matter how unreasonable the government's conduct. *See id.* at 20.

117. Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 143 (2014) (citing, as an example, the issue of data privacy).

118. Some commentators have suggested—and the Supreme Court's recent jurisprudence bears this out—that *Katz* did not supplant the protection of property so much as reframe it. *See, e.g.*, Kerr, *supra* note 106, at 820 ("[A] close examination of *Katz* suggests a plausible contrary reading: *Katz* did not revolutionize Fourth Amendment law, but merely reemphasized the loose property-based approach announced in *Jones*."). Further supporting this thesis is the fact that, in the years immediately following *Katz*, the Court translated many of its existing precedents into the language of privacy without unsettling Fourth Amendment doctrine. *Id.* at 824.

119. Peter P. Swire, Katz *is Dead. Long Live* Katz., 102 MICH. L. REV. 904, 906 (2004).

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

121. *Id.* at 361 (Harlan, J., concurring).

2. THE EXPOSURE PARADIGM

As we have seen, the private-search doctrine is justified along a similar rationale—what I'll call the "exposure paradigm." The cornerstone of the exposure paradigm is that exposure of information to third parties is equated with a loss of privacy in that information, and hence a loss of constitutional protection.[122] Two additional features of the exposure paradigm are worth noting. First, Fourth Amendment privacy is posited as an individual value. I mean this both in the sense that the conception of privacy at work is highly individualistic (rather than, say, communal)[123] and also in the sense that an individual's privacy is normatively prized. This is why the measure of government misconduct under the private-search doctrine is whether the defendant experienced any additional diminishment of privacy subsequent to the private search. Second, the exposure paradigm treats privacy as a binary property of information. The exposure of information to a third party effectively operates like a switch, turning the protections of the Fourth Amendment off.[124] Consequently, the pertinent legal question under the private-search doctrine is not whether the defendant expected privacy—given that nearly all private searches are surreptitious, a genuine expectation of privacy can typically be assumed—nor whether that person is entitled to privacy given the steps they may have taken to preserve it, but instead whether information simply *is* private. Scholarly debates in this area thus tend to center on the narrow questions of

122. *E.g.*, *United States v. Odoni*, 782 F.3d 1226, 1238 (11th Cir. 2015) ("An individual does not have a reasonable expectation of privacy in an object to the extent the object has been searched by a private party."); *United States v. Tosti*, 733 F.3d 816, 821 (9th Cir. 2013) (explaining that the government's examination of photos on the defendant's computer was not a search because a private party's "prior viewing of the images had extinguished [the defendant]'s reasonable expectation of privacy in them"); *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998) ("[T]o be a Fourth Amendment search, a governmental intrusion must infringe on a legitimate expectation of privacy. Because a private search frustrates such an expectation . . . an ensuing police intrusion that stays within the limits of the private search is not a search for Fourth Amendment purposes." (citations omitted)).

123. Some scholars have gone so far as to propose reorienting the Fourth Amendment around a notion of relational privacy. *See, e.g.*, Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987).

124. *See, e.g.*, *United States v. Jacobson*, 466 U.S. 109, 117 (1984) ("Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information.").

which information should be recognized as private and under what conditions.[125]

A relatively recent decision by the Fifth Circuit, *United States v. Oliver*,[126] provides a clear example of these two features of the exposure paradigm operating in the private-search context. The case involved the warrantless search of a cardboard box for evidence of a mail fraud conspiracy.[127] The defendant, Oliver, had left the box at his girlfriend's house, instructing her not to open it before leaving town for several days.[128] When federal agents later approached Oliver's girlfriend inquiring about him, she provided them with the box, which the agents then searched without a warrant.[129] At the suppression hearing, Oliver's girlfriend admitted that she had previously looked inside the box before turning it over to the government.[130] Importantly, however, she never informed the agents of that fact.[131]

However, a divided panel of the Fifth Circuit upheld the denial of suppression by invoking the private-search doctrine.[132] According to the *Oliver* court, "[w]here a private individual examines the contents of a closed container, a subsequent search of the container by government officials does not constitute an unlawful search for purposes of the Fourth Amendment . . . ."[133] Even though the federal agents were not aware that the box had been previously searched, the court reasoned that "it is the private search itself, and not the authorities' learning of such search, that renders a police officer's subsequent warrantless search permissible."[134] Because "it is the private search itself that frustrates the privacy expectation," following the search of the box by Oliver's girlfriend extinguished all Fourth Amendment protection—"no reasonable expectation of privacy remained."[135]

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125. *See, e.g.*, Kerr, *supra* note 17, at 581–86 (arguing in favor of the private-search doctrine on the ground that it provides ex ante clarity regarding whether and when information is private).

126. 630 F.3d 397 (5th Cir. 2011).

127. *Id.* at 402–03.

128. *Id.* at 403.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 405–08; *see also id.* at 416 (Garza, J., dissenting).

133. *Id.* at 406.

134. *Id.* at 407. In a footnote, the *Oliver* majority dismissed the argument that prior knowledge of a private search is relevant, noting that "no case expressly requires such knowledge." *See id.* at 407 n.4.

135. *Id.* at 407. Apparently recognizing the breadth of its conclusion, the court also stated that its holding "is limited to the unique facts of this case and is not intended to expand significantly the scope of the private search doctrine." *Id.*

Oliver reflects an extreme commitment to the features of the exposure paradigm just discussed. First, because privacy is envisioned as experienced individually, the normative aim of privacy is presumed to be defeated by the exposure of information to seemingly any third party. Even though the case involved a "search" conducted by the defendant's girlfriend of an item he had stored at her home, the *Oliver* court refused to recognize the possibility that privacy could survive any amount of sharing.[136] Second, once Oliver's privacy interest was frustrated by the girlfriend, the binary switch was flipped and the contents of the box were rendered non-private for all subsequent purposes, including a criminal investigation by federal agents. Counterintuitively, the legality of the government's conduct turned exclusively on the occurrence of a prior act by a private party of which the agents were utterly unaware.[137]

Oliver also illuminates the conception of Fourth Amendment privacy entailed by courts' conventional understanding of the private-search doctrine. The form of privacy adopted by courts interpreting the Fourth Amendment is thus largely unchanged from the form it took in the late 1800s, when Samuel Warren and Louis Brandeis published their indelible law review article advocating for a right against salacious gossip and the broadcasting of "details of sexual relations" to "satisfy a prurient taste."[138] They viewed privacy as fundamentally about the necessity of individual solitude, a man's ability to "retreat from the world."[139] Brandeis himself extended this conception of privacy to the Fourth Amendment context in his well-known dissent in *Olmstead v. United States*,[140] typically considered *Katz*'s progenitor.[141] Since *Katz*,

136. Despite using the label "girlfriend," the *Oliver* court may have given less deference to the relationship because it failed to match the heteronormative ideal of intimacy. For example, the court took care to explain that, despite "dating for several weeks," Oliver's girlfriend "testified that she did not know Oliver's last name until she was informed of it by federal authorities." *Id.* at 407. The court also noted that Oliver had left town "without notifying or otherwise communicating his whereabouts" to the girlfriend. *Id.*

137. *Id.* at 407.

138. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890); *see also* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 115–18 (2008) (discussing *Boyd v. United States*, which guaranteed against invasion "of the sanctit[ies] of a man's home and the privacies of life." 116 U.S. 616, 630 (1886)).

139. Warren & Brandeis, *supra* note 138, at 196. My use of the masculine noun is not inadvertent; Warren and Brandeis were effectively arguing for the preservation of the traditional public/private divide and the attendant domestic sphere. *See, e.g.*, Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1304 (2010) ("*The Right to Privacy* also reflected traditional Gilded Age notions of gender roles and the 'cult of domesticity.'").

140. 277 U.S. 438 (1928).

"courts have applied a narrow, individualistic conception of privacy, rooted in the right to exclude others, the right 'to be let alone.'"[142] This narrow picture of Fourth Amendment privacy is perhaps not surprising considering the Supreme Court's traditional composition.[143] But it is at odds with criminal procedure elsewhere. At least some search-and-seizure doctrines respect, even if only partially, the capacity to share spaces and information:

> The police need a warrant to enter a shared home just as much as they do an unshared one. If two people share a home or an office, they still retain a constitutional reasonable expectation of privacy there. Sharing space provides the co-occupant with common authority to permit their consent, but it does not relinquish all Fourth Amendment protection.[144]

To the extent that courts applying the private-search doctrine ever recognize the possibility of shared privacy, however, they largely funnel sharing into restrictive forms of domesticated intimacy.

The exposure paradigm is also largely untenable in modern society. Most everyday activities—placing a phone call, using the internet, purchasing something with a credit card—expose arguably private information to others.[145] "[L]ife on the grid makes secrecy, and therefore privacy, all but impossible to secure."[146] Scott Sundby offered the following glimpse into the world that follows from a Fourth Amendment exposure paradigm:

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141. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that the Constitution confers, "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); Richards, *supra* note 139, at 1296 (explaining that Brandeis's *Olmstead* dissent "introduced modern concepts of privacy into constitutional law, and ultimately led not only to the 'reasonable expectation of privacy' test that governs Fourth Amendment law, but also shaped the constitutional right to privacy recognized in *Griswold v. Connecticut* and *Roe v. Wade*." (footnotes omitted)).

142. Coombs, *supra* note 123, at 1593–94.

143. The individualism reflected in the Supreme Court's Fourth Amendment jurisprudence "is linked to a privileging of reason over emotion, mind over body, and individual over community that is traditionally male." *Id.* at 1595 & n.9 (stating that Justices are "a group with particularly well-developed experiences and concepts of individualized privacy.").

144. Kerr, *supra* note 17, at 589 (citations omitted).

145. Joseph T. Thai, *Is Data Mining Ever a Search Under Justice Stevens's Fourth Amendment?*, 74 FORDHAM L. REV. 1731–32 (2006) ("On a daily basis, we convey to third parties detailed information about the most mundane to the most intimate aspects of our lives.").

146. Miriam E. Baer, *Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in* United States v. Jones, 128 YALE L.J. FORUM 393, 401 (2014).

> To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with any other person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the backyard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available (be sure to check the latest Sharper Image catalogue). Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents (again see your Sharper Image catalogue); ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached.[147]

In other contexts, scholars have decried this facet of Fourth Amendment jurisprudence as Orwellian[148] and Lochnerian.[149] Richard Posner, for example, has challenged the exposure paradigm as unrealistic, arguing that "privacy does not mean refusing to share information with everyone."[150] However, even those most critical of courts' narrow third-party jurisprudence tend to retain an individualistic model of privacy. Citing the threat of ubiquitous government surveillance, scholars imagine the harm of circumscribing privacy as a kind of Foucauldian discipline—they fear that citizens will stifle their individual thoughts and expressions so that their true selves will not be observed by governmental actors.[151] Jed Rubenfeld, for example, has

147. Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1789–90 (1994).

148. *E.g.*, Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy,* 75 S. CAL. L. REV. 1083, 1101–02 (2002) (explaining the dangers of government information gathering). *See generally* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (depicting a totalitarian government that operated through constant surveillance of its citizens).

149. *E.g.*, Thai, *supra* note 145, at 1735–36 (characterizing the third-party doctrine as containing a "Lochnerian assumption that we consciously and freely cede our privacy in personal data conveyed to others in the necessary course of life in our information society").

150. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 140 (2006).

151. *See* David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1095–97 (2014) (surveying the scholarship arguing for what he terms the "stultification thesis"). *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 202–03 (Alan Sheridan trans.,

argued that Fourth Amendment jurisprudence should allow citizens space "to be free from the structures of public norms, free to be their own men and women, free to say what they actually think, and to act on their actual desires or principles, even if doing so defies public norms."[152] Other notable scholars, including Neil Richards and Daniel Solove, have offered variations on this argument.[153] Notably, this claim is *not* that sharing or mutuality are valuable in themselves, or even that "privacy" can be conceptualized in a manner that naturally accommodates these values, but rather that the Fourth Amendment must protect some amount of shared privacy in order to ensure the necessary space for individuals to express or embody their true selves.[154]

What is sometimes lost in the abstract, academic debates over government "surveillance" is that the absence of Fourth Amendment privacy also operates to authorize governmental actions that diminish and denigrate those who are subjected to them.[155] Fourth Amendment privacy does not merely protect against observation, it protects against on-the-ground policing practices that have real-world effects. A

Vintage Books 2d ed. 1995) ("He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.").

152. Rubenfeld, *supra* note 138, at 128. Whether diminished privacy in fact results in individual self-censorship is ultimately an empirical question, and one currently in need of some additional support. *See* Sklansky, *supra* note 151, at 1097–98.

153. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1948 (2013) (explaining "that when we are watched while engaging in intellectual activities, broadly defined—thinking, reading, web-surfing, or private communication—we are deterred from engaging in thoughts or deeds that others might find deviant"); DANIEL J. SOLOVE, NOTHING TO HIDE 27, 178 (2011) (explaining that surveillance "can lead to self-censorship" and might "inhibit . . . free speech, free association, and other First Amendment rights").

154. For those of us engaged in the study of gender and sexuality, the supposition of a true self that emerges in seclusion is questionable (not to mention the assumed desirability of private spaces in which people may feel unrestrained). Frank Rudy Cooper, however, has articulated a version of this argument premised on gender performativity theory. He claims that "[s]urveillance operates performatively because it targets speech against the status quo, impelling one to perform one's identity in conformity with the status quo and thereby reproducing the preexisting social structure." Frank R. Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Marin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 537–38 (2008). Query why so many commentators consider governmental surveillance to be more (or uniquely) disciplining when compared to observation by one's associative community, such as family, friends, or colleagues.

155. *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 304–36 (2013) (detailing social policies that operate by regulating and disciplining low-income women).

roadside frisk of an automobile passenger, for example, is constitutionally justified because of the arguably diminished privacy interests of persons already involved in a lawful vehicle stop.[156] As a consequence of that conclusion about privacy, passengers are subject to both the intrusion of the physical frisk—a significant matter in its own right[157]—and also the public spectacle of the frisk, which stereotypes the person searched "as criminal, as violent, and as needing to be regulated by the police" even when the search proves fruitless.[158]

Conceptualizing privacy as an individual value, one that is destroyed by the exposure of information to others, thus reinforces social hierarchies through which the most vulnerable and dependent populations are those most subject to government intervention.[159] To take but one example, consider LGBTQ youth, who make up an outsized portion of the homeless population in the United States.[160] For these individuals, homelessness is frequently tied to patterns of interfamily conflicts and violence that occur within the privacy of their parents' homes.[161] Once on the street, the lack of Fourth Amendment privacy exposes them to extensive criminal regulation covering most "survival-focused activity associated with homelessness, such as theft, drug use, drug possession and dealing, and sex work."[162] Not only are their lives discursively devalued because they lack access to normatively-prized privacy, but their very publicness (i.e., their lack of privacy) becomes a ground for their subjection to the government.[163]

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156. *See, e.g.*, *Arizona v. Johnson*, 555 U.S. 323, 331–33 (2009).

157. *See Terry v. Ohio*, 392 U.S. 1, 24–25 (1968) ("Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.").

158. *See* Gustafson, *supra* note 155, at 303.

159. *Cf.* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002) ("The material result of . . . racial allocation is that people of color are burdened more by, and benefit less from, the Fourth Amendment than whites."); Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609, 614 (2013) (explaining how criminal laws that purport to prevent sexual abuse are increasingly enforced to re-instantiate gendered roles and identities).

160. Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1376, 1394–95 (2014) (citing statistics showing that between 20–40% of American homeless self-identify as LGBT).

161. *Id.* at 1395.

162. *See id.*

163. *See id.* (suggesting that criminal laws enforced against homeless youth are "an attempt to drive the homeless, including homeless youth, out of public view and spaces"); *cf.* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1415–16 (2004) ("*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex

Even traditionally "intimate" behavior is typically not protected when it occurs in public *because* it occurs in public.[164] There are real and costly consequences for individuals and communities who are unwilling or unable to live in the kind of absolute secrecy demanded by the private-search doctrine.[165]

II. DISSOLVING THE PRIVATE-SEARCH DOCTRINE

Fortunately, the private-search doctrine does not exist. This Part revisits the Supreme Court's seminal opinions in *Walter* and *Jacobsen*, unearthing the plain-view principles that perform the doctrinal work. As this Part demonstrates, *Jacobsen*'s outcome—which is primarily responsible for the notion that the doctrine allows replication of private searches—turned on an often-overlooked invocation of the single-purpose container exception to the Fourth Amendment. Meanwhile, *Walter*'s reference to the "scope" of the private search has been perversely interpreted as an authorization for government conduct when the evidence suggests that it was intended to articulate a restraint on government. Correctly understood, the Supreme Court's "private-search" jurisprudence actually contravenes the exposure paradigm; the Court's reliance on a plain-view exception in both *Walter* and *Jacobsen* implicitly affirms that some measure of privacy survives the exposure of information to third parties.

A. Jacobsen*'s "Virtual Certainty" Justification*

Correctly understanding the Supreme Court's private-search cases requires recognizing and resolving a fundamental dispute between Justice Stevens and Justice White regarding the scope of the plain-view doctrine. Superficially, the plain-view doctrine seems an unlikely key for unlocking the mysteries of *Walter* and *Jacobsen*. In its most common form, the plain-view doctrine justifies warrantless seizures (rather than searches), and only when contraband is already visible.[166] It

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and/or intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex.").

164. *See* Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 13–16 (2008) (explaining how traditional notions of privacy are constrained by intuitions about geographical privacy, such as the right to exclude others).

165. *See, e.g.*, Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1107 (2002) (arguing that the Supreme Court's third-party jurisprudence erroneously conflates privacy with total secrecy).

166. *See* LAFAVE, *supra* note 24, § 2.2(a), at 598 ("[T]he plain view doctrine . . . is intended to provide a basis for making a *seizure* without a warrant."); *Horton v. California*, 496 U.S. 128, 134 (1990) ("If 'plain view' justifies an exception from an

is not intuitively obvious why the doctrine should have much, if any, bearing on whether the government may constitutionally project a reel of film or open a cardboard box.

In both *Walter* and *Jacobsen*, however, Justice White authored concurring opinions that stressed plain view as marking the limits of the government's authorization. In *Walter*, White agreed with Justice Stevens that "nothing wrongful" had occurred prior to the FBI agents' projecting the films because the private parties had left the shipping containers open and the film's boxes exposed.[167] He reasoned that suppression of the films was required for the simple fact that projecting the films revealed information that was not previously visible to the government.[168] In *Jacobsen*, White again articulated his view that the Constitution permitted nothing more than for the government to passively receive information following a private search: "Where a private party has revealed to the police information he has obtained during a private search or exposed the results of his search to plain view, no Fourth Amendment interest is implicated because the police have done no more than fail to avert their eyes."[169] But White stressed that nothing the private parties had done could "legitimize *governmental conduct* that otherwise would be subject to challenge under the Fourth Amendment."[170] (White concurred in the judgment because he believed the record demonstrated that the white powder had remained literally visible to the governmental agents despite the fact that the FedEx employees had attempted to re-pack the container.)[171]

Where Justice Stevens—and the *Jacobsen* majority more generally—disagreed with Justice White was in the necessity of a literal view by the government. In a little-examined footnote, Stevens explained that "the precise character of the white powder's visibility to the naked eye is far less significant than the facts that the container could no longer support any expectation of privacy, and that it was

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otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.").

167. *Walter v. United States*, 447 U.S. 649, 661 (1980) (White, J., concurring).

168. *Id.* at 662 (White, J., concurring) ("Unlike the opening of the packages that destroyed their privacy by exposing their contents to the plain view of subsequent observers, a private screening of the films would not have destroyed petitioners' privacy interest in them.").

169. *United States v. Jacobsen*, 466 U.S. 109, 130 (1984) (White, J., concurring).

170. *Id.* at 130–31 (White, J., concurring).

171. *Id.* at 127 (White, J., concurring) ("I would proceed on the basis that the clear plastic bags were in plain view when the agent arrived and that the agent thus properly observed the suspected contraband.").

virtually certain that it contained nothing but contraband."[172] At first glance, Justice Stevens's references to a container that "could no longer support any expectation of privacy" and the officer's "virtual certainty" about its contents appear conclusory. And, indeed, those references have been largely ignored by lower courts until very recently.[173]

However, an examination of Justice Stevens's previous contributions to the Supreme Court's "plain view" jurisprudence demonstrate that both courts and commentators have missed the critical role this language played in the *Jacobsen* decision.[174] In the years prior to *Jacobsen*, Justice Stevens had twice advocated for a "virtual certainty" standard for a specific kind of Fourth Amendment search. Both occasions involved challenges to the government's authority to inspect closed containers. Both serve as meaningful analogues to the government conduct at issue in *Jacobsen*. In the Sections that follow, I examine those analogies in detail to show that the knowledge of the federal agent—not the mere fact of a prior, private search—was the dispositive justification for the *Jacobsen* majority's holding.

1. THE SINGLE-PURPOSE CONTAINER ANALOGY

In a line of decisions tracing back at least as far as *Arkansas v. Sanders*,[175] the Supreme Court has intimated that some containers "by

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172. *Id.* at 120 n.17 (majority opinion).

173. A few lower courts latched on to the latter half of Stevens's statement, concluding that police replication of a private search requires certainty that noncontraband items are absent. *See, e.g.*, *United States v. Young*, 573 F.3d 711, 720–21 (9th Cir. 2009) ("This case is distinguishable from *Jacobsen* because neither the hotel room nor the backpack contained only contraband."); *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) ("Unlike the package in *Jacobsen*, however, which 'contained nothing but contraband,' Allen's motel room was a temporary abode containing personal possessions."). Others have confusingly treated "virtual certainty" as a justification for *exceeding* the scope of a prior private search. *See, e.g.*, *United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001) ("The guideline that emerges . . . is that the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise.").

174. Because commentators have failed to recognize the connection to the plain-view doctrine, they have frequently dismissed the "virtual certainty" inquiry as misdirected. *See, e.g.*, Holley, *supra* note 6, at 706 (explaining that, while context about the contents of a container "may provide probable cause, it does not justify a warrantless search, absent a separate exception"); Clancy, *supra* note 16, at 243–44 ("[A]lthough the police may have had a high degree of confidence in what they would find when they opened the container, that confidence should not eliminate the applicability of the Amendment; instead, that confidence goes to the reasonableness of the police's actions.").

175. 442 U.S. 753 (1979).

their very nature cannot support any reasonable expectation of privacy because their contents *can be inferred from their outward appearanc*e."[176] The Supreme Court described this argument as "little more than another variation of the 'plain view' exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view."[177] It made clear, however, that to qualify for this exception, "a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer."[178] Lower courts have affirmed the continuing validity of the single-purpose container exception, as well as acknowledged its basis in the plain-view doctrine.[179]

Just one year before *Jacobsen* was decided, Justice Stevens argued for the use of a "virtual certainty" standard in applying the single-purpose container exception. The case was *Texas v. Brown*.[180] In the course of a traffic stop, a Fort Worth police officer had spotted an opaque party balloon, knotted at the tip.[181] The officer knew that narcotics were frequently packaged in these kinds of balloons, and thus had probable cause to at least conduct a plain-view seizure.[182]

Justice Stevens wrote separately to discuss whether the officer could constitutionally open the balloon—conceptually, a closed container—in order to confirm the presence of narcotics that had been assumed from its external appearance. Stevens began by affirming the baseline principle that "a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within."[183] He then invoked the single-purpose container exception, reasoning that opening the balloon would not have infringed the defendant's reasonable expectation of privacy if the balloon was "one of those rare single-purpose containers" described in *Sanders* that "could have given the officer a degree of certainty that is equivalent to the plain view of the

176. *Id.* at 764 n.13 (emphasis added) (providing as examples "a kit of burglar tools or a gun case"), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

177. *Robbins v. California*, 453 U.S. 420, 427 (1981), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982).

178. *Id.* at 428 (concluding that blocks of marijuana wrapped in green plastic did not sufficiently announce their contents to qualify for this exception).

179. *See United States v. Meada*, 408 F.3d 14, 22–23 (1st Cir. 2005) (explaining that "some containers so betray their contents as to abrogate any [reasonable] expectation" and their contents "are treated as being in plain view").

180. 460 U.S. 730, 751 (1983).

181. *Id.* at 733.

182. *Id.* at 734, 743–44.

183. *Id.* at 747 (Stevens, J., concurring).

heroin itself."[184] In a footnote, Justice Stevens argued that, doctrinally, the requisite degree of certainty should be "virtual certainty," claiming that it better served the purposes of the Fourth Amendment than even literal plain view:

> Sometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in a particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, "virtual certainty" is a more meaningful indicator than visibility.[185]

2. THE CONTROLLED DELIVERY ANALOGY

Justice Stevens again advocated for a "virtual certainty" standard in a second case pre-dating *Jacobsen*—again by just one year—when extending the single-purpose container exception into a novel context: the "controlled delivery" of a package that the government had previously searched. The case, *Illinois v. Andreas*,[186] involved a metal shipping container from Calcutta, India that had been searched by a customs agent when it arrived in Chicago, Illinois.[187] The container held a wooden table that concealed a supply of marijuana.[188] Posing as delivery men, DEA agents subsequently delivered the shipping container to its intended addressee, whom they arrested shortly after he took possession.[189] At the time of arrest, the shipping container had been inside the defendant's apartment, unmonitored, for approximately 30–45 minutes.[190] Nevertheless, the Supreme Court upheld a post-arrest, warrantless search of the container.[191]

The *Andreas* Court explained that, "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost."[192] It reasoned that, following the customs search, no legitimate expectation of privacy could be restored to the container

184. *Id.* at 750–51 (Stevens, J., concurring).
185. *Id.* at 751 n.5 (Stevens, J., concurring).
186. 463 U.S. 765 (1983).
187. *Id.* at 767.
188. *Id.*
189. *Id.*
190. *Id.*
191. *See id.* at 773.
192. *Id.* at 771–72.

"absent a substantial likelihood that the contents [of the container] have been changed" during the interruption in surveillance.[193] Justice Stevens agreed with the majority's reasoning, explicitly analogizing the case to the single-purpose container doctrine.[194] "The issue in this case," Stevens wrote, "is remarkably similar to the controlling issue in *Texas v. Brown*: Was there 'virtual certainty' that the police would find contraband inside an unusual container that they had lawfully seized?"[195] In Stevens's view, the answer to that question was yes.[196]

Importantly, Justice Stevens's dissent in *Andreas* demonstrates that the "virtual certainty" rule he advocated in *Brown* is not limited to containers that objectively evidence their contents, since the container at issue was an otherwise-innocuous shipping container.[197] Rather, the inquiry is fundamentally about the ex ante knowledge of the government agent invading the container. While an agent's knowledge may often be a product of the observable features of a container, *Andreas* confirms that it need not always. Alternative sources of information about the contents of a closed container can suffice to place those contents functionally in plain view.[198]

Andreas also helps to illuminate Justice Stevens's repeated emphasis in the *Jacobsen* opinion of certain contextual facts—for example, that the Federal Express employees "were lawfully in possession of the package," that the package "had previously been opened," that package "remained unsealed," and that "the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents."[199] These facts would have been irrelevant had *Jacobsen* truly stood for a bright-line rule that third-party exposure automatically permits the government to replicate a prior private search. *Andreas* makes clear that a previously searched

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193. *Id*. at 773.

194. *Id.* at 782 (Stevens, J., dissenting) (dissenting on the ground that certain factual determinations required remanding the case).

195. *Id.* (internal citation omitted).

196. *See id.* at 782 n.1 ("If I were sitting as a trial judge, and actually had heard the evidence, I believe I would have found that there was virtual certainty that the police officers were correct . . . .").

197. *See id.* at 767 (majority opinion). *But see id.* at 773 (citing the "unusual size of the container" and "its specialized purpose" as evidence that its contents had likely not changed).

198. *Cf. United States v. Koenig*, 856 F.2d 843, 852–54 (7th Cir. 1988) (citing to both *Jacobsen* and *Andreas* in noting that, where a container had been privately searched and subsequently shipped by the government, "it [was] as if the package had been repackaged by DEA in transparent wrapping so that its contents were at all times in plain view").

199. *United States v. Jacobsen*, 466 U.S. 109, 119–21, 120 n.17 (1984).

container can regain a lost expectation of privacy if the contents of the container may have changed since the prior search.[200] And, indeed, Stevens cited these facts precisely to explain that the Federal Express employees' repacking of the container had not sufficed to restore the lost privacy interest.[201]

Taken together, these two analogies—single-purpose containers and controlled deliveries—explain why Justice Stevens cited "virtual certainty" in *Jacobsen* to respond to Justice White's strict demands for literal visibility. Rather than parsing the trial court record to determine whether the white powder was actually in plain view, as Justice White was inclined to do, Justice Stevens staked his holding on the fact that the searching agent was sufficiently certain about the package's contents. That certainty came not from the container itself, but from the circumstances of the prior search, including the information conveyed by the private searcher:

> The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. . . . Under these circumstances, the package could no longer support any reasonable expectation of privacy; it was just like a balloon 'the distinctive character [of which] spoke volumes as to its contents' . . . or the hypothetical gun case in *Arkansas v. Sanders*.[202]

Given the searching officer's certainty, opening a closed container to retrieve the contraband within would not tell him "anything more than he already had been told."[203]

Jacobsen upheld a federal agent's intrusion into an ordinary cardboard box wrapped in plain brown paper. It did so not simply because the package had previously been searched. After all, Stevens himself explained that a previously searched package remained off limits provided that it could continue to support an expectation of privacy.[204] Instead, the intrusion in *Jacobsen* was justified because the

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200. *See Andreas*, 463 U.S. at 773.

201. *See id.* at 120 n.17. By contrast, where a private party simply informs the government of the presence of contraband in a container which he does not have control (physical or otherwise), as in Justice White's examples, *see id.* at 132 (White, J., concurring), the government is unlikely to possess the requisite certainty to justify a search.

202. *Id.* at 121 (majority opinion) (alterations in original) (internal citations omitted).

203. *Id.* at 119.

204. *Id.* at 120 n.17.

information communicated following the private search, along with the contextual circumstances, had effectively transformed the inconspicuous package into "one of those rare single-purpose containers which 'by their very nature, cannot support any reasonable expectation of privacy.'"[205]

B. Limiting Walter*'s "Scope"*

The foregoing analysis of *Jacobsen* presents as a puzzle for those accustomed to thinking of third-party exposure as vitiating privacy. On one hand, Justice Stevens's opinion in *Jacobsen* twice cited the scope of the private search as the ostensible measure of the government's conduct.[206] As a consequence of these proclamations, the conventional approach to the private-search case has been simply to compare the search performed by the private party with any subsequent governmental conduct.[207] This approach is defensible if, and only if, the exposure paradigm is correct—in other words, if the private search itself is the mechanism by which privacy is frustrated. On the other hand, if the mere fact of a prior, private search had been sufficient to destroy the defendant's privacy interest in the package, "virtual certainty" about the contents should not have been required to justify the government's follow-along conduct. The Federal Express employees had exhaustively searched the package; nothing the government did could have exceeded the scope of that search.

The virtual certainty inquiry thus implies that Fourth Amendment privacy may survive a private search.[208] Despite the comprehensive

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205. *Texas v. Brown*, 460 U.S. 730, 750–51 (1983) (Stevens, J., concurring) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979)); *Sanders*, 442 U.S. at 764 n.13 ("Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . . [S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.").

206. *Jacobsen*, 466 U.S. at 115 ("The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search."); *id.* at 116 ("[T]he legality of the governmental search must be tested by the scope of the antecedent private search.").

207. *See, e.g.*, *United States v. Lichtenberger*, 786 F.3d 478, 485 (6th Cir. 2015) (explaining that the first step in evaluating a Fourth Amendment challenge under the private-search doctrine is "comparing the scope of the two searches").

208. Justice Stevens basically said as much in refuting Justice White's parade of horribles. *See Jacobsen*, 466 U.S. at 132 (White, J., concurring) ("If a private party breaks into a locked suitcase, a locked car, or even a locked house, observes incriminating information, returns the object of his search to its prior locked condition, and then reports his findings to the police, the majority apparently would allow the police to duplicate the prior search on the ground that the private search vitiated the

scope of the previous private search, the government was not free to open the previously searched container unless and until the agent was also virtually certain of the contents. Furthermore, the single-purpose container cases discussed in the last Section instruct that virtual certainty is relevant because it is a threshold at which Fourth Amendment privacy is effectively absent. If that holds, what function did "scope" serve in the opinion—and, more importantly, in the constitutional analysis?

To frame the puzzle more acutely: If third-party exposure automatically frustrates privacy, then Justice Stevens's repeated references to "virtual certainty" were superfluous. If, by contrast, virtual certainty was required for the government to replicate the private search, then Stevens's repeated references to "the scope of the private search" were seemingly equally superfluous. Resolving this puzzle requires first returning to *Walter*, where the reference to "scope" originated. This Section then unpacks and contextualizes those references to construct an cohesive account of *Jacobsen*'s holding that avoids either superfluity.

1. WARRANTING SEARCHES

Justice Stevens's plurality opinion in *Walter* introduces the scope of the private search by analogy to searches conducted pursuant to a valid warrant. Stevens first explains that every "properly authorized official search is limited by the particular terms of its authorization."[209] Thus, he reasons, a similar restraint should apply when the government benefits from a private party's invasion of the privacy of another.[210] The analogy concludes with the sentence that would come to spawn the conventional account of the private-search doctrine: "[S]urely the

owner's expectation of privacy."); *id.* at 120 n.17 (majority opinion) ("We reject Justice White's suggestion that this case is indistinguishable from one in which the police simply learn from a private party that a container contains contraband, seize it from its owner, and conduct a warrantless search which, as Justice White properly observes, would be unconstitutional."). *See generally* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590–93 (1990) (discussing "the familiar parade of horribles").

209. *Walter v. United States*, 447 U.S. 649, 656–57 (1980) (plurality opinion).

210. *Id.* at 657. Admittedly, the analogy to warranted searches is questionable. In *Walter*, the government's conduct was "authorized," if at all, by an earlier frustration of privacy. In the absence of a privacy interest, the government conducted no Fourth Amendment "search" at all. The wisdom of particularity and the evils of general warrants seem out of place in a discussion about conduct that takes place entirely beyond the Amendment's reach.

Government may not exceed the scope of the private search unless it has the right to make an independent search."[211]

Most courts and commentators have subsequently interpreted the analogy as equating the conduct of the private party with the "authorization" provided by a valid warrant. That is, even though Justice Stevens's proclamation is articulating a limitation on governmental action—the government may not exceed the scope of the private search—it has long been cited to imply its logical inverse, that the government is affirmatively authorized to do all that the private party has done before it.[212] On this interpretation, the government does not require "the right to make an independent search" unless and until it exceeds the scope of the private search.[213]

As we have seen, however, *Jacobsen*'s reasoning belies this common understanding. Several overlooked features of Justice Stevens's *Walter* plurality opinion further unsettle the conventional wisdom that his proclamation about "scope" was intended to authorize government replication of private searches. First, and most importantly, the opinion contains a footnote expressly denying that the Court was announcing such a bright-line rule.[214] Recall that *Walter* presented a challenge to the FBI's viewing of films that had not been viewed by private searchers. According to Stevens, "Since the viewing was first done by the Government when it screened the films with a projector, *we have no occasion to decide* whether the Government would have been required to obtain a warrant had the private party been the first to view them."[215] This caveat would be nonsensical if Stevens's plurality opinion is simultaneously read to announce that privately searched items retain no privacy interest.

Second, the *Walter* plurality's singular reference to "scope" was preceded by a peculiar, and too often ignored, qualifier. Stevens's complete sentiment was as follows:

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211. *Id.*

212. The *Jacobsen* opinion employed a more ambiguous phrasing, explaining that "additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115.

213. *Id.* at 116. *See, e.g.*, *United States v. Jenkins*, 46 F.3d 447, 457 (5th Cir. 1995) ("The Fourth Amendment violation occurred where the government did something it was not authorized to do—conduct a more extensive search without a warrant."); *United States v. Guindi*, 554 F. Supp. 2d 1018, 1023 (N.D. Cal. 2008) ("Because the government search was more extensive than the private search and disclosed information about the films about which 'one could only draw inferences,' the Court held that the search violated the Fourth Amendment." (quoting *Walter*, 447 U.S. at 657)).

214. *Walter*, 447 U.S. at 657 n.9 (plurality opinion).

215. *Id.* (emphasis added).

> Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search.[216]

Stevens's reference to "some circumstances" in which government re-examination is constitutionally permissible necessarily implies the possibility of other circumstances in which it is not. Such a possibility is incompatible with the exposure paradigm used to support the private-search doctrine. Equally incompatible is Stevens's citation to the *plain-view exception* as the characteristic example of a circumstance in which further inspection of privately proffered evidence is justified. At the risk of belaboring the point, if Stevens's reference to "the scope of the private search" was intended to announce that the government may replicate all that the private party had done, as most courts and commentators have claimed, Stevens would not have needed to reach for a separate Fourth Amendment exception, such as plain view, to explain that government reexamination of previously searched materials is justified (and even then only sometimes).

Nor did other members of the *Walter* Court clearly endorse a bright-line rule along the lines of what would eventually become the private-search doctrine. Justice Marshall concurred without comment,[217] and Justice White explicitly disclaimed such a rule.[218] In fact, Justice White wrote separately precisely to distance himself from "[t]he notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope."[219] As for the four dissenters, Justice Blackman's opinion primarily reasoned that the films were no longer private not because of anything that the L'Eggs employees had done, but because the films' packaging—which, he reminded, was already exposed to the FBI upon their arrival—"clearly revealed the nature of their contents."[220] According to

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216. *Id.* at 657.

217. *Id.* at 660 (Marshall, J., concurring).

218. *Id.* at 660 (White, J., concurring) ("I write separately, however, because I disagree with Mr. Justice Stevens' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government.").

219. *Id.*

220. *Id.* at 663 (Blackmun, J., dissenting) (contending that Justice Stevens's "opinion seems conveniently to have overlooked the fact that the FBI received the film cartons *after* they had been opened, and *after* the films' labels had been exposed to the public").

Blackmun, this left the films with no more privacy protection than if the federal agents had arrived to find an exposed gun case.[221]

The dissent's invocation of the hypothetical gun case from *Arkansas v. Sanders* should not be minimized. All four dissenters would later join Justice Stevens's majority in *Jacobsen*.[222] This gives further credence to the idea that the single-purpose container exception—couched in Justice Stevens's unique "virtual certainty" formulation—did the doctrinal heavy lifting in that case, just as the dissent would have allowed it to justify the government's invasion of a closed container in *Walter*. Effectively, the *Walter* dissenters concluded that the federal agents were permitted to screen the films because they were already virtually certain of the contents.[223]

So why did Justice Stevens reference "the scope of the private search" in *Walter* at all?[224] The answer, it seems, is that Stevens was rebuking the government lawyers' contention "that the limited private search justified an unlimited official search."[225] In its brief to the Court, the government had argued that the FBI agents should be unconstrained in examining evidence turned over by private parties.[226] Stevens

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221. *Id.* at 665 (Blackmun, J., dissenting). Blackman painted this disagreement with Stevens as a matter of timing the privacy inquiry. *See id.* (Blackmun, J., dissenting) ("The opinion fails to explain, at least to my satisfaction, why petitioners' subjective expectation of privacy at the time they shipped the films, rather than at the time the films came into possession of the FBI (with the resulting protection of constitutional safeguards from unreasonable governmental action), controls this inquiry."). In fact, the two opinions are rather easily reconciled. Stevens cited the defendants' packaging of the films in an inconspicuous container as evidence of their *subjective* expectation of privacy but disagreed with the dissenters that the exposed film boxes sufficed to render the contents of the films obvious. *See id.* at 657–59, 659 & n.12 (plurality opinion). The dissent argued that, *because* the labels rendered the contents of the films obvious, any subjective expectation of privacy was *unreasonable* by the time the government projected the films. *See id.* at 665 (Blackmun, J., dissenting).

222. *Compare id.* at 662 (Blackmun, J., dissenting), *with United States v. Jacobsen*, 466 U.S. 109, 110 (1984).

223. *See Walter*, 447 U.S. at 664 n.1 (Blackmun, J., dissenting) ("When the FBI screened these films, they already were aware of the nature of their contents."). As an alternative ground for their conclusion, the dissent also argued that Walter's expectation of privacy was not reasonable because his use of fictitious names and a common carrier made it likely that the films would be exposed to an unintended party. *Id.* at 664–65.

224. *Id.* at 657 (plurality opinion).

225. *Id.* at 656 (plurality opinion).

226. *See* Brief for the United States at 39 n.25, *Walter v. United States*, 447 U.S. 649 (1980) (Nos. 79-67, 79-148) (arguing that "even if the screening of the films following that transfer did intrude upon petitioners' legitimate expectations of privacy, the use of the films as evidence at trial was not the 'fruit' of that impropriety" because the transfer of the films to the government was lawful).

declared that such an argument "must fail."[227] He did so by analogy to properly issued warrants in order to reaffirm that "any official *use* of a private party's invasion of another person's privacy" must be strictly limited by the particular terms of its authorization.[228] The choice of analogy is characteristic of Stevens. In a prior decision, he had written of the inherent danger "that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will."[229] In *Walter*, Stevens again emphasized that the Fourth Amendment operates precisely to restrain the evils of indiscriminate rummaging.[230]

2. An Information-Transmission Paradigm

Even if I am correct that Justice Stevens's plurality opinion in *Walter* invoked the scope of the private search as a reminder that governmental action requires justification, not as a proclamation of a new form of justification, it cannot be denied that Stevens twice stated in *Jacobsen* that scope is the "test" by which governmental action following a private search must be measured.[231] Any fair interpretation of *Jacobsen* must account for that fact. So what could Stevens have meant?

To begin, consider what Justice Stevens could not have meant. It now seems implausible that Stevens was declaring that the government may freely replicate a prior private search. First of all, doing so would have been incompatible with his repeated invocation of the single-purpose container exception (i.e. "virtual certainty"). Secondly, Stevens effectively said as much in his opinion.[232] Justice White's concurrence pressed the *Jacobsen* majority on its rationale, fearing that it might eventually permit police to "break[] into a locked suitcase, a locked car, or even a locked house" whenever a prior "private search vitiated the owner's expectation of privacy."[233] In a direct response to Justice White, Justice Stevens was adamant that the Constitution would not allow police to "simply learn from a private party that a container contains contraband, seize it from its owner, and conduct a warrantless search."[234] Instead, he affirmed the longstanding principle that "[a]

227. *Walter*, 447 U.S. at 656 (plurality opinion).
228. *Id.* at 657 (emphasis added).
229. *Texas v. Brown*, 460 U.S. 730, 748–49 (1983) (Stevens, J., dissenting).
230. *Walter*, 447 U.S. at 656–57 (plurality opinion).
231. *United States v. Jacobsen*, 466 U.S. 109, 115–16 (1984).
232. *See id.* at 120 n.17.
233. *Id.* at 132 (White, J., concurring).
234. *Id.* at 120 n.17 (majority opinion).

container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."[235]

How can one square these seemingly contradictory commitments? A close analysis of Justice Stevens's *Jacobsen* opinion reveals some additional interpretive gloss that may provide the crucial clue. In the opinion, Stevens equated the government's ability to benefit from private searches with its ability to rely on privately volunteered information more generally.[236] He explained that the scope limitation he announced in *Walter* "follows from the analysis applicable when private parties reveal other kinds of private information to the authorities."[237] He elaborated on this relationship by emphasizing the transmission of information from private parties to the government:

> It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information . . . .[238]

The parallel structure of these two sentences is key. Both purport to describe the same circumstance, one in which the Fourth Amendment does not prohibit the governmental use of specific information. But rather than set the threshold at the point where "an individual reveals private information to another," Stevens focuses on the moment when the recipient reveals that information to the authorities. The second sentence reinscribes that scenario under the heading "frustration of the original expectation of privacy," adding that the information in the government's possession is "now nonprivate."

Stevens thus portrays privacy's demise as occurring when information is communicated to the government, rather than when it is exposed to third parties. (In the typical private-search case, it just so happens that the information is revealed to the government *by* third parties.) If the parallel structure of that analysis is intentional, it reveals an important insight about the role that information transmission plays in the *Jacobsen* Court's assessment of Fourth Amendment privacy. The government's ability to benefit from a prior private search turns on the

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235. *Id.*
236. *Id.* at 116–17
237. *Id.* at 117.
238. *Id.*

extent to which information about the search was actually transmitted to the authorities.

This interpretation is bolstered by Stevens's emphasis on information transmission in another of the arguments he advanced in declaring the government's conduct a non-search. Stevens explained that the government could already "utilize the Federal Express employees' testimony concerning the contents of the package," so further inspection of the container would not produce new information.[239] The officers could not learn more than they "already had been told."[240] As a point of comparison, Stevens made a point in his *Walter* opinion of emphasizing that "the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. . . . Further investigation—that is to say, a search of the contents of the films—was necessary in order to obtain the evidence which was to be used at trial."[241]

If I am right in this observation, the "scope" of the private search in *Jacobsen* was not so much a question of what the Federal Express employees had done, but of what they were willing to communicate to the government about what they had done. Against this backdrop, Stevens's requirement of "virtual certainty" takes on renewed importance. For one thing, it underscores the Court's tying of Fourth Amendment privacy to the *government's* possession of information. The DEA agent was constitutionally permitted to open the package only once *he* was sufficiently certain of the contents (the private searchers' certainty, we might note, played no role in the Court's analysis). At that point—and not before—the contents of the package were rendered no longer private. For another thing, Stevens's requiring virtual certainty suggests that the relevance of information to privacy may be asymmetrical. As Stevens explained, mere information about the contents of a closed container will ordinarily not suffice to permit a government search (even if that information is entirely correct), because the risk of exposing additional, new information to the government makes the conduct constitutionally impermissible.[242] Only once that risk has been (virtually) extinguished are the privacy interests protected by the Fourth Amendment likewise extinguished.

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239. *Id.* at 119.

240. *See id.*

241. *Walter v. United States*, 447 U.S. 649, 654 (1980) (plurality opinion).

242. *See Jacobsen*, 466 U.S. at 120 n.17 ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."). Justice Stevens's more recent contributions to search-and-seizure jurisprudence have emphasized both contraband's nonprivate nature and the Fourth Amendment's concern with exposing "information about perfectly lawful activity." *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

In recent years, many scholars have attempted to distance the Fourth Amendment from notions of informational privacy.[243] Indeed, some have argued that thinking about privacy as the control over information may be affirmatively detrimental to the security ostensibly afforded by the Fourth Amendment.[244] However, these arguments have largely aimed at resisting any claim that informational privacy is the primary or exclusive social value that the Fourth Amendment exists to protect.[245] David Sklansky, for example, has written extensively and eloquently on why criminal procedure scholars should be careful to avoid reducing all Fourth Amendment privacy to data flows, as doing so fails to capture the harm in particularly problematic privacy invasions.[246] "An information-based theory of privacy," he warns, is "of little use in understanding the hazards, beyond injured sensibilities, of aggressive stop-and-frisk police tactics, or of traffic stops and vehicle searches that uncover nothing of interest."[247]

Jacobsen, by contrast, suggests that informational privacy may be useful in a different way—not in defining the invasion experienced by citizens, but in measuring (undoubtedly one measure among many) when governmental action triggers the Fourth Amendment's strictures. If governmental action reveals new information (about which the owner had a reasonable expectation of privacy), then a search has presumptively occurred.[248] These insights also dovetail nicely with the

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243. *See, e.g.*, Sklansky, *supra* note 151, at 1074 ("Fourth Amendment law is overloaded with information: not just in the sense that the explosive growth of digitized information requires rethinking traditional rules of search and seizure, but also in the sense—and this is what I want to stress—that a preoccupation with data flows has led to the neglect of some important dimensions of privacy.").

244. *See* Rubenfeld, *supra* note 138, at 118 ("So long as Fourth Amendment privacy is parasitical on private-sphere privacy, the former must die as its host dies, and this host is undoubtedly faltering today in the networked, monitored and digitized world we are learning to call our own.").

245. *See id.* at 117 (arguing that the Fourth Amendment's purpose is understood "increasingly in terms of values that, instead of speaking to the distinctive dangers of state surveillance and detention, speak rather to an individual's comfort, dignity, tranquility, respectability, and fear of embarrassment").

246. *See* Sklansky, *supra* note 151, at 1102–06.

247. *Id.* at 1105. *But cf.* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1022 (1995) (arguing that the centerpiece of search law "flows out of the interest in keeping secrets, not out of the interest in being free from unreasonable police coercion or from other kinds of dignity harms that search targets may suffer").

248. Skeptical readers may fear the conceptual slicing necessary to distinguish governmental action from inaction. However, the plain-view doctrine already incorporates a similar distinction between government action and police simply failing to "avert their eyes." *See Coolidge v. New Hampshire*, 403 U.S. 443, 471, 489 (1971). Nor do I see any reason that such slicing would be conceptually more difficult than the

Supreme Court's more traditional plain-view jurisprudence. In *Arizona v. Hicks*,[249] for instance, a canonical plain-view case, the Supreme Court upheld the exclusion of evidence that was only obtainable once a police officer moved an item of stereo equipment to reveal its serial numbers.[250] The court succinctly explained why the officer's conduct amounted to a search: "[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of . . . privacy . . . ."[251]

In *Jacobsen*, no search occurred because the agents already possessed all the available information. No matter what steps the federal agents took with the package, the bag of white powder, the tube, or the newspaper, there was nothing new to be learned.[252] The government stayed within the "scope" of the private search because they did not—indeed could not—obtain information beyond what was voluntarily transmitted to them by the private searchers. (And the private searcher's revelation of information, it should be noted, was not subject to the Fourth Amendment because it was private action.)[253] In *Walter*, by contrast, a search occurred when government agents took an action—screening the films—that revealed to them information they previously lacked.[254] As Justice Stevens later described it in *Jacobsen*, "if the authorities use information with respect to which the expectation of privacy has not already been frustrated," then they "have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant."[255]

Some may say that these are two sides of the same coin—that, by regulating police access to information, the Fourth Amendment protects individuals from the harm of having their information known by others. But there is more to this story. By regulating police access to information, the Fourth Amendment limits police tactics used to obtain that information. It therefore restricts embodied police from moving through the world in particular ways, including ways that are

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current doctrinal division between government action and private action under the private-search doctrine. *See supra* Section I.C.

249. 480 U.S. 321 (1987).

250. *Id.* at 323–24, 329.

251. *Id.* at 325.

252. *United States v. Jacobsen*, 466 U.S. 109, 118 (1984) ("When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder.").

253. *Id.* at 115.

254. *Walter v. United States*, 447 U.S. 649, 654 (1980) (plurality opinion) (explaining that viewing the films "was necessary in order to obtain the evidence which was to be used at trial").

255. *Jacobsen*, 466 U.S. at 117–18.

potentially violent or coercive. This may very well serve to protect citizens' dignitary or property interests without requiring police in the field to make judgment calls about the burdens their conduct places on those interests when they merely seek information. Furthermore, the value of information to the government is not simply the inverse of the invasion experienced by the citizen. Information is the currency of the criminal justice system.[256] The government uses information to learn whether a crime has occurred, to convince judges and jurors of the same, to prove that a particular defendant is responsible, and to explain why certain punishment is required. The focus on information as a measure of whether the Fourth Amendment is implicated thus limits governmental efforts to access its weapon of choice to particular authorizations, irrespective of whether the information holders mourn the loss of their informational privacy.

III. IMPLICATIONS

According to critics, the Fourth Amendment is in crisis.[257] In the nearly half-century since *Katz*, we have yet to reach consensus on what privacy even is, let alone why it may be worth protecting.[258] The Fourth Amendment's protection of privacy is riddled with exceptions, despite the Supreme Court's insistence that exceptions should be few and well-delineated.[259] Worse, the exceptions are viewed as unconnected and incoherent, leaving Fourth Amendment jurisprudence

256. *See* Stuntz, *supra* note 247, at 1030.

257. *See, e.g.*, Sklansky, *supra* note 151, at 1071 (explaining that the Fourth Amendment currently faces more "doctrinal disarray . . .than at any time since the 1960s"); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1311 (2012) ("If we continue to interpret the Fourth Amendment as we always have, we will find ourselves not only in a surveillance society, but also in a surveillance state."); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1521 (2010) (advocating for the abandonment of the "doomed" reasonable expectation of privacy test).

258. *See* Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 286 (Ferdinand David Schoeman ed., 1984).

259. *Compare* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 170 (2008) (identifying "some twenty exceptions including searches incident to arrest, automobile searches, stop and frisk searches, plain view searches, consent searches, border searches, administrative searches of regulated businesses, exigent circumstances, welfare searches, inventory searches, airport searches, school searches, searches of mobile homes, and searches of offices of public employees"), *with Katz v. United States*, 389 U.S. 347, 357 (1967).

a minefield for the uninitiated.[260] It may well be that "privacy" is simply a misleading shorthand for a collection of various principles that perform the real doctrinal work.[261]

As the exceptions expand, criminal procedure scholars increasingly struggle to reconcile the liberal promise of *Katz* with the ubiquity of government surveillance.[262] Many have given up the fight altogether, contending that privacy may simply be the wrong manifestation of the security guaranteed to the people by the Constitution.[263] Others argue that privacy is indeed worth protecting, but that the courts' myopic approach has left the Fourth Amendment powerless to do so.[264] Still others level blame at the "reasonable expectation of privacy" test, a circular notion that offers courts unfettered discretion to define the shape and scope of a fundamental constitutional right.[265] Whatever their

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260. *See, e.g.*, Nita A. Farahany, *Searching Secrets*, 160 U. PENN. L. REV. 1239, 1241–42 (2012) ("Scholars have resigned themselves to believing that Supreme Court Fourth Amendment doctrine is incoherent, with little sense to be made of recent cases."); Milligan, *supra* note 115, at 4 (suggesting that Supreme Court Justices "evaluate each 'search' issue without regard for coherence across the spectrum of 'search' issues").

261. *See, e.g.*, Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506 (2007) ("Although the courts speak of a single 'reasonable expectation of privacy' test, the one label masks several distinct but coexisting approaches."); Milligan, *supra* note 115, at 29–46 (describing various privacy "atoms" that explain the Supreme Court's Fourth Amendment jurisprudence).

262. *See, e.g.*, Jonathan Simon, Katz *at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 959 (2008) ("Commentators have long appreciated that something potentially revolutionary to at least Fourth Amendment jurisprudence was embedded in *Katz* but had failed to develop."); Swire, *supra* note 117, at 931 ("*Katz* has already had two lives. The first was as the protector of privacy envisioned by Justice Brennan and celebrated in the 'reasonable expectation of privacy' test. The second has been as an invader of privacy.").

263. *See, e.g.*, Sklansky, *supra* note 151, at 1073 ("Academics, along with popular writers, have questioned whether there is any real content to the concept of privacy, whether there is any hope of preserving privacy in the modern world, and whether the loss of privacy is truly worth mourning."). *See generally* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 15–19 (2009) (arguing that the Fourth Amendment protects liberty); Rubenfeld, *supra* note 138, at 104–05 (arguing that the Fourth Amendment is better understood as protecting a personal life); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759–60 (1994) (offering an interpretation of the Fourth Amendment designed to further truth-seeking); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 447 (1995) (suggesting that Fourth Amendment jurisprudence was not intended to protect privacy, but rather to reduce prosecutions of substantively contentious crimes).

264. *See* Solove, *supra* note 257, at 1519 (explaining that "countless commentators" have found the Court's conception of privacy to be "totally out of touch with society").

265. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (observing that "reasonable expectations of privacy" have turned out to be

arguments, a growing contingent of commentators are now convinced that Fourth Amendment privacy has outlived its usefulness.

A correct reading of the Supreme Court's private-search cases cast some doubt upon these fatal prognoses. The so-called "private-search doctrine" turns out not to be the broad, standalone doctrine once feared. In fact, there is no private-search doctrine. *Walter* and *Jacobsen* were resolved by reference to extant plain-view principles—principles that, it turns out, span several ostensibly disparate Fourth Amendment "doctrines."[266] Justice Stevens's opinions in these cases demonstrate why it is may be unwise to so easily give up on the virtue of coherence across Fourth Amendment jurisprudence.

In addition, tracing the plain-view foundations of the private-search cases revealed several important insights into the nature of Fourth Amendment privacy. As the private-search cases demonstrate, the exposure of information to third-parties does not automatically destroy privacy. Rather, it is transmission of information to the authorities that potentially does. What the Fourth Amendment confers is, in the famous words of Justice Louis Brandeis, "*as against the Government*, the right to be let alone."[267] Dispensing with the private-search doctrine brings hope for the possibility of some much-needed Fourth Amendment coherence. If *Walter* and *Jacobsen* reveal that a search requires both governmental action and the revelation of private information, perhaps more of our non-search exceptions are just alternative dimensions of this singular inquiry. The Sections that follow extend this intuition, collapsing *Walter* and *Jacobsen* into related doctrines to explore the advantages and implications of recognizing the plain-view principles of the private-search cases more broadly.

A. Single-Purpose Containers

Understanding private-search cases, such as *Walter* and *Jacobsen*, as instances of the single-purpose container exception may resolve a

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just "those expectations of privacy that this Court considers reasonable"); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, & Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 488 (2013) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)) ("[T]he Fourth Amendment threshold 'reasonable expectation of privacy' test has been roundly criticized as insufficiently adapted to a world in which our experience of privacy comes packaged in unconventional ways—whether through the settings of a Facebook feed, the anonymity of an urban landscape, or even the mechanical sophistication of scientific diagnostic tools.").

266. *Cf.* Stuntz, *supra* note 247, at 1022 (explaining that plain view is, in many ways, the centerpiece of search law).

267. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

second, longstanding circuit split regarding single-purpose containers. As detailed above, the single-purpose container exception applies whenever a "container is such that its contents may be said to be in plain view."[268] In such case, a plain-view seizure is justified and opening the container will not effect a search because the information thereby revealed was already known.[269] For decades, lower federal courts have disagreed about whether this exception should turn solely on the characteristics of the container or whether information extrinsic to the container—in particular, the training and experience of the searching officer—may also be considered.

The Ninth and Tenth Circuits have long held that a single-purpose container must be identifiable as such by an objectively reasonable layperson, without considering extrinsic information.[270] This view is consistent with the seminal language in *Arkansas v. Sanders*,[271] where the Supreme Court first proclaimed that some containers "*by their very nature* cannot support any reasonable expectation of privacy."[272] The Ninth Circuit has further justified its position on both conceptual and pragmatic grounds. Conceptually, Fourth Amendment privacy is commonly said to be a product of "general social norms,"[273] and thus the constitutional protection afforded a given container should likewise be determined from the perspective of the objective society.[274] Pragmatically, the Ninth Circuit feared that the single-purpose container exception would eventually "swallow the warrant

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268. *Robbins v. California*, 453 U.S. 420, 427 (1981), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982). Both *Sanders* and *Robbins* were eventually overruled as the court revised its Fourth Amendment jurisprudence involving searches of automobiles. However, the reasoning behind the single-purpose container exception has persisted. *See generally United States v. Donnes*, 947 F.2d 1430, 1437 (10th Cir. 1991).

269. Of course, "the gun case might turn out to contain something other than a gun," but courts have concluded that such an occurrence does not retroactively transform the government's action into a prohibited search. *United States v. Meada*, 408 F.3d 14, 24 (1st Cir. 2005).

270. *United States v. Gust*, 405 F.3d 797, 803–04 (9th Cir. 2005). *See Donnes*, 947 F.2d at 1438. The Fifth Circuit may have adopted a similar position, though the extent of its reasoning has not been fully articulated. *See United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir. 1988) (holding that a federal agent conducted a search by opening a container whose "contents cannot be *inferred* from simply looking at the box"); *United States v. Villareal*, 963 F.2d 770, 776 (5th Cir. 1992) ("It goes without saying that a defendant can orally inform a police officer what is in a container, yet stand on his rights and refuse to allow the officer to search that container.").

271. 442 U.S. 753 (1979).

272. *Id.* at 764 n.13 (emphasis added), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

273. *See Robbins*, 453 U.S. at 428.

274. *See United States v. Miller*, 769 F.2d 554, 560 (9th Cir. 1985).

requirement" if courts were permitted to consider extrinsic information, such an officer's subjective knowledge or the circumstances attending the search.[275] The Tenth Circuit has made similar pragmatic arguments, expressing concern that the single-purpose container exception would expand to sanction the "warrantless search of any container found in the vicinity of a suspicious item."[276]

By contrast, the Fourth and Seventh Circuits have suggested that a single-purpose container should be identified from the viewpoint of the searching officer, taking into consideration all available facts and circumstances.[277] Citing the Supreme Court's references, in the context of plain-view seizures, to the value of "the trained eye of the officer,"[278] the Fourth Circuit has held that "the circumstances under which an officer finds the container may add to the apparent nature of its contents."[279] Those circumstances include the training and experience of the searching officer.[280] The Seventh Circuit, though recently proclaiming that it has not taken a formal position on the issue,[281] has likewise stated in dicta that the single-purpose container inquiry involves assessing "the shape or other characteristics of the container, taken together with the circumstances in which it is seized (from a suspected drug dealer, or a harmless old lady?)."[282]

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275. *See Gust*, 405 F.3d at 802 (suggesting that warrantless searches would be upheld "based solely on probable cause derived from the officers' subjective knowledge and the circumstances"). It is unclear why the *Gust* Court believed the relevant standard to be "probable cause" rather than a certainty equivalent to the plain view of the contents, as explained by Justice Stevens in *Texas v. Brown*. *See* 460 U.S. 740, 751 (1983) (Stevens, J., concurring).

276. *Donnes*, 947 F.2d at 1348; *see also United States v. Bonitz*, 826 F.2d 954, 958 (10th Cir. 1987) (citing the Fourth Amendment's intended purpose to prevent against "the inherent temptations and persistent dangers of abuse").

277. *United States v. Davis*, 690 F.3d 226, 233–39 (4th Cir. 2012); *United States v. Cardona-Rivera*, 904 F.2d 1149, 1155 (7th Cir. 1990).

278. *Brown*, 460 U.S. at 743. In a concurrence, Justice Powell underscored the value of "training and experience" to an officer's ability "to draw inferences and make deductions that might well elude an untrained person." *Id.* at 746 (Powell, J., concurring).

279. *United States v. Williams*, 41 F.3d 192, 196–97 (4th Cir. 1994) (upholding the search of two packages in a mostly empty suitcase that were wrapped in brown paper and cellophane).

280. *Id.* at 197–98 (citing the officer's ten years of narcotics experience); *Davis*, 690 F.3d at 235 (noting that the doctrine "quite plainly allows the experience of the officer to be taken into account when determining whether a container's contents are a 'foregone conclusion.'" (quoting *Williams*, 41 F.3d at 198)).

281. *United States v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008).

282. *Cardona-Rivera*, 904 F.2d at 1155; *see also id.* at 1156 (stating that, once the defendant "admitted that his package contained a contraband substance, no lawful interest of his could be invaded by the officers' opening the packages"); *cf. Robbins v. California*, 453 U.S. 420, 442 (1981) (Rehnquist, J., dissenting)

The few academic commentators to have addressed this split largely invoke balancing tests[283] or recite policy arguments[284] to justify favoring one approach over another. Such analyses miss that, when taking a broader view of the plain-view principles at play, the Supreme Court has already spoken.[285] Recasting private-search cases, like *Walter* and *Jacobsen*,[286] and controlled-delivery cases, like *Illinois v. Andreas*,[287] as instances of single-purpose container exception vindicates the approach taken by the Fourth and Seventh Circuits. This is so because neither *Andreas* nor *Jacobsen* involved a package whose contents were obvious from a superficial analysis of the container itself.[288] Yet the Court held that both containers could be opened and inspected without triggering the Fourth Amendment due to certainty about the contents that was tantamount to plain view.[289] The result in each case was due almost exclusively to extrinsic information that the

(concluding that the single-purpose container rule applied to blocks of marijuana wrapped in opaque plastic garbage bags found in the trunk of a car in light of the totality of the circumstances: that "marihuana and other drug paraphernalia" had been found in the front of the car; that the driver of the car had admitted, "What you are looking for is in the back"; and that one of the officers testified that "he was aware that contraband was often wrapped in this fashion—a fact of which all those who watch the evening news are surely well aware").

283. *See* Allison M. Lucier, *You Can Judge a Container by Its Cover: The Single-Purpose Container Exception and the Fourth Amendment,* 76 U. CHI. L. REV. 1809, 1824 (2009) ("[T]he best interpretation of the single-purpose container exception should balance the degree to which the search intrudes upon an individual's privacy interests with the degree to which the search is needed for the promotion of legitimate governmental interests.").

284. *See* Daniel Kegl, *The Single-Purpose Container Exception: A Logical Extension of the Plain-View Doctrine Made Unworkable by Inconsistent Application*, 30 N. ILL. U. L. REV. 237, 251 (2009) ("[T]he approach taken by the First, Fifth, Ninth, and Tenth Circuits is preferable because it limits the scope of the exception by allowing fewer containers to qualify and also limits the amount of deference afforded to policy officers.").

285. *See, e.g.*, *See* Lucier, *supra* note 283, at 1824 ("The origin of the single-purpose container exception—a footnote in *Sanders*—provides little guidance as to its application. It does not indicate from whose viewpoint single-purpose container determinations should be made, nor does it say anything about the surrounding circumstances."); Kegl, *supra* note 284, at 256 ("As a general matter, the circuit split turns on the interpretation of *Robbins* [*v. California*].").

286. *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Jacobsen*, 466 U.S. 109 (1984).

287. *Illinois v. Andreas*, 463 U.S. 765 (1983).

288. *See id.* at 767 (describing the container as "[a] large, locked metal container"); *Jacobsen*, 466 U.S. at 111 ("The container was an ordinary cardboard box wrapped in brown paper.").

289. *Andreas*, 463 U.S. at 773*; Jacobsen*, 466 U.S. at 120 & n.17.

searching officers previously acquired and the particular circumstances attending the government seizure and inspection.[290]

This result is also sensible. While the Ninth Circuit's invocation of "general social norms" is an appropriate yardstick for measuring whether a defendant reasonably expected privacy (for example by exhibiting an intention to keep certain objects, activities, or statements private),[291] a subjective expectation of privacy, no matter how reasonable at the outset, can be frustrated by actions outside of a defendant's control.[292] For instance, if the contents of a container are removed and placed in the plain view of police, the original privacy interests are simply lost. For the same reason, privacy is lost when government agents obtain information that provides them with certainty about the contents of an erstwhile private container.[293]

Meanwhile, the Ninth Circuit's pragmatic concerns should be allayed if courts take seriously the idea that, as the Supreme Court itself indicated,[294] *Walter* presented a hard case. The central disagreement between the plurality and the dissenters in *Walter* was whether the "explicit" descriptions on a film's packaging provide the requisite

290. *Andreas*, 463 U.S. at 771–72 ("[O]nce a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost."); *id*. at 773 (reasoning that a brief interruption in surveillance was not sufficient to undermine the officer's confidence in the contents of the container); *Jacobsen*, 466 U.S. at 119–21 & n.17 (citing the information the agent "already had been told," the employees' "lawful possession of the package," the fact that the package "remained unsealed," and the fact that "the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents").

291. *Cf. Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.").

292. *See Walter v. United States*, 447 U.S. 649, 656 (1980) (plurality opinion) (citation omitted) ("It has, of course, been settled since *Burdeau v. McDowell* that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully.").

293. *See Jacobsen*, 466 U.S. at 115 ("The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred."); *id*. at 118 ("When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder.").

294. *See Walter*. 447 U.S. at 666 (Blackmun, J., dissenting) ("[T]he cases are strange and particular ones. The margin for reversal is narrow, and I rest assured that sound constitutional precepts will survive the result the Court reaches today.").

certainty in its contents.[295] Unlike the paradigmatic gun case, which may have more than its labels to speak to its character (including, typically, a distinctive shape and composition),[296] the film boxes in *Walter* did not sufficiently betray their contents, according to numerous members of the Court.[297] Extending this reasoning to even more ambiguous containers—including, commonly, computers—should require greater confidence in the veracity of the private searcher and clear contextual evidence to corroborate the private party's claims.[298]

B. The Third-Party Doctrine

Understanding the operation of privacy in private searches may also have implications for the continued vitality of the so-called third-party doctrine. The third-party doctrine generally holds that a person has "no legitimate expectation of privacy in"—and therefore no Fourth Amendment protection of—"information he voluntarily turns over to third parties."[299] (Note how this differs from the private-search doctrine, which involves the *involuntary* disclosure of information through an unexpected search.)[300] In recent years, the third-party doctrine has been one of the most heavily debated areas of criminal procedure. Among scholars, the doctrine is heavily criticized.[301] Amidst this criticism, some members of the Supreme Court have intimated that the doctrine may need to be reconsidered.[302] Last Term, while claiming

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295. *Compare id.* at 652 (plurality opinion), *with id.* at 663 (Blackmun, J., dissenting).

296. *But see United States v. Banks*, 514 F.3d 769, 775 (8th Cir. 2008) (reasoning that a case labeled "Phoenix Arms" is "obviously a gun case"); *United States v. Meada*, 408 F.3d 14, 23 (1st Cir. 2005) (upholding the search of a case labeled "Gun Guard").

297. *See Walter*, 447 U.S. at 654 (plurality opinion); *id.* at 661–62 (White, J., concurring).

298. *Cf. United States v. D'Andrea*, 648 F.3d 1, 9–10 (1st Cir. 2011) (remanding for an evidentiary hearing regarding the government's certainty where anonymous tipster reported child pornography in cloud-based data storage account but may have been unable to provide a password to the account). In the interest of disclosure, I was a law clerk on the United States Court of Appeals for the First Circuit during the *D'Andrea* appeal.

299. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

300. *See United States v. Jacobsen*, 466 U.S. 109, 115 (1984).

301. *E.g.*, Thai, *supra* note 145, at 1735–36 (characterizing the third-party doctrine as containing a "Lochnerian assumption that we consciously and freely cede our privacy in personal data conveyed to others in the necessary course of life in our information society"); Kerr, *supra* note 17, at 563 (describing it as "the Fourth Amendment rule scholars love to hate.").

302. *See United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("More fundamentally, it may be necessary to reconsider the premise that

to not disturb its prior precedents, the Court held that the third-party doctrine may be inapplicable to certain categories of information.[303]

This Section explores whether the plain-view principles at work in *Walter* and *Jacobsen* have implications for the third-party doctrine. Orin Kerr, one of the few defenders of the third-party doctrine, suggests that all of the above cases reduce to a simple rule: "By disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed."[304] So stated, the rule echoes the same post-*Katz* exposure paradigm that justified the private-search doctrine (perhaps the reason many scholars have treated the doctrines as relatives). At its core, however, the third-party doctrine is less a singular doctrine and more a series of conclusions about Fourth Amendment privacy in third-party contexts that share a family resemblance.[305] Three types of cases are typical.

First, the Supreme Court has held that a defendant has no cognizable privacy interest when a third party provides information in response to a government request. The Court had long allowed the government to use privately volunteered evidence on the rationale that the Fourth Amendment does not reach private action.[306] In the early 1970s, the Court upheld its private-action jurisprudence against claims grounded in the newfound language of privacy. In *Coolidge v. New Hampshire*,[307] the Court concluded that police did not conduct a Fourth Amendment search by requesting guns and clothing from an incarcerated suspect's wife.[308] Rejecting arguments that the request had effectively transformed the wife into an instrument of the state, merely facilitating the government's violation of privacy, the *Coolidge* Court emphasized that the wife believed she would exonerate her husband.[309] To characterize her compliance as an intrusion upon privacy, the Court

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an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

303. *See Carpenter v. United States*, 138 S. Ct. 2206, 2216–17 (2018) (describing cell-cite location information as a "qualitatively different category" of record); *id.* at 2219 (explaining that cell-cite location information is "a distinct category of information" that would require "a significant extension" of the third-party doctrine); *id.* at 2222 ("At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers.").

304. Kerr, *supra* note 17, at 563.

305. *Cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66 (G.E.M. Anscombe trans., 3d ed. 1968).

306. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

307. 403 U.S. 443 (1971).

308. *Id.* at 488–89.

309. *Id.* at 489–90.

announced, "would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good faith effort by his wife to clear him of suspicion."[310] It is now well settled that, when "third parties *agree* to turn over our information to the authorities, the Constitution poses no impediment whatsoever, at least under current understanding of U.S. Supreme Court precedent."[311]

Second, the Supreme Court has held that no Fourth Amendment search occurs when a criminal suspect directly provides information to undercover government agents. Historically, challenges to the use of undercover agents were rejected by the Supreme Court on a consequentialist ground—that prohibiting undercover agents would severely hamper government investigations.[312] However, the Court eventually couched the same result in the rhetoric of privacy, concluding that a suspect cannot justifiably expect privacy in communications transmitted directly to an agent of the government.[313] Reasoning that the Fourth Amendment condones the frustration of privacy when a disloyal associate turns to the police, the Supreme Court in *United States v. White*[314] held that the privacy analysis is no different when the associate turns out to be a government agent wearing a wire.[315]

Third, the Court has upheld the compelled collection and production of information—typically business records—directly from third parties. In *United States v. Miller*,[316] the defendant challenged the constitutionality of government-issued subpoenas that were used to obtain the defendant's banking records.[317] In upholding such practices, the Supreme Court explained that information contained on the defendant's checks was in no way private, since the checks were disclosed to numerous third parties as they made their way through the banking system.[318] Shortly thereafter, in *Smith v. Maryland*,[319] the Court similarly ruled that a defendant had no privacy interest in phone records, since the numbers dialed are necessarily disclosed to phone

310. *Id.*
311. Thai, *supra* note 145, at 1732 (emphasis added).
312. *See Lewis v. United States*, 385 U.S. 206, 210 (1966).
313. *United States v. White*, 401 U.S. 745, 752 (1971).
314. *Id.*
315. *Id.* at 752–53.
316 425 U.S. 435 (1976).
317. *Id.* at 442–43.
318. *Id.*
319. 442 U.S. 735 (1979).

company employees for the call to be connected.[320] Lower courts have extended this line of cases to find a lack of privacy in many common commercial records, such as Internet subscriber and search history records.[321]

Interestingly, the first two types of third-party-doctrine cases appear to be justified by the same principles operating in the private-search cases. First, when a private third party volunteers information in response to a simple government request, the constitutional analysis involves a straightforward application of the principles governing private action.[322] What the private-search cases teach us is that losing control over information exposes us to constitutionally significant risks.[323] Once a private search occurs, the private searcher may choose to alert the authorities or not. If information is revealed to the government, the privacy interest in that information is lost. Even where the initial breach of privacy was an unforeseeable private search, the governmental use of information volunteered by a private third party is permissible.[324] The second category of cases, involving undercover government agents, would seem to turn on similar principles. Equating the government agent with any other disloyal accomplice, as the Supreme Court has done, may appear to muddy the distinction between governmental and private conduct. But, unless the agent coerced or compelled the transmission of information,[325] the loss of privacy was the result of private choices (by the defendant) in disclosing information, rather than government action.

What is abundantly clear, however, is that a similar logic does not suffice to justify the third-party doctrine cases involving the government-compelled provision of information. If we focus, as *Jacobsen* appears to instruct, on the relationship between governmental action and information transmission, it is hard to see how the compulsory provision of information in response to a government subpoena can be viewed as anything short of a Fourth Amendment search. To underscore the point, we can readily view third parties

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320. *Id.* at 744–46. Oddly, the majority reasoned that the voluntary exposure rationale was justified even though the "the telephone company has decided to automate" the actual connection process. *Id.* at 745.

321. *See In re Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *United States v. D'Andrea*, 497 F. Supp. 2d 117, 120 (D. Mass. 2007).

322. *See Coolidge v. New Hampshire*, 403 U.S. 443, 488–90 (1971).

323. *Cf.* Stuntz, *supra* note 247, at 1016. Along these lines, we might think of the Fifth Amendment's privilege against self-incrimination as a constitutional right to control one's own dissemination of information.

324. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

325. Individual questions of coercion would need to be resolved on their specific facts, and this brief aside offers neither the space nor the opportunity for full consideration of the principles at play.

complying with government subpoena as agents of the government in the same way that we treat third-parties as governmental agents when replicating a private search at the government's behest.[326] If this line of third-party-doctrine cases is to be justified, it must be on the basis of some additional principle outside of those operating in the private-search context.

Last Term, the Supreme Court announced, for the first time, some limits on the extent of the third-party doctrine's subpoena cases. In *Carpenter v. United States*,[327] the Court held that third-party cell-site location information ("CSLI") is a "distinct category of information" with unique privacy implications, and therefore ordinarily cannot be subpoenaed by the government without a warrant.[328] Superficially, the *Carpenter* decision purports to be a narrow one.[329] It distinguishes CLSI from other third-party records, such as banking records and phone logs, on two grounds. First, the technology's capacity for pervasive tracking—"a detailed chronicle of a person's physical presence compiled every day, every moment, over several years"—infringes more substantially on personal privacy.[330] Second, CLSI is not information that is truly shared "voluntarily," given that cell phones are both indispensable to modern life and generate CLSI automatically, "without any affirmative act on the part of the user beyond powering up."[331]

Note that the first basis on which *Carpenter* distinguishes prior third-party doctrine cases supports the preceding analysis of the private-search doctrine. By finding that the defendant retained a reasonable expectation of privacy in CLSI that had been exposed to a third party (the cellular service providers from whom it was obtained), the *Carpenter* Court rejected a strong version of the exposure paradigm. The Court announced that its prior third-party doctrine precedents "did not rely *solely* on the act of sharing" to find an absence of privacy, but also considered contextual factors about the nature of the information collected.[332] It similarly proclaimed, "[T]he fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."[333]

Meanwhile, the *Carpenter* Court's emphasis on the voluntariness of third-party sharing offers insight into the principle that purports to

326. *See supra* Section I.C.
327. *See Carpenter v. United States*, 138 S. Ct. 2206 (2018).
328. *Id.* at 2219.
329. *Id.* at 2220.
330. *Id.*
331. *Id.*
332. *Id.* at 2219 (emphasis added).
333. *Id.* at 2217.

distinguish the third-party doctrine from private-search cases: assumption of risk. Courts have long rationalized the third-party doctrine by treating individuals as having assumed a risk of disclosure when entrusting information to third parties.[334] Scholars, however, have criticized this assumption-of-risk logic on the ground that providing information to third-parties in our information age is no longer genuinely voluntary.[335] In fact, Justice Sotomayor expressed this same sentiment several years before *Carpenter*, explaining that the rationale "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[336] These criticisms seem to have won the day in *Carpenter*.

If the third-party doctrine only extends to cases where the sharing of information was genuinely voluntary, as *Carpenter* seems to imply, then the basis for finding a diminished expectation of privacy in those cases is not a function of what happened to the information (it was exposed to a third party), but rather is a function of the thoughts and actions of the individual challenging the search (voluntarily conveying information in the face of known risks). Such thoughts and actions are not present in the private search cases, where third parties acquire information surreptitiously (perhaps even illegally).[337] Consequently, the frustration of privacy does not occur in private-search cases until a further step—the transmission of the information to the government.

Professor Kerr, however, has challenged the assumption-of-risk logic of the third-party doctrine on a more fundamental level.[338] He argues that "assumption of risk is a result rather than a rationale: A person must assume a risk only when the Constitution does not protect

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334. *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (quoting *Miller v. United States*, 425 U.S. 435, 442 (1976)) (reasoning that, a defendant who "voluntarily conveyed" information that would be "exposed to . . . employees in the ordinary course of business" took the risk that the information will be conveyed to the government).

335. *See, e.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 156 (2007) (emphasis added) (arguing that "the Court simply defies reality when it says that one *voluntarily* surrenders information to doctors, banks, schools, and phone and Internet providers.").

336. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

337. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) ("Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." (footnote omitted)).

338. Kerr, *supra* note 17, at 564.

it."[339] Again, with respect to the first two types of third-party cases, I think it is natural to think about the outcome as an assumed risk. When we voluntarily share information, we place ourselves at the mercy of those we have ceded control to. Consciously or not, we assume a risk of disloyalty or infidelity. We may trust third parties to protect our information, but we simultaneously have no Fourth Amendment recourse if they elect to broadcast our secrets to the world.

If we extend this thought to the subpoena context, however, Kerr is undoubtedly correct. It would be circular to claim that *the reason* the Fourth Amendment does not prevent the government from obtaining individuals' bank records is that the individuals elected to bank despite the known risk that the government might lawfully subpoena their records.[340] Even if we were to take the additional step of suggesting that defendants have a reduced *ex ante* expectation of privacy in information where there is a risk of disloyalty, it seems to me that the reduction in privacy must track the perceived risk. Allowing the government to constitutionally compel the disclosure of information on the basis of that reduction changes the risk-calculus itself.

It thus becomes hard to reconcile the government's extensive use of its subpoena power with any conception of privacy that can withstand the exposure of information to third parties. In white-collar investigations, prosecutors frequently compel evidence of corporate misconduct from third parties by means of administrative or grand jury subpoenas.[341] Unlike search warrants, subpoenas do not require probable cause.[342] They do not even require reasonable suspicion of the kind that might justify a stop and frisk.[343] "As long as the material asked for is relevant to the . . . investigation and as long as compliance with the subpoena is not too burdensome, the subpoena is enforced."[344] At the federal level alone, thousands of subpoenas are issued each year by agencies such as the Department of Justice.[345] Since these subpoenas are frequently directed to third parties, rather than to the individual targets of government investigations, they are almost entirely

339. *Id.*; *accord* SLOBOGIN, *supra* note 335, at 400 (explaining that "we only assume those risks of unregulated government intrusion that the courts tell us we have to assume").

340. Empirically, it is doubtful that most citizens are aware of such risks, making that logic problematic as an equitable matter as well.

341. Baer, *supra* note 146, at 396. *See generally* SLOBOGIN, *supra* note 335, at 139–67.

342. SLOBOGIN, *supra* note 335, at 140.

343. *See generally Terry v. Ohio*, 392 U.S. 1, 27 (1968) (articulating the "reasonable" suspicion standard).

344. Stuntz, *supra* note 247, at 1038.

345. Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 805 (2005).

unregulated under the current formulation of the third-party doctrine. "Thus, as an investigative tool, subpoenas are probably more important than physical searches of homes, businesses, and effects."[346] Some privacy scholars have been highly critical of this state of affairs[347] while others have defended it as essential to the administrative state.[348]

Kerr, instead, has defended the third-party doctrine because it "ensures roughly the same degree of privacy protection regardless of whether a criminal commits crimes on his own or uses third parties."[349] This is part of his equilibrium-adjustment theory of the Constitution, which advocates for Constitutional doctrine to maintain roughly the balance between criminals and police that existed at the time of the Constitution's adoption. As a descriptive account, Kerr's theory is powerful; to be sure, the *Carpenter* Court was doing a considerable amount of equilibrium adjustment, much of it explicitly. But this, too, implicitly distances the third-party doctrine from the strong version of the exposure paradigm long thought to undergird the private-search doctrine: The *Carpenter* Court was willing to respect a citizen's claim to privacy in information shared with a third-party because to do otherwise would shift too much investigative power to the government.

As a normative account, however, we should further ask whether the equilibrium is in fact correctly struck. There may be reason to doubt that the framers' views on reasonable intrusions should guide our contemporary perspectives, laden as they are with race and class privilege.[350] Kerr has argued that, without a robust third-party doctrine, "[a] criminal could plot and execute his entire crime from home knowing that the police could not send in undercover agents, record the fact of his phone calls, or watch any aspect of his Internet usage without first obtaining a warrant."[351] But, as we have seen, the use of third-parties does entail risks that the criminal must bear. Any private party—not just criminal accomplices, but employees of the suspect's phone company or internet service provider—could choose to volunteer information to the government or to willingly comply with a governmental request for records or evidence. When the government wields its authority over citizens to obtain information that is not

346. *Id.*

347. *See* Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 199 (2014).

348. Stuntz, *supra* note 247, at 1047–48.

349. Kerr, *supra* note 17, at 577.

350. *See* David A. Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 241 (2015) ("Peers and members of Parliament received special protections against search and seizure, while the homes of the poor were freely inspected for vagrants, poached game, and morals violations.").

351. Kerr, *supra* note 17, at 576.

otherwise forthcoming, however, the Constitution does and should demand more rigorous processes. This seems to me a worthwhile balance to preserve an account of the Fourth Amendment that admits of third-party privacy and does not deny the value in shared lives.

Obviously, this is far from the end of the analysis. No one doctrine will provide a complete answer to the fundamental questions of criminal procedure. There are many correct ways of theorizing about what the Constitution guarantees and how those guarantees should be manifested. Before adding yet-another voice into the chorus of scholars railing against the prevailing doctrines, however, it is important to have those doctrines correct. A full understanding of the *Walter* and *Jacobsen* decisions highlights one area where the standard story was wrong. Correctly identifying the plain-view principles at work in the private-search cases has illuminated a number of interesting implications for the Fourth Amendment as it currently stands. Thinking deeply about the operation of privacy in private searches may provide a coherent angle for attacking the question of third-party privacy more generally. If my interpretation of the private-search doctrine is correct, it offers new insights into one doctrinal area—private searches—that may be leveraged to refine others.

CONCLUSION

Little examined, less understood, the private-search doctrine may hold significant insights into Fourth Amendment privacy. But only once we acknowledge that the doctrine does not exist. For nearly four decades, courts and commentators have presumed that a reasonable expectation of privacy cannot survive even the involuntary exposure of information to a third party. That paradigm valorized an individualistic conception of privacy that devalues shared spaces and interpersonal dependency. The presumption, we now know, stems from a pervasive misreading of the only two Supreme Court cases to have touched the issue.

In truth, there is no private-search doctrine precisely because its internal logic entails an untenable, and ultimately self-defeating, conception of privacy. Unearthing the plain-view foundations of *Walter v. United States* and *United States v. Jacobsen* exposes the too-long-neglected dividing line between constitutional conduct following a private search and an unconstitutional warrantless search. These cases stand simply for the ideas that private information remains private until transmitted to the government and that governmental action must hew closely to its just authority.

Moreover, dispensing with the private-search doctrine has advantages beyond private searches. Contention over single-purpose

containers, for example, becomes indefensible once we properly count the packages in *Walter* and *Jacobsen* among their ranks. Extending further, the plain-view concepts at work in the Supreme Court's private-search jurisprudence both provides a new justification for and suggests new limitations on the heavily debated third-party doctrine. Lastly, but no less importantly, correctly interpreting the Supreme Court's private-search jurisprudence offers a new approach to thinking about Fourth Amendment privacy. It is not (or is not *only*) the expression of a protected social interest. It is also a yardstick by which to measure whether governmental action requires constitutional authorization. After all, it is the government that the Fourth Amendment restrains as much as it is the people who the Fourth Amendment secures. Privacy need not be resigned to only one of these ends.