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The Wheels on the Bus Go 'Round and 'Round: Addressing the Need to Provide Greater Latitude to Law Enforcement Officers in the Public Transportation Setting

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Notes

THE WHEELS ON THE BUS GO 'ROUND AND 'ROUND: ADDRESSING THE NEED TO PROVIDE GREATER LATITUDE TO LAW ENFORCEMENT OFFICERS IN THE PUBLIC TRANSPORTATION SETTING

While the federal government tightens security on airplanes, U.S. buses and trains have become inviting targets for terrorism . . . .[1]

I. INTRODUCTION

Paul is a passenger on a commercial bus, traveling across the country.[2] He steps from the bus during a short layover and, while away, police officers board the bus. The officers move down the aisle, feeling the outside of luggage. As Paul reboards the bus, the officers are holding a bag, asking each passenger if he or she owns the bag. When Paul acknowledges ownership, the officers ask him for permission to open the bag and inspect its contents. At this point, Paul is faced with a dilemma. He knows that there are no weapons or contraband in the luggage, but, at the same time, he does not want total strangers poking through the personal belongings contained within the bag.

Assume for the moment that Paul denies the officers' request and, rather than respecting his wishes, the officers shrug their shoulders and proceed to open the bag. Upon a search of its contents, all they locate of interest is a bag of sugar. The officers then might apologize and return the bag or, if they are suspicious, they might conduct further investigation to satisfy themselves that the contents of the apparent sugar bag is not, in fact, a controlled substance.

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[1] S. Hoffman & J. Kiamzon, *U.S. Buses, Trains Called Targets for Terrorists // Multiple-entry Points, No Guards are Invitation for Disaster*, LANCASTER NEW ERA, Feb. 20, 1998, at A3.

[2] Although the two scenarios which follow are based loosely on the experiences of the passengers in *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996), and *United States v. Nicholson*, 144 F.3d 632 (10th Cir. 1998), they are purely hypothetical. They are useful for stimulating thought on the perplexing problem of balancing the competing interests of an individual's privacy rights and the government's interest in effective law enforcement. They are created from the author's imagination and are not intended to reflect any one person or case.

Next, consider a situation in which Christina is traveling across the country as a passenger on a commercial bus with her spouse and two small children. After a short layover, the family returns to the bus to find police officers holding luggage. The officers are asking the passenger who owns the luggage to come forward. The baggage does not belong to Christina or anyone in her family, so they sit quietly. When none of the other passengers claim the luggage, the officers open the bag and find several fully loaded handguns, additional ammunition, and a substantial quantity of cocaine.

Reflecting on these two hypothetical scenarios, it is likely that Paul and Christina feel much differently about the officers' actions, even though the actions are substantially similar in both cases. In the first scenario, it is likely that Paul feels that his privacy rights have been violated. The personal belongings that he placed inside the bag were exposed to the prying eyes of law enforcement officers. In fact, if familiar with the terminology of Fourth Amendment jurisprudence, Paul would likely feel that the officers' actions constituted an unreasonable search and, therefore, are a violation of the Fourth Amendment. On the other hand, in the second scenario, it is likely that Christina and her family are more willing to have their bags probed and opened, if necessary, to insure that any illegal contraband and dangerous weapons on the bus are discovered by law enforcement officers in a timely fashion. In that case, Christina's desire for security and safety would likely trump her concern for individual privacy.

Although hypothetical, these scenarios are helpful in demonstrating one of the tensions inherent in Fourth Amendment jurisprudence. Namely, courts must determine the appropriate balance between the need for effective law enforcement and the individual's right to privacy. This Note addresses that issue as it applies to public transportation on buses, trains, and similar modes of transportation. The importance of this examination grows stronger as it becomes more clear that buses and other forms of public transportation are increasingly being recognized as conduits for drug trafficking.[3] Law enforcement efforts to stem this growing tide of drug traffic have increased; but, as a result, a split in the federal circuit courts has recently developed over how the courts should

[3] *See, e.g.*, John Beauge, *Philly, Williamsport Officials Aim to Clamp Down on Crime Pipeline*, HARRISBURG PATRIOT & EVENING NEWS, April 2, 1998, at B04.

approach the issue of warrantless searches in the context of public transportation, such as buses.[4]

This Note proposes an approach for courts to use when dealing with this issue. Before reaching that approach, however, this Note suggests that, in determining when Fourth Amendment analysis is appropriate, it is helpful to rely on the commonly understood definition of the word "search".[5] Then, given that definition, law enforcement officers should be allowed to conduct a limited search of passenger luggage if they can articulate a generalized suspicion focused on, for example, one bus or group of buses.[6] This will strike an appropriate middle ground between the lack of suspicion that is acceptable to search luggage in an airport setting and the probable cause that is necessary in an automobile setting.

This Note will begin by presenting a brief background of the Fourth Amendment's guarantee against unreasonable searches.[7] The next Section will examine existing Fourth Amendment jurisprudence as it is applied to transportation scenarios. In particular, this Note will focus attention on the exception to Fourth Amendment strictures in the airport context, at one extreme,[8] and the probable cause requirement in the automobile context at the other.[9] Section III will take a closer look at the approach utilized thus far in the federal circuit courts with regard to

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[4] Specifically, *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996), and *United States v. Nicholson*, 144 F.3d 632 (10th Cir. 1998), present divergent views on whether such law enforcement efforts are appropriate. The Seventh Circuit has allowed the activity by declaring that it is not a search. *McDonald*, 100 F.3d at 1327. The Tenth Circuit, however, feels that the activity is a search in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures. *Nicholson*, 144 F.3d at 639. It is necessary to note here that the Supreme Court's decision in *Florida v. Bostick*, 501 U.S. 429 (1991), apparently is not controlling. In that case, the question before the Court was whether or not the officers had unconstitutionally "seized" the passengers on the bus. *Id.* This Note, like the courts in *McDonald* and *Nicholson*, is concerned with whether the officers "searched" the passengers' luggage.

[5] Webster's Dictionary defines "search" as to "go through and examine carefully; explore . . . probe . . . penetrate." NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 475 (1981).

[6] This search would allow officers to conduct pat-down, probing searches of the outside of luggage stored in overhead storage racks. The type of search being described is demonstrated by the activities of the officers in *McDonald*, see *infra* notes 75-102 and accompanying text, and *Nicholson*, see *infra* notes 103-115 and accompanying text.

[7] *See infra* notes 17-45 and accompanying text.

[8] *See infra* notes 48-59 and accompanying text.

[9] *See infra* notes 60-71 and accompanying text.

searches in other public transportation circumstances.[10] Finally, in Section IV, this Note will propose a different approach than the one implemented thus far in federal appellate cases. Rather than deal with the question of an individual's reasonable expectation of privacy, courts should concede that a search is involved, and focus on whether an exception should apply to the strictures of the Fourth Amendment.[11] This Note suggests that, in the case of public transportation, courts should adopt a middle ground rule between the airport-type exception[12] and the probable cause requirement,[13] permitting *United States v. McDonald*[14]-type searches when officers have reasonable suspicion of criminal activity on a bus, train, or other similar mode of transportation, or a group of such modes of transportation. This rule would provide greater uniformity by resolving the circuit split, as well as provide a better check on police action by supplying a bright line test for courts to apply when determining if an officer's actions violate Fourth Amendment guarantees.

II. BACKGROUND

Before moving to a critique of, and proposed alternative to, the reasonable expectation of privacy analysis, it is helpful to gain a brief understanding of the history of Fourth Amendment jurisprudence in order to lay the framework for later analysis. Therefore, this Note will first examine the Fourth Amendment's guarantee against unreasonable searches and seizures.[15] This, then, will be followed by a look at existing Fourth Amendment application in certain transportation settings.[16]

A. Fourth Amendment Guarantee Against Unreasonable Searches and Seizures

The Fourth Amendment's[17] protection against an unreasonable search is a uniquely American right that developed as a result of the

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[10] *See, e.g.*, United States v. McDonald, 100 F.3d 1320 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2423 (1997); United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998). *See infra* notes 73-115 and accompanying text.

[11] *See infra* notes 116-147 and accompanying text.

[12] *See infra* notes 48-59 and accompanying text.

[13] *See infra* notes 60-71 and accompanying text.

[14] 100 F.3d 1320 (7th Cir. 1996).

[15] *See infra* notes 17-45 and accompanying text.

[16] Specifically, attention will be paid to the airport setting, as well as searches of automobiles. *See infra* notes 46-71 and accompanying text.

[17] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

colonists' struggles with British power.[18] Before passage of the Amendment, general searches were standard in the colonies.[19] General warrants permitted these searches for purposes ranging from regulating alcohol consumption and mandating observance of the Sabbath to insuring the adequacy of corn supplies and settling contested timber rights.[20] However, the colonies, led by Massachusetts, gradually began to disfavor use of the general warrant.[21] It was not until the 1780s, though, that a number of the states finally ended most uses of the general warrant.[22] While the approach of state law moved gradually to specific warrants, the states imposed a much stricter requirement on the federal government and in a more rapid fashion.[23] Therefore, by the time the Fourth Amendment was adopted, search and seizure at the federal level had already been significantly restricted.[24]

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[18] *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (1966).

[19] *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939 (1997) ("Prior to 1760, general, promiscuous intrusion by government officials provided the standard method of search and seizure in colonial America.").

[20] *Id.* at 939-41 (discussing the wide-ranging applications and purposes of colonial warrants in the various colonies and noting that all of the colonies allowed some form of warantless search and seizure as well).

[21] *Id.* at 941-43.

> Colonial attitudes toward general intrusions began to harden in the mid-eighteenth century at Massachusetts Bay, the first colony to "fathom[ ] the full implications of specificity in warrants and translate[ ] them into legislation and practice . . . ." Massachusetts thus became the first jurisdiction to embrace the specific warrant as the conventional method of search and seizure. Massachusetts' transformation from general searches to specific warrants occurred slowly, and not by happenstance. The specific warrant emerged "because of events, especially political events, that were peculiar to [Massachusetts]." In particular, two controversies in the 1750s that involved violent, general searches against crucial political groups elicited an unprecedented legislative reaction against general searches, leading to the development of the specific warrant. The first was the proposed Excise Act of 1754; the second was the public opposition generated by customs officers undertaking to conduct searches *ex officio* and by writs of assistance.

Id.

[22] *Id.* at 948.

[23] *Id.* at 949. In fact, "[b]y one means or another, a total of four states had deprived the national authority of general warrants before the the [sic] Fourth Amendment did so." *Id.*

[24] Maclin, *supra* note 19, at 949. Specifically, Professor Maclin notes that "[t]he Fourth Amendment therefore 'inherited a tradition in which the ambit of federal search and

In passing the Fourth Amendment, the Framers were attempting to address several primary concerns. Among these concerns were the desire for a justification of probable cause before a search or seizure occurred, the desire to particularize searches and seizures to thereby restrict their scope, and the desire to provide independent methods, such as judicial review, to enforce the limits placed on searches and seizures.[25] With these justifications as a starting point, Fourth Amendment jurisprudence expanded, at varying rates, after the Amendment's passage. While the case law surrounding this area alone can, and does, fill volumes, this Note will narrow the discussion to a few decisions in which the Supreme Court has reflected on, and further defined, the purposes of the Fourth Amendment.

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seizure was already tighter than that of the states.'" *Id.* It would seem, therefore, that the States recognized early on the dangers of allowing officers the ability to search and seize based only on the authority of a general warrant. For that reason, the need for instituting safeguards, like requiring that warrants be more specific when issued, was recognized and implemented. Before proceeding, definitions of terms "search" and "seizure" for the purposes of the Fourth Amendment would be helpful, as Black's Law Dictionary explains them. A search is "[a]n examination of a person's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action...." BLACK'S LAW DICTIONARY 1349 (6th ed. 1990). Further, an "unreasonable search" is defined as a search that is "without authority of law." *Id.* at 1350. A seizure of an individual is defined as "the taking of one physically or constructively into custody and detaining him, thus causing a deprivation of his freedom in a significant way, with real interruption of his liberty of movement." *Id.* at 1359.

[25] *See* Morgan Cloud, *Searching Through History; Searching For History*, 63 U. CHI. L. REV. 1707, 1731 (1996). Professor Cloud feels that "to fail to distinguish between specific and general warrants, and the corollary differences between general and specific searches without a warrant, is to simply miss one of the important historical developments in the years preceding the ratification of the Fourth Amendment." *Id.*

> The Fourth Amendment defines general warrants as unreasonable, but it also defines specific warrants as reasonable. This is a distinction that makes a difference. A specific warrant may have provided a defense to a lawsuit [brought against an officer who conducted a search of an individual's home or person], but it was not inconsistent with the Framer's primary concerns.

Id.

Professor Cloud notes that those "primary concerns were to ensure that searches and seizures would be justified by probable cause, to restrict their scope with the requirement of particularity, and to enforce these limits with various mechanisms, including independent judicial review." *Id.*

For example, in *Johnson v. United States*,[26] the Supreme Court pointed out that the Fourth Amendment's purpose is to allow the individual's right of privacy to be trumped by the right to search only when an independent judicial officer deems it appropriate.[27] Further, in 1985, Justice White, writing for the Court, noted that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable."[28] While these general statements about the purposes of the Fourth Amendment seem relatively straightforward, commentators have recognized a disagreement about the relationship between the two clauses in the Amendment.[29]

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[26] 331 U.S. 10, 13-14 (1948) (discussing the limits of federal officers' ability to conduct warrantless searches of defendant's hotel room based on their suspicions that defendant was violating federal narcotics laws).

[27] *Id.* "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence." *Id.* Rather, "[i]ts protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the competitive enterprise of ferreting out crime . . . ." *Id.* In this way, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.*

[28] New Jersey v. T.L.O., 469 U.S. 325, 337 (1985). Previous to this observation by Justice White, in 1979, the Supreme Court stated:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions . . . ." Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."

Delaware v. Prouse, 440 U.S. 648, 653-55 (1979).

[29] *See, e.g.*, Thomas K. Clancy, *The Role of Individualized Suspicion In Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 488 (1995). The first clause contains the guarantee that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. The second clause indicates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*

In summary, the first clause guarantees that the individual will be free from unreasonable searches and seizures, and the second indicates the procedures for obtaining a warrant.[30] Of the two primary points of view that have emerged, one advocates that the second clause exists to interpret the first.[31] In other words, the only type of search that is not unreasonable is one that is conducted under the procedural safeguards contained within the second clause.[32] Therefore, only in exceptional circumstances would an officer be allowed to act without first obtaining a warrant.[33]

The second primary point of view posits that the two clauses are separate and distinct.[34] The first clause would therefore only require that searches be reasonable, while the second would focus only on the searches that are conducted under the authority of warrants.[35] Under this theory, the Fourth Amendment does not mandate the use of warrants; it only indicates the conditions that warrants must meet in order to be valid.[36]

Rather than select one of these particular views to espouse, however, the Supreme Court has continued to maintain that the overriding concern is that searches be reasonable.[37] Specifically, the modern Court has held that an individual's "reasonable expectation of privacy" plays a key role in determining whether a search has taken place.[38] In the

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30 U.S. CONST. amend. IV.

31 *See generally* James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103 (1992).

32 *See* Clancy, *supra* note 29, at 518; LANDYNSKI, *supra* note 18, at 42.

33 *See* Clancy, *supra* note 29, at 519; *see also* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 290, 294 (1984). Among the most prominent advocates of this view of the Fourth Amendment was Supreme Court Justice Felix Frankfurter, as seen in his dissenting opinion in *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting). *See also* Clancy, *supra* note 29, at 520.

34 *See* Clancy, *supra* note 29, at 521; *see generally* Tomkovicz, *supra* note 31.

35 *See* Clancy, *supra* note 29, at 521-22.

36 *Id.* at 522 (citing Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 639 (1982)). One of the most prominent proponents of this viewpoint is Chief Justice Rehnquist, who has written that "[t]he terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which may issue shall only issue upon probable cause." *Id.* (quoting Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting), *overruled by* United States v. Ross, 456 U.S. 798 (1982)).

37 *See supra* note 29 and accompanying text.

38 This approach to Fourth Amendment jurisprudence can be traced back to *Katz v. United States*, 389 U.S. 347 (1967). For further discussion on *Katz*, see *infra* note 74 and accompanying text.

landmark decision of *Katz v. United States*,[39] Justice Harlan, in his concurring opinion, indicated that defining an individual's reasonable expectation of privacy is a two-step process that involves that person's subjective expectation of privacy, as well as whether society is willing to objectively view that expectation as reasonable.[40]

Further, while insisting on reasonableness, the Court has indicated that the concept of reasonableness cannot be precisely defined or mechanically applied.[41] As such, the right to be free from unreasonable search and seizure must be shaped by the context in which it is asserted.[42] Generally, however, it is assumed that, in order to withstand judicial scrutiny, a search must either be authorized by a warrant or be based on probable cause.[43] If a search has not been conducted pursuant to a warrant or does not fit under one of a myriad of exceptions, the evidence obtained has been recovered in violation of the Fourth Amendment, making it subject to exclusion.[44]

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[39] 389 U.S. 347 (1967).

[40] *Id.* at 361 (Harlan, J., concurring). "Before the [F]ourth [A]mendment applies to a search and seizure, a person must, first, 'have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as reasonable.'" State v. Kelly, 678 P.2d 60 (Idaho Ct. App. 1984) (citing Katz v. United States, 789 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[41] *See* Bell v. Wolfish, 441 U.S. 520, 559 (1979). In *Bell*, the Court noted that reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

[42] *See* Clancy, *supra* note 29, at 525; Wyman v. James, 400 U.S. 309, 318 (1971) (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)); *see also* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (noting that reasonableness "depends on the context within which a search takes place").

[43] *See* Draper v. United States, 358 U.S. 307, 310-11 (1959) (discussing that warrantless searches must be based on probable cause). Specifically, the Court in *Draper* noted:

> The crucial question for us then is whether knowledge of the related facts and circumstances gave . . . "probable cause" within the meaning of the Fourth Amendment . . . to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest [and the search], though without a warrant, was lawful . . . .

Id. at 310.

[44] The exclusionary rule was first introduced by the Supreme Court in *Weeks v. United States*, 232 U.S. 383, 398 (1914). Then, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme Court held that the Fourth Amendment was applicable to the States through the Fourteenth Amendment, but also held that the exclusionary rule was not applicable to the States. *Wolf*, 338 U.S. at 27-28, 33. Finally, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court extended the exclusionary rule to state courts. *Mapp*, 367 U.S. at 655. Specifically, the Court held that any evidence that is the fruit of a search or seizure in violation of the United States Constitution is, "by that same authority, inadmissible in a state court . . . .

While the intricacies of Fourth Amendment jurisprudence are quite complex, it is sufficient for purposes of this Note to focus on a few general rules. If no search takes place, the Fourth Amendment is not implicated. If a search occurs, however, it must first and foremost be reasonable. Generally, searches must be supported by a warrant or probable cause unless another exception can be found that justifies the actions of the law enforcement officer. One such exception, as will be seen in the following section, is a search of an individual in the airport context. If, however, the law enforcement officer is unable to justify the search through any of these methods, that search will be deemed unreasonable, and the evidentiary fruit it yields will be excluded from any resulting prosecution. Thus, with this general background on the Fourth Amendment's guarantee against unreasonable searches and seizures, attention will now be directed to the existing application of Fourth Amendment search and seizure law in the context of both airport and automobile searches.[45]

B. Existing Fourth Amendment Application to Transportation

While it is beyond the scope of this Note to adequately and exhaustively cover all of the existing case law and commentary on Fourth Amendment jurisprudence with regard to transportation, a brief look is nevertheless instructive. Once it is determined that specific government action constitutes a search, the question becomes one of the

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Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*

[45] The author readily admits that this general background of Fourth Amendment history is cursory, at best. As one scholar notes, however, "[n]o history of a topic as broad as the origins of the constitutional rules governing searches and seizures could ever be factually complete in an absolute sense." *See* Cloud, *supra* note 25, at 1708. Indeed, an exhaustive examination of Fourth Amendment jurisprudence was not the intent of the preceding section. Rather, the goal was to acquaint the reader with the general requirement of "reasonableness" that the Supreme Court has repeatedly recognized. In addition, it is helpful to note that this area is hardly well-defined, and that commentators, and even the Court itself, is often unclear about the precise meaning of the Fourth Amendment and its proper application. Any attempt at resolving such issues here would inevitably distract from the true purpose of the Note, which is to suggest that law enforcement officers should be allowed to conduct limited searches on buses, and the like, if they can articulate a generalized suspicion about a bus, or other similar mode of transportation, or a group of such vehicles. In order to make such an argument, it is necessary that *McDonald*-type searches, as will be later defined, be viewed as "searches" under the Fourth Amendment. In order to facilitate such a finding, for purposes of this Note only, the author suggests simplifying Fourth Amendment analysis in the public transportation setting by defining "search" as it is commonly understood.

justification of that search. As noted earlier, the general rule in this area is that such a search must be authorized by a warrant, or be based on probable cause.[46] Continuous modifications of the warrant requirement have taken place, however, as multiple exceptions are recognized and applied by the courts.[47] The exception to the warrant requirement applied in the airport setting is of particular significance here.[48] While electronic screening of luggage in an airport is understood to be a search under the Fourth Amendment,[49] courts have routinely allowed such searches of carry-on luggage without a warrant.[50]

Typical of the type of searches ruled constitutional under this exception is the one performed upon Mary Patricia Clay in early 1980 at the Orlando International Airport.[51] After sending her shoulder bag through the X-ray scan machine prior to boarding her plane, a security

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[46] *See supra* note 43 and accompanying text.

[47] In his concurrence in *California v. Acevedo*, 500 U.S. 565 (1991), Justice Scalia comments on this very phenomenon:

> Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator catalogued nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . . ." Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1473-1474 . . . . Since then, we have added at least two more. *California v. Carney*, 471 U.S. 386 (1985) (searches of mobile homes); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (searches of offices of government employees). Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement.

Id. at 582-83 (Scalia, J., concurring in judgment).

[48] *See, e.g.*, United States v. Davis, 482 F.2d 893, 910-12 (9th Cir. 1973) (holding that a screening search at airports is not unreasonable under Fourth Amendment analysis as the individual is not required to submit to the search, but rather remains free to leave at any time).

[49] United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972).

[50] *See, e.g., Davis*, 482 F.2d at 893. For the reasoning of one court that allowed such a search, see *infra* note 57. The exception, however, is most readily applied to carry-on luggage only. The presence of an exception for checked luggage is not as clear. *See, e.g.*, United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972).

[51] *See* United States v. Clay, 638 F.2d 889 (5th Cir. 1981).

officer detained Clay after noticing an unidentifiable object in her bag.[52] After receiving Clay's permission, the officer opened the bag and began to search through it.[53] Unable to locate the object, the officer then opened a manila envelope that was found inside the bag, without Clay's consent.[54] Inside the envelope the officer found a quantity of cocaine.[55] The Fifth Circuit Court of Appeals refused to suppress the evidence, holding that the officer's actions did not constitute an unreasonable search.[56] Specifically, the court found that a passenger, as well as carry-on luggage, may be searched on mere suspicion, even if that suspicion is unsupported.[57]

This approach by the Fifth Circuit has generally been the approach taken by most courts when dealing with the question of searches in an airport setting.[58] In other words, courts are generally quite liberal in

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[52] *Id.* at 890-91.

[53] *Id.* at 891.

[54] *Id.*

[55] *Id.*

[56] *Clay*, 638 F.2d at 892.

[57] *Id.* The court held that "[t]hose who actually present themselves for boarding on an air carrier . . . are subject to a search based on mere or unsupported suspicion . . . [and that standard] is equally applicable to a search of a passenger's carryon luggage at the security checkpoint." *Id.* In reaching its conclusion, the court relied on an earlier decision in *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

> In ascertaining the standard applicable to the search in *Skipwith*, the court balanced the competing interest of public necessity of airport security, "efficacy of the search, and degree of intrusion" against the "degree and nature of the intrusion into the privacy of the person" and the effects the search has on citizens. The court concluded that "the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations . . . ." Turning to the facts of the case under consideration, Clay presented herself at the security checkpoint for boarding, where she knew or should have known that her carryon articles were subject to search . . . . [T]he fact that the x-ray scan machine indicated Clay's shoulder bag contained an unidentifiable dark object created sufficient suspicion to justify a complete physical search of the luggage until the object was positively identified as harmless.

Clay, 638 F.2d at 892 (citations omitted).

The *Clay* court also quoted *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973), noting that a "search may continue until the law enforcement official satisfies himself that no harm would come from the passenger's boarding the plane." *Id.*

[58] *See, e.g.*, United States v. Freeland, 562 F.2d 383, 385 (6th Cir. 1977) (noting that the court did "not believe that all searches of passengers' luggage at airports are invariably subject to the proscription of the Fourth Amendment"); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974). The court found:

allowing warrantless searches in the context of a passenger's luggage at an airport.[59] Providing contrast to this approach, however, is the stricter approach taken by courts when defining the extent to which law enforcement personnel should be allowed to conduct the search of an automobile.

Under the stricter approach,[60] courts require that a police officer have probable cause before conducting a warrantless search of an automobile.[61] Therefore, interestingly, even in the context of an automobile search, there has been an exception applied to the warrant

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> [T]hat the use of a magnetometer is a reasonable search despite the small number of weapons detected in the course of a large number of searches.... The absolutely minimal invasion in all respects of a passengers' privacy weighed against the great threat to hundreds of persons if a hijacker is able to proceed to the plane undetected is determinative of the reasonableness of the search.

Id.

See United States v. Brown, 508 F.2d 427 (8th Cir. 1974) (allowing the search of a passengers "flight bag"); United States v. Dalpiaz, 494 F.2d 374, 376 (6th Cir. 1974). The court stated:

> The basis for upholding such searches is that a person who proceeds to attempt to board a plane in the face of widespread publicity about the problem of air piracy and specific airport notices concerning the security measures which are employed to detect potential hijackers consents to this limited search.

Id.

See also United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (finding that searches of passengers and their carry-on luggage is reasonable under the Fourth Amendment).

[59] *See supra* note 58 and accompanying text.

[60] This approach is demonstrated in cases such as *Carroll v. United States*, 267 U.S. 132 (1925), and its progeny. For further discussion of *Carroll*, see *infra* notes 63-71 and accompanying text.

[61] Probable cause regarding arrest, search, and seizure is defined as "[r]easonable grounds for belief that a person should be... searched. Probable cause exists where the facts and circumstances would warrant a person of reasonable caution to believe that an offense was or is being committed.... [M]ere suspicion or belief, unsupported by facts or circumstances, is insufficient." BLACK'S LAW DICTIONARY 627-28 (5th ed. 1983). The Supreme Court has also weighed in on the definition of probable cause. For example, in 1996, the Court indicated:

> Articulating precisely what... "probable cause" mean[s] is not possible.... [It is a] commonsense, nontechnical conception[ ] that deal[s] with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act....'" As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules."

Ornelas v. United States, 517 U.S. 690, 695-96 (1996).

The Court noted that it has found "probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696.

requirement when probable cause can be shown.[62] This exception, which the Supreme Court calls the automobile exception, is known as the *Carroll* Doctrine[63] because it had its origins in the 1925 decision of *Carroll v. United States*.[64]

In *Carroll*,[65] the defendants were stopped by federal prohibition agents while carrying liquor in their automobile.[66] The agents had probable cause to believe that the defendants were in possession of the liquor and did indeed locate it upon a search of the vehicle.[67] The defendants, however, argued that the search was in violation of the Fourth Amendment.[68] The Court disagreed, holding that a warrantless search and seizure is valid if made with probable cause.[69] In other words, if the search was made "upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."[70]

The *Carroll* doctrine, or the "automobile exception" as it is more commonly known, has established that although a warrantless search of an automobile may be conducted, it must be supported by probable cause.[71] In this way, the requirements of a search in that context are

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[62] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in judgment); 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 668 (2d ed. 1982).

[63] WRIGHT, *supra* note 62, at § 668.

[64] 267 U.S. 132 (1925); *see also* WRIGHT, *supra* note 62, at § 668 (citing Carroll v. United States, 267 U.S. 132 (1925)).

[65] *Carroll*, 267 U.S. at 132.

[66] *Id.* at 135-36.

[67] *Id.*

[68] *Id.* at 138-40.

[69] *Id.* at 149.

[70] *Carroll*, 267 U.S. at 149. Thus, the *Carroll* doctrine, at its core, indicates that "a warrantless search of an automobile can be made 'whenever there is (1) probable cause to believe that the automobile contains evidence of crime and (2) an exigency arising out of the imminent or likely disappearance of the automobile.'" WRIGHT, *supra* note 62, at § 668. (quoting Charles E. Moylan, Jr., *The Automobile Exception: What It Is and What It Is Not–A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1011-12 (1976)).

[71] *See* Arkansas v. Sanders, 442 U.S. 753 (1979); Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Lee, 274 U.S. 559 (1927); United States v. Berkwitt, 619 F.2d 649 (7th Cir. 1980); United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980); United States v. Bryant, 580 F.2d 812 (5th Cir. 1978). The Court based the *Carroll* doctrine on the danger that the mobility inherent in automobiles presents to effective law enforcement. *Carroll*, 267 U.S. at 153. Although various cases have examined the *Carroll* doctrine since its inception, the 1925 decision still stands as good law. Therefore, whenever a police officer has probable cause that crime-connected items are in a vehicle, that officer may search the vehicle

significantly more stringent than in the context of an airport where neither probable cause nor individualized suspicion is required. Further, while the airport and the automobile are only two of the potential settings for Fourth Amendment questions and the cursory examination of these two approaches is hardly exhaustive, they will serve as an appropriate foundation for analyzing two recent cases that have caused a split in the federal circuit courts over the question of unreasonable searches on a bus.[72] These two cases will provide the backdrop for this Note's proposed method of addressing the ability of law enforcement officers to fight crime on buses, trains, and other similar modes of transportation.

III. TWO DIFFERING APPROACHES TO FOURTH AMENDMENT APPLICATION IN THE BUS SETTING

In approaching the question of Fourth Amendment application in public transportation settings other than airplanes and automobiles, two relatively recent federal circuit courts of appeal decisions deal with the issue of searches, or the lack thereof, on buses.[73] These cases present divergent views on whether the patting down of bus passengers' carry-on luggage constitutes a search under the Fourth Amendment. In neither case was the officers' actions supported by probable cause or a warrant. These two circuits felt differently about whether the officers should be allowed to conduct such a search. Given this conflict, it seems clear that a different approach to the issue might yield a more consistent result. The final part of this Section will further attempt to illustrate this point by critiquing the law's current focus on an individual's reasonable expectation of privacy.[74]

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without a warrant. The geography of the search extends to wherever the probable cause can be said to reach to. Further, when the Court decided *Acevedo*, it added that even if an officer's suspicion only extends to containers located within a car, and not the entire car, the officer may search that container. California v. Acevedo, 500 U.S. 565, 576 (1991).

[72] A bus provides an interesting setting for this issue as it presents neither the security concerns of an airport, nor the privacy concerns of an automobile.

[73] *See* United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998); United States v. McDonald, 100 F.3d 1320 (7th Cir. 1996).

[74] *See infra* notes 116-124 and accompanying text. Before proceeding with an examination of *McDonald* and *Nicholson*, however, it is necessary to briefly examine the concept of reasonable expectation of privacy and how it is used by the courts to define when an officer's actions constitute a search under the Fourth Amendment. In 1967, the Supreme Court decided *Katz v. United States*, 389 U.S. 347 (1967). It is from this case that the Court's reasonable expectation of privacy analysis was spawned. The Court noted that among the factors to be considered in determining if a search has occurred is the location of the

A. United States v. McDonald

The first of the two cases that this Note will use to provide the framework for later analysis is *United States v. McDonald*,[75] which originated in the Seventh Circuit Court of Appeals. In February of 1994, as a response to concerns about drug trafficking on company buses and at bus depots, Greyhound Bus officials in Indianapolis, Indiana, contacted the city's police department for help.[76] Three department police officers were subsequently assigned to drug interdiction at the Indianapolis Greyhound bus depot.[77]

On the 15th of that month, a bus from St. Louis, Missouri, arrived in Indianapolis for a short layover.[78] After the passengers disembarked, police officers sought and obtained permission from the driver to inspect the bus.[79] At no point, however, did the officers seek or obtain a warrant for their activities.[80] Upon boarding the bus, the three officers walked down the aisle, feeling the outside of the luggage located in the overhead storage racks, as well as smelling the air around the bags.[81] During this probe, one of the officers discovered two bags that she suspected contained controlled substances.[82] After another officer confirmed this

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activity in question, the nature of the intrusion, whether the individual acted as if privacy was expected, and an objective evaluation of when a reasonable person would expect privacy. *See Katz*, 389 U.S. at 351-62. The Court indicated that "[w]hat a person knowingly exposes to the public . . . 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 . . . ." *Id.* (citations omitted). At that point, "once it is recognized that the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

[75] 100 F.3d 1320 (7th Cir. 1996).

[76] *Id.* at 1322.

[77] *Id.* Specifically, the Greyhound officials requested that the officers be alert for drug activity they suspected was taking place in the depot, as well as the surrounding area. *Id.* at 1322 n.1.

[78] *Id.* at 1322.

[79] *Id.*

[80] *McDonald*, 100 F.3d at 1322.

[81] *Id.* The officers themselves smelled the air around the bags, rather than employing a canine sniff. *Id.*

[82] Based on her training, and twenty-two years of experience, Detective Cotton testified that the bags felt as if they contained "bricks" of cocaine, or some other form of narcotic. *Id.* at 1322 n.2.

assessment, the officers waited until the passengers reboarded the bus before proceeding with the investigation.[83]

Upon returning to the bus, Lashawn McDonald sat near the bags.[84] Although she denied ownership, another passenger later told the officers that McDonald had brought the two bags aboard the bus.[85] Before being advised of this, however, the officers sought and received the driver's permission to open the bags.[86] They sought this permission, as the bags appeared to be abandoned, based on the fact that no passenger would claim them.[87] Upon opening the luggage, the officers discovered that the bags contained several bricks of cocaine.[88]

Upon being indicted, McDonald filed a motion to suppress, arguing that the officers' actions constituted an unlawful search that violated the Fourth Amendment.[89] After the district court denied the motion to

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[83] *Id.* at 1322-23.

[84] *Id.* at 1323.

[85] *McDonald*, 100 F.3d at 1323.

[86] *Id.*

[87] *Id.* The court went to some length in explaining the details of the passengers' denial of ownership.

> After identifying herself as a police officer, Officer Cotton spoke with two female passengers sitting in close proximity to the suspect luggage and asked if either of them owned the identified bags on the overhead rack. Each of them individually denied ownership of the luggage. Detective Cotton next approached McDonald, who was sitting in front of the two female passengers with whom she had just spoken, identified herself as a police officer, pointed to the two suspect luggage bags, and asked her if either of the two bags belonged to her. McDonald responded that they did not. Cotton then addressed all nine passengers on the bus collectively and asked if any of them claimed ownership of the bags. No passenger claimed ownership. Cotton then removed the bags from the luggage rack . . . held them above her head, and again asked, "Do these bags belong to anyone on the bus?" Once more, there was no response. She repeated this inquiry two more times, each time receiving no response.

Id.

The officers were later told by one of the other passengers that he had watched McDonald carry the luggage in question on board the bus. *Id.* While the court spent some time addressing the question of whether McDonald's actions constituted abandonment of the bags, that analysis will not be examined here, as it does not bear on the topic of this Note.

[88] *Id.*

[89] *Id.* After holding a hearing on the defendant's motion, the district court found that the actions of the police officers did not constitute an unreasonable search under the Fourth Amendment. *Id.* After her motion to suppress was denied, the defendant pled guilty to the charge of possession, with intent to distribute, cocaine. *Id.* The plea agreement that she entered into gave the defendant the right to appeal the district court's denial of her motion

dismiss[90] and McDonald appealed, the Seventh Circuit affirmed the lower court's decision, holding that the police officer's touching of the bags did not constitute a search under Fourth Amendment analysis.[91] Therefore, the Seventh Circuit found that there was no violation of the Fourth Amendment.[92]

The court's reasoning stemmed from its examination of the concept of reasonable expectation of privacy.[93] Noting that McDonald knew that by placing her baggage in the overhead rack other passengers could come into contact with it, the court found that she had no reasonable expectation of privacy that her bags would not be touched by others.[94] If McDonald had no reasonable expectation of privacy, then no search occurred that would trigger Fourth Amendment analysis.

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to suppress, but, in return, she waived the right to appeal her conviction and sentence. *Id.* at 1322.

> After hearing the defendant's testimony admitting the elements of the offense, the district court accepted McDonald's plea and found her guilty of the crime charged. The court sentenced the defendant to 120 months imprisonment, to be followed by five years of supervised release, and imposed a special assessment fee of $50.

Id. at 1324.

[90] *See* United States v. McDonald, 855 F. Supp. 267, 269 (S.D. Ind. 1994).

[91] *McDonald*, 100 F.3d at 1327.

[92] *Id.*

[93] *Id.* The court stated:

> Given the unfortunate realities of today's world, where law enforcement authorities must combat a steady influx of illicit drugs, as well as guard against possible terrorist incidents accomplished with devices ranging from simple handguns to sophisticated bombs, it is not surprising that over the last few decades our society has accepted increased security measures (e.g., hand-held metal detectors used to scan one's torso) at many locations such as airports, courthouses, hospitals, and even schools. In light of these realities, we agree with other courts of appeal that have held that the reasonable expectation of privacy inherent in the *contents* of luggage is not compromised by a police officer's physical touching of the exterior of luggage left exposed in the overhead rack of a bus.

Id. at 1325 (footnote omitted) (emphasis in original).

[94] *Id.* at 1326. The court felt that McDonald had "knowingly and voluntarily exposed the *exterior* of her bags to being physically touched by other persons. In other words, she did not have a reasonable expectation of privacy that the exterior of her luggage would not be felt, handled, or manipulated by others." *Id.* (emphasis in original). Other circuits have also addressed this question, and held that the manipulation of the outside of luggage by police officers does not violate the reasonable privacy interests of the owners of the luggage. *See infra* note 97. For a brief explanation of the concept of an individual's reasonable expectation of privacy, see *supra* note 73 and accompanying text.

The Seventh Circuit also supported its decision by analogizing the police officer's examination of the luggage compartment to canine sniffs of luggage, which the United States Supreme Court had addressed in *United States v. Place*.[95] In *Place*, the Supreme Court held that a canine sniff of luggage did not constitute a search under the Fourth Amendment.[96] The Seventh Circuit noted that the officers in *McDonald*, like the canines in *Place*, did not have to open the baggage during their examination.[97] Therefore, the officers' actions did not constitute a search.[98] In addition to this analogy to canine sniffs, the court based it holding that the officers' actions did not constitute a search under the Fourth Amendment primarily on its determination that McDonald did not have a reasonable expectation of privacy that the exterior of her luggage would not be touched.[99]

When dealing with similar issues, other courts have taken an approach comparable to the Seventh Circuit's approach.[100] In direct conflict with the Seventh Circuit, however, the Tenth Circuit Court of Appeals found in *United States v. Nicholson*[101] that, on facts similar to *McDonald*, the officers' actions did constitute an unreasonable search in violation of the Fourth Amendment.[102]

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[95] 462 U.S. 696 (1983).

[96] *Id.* at 707.

[97] *McDonald*, 100 F.3d at 1325-26 n.7. Specifically, the court found that "[s]imilar to a canine sniff, a police officer's touching and feeling of luggage does not require opening the baggage or inspecting its contents. Thus, the information gleaned from such action is limited." *Id.* The court then pointed out that in performing a canine sniff, police officers would most likely be forced to manipulate the luggage being examined in order to make it available to the canine. *Id.* "Because the Supreme Court has approved the canine sniff, it follows that the Court would also likely approve some degree of police handling and manipulation of personal luggage in order to make the luggage accessible to the police dog." *Id.*

[98] *Id.* at 1327.

[99] *Id.* at 1326.

[100] *See* United States v. Guzman, 75 F.3d 1090 (6th Cir. 1996) (holding that an officer's touching of the defendant's luggage, while it was located in an overhead storage rack on a bus, was not an unreasonable search under the Fourth Amendment); United States v. Lovell, 849 F.2d 910 (5th Cir. 1988) (holding that border patrol guard's removal of luggage from a conveyor belt in order to compress the sides of it, as well as sniff the luggage, was not a search under the Fourth Amendment); United States v. Viera, 644 F.2d 509 (5th Cir. 1981) (holding that a police officer lightly pressing the outside of a suitcase does not constitute a search under the Fourth Amendment). As can be seen in each of these cases, the courts ruled that an individual's privacy interests are not violated by the manipulation of the exterior of luggage. *McDonald*, 100 F.3d at 1326.

[101] 144 F.3d 632 (10th Cir. 1998).

[102] *Id.* at 640.

B. *United States v. Nicholson*

The factual background of *Nicholson* is actually quite similar to that of *McDonald*. Several detectives from the Oklahoma City Police Department's Drug Interdiction Unit inspected luggage on a Greyhound bus during its temporary stop in Oklahoma City.[103] When the passengers departed for a short layover, two officers began inspecting luggage in the cargo hold, while two others boarded the bus to inspect carry-on luggage on the overhead racks.[104]

The detectives testified that they would remove the luggage from the overhead racks while manipulating and smelling them in the process.[105] During their examination, the detectives found a bag in which they felt "tightly-wrapped bundles" that they suspected contained illegal drugs.[106] After replacing the luggage, the detectives waited until the passengers reboarded the bus and watched as the defendant sat underneath the bag.[107] After the passengers all denied ownership of the luggage, the detectives inspected the contents of the bag and discovered that it contained approximately five kilograms of cocaine.[108]

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[103] *Id.* at 634.

[104] *Id.* While the results of the cargo hold inspection potentially pose a more difficult question, examination of the case will be restricted to the results of the carry-on luggage inspection.

[105] *Id.* at 635.

[106] *Nicholson*, 144 F.3d at 635. "Detectives Leach and Arragon entered the passenger area of the bus and began removing bags from the overhead racks. Detective Leach testified that '[d]uring the course of removing the bags from the overhead racks... they are manipulated and smelled....'" *Id.* One of these detectives testified that "he felt hard, 'tightly-wrapped bundles' inside an unidentified black carry-on bag, which led him to believe the bag might contain illegal drugs." *Id.* Interestingly,

> [a]lthough Detective Leach testified that he generally smelled carry-on bags after removing them from the overhead rack, he did not testify that he actually smelled Defendant's carry-on bag, or that his suspicions were aroused by the bag's scent. After manipulating the carry-on bag, Detective Leach placed it back in the overhead rack.

Id.

[107] *Id.*

[108] *Id.* "After Detectives Wenthold and Leach had checked the identity of each passenger, the black carry-on bag remained unclaimed. Detective Leach retrieved the bag from the overhead rack, held it above his head, and asked if anyone on the bus owned the bag. No one responded...." *Id.* At that point, "[t]he detectives... removed both bags from the bus to inspect their contents. Outside the bus, the detectives opened both bags. Inside the black carry-on bag, the detectives found five gray duct-taped bundles each containing approximately one kilogram of cocaine." *Id.*

Nicholson subsequently stipulated to ownership of the luggage in order to challenge the actions of the detectives.[109] The district court followed *McDonald* and found that the defendant's motion to suppress should not be granted because the officers did not violate Nicholson's reasonable expectation of privacy.[110] Therefore, the district court found there was no violation of the Fourth Amendment.[111]

The Tenth Circuit Court of Appeals, however, disagreed.[112] The court acknowledged that placing the luggage on the overhead rack exposed it to some manipulation, but not the kind of inspection that the detectives used in discovering the cocaine.[113] The court felt that the detectives' actions exceeded what a bus passenger would reasonably expect with regard to manipulation of luggage.[114] Thus, the Tenth Circuit concluded that the detectives had violated Nicholson's reasonable expectation of privacy and that their manipulation of the bag constituted an unreasonable search under the Fourth Amendment.[115]

Therefore, although the Tenth Circuit reached a different result than the Seventh Circuit in *McDonald*, the Tenth Circuit, like the Seventh Circuit, focused on the passenger's reasonable expectation of privacy in determining whether a Fourth Amendment search had occurred. This Note will now briefly discuss why this prevailing focus on an individual's reasonable expectation of privacy is not as helpful as simply using the commonly understood definition of the word "search." This

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[109] *Id.* By stipulating to ownership of the luggage, Nicholson was able to gain the standing requisite to challenging the officers' actions as violative of the Fourth Amendment. *Id.*

[110] *Id.* at 639.

[111] *Nicholson*, 144 F.3d at 639.

[112] *Id.*

[113] *Id.* The court sought to distinguish its holding here from the one in *United States v. Gault*, 92 F.3d 990 (10th Cir. 1996). In *Gault*, an officer kicked and lifted a bag on the floor of a train, which was partly extended into the aisle. *Gault*, 92 F.3d at 991. The court reasoned that the information "obtained from the kick and lift of the bag, its weight and the solidity of its contents, was the same information that a passenger would have obtained by kicking the bag accidentally or by lifting it to clear the aisle." *Id.* at 992.

[114] *Nicholson*, 144 F.3d at 639.

[115] *Id.* Specifically, the court reasoned that, "[w]e believe that by handling Defendant's carry-on bag in this manner, Detective Leach departed from the type of handling a commercial bus passenger would reasonably expect his baggage to be subjected, and entered the domain protected by the Fourth Amendment." *Id.* Therefore, "[w]hen Detective Leach removed Defendant's carry-on bag from the overhead rack and conducted a 'tactile examination . . . aimed at discovering the nature of the contents of the bag,' he violated Defendant's reasonable expectation of privacy in the bag." *Id.* (citations omitted). In this way, the detectives' actions, as they relate to the handling of Nicholson's bag, were a search under the Fourth Amendment. *Id.*

Note will then argue that courts should recognize a search is taking place and apply a standard, in this type of situation, that allows a search if the law enforcement officers can demonstrate generalized suspicion.

C. *Critique of Focus on Individual's Reasonable Expectation of Privacy*

As noted earlier, the current approach in determining whether a search has occurred involves, as *Katz* suggested, an examination of an individual's reasonable expectation of privacy.[116] As one scholar explains, the reasonable expectation of privacy approach to Fourth Amendment jurisprudence is flawed, as it requires courts to either conclude out of hand that the expectations are unreasonable, or offer reasonable support for the legitimacy of those expectations.[117] Placing the concept of privacy at the core of Fourth Amendment analysis has clearly produced unforeseen, and often unacceptable, results.[118] At the

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[116] *See supra* note 74 and accompanying text.

[117] Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 394 (1991). Professor Berner elaborated on an article written by another scholar, Anthony Amsterdam, which laid the framework for his approach. *See* Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349 (1974). In criticizing the "reasonable expectation of privacy" approach to Fourth Amendment jurisprudence, Professor Amsterdam argues:

> An actual subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the [F]ourth [A]mendment protects. It can neither add to, nor can its absence detract from, an individual's claim to [F]ourth [A]mendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that... [George Orwell's 1984 police state] was being [instituted]... and that we were all forthwith being placed under comprehensive electronic surveillance.

Id. at 384.

[118] Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1756 (1994). Professor Sundby explains:

> The Court's embracing of the "right to be let alone" as the animating principle of the Fourth Amendment thus changed the nature of the Court's analysis in a most fundamental way by making privacy the lodestar for determining how and when the Amendment applied. But, intriguingly, a value that clearly was meant to liberate the Amendment from wooden categorizations of Fourth Amendment interests also turned out to contain the seeds for the later contraction of Fourth Amendment rights. For what ultimately emerged was an Amendment that was privacy-bound, rising or falling in both scope and protection based upon how the notion of privacy fared in the Court and within society as a whole. And with the benefit of hindsight, a number of factors can now be identified that help explain why a Fourth Amendment founded almost exclusively upon the principle of privacy is in decline.

most basic level, it is difficult to quantify just exactly what an individual's expectation of privacy is in any given situation. Each person, if asked, would likely define his expectation of privacy differently from any other given person, based upon his own individual upbringing, life experience, and a variety of other contributing factors. If it is indeed difficult to pin down exactly what comprises any individual's reasonable expectation of privacy and where the limits to that individual's reasonableness are to be found, courts will invariably find themselves attempting to superimpose their own grasp of what the public feels is reasonable on any given defendant. The futility of such an exercise is demonstrated by the approach taken by various courts when they attempt to analyze what the general public, or the reasonable person in like or similar circumstances, would expect by way of privacy.[119]

Yet, another reason that makes the determination of an individual's reasonable expectation of privacy so difficult stems from the realities of modern life. The distinction between what is considered public and

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Id. at 1757-58. Professor Sundby then proceeds to discuss many of these factors.

[119] *See, e.g.*, Florida v. Riley, 488 U.S. 445, 449-50 (1989); State v. Kelly, 678 P.2d 60 (Idaho Ct. App. 1984); Commonwealth v. Busfield, 363 A.2d 1227, 1229 (Pa. Super. Ct. 1976). In *Riley*, the defendant was growing marijuana inside a greenhouse in his backyard. *Riley*, 488 U.S. at 448-49. The police, acting on a tip, flew over the defendant's backyard in a helicopter, and were able to spot the marijuana through a hole in the roof of the greenhouse. *Id.* The Supreme Court noted that any member of the general public could have legally flown over the defendant's backyard and spotted the marijuana growing in his greenhouse. *Id.* at 451. As the police officer did no more than that, the Court held that Riley had no reasonable expectation of privacy in his greenhouse, and therefore there was no search in violation of the Fourth Amendment. *Id.* at 451-52. In *Kelly*, the defendant owned rural property, and was growing marijuana on it. *Kelly*, 678 P.2d at 64. Acting on a tip, police officers drove out to the property, and standing at Kelly's fence line were able to look onto his property and see the marijuana plants. *Id.* The court held:

> It is clear that Kelly could have no reasonable expectation that members of the public would not walk along the highway right-of-way and look onto his property. This is no more than the officers did when they identified the plants as marijuana. The observation of marijuana was thus not a search prohibited by the [F]ourth [A]mendment.

Id. at 65.

In *Busfield*, officers were able to see through the window of the defendant's house, which was covered only by a sheer curtain, and observe several men, a set of scales, marijuana, and related paraphernalia. *Busfield*, 363 A.2d at 1227-28. The court held that the defendant forfeited any reasonable expectation of privacy he might have expected in his home by his own activities. *Id.* at 1229. "It is patently unreasonable to assume one expects privacy when he shields himself only by a sheer curtain, easily seen through, when the means to insure privacy in the form of a window blind is available to him." *Id.*

what is considered private is becoming increasingly less clear as a result of modern technology.[120] Thus, determining what an individual's "reasonable expectation of privacy" actually is, and the limits to which it extends, has become increasingly difficult.[121]

As one commentator notes, the concept of privacy has various potential meanings.[122] These differing meanings seem to make it difficult to accurately quantify what an individual's reasonable expectation of privacy is in any given situation. While the *Katz* analysis includes both the subjective individual's expectation and the society's reasonable expectation, quantifying a reasonable expectation of privacy is still apparently difficult. The obvious question, therefore, is what, if anything, provides a better solution to determining when the Fourth Amendment's strictures should be applied.

One potential solution is to avoid the reasonable expectation of privacy inquiry altogether and simply determine if the activities undertaken by law enforcement qualify as a "search," as that word is

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[120] Sundby, *supra* note 118, at 1758.

> Technological and communication advances mean that much of everyday life is now recorded by someone somewhere, whether it be credit records, banking records, phone records, tax records, or even what videos we rent. We may want to be left alone, but we realistically do not expect it to happen in any complete sense.

Id. at 1758-59 (footnotes omitted).

[121] *Id.* at 1761.

[122] William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020-21 (1995). Stuntz goes on to single out two kinds of privacy that he feels are the most important in the criminal procedure context.

> The first is fairly definite: privacy interests as interests in keeping information and activities secret from the government. The focus here is on what government officials can see and hear, what they can find out. The paradigmatic infringement of this kind of privacy is the act of reading someone's correspondence or listening to her telephone conversations, or perhaps rummaging through her bedroom closet. The second kind of privacy is much harder to get one's hands on: it is easier to say what it is not than what it is. It is not, other than coincidentally, about protecting secrets and information. Rather, it is about preventing invasions of dignitary interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests or street stops infringe privacy in this sense because they stigmatize the individual, single him out, and deprive him of freedom.

Id. at 1021.

commonly defined.[123] The simplicity of this approach is undoubtedly helpful in addressing the current question of whether the activities of the officers in *McDonald* and *Nicholson* violated the safeguards of the Fourth Amendment.[124]

By simply determining if the commonly understood definition of a search has been met, courts can avoid the seemingly impossible question of whether a person's reasonable expectation of privacy is violated by an officer's actions. Next, Section IV will employ that analysis to determine if the type of activity involved in *McDonald* and *Nicholson* constitutes a search. This will then provide an alternative framework for determining if the officers' actions in those cases were constitutional under the Fourth Amendment.

IV. APPLICATION OF A MIDDLE GROUND RULE

Before addressing the question of how courts should deal with problems like those encountered in *McDonald* and *Nicholson*, this Section will first examine whether the Fourth Amendment is applicable. As determined above, however, rather than approach this question from the standpoint of "reasonable expectation of privacy," this Note will ask whether the officer's actions constituted a "search," as that word is commonly understood.[125] The Section will then propose the adoption of

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[123] Webster's dictionary defines "search" as to "go through and examine carefully; explore . . . probe . . . penetrate". NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 475 (1981). *See also supra* note 5. Professor Berner seems to favor this approach:

> Rather than define the activity in terms of the interest (a search is anything that intrudes on a reasonable expectation of privacy) or the interest in terms of activity (the [F]ourth [A]mendment protects those places we want free from intrusion), [Professor Berner proposes] that we define the governmental activity in its own terms–that we take the word 'search' to mean what it means.

Berner, *supra* note 117, at 398. He then goes on to define "search" by noting that "to search is physically to seek, through any of the senses, for a governmental purpose, including, of course, crime detection." *Id.*

[124] An exhaustive examination of the feasibility of this alternative is certainly beyond the scope of this Note, but because of the simplicity it provides, it will be adopted here.

[125] It is appropriate at this point to indicate that this Note does not presume to suggest an abandonment of many years of *Katz* reasonable expectation of privacy analysis and jurisprudence. Rather, it is attempting to point out that the difficulty of becoming mired down in struggling to discern what the extent of a person's reasonable expectation of privacy is can be simplified by resorting to the commonly understood definition of the word "search." In this way, rather than join the Seventh and Tenth Circuits in arguing over whether the bus passengers had a reasonable expectation of privacy, this Note can proceed to its thesis, which is that officers should be allowed to conduct the type of activities carried on in *McDonald* and *Nicholson*, without a warrant or probable cause, as long as they have a

a middle-ground rule, found between the test for searches in an airport setting and automobile searches, that should be applied to buses, trains, and other similar modes of transportation. Lastly, this Section will conclude with a discussion of the advantages of such an approach.

Given the factual circumstances of both *McDonald* and *Nicholson*, it is clear that the police officers were involved in exploring, probing, and examining the luggage.[126] At this point it is important to remember that the dictionary defines "search" as examining carefully, exploring and probing.[127] Therefore, even if not actually opening the baggage, the actions of the officers satisfy the definition of a search. Although some will likely dispute this determination, this Note, for the sake of argument, will deem the type of activity that was conducted a search. With this determination made, attention can now properly be turned to the application of the Fourth Amendment when law enforcement officers board public transportation, such as buses or trains, and conduct pat-down searches of luggage, like the searches conducted in *McDonald* and *Nicholson*.

A. Adoption of a Middle-Ground Rule

Although the crime that occurs on buses, trains, and the like invariably receives significantly less attention than that which occurs on airplanes, the threat posed by such crime is very real nonetheless.[128] Perhaps one reason for this greater focus on crime in the air is the greater number of innocent lives that are affected. Hundreds of lives are placed at risk when a plane is hijacked, when explosives are placed on board, or when other criminal activity occurs on an airplane. The unfortunate result of such an occurrence, many times, is the loss of all of those

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generalized suspicion that a crime has occurred, or is occurring, on that bus, or group of buses.

[126] In *McDonald*, the court notes that the officers were "pushing and feeling the exterior of the bags." United States v. McDonald, 100 F.3d 1320, 1322 (7th Cir. 1996). In *Nicholson*, the officers were engaged in, among other things, feeling the outside of the bags. United States v. Nicholson, 144 F.3d 632, 634 (10th Cir. 1998).

[127] *See supra* note 5.

[128] As one example, Chicago recently struggled with concern over passengers' safety on its buses and trains.

> Hopefully there will come a time when CTA riders can travel on the city's buses and trains at all hours with a comfortable sense of safety. But we are not there yet. Although violent crime is down, the perception still exists among many riders that the possibility of trouble is never far away on a CTA train . . . .

Editorial, *CTA Must Act Now*, CHI. SUN-TIMES, Mar. 23, 1998, at 25.

lives.[129] This, then, might serve as a justification for the relaxed approach to Fourth Amendment application found to exist in the airport setting.

A concern certainly exists about crime in public transportation other than airplanes; however, such crime does not affect the same number of lives in any given instance as it does in an airport setting.[130] Given this difference in the number of lives affected, perhaps the most viable solution is to deny law enforcement officers the latitude given in the airport context, but still give greater latitude than currently exists when approaching crime detection and enforcement in other public transportation settings. Rather than relax the Fourth Amendment requirements to the point of the airport setting or maintain the strictures that apply to automobile searches, it seems appropriate to approach the matter from somewhere in between. In this way, the increased danger that is posed to the public by utilizing public transportation such as buses is addressed, without the need to go to the suspicionless search extreme that is allowed in the airport context. Such an approach would allow officers to conduct the type of searches undertaken in *McDonald* and *Nicholson* for the purpose of protecting the public without violating the passengers' constitutional rights.

This type of approach has been utilized in various situations that have come before the United States Supreme Court. In 1995, the Court decided *Vernonia School District 47J v. Acton*.[131] Although the case does not involve transportation, it does present an example of the type of middle-ground rule proposed here. In *Vernonia School District*, a student challenged his school's random urinalysis drug testing of athletes as being violative of the Fourth Amendment.[132] The Court held, however,

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[129] For example, a bomb that was placed on board a Pan Am jet killed 270 people over Lockerbie, Scotland. David L. Marcus, *Lockerbie Trial Takes a Step Toward Reality Near Bombing's 10th Anniversary, Libya Says it OK's Netherlands Site*, BOSTON GLOBE, Dec. 16, 1998, at A2.

[130] For examples of articles recognizing this concern, see *supra* notes 1, 3, 128 and accompanying text.

[131] 515 U.S. 646 (1995).

[132] *Id.* at 651. The School District noted that drug use was becoming an increasing problem, and that student athletes were among the leaders of the drug culture. *Id.* at 649. As a result, the school system instituted a policy that required random drug testing of all athletes. *Id.* at 650. "The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport." *Id.* Beyond this generalized testing of each athlete, "once each week of the season the names of the athletes are placed in a 'pool' from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for

that the school had a significant interest in deterring its students from the use of drugs, and that the school should not be required to conduct its search in the "least intrusive" manner possible.[133] The Court simply relied on the requirement of the "reasonableness" of the search.[134]

Similarly, in *Skinner v. Railway Labor Executives' Ass'n*,[135] the Court allowed a search mandated by the Federal Railroad Administration (FRA).[136] In that case, the FRA became concerned with the number of railway accidents, and suspected that alcohol and drug use were significant contributing factors in many of those accidents.[137] As a result, the FRA mandated both blood and urine testing for all railroad employees.[138] Railway labor organizations challenged the regulations as violative of the Fourth Amendment.[139] The Court did find that the regulations constituted a search under the Fourth Amendment,[140] but concluded that those searches met the reasonableness requirements given the significant government interest involved.[141]

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random testing." *Id.* One student, James Acton, wanted to play football, but both he and his parents refused to sign the drug testing consent forms. *Id.* at 651. When the school denied him the chance to participate, Acton brought suit. *Id*

[133] *Id.* at 661, 663. The Court indicated that, "[t]aking into account all the factors we have considered above–the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search–we conclude Vernonia's Policy is reasonable and hence constitutional." *Id.* at 664-65.

[134] *Id.* at 652-53. The Court previously adopted a similar approach in *New Jersey v. T.L.O.*, but there, the official who conducted the search had individualized suspicion that the defendant was involved in wrongdoing. 469 U.S. 325 (1985). The Court in *Vernonia School District*, however, further advanced the analysis and found that individualized suspicion is not required, but that a more generalized suspicion is satisfactory. *See Vernonia School District*, 515 U.S. at 653-54. The Court stated:

> We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction; and to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers.

Id. at 653-54.

[135] 489 U.S. 602 (1989).

[136] *Id.*

[137] *Id.* at 606-07.

[138] *Id.* at 609-10.

[139] *Id.* at 612.

[140] *Skinner*, 489 U.S. at 620. The court noted that "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Id.*

[141] *Id.* at 621. The Court stated:

Although there are other examples of the Court relaxing the Fourth Amendment's requirements,[142] these two prominent cases serve to demonstrate the feasibility of a middle ground rule in certain circumstances. Both *Vernonia School District* and *Skinner* demonstrate that the Court is willing to allow warrantless searches if the government can make a plausible showing of reasonableness. What remains then is to point out the reasonableness of allowing officers to conduct the type of searches that the police undertook in *McDonald* and *Nicholson*. Given the government's legitimate concern in reducing the drug trafficking and other crime that occurs on public transportation, to strike a middle ground rule that would allow law enforcement officers to conduct pat-down type searches of luggage located in overhead racks on buses, trains, and the like is clearly appropriate. The officers would be allowed to conduct such a search when they have a generalized suspicion that focuses on one bus or train, or upon a group of buses or trains.[143] Such a solution is appropriate because it admits that a search is taking place; yet, it does not violate the Fourth Amendment's strictures because such a search is considered reasonable.[144] In that way, law enforcement officers would be allowed to better protect the public from crime without violating a passenger's constitutional rights.

> The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'

Id.

[142] *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless search of probationer's home allowed as it was based on reasonable suspicion); Martinez-Fuerte v. United States, 428 U.S. 543 (1976) (border guards given more latitude in ability to search).

[143] In *McDonald*, the Indianapolis Police Department developed generalized suspicion of the buses passing through the Greyhound Bus Depot when the Greyhound officials contacted the police department with the company's concerns over the flow of illegal drugs on its buses. United States v. McDonald, 100 F.3d 1320, 1322 n.1 (7th Cir. 1991). The Greyhound officials specifically requested that the police watch over the drug activity that was suspected to be taking place in and through the Indianapolis bus depot. *Id.* Similarly, in *Nicholson*, the officers from the Oklahoma City Police Department's Drug Interdiction Unit were operating with the permission of Greyhound Bus Officials at the Oklahoma City depot. United States v. Nicholson, 144 F.3d 632, 634 (10th Cir. 1998).

[144] Although some readers are likely to contend that this middle ground rule infringes too greatly on the individual's privacy rights, it is the position of the author that such a limited infringement is justified by the higher level of security that it provides to those who utilize public transportation.

If this middle-ground rule is applied to the introductory hypotheticals of this Note, it appears that the passengers might be more willing to accept the officers' actions. By recognizing that law enforcement officers have the ability to conduct a limited pat-down search of their luggage, law-abiding passengers understand that their protection is better provided for, and that their individual privacy rights have only been infringed, if at all, in a very limited manner. In that way, it appears that a proper balance is struck between the government's legitimate interest in effective law enforcement for public safety and the individual's right to privacy.

B. Goals Achieved By This Rule

A middle-ground rule achieves several goals. First, it achieves uniformity throughout the circuits. Currently, with a split over the issue of whether the activity conducted is even a search, no uniform application of a consistent principle exists throughout the federal circuits. The simplicity of the rule proposed allows the courts to move past the question of whether a search is involved and to spend its resources attempting to determine if the officers had a generalized suspicion sufficient to allow the search.

In addition, a significant deterrent effect will result. As it becomes known that law enforcement officials are able to conduct such searches, criminals will likely be more reluctant to carry on their illicit activities on public transportation due to the threat of discovery.[145] Furthermore, not only would criminals be deterred, but also courts would then possess a bright line test to apply in determining if an officer's actions violated a passengers' rights. Specifically, courts could abandon the need to examine the passengers' reasonable expectation of privacy[146] and focus on whether the officers conducting the search had the requisite generalized suspicion of the bus or train, or group of buses or trains.[147]

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[145] San Francisco is just one example of where this phenomenon has been observed. "Overall crime on San Francisco's transit system declined by one-third over the past two years, with assaults plunging 60-percent during the same period .... Transportation Director Emilio Cruz said increased police presence and bus inspection programs helped fuel the decrease." Jason B. Johnson, *More Cops, Inspections Have Cut Crime on Muni / Assaults Dropped 60% Over 2 Years*, SAN FRANCISCO CHRON., April 1, 1998, at A14.

[146] For discussion of why an individual's reasonable expectation of privacy is hard to identify or quantify, see *supra* notes 116-124 and accompanying text.

[147] It should be noted at this point that this Note is not suggesting that the concept of an individual's reasonable expectation of privacy should have no place whatsoever in Fourth

V. CONCLUSION

Given the potential pitfalls of adopting an approach that requires an examination of a passenger's "reasonable expectation of privacy," this Note did not analyze the type of law enforcement conduct that occurred in *McDonald* and *Nicholson* under that line of jurisprudence. Instead, for purposes of this Note, it is recognized that the activity being conducted satisfies the commonly understood definition of the word "search." Once it is determined that a search has taken place, courts should then adopt a middle ground rule that strikes the proper balance between the relaxed approach in the airport setting and the stricter probable cause approach taken in the automobile setting. Specifically, officers should be allowed to conduct these "searches" when they can demonstrate a generalized suspicion of criminal activity that focuses on one bus, train, or other mode of public transportation, or even a group of those buses, trains, and the like. This approach will provide for greater uniformity, deterrence, and a bright line test for use by the courts. Indeed, such a rule would, as Justice Clark wrote, "give[ ] to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[148]

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Amendment analysis. Rather, it is suggesting that a simpler approach to determining when a search has taken is place is to use the commonly understood definition of the word. An individual's expectation of privacy, then, would play a role in the court's determination of whether a search, after having been conducted, was accomplished pursuant to the strictures and safeguards that the Fourth Amendment requires.

[148] Mapp v. Ohio, 367 U.S. 643, 660 (1961).