

Tulsa Law Review

Volume 37
Issue 1 2000-2001 Supreme Court Review

Fall 2001

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Recommended Citation

Laura Hill, *To Squeeze or Not to Squeeze: A Different Perspective*, 37 Tulsa L. Rev. 425 (2013).

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TO SQUEEZE OR NOT TO SQUEEZE?: A DIFFERENT PERSPECTIVE

I. INTRODUCTION

Imagine your experience as a passenger on a bus or an airplane. After checking your luggage to be stowed underneath, you proceed with your carry-on satchel, perhaps a purse or maybe even a small bag, and board the bus or plane. You place your carry-on luggage in the overhead compartment and sit down while other passengers conduct similar routines. As more and more passengers begin to pack their luggage into the inadequate space allotted overhead, you notice your bag, along with the bags of others, being shoved, crammed, and rearranged. This practice occurs until each passenger has arranged his or her luggage to satisfaction. If you are traveling on a plane, the flight attendant makes a final sweep to secure all luggage, which usually consists of yet another round of rearranging to prevent the shifting of parcels.

Now suppose that, while sitting on a bus waiting for the trip to commence, a law enforcement officer enters and walks the aisle. As the officer exits the bus, he squeezes the exterior of various pieces of luggage stored overhead. One parcel arouses suspicion after a squeeze reveals a "brick-like" substance. The officer suspects that the bag might contain contraband.¹ This situation raises a series of controversial questions. Should the officer have a right to manipulate the bag in the first place? Does it matter how hard or softly he squeezed the bag in question? Would it make a difference if the squeezing incident occurred at a permanent border checkpoint, or do you cringe at the thought of someone handling carry-on luggage at all? If the squeeze and subsequent search resulted in the discovery of drugs or a firearm, would you be relieved that the item was located and removed before you traveled with it on the same bus? Finally, is it relevant that the bag is subject to manipulation by other passengers?²

1. Contraband can be defined as "goods unlawful to import or export." *Webster's 21st Century Dictionary* 64 (Thomas Nelson, Inc. 1992); see *Black's Law Dictionary* 322 (Centennial ed., 6th ed., West 1990) (defining contraband as "any property which is unlawful to produce or possess. Things and objects outlawed and subject to forfeiture and destruction upon seizure.").

2. This hypothetical is based on the fact pattern in *Bond v. U.S.*, 529 U.S. 334 (2000), in so much as to alert the reader to the difficult questions raised in such situations. *Bond* will be examined in subsequent sections throughout this Note.

The above hypothetical and subsequent questions illustrate the tension in the application of our Fourth Amendment guarantee to be free from “unreasonable searches and seizures.”³ The complexity of search and seizure law requires a balancing of our constitutional freedom to be secure in our “persons, houses, papers, and effects”⁴ while accounting for society’s safety interest achieved through law enforcement measures. The narrow line between an unreasonable search and seizure and an appropriate law enforcement practice hinges upon whether a person manifests a reasonable expectation of privacy in the object of the search.⁵ Because every person maintains a different opinion of what constitutes a reasonable expectation of privacy, it is easy to understand why search and seizure jurisprudence is so complex and controversial.

This Note will first review Fourth Amendment jurisprudence in general. This will be followed by a reasonable expectation of privacy analysis, which is so crucial to the issue at hand. The state of search and seizure law in light of the United States Supreme Court decision in *Bond v. United States*⁶ will be discussed following a historical look at search and seizure law prior to *Bond*. The main goal of this Note is to dissect the majority’s opinion by pointing out significant omissions in its analysis of the *Bond* facts. The Court’s failure to discuss relevant exceptions to the warrant requirement, such as plain view, plain feel, border searches, canine sniffs, and airport searches, is both noteworthy and puzzling because the exceptions imply that a person has a lowered expectation of privacy in those situations.

Significantly, *Bond* seemingly created a new “no squeeze” rule applicable only to law enforcement officials. This result is illogical because bags on a bus are often manipulated by other passengers, arguably much more intrusively than by an officer’s exterior inspection. The author will discuss a suggested approach to dealing with searches of luggage in the bus context and compare it with the *Bond* Court’s holding. Regardless of whether the reader agrees with the arguments espoused in this Note, the author hopes that at the very least, the reader will acknowledge that based on the peculiarities of the case, the *Bond* decision was not the proper vehicle by which to expand Fourth Amendment protection of an individual’s luggage from “law enforcement squeezes.” Moreover, the Court’s complete failure to discuss the implications of its holding in relation to the various exceptions to the warrant requirement should lead the reader of *Bond* to question whether the decision was rightly reasoned.

3. U.S. Const. amend. IV.

4. *Id.*

5. See *Katz v. U.S.*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

6. 529 U.S. 334 (2000).

II. BACKGROUND

A. *Fourth Amendment Protection from Unreasonable Searches and Seizures*

“The Fourth Amendment’s protection against unreasonable searches and seizures is a uniquely American right that developed as a result of the colonists’ struggles with British power.”⁷ The Fourth Amendment proscribes unreasonable searches and seizures by stating:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸

A “search” occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.”⁹ Moreover, “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”¹⁰ The two types of seizure are the seizure of property and seizure of a person.¹¹

Searches conducted without a warrant are *per se* unreasonable, subject only to a few established and well-delineated exceptions.¹² Some relevant exceptions to the warrant requirement include plain view searches, automobile searches, border searches, checkpoint/roadblock searches, and “stop and frisk” searches.¹³ Although various exceptions

7. Andrew P. Heck, Student Author, *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*, 34 Val. U. L. Rev. 169, 172-73 (1999) (stating that general searches were routine in the colonies before the enactment of the Fourth Amendment).

8. U.S. Const. amend. IV. This amendment sets out the rule that a person should be free from unreasonable searches and seizures, along with the methods for obtaining a warrant. *See id.*

9. *People v. Camacho*, 98 Cal. Rptr. 2d 232, 245 (Cal. 2000) (citing *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984)); *see Webster’s 21st Century Dictionary* at 236 (defining “search” as a “methodical attempt to find something; hunt”).

10. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (Douglas, J., dissenting).

11. U.S. Const. amend. IV (stating that a warrant must describe with particularity the person or thing to be seized).

12. *Thompson v. La.*, 469 U.S. 17, 19-20 (1984) (holding that a warrantless “murder scene” search of defendant’s home was unconstitutional). The Court stated that “[i]n a long line of cases, this Court has stressed that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.’” *Id.* (quoting *Katz v. U.S.*, 389 U.S. at 357). The *Thompson* Court further noted that “[t]his was not a principle freshly coined for the occasion in *Katz*, but rather represent[s] this Court’s longstanding understanding of the relationship between the two Clauses of the Fourth Amendment.” *Thompson*, 429 U.S. at 20.

13. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1473 (1985). This is merely a sampling of the exceptions to the warrant requirement, some of which will be used in the analysis of this Note. Bradley noted several other exceptions: “searches incident to arrest . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to

exist which allow law enforcement officers to conduct a warrantless search, these exceptions are “jealously and narrowly guarded.”¹⁴ If a search is unlawful because necessary elements of the exceptions are not satisfied, evidence must be excluded as “fruit of the poisonous tree.”¹⁵ The fruit of the poisonous tree doctrine excludes evidence obtained directly or indirectly in the course of an unlawful search.¹⁶ The purpose of this exclusionary rule of evidence is to deter police misconduct and preserve an individual’s Fourth Amendment rights.¹⁷

B. The Hallmark of Fourth Amendment Analysis: Reasonable Expectation of Privacy

In determining whether a person’s Fourth Amendment rights have been violated by a search, courts must first decide if the individual has a reasonable expectation of privacy in the object of the search.¹⁸ “The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’”¹⁹ The first prong of the test asks, did the person exhibit, by his or her conduct, an actual subjective expectation of privacy?²⁰ Second, was that person’s expectation one that society recognizes as reasonable?²¹ To satisfy the first prong, efforts to conceal the object of the search can be indicative of a person’s conduct manifesting a subjective expectation of privacy when he or she takes “normal precautions to maintain [his or her] privacy.”²² However, in terms of examining whether the defendant manifested a subjective expectation of privacy, the Court appears to distinguish between an attempt to conceal something, and the mere “hope that no one would observe.”²³

The second part of the inquiry into a constitutionally protected

arrest... boat boarding for document checks... welfare searches... consent searches... inventory searches... airport searches... school search[es].” *Id.* at 1473-74.

14. *Thompson*, 469 U.S. at 19-20.

15. *State v. McBarron*, 585 P.2d 1041, 1045 (Kan. 1978).

16. *Id.* (explaining the doctrine “bars the admissibility in a criminal prosecution of evidence obtained in the course of unlawful searches and seizures”).

17. *U.S. v. Leon*, 468 U.S. 897, 918-19 (1984) (discussing the rule’s deterrent effect on police misconduct).

18. *Katz*, 389 U.S. at 361.

19. *Cal. v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 360).

20. *Katz*, 389 U.S. at 361.

21. *Id.*; see generally *Black’s Law Dictionary* at 1265 (defining reasonable as “[f]air, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason. . . . Not immoderate or excessive”).

22. *Rawlings v. Ky.*, 448 U.S. 98, 105 (1980).

23. *Ciraolo*, 476 U.S. at 212. The Court noted that it was unclear from the circumstances of the case whether defendant manifested a subjective expectation of privacy from all observations of his backyard, or simply hoped his indiscretions would not be discovered. *Id.*

reasonable expectation of privacy depends upon whether society is willing to recognize the person's expectation as reasonable.²⁴ The Court has stated that "[i]n pursuing this inquiry, we must keep in mind that '[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'"²⁵ The Court has consistently held that an object exposed by an individual to the plain view of outsiders does not deserve Fourth Amendment protection since no intention to keep the object private has been demonstrated.²⁶ These two elements of the *Katz* inquiry must be satisfied in order to afford a person a constitutionally protected reasonable expectation of privacy.²⁷

III. SEARCH AND SEIZURE ON BUSES PRIOR TO *BOND V. UNITED STATES*

The law governing searches in the public transportation setting (notably on buses) was divided before *Bond*.²⁸ Two cases illustrate contrary applications of Fourth Amendment protections in the bus setting.²⁹ These cases reinforce the controversial nature of luggage searches on buses.³⁰ Moreover, the outcome in both cases rested upon the application of the two-part inquiry into whether a person has a reasonable expectation of privacy.³¹ The issue came down to whether the passenger's expectation that his or her luggage is constitutionally protected from a "squeeze" by a law enforcement official was reasonable.³²

A. *United States v. McDonald*

The first case came out of the Seventh Circuit Court of Appeals. In *United States v. McDonald*,³³ the court found that a police officer's manipulation of carry-on luggage in the overhead rack of a Greyhound bus did not constitute a search within the purview of the Fourth

24. *Katz*, 389 U.S. at 361.

25. *Ciraolo*, 476 U.S. at 212. (quoting *Oliver v. U.S.*, 466 U.S. 170, 181-83 (1984)).

26. *See Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

27. *Id.* at 361.

28. *Cf. U.S. v. McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996) (finding no reasonable expectation of privacy in person's luggage on a bus and no search occurred); *U.S. v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998) (finding the officer's search of the luggage constituted a search).

29. *See id.*

30. *See id.*

31. *See McDonald*, 100 F.3d at 1324 (noting the question before the court was whether McDonald had a reasonable expectation of privacy in her luggage); *Nicholson*, 144 F.3d at 636 (discussing the burden of *Nicholson* to show a subjective and reasonable expectation of privacy).

32. *Id.*

33. 100 F.3d 1320 (7th Cir. 1996).

Amendment and thus failed to invoke Fourth Amendment protection from an unreasonable search and seizure.³⁴ As defendant McDonald and the other passengers disembarked during a layover, three Indianapolis Police Department officers boarded the bus without a search warrant with the consent of the bus driver.³⁵ The officers walked the aisle and felt the exteriors of bags stored in the overhead compartments.³⁶ The officers then sniffed the air around the bags.³⁷ The squeezing yielded two bags that the officers suspected contained controlled substances after they felt a packed “brick” substance.³⁸ The officers waited until the passengers returned to the bus and inquired as to the ownership of the bags.³⁹ No one acknowledged ownership.⁴⁰ After repeated inquiries about their ownership along with direct denials of ownership by the defendant, the bus driver allowed the officers to open the luggage.⁴¹ Eleven one-kilogram bricks of cocaine were discovered inside.⁴² Further investigation led to the arrest of McDonald as the suspected owner of the luggage.⁴³

The court denied McDonald’s motion to suppress in which she asserted that the officers’ manipulation of the bags on the overhead rack constituted an unlawful search under the Fourth Amendment.⁴⁴ The Seventh Circuit ruled that the touching of the bags did not fall within the auspices of a search under Fourth Amendment criteria.⁴⁵ In reaching this decision, the court examined the defendant’s reasonable expectation of privacy.⁴⁶ Although conceding that a person does possess a protected privacy interest in personal luggage⁴⁷ the court reasoned that “the privacy interest of people who are in transit [i.e. on a bus, train, or airplane] on ‘public thoroughfares [is] substantially less than those

34. *Id.* at 1326-27.

35. *Id.* at 1322. The officers were on a drug interdiction assignment responding to concerns about suspected drug activity around the bus depot. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* The officer who initially felt the bags containing the drugs had “twenty-two years of narcotics experience” and “stated that the term ‘brick’ refers to one kilogram of cocaine (or other narcotic) packed into a square shape resembling a building brick.” *Id.* at 1323 n. 2.

39. *McDonald*, 100 F.3d at 1323.

40. *Id.* at 1322-23. Defendant McDonald sat near the bags but denied ownership of them. *Id.* at 1323. After the officers opened the bags, another passenger informed the police that McDonald had carried them onto the bus. *Id.* The court held that McDonald’s repeated denial of ownership of the bags constituted abandonment. *Id.* at 1329.

41. *Id.* at 1323.

42. *Id.*

43. *Id.* Other contents in the bags suggested that McDonald was the likely owner because she was the “only female passenger on the bus who had the physical stature to be capable of wearing the clothes found within the bags.” *McDonald*, 100 F.3d at 1323.

44. *Id.* at 1323-24.

45. *McDonald*, 100 F.3d. at 1327.

46. *Id.* at 1325.

47. *Id.* at 1324.

attached to a fixed dwelling.”⁴⁸ More importantly, McDonald did not have a reasonable expectation of privacy in the bags since it was unreasonable to believe that others would not handle them.⁴⁹ In sum, because McDonald could reasonably foresee that her bags would be manipulated by others on the bus, the court held that she “knowingly and voluntarily exposed the exterior of her bags to being physically touched by other persons.”⁵⁰ The defendant’s lack of a constitutionally protected reasonable expectation of privacy removed the luggage from Fourth Amendment protection.⁵¹

B. *United States v. Nicholson*

The Tenth Circuit reached an opposite decision based upon similar facts and the application of the reasonable expectation of privacy analysis in *United States v. Nicholson*.⁵² The facts in *Nicholson* closely resemble those in *McDonald*. In *Nicholson*, the Oklahoma City Police Department’s Drug Interdiction Unit inspected luggage on a Greyhound bus during its layover.⁵³ The officers manipulated luggage stored in both the overhead racks and the compartment underneath the bus.⁵⁴ The squeezing and smelling process uncovered a bag containing what felt like “tightly-wrapped bundles.”⁵⁵ As in *McDonald*, all of the passengers denied ownership of the bag and the officers opened it to discover cocaine inside.⁵⁶ The district court held that no violation of the Fourth

48. *Id.* at 1324-25 (citing *U.S. v. Rem*, 984 F.2d 806 (7th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993)).

49. *Id.* at 1325. The court discussed the Sixth Circuit’s opinion in a factually similar case that a privacy “expectation does not extend to the exterior of luggage placed on overhead racks because such items are ‘accessible to others in the normal flow of traffic on the bus’”. *Id.* (quoting *U.S. v. Guzman*, 75 F.3d 1090, 1095 (6th Cir. 1996)). The court also recognized an Eighth Circuit case stating “[p]assengers have no objective, reasonable expectation that their baggage will never be moved once placed in the overhead compartment.” *Id.* (citing *U.S. v. Harvey*, 961 F.2d 1361, 1364 (8th Cir. 1992)).

50. *McDonald*, 100 F.3d at 1326.

51. *Id.* The court in *McDonald* also analogized the officers’ touching to that of a canine sniff, which does not constitute a search under the Fourth Amendment. *Id.* at 1325 n. 7. Although this is critical to the analysis of this Note, the author prefers to reserve this issue for later discussion. See *infra* Section VII.D.

52. 144 F.3d 632.

53. *Id.* at 634.

54. *Id.* Although controversial and problematic in itself, the inspection of the luggage under the bus is beyond the scope of this Note. The facts of *Bond*, the main focus of the analysis, only involved luggage stored on the overhead racks inside the bus. *Bond*, 529 U.S. at 338.

55. *Nicholson*, 144 F.3d at 635. “Detective Leach testified that ‘[d]uring the course of removing the bags from the overhead racks . . . they manipulated and smelled . . .’” *Id.* Another detective stated 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.*

56. *Id.* “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.* The detectives then “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.*

Amendment occurred, but the Tenth Circuit Court of Appeals disagreed reasoning that although the luggage on an overhead rack might be exposed to some manipulation, the handling by the officers to discover the cocaine was simply too intrusive.⁵⁷ Therefore, the officers conducted an unreasonable search proscribed by the Fourth Amendment because the defendant maintained a reasonable expectation of privacy in his bag.⁵⁸ Even if the bag was likely to encounter some manipulation, it was not reasonable to assume it would be subjected to the degree of probing that the officers executed in the inspection for contraband.⁵⁹

Thus, it is apparent that a search of luggage on a bus can raise difficult questions and divergent opinions about what a reasonable expectation of privacy entails.⁶⁰ The previous cases were factually similar, yet two courts issued totally contrary rulings. The one consistency in the opinions, however, was the application of the reasonable expectation of privacy analysis set forth in *Katz v. United States*.⁶¹ Recently, in *Bond v. United States*,⁶² the Supreme Court applied the *Katz* inquiry to determine whether a passenger on a bus had a reasonable expectation of privacy in his luggage placed in the overhead compartment. *Bond* is now the controlling law for searches and seizures of luggage in a bus setting.⁶³

IV. *BOND V. UNITED STATES*: A NEW CONSTITUTIONAL "NO SQUEEZE" RULE FOR LAW ENFORCEMENT

In *Bond v. United States*, the Supreme Court applied the two-part privacy expectation analysis and held that the search of a passenger's luggage in an overhead compartment on a bus violated his Fourth Amendment protection from unreasonable searches and seizures.⁶⁴ The passenger, Steven Dewayne Bond, was traveling on a Greyhound bus from California to Arkansas.⁶⁵ The bus made a mandatory stop at a

57. *Id.* at 639.

58. *Id.*

59. *Id.* "We 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.*

60. *Cf. McDonald*, 100 F.3d at 1327 (finding no reasonable expectation of privacy when luggage was placed on an overhead rack); *Nicholson*, 144 F.3d at 638 (finding degree of manipulation by the officer constituted a search).

61. *See McDonald*, 100 F.3d at 1324 (discussing the reasonable expectation of privacy requirement for a Fourth Amendment violation); *Nicholson*, 144 F.3d at 636 (discussing the reasonable expectation of privacy requirement for a Fourth Amendment violation); *Katz*, 389 U.S. 347.

62. 529 U.S. 334 (2000).

63. *See Bond*, 529 U.S. 334. This ruling by the Supreme Court supersedes the split in the lower courts and precludes law enforcement officers from "squeezing" passengers' luggage on a bus. *Id.*

64. *Id.* at 338.

65. *Id.* at 335.

permanent Border Patrol checkpoint in Sierra Blanca, Texas.⁶⁶ As a Border Patrol agent exited the bus after checking the immigration status of the passengers, he squeezed the passengers' luggage stored in the overhead compartment.⁶⁷ When the agent squeezed Bond's green canvas bag in the compartment directly above, he felt a "brick-like" mass.⁶⁸ Bond acknowledged his ownership of the bag and allowed the agent to open it.⁶⁹ Inside the bag the agent discovered a "brick" of methamphetamine wrapped in duct tape and rolled into a pair of pants.⁷⁰

Defendant Bond moved to suppress the drug evidence on the basis that it was obtained in the course of an illegal search.⁷¹ The district court denied the motion.⁷² The appellate court rejected Bond's argument that the agent had manipulated his bag in a manner that other passengers on the bus would not have.⁷³ The court further held that the search did not fall within the scope of the Fourth Amendment.⁷³ In holding Bond's reasonable expectation of privacy had been violated, the Supreme Court granted *certiorari* and reversed.⁷⁴

In the majority opinion by Chief Justice Rehnquist, the Court applied the two-fold *Katz* test to determine whether Bond maintained a reasonable expectation of privacy in his bag.⁷⁵ First, on the issue of whether Bond "by his conduct . . . exhibited an actual expectation of privacy; that is whether he ha[d] shown that 'he [sought] to preserve [something] as private,'" the Court answered in the affirmative.⁷⁶ The Court found it notable that Bond used an "opaque" bag and placed it directly above his seat, indicating to the Court that Bond sought to preserve his privacy.⁷⁷ Second, the Court concluded that although a passenger may likely expect other passengers or bus employees to inspect his or her bag, he or she does not expect them to handle the bag in an exploratory manner as did the Border Patrol agent.⁷⁸ Thus, the

66. *Id.* The significance of the search occurring at a Border Patrol checkpoint will be discussed in the section on the border search exception to the warrant requirement. See *infra* Section VII.C.

67. *Bond*, 529 U.S. at 336.

68. *Id.*

69. See *id.* at 336 n. 1 (stating that the "[g]overnment has not argued here that [Bond's] consent to Agent Cantu's opening the bag is a basis for admitting the evidence").

70. *Id.* at 336.

71. *Id.*

72. *Id.* Bond was found guilty of conspiracy to possess and possession with intent to distribute methamphetamine and sentenced to fifty-seven months in prison. *Id.*

73. *Bond*, 529 U.S. at 336.

74. *Id.*

75. *Id.* at 338.

76. *Id.* (quoting *Smith v. Md.*, 442 U.S. 735, 740 (1979)).

77. *Id.*

78. *Bond*, 529 U.S. at 338.

manipulation of the bag violated Bond's Fourth Amendment rights.⁷⁹

In concluding the handling of Bond's luggage by the Border Patrol officer violated his Fourth Amendment rights, the Court focused primarily on the type of inspection used by the agent in examining the bag.⁸⁰ The Court distinguished between a tactile inspection and a mere visual inspection in reasoning that a "[p]hysically invasive inspection is simply more intrusive than [a] purely visual inspection."⁸¹ The government argued that Bond forfeited his reasonable expectation of privacy that his luggage would not be manipulated by "exposing his bag to the public."⁸² Yet, the Court reasoned that the manner in which the agent manipulated the bag was more intrusive than a simple visual inspection and exceeded the type of handling that another passenger might undertake.⁸³

V. BOND DISSENTERS: THE PRAGMATIC ARGUMENT

Justices Breyer and Scalia dissented in the *Bond* case.⁸⁴ The unlikely duo approached the facts of the case in a seemingly more pragmatic manner than did the majority.⁸⁵ Justice Breyer asked, "Does a traveler who places a soft-sided bag in the shared overhead compartment of a bus have a 'reasonable expectation' that strangers will not push, pull, prod, squeeze, or otherwise manipulate his luggage?"⁸⁶ "Unlike the majority, I believe that he does not."⁸⁶ The dissent sides with the lower court's decision that it was entirely foreseeable that, in terms of manipulation by other passengers, a "substantially similar tactile inspection" by the officer might occur.⁸⁷

As noted, the majority's rationale was that, notwithstanding the fact that other passengers would likely handle the defendant's bag, Bond did not expect it to be subjected to an exploratory search such as the one

79. *Id.*

80. *See id.* at 338-39.

81. *Id.* at 337 (citing *Terry*, 392 U.S. at 17-18). In *Terry*, the Court noted that a "careful [tactile] exploration of the outer surfaces of a person's clothing all over his or her body [is a] serious intrusion . . . and [is] not to be taken lightly." *Terry*, 392 U.S. at 17-18. The *Bond* Court does clarify, however, that the bag was not part of the defendant's person, but argued that carry-on luggage often contains "personal items that, for whatever reason, [people prefer] to keep close at hand." *Bond*, 529 U.S. at 338.

82. *Bond*, 529 U.S. at 337. To support this contention, the government cited to *Ca. v. Ciraolo*, 476 U.S. 207 (1986) (holding that observation of a backyard by police officers as they flew overhead did not violate defendant's reasonable expectation of privacy) and *Fla. v. Riley*, 488 U.S. 445 (1989) (holding that observation by helicopter of a greenhouse in the curtilage of a home did not violate the Fourth Amendment). These cases will be analyzed in further detail in the plain view section. *See infra* Section VII.A.

83. *Bond*, 529 U.S. at 338-39.

84. *Id.* at 339 (Breyer & Scalia, JJ., dissenting).

85. *See id.*

86. *Id.*

87. *Id.* at 340 (citing the Court of Appeals in *Bond*, 167 F.3d 225, 227 (5th Cir. 1999), *rev'd*, *Bond*, 529 U.S. 334 (2000)).

conducted by the agent.⁸⁸ Yet, Justice Breyer asked: “How does the ‘squeezing’ . . . differ from the treatment that overhead luggage is likely to receive from strangers in a world of travel that is somewhat less gentle than it used to be? I think not at all.”⁸⁹

The dissent alluded to the implications of what it termed a new “constitutional jurisprudence of ‘squeezes’” which would only serve to further complicate an already difficult area of law.⁹⁰ Is the effect of the majority’s holding to require a distinction between a hard and gentle squeeze? Breyer stated that “[t]he comparative likelihood that strangers will give bags in an overhead compartment a hard squeeze would seem far greater.”⁹¹ The dissent suggested that although the majority decision precludes handling of luggage by law enforcement officials, the constant pushing, prodding, and squeezing by other passengers who are total strangers will still continue.⁹² Therefore,

this decision cannot do much to protect true privacy. Rather, the traveler who wants to place a bag in a shared overhead bin and yet safeguard its contents from public touch should plan to pack those contents in a suitcase with hard sides, irrespective of the Court’s decision today.⁹³

VI. BOND AND THE REASONABLE EXPECTATION OF PRIVACY TEST

Recall that the Supreme Court in *Bond* found that a person has a constitutionally protected right of privacy in his or her luggage on a bus and that a tactile inspection of a carry-on bag by a law enforcement official violates a person’s Fourth Amendment rights.⁹⁴ The purpose of this Note is to dissect the *Bond* holding and argue this case was not the proper vehicle to set a precedent that luggage placed in an overhead rack on a bus is protected by the Fourth Amendment. Therefore, it is necessary to examine the *Katz* two-part test in further depth and apply it to the *Bond* facts.

The first inquiry is whether *Bond* manifested an actual, subjective expectation of privacy in his carry-on luggage.⁹⁵ Here, the Court looked at his conduct to determine whether “he [sought] to preserve [something]

88. *Id.* at 339.

89. *Bond*, 529 U.S. at 340. “Any person who has traveled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage.” *Id.* at 340 (quoting *McDonald*, 100 F.3d at 1327).

90. *Id.* at 342; cf. *Whren v. U.S.*, 517 U.S. 807, 815 (1996) (warning against the creation of trivial Fourth Amendment distinctions).

91. *Bond*, 529 U.S. at 341. The dissent also raises the issue of canine sniffs, but that query will be reserved for a latter section. See *infra* Section VII.D.

92. *Id.* at 342.

93. *Id.* at 343.

94. *Id.* at 329.

95. *Id.* at 338.

as private.”⁹⁶ Bond attempted to conceal his illegal drugs by wrapping the methamphetamine in duct tape, rolling it into a pair of pants, and placing it in a green canvas bag stored above his seat.⁹⁷ Because subjective refers to “existing or originating in one person’s mind,”⁹⁸ it is difficult to conclusively determine whether Bond truly manifested an actual subjective expectation of privacy, or merely a “hope that no one would observe”⁹⁹ his contraband. Although one cannot read another person’s mind to decide whether Bond merely hoped his drugs would be kept private or whether he actually maintained a subjective expectation of privacy in his bag evidenced by his effort at concealment. Despite this uncertainty, it is feasible to conclude that Bond satisfied the first prong of the expectation inquiry.

However, even if Bond did manifest a subjective expectation of privacy in his bag, depicted by his efforts to conceal the contraband, it is more difficult to say that his subjective expectation was one that society recognizes as reasonable.¹⁰⁰ This second element of the *Katz* test is based upon an objectively reasonable expectation of privacy.¹⁰¹ Although luggage is clearly an “effect” under the Fourth Amendment,¹⁰² the Court has held that “it is not *objectively* reasonable to expect privacy if ‘any member of the public . . . could have’ used his senses to detect ‘everything that the officers observed.’”¹⁰³ The majority concedes that, by placing a bag on the overhead rack, a passenger expects others to handle his or her bag.¹⁰⁴ Yet, the Court takes issue with the exploratory manner in which the agent manipulated the bag.¹⁰⁵ Here, the dissent has the more practical argument that the probability of strangers handling the bag in a similar manner is great; therefore, a passenger has no reasonable expectation of privacy.¹⁰⁶

On the assumption that every passenger has likely witnessed luggage handled roughly by other passengers at one time or another, it seems difficult to declare that society would recognize Bond’s subjective expectation of privacy in his bag as reasonable. This also applies in

96. *Id.* (quoting *Smith v. Maryland*, 442 U.S. 740 (1979)).

97. *Bond*, 529 U.S. at 336. The Court finds it notable that Bond placed the methamphetamine in an “opaque bag.” *Id.* at 338. The term “opaque” means “passing no light; obscure.” *Webster’s 21st Century Dictionary* at 179.

98. *Webster’s 21st Century Dictionary* at 264.

99. *Ciraolo*, 476 U.S. 207, 212. The Court considered whether defendant, who had been cultivating marijuana in his fenced-in backyard, manifested a subjective expectation of privacy if someone perched at a higher level might be able to observe his crop. *Id.*

100. *Bond*, 529 U.S. at 338.

101. Objective refers to “the world outside the mind; concerned with reality, rather than thought or emotion.” *Webster’s 21st Century Dictionary* at 177.

102. *Bond*, 529 U.S. at 336 (quoting *U.S. v. Place*, 462 U.S. 696, 707 (1983)).

103. *Id.* at 341. (quoting *Ciraolo*, 476 U.S. at 213-14) (emphasis added).

104. *See id.* at 338.

105. *Id.* at 338-39.

106. *Id.* at 341.

distinguishing manipulation of the luggage by strangers compared to that of law enforcement agents. If other passengers handle the bags in a more intrusive way in their attempt to make room for their own bags, the allegation that an officer's inspection is more intrusive simply does not hold its weight. The Court seems to be relying on the purpose of the touch by the officers as compared to that of the other passengers.¹⁰⁷ However, "in determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose that matters."¹⁰⁸

In sum, although Bond might be able to satisfy the first prong of the *Katz* test by his efforts to conceal the object illustrating his manifestation of a subjective expectation of privacy,¹⁰⁹ the Court's holding that society would recognize his expectation as reasonable¹¹⁰ is not persuasive. Because it was foreseeable that other passengers would manipulate Bond's bag, quite possibly in a highly intrusive fashion, it can be argued that he knowingly exposed his bag, along with its contents therein, to the public. Such an act precludes Fourth Amendment protection because Bond no longer maintained a reasonable expectation of privacy in that bag.¹¹¹

A final consideration in the analysis of Bond's reasonable expectation of privacy is the fact that the search of the bag occurred on a Greyhound bus. This invokes discussion of the automobile exception to the warrant requirement and the diminished expectation of privacy of those in transit.¹¹² "The rationale for the automobile exception is two-fold: (1) the impracticability of obtaining a search warrant in light of the inherent mobility of an automobile; and (2) the reduced expectation of privacy with respect to one's automobile."¹¹³ The lowered expectation of

107. See *Bond*, 529 U.S. at 338-39 (discussing the assumption that passengers will manipulate the bag, but not "feel the bag in an exploratory manner" as the agent did).

108. *Bond*, 529 U.S. at 341 (Breyer & Scalia, JJ., dissenting) (emphasis added). "The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether the officer's actions violate the Fourth Amendment." *Id.* at 339 n. 2. Note that "effect" as used here is not the same as an "effect" listed in the Fourth Amendment.

109. See *Bond*, 529 U.S. at 338 (discussing petitioner's effort to maintain privacy by using an opaque bag placed near his seat); *Katz*, 389 U.S. at 361.

110. *Bond*, 529 U.S. at 339.

111. Cf. *Riley*, 488 U.S. at 453 (O'Connor, J., concurring) (discussing requirement that defendant's expectation of privacy be reasonable).

112. It is important to note that in order to apply the automobile exception to the warrant requirement, "police officers must have probable cause to believe that the automobile contains contraband." *Carroll v. U.S.*, 267 U.S. 132, 149 (1925). See Heck, *supra* n. 7, at 172-73 (explaining that the automobile exception, originating from the Supreme Court decision in *Carroll*, can only be conducted without a warrant if supported by probable cause). However, probable cause to search the Greyhound bus was not an issue in *Bond* because the search of the luggage on the bus was conducted at a permanent Border Patrol checkpoint. Border searches do not require probable cause to conduct a search. This will be explored in further detail in a latter section. See *infra* Section VII.C.

113. *State v. McCrary*, 45 S.W.3d 36, 45 (Tenn. Crim. App. 2000) (citing *Cal. v. Carney*, 471 U.S. 386, 393 (1985)).

privacy comes from the notion that “[i]t is generally recognized that the privacy interest of people who are in transit [i.e. on a bus, train, or airplane] on public thoroughfares [is] substantially less than those that are attached to a fixed dwelling.”¹¹⁴ Moreover, automobiles have a public nature in which luggage can, and is likely to, be manipulated by members of the general population.¹¹⁵ Recall that when a person knowingly exposes something to the public, it loses its Fourth Amendment protections.¹¹⁶

Applying the automobile exception rationale to the facts in *Bond* indicates that because the contraband in defendant’s bag was on a bus, he was not entitled to the most stringent Fourth Amendment protection.¹¹⁷ A bus is transient in nature, making it practically difficult to obtain a warrant before a routine stop or layover is complete. Moreover, as previously discussed, a commercial Greyhound bus is a very public setting in which various strangers can handle a passenger’s luggage, especially when it is placed in the overhead compartment commingled with other parcels. The majority failed to account for these circumstances in the *Bond* analysis, relying primarily on the type of intrusion to which the bag was subjected.¹¹⁸ Effective law enforcement requires that officers have the ability to act, sometimes without a warrant,¹¹⁹ in situations where the transient nature of an automobile might preclude obtaining a search warrant in a short amount of time.¹²⁰

114. *Rem*, 984 F.2d at 812 (quoting *U.S. v. Whitehead*, 849 F.2d 849, 854 (4th Cir. 1988)).

115. *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974).

116. *Cal. v. Greenwood*, 486 U.S. 35, 41 (1988) (quoting *Katz*, 389 U.S. at 351).

117. *Contra Bond*, 529 U.S. at 335.

118. *See Bond*, 529 U.S. at 338.

119. *See supra* n. 112. Again, recall that officers must have probable cause, yet, this is loosened in border searches, which will be analyzed later. *See infra* Section VII.C.

120. Aside from a belief that luggage may contain contraband, safety factors also account for a lowered expectation of privacy of luggage on a bus. *See generally McDonald*, 100 F.3d 1320. “This diminished privacy interest derives from, among other factors, the myriad legitimate safety concerns that pertain to those who travel by common carrier. These concerns stem from . . . the risk inherent in the mode of travel itself . . .” *Id.* at 1325 n. 6 (citing *U.S. v. Whitehead*, 849 F.2d 849, 851 (4th Cir. 1988)). The *McDonald* Court stated that:

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).

VII. EXCEPTIONS TO THE WARRANT REQUIREMENT AND THEIR APPLICATION TO
THE *BOND* DECISION

Understanding the complexities of search and seizure jurisprudence requires the realization that, although the general rule espoused in the Fourth Amendment prohibits unreasonable searches and seizures, this does not mean that it absolutely proscribes all warrantless searches and seizures.¹²¹ Instead, a number of exceptions to the warrant requirement have evolved to allow officers flexibility in conducting warrantless searches under certain circumstances.¹²² Along with the aforementioned automobile exception, some of the other exceptions relevant to the analysis in this Note include: plain view, plain touch/feel, border/checkpoint searches, and canine sniffs.¹²³ This section examines these exceptions in detail and their role in determining whether a squeeze of luggage in the overhead bin of a bus violates a passenger's Fourth Amendment rights.

A. *The Plain View Doctrine: Knowing Exposure to the Public Does not Afford Fourth Amendment Protection*

The plain view exception to the warrant requirement allows for a warrantless seizure of an item in plain view of the officer.¹²⁴ To seize evidence in plain view without a warrant, a police officer must be in a lawful position to observe the object, and its incriminating character must be readily apparent.¹²⁵ The *Bond* majority quickly dismissed any analogy to the plain view doctrine by attempting to distinguish the cases offered by the government.¹²⁶ The government cited *California v. Ciraolo*¹²⁷ to support its contention that *Bond* had forfeited his reasonable expectation of privacy in the luggage. *Ciraolo* involved a visual inspection of the defendant's fenced-in backyard by airplane from an altitude of 1000 feet.¹²⁸ As the officers flew over the backyard, it was

121. Rather, the Fourth Amendment only prohibits "unreasonable" searches and seizures, which is why the expectation of privacy analysis is so vital to determine if a person has a constitutionally protected privacy interest in the luggage, making a search of it unlawful. See U.S. Const. amend. IV.

122. See Bradley, *supra* n. 13 (discussing exceptions to the warrant requirement).

123. See *id.*

124. Andrew E. Taslitz & Margaret L. Paris, *Constitutional Criminal Procedure* 308 (The Foundation Press, Inc. 1997).

125. *Mirn. v. Dickerson*, 508 U.S. 366, 375 (1993).

126. See *Bond*, 529 U.S. at 337 (distinguishing *Bond*'s situation from other plain view cases involving only visual, not tactile observation).

127. 476 U.S. 207 (1986).

128. *Id.* at 209. Police secured a plane for aerial observation of defendant's backyard responding to an anonymous tip that defendant was cultivating marijuana. *Id.* The police could not observe the plants from ground level because two fences enclosed the yard. *Id.* A six-foot tall outer fence and a ten-foot inner perimeter enclosure obscured the view from ground level. *Id.*

readily apparent the defendant was cultivating marijuana.¹²⁹

The *Ciraolo* Court applied the *Katz* two-part analysis to determine if the defendant had a reasonable expectation of privacy in his backyard.¹³⁰ The Court hesitated to rule definitively on the issue of whether he exhibited an actual and subjective expectation of privacy in the object of the search.¹³¹ It stated that “[w]hether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances.”¹³² On one hand, the defendant erected a fence that could be interpreted as an attempt to assert his privacy in the curtilage of his home.¹³³ Yet, the Court noted that a “10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or two-level bus.”¹³⁴

The Court then applied the second prong to determine whether the defendant’s expectation of privacy was reasonable, i.e. whether society would accept his expectation as reasonable.¹³⁵ The *Ciraolo* Court declared that “[t]he test of legitimacy is not whether the individual chooses to conceal assertedly ‘private’ activity, [but rather] whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”¹³⁶ This analysis is crucial because even though the Court acknowledges that privacy expectations are greatest at the home, just because the area is

within the curtilage itself does not bar all police observation. The Fourth Amendment protection . . . has never been extended to require law enforcement officers to shield their eyes Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.¹³⁷

The Court found that defendant’s expectation that his marijuana plants were protected from aerial observation was not one that society would recognize as reasonable.¹³⁸ This has profound implications in the analysis of the facts in the *Bond* case. Admittedly, the facts in *Bond* did not concern the plain view exception to the warrant requirement.¹³⁹ The

129. *Id.* at 209.

130. *Id.* at 207.

131. *Id.* at 211-12.

132. *Id.*; see *supra* n. 21.

133. See *Ciraolo*, 476 U.S. at 209 (discussing the ten foot fence around the respondent’s yard).

134. *Id.* at 211.

135. *Bond*, 529 U.S. at 338.

136. *Ciraolo*, 476 U.S. at 212 (citing *Oliver*, 466 U.S. at 181-83).

137. *Id.* at 213.

138. *Id.* at 214.

139. See *Bond*, 529 U.S. at 335-36 (the contents of petitioner’s bag were not immediately

methamphetamine was not in clear view since it was stashed in an opaque bag above the passenger's seat.¹⁴⁰ However, much like the defendant in *Ciraolo*, Bond did not satisfy the second part of the *Katz* inquiry; his subjective expectation of privacy was not one that society would recognize as legitimate and reasonable.¹⁴¹ Although Bond took precautions to conceal his contraband from the public at large, he could assume that other passengers would manipulate his luggage in various ways,¹⁴² just as the defendant in *Ciraolo* could expect that those flying over his backyard could notice his "garden."¹⁴³ Therefore, because it was foreseeable that others would handle Bond's bag, he could not claim Fourth Amendment protection.¹⁴⁴

This brings us again to the *Bond* Court's main focus on the type of inspection conducted. It attempted to dismiss any analogy to *Ciraolo* on the basis that the inspection was only visual and not tactile.¹⁴⁵ However, one might wonder how much a fly-over that confirms the cultivation of marijuana in a backyard differs from a squeeze of the exterior of luggage that alerts an officer to the presence of contraband. The conclusions to be drawn from the facts in *Bond* and *Ciraolo* seem analogous. In *Ciraolo*, other people in airplanes, not just the police, could observe defendant's marijuana from the same altitude.¹⁴⁶ Similarly, in *Bond*, other passengers could handle his luggage at will, possibly in a more intrusive manner than the police.¹⁴⁷

The *Bond* Court centered its analysis on distinguishing between manipulation by strangers, which it conceded that a passenger should reasonably expect to occur, and probing by a law enforcement agent.¹⁴⁸ Yet, in light of the Court's reasoning in *Ciraolo* that it is irrelevant that

apparent to the officers).

140. *Id.* at 336.

141. *Katz*, 389 U.S. at 360.

142. *Bond*, 529 U.S. at 338-39.

143. *Ciraolo*, 476 U.S. at 213-14.

144. *Contra Bond*, 529 U.S. at 338-39 (discussing Bond's expectation that passengers to move the bag in one way or another).

145. *See Bond*, 529 U.S. at 337. The Court also distinguished *Bond* from *Fla. v. Riley*, 488 U.S. 445 (1989). The government offered both *Ciraolo* and *Riley* to support its assertion that Bond had forfeited his reasonable expectation of privacy. Unlike *Ciraolo*, *Riley* was not discussed here in depth because the cases are so factually similar.

146. *See Ciraolo*, 476 U.S. at 209 (discussing officer's observation of the marijuana by flying above in a private plane).

147. *Bond*, 529 U.S. at 338 (discussing Bond's expectation of other passenger's handling his bags).

148. *See id.* at 338-39. The Court noted that:

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag will be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.

Id.

two airplanes might “pass overhead at identical altitudes, simply for different purposes,”¹⁴⁹ this new “no squeeze” rule for law enforcement seems both illogical and unevenly applied. The same rationale would seem to apply when discussing manipulation of luggage by strangers and law enforcement personnel. If the defendant in *Ciraolo* could not expect protection from a plane flying overhead for the “focused”¹⁵⁰ purpose of observing his marijuana garden, why can a bus passenger expect law enforcement officials to take a hands-off approach when other passengers can manipulate carry-on luggage at will?¹⁵¹

Since the Court gives great weight to its distinction between a mere visual inspection as compared to a physical manipulation of luggage (the physical inspection resulting in an unlawful search if conducted by law enforcement),¹⁵² one must inquire about the degree of difference between a visual inspection and a simple squeeze of the exterior of luggage. Either way, a visual or tactile inspection could confirm the existence of something prohibited by law. This leads to the next point of inquiry – the plain feel/plain touch exception to the warrant requirement in which the incriminating character of the evidence is readily apparent, especially to an experienced police officer. The *Bond* Court completely omitted this exception from its analysis of the case.¹⁵³

B. *Plain Touch/Plain Feel: The Experienced Officer and the “Immediately Apparent” Issue*

Another method for pointing out the flaws in the majority’s reasoning is to review an area of search and seizure jurisprudence the Court failed to mention in *Bond*—the plain feel doctrine.¹⁵⁴ The Supreme Court held in *Minnesota v. Dickerson* that no categorical ban exists on the use of the plain touch/plain feel doctrine.¹⁵⁵ The plain feel doctrine is an analogy to the plain view exception to the warrant

149. *Ciraolo*, 476 U.S. at 213 n. 2. See *Riley*, 488 U.S. 445. The *Riley* Court discussed an anonymous tip of marijuana cultivation resulted in sheriff deputy observing plants in a greenhouse with its roof and sides partially open from a helicopter at a 400 foot altitude. *Id.* at 448. Justice O’Connor stated that in terms of a reasonable expectation of privacy, what mattered was not whether the helicopter was flying where it had a right to be. *Id.* at 454. Instead, the question was whether it was reasonable for Riley to expect privacy from overhead observation from the public airspace at an altitude where the public travels regularly. *Id.* at 454 (O’Connor, J., concurring).

150. *Ciraolo*, 476 U.S. at 214 n. 2.

151. This inquiry is especially important because the Court has held that the purpose of the search is irrelevant. See *Bond*, 529 U.S. at 338-39.

152. Cf. *Bond*, 529 U.S. at 339 (physical manipulation of the bag by police officers was unreasonable); *Ciraolo*, 476 U.S. at 215 (no warrant is required for officers to observe something readily apparent).

153. See *Bond*, 529 U.S. at 336-38 (discussing plain view exception without discussing the plain feel/touch exception).

154. See *Minn. v. Dickerson*, 508 U.S. 366, 375-76 (giving the rationale for the plain feel exception).

155. *Dickerson*, 508 U.S. at 375.

requirement.¹⁵⁶ The plain view doctrine permits police to seize an object without a warrant if they are lawfully in a position to view it, “if its incriminating character is immediately apparent, and if the officers have a lawful right of access”¹⁵⁷ to it; whereas, the plain touch doctrine “has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.”¹⁵⁸ Therefore, like the plain view doctrine, the plain touch exception requires that officers be in a lawful position to observe an object, the incriminating nature of the evidence must be immediately apparent from its contour and mass, and the officer must have a lawful right of access to the object.¹⁵⁹ These elements merited analysis in *Bond* because the drugs in Bond’s carry-on bag could arguable have been immediately apparent to the agent after the exterior squeeze.

Applying these elements to the *Bond* situation, it can be argued that the Border Patrol agent was in a lawful position to feel the methamphetamine because he had lawfully entered the bus at a permanent border checkpoint to check the immigration status of the passengers.¹⁶⁰ As will be discussed in the next section, border checkpoint searches typically do not require a stringent standard of probable cause.¹⁶¹ Moreover, at these checkpoints law enforcement officers are usually concerned about more than just the citizenship status of the passengers on account of the large influx of drugs coming over the border, especially from Mexico.¹⁶²

The next element, whether the methamphetamine in the bag was immediately apparent, presents a more controversial question. Some might argue that because the drugs were wrapped in duct tape, rolled into a pair of jeans, and then stashed inside a green bag, they were removed from the purview of the “incriminating character immediately apparent” element required by *Minnesota v. Dickerson*.¹⁶³ However, one could contend that an experienced law enforcement official might be able to ascertain that the “brick-like” substance was contraband, especially if he or she had felt similar items in the past.¹⁶⁴ The trial court in *Dickerson* recognized this possibility when it stated:

To this Court there is no distinction as to which sensory perception the

156. See *id.* at 375. “The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no ‘search’ within the meaning of the Fourth Amendment” *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See *Bond*, 529 U.S. at 335.

161. See *infra* n. 187.

162. See *infra* n. 189.

163. *Dickerson*, 508 U.S. at 375.

164. *McDonald*, 100 F.3d at 1322; see *supra* n. 38.

officer uses to conclude the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. . . . The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses.¹⁶⁵

The Court's statement in *Dickerson* raises the question of what a simple touch might reveal to an experienced officer. If the sense of touch combined with both experience and training can be a reliable method of ascertaining the identity of an object in a frisk or patdown, it can be argued that a Border Patrol agent with ample experience and training could identify illegal contraband by squeezing a piece of luggage. A Border Patrol agent's job entails not only checking the immigration status of passengers, but also curtailing the flow of illegal drugs into the country.¹⁶⁶ Thus, an agent who has been trained in the detection of drugs and has experience in dealing with drug smugglers could surely have the ability to ascertain an item of contraband.¹⁶⁷ If an officer's sniff of the air surrounding a defendant, or a "hit" on a bag through a canine sniff test, can identify the presence of narcotics, how is a squeeze of the outer portion of luggage by an experienced officer any different?¹⁶⁸

The third element in satisfying the test for the plain feel exception is similar to the first in that it requires officers to have a lawful right of access to the object.¹⁶⁹ Again, because this search was conducted at a Border Patrol checkpoint it implicates a loosened requirement of probable cause and allows officers the right of access to the bus and its contents therein.¹⁷⁰ Thus, the Border Patrol agent had a lawful right of access to the bus, and arguably the luggage therein, since it was stopped at a permanent Border Patrol checkpoint. Even if the officer was required to have probable cause before the search could be legal, one could argue that probable cause existed based upon the suspicion of drug smuggling at a border area, which outweighed Bond's individual privacy interest.¹⁷¹

Before turning to the area of border searches, it is helpful to analyze the degree of the intrusion from the officer's squeeze of the bag in *Bond* in the context of the plain feel exception. Recall that the Court in *Bond* concluded that the manner of the squeeze by the agent—although certainly expected by other passengers on the bus—was simply too

165. *Dickerson*, 508 U.S. at 369-70.

166. *See U.S. v. Montoya de Hernandez*, 473 U.S. at 539 (discussing custom agents' ability to search persons coming into the United States).

167. *See supra* n. 38 (discussing the experience of the officer).

168. The issue of a canine sniff will be discussed in the section on airport searches. *See infra* Section VII.D.

169. *Dickerson*, 508 U.S. at 375.

170. *See infra* n. 189.

171. *See infra* nn. 189, 191.

intrusive because tactile inspections are much more intrusive than visual inspections.¹⁷² The Court in *Terry v. Ohio*¹⁷³ discussed the assertion that an officer's power to make a full search of a person once probable cause has been established is justified based on the "notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity' which can properly be imposed upon the citizen in the interest of effective law enforcement based on a police officer's suspicion."¹⁷⁴ Contrary to this argument, the *Terry* Court ultimately concluded that such a search is not merely a "petty indignity."¹⁷⁵ The Court explicitly described the process of a body search by a police officer and decided that it constituted a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment . . . not to be undertaken lightly."¹⁷⁶

However, the squeeze of a carry-on bag in *Bond* is distinguishable from a humiliating body search. The simple squeeze of the outside of one bag among many to ascertain the contour or mass of an object is not a terribly traumatic experience to a person who lives in the modern age of metal detectors and X-ray machines.¹⁷⁷ A law enforcement officer's squeeze of a bag in an overhead compartment does not invoke the image of the petty indignity of standing in a spread-eagle position against a wall while being thoroughly inspected by an officer.¹⁷⁸ Although a squeeze of one's bag might subject some people with sensitive dispositions to embarrassment, such lowered expectations of privacy have become commonplace today with the rising concern for public safety in the wake of terrorist attacks and the effort to stem the flow of illegal drugs into the country.¹⁷⁹ Thus, a tactile inspection of a bag is arguably less inconvenient to a person than a body search under the *Terry* reasoning.¹⁸⁰

In sum, the Court's complete lack of discussion of the plain feel doctrine in the *Bond* case is another factor undermining its analysis of

172. *Bond*, 529 U.S. at 337.

173. 392 U.S. 1 (1968).

174. *Id.* at 10-11 (quoting *People v. Rivera*, 201 N.E.2d 32, 36 (1964)).

175. *Id.* at 16-17. "Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a petty indignity." *Id.* (quotations omitted).

176. *Id.* at 17. The Court describes a body search as one in which an officer "feel[s] with sensitive fingers every portion of the prisoner's body. A [thorough] search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." *Id.* at 17 n. 13 (quoting *Priar & Martin, Searching and Disarming Criminals*, 45 J. Crim. L.C. & P.S. 481 (1954)).

177. *See supra* n. 121.

178. *See supra* n. 176.

179. *Supra* n. 121.

180. *Supra* n. 177. Although a bag does fall within the auspices of an "effect" under the Fourth Amendment, this author contends that in terms of the degree of intrusion, a tactile inspection of a bag does not implicate the amount of inconvenience discussed in *Terry* relating to a body search. *Id.*

Bond's factual circumstances. The plain feel analogy to the plain view doctrine has implications in the context of an experienced officer with adequate training and experience to ascertain the presence of contraband merely through a squeeze of the exterior of a piece of luggage. The degree of intrusion that might subject a person to a "petty indignity" begs for a common sense analysis of the nature of the search.¹⁸¹ Although luggage is afforded Fourth Amendment protection as an "effect,"¹⁸² a person could reasonably maintain that an all-out body search is more intrusive and inconvenient than a squeeze of a bag, especially in light of all the safety precautions today. Furthermore, in certain contexts, such as border checkpoints, the safety of the public in preventing the flow of illegal drugs appears to lower a person's privacy interests.¹⁸³

C. Border Checkpoint Searches

The *Bond* Court failed to discuss the relevance that the search occurred at a permanent Border Patrol checkpoint in Sierra Blanca, Texas; thereby implicating a lower expectation of privacy.¹⁸⁴ In *United States v. Montoya de Hernandez*,¹⁸⁵ the Court discussed a search conducted at an international border.¹⁸⁶ It stated that "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."¹⁸⁷ The very fact that a person or thing comes into the United States is alone sufficient for the person or item to be subjected to a search.¹⁸⁸

181. See *supra* n. 177.

182. See *supra* n. 8 and accompanying text.

183. See *infra* nn. 188-89 and accompanying text.

184. *Bond*, 529 U.S. at 335.

185. 473 U.S. 531 (1985).

186. *Id.* at 535-36. Here, the defendant was detained at customs in Los Angeles after a flight from Bogota, Columbia. *Id.* at 533. She had \$5000.00 in cash in her possession, but no billfold. *Id.* Recognizing Bogota as a "source city" for drugs, coupled with defendant's suspicious behavior, customs officials detained Montoya de Hernandez and later discovered that she had smuggled drugs in her alimentary canal. *Id.* Over the next few days, defendant passed a total of eighty-eight balloons containing 528 grams of cocaine. *Id.* at 536.

187. *Id.* at 537 (citing *U.S. v. Ramsey*, 431 U.S. 606, 616-17 (1977)). The Court further expounded that "[i]mport restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers '[to] regulate Commerce with foreign Nations.'" *Ramsey*, 431 U.S. at 619 (quoting U.S. Const. art. I, § 8).

188. *Montoya de Hernandez*, 473 U.S. at 537. The Court has stated:

Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance or reasonableness is qualitatively different at the international border than in the

Applying the facts of *Bond* to the border search exception leads the reader to conclude that Bond manifested an unreasonable expectation that his bag would not be handled or inspected by a law enforcement agent. The Border Patrol agent did not need any reasonable suspicion or probable cause to squeeze the bags on the bus without a warrant because the squeeze occurred at a permanent Border Patrol checkpoint in Sierra Blanca, Texas.¹⁸⁹ Although this may not invoke the international border image in the mind of all readers since Bond boarded the bus in California and was bound for Arkansas, the fact remains that the search occurred at a border checkpoint.¹⁹⁰

The Court further stated that 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.’”¹⁹¹ Today’s climate of drug smuggling¹⁹² and proactive tactics to curb such a problem¹⁹³ arguably enhances the legitimate concern of the government for public safety and outweighs an individual’s Fourth Amendment interest that his or her bag will not be handled at a border checkpoint. The Court discussed the “longstanding concern for the protection of the integrity of the border” which is “heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.”¹⁹⁴ It determined that the “public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.”¹⁹⁵

Therefore, the consensus on the broad power afforded to law enforcement in the context of border searches indicates a propensity to

interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant

Id. at 538. See *Black’s Law Dictionary* at 184 (defining a border search and stating that “[a]ny person or thing coming into the United States is subject to search by that fact alone, whether or not there be any suspicion of illegality directed to the particular person or thing to be searched”).

189. See *supra* n. 188.

190. *Black’s Law Dictionary* at 184 (“To qualify as a ‘border search,’ a search must occur at the border or at the functional equivalent or the border.”).

191. *Montoya de Hernandez*, 473 U.S. at 537 (citing *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)).

192. See *U.S. v. McDonald*, 100 F.3d 1320, 1325 (discussing the current problem of illegal drugs).

193. See *id.* (discussing the necessity of increased security measures).

194. *Montoya de Hernandez*, 473 U.S. at 538 (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring)).

195. *Mendenhall*, 446 U.S. at 561, (Powell & Blackmun, JJ., & Rehnquist, C.J., concurring in the judgment). The Justices further opined that:

Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. . . . As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561-62.

allow the Border Patrol agent's inspection of Bond's bag on the bus when stopped at the permanent Border Patrol checkpoint in Texas. Moreover, the rationale of protecting the border and elevating the legitimate interest of the government to combat the flow of drugs in to the country apparently worked in the *Bond* situation. Yet, the Court did not even discuss the relevance of the search occurring at a border checkpoint when it decided that the squeeze of Bond's bag violated the Fourth Amendment,¹⁹⁶ thus calling into question the validity of the Court's analysis. What can be gleaned from this discussion on border checkpoints is that, even if a person's carry-on bag in the overhead compartment of a bus is entitled to Fourth Amendment protection from a law enforcement squeeze, *Bond's* under-inclusive analysis disqualifies it as the proper case to set a precedent for a "constitutional jurisprudence on squeezes."¹⁹⁷

D. *Sniff and Scan, But Do Not Squeeze?: The Airport Search Issue*

The Court similarly failed to discuss the fact that airline passengers sacrifice many of their privacy rights by walking through metal detectors, passing their luggage through X-ray machines, and possibly even having their luggage subjected to a canine sniff test.¹⁹⁸ The main justification for such a reduced expectation of privacy is the concern for public safety.¹⁹⁹ Yet, one ponders why this overriding concern for the safety of the public at large does not also apply to buses. The Court's analysis in *Bond* also leaves some unresolved intellectual and practical questions. For example, what is the difference between a canine sniff that "hits" on a bag containing drugs and a squeeze of a bag's exterior leading an experienced officer to believe that drugs are located inside?

In *Bond*, the Court did not discuss the relation of its holding to the airport search context.²⁰⁰ This is particularly troublesome in light of the fact that an airplane traveler's luggage is frequently exposed to canine sniffs and X-rays machines.²⁰¹ In terms of canine sniffs, the Court held in *United States v. Place* that subsection of personal luggage to a "sniff test" does not constitute a search within the meaning of the Fourth Amendment.²⁰² The Court reasoned that:

196. *Bond*, 529 U.S. at 339.

197. *Bond*, 529 U.S. at 342 (Breyer & Scalia, J.J., dissenting).

198. *See supra* n. 121 (discussing heightened security at airports).

199. *See id.*

200. *See generally Bond*, 529 U.S. 334 (no discussion of airport search).

201. *Supra* n. 121.

202. *See U.S. v. Place*, 462 U.S. 696 (1983). In *Place*, the defendant was indicted for possession of cocaine with intent to distribute after DEA agents subjected his suitcase to a sniff test by a trained narcotics detection dog that hit on the luggage. *Id.* at 699. The appellate court reversed after deciding that the sniff test was permissible, but that the amount of time for which the luggage was detained exceeded the bounds of a reasonable detention. *Id.* at 700. The Supreme Court affirmed. *Id.*

A 'canine sniff' by a well-trained narcotics detection dog . . . does not require opening the luggage . . . [and] is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.²⁰³

If the notion centers on the fact that a sniff does not require opening a bag, the inquiry then becomes: how different is a canine sniff from a squeeze of the outside of luggage? The sniff indicates the potential presence of narcotics without rummaging through the interior of the bag. Nonetheless, so too can a simple squeeze when conducted by an experienced and well-trained law enforcement official. The squeeze could, under the plain feel doctrine, indicate the incriminating character of the evidence based on its contour or mass.²⁰⁴

Past decisions have thought the difference between a sniff and a squeeze to be minimal.²⁰⁵ "Similar 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."²⁰⁶ Moreover, because officers must handle the baggage to make it accessible for the dogs to sniff, some amount of manipulation is surely allowed.²⁰⁷

The main justification for warrantless searches in the airport context is public safety. Courts have generally applied liberal search standards in the airport setting. The most obvious example is the use of electronic scanning machines to ascertain the contents of carry-on luggage. While this is thought to be a search under the Fourth Amendment, courts routinely allow the practice without requiring a warrant.²⁰⁸ X-ray machine scans are arguably more intrusive than a simple squeeze because they allow the operator to view all the contents inside one's luggage.²⁰⁹ Furthermore, the scan of a carry-on satchel at an airport is not based on any particularized suspicion of any one passenger, but rather it is based on an overall suspicion and an attempt

203. *Id.* at 707.

204. *See Dickerson*, 508 U.S. at 375.

205. *See e.g. McDonald*, 100 F.3d at 1325 n. 7 (discussing the intrusion of a canine sniff).

206. *Id.*

207. *Id.* The *McDonald* Court stated:

[W]e note that police, in order to facilitate a canine sniff, would in all likelihood have to handle or manipulate baggage to make it accessible for the police dog. 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 for the police dog.

Id.

208. *See Heck*, *supra* n. 7, at 179 (citing *U.S. v. Epperson*, 454 F.2d 769, 770 (4th Cir. 1972)).

209. *McDonald*, 100 F.3d at 1327.

to protect the public as a whole.²¹⁰ Located next to the X-ray machine is often a metal detector. Most people consider passing through such devices simply a routine part of travel and are not too embarrassed when coins in their pockets or even certain buttons on their clothing set off the metal detector alarm.

Searches of luggage in airports are considered reasonable in today's climate of terrorist bombings and hijackings. The rationale is that "absolutely minimal invasion in all respects of a passenger's 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."²¹¹ It has been noted that one basis for upholding these searches is that people who plan to fly are aware of the dangers and safety concerns and thus consent to a limited search based on this awareness.²¹²

However, one might argue that whereas a traveler is put on notice of the restrictions he or she will face when using an airline, the same does not hold true for a commercial bus. Consequently, the less stringent safety precautions on buses are perhaps the very reason a passenger chooses to travel via bus rather than by air since courts have found that passengers presenting themselves at an airport checkpoint impliedly consent to a search of their luggage.²¹³ Thus, it would follow that a person who travels by bus might not reasonably expect to have his or her luggage inspected in such a manner. Still, in today's world of metal detectors in schools and courthouses,²¹⁴ everyone acknowledges that there are some sacrifices individuals must make in order to further public safety. Buses are every bit as susceptible to terrorist attacks as planes. A passenger on a bus, whether expecting to undergo a search of his or her carry-on luggage, knows that luggage placed in the overhead rack is fair game to any other passenger for rearranging and at times even shoving.²¹⁵ In terms of the reasonable expectation of privacy test,

210. See *Heck*, *supra* n. 7, at 180 n. 57 (quoting *U.S. v. Clay*, 638 F.2d 889, 892 (5th Cir. 1981)) ("Those 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."). "[T]he standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in the border crossing situations." *U.S. v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

211. *U.S. v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974). This is perhaps even more applicable today in the midst of recent terrorist attacks on planes, buses, and buildings. See *id.*

212. *U.S. v. Dalpiaz*, 494 F.2d 374, 376 (6th Cir. 1974).

213. See *McDonald*, 100 F.3d 1320, 1331 n. 5 (1996) (Ripple, J., dissenting).

214. See *supra* n. 121 (discussing the realities of today's world requiring flexibility for officers to search luggage in buses without a warrant).

215. *McDonald*, 100 F.3d at 1327 (quoting the district court). "[A]ny person who has traveled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage in order to squeeze additional luggage into the compartment or remove previously placed

the passenger's knowledge that his or her bag will be handled seems to curtail a claim that a reasonable expectation of privacy exists in the luggage.²¹⁶

In sum, the Court's omission of the airport exception to the warrant requirement in its analysis of *Bond* is puzzling. Airplane passengers are routinely subject their luggage to X-ray machines that can "see" inside, and they also pass through metal detectors that sound if certain objects are on their person. Moreover, sometimes luggage is exposed to canine sniffs that "hit" upon it to indicate the presence of narcotics. How is one to square this with the Court's holding that a squeeze of the exterior of a bag on a bus is too intrusive? An experienced officer might just as easily ascertain the presence of drugs through his plain touch of a bag as would a trained narcotics dog using its sense of smell. Both would not open the bag to do this, but identify the existence of contraband based on an exterior examination, albeit through different senses. Furthermore, the policy behind the airport searches of protecting the public should be extended to buses because they are surely just as vulnerable to potential terrorist attacks whether by guns, bombs, or other means.²¹⁷

VIII. CONCLUSION: A MORE LOGICAL APPROACH?

The complexity of search and seizure law might lead one to question whether there is a logical approach to applying the Fourth Amendment to situations like luggage searches on a bus. One author has proposed a "middle ground rule" in such situations.²¹⁸ The middle ground approach allows greater latitude for law enforcement officials to conduct searches of luggage on buses in order to protect the safety of the public.²¹⁹ The approach highlights the need for relaxed proscriptions against searches in airports due to the sheer number of lives that could be lost in a terrorist attack, while still accounting for the safety risks in the other modes of transportation.²²⁰ The proposed middle ground rule simplifies

luggage." *Id.*

216. *See supra* n. 89 and accompanying text.

217. Although the issue in *Bond* centered on narcotics, the underlying principle of protecting the interest of the public is still applicable.

218. Heck, *supra* n. 7, at 193-94. Heck's middle ground rule would be a compromise between the tests for searches in airports and searches of automobiles. The middle ground rule would apply to "buses, trains, and other similar modes of transportation." *Id.*

219. *See id.* at 194 (discussing the differences in the relaxed and strict standards applicable to airports and buses, respectively). Heck notes that "[a]lthough 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." *Id.*

220. *See id.* at 195 (arguing that the admissibility of searches on buses should not be relaxed to the point of airport searches, but neither should it be as restricted as an automobile search because buses do invoke a public setting in which more people could be harmed).

the method for determining if a search occurred by allowing courts to “spend [their] resources attempting to determine if the officers had a generalized suspicion sufficient to allow the search”²²¹ instead of agonizing over whether a search even occurred. The middle ground approach is also touted as a significant deterrent.²²² Finally, the need to inquire into a person’s reasonable expectation of privacy would be eliminated in the application of a middle ground rule.²²³

Although the middle ground approach claims to eliminate the need for an inquiry into a person’s reasonable expectation of privacy on the premise that it is too difficult to quantify,²²⁴ the reasonable expectation of privacy test still retains its usefulness in applying Fourth Amendment protections from unreasonable searches and seizures. The reasonable expectation of privacy inquiry is the most flexible and enduring test we can hope to have in the complex maze of search and seizure law. Since it was first expounded in *Katz v. United States*,²²⁵ it has allowed the courts to view a person’s expectation of privacy from an ultimately objective frame of analysis. Unfortunately, as with all tests, the two-part inquiry is subject to error from time to time. Such flaws occur when a court misapplies the standard and does not use common sense and logic in its application.²²⁶

221. *Id.* at 198. The author also argues that a middle ground approach would achieve uniformity throughout the circuits, but the *Bond* ruling (which came after Heck’s article) has expounded a uniform guideline in its ruling that an officer’s squeeze of a bus passenger’s luggage violated his reasonable expectation of privacy. See *supra* n. 49 and accompanying text.

222. See Heck, *supra* n. 7, at 198 (“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.”). Heck maintains that a deterrent effect can be found in San Francisco where “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.” *Id.* at 198 n. 145.

223. *Id.* at 198. “Specifically, courts could abandon the need to examine the passengers’ reasonable expectation of privacy 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.” *Id.*

224. *Id.* at 198 n. 146. Heck cites a critique of the reasonable expectation of privacy analysis in Fourth Amendment jurisprudence:

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 . . . that . . . George Orwell’s 1984 police state was being [instituted] . . . and that we were all forthwith being placed under comprehensive electronic surveillance.

Id. at 190 n. 117 (citing Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349 (1974)).

225. 389 U.S. 347 (1967).

226. This author argues that the Supreme Court in *Bond* misapplied the two-part reasonable expectation of privacy inquiry because the expectation that others would not handle a person’s carry-on parcel on a bus is not one that society would recognize as reasonable. *Contra Bond*, 529 U.S. 334. The *Bond* Court acknowledged that other passengers might manipulate the luggage, but a person manifests a reasonable expectation that a law enforcement official would not handle the bag. *Id.* at 338. This author contends

The Court in *Bond v. United States*²²⁷ failed to correctly apply the reasonable expectation of privacy test in a manner consistent with logic and our nation's evolving safety and drug concerns. The greatest advantage of our Constitution is that it is a "living" constitution that has adapted to our evolving morals and crises over the last two hundred plus years.²²⁸ In keeping with this tradition, the courts must exercise great care to allow our laws to adapt to the times. As mentioned in the airport and drug sections of this Note, in our age of terrorist attacks and rampant drug smuggling, law enforcement officials must be afforded some level of ability to deal with the problems and protect the interest of society as a whole.²²⁹

Even if a person does manifest a subjective expectation of privacy in his or her luggage stowed overhead in a crowded bus compartment, and even if society would recognize such an expectation as reasonable, *Bond* was not the proper case to set a precedent effectively tying the hands of law enforcement officials in a bus setting. The bottom line of *Bond* is that even if a dozen other strangers can reasonably be expected to smash, shove, and manipulate a person's carry-on luggage on a bus, a law enforcement official absolutely cannot even feel the exterior of the baggage.²³⁰ This new "no squeeze" rule for law enforcement officers is illogical and impractical.

Perhaps even more puzzling is the Court's complete failure to discuss relevant exceptions to the warrant requirement, which were arguably implicated in the facts of *Bond*.²³¹ An analogy to the plain view doctrine was invoked because anything a person knowingly exposes to the public is not entitled to Fourth Amendment protection.²³² However, the Court immediately dismissed the analogy. Similarly, the plain feel

that the various exceptions to the warrant requirement (along with common sense and experience) dilute this argument. The many peculiarities in the facts of *Bond* that invoke various exceptions to the warrant requirement chip away at the notion that the passenger maintained a reasonable expectation of privacy that his carry-on luggage would not be handled by law enforcement personnel on the bus.

227. 529 U.S. 334 (2000).

228. In viewing the United States Constitution as a "living constitution," the eloquent words of Oliver Wendell Holmes are applicable:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation. [Cases] must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Mo. v. Holland, 252 U.S. 416, 433 (1920).

229. See *supra* n. 121.

230. See *Bond*, 529 U.S. at 338.

231. See *supra* n. 13.

232. See *supra* n. 89.

doctrine was a relevant, but omitted, inquiry to the Court's analysis since an experienced officer might be able to immediately ascertain the incriminating character of a "brick-like" mass in a bag.²³³ Automobile searches at border checkpoints, such as the checkpoint where the *Bond* search occurred, do not require probable cause and the expectation of privacy is diminished.²³⁴ Finally, airport searches are more intrusive than a simple squeeze of the exterior of a bag because those searches involve X-ray machines, metal detectors, and occasional canine sniffs.²³⁵

In light of the Court's improper use of *Bond* as the vehicle to enhance Fourth Amendment protection of passengers' luggage on a bus from law enforcement squeezes, arguably more logical and well-reasoned approaches to this issue can be found in cases like *United States v. McDonald*.²³⁶ The *McDonald* Court was more practical in declaring that because a person could expect that other passengers on a bus would manipulate his or her luggage, he or she did not manifest a reasonable expectation of privacy in the luggage. Therefore, no search occurs because no reasonable expectation of privacy exists in the luggage.²³⁷ Similarly, the dissenting justices in *Bond* were more practical in accounting for the realities of modern travel and criticizing the nonsensical distinction between a stranger's exploratory handling of a bag as compared to a mere outer squeeze of the same bag by a law enforcement officer.²³⁸

In conclusion, *Bond* fails to hold its weight as the proper vehicle for setting a precedent against law enforcement exterior squeezes of luggage on a bus. The many unique factors in *Bond* invoke various exceptions to the warrant requirement which the Court did not properly analyze. Moreover, the Court's illogical application of the reasonable application of privacy test dooms the case to placement in a category of poorly reasoned decisions on the part of the Supreme Court. The Court must take into account the realities of travel and society's ever-increasing need for prevention from terrorist attacks and drug smuggling. Bus passengers deserve as much protection as airline passengers have been given. Admittedly, no one enjoys having his or her luggage manipulated, but if a stranger can shove and manipulate your bag, is it really so intrusive for a law enforcement official to conduct a mere exterior squeeze of the bag? The concept of a living constitution calls for

233. See *supra* Section VII.B.

234. See *supra* nn. 188-89 and accompanying text.

235. See *supra* nn. 208, 211 and accompanying text.

236. 100 F.3d 1320 (1996); see *supra* nn. 49, 51 and accompanying text.

237. See *id.* at 1325.

238. *Bond*, 529 U.S. at 340; see *supra* n. 90.

flexibility for law enforcement officers to implement the law and protect society as a whole, even in the bus setting. In the end, *Bond's* holding only serves to complicate an already perplexing area of constitutional law.

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