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William Mitchell Law Review

Volume 27 | Issue 3 Article 18

2001

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Recommended Citation

Eldridge, Jason W. (2001) "The Fourth Amendment: The Privacy of Overhead Luggage Compartments on Commercial Buses," *William Mitchell Law Review*: Vol. 27: Iss. 3, Article 18.
Available at: http://open.mitchellhamline.edu/wmlr/vol27/iss3/18

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THE FOURTH AMENDMENT: THE PRIVACY OF OVERHEAD LUGGAGE COMPARTMENTS ON COMMERCIAL BUSES

Bond v. United States, 529 U.S. 334 (2000)[1]

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1. 120 S. Ct. 1462 (2000). Due to the recentness of the case, the author supplies the Supreme Court Reporter citation as a courtesy.

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I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.[2]

At its most basic, the Fourth Amendment is a guarantee against unreasonable governmental intrusion into the lives of private citizens.[3] Bus travel presents unique Fourth Amendment situations.[4] As a bus traveler, when you place your luggage in an overhead luggage compartment, legally you do not have a reasonable expectation of privacy in the luggage simply because you have a ticket.[5] May a law-enforcement agent board the bus and search your luggage? Does it matter if the luggage is soft or hard-sided, or if the bus is full or only half full of passengers? Answering these questions is confusing not only for travelers, but for courts as well.

In *Bond v. United States*,[6] the Supreme Court examined a law-enforcement officer's tactile examination of a bus traveler's luggage located in an overhead storage compartment.[7] Previously, circuit courts analyzed tactile examination of luggage by law-enforcement officers,[8] but neither *Bond* nor the circuit court cases

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2. U.S. CONST. amend. IV. The Fourth Amendment applies to state officials through the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949).

3. J. DAVID HIRSCHEL, FOURTH AMENDMENT RIGHTS 1 (1979) (stating that the drafters of the Fourth Amendment wanted to protect American citizens from governmental intrusions that had been common in England).

4. Airplane travel may present similar Fourth Amendment discussions, especially when buses and airplanes use similar overhead storage compartments for passengers. This note will limit itself to buses so that it does not inaccurately expand the Supreme Court's holding in *Bond* and other cases that limit themselves to buses.

5. Camera v. Municipal Court of San Francisco, 387 U.S. 523, 536-37 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.*

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

7. *Id.* at 336 (describing the search of Bond's luggage).

8. United States v. Gwinn, 191 F.3d 874, 876 (8th Cir. 1999) (examining the actions of police officer who lifted and felt gym bag located in overhead luggage compartment of train); United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998) (addressing actions of officer who removed luggage from overhead luggage

have held that such searches are violations of the Fourth Amendment per se. Each case is fact specific and depends upon whether the defendant had a reasonable expectation of privacy in his particular piece of luggage. Nevertheless, when considered together, *Bond* and the circuit court decisions demonstrate factors and principles that can be used to determine whether a bus passenger has a reasonable expectation of privacy in his luggage, and thus whether the Fourth Amendment is violated.

First, this casenote will examine the origins and history of the Fourth Amendment. Then, it will present the circuit court cases that have analyzed the Fourth Amendment and tactile examinations of luggage by law-enforcement officers. Next, it will present the facts of *Bond* and extract from both *Bond* and the circuit court cases a list of factors to be used by future courts to determine whether a bus passenger has a reasonable expectation of privacy in luggage stored in an overhead compartment. Finally, it will apply these factors to *Bond* and demonstrate that *Bond* was decided incorrectly.

II. HISTORY OF THE FOURTH AMENDMENT AS IT RELATES TO LUGGAGE SEARCH AND SEIZURE

A. *The History Of The Fourth Amendment*

In order to understand the tenets of the Fourth Amendment, it is useful to examine the situations and issues that called for its creation and out of which it was formulated.[9] This understanding will facilitate a discussion of the Fourth Amendment as it operates today.

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rack in order to better examine it); United States v. McDonald, 100 F.3d 1320, 1323 (7th Cir. 1996) (addressing law-enforcement officer's touch of soft-sided luggage in bus overhead luggage compartment); United States v. Gault, 92 F.3d 990 (10th Cir. 1996) (addressing officer's kicking and touching of nylon bag protruding into the aisle of a train); United States v. Guzman, 75 F.3d 1090, 1093 (6th Cir. 1996) (addressing police detective's touch of cloth bag in bus luggage rack); United States v. Most, 876 F.2d 191, 193 (D.C. Cir. 1989) (examining "crush technique" used by police officer on plastic shopping bag); United States v. Lovell, 849 F.2d 910, 912 (5th Cir. 1988) (addressing the compression of soft-sided luggage by border patrol agents).

9. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 1-2 (1966) (stating that an understanding of the history of the Fourth Amendment is necessary to evaluate its development through judicial construction, especially for issues of recent origin like wiretapping and blood testing because they could not have been anticipated by the drafters of the Bill of Rights).

Originally, the U.S. Constitution did not contain a Bill of Rights.[10] The first Congress proposed ten amendments to the Constitution[11] as a limitation on the federal government.[12] This is what we now call the Bill of Rights. The Fourth Amendment was included among the first ten amendments, but it was not actively used for several years.[13]

Its purpose among the other amendments was to help the United States avoid the onerous system of writs and warrants that were part of British rule.[14] Thus, the impetus for the Fourth Amendment is rooted both in English history and in the relationship between England and the American colonies.[15]

The drafters of the Fourth Amendment knew[16] that after the development of the printing press, The English Crown had used a sweeping power of search and seizure to silence publications it considered seditious or libelous[17] and to search for and seize smuggled goods.[18] A warrant awarded to its holder the power to enter and seize, ostensibly to enforce publication-licensing statutes.[19] Writs of

10. ERWIN N. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 1 (1975) (explaining the early history of the Fourth Amendment); *see also* 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE 14 (3d ed. 2000) (stating one reason for the absence of the Bill of Rights from the Constitution was that some saw it as unnecessary because every state constitution already included a provision against unlawful searches and seizures); *see also* LANDYNSKI, *supra* note 9, at 39. The *Federalist No.* 84 replies to critics who attacked the Constitution for not having a Bill of Rights. *Id.*

11. GRISWOLD, *supra* note 10, at 1 (stating that it is well known the original Constitution did not contain a Bill of Rights).

12. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 105 (2d ed. 1999) (stating that the Bill of Rights was designed as a limitation on the federal government).

13. *Id.* at 1-2 (referring to the Fourth Amendment as a "sleeping giant" because of the relatively few number of criminal cases early in U.S. history).

14. Eric Y. Kizirian, Comment, *Manipulating the Fourth Amendment: The Expectation of Privacy in Luggage Aboard a Commercial Bus*, 29 SW. U. L. REV. 109, 138 n.27 (1999) (explaining the reason for the Fourth Amendment); LANDYNSKI, *supra* note 9, at 20 (stating the purpose for the Fourth Amendment).

15. HALL, *supra* note 10, at 4–6 (examining historical origins of the Fourth Amendment and general warrants in England).

16. LANDYNSKI, *supra* note 9, at 20 (stating that the Fourth Amendment was drafted for the "express purpose" of guarding against searches of the English government experienced both in England and in the colonies).

17. HALL, *supra* note 10, at 4 (stating the Crown's concern with seditious and libelous publications as part of a history of general warrants).

18. *Id.* at 5 (stating that after new libel and sedition laws were passed in 1637, general warrants were used to search for smuggled goods).

19. *Id.* (stating that warrants were not necessarily limited to law enforcement officials).

assistance were also common,[20] so called because they required officers of the Crown to assist those executing the warrant.[21] The power of the warrants was typically broad enough to allow the holder of the warrant the power "to make search wherever it shall please them in any place ... within our kingdom of England ... and to seize, take hold, burn ... those books and things which are or shall be printed contrary to the form of any statute, act or proclamation ...."[22]

The drafters of the Fourth Amendment also knew that in the pre-Revolutionary time period in the American colonies, American customs officers were given the same powers of search as officials in England as part of an effort by the Crown to control trade in the colonies.[23] Writs of assistance in the colonies were especially onerous because they did not require the return of seized property and they lasted until six months after the death of the issuing sovereign.[24] Thus, a writ of assistance had the possibility of lasting many years, during which time the holder was allowed to enter the home of the person named.[25]

The most famous case to question the fairness of warrants came from the Court of Common Pleas. In 1765, Lord Camden put a restraint on the rampant use of general warrants[26] in the landmark[27] case *Entick v. Carrington*,[28] the holdings of which later became part of the Fourth Amendment.[29]

Entick was the editor of a publication criticizing the Crown.[30] A

20. *Id.* (stating writs of assistance were common by the 16th century).

21. LANDYNSKI, *supra* note 9, at 22 (stating a writ of assistance was the same as a general warrant for search and seizure of smuggled goods except that it required officers of the Crown to assist in its execution).

22. *Id.* at 21 (citations omitted).

23. HALL, *supra* note 10, at 6 (examining writs of assistance in the colonies); *see also* LANDYNSKI, *supra* note 9, at 30 (stating that Parliament wanted to "prevent the colonies from trading with areas outside the Empire").

24. HALL, *supra* note 10, at 7 (explaining why writs of assistance caused resentment in the colonies).

25. *Id.* (examining writs of assistance).

26. *Id.* at 11-12 (explaining briefly the holding of Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765)).

27. NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 340 (1997) (describing "landmark" civil rights cases of the 1760s and 1770s).

28. 95 Eng. Rep. 807 (K.B. 1765).

29. CANTOR, *supra* note 27, at 340 ("Camden's decision is the basis for the Fourth Amendment to the American Constitution.").

30. *Entick*, 95 Eng. Rep. at 808 (stating Entick was the author of "several weekly very seditious papers intitled [sic] The Monitor, or British Freeholder").

general warrant was issued for the seizure of all of the papers at his home.[31] He brought suit for trespass and was awarded a large jury verdict.[32] Lord Camden, in the opinion of the Court of Common Pleas, held that the general warrant was invalid because it was so broad that it robbed citizens of privacy and security in their homes.[33]

In a famous line, Lord Camden stated that if he ruled in favor of the government, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger" whenever a person was suspected of libel.[34]

With these origins in mind, the Fourth Amendment was written to give constitutional status against the use of general warrants:[35]

> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the [F]ourth [A]mendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.[36]

A careful reading of the Fourth Amendment shows that although it contains directions for behavior, on its face it does not provide punishments or remedies to be applied when its directions are broken.[37] This absence is not a mistake. Some scholars suggest the reason for the absence is not that the drafters of the Fourth Amendment were careless, but rather they considered it unnecessary to describe sanctions because the sanctions were already established and well known under common law.[38]

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31. *Id.* at 808 (describing the warrant).
32. *Id.* at 809.
33. *Id.* at 817-18 (holding the defendants were unlawful in their actions).
34. *Id.* at 818.
35. J. A. C. GRANT, OUR COMMON LAW CONSTITUTION 18 (1960) ("[T]he Fourth Amendment in essence gives constitutional status to the English decisions ... against general warrants.").
36. Boyd v. United States, 116 U.S. 616, 626-27 (1886).
37. BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 12-14 (1986) (examining the intentions of the framers of the Fourth Amendment).
38. *Id.* at 14 (claiming the drafters of the Fourth Amendment saw themselves

Against this background, the Fourth Amendment today still operates to preserve the privacy of the individual, although it did not become an effective tool until it was analyzed by case law.[39] Currently, it is widely acknowledged that the Fourth Amendment is an area of law with a complicated history.[40] It has been said "[n]o area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate."[41]

The Fourth Amendment still embodies the concern for privacy that called for its creation. As it operates today, the Fourth Amendment governs government searches and seizures.[42] It both (1) prohibits unreasonable searches and seizures,[43] and (2) requires search warrants to be issued only when there exists probable cause.[44] Although at common law, illegally obtained evidence was allowed into court,[45] today, when either of the directives of the Fourth Amendment is violated the evidence obtained in the search is suppressed.[46] This is the exclusionary rule.[47] Stated another way:

> Law enforcement practices are not required by the [F]ourth [A]mendment to be reasonable unless they are

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as building on the English tradition and the common law).

39. LAFAVE & ISRAEL, *supra* note 12, at 105 (stating that the Fourth Amendment remained "unexplored" until 1886, with *Boyd v. United States*).

40. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) (lamenting the confusion surrounding the Fourth Amendment).

41. *Id.* (discussing the clarity of the Fourth Amendment).

42. *Twenty-Eighth Annual Review of Criminal Procedure – I. Investigation and Police Practices: Overview of the Fourth Amendment*, 87 GEO. L.J. 1097, 1097 (1999) [hereinafter *Overview*] (explaining where and when the Fourth Amendment is used); HALL, *supra* note 10, at 709 ("One of the oldest principles in the law of search and seizure holds that searches by private or non law enforcement personnel are not governed by the Fourth Amendment regardless of the unlawful manner in which the search may have been conducted.").

43. *Overview*, *supra* note 42, at 1097 (explaining the two separate clauses to the Fourth Amendment).

44. *Id.*

45. GRANT, *supra* note 35, at 46, 51 (stating that under common law the admissibility of evidence was not affected by its legal status as to how it was obtained).

46. HALL, *supra* note 10, at 709; *see also* WILSON, *supra* note 37. at 5 (describing the history of the Fourth Amendment beginning with the common law).

47. Interestingly, evidence obtained by a private citizen on his/her own is not excluded. JAMES C. CISSSELL, FEDERAL CRIMINAL TRIALS 15-16 (5th ed. 1999) (listing the parameters of private searches); *see also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (establishing the rule that the Fourth Amendment is not a restraint "upon other than governmental agencies"); LAFAVE & ISRAEL, *supra* note 12, at 117-18 ("[T]he private searcher is often motivated by reasons independent of a desire to secure criminal conviction and seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction.").

either 'searches' or 'seizures.' Similarly, 'searches' and 'seizures' are not regulated by the [F]ourth [A]mendment except insofar as they bear the requisite relationship to 'persons, houses, papers, and effects.'[48]

Thus, Fourth Amendment applicability is not the same as Fourth Amendment compliance.[49] The Fourth Amendment applies to searches by government agents and requires they comply with a standard of reasonableness.[50]

Since its creation, the Fourth Amendment has been refined by case law. The most significant interpretation of the Fourth Amendment by the Supreme Court came in the decision of *Katz v. United States*.[51] In *Katz* the Court held that an individual's expectation of privacy was violated when his telephone booth conversations were monitored by the government.[52] Justice Harlan, in a concurrence,[53] established a two-part test for determining whether an individual possesses a reasonable expectation of privacy.[54] First, a person must exhibit an actual expectation of privacy.[55] Second, the expectation must be one that society is willing to recognize as reasonable.[56]

It is essential to an understanding of the Fourth Amendment to realize that without a reasonable expectation of privacy, searches by the government do not violate the Fourth Amendment.[57] The

48. Amsterdam, *supra* note 40, at 356 (citations omitted).

49. WILLIAM D. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF THE SUPREME COURT DECISIONS 1 (1995) (stating that where the Fourth Amendment applies to a situation the commandment for law enforcement to be reasonable also applies; however, when the Fourth Amendment does not apply to a situation, neither does the commandment to law enforcement to be reasonable).

50. *Burdeau*, 256 U.S. at 475. The origin and history of the Fourth Amendment show that it was intended as a restraint upon the activities of the *government* and it does not require exclusion where no agent of the government is involved in a wrongful seizure. *Id.*

51. 389 U.S. 347 (1967).

52. *Id.* at 353. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*

53. *Id.* at 360.

54. *Id.* at 361 (describing a "twofold requirement").

55. *Id. See also* Kizirian, *supra* note 14, at 3 (explaining Harlan's dissent and two-prong test); Amsterdam, *supra* note 40, at 383 (explaining *Katz* and its formula for Fourth Amendment coverage).

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

57. *Id. See also* HALL, *supra* note 10, at 90 (stating that in order for the Fourth Amendment to apply there must be a reasonable expectation of privacy and with-

Katz holding, along with Justice Harlan's concurrence establishing a reasonable expectation of privacy, is still used to determine whether a search is reasonable under the Fourth Amendment.[58]

B. Luggage

Although *Bond* is the first time the Supreme Court has specifically examined the privacy of luggage in overhead storage compartments on buses, it is not the first time the court has applied a Fourth Amendment analysis to other types of luggage searches.[59] Luggage falls within "effects" protected by the Fourth Amendment.[60] Luggage encompasses "any repository of intimate and necessary personal property."[61] In his large treatise on search and seizure, John Wesley Hall, Jr. claims there is no reduced expectation of privacy for delicate versus more durable luggage, but admits that the appearance or feel of luggage can diminish the expectation of privacy.[62]

In *United States v. Chadwick*,[63] the Supreme Court held that delicate and durable luggage are equally protected by the Fourth Amendment[64] just as a cottage and castle are equally private. But, just as a glass home may reveal its interior and diminish privacy, so soft luggage or non-opaque luggage may reveal its contents. The Supreme Court recognizes that the appearance or feel of a container will diminish the expectation of privacy.[65]

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out it the Fourth Amendment is not applicable and no search has occurred).

58. Kizirian, *supra* note 14, at 3 (explaining *Katz* and the Fourth Amendment).

59. Florida v. Bostick, 501 U.S. 429, 436 (1991) (examining, inter alia, whether a bus passenger felt free to decline officers' request to search his luggage); United States v. Place, 462 U.S. 696, 707 (1983) (holding it is not a Fourth Amendment search when a traveler's luggage is exposed to a narcotics detection dog for the purposes of sniffing because "it does not expose non-contraband items that otherwise would remain hidden from view"); United States v. Chadwick, 433 U.S. 1, 7 (1977) (explaining that the reach of the Fourth Amendment extends beyond homes to all legitimate privacy interests, including the defendants' double-locked footlocker).

60. HALL, *supra* note 10, at 253-55 (stating that luggage and other closed containers are effects covered by the Fourth Amendment).

61. *Id.* at 253.

62. *Id.* at 255. "Sometimes the appearance or feel of a container will diminish the expectation of privacy." *Id.*

63. 433 U.S. 1 (1977).

64. *Id.* at 13 (discussing expectation of privacy in personal luggage).

65. Arkansas v. Sanders, 442 U.S. 753, 764, 765 n.13 (1979) (explaining some containers do not deserve the full protection of the Fourth Amendment, such as containers that infer their contents, like a gun case, or containers that reveal their

Before *Bond*, in the seven following cases, circuit courts addressed the issue of reasonable expectation of privacy in different types of luggage. Although the holdings are not identical, when combined, the reasoning each court uses for its decision creates a road map for future courts looking for a reasonable expectation of privacy for luggage in overhead storage compartments.

1. Fifth Circuit: United States v. Lovell

In *United States v. Lovell*,[66] the Fifth Circuit specifically addressed whether the squeezing of soft-sided luggage is a search under the Fourth Amendment.[67] Border Patrol Agents at the El Paso airport observed the defendant nervously check-in two soft-sided suitcases.[68] After the defendant left, the agents removed the suitcases from a conveyor belt and felt the sides of the suitcases.[69] The scent of marijuana was revealed when the agents "compressed the sides of the bags to force air out of them."[70]

The court held that such "prepping"[71] of luggage was not a search under the Fourth Amendment.[72] Repeating its language from a previous decision,[73] the court held that actions such as the agents squeezing of the suitcase were "a minor intrusion upon privacy and integrity ... not generally considered searches or seizures subject to the safeguards of the [F]ourth [A]mendment."[74]

The holding does not directly examine reasonable expectation of privacy, like *Bond*; instead, it simply holds that the agent's actions were minimally intrusive.[75] Thus, according to *Lovell*, "an individual

contents to plain view).

66. 849 F.2d 910 (5th Cir. 1988).

67. *Id.* at 912 (addressing as an issue of the case whether the compression of defendant's suitcases was either a search or a seizure).

68. *Id.* at 911 (describing defendant's luggage and visible signs of his nervousness).

69. *Id.* (stating that the agents noticed the suitcases were heavy and the agents could feel a "solid mass" inside the suitcases).

70. *Id.* (stating after the agents smelled marijuana a narcotics-sniffing dog alerted to the defendant's luggage).

71. *Id.* at 913.

72. *Id.* (recognizing there could be a "prepping" so violent that it rises to the level of a Fourth Amendment search, but not the "prepping" done by the agents in this case).

73. *Id.* (referring to *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981), a case involving luggage removed from an airline baggage cart and subjected to sniffing by a narcotics-detection dog).

74. *Id.* at 913 (citations omitted).

75. *Id.* (rejecting defendant's claim that the agent's actions were more intru-

does not have a reasonable expectation of privacy that his luggage will not be touched or moved by others during travel"[76] at an airport.

2. *Sixth Circuit:* United States v. Guzman

In *Guzman*,[77] a police detective laid his hand on the defendant's cloth bag stored in an unenclosed[78] luggage rack on a Greyhound bus.[79] The experienced officer felt hard bricks inside the bag, which he believed to be drugs.[80]

To determine if the officer's actions constituted a search under the Fourth Amendment, the Sixth Circuit, like the Supreme Court in *Bond*,[81] examined the defendant's expectation of privacy.[82] The court held the defendant had no reasonable expectation of privacy,[83] finding the defendant should have known his luggage would be exposed and accessible to others on the bus.[84] Also, the defendant did not establish a reasonable expectation of privacy through his actions: he did not exhibit physical control of his bag by either storing it close to himself[85] or by jumping up to move it when he saw others approaching.[86]

The court clarified its position by stating, "there is a meaningful distinction between an individual's privacy interest in the interior and exterior of his luggage ... [but] this expectation of privacy does not extend to the exterior or airspace surrounding luggage."[87]

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sive than the actions in *Goldstein*).

76. Kizirian, *supra* note 14, at 124.

77. United States v. Guzman, 75 F.3d 1090 (6th Cir. 1996).

78. *Id.* at 1092. "The overhead luggage rack is an unenclosed shelf that runs the entire length of the bus. It is two feet deep with elastic ropes over the front of it." *Id.*

79. *Id.* (describing the officer's contact with the defendant).

80. *Id.* (stating the officer's testimony).

81. *See* discussion *infra* Part III.

82. *Guzman,* 75 F.3d at 1093. "[O]ur first consideration is whether defendant had a legitimate and reasonable expectation of privacy in the exterior of his luggage when he placed it in a public overhead compartment on a Greyhound bus." *Id.*

83. *Id.* at 1095 (stating defendant had no reasonable expectation of privacy for his luggage).

84. *Id.* "[H]e should have known that it would be accessible to others in the normal flow of traffic on the bus." *Id.*

85. *Id.* (stating a bus passenger can "assert" himself and create an expectation of privacy by maintaining close physical control of his property).

86. *Id.* (stating a passenger can create an expectation of privacy if he is "quick to intercede").

87. *Id.*

Important in *Guzman* is the court's description of the defendant's actions as placing his luggage into the "normal flow of traffic,"[88] meaning interaction with other passengers on the bus.[89] It has been suggested that "normal flow of traffic" would not include contact with a law-enforcement official who boards a bus.[90] Nevertheless, the "normal flow of traffic" distinction is worth noting because it can be used to help law-enforcement officials develop rules of conduct when encountering similar situations.[91]

3. *Seventh Circuit:* United States v. McDonald

Like the Sixth Circuit,[92] the Seventh Circuit in *McDonald,*[93] held that a passenger who placed her soft-sided[94] luggage in the overhead luggage compartment of a commercial bus[95] did not have a reasonable expectation of privacy.[96] Citing *Guzman,*[97] the court held that by placing her luggage in the overhead rack, the defendant knowingly exposed the exterior of her luggage to other passengers who would have to "move, touch, or push [the defendant's] bags, and would in all probability feel the outside of her bags in doing so."[98] Thus, without a reasonable expectation of privacy, it was not a search when a law-enforcement officer laid her hands on the luggage and felt bricks of cocaine inside.[99]

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88. *Id.*

89. *Id.* (stating that by placing his luggage in the overhead rack defendant left it open to the flow of traffic from "others").

90. Kizirian, *supra* note 14, at 123 (arguing that it is not part of a normal flow of traffic on a commercial bus for government officials to board and touch a passenger's luggage).

91. *See* discussion *infra* Part IV.

92. *Guzman,* 75 F.3d at 1090.

93. Unites States v. McDonald, 100 F.3d 1320 (7th Cir. 1996).

94. *Id.* at 1322 (describing defendant's luggage).

95. *Id.* (stating it was a Greyhound bus from St. Louis on a short layover in Indianapolis).

96. *Id.* at 1326 (stating that because defendant knowingly exposed her luggage to other passengers she did not have a reasonable expectation of privacy).

97. *Guzman,* 75 F.3d at 1090; *see also* Andrew J. Purcell, Comment, *Feeling Violated: Seventh Circuit Puts the Squeeze on Fourth Amendment Rights of Bus Travelers,* 31 J. MARSHALL L. REV. 245, 257-61 (explaining *McDonald* and listing factors that make *Guzman* a misapplication for *McDonald*).

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

99. *Id. See also* Andrew P. Heck, Note, *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, 186 (1999) (stating that if defendant did not have a reasonable expectation of privacy then no search occurred to call for a Fourth Amendment analysis).

The court did not mention the size of the bus in its analysis other than to say it was a Greyhound,[100] public-transportation bus. Yet, the court said there were only nine passengers on the bus.[101] If the bus were a standard-sized commercial bus, it seems reasonable that nine people could spread themselves to the point that each would have ample space in an overhead luggage bin and thus, an expectation of privacy greater than that on a more crowded bus. Indeed, the passengers of the bus were aware that there were only nine of them: the court states that three passengers were seated in the front of the bus and the remaining six were seated in the back.[102]

Although the Seventh Circuit cites to *Guzman*[103] in its analysis,[104] it chose to ignore the Sixth Circuit's suggestions for finding that a passenger can create an expectation of privacy by her actions.[105] Neither did the defendant raise the issue in her defense.[106]

4. *Eighth Circuit:* United States v. Gwinn

In *Gwinn*,[107] the Eighth Circuit compared the behavior of a police officer feeling luggage in the overhead luggage rack of a train with the behavior to be expected from another traveler on the train.[108] The defendant placed a soft-sided gym bag in the overhead compartment of an Amtrak train.[109] While passengers were off the train at a scheduled stop,[110] police officers boarded the train to look for narcotics.[111] The officer in question, in examining the defen-

100. *McDonald*, 100 F.3d at 1322.

101. *Id.* at 1323. The court states that the passengers disembarked during a layover. *Id.* at 1322. Then, the court states that officers waited while "the nine reboarding passengers got on the bus." *Id.* at 1323.

102. *Id.* at 1323. "[T]hree female passengers sat in the front of the bus, while the *other six* passengers took seats at the rear." *Id.* (emphasis added).

103. 75 F.3d 1090 (6th Cir. 1996).

104. *McDonald*, 100 F.3d at 1325 (stating that the factual situations are similar and recounting the holding in *Guzman*).

105. *Guzman*, 75 F.3d at 1095 (discussing ways in which a bus traveler may maintain physical control over his property).

106. *McDonald*, 100 F.3d at 1324 (listing the defendant's claims).

107. United States v. Gwinn, 191 F.3d 874 (8th Cir. 1999).

108. *Id.* at 878 (examining the extent of the officer's contact with defendant's bag and finding that it went beyond the incidental touching or the "limited intrusiveness of a canine sniff").

109. *Id.* at 876 (explaining the facts of the case).

110. *Id.* The train was en route from Los Angeles to Chicago and was at a stopover in Kansas City. *Id.*

111. *Id.* (stating that the officers assigned purpose was to look for narcotics in

dant's bag, stood on the armrest of the seat below, lifted the bag, felt its sides, and squeezed it to expel air that might reveal the scent of narcotics,[112] and which did indeed reveal narcotics.[113]

First, the court held that the defendant had a "subjective" expectation of privacy for his luggage:[114] at most, he could expect his luggage to be "briefly touch[ed]"[115] by fellow passengers. Next, using reasoning similar to that used by the Supreme Court in *Bond*,[116] the court concluded that the officer's particular touching went beyond the degree[117] of touching defendant could expect from fellow travelers.[118] Thus, the officer's behavior constituted a search within the meaning of the Fourth Amendment.[119] Because the officer did not have probable cause or a warrant, the search was unlawful.[120]

Although the Eighth Circuit did not offer criteria for future courts to use in examining degree of touching cases, the facts of the case reveal possible criteria. In determining that the officer's behavior went beyond the behavior to be expected from fellow travelers, the court noticed the officer stood on the armrest of the seat below in order to reach the defendant's luggage.[121] Thus, one factor in determining whether a person has demonstrated a reasonable expectation of privacy for his luggage is the position of the overhead luggage compartment. If the compartment is not easily accessible, it is reasonable for a passenger to believe that his luggage will be touched less than if the compartment is in a more accessible position.

the train's coach section).

112. *Id.* (describing the officer's actions).

113. *Id.*

114. *Id.* at 878 (stating the expectation was that the exterior of the bag would not be subject to "physical manipulation by others").

115. *Id.* at 879.

116. *See* discussion *infra* Part III.

117. *Id.* The court uses the "degree of intrusion" examination from the Tenth Circuit decision, *United States v. Nicholson*, 144 F.3d 632 (10th Cir. 1998); *infra* pp. 2017-18.

118. *Gwinn*, 191 F.3d at 879 (stating the majority of the traveling public would expect light touching but not "thorough squeezing and manipulation").

119. *Id.* (holding the officer's actions to be a search within the meaning of the Fourth Amendment, and because the officer had no warrant, probable cause, reasonable suspicion, or consent, the search was unlawful).

120. *Id.* (stating the holding of the case).

121. *Id.* at 876. "[Officer] stepped up on the back of a foot rest and the arm rest of one of the seats." *Id.*

5. *Tenth Circuit:* United States v. Gault *and* United States v. Nicholson

In *Gault*,[122] the Tenth Circuit, consistent with the Supreme Court,[123] held there is no reasonable expectation of privacy in the air surrounding one's luggage.[124] The defendant, aboard an Amtrak train,[125] did not have a reasonable expectation of privacy in his nylon gym bag.[126] First, the bag was placed on the floor protruding five inches into the aisle,[127] exposing it to touching and kicking from other passengers as they attempted to pass.[128] Also, the scent of narcotics coming from the bag was not protected by the Fourth Amendment.[129]

The more recent luggage case from the Tenth Circuit, *Nicholson*,[130] is the case in which "degree of intrusion"[131] language was first used. In *Nicholson*, the Tenth Circuit aligned itself with the Seventh Circuit,[132] holding that a passenger on a commercial bus has no reasonable expectation of privacy that his luggage will not be "manipulated"[133] by other travelers. In determining if a police officer's handling of luggage goes beyond the handling to be expected from fellow travelers, the court cites the "degree of intrusion" as the con-

122. United States v. Gault, 92 F.3d 990 (10th Cir. 1996).

123. United States v. Place, 462 U.S. 696, 707 (1983) (holding that a canine sniff is not a search because it does not expose items that would otherwise remain hidden from view); *see also* LAFAVE & ISRAEL, *supra* note 12, at 129 (explaining the holding of *Place*).

124. *Gault*, 92 F.3d at 992 (holding there was not a reasonable expectation of privacy in the air surrounding the defendant's gymbag).

125. *Id.* at 991 (stating that the train was en route from Los Angeles to Chicago and defendant boarded in Albuquerque, New Mexico).

126. *Id.* (stating the defendant used a "zippered nylon gym bag" which he kept on the floor, protruding five inches into the aisle).

127. *Id.*

128. *Id.* at 992. "[A] window seat passenger would have had to step over it, possibly kicking it in the process, or lifting the bag to avoid it." *Id.*

129. *Id.* (holding there is no reasonable expectation of privacy in the air around luggage).

130. United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998).

131. *Id.* at 639. "The degree of intrusion is the determining factor as to whether an officer's contact with the exterior of luggage constitutes a search under the Fourth Amendment." *Id.*

132. Heck, *supra* note 99, at 189. "[A]lthough the Tenth Circuit reached a different result than the Seventh Circuit in *McDonald*, the Tenth Circuit, like the Seventh Circuit, focused on the passenger's reasonable expectation of privacy in determining whether a Fourth Amendment search had occurred." *Id.*

133. *Nicholson*, 144 F.3d at 639.

trolling factor.[134] If an officer's conduct exceeds the degree of intrusion to be expected from fellow passengers, his actions are a search under the Fourth Amendment.[135]

In *Nicholson*, the court held the degree of intrusion from the officer in question went beyond the intrusion to be expected from fellow travelers when the officer removed the defendant's luggage from the overhead rack in order to facilitate a tactile examination of the luggage.[136] Thus, the officer's actions were a search under the Fourth Amendment.[137] The "degree of intrusion" tool for examining tactile searches will be used by the Supreme Court in *Bond*,[138] although not cited to the Tenth Circuit.

6. *District Of Columbia Circuit:* United States v. Most

In *Most*,[139] the defendant left his plastic shopping bag[140] with the clerk of a grocery store.[141] Although it was common to leave bags with the clerk while patrons shopped, the defendant asked the clerk to continue to watch his bag when he left the store.[142] The clerk placed the bag on the floor underneath the checkout counter.[143] Once the defendant left, a police officer who had been following him[144] took the bag and felt the bottom of it using a "crush technique"[145] that revealed narcotics.[146]

The District of Columbia Circuit Court, although not specifi-

134. *Id.* (explaining degree of intrusion).

135. *Id.* (stating that the defendant could expect some touching from other passengers but had no reasonable expectation the luggage would be touched in the manner the officer used).

136. *Id.* (stating that the officer's handling "departed" from the handling a passenger could expect).

137. *Id.* (stating the search "entered the domain protected by the Fourth Amendment").

138. *See* discussion *infra* Part III.

139. United States v. Most, 876 F.2d 191 (D.C. Cir. 1989).

140. *Id.* at 192 (describing the bag as a red, yellow, and black plastic bag with drawstrings).

141. *Id.* (stating the store required patrons to check their bags while they shopped).

142. *Id.* (describing the defendant's actions in the store).

143. *Id.*

144. *Id.* The officers had been following the defendant since they observed him remove the bag from the trunk of a car, noting his suspicious manner. *Id.*

145. *Id.* at 193 (explaining that the officer first picked up the bag by its drawstrings, looked into it from the top, increased the opening of the bag with a pen, and then felt the bottom with what he called a "crush technique").

146. *Id.* (stating that the officer felt hard, individually wrapped packages which he correctly concluded to be narcotics).

cally mentioning the *degree* of the officer's contact, reasoned in a manner similar to the degree of intrusion test that would later be pronounced by the Tenth Circuit.[147] The court held that the officer's feeling of the plastic bag "went beyond the sort of highly limited contact that would be necessary if the bag were moved [by the clerk] from one location to another."[148] Because this movement by the clerk was the only type of contact the defendant could have expected, the officer's manipulation of the bag was a search under the Fourth Amendment and thus unconstitutional.[149]

III. THE *BOND V. UNITED STATES* DECISION

With *Bond*, the Supreme Court joined the previously-mentioned circuit courts in examining reasonable expectation of privacy for luggage in overhead storage compartments. Although briefs by the petitioner Bond[150] and the government[151] referred to the previous circuit court cases, the Supreme Court chose to apply its own fresh analysis instead of relying on the circuit courts.

A. *The Facts Of* Bond

The facts of *Bond*[152] are deceptively simple. Petitioner, Steven Dewayne Bond ("Bond"), was a passenger on a Greyhound bus traveling from California to Little Rock, Arkansas.[153] He sat in row four or five from the back of the bus.[154] At Sierra Blanca, Texas, the bus stopped at a Border Patrol checkpoint[155] where border patrol agent Cesar Cantu ("Agent Cantu") boarded the bus to check the immigration status of the passengers.[156] By the time Agent Cantu

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147. *Nicholson*, 144 F.3d at 639 (stating the "degree of intrusion is the determining factor").

148. *Most*, 876 F.2d at 198 n.13.

149. Kizirian, *supra* note 14, at 119 (explaining the District of Columbia Court's emphasis on the *manner* in which the bag was handled).

150. Brief for Petitioner at V, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349) (citing to *Gwinn*, *McDonald* and *Nicholson*); *see also* Reply Brief for Petitioner at iii, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349) (citing to *Most* and *Nicholson*).

151. Brief for the United States at V, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349) (citing to each of the circuit court cases discussed in this casenote except *United States v. Most*).

152. *Bond*, 529 U.S. at 334.

153. *Id.* at 335.

154. *Id.* at 336.

155. *Id.* at 335. The bus was required to stop at the Border Patrol checkpoint.

156. *Id.*

reached the back of the bus he had satisfied himself that none of the passengers were illegally in the United States.[157] As he walked back toward the front of the bus,[158] "he squeezed the soft luggage which passengers had placed in the overhead storage space above the seats."[159]

When he inspected the luggage compartment above Bond's seat, Agent Cantu squeezed a green canvas bag and noticed it contained a "brick-like" object[160] that when squeezed indicated a different mass inside.[161] Bond admitted owning the bag and allowed Agent Cantu to open it, revealing a "brick of methamphetamine" wrapped in duct tape and rolled in clothing.[162] Bond admitted owning the methamphetamine.[163]

At district court level, Bond moved to suppress the methamphetamine as evidence, claiming Agent Cantu illegally searched the bag.[164] The district court denied the motion and found Bond guilty of conspiracy to possess methamphetamine and possession with intent to deliver methamphetamine.[165] He was sentenced to prison.[166]

On appeal, Bond argued that although other bus passengers had access to his bag in the overhead bin, Agent Cantu handled the bag in a way that other passengers would not.[167] Because Bond consented to the search of his bag, the court of appeals limited its analysis to the question of whether Cantu violated Bond's Fourth

157. *Id.* Cantu stated border patrol agents routinely entered buses at Border Patrol checkpoints to run immigration checks. *Id.* at 1465.

158. Brief for the United States at 3, *Bond v. United States*, 529 U.S. 334 (2000) (No. 98-9349) ("Because the bus had no rear door, Agent Cantu returned to exit through the front").

159. *Bond*, 529 U.S. at 338. Agent Cantu stated that when border patrol agents exited buses after immigration checks, it was a regular practice for them to inspect luggage in the overhead bins by squeezing. Agent Cantu believed his squeezes were ordinarily not hard enough to break anything fragile. *Id.*

160. *Id.* at 339.

161. *Id.*

162. *Id.* at 336. The "brick" was approximately six or seven inches long by four or five inches wide. Brief for Petitioner at 3, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349).

163. Brief for the United States at 3-4, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349) (stating that Bond revealed to Cantu that he was delivering the methamphetamine from California to Little Rock, Arkansas).

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

165. *Id.* The court stated both counts are violations of 84 Stat. 1260, 21 U.S.C. § 841(a)(1). *Id.*

166. *Id.* Bond was sentenced to 57 months.

167. *Id.*

Amendment rights prior to the search.[168]

Relying on the Supreme Court's decision in *California v. Ciraolo*,[169] the court of appeals upheld the district court's denial of the motion to suppress and found (1) it was irrelevant if Cantu handled the bag intending to find contraband,[170] and (2) Cantu's handling of the bag was not a search under the meaning of the Fourth Amendment.[171] Thus, the issues for the Supreme Court were twofold: (1) was the bag protected under the Fourth Amendment, and (2) was the handling of the bag a "search" within the meaning of the Fourth Amendment.[172]

B. The Court's Analysis

The Supreme Court found that Agent Cantu's manipulation of Bond's bag violated the Fourth Amendment.[173] The decision focused on *how* Agent Cantu handled the bag and whether the handling went outside of the realm of possible handling that Bond could have expected from other bus passengers.

The Court began its decision by stating that a traveler's luggage is an "effect" that clearly falls under the Fourth Amendment's protection.[174] Carry-on luggage is typically used for personal items that a traveler wishes to keep close.[175] The government argued that when Bond placed his bag in the overhead bin it became a matter open to public observation because it could be touched by other passengers.[176] Similar touching by Agent Cantu would not violate the Fourth Amendment.[177]

First, the Court distinguished two of its previous decisions, which held that matters open to public observation are not pro-

168. United States v. Bond, 167 F.3d 225, 226 (5th Cir. 1999) (stating the issue that was considered by the court of appeals).

169. 476 U.S. 207 (1985).

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

171. *Id.*

172. *Id.* at 336-37.

173. *Id.* at 339.

174. *Id.* at 336. In *Place*, the Court stated "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." United States v. Place, 462 U.S. 696, 707 (1983).

175. *Bond*, 529 U.S. at 337-38.

176. *Id.* at 337.

177. Brief for the United States at 8, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349) (arguing that defendant cannot claim an unwanted physical invasion by police when the bag is exposed to such handling from other passengers).

tected by the Fourth Amendment.[178] The first case, *Ciraolo*,[179] held that a homeowner's reasonable expectation of privacy was not violated by observations from a police airplane flying at 1000 feet.[180] Next, in *Florida v. Riley*,[181] the Court held that observations of a home greenhouse made from a police helicopter flying at 400 feet were also not violations of the homeowner's reasonable expectation of privacy.[182] In both cases, the Court reasoned that the properties were not protected from inspections that were not physically intrusive.[183] Any member of the public could have seen what the police saw by flying overhead.[184] Thus, the defendants' expectations of privacy were not reasonable.[185] *Ciraolo* and *Riley* are distinguishable from *Bond* because "they involved only visual, as opposed to tactile, observation."[186]

Next, the Court held that when Agent Cantu physically manipulated Bond's luggage, his handling and squeezing went beyond the handling Bond could have expected from other passengers, which defined his expectation of privacy.[187] Thus, the search violated the Fourth Amendment and the court of appeals was reversed.[188]

Finally, Justice Breyer was joined by Justice Scalia in a well-reasoned dissent from the majority opinion in *Bond*.[189] The dissent pointed out that Agent Cantu's treatment of Bond's luggage was no different from the treatment Bond could have expected from fellow passengers.[190] The dissent cited to articles from popular news sources that told horror stories of luggage placed in overhead compartments, in which luggage was "crammed," "rearrange[d]," "recram[ed]," "removed," "shoved and pounded"[191] by fellow passengers. This is the sort of treatment a traveler can expect when us-

178. *Bond*, 529 U.S. at 337 (distinguishing *Ciraolo* and *Riley*).
179. 476 U.S. 207 (1986).
180. *Bond*, 529 U.S. at 337 (explaining *Ciraolo*).
181. 488 U.S. 445 (1989).
182. *Bond*, 529 U.S. at 337 (explaining *Riley*).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 338.
188. *Id.* at 339.
189. *Id.* (Breyer, J., dissenting)
190. *Id.* at 340 (stating that Agent Cantu's treatment of the luggage did not differ from the treatment the luggage was likely to receive from other travelers on the bus).
191. *Id.* (citations omitted).

ing an overhead compartment on a bus or airplane in order to store luggage.

The dissent emphasized that both the trial court[192] and court of appeals[193] found nothing unusual about Agent Cantu's manipulation of the luggage as compared to the manipulation Bond could have expected from fellow passengers. Thus, it was unreasonable for Bond to claim he had an expectation of privacy in the bag because, "any member of the public ... could have used his senses to detect everything the officers observed."[194]

Even though Agent Cantu's purpose for touching the bag was different from that of a fellow passenger, purpose does not matter when determining whether an expectation of privacy is reasonable.[195] If the Fourth Amendment were controlled by purpose, it "could prevent police alone from intruding where other strangers freely tread."[196] This, in turn, would hinder the ability of law enforcement to do its job.

The dissent wisely points out that the majority decision further complicates the already complicated Fourth Amendment and increases difficulties for law enforcement in ordinary criminal matters.[197] The decision does little to protect true privacy for passengers using overhead storage compartments and deters law enforcement searching for drugs at border stops from using non-intrusive touch "to investigate publicly exposed bags."[198]

C. *Factors For Future Courts To Consider When Examining Reasonable Expectation Of Privacy For Luggage In Overhead Compartments*

Although they have not listed them specifically, the Supreme Court and the circuit courts have each created factors to be considered when determining if a bus passenger has a reasonable expectation of privacy in a piece of luggage in an overhead storage compartment. When these factors are extracted from the cases and listed, they benefit both law-enforcement agents and courts.

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192. *Id.* (stating the trial court "saw nothing unusual, unforeseeable, or special about this agent's squeeze").

193. *Id.* (stating the court of appeals found the agent's squeezing foreseeable).

194. *Id.* at 341.

195. *Id.* "[I]n determining whether an expectation of privacy is reasonable, it is the effect, not the purpose that matters." *Id.*

196. *Id.* at 342.

197. *Id.* (explaining that the majority decision further complicates the Fourth Amendment and increases the difficulty of ordinary criminal matters).

198. *Id.* at 342-43.

First, law enforcement benefits from a listing of these factors because law-enforcement agents familiar with these factors can then effect more productive searches and trample on fewer rights. The knowledge of what constitutes a reasonable expectation of privacy decreases the likelihood that police searches will violate the Fourth Amendment and result in any evidence obtained in the search being suppressed. Also, it allows law enforcement to take an active role in creating rules of conduct for searches.

The Supreme Court has stated it does not want to be the primary rulemaking authority for police conduct in the area of Fourth Amendment searches and seizures.[199] Because the Court does not become involved in a particular case until after the actual search and seizure occurs, the Court more properly functions as a "backstop"[200] for law enforcement behavior: instead of creating rules of conduct it reviews and judges permissible conduct and policies.[201]

The group in the best position to establish rules of conduct for law enforcement is the law-enforcement agencies themselves.[202] In the past, the Supreme Court has looked favorably upon police behavior in the realm of Fourth Amendment searches and seizures when the officers involved were operating according to police-established policies for search and seizure conduct.[203] Thus, it is to

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199. Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (stating "it is not our function to write a manual on administering routine, neutral procedure of the station house ..."). *See also* Colorado v. Bertine, 479 U.S. 367, 374 (1987) (stating "reasonable police procedures ... satisfy the Fourth Amendment, even though courts might ... be able to devise equally reasonable rules requiring a different procedure").

200. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

> In most areas of constitutional law the Supreme Court of the United States plays a back-stopping role, reviewing the ultimate permissibility of dispositions and policies guided in the first instance by legislative enactments, administrative rules or local common-law traditions. In the area of controls upon the police, a vast abnegation of responsibility at the level of each of these ordinary sources of legal rule-making has forced the Court to construct all the law regulating the everyday functioning of the police.

Id.

201. *Id.*

202. Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 447 (1990) (stating that in order to limit the number of discretionary decisions a police officer must make, it is necessary for law enforcement to create a system of rulemaking).

203. Amsterdam, *supra* note 40, at 451-57 (listing cases in which the Supreme Court has looked to police rules of conduct when deciding Fourth Amendment

the benefit of law enforcement to have established policies.[204]

In addition to the approval of the courts, the advantage of established policies for search and seizure is obvious: officers in the field will act in accordance with standards of safety and privacy and not merely upon their personal discretion or caprice.[205] Wayne R. LaFave lists four advantages to police establishing their own rules of conduct:

> Rule making enhances the quality of police decisions;
>
> Rule making tends to ensure the fair and equal treatment of citizens;
>
> Rule making increases the visibility of police policy decisions; and
>
> Rule making offers the best hope we have for getting policemen consistently to obey and enforce constitutional norms that guarantee the liberty of the citizen.[206]

In like manner, Anthony G. Amsterdam, who has also analyzed police rule making, says "[r]ule making would also tend to tame the welter of police practices that now come before the courts for [F]ourth [A]mendment adjudication by preventing some of those practices from being used in the first place."[207]

The amount of Fourth Amendment litigation would be reduced in a system with rules created by the police command structure[208] because officers would determine *before* a search if a reasonable expectation of privacy exists. Also, police rulemaking has

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issues); *see also Bertine*, 479 U.S. at 367 (upholding the inventory of the contents of an impounded van because it was done according to established police regulations); Illinois v. Lafayette, 462 U.S. 640 (1983) (upholding the inventory of defendant's effects because it was done according to established police regulations); South Dakota v. Opperman, 428 U.S. 364 (1976) (upholding an inventory of the contents of an impounded car because it was done according to established police regulations).

204. LaFave, *supra* note 202, at 456-57 (explaining the advantage of established rules). LaFave states that *Bertine* "strongly encourages departments to adopt written policies." *Id.*

205. *Id.* at 459 (stating Justice Powell's concurrence in *Opperman* establishing that the Fourth Amendment guards against arbitrary invasion by government officials reveals the need for police to form rules of conduct).

206. Wayne R. LaFave, *Police Rule Making and the Fourth Amendment: The Role of the Courts*, DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY, 211, 218 (Lloyd E. Ohlin and Frank J. Remington eds., 1993) (listing four ways in which "policymaking" improves police performance); *see also* LaFave, *supra* note 202, at 451 (listing the same four rules).

207. Amsterdam, *supra* note 40, at 421.

208. *Id.*

potential for community involvement because rules will be available for public scrutiny[209]—a scenario very different from the current practice of examining isolated incidents in the courts after the fact.

In addition to the benefit for law enforcement, future courts will also benefit from a listing of the factors for finding a reasonable expectation of privacy. It will allow for consistency in holdings and predictability for arguing attorneys.

After noting the advantage of listing these factors, the next step is to look to the circuit courts and the *Bond* decision and predict rules to be gleaned from them. First, in *Bond*, the Court found Agent Cantu's method of searching violated the Fourth Amendment because his touch exceeded the touch that could be expected from fellow passengers.[210] The Court did not say his touch was unconstitutional per se, nor did it provide specific factors for other courts or law-enforcement agencies to use when presented with similar fact patterns in the future. However, an examination of the decision reveals several factors that could be used by a future court.

The following list is not exhaustive, but rather a preliminary list of factors for future courts and law enforcement to use when examining reasonable expectation of privacy for luggage in overhead storage compartments.

> (1) *The Density of People on the Bus.* Luggage in overhead luggage bins on a bus crowded with people necessarily has a lower expectation of privacy than the same luggage in a sparsely populated bus where passengers are spread out, taking advantage of increased individual space. The Seventh Circuit, in *United States v. McDonald*,[211] remarked on the number of passengers aboard a bus that was boarded by law enforcement, but did not list this number as a specific factor in its decision.[212] Nevertheless, *Bond* found a passenger's reasonable expectation of privacy can be determined in part by the other passengers on the bus, because a traveler can expect that other passengers will touch or move luggage in overhead bins.[213] Thus, it fol-

209. *Id.* at 422.

210. Bond v. United States, 529 U.S. 334, 338-39 (2000) (holding Cantu's manipulation of Bond's bag violated the Fourth Amendment because Bond did not expect his bag would be handled in an "exploratory manner").

211. 100 F.3d 1320 (7th Cir. 1996).

212. *Id.* at 1323 (stating that "nine reboarding passengers got on the bus").

213. *Bond*, 529 U.S. at 338. "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." *Id.*

lows that the density of passengers aboard a bus is a determining factor for finding a reasonable expectation of privacy in luggage stored in an overhead bin. When a passenger is seated away from fellow bus travelers, it is unlikely that those other travelers will disturb his luggage.

(2) *The Type of Overhead Bin.* A bus passenger could reasonably have a greater expectation of privacy in an overhead bin with a door than one without a door that leaves luggage clearly exposed. The Sixth Circuit, in *United States v. Guzman,*[214] considered the open design of a luggage rack when it determined that a passenger did not have a reasonable expectation of privacy in his luggage.[215] The court noted, "the overhead [luggage] rack is an unenclosed shelf that runs the entire length of the bus. It is two feet deep with elastic ropes over the front of it."[216] Such a luggage rack simply cannot offer the privacy from view, touch or smell that can be given by an enclosed luggage compartment with a door, or even a shelf with a solid bottom.

(3) *The Length of the Bus Trip.* On a long trip passengers will get up more often to retrieve items from their luggage than on a short trip. Although neither *Bond* nor any of the circuit court decisions mention this factor specifically, they each mention the length of the bus trip[217] when the search involved a bus passenger. It follows that the length of time a passenger spends on a bus can be a factor for examining the reasonable expectation of privacy the passenger has in his luggage stored in an overhead compartment.

(4) *The Type of Luggage Used.* Obviously, a hard-sided suit-

214. 75 F.3d 1090 (6th Cir. 1996).

215. *Id.* at 1095. "Guzman placed his bag on the overhead storage rack of a commercial bus where he should have known that it would be accessible to others in the normal flow of traffic on the bus." *Id.*

216. *Id* at 1092.

217. *Bond,* 529 U.S. at 335 (stating Bond was on a bus traveling from California to Little Rock, Arkansas); United States v. Gwinn, 191 F.3d 874, 876 (8th Cir. 1999) (stating defendant was on a train en route from Los Angeles to Chicago); United States v. Nicholson, 144 F.3d 632, 634 (10th Cir. 1998) (stating that the defendant was aboard a bus from San Diego to New York City, stopped in Oklahoma City); *McDonald,* 100 F.3d at 1322 (stating the defendant was on a bus from St. Louis stopped in Indianapolis); United States v. Gault, 92 F.3d 990, 991 (10th Cir. 1996) (stating that the defendant boarded a train in Albuquerque, New Mexico, en route to Chicago from Los Angeles); *Guzman,* 75 F.3d at 1091 (stating that the defendant arrived in Memphis, Tennessee on a bus from Dallas, Texas).

case offers more protection and privacy than a canvas knapsack. Appearance and feel of luggage can affect the reasonable expectation of privacy that a piece of luggage affords.[218] The *Bond* decision notes that the defendant used a canvas bag as his carry-on luggage.[219] Likewise, in each circuit court case discussed above, the defendant used soft luggage.[220] Hard luggage hides its interior and provides a greater expectation of privacy than soft luggage.

(5) *The Placement of Luggage Within the Luggage Bin.* A passenger who places his luggage in the rear of the luggage bin or in the corner has a greater expectation of privacy than the passenger who is forced to store her luggage at the front of the compartment. Luggage that is located in back of or behind other luggage is hidden from view and protected from touch as long as the luggage in front of it remains.

Although neither the circuit courts nor *Bond* mentions the placement of luggage within overhead storage bins, this factor is similar to considering the type of luggage rack.[221] Just as an open luggage rack leaves luggage more exposed than a closed luggage rack, luggage positioned at the front of a luggage rack is more exposed than luggage at the back.

(6) *The Attention a Passenger Gives to his Luggage During the Trip.* If a passenger rises to move his own luggage each time he sees another passenger approach the overhead luggage compartment, he has created an increased expectation of privacy due to his own attention and activity.[222] In *Guzman*, the Sixth Circuit stated:

> [A] bus passenger might maintain physical control over property stowed in close proximity to his person if he is quick to intercede in order to prevent another

218. HALL, *supra* note 10, at 255. "Sometimes the appearance or feel of a container will diminish the expectation of privacy." *Id.*

219. *Bond*, 529 U.S. at 334 (noting that Bond used a "canvas bag").

220. *Gwinn*, 191 F.3d at 876 ("soft-sided bag"); *Nicholson*, 144 F.3d at 634 ("fabric-sided bag"); *McDonald*, 100 F.3d at 1322 ("two medium-sized softsided bags"); *Gault*, 92 F.3d at 991 ("zippered nylon gym bag"); *Guzman*, 75 F.3d at 1091 ("a blue cloth bag"); United States v. Most, 876 F.2d 191, 192 (D.C. Cir. 1989) ("plastic bag"); United States v. Lovell, 849 F.2d 910, 911 (5th Cir. 1988) ("soft-sided nylon suitcases").

221. *Guzman*, 75 F.3d at 1095 (describing an open luggage rack).

222. *Id.*

> from disturbing it; but that he might well have to assert himself in order to ward off others only highlights the lack of any societal understanding that he may expect privacy in such a place.[223]

Thus, it is possible for a vigilant traveler to *create* a reasonable expectation of privacy in his luggage stored in an overhead bin.

(7) *The Height and Accessibility of the Overhead Compartment.* An overhead luggage compartment that is located high enough to be out of sight creates a reasonable expectation of privacy. In *United States v. Gwinn*,[224] the Eighth Circuit described the actions of an officer who "stepped on the back of a foot rest"[225] in order to get to the luggage rack on a train. The court held that although the defendant could have expected casual contact with other passengers, the officer's actions went beyond what the defendant could have expected.[226] Therefore, it was a search under the Fourth Amendment.[227] If luggage racks are located out of the flow of traffic, it is reasonable to expect that luggage stowed in such a place will receive less contact than luggage in a more accessible rack.

This list of factors is not meant to be exhaustive. It is merely an example of the type of reasoning that must go into a system of guidelines that courts and law enforcement can use when examining reasonable expectation of privacy. These factors can be used by courts and police officers to determine if a piece of luggage stored in the overhead storage compartment of a bus has a reasonable expectation of privacy.

IV. APPLYING THE FACTORS FOR FINDING A REASONABLE EXPECTATION OF PRIVACY TO THE *BOND* DECISION

When the above factors are applied to the facts of *Bond*, it is clear that defendant Bond had no reasonable expectation of privacy in his luggage. First, Bond was on a long trip.[228] The increased time on the bus increases the likelihood that, at some time, his lug-

223. *Id.*
224. 191 F.3d 874 (8th Cir. 1999).
225. *Id.* at 876.
226. *Id.* at 878.
227. *Id.*
228. United States v. Bond, 529 U.S. 334, 335 (2000) (traveling from California to Little Rock, Arkansas).

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gage will be touched by others which, in turn, decreases his expectation of privacy in the luggage.[229] Next, the facts do not show that he made any inquiries about privacy.[230] This shows he did not create an expectation of privacy through his vigilance.[231] In a similar manner, he did not demonstrate special protection of his luggage from other passengers. Finally, he used a canvas bag instead of a suitcase or bag of harder material.[232] This factor also decreases his expectation of privacy in the luggage.[233]

Considered together, Bond's actions and the surrounding circumstances demonstrate that he did not have a reasonable expectation of privacy in the luggage he stored in the overhead bin. Without a reasonable expectation of privacy the search of Bond's luggage did not fall under the Fourth Amendment, and the evidence obtained should have been allowed to stand.

V. CONCLUSION

Luggage searches aboard buses are a long way from protecting colonial homes from the king's officers. But, the principle of the Fourth Amendment remains the same. Its policy today is to protect citizens from intrusions by government officials just as it was 200 years ago.

With *Bond*, the Supreme Court adds to the confusion surrounding the Fourth Amendment. Its holding leaves a question for both law enforcement and future courts because it does not explain criteria for finding a reasonable expectation of privacy for luggage in overhead compartments. Even though such a finding is fact specific, criteria can be listed to guide such findings. Without a definite reasonable expectation of privacy there is no way to determine if an officer's conduct violates the Fourth Amendment.

In order to construct a framework for future decisions, law enforcement and courts should look to the *Bond* decision along with the previous circuit court cases and the principles they used in their analyses. With this knowledge, guidelines can be established for determining whether a bus traveler has a reasonable expectation of privacy in luggage stored in an overhead luggage compartment.

229. *Supra* Part IV.
230. *Bond*, 529 U.S. at 335-36 (describing the facts of the case).
231. *Supra* Part IV.
232. *Bond*, 529 U.S. at 336.
233. *Supra* Part IV.