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# FEELING VIOLATED: SEVENTH CIRCUIT PUTS THE SQUEEZE ON FOURTH AMENDMENT RIGHTS OF BUS TRAVELERS

ANDREW J. PURCELL\*

## INTRODUCTION

A woman named LaShawn McDonald boarded a northbound Greyhound™ bus in St. Louis.<sup>1</sup> During a layover in Indianapolis, LaShawn and the other passengers got off the bus to stretch their legs and get a bite to eat inside the bus station.<sup>2</sup> As she left the bus, LaShawn left behind two medium-sized, soft-sided bags in the overhead compartment above her seat.<sup>3</sup> Unbeknownst to LaShawn and the other passengers, three plain-clothed Indianapolis police officers boarded the bus with the driver's permission.<sup>4</sup> While on the bus, the police randomly pushed, felt, and manipulated the exterior of baggage left in the overhead compartments.<sup>5</sup> When the police officers reached LaShawn's bags, one of the officers felt the outside of the bags as they had all the other bags in the overhead compartments.<sup>6</sup> Using her fingers to manipulate the exterior of the bags, the officer felt a "brick-like" object, which she suspected to be drugs.<sup>7</sup> The three officers noted the location of the bags and then stepped off the bus before the passengers reboarded.<sup>8</sup> After the passengers were seated, the officers returned to the suspect bags and confronted LaShawn.<sup>9</sup> Because LaShawn denied owning

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1. *United States v. McDonald*, 100 F.3d 1320, 1322 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2423 (1997).

2. *Id.*

3. *Id.*

4. *United States v. McDonald*, 855 F. Supp. 267, 268, n.2 (S.D. Ind. 1994). As part of an agreement with Greyhound™ officials, the Indianapolis Police Department had permission to conduct drug interdiction activities within the company's terminal and buses. *Id.* The police conducted this procedure without the passengers knowledge or consent. *McDonald*, 100 F.3d at 1322.

5. *McDonald*, 855 F. Supp. at 268.

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

7. *Id.*

8. *Id.* at 1322-23.

9. *Id.* at 1323.

the bags, the officers concluded they had been abandoned and eventually opened the bags and discovered eleven kilograms of cocaine.<sup>10</sup> The officers arrested LaShawn despite her numerous denials of owning the bags; a grand jury subsequently indicted her for "knowingly possessing with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1)."<sup>11</sup>

The preceding scenario is not hypothetical; these events actually occurred and raise many questions regarding the officers' conduct and LaShawn's rights under the Fourth Amendment. Some of these concerns include: (1) whether it was proper for the police to board the bus and begin feeling baggage without the presence, consent, or knowledge of the passengers and without a search warrant or probable cause; (2) whether the officers' actions of feeling and manipulating the outside of the baggage to determine its contents amount to an unreasonable search in violation of the passengers' Fourth Amendment rights; and (3) whether passengers on commercial carriers should expect that their luggage and its contents will remain private?

The United States Court of Appeals for the Seventh Circuit addressed these issues last year in *United States v. McDonald*,<sup>12</sup> reaching a decision that greatly expands the power of law en-

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10. *Id.* After the officers reboarded the bus, they asked the passengers who owned the two bags in which the officer had felt the suspicious objects. *Id.* The officers then asked McDonald if she owned the two bags and she replied that she did not. *Id.* The officers then repeatedly asked all the passengers on the bus if any of them owned the two bags. *Id.* After getting no response, one of the officers removed the bags from the overhead luggage compartment and took them to the front of the bus. *Id.* The officer explained to the bus driver that the bags seemed to be abandoned and requested permission to open them. *Id.* After receiving the driver's permission to open the bags, the officer discovered six kilograms of cocaine in one bag and five in the other. *Id.*

In the meantime, another passenger on the bus told one of the officers that he witnessed McDonald carry the bags onto the bus. *Id.* Despite repeating her assertion that she did not own the bags, the officers took McDonald to the police office located in the bus terminal and placed her under arrest. *Id.*

11. *United States v. McDonald*, 855 F. Supp. 267, 268 (S.D. Ind. 1994). After losing a motion to suppress the evidence which the police discovered while searching the bus, McDonald reserved her right to appeal the denial of the motion to suppress. *McDonald*, 100 F.3d at 1323-24. She then pleaded guilty to knowingly possessing with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). Plea Agreement at 1, *United States v. McDonald* (S.D. Ind. 1994) (No. IP 94-43-CR). United States District Court Judge Sarah Evans Barker, sentenced McDonald to 10 years imprisonment and ordered her to pay \$50. Judgment at 2-4, *United States v. McDonald* (S.D. Ind. 1995) (No. IP 94-43-CR-01). Upon her release from prison, McDonald will be on supervised release for a term of five years. *Id.*

12. See *United States v. McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 2423 (1997) (2-1 decision) (holding, as a matter of first impression, that a police officer's manipulation of the outside of luggage in overhead racks on a commercial bus does not constitute a search under the Fourth Amendment).

forcement officials to search for drugs on commercial buses and trains. On November 21, 1996, the Seventh Circuit affirmed a decision by the United States District Court for the Southern District of Indiana, denying LaShawn McDonald's motion to suppress the evidence the police officers discovered in her bags onboard the Greyhound™ bus.<sup>13</sup> This decision not only increases the power of law enforcement personnel, but also infringes upon the constitutional rights of travelers.

This Comment examines the flawed reasoning behind the Seventh Circuit's holding that the search<sup>14</sup> of LaShawn McDonald's bags was reasonable under the Fourth Amendment. This Comment also examines how the Seventh Circuit's decision will affect the constitutional rights of travelers on commercial buses and trains.

Part I of this Comment discusses the historical background of search and seizure protections under the Fourth Amendment and how those protections have changed over the years as a result of interpretive decisions by the United States Supreme Court. Part II analyzes the Seventh Circuit's decision in *United States v. McDonald* and how that decision affects commercial travelers' constitutional right of privacy. Part III suggests that the Supreme Court's failure to review *United States v. McDonald* will result in decisions which trample upon travelers' Fourth Amendment rights while still failing to effectively combat drug trafficking in the United States.<sup>15</sup>

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13. See *McDonald*, 855 F. Supp. at 270.

14. *Black's Law Dictionary* defines "search" as "looking for or seeking out that which is otherwise concealed from view . . . . It consists of probing or exploration for something that is concealed or hidden from searcher; an invasion, a quest with some sort of force, either actual or constructive." BLACK'S LAW DICTIONARY 1349 (6th ed. 1990).

*Black's* also lists the following cases in defining "search": *Colorado v. Carlson*, 677 P.2d 310, 315 (Colo. 1984) (stating that "a search consists of a looking for or seeking out which is otherwise concealed from view"); *Colorado v. Harfmann*, 555 P.2d 187, 189 (Colo. Ct. App. 1976) (holding that "visual observation which infringes upon a person's reasonable expectation of privacy constitutes a search"); *Vargas v. Texas*, 542 S.W.2d 151, 153 (Tex. Crim. App. 1976) (stating that a "search" in which the exclusionary rule may apply is one in which there is a quest for, a looking for, or a seeking out of that which offends against the law by law enforcement personnel or their agents"); *Illinois v. Carroll*, 299 N.E. 2d 134, 139 (Ill. Ct. App. 1973) (defining "search" as "a probing or exploration for something that is concealed or hidden from the searcher"); *Ohio v. Woodall*, 241 N.E. 2d 755, 757 (Ohio Ct. C.P. Lake County 1968) (stating that a "search" is "an examination of a man's house, building, premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecuting a criminal action or some crime or offense with which he is charged"); *California v. Harris*, 63 Cal. Rptr. 849, 852 (Cal. Ct. App. 1967) (stating that a "search" implies prying into hidden places for that which is concealed . . .").

15. *McDonald v. United States*, 117 S.Ct. 2423 (1997) (denying LaShawn

I. HISTORICAL BACKGROUND TO FOURTH AMENDMENT  
PROTECTION AGAINST UNREASONABLE SEARCHES

Despite more than 200 years of interpreting the search and seizure clause, the United States Supreme Court has never adhered to a particular meaning of the word "search" as used in the Fourth Amendment.<sup>16</sup> Although the Court has recognized that a search usually involves an exploration by a law enforcement officer, it has stopped short of saying that every exploratory act is a search within the context of the Fourth Amendment.<sup>17</sup>

Since the drafting of the Constitution, the Fourth Amendment right to be free from warrantless searches and seizures has gradually evolved.<sup>18</sup> Despite the warrant requirement of the Fourth Amendment, the Supreme Court has interpreted the amendment to allow law enforcement officers to conduct searches without warrants so long as the searches are based on the officers' objective determination of whether or not probable cause exists.<sup>19</sup> One of the most significant Supreme Court cases involving warrantless police investigative activities based on probable cause is *Katz v. United States*,<sup>20</sup> which established the "reasonable expecta-

McDonald's petition for writ of certiorari from the United States Court of Appeals for the Seventh Circuit).

16. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.1(a), at 380 (3rd ed. 1996).

17. *Id.* For the purposes of this Comment, the word "search" will be used in a generic sense and not limited to mean an act that is unreasonable under the Fourth Amendment.

18. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

*Id.*

19. WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.3(b), at 140 (2d ed. 1992).

Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his action . . . . The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man . . . . Notwithstanding this objective test, the Supreme Court has made it clear that the expertise and experience of the officer are to be taken into account, which is as it should be. This usually means that a trained and experienced officer will have probable cause in circumstances when the layman would not, as when an officer is able to identify an illegal substance by smell or sight because of his training and experience. But sometimes an experienced officer will be held *not* to have had probable cause if a man with his special skills, though perhaps not a layman, should have recognized that no criminal conduct was involved.

*Id.* at 140-41 (emphasis in original).

20. 389 U.S. 347, 353 (1967) (holding that the government's monitoring and recording defendant's words spoken into the receiver in a telephone booth

tion of privacy" standard.<sup>21</sup>

### A. *The Katz Expectation of Privacy*

In the 1967 *Katz* decision, the Supreme Court adopted the standard for determining when persons can expect that their property, conduct, conversations, and other personal practices will be free from governmental intrusion.<sup>22</sup> The Court reversed the defendant's conviction of transmitting wagering information by telephone because prosecutors obtained the conviction using information recorded during telephone calls the defendant made from a public telephone booth.<sup>23</sup> The majority concluded that the defendant was justified in his expectation of privacy in the calls he made from the phone booth.<sup>24</sup> The Court reasoned that "the Fourth Amendment protects people, not places," and, therefore, what a person attempts to keep private, even if in a public area, may be deserving of constitutional protection.<sup>25</sup> Although the majority held that a person can have an expectation of privacy in public places, it is the concurring opinion of Justice Harlan that introduced the present test for determining whether that expectation is reasonable.<sup>26</sup>

In his concurrence, Justice Harlan explained that a person's expectation of privacy depends on two requirements: (1) the person must exhibit a "(subjective) expectation of privacy," and (2) society must recognize that expectation as reasonable.<sup>27</sup> Justice Harlan's standard as applied to *Katz's* telephone conversation led to the conclusion that because *Katz* expected his conversations inside a public phone booth would remain private, and because society would consider such an expectation to be reasonable, the Fourth Amendment protected the privacy of his telephone conversations.<sup>28</sup>

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violated the defendant's privacy and therefore constituted a Fourth Amendment search and seizure).

21. *Id.* at 361.

22. *Id.*

23. *Id.* at 359.

24. *Id.* at 353.

25. *Id.* 351.

26. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring).

27. *Id.* at 361.

28. *Id.* Harlan gave the following explanation regarding the evaluation of whether a person has a legitimate expectation of privacy:

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

Justice Harlan's concurrence in *Katz* first established the reasonable expectation of privacy standard and the Supreme Court formally adopted the standard in subsequent cases.<sup>29</sup> However, in *Terry v. Ohio*,<sup>30</sup> a year after the *Katz* decision, the Court held that there are times when one's privacy right must yield to the interests of police officers in ensuring their own safety as well as that of the public.<sup>31</sup>

### B. The "Terry Stop"

In the landmark case of *Terry v. Ohio*, the Supreme Court concluded that under certain circumstances, the individuals' privacy rights must yield to the governmental interest in preventing crime and protecting the public.<sup>32</sup> The Court held that when a law enforcement officer observes suspicious behavior leading him to believe that a person has committed a crime, or is about to commit a crime, the officer is justified in stopping the suspicious person, inquiring about the person's activities, and conducting a pat-down search for weapons.<sup>33</sup>

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[citation omitted].

The critical fact in this case is that "(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted (citation omitted). The point is not that the booth is "accessible to the public" at other times, (citation omitted) but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. [citation omitted]

*Id.*

29. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39 (1988) (stating that "the warrantless search and seizure of the garbage bags left at the curb outside the [defendant's] house would violate the Fourth Amendment only if [the defendant had] manifested a subjective expectation of privacy in [his] garbage that society accepts as objectively reasonable"). The *Greenwood* case represents the Supreme Court's adoption of the "reasonable expectation of privacy standard" created by Justice Harlan's concurring opinion in *Katz*, 389 U.S. at 361. *Id.*

30. 392 U.S. 1 (1968).

31. *Id.* at 30-31 (holding that a police officer who, acting without a warrant but based on his belief that a crime was about to be committed, stopped the defendant and conducted a frisk search for weapons acted reasonably and within the Fourth Amendment).

32. *Id.*

33. *Id.* at 30. The police officer stopped the defendant Terry after observing his suspicious behavior during a routine afternoon patrol in downtown Cleveland. *Id.* at 5-7. The officer testified that although he could not say what exactly first drew his attention to the defendant and his companion, "they didn't look right . . . at the time." *Id.* at 5.

After his attention was drawn to the two men, he observed them continuously walking past a store window, looking inside, and then conferring with each other at the street corner. *Id.* at 6. The men made about 12 trips past the store window and spoke briefly with a third man who had stopped to talk to them. *Id.* After the third man left, the two men repeated their pacing

The Court held that if nothing dispels an officer's suspicions or fears, the officer can conduct a limited search of individuals' outer clothing in an attempt to find weapons that might pose a threat to the safety of the officer or the citizenry.<sup>34</sup> Despite the Court's warning that *Terry* permits only a limited search,<sup>35</sup> *Terry* is an example of circumstances in which the privacy rights of individuals must sometimes yield to a greater public purpose, such as protecting the safety of law enforcement officers and citizens. The Supreme Court recognized, however, that there are some privacy rights under the Fourth Amendment that should generally not be infringed. One such right is the privacy citizens expect in the contents of their luggage and other baggage, which the Court addressed in the 1977 case of *United States v. Chadwick*.<sup>36</sup>

### C. The Recognition of Privacy Interests in Luggage

In *United States v. Chadwick*, the Supreme Court affirmed the suppression of marijuana found in the defendants' footlocker during a warrantless search an hour and a half after their arrests.<sup>37</sup> At trial, the Government argued that the warrantless

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for a few minutes more before walking off in the direction the third man had gone. *Id.*

After watching the three men, the officer suspected them of "casing a job, a stick-up," and feared the men might be armed. *Id.* Subsequently, the police officer confronted the suspects, identified himself as a police officer and asked their names. *Id.* at 6-7. After receiving an insufficient response to his questions, the officer grabbed the defendant, turned him around and frisked him. *Id.* at 7. The officer felt a pistol in the left breast pocket of the defendant's jacket. *Id.* After removing the gun from the defendant's coat, the officer conducted the same pat-down search on the other two men and discovered another weapon; at no time prior to feeling the weapons did the officer place his hands inside the outer clothing of the men. *Id.*

34. *Id.* at 30.

35. *Id.*

36. 433 U.S. 1, 11 (1977) (holding that the Fourth Amendment protection against warrantless searches applies to footlockers and other luggage).

37. *Id.* at 15-16. In *Chadwick*, Amtrak officials alerted authorities after observing two individuals load a large footlocker onto the train in San Diego. *Id.* at 3. The footlocker seemed suspicious to the officials because it was unusually heavy for its size and leaked talcum powder, a substance commonly used to hide the odor of marijuana. *Id.*

Upon arriving at the train station in Boston two days later, the two individuals collected their luggage and the footlocker from the baggage area. *Id.* at 4. Unbeknownst to the individuals, police officers released a drug-detection dog in close proximity to the individuals' luggage and footlocker. *Id.* The dog inconspicuously indicated the presence of drugs to the police officers. *Id.* Defendant Chadwick met the two travelers and helped put the footlocker in the trunk of his car. *Id.* Federal agents arrested the three individuals before the trunk had been closed or the car engine had been started. *Id.* The agents took the keys to the footlocker and transported the suspects, the car, and the footlocker to the Federal Building in Boston. *Id.* An hour and a half after arresting the individuals, agents opened the footlocker, which was locked with a trunk lock and padlock, and searched its contents without a search warrant or

search of the defendants' footlocker in the trunk of their car was justified under the "automobile exception."<sup>38</sup> The Supreme Court, however, found the exception did not apply, and therefore the warrantless search of the footlocker was not justified.<sup>39</sup>

The majority opinion in *Chadwick* illustrates that the special exception to the warrant clause of the Fourth Amendment that exists for automobiles is premised on the fact that obtaining a warrant is often impractical due to the mobility of automobiles.<sup>40</sup> The majority also states that while automobiles serve as transportation, luggage is used to store personal belongings; therefore, individuals have a much higher expectation of privacy in the contents of their luggage than they do in automobiles.<sup>41</sup> The *Chadwick* decision was a major victory for protecting individuals' privacy rights when traveling. Following *Chadwick*, the Supreme Court continued hearing a variety of cases regarding travelers' privacy rights. In the early 1980s, the Court heard two landmark cases weighing the Fourth Amendment rights of travelers against the interests of airport security personnel.<sup>42</sup>

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the individuals' consent. *Id.* 4-5.

38. *Id.* at 5. See generally *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (holding that the warrantless search of an automobile at a police station was not improper when based on probable cause) (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

39. *Chadwick*, 433 U.S. at 11-13.

40. *Id.* at 12.

41. *Id.* at 13.

42. See *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

Many of the security techniques used to stop drug trafficking through air travel are the progeny of the 1960s attempts to prevent airline hijacking. See generally LAFAVE, ET.AL., *supra* note 19, § 3.9(h) at 227-28 (describing the historical background leading to the current state of airport security).

LaFave explains that airplane hijacking was a major problem the United States government faced in the 1960s and resulted in the current state of airport security. *Id.* at 227. The government created a procedure to identify which passengers should be subjected to an increased level of pre-boarding scrutiny which is necessary to deal with the hijacking threat. *Id.* Security agents used a behavioral profile developed from a comprehensive study of hijackers to judge whether particular passengers were potential hijackers. *Id.* If the profile identified a passenger as a potential hijacker, security agents sent him or her through a metal detector, which was set to detect the amount of metal normally present in small handguns. *Id.* If the person fit the hijacker profile and triggered a positive response from the metal detector, agents would interview the individual. *Id.* In the event the individual failed to provide the security agents with adequate information, the agents would frisk the individual and search his carry-on luggage. *Id.* The more intrusive frisks and luggage searches were generally used against a very small percentage of travelers. *Id.* The courts applied a balancing test and upheld these searches on the grounds that they were based on the type of reasonable suspicion required by *Terry v. Ohio*. *Id.* at 227-28

In 1973, the government adopted a new program to replace the selective process previously used in the 1960s. *Id.* at 228. Under the new pro-

#### D. The Airport Privacy Decisions

##### 1. Detainment of Suspicious Travelers

The first of the landmark decisions regarding the privacy of travelers in airports was the 1980 case of *United States v. Mendenhall*.<sup>43</sup> In that case, the Supreme Court held that Drug Enforcement Agency (DEA) agents did not violate the Fourth Amendment by stopping Defendant Mendenhall in an airport concourse, identifying themselves as DEA agents, and asking to see her identification.<sup>44</sup>

Justice Stewart's majority opinion indicates that a person is "seized" only if his movement is restrained by physical force or a display of authority.<sup>45</sup> The Court explained that if police question a person, yet the person feels free to ignore the questioning and leave the area, that individual's liberty and privacy have not been intruded upon.<sup>46</sup> Based upon the fact that the agents in *Menden-*

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gram, security personnel check all passengers before they board. *Id.* Every passenger is required to pass through a metal detector and all carry-on luggage is inspected by hand or by an x-ray device. *Id.* If an individual triggers a positive response from the metal detector, he must remove items from his person until he can pass through the detector without triggering a response. *Id.* If the x-ray examination of an individual's luggage reveals a suspicious item, the passenger is not allowed to proceed to the boarding area unless he permits security personnel to search his luggage. *Id.* The use of metal detectors and x-rays qualify as searches, and therefore this procedure initially raised questions regarding whether or not subjecting all passengers to such searches was permissible under the Constitution. *Id.* Courts employed a balancing test and concluded that this procedure also passed Fourth Amendment scrutiny. *Id.*

LaFave points out that advance awareness of the risks involved in such searches, and how those risks can be avoided, are key factors in making an inspection procedure reasonable. *Id.* He also states that even under the new system, the reasonable suspicion standard set forth in *Terry* may apply to a person who "passed" an inspection but also produced highly suspicious facts. *Id.*

43. *Mendenhall*, 446 U.S. at 555 (holding that Drug Enforcement Agency agents approaching and questioning a woman in an airport concourse was not a "seizure" within the meaning of the Fourth Amendment).

44. *Id.* Defendant Mendenhall arrived by plane at the Detroit Metropolitan Airport following a flight from Los Angeles. *Id.* at 547. The agents assigned to the airport observed the woman's behavior and suspected she was carrying narcotics. *Id.* The agents approached the woman in the airport concourse, identified themselves, and asked to see her identification and plane ticket. *Id.* at 547-48.

After discovering the woman's ticket was issued in a name different from the one she gave them, the agents asked the woman to accompany them to their office in the airport for further questioning. *Id.* at 548. Defendant Mendenhall accompanied the agents to their office and consented to a search of her person and handbag, which led to the discovery of two packages of heroin. *Id.* at 548-49.

45. *Id.* at 553.

46. *Id.* at 554.

hall were not in uniform, did not display weapons, and approached the woman rather than ordering her to them, the Supreme Court concluded that no "seizure" had occurred.<sup>47</sup> The Court also noted that the encounter took place in the public concourse of a busy airport as indicative of the defendant being free to disregard the agents' questions and continue on her way.<sup>48</sup>

Three years after *Mendenhall*, the Supreme Court examined a similar set of facts in *Florida v. Royer*.<sup>49</sup> The Court in *Royer* held that while law enforcement officials may temporarily detain a suspicious passenger in an airport, they may not exceed the investigative limits established in *Terry*.<sup>50</sup>

The Court stated that law enforcement officials do not violate the Fourth Amendment simply by approaching persons in airport concourses and other public places and asking if they are willing to answer a few questions.<sup>51</sup> The Court, however, pointed out that when law enforcement officials are investigating a person who is only suspected of criminal activity, they cannot conduct a full search of that individual, his car or other belongings.<sup>52</sup> Law en-

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47. *Id.* at 555.

48. *Id.*

49. *Royer*, 460 U.S. at 502-03 (1983) (holding that police can temporarily detain a suspicious traveler in an airport while attempting to verify or dispel suspicions that he is a drug courier). Despite holding that the detainment of Royer was permissible, the Court held that a police officer exceeds the limits of an investigative stop if the officer detains a suspicious traveler in a small room and retains the traveler's identification and plane ticket. *Id.*

50. *Id.* at 507. Miami detectives first observed Defendant Royer at Miami International Airport as he prepared to board a flight to New York. *Id.* at 493. The detectives believed the defendant fit the "drug courier profile" based on his appearance, luggage, and behavior. *Id.* Unaware that he was being monitored by police, Royer purchased a one-way ticket to New York and checked his two suitcases under a false name. *Id.*

The detectives approached the defendant as he walked through the airport concourse, identified themselves as police officers and asked the defendant if they could speak with him. *Id.* at 494. The defendant complied with the detectives' request to show them his airline ticket and driver's license. *Id.* After noticing the discrepancy between the defendant's identification and the name on his ticket, the detective told Royer they suspected him of drug trafficking and asked him to accompany them to a nearby room. *Id.*

As Royer waited in the room, which was also described as a "large storage closet," one of the detectives used Royer's baggage claim tickets to retrieve his luggage. *Id.* The detectives then asked Royer if he would allow them to search his suitcases; he did not orally consent but produced a key and unlocked one of the suitcases. *Id.* One of the detectives opened the suitcase without further permission from Royer; the detectives discovered marijuana in both suitcases. *Id.* The detectives then arrested Royer. *Id.* Approximately fifteen minutes had passed from the time the detectives first approached Royer to the time they discovered the drugs and placed him under arrest. *Id.* at 495.

51. *Id.* at 497.

52. *Id.* at 499.

forcement officials also exceed their boundaries if their investigation of an individual verges upon the conditions of an arrest.<sup>53</sup> After the police asked Royer to accompany them to a room near the concourse, they took possession of his plane ticket, identification, and luggage and never informed him that he was free to leave.<sup>54</sup> Based upon these facts, the Court concluded that "the detention to which he [Royer] was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity."<sup>55</sup>

Since the decisions in *Mendenhall* and *Royer*, the Supreme Court has remained consistent in holding that law enforcement officials do not violate the Fourth Amendment by approaching individuals for limited questioning.<sup>56</sup> The Court further expanded the resources available to airport security personnel in the 1983 case of *United States v. Place*.<sup>57</sup>

## 2. *The Use of Canines to Detect Narcotics*

The Supreme Court's decision in *United States v. Place* gave law enforcement personnel what is arguably one of the most useful weapons in the War on Drugs.<sup>58</sup> In *Place*, the Supreme Court held

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53. *Id.*

54. *Id.* at 503.

55. *Royer*, 460 U.S. at 502.

56. *See, e.g.*, *Florida v. Rodriguez*, 496 U.S. 1, 5 (1984) (holding that police officers did not implicate a Fourth Amendment interest when they approached a man in a public area of an airport and asked if he would step aside and talk to them).

57. 462 U.S. 696, 707 (1983) (holding that police officers' temporary detainment of a person's luggage for the purpose of exposing it to trained drug-detecting dogs did not constitute a search within the meaning of the Fourth Amendment).

58. *Id.* at 698. Police became suspicious of Defendant Place's behavior as he waited in a ticket line in Miami International Airport. *Id.* Police officers approached Place after he purchased a one-way ticket to New York and asked him to produce his plane ticket and identification. *Id.* Although he agreed to allow the police to search his two suitcases, the police decided not to search Place's luggage because his flight was about to depart. *Id.* Before Place boarded his plane, the officers noticed discrepancies in the address tags on his luggage and later learned that neither address existed. *Id.*

Later, the Miami authorities contacted agents with the Drug Enforcement Agency (DEA) in New York and shared their information regarding the defendant. *Id.* As Place arrived in New York, DEA agents observed Place and noticed his suspicious behavior. *Id.* The agents approached Place after he claimed his luggage and told him he was suspected of carrying narcotics. *Id.* at 698-99. After Place refused to consent to a search of his bags, the agents told him he could accompany them as they took his luggage to a judge to obtain a search warrant. *Id.* at 699. Place declined, but took a phone number where he could reach the agents. *Id.* The agents then took the luggage to Kennedy Airport in New York and subjected the bags to a "sniff test" by a trained drug-detection dog. *Id.* The dog responded positively to one of the two bags. *Id.* However, because it was late in the afternoon on a Friday, the

that police exposure of luggage to dogs trained to detect the presence of narcotics was not a search within the meaning of the Fourth Amendment.<sup>59</sup> The Court explained that while the Fourth Amendment protects a recognized privacy interest in the contents of personal luggage,<sup>60</sup> the use of drug dogs does not violate that interest.<sup>61</sup>

The Court based its conclusion largely on the fact that canine sniffs do not involve an actual opening of luggage and, unlike an officer's rifling through items in a suitcase, canine sniffs do not physically reveal contraband that would otherwise remain unseen.<sup>62</sup> The Court also distinguished canine sniffs from other types of searches. The Court indicated that canine sniffs are not as intrusive as typical searches because the dog can only reveal whether or not narcotics are present.<sup>63</sup> The Court also concluded that while drug detecting dogs aid law enforcement officials in learning more about the contents of a person's luggage, the information obtained is limited and, therefore, does not amount to a "search."<sup>64</sup> Despite the Supreme Court's numerous decisions regarding the privacy interests of travelers and their luggage, the case most illustrative on this issue is the landmark case of *Florida v. Bostick*.<sup>65</sup>

#### E. Permitting the Bostick Bus Search

In the 1991 *Bostick* case, the Supreme Court drastically altered the privacy rights of travelers using commercial bus lines. The Court held that law enforcement officials may randomly board buses and conduct searches pursuant to the consent of passengers.<sup>66</sup> In *Bostick*, Broward County Florida Sheriff's Department officers boarded a bus in Fort Lauderdale to search passengers' luggage for drugs.<sup>67</sup> The armed and uniformed officers approached Bostick and asked to see his ticket and identification, which they inspected and returned to him after noticing nothing unusual about them.<sup>68</sup> The officers then explained that they were searching for illegal drugs and asked the defendant if he would allow them to

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agents kept the luggage until the following Monday, at which time they obtained a search warrant for the bag. *Id.* Upon opening the bags, police discovered 1,125 grams of cocaine. *Id.*

59. *Id.* at 707.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Place*, 462 U.S. at 707.

64. *Id.*

65. 501 U.S. 429, 439 (1991) (holding that random searches of buses with the passengers' consent are not unconstitutional per se).

66. *Id.*

67. *Id.* at 431.

68. *Id.*

search his luggage, but they informed him he had the right to refuse.<sup>69</sup> After receiving Bostick's permission, the officers opened his luggage and discovered cocaine; police then arrested Bostick for drug trafficking.<sup>70</sup> Despite Justice Thurgood Marshall's vigorous dissent,<sup>71</sup> the Court concluded that Bostick's presence on the bus did not affect the police officers' rights to approach him and ask questions or to request consent for a search.<sup>72</sup>

The Court stated that if the same meeting between the police and Bostick occurred prior to Bostick's boarding the bus, or, even in the bus terminal, it would not have constituted a "seizure."<sup>73</sup> The majority also noted that the Court had reviewed similar situations in airports, and determined that they are the type of consensual encounters that do not violate any Fourth Amendment provisions.<sup>74</sup> Bostick argued that a "seizure" occurred because the cramped confines of a bus would lead a reasonable person to believe he was not free to leave.<sup>75</sup> The majority seemed to use Bostick's own argument against him, by concluding that his presence on a bus which was about to depart, and not the police officer's questioning, was what prevented him from leaving.<sup>76</sup> The majority believed that the fact Bostick chose to take the bus, and perhaps felt compelled to remain on the bus after boarding, was not an indication that the police officers' conduct was in any way coercive.<sup>77</sup> Despite the majority's holding that random bus searches pursuant to passengers' consent are not per se unconstitutional, the issue still remains whether the type of search the police conducted in *McDonald* is consistent with what the Court contemplated in *Bostick*.

## II. SEVENTH CIRCUIT FAILS THE FOURTH AMENDMENT

The Supreme Court's decision in *Bostick* gave law enforcement officials a major weapon in the War on Drugs by holding that random bus searches pursuant to passenger consent are not per se unconstitutional.<sup>78</sup>

In *United States v. McDonald*, however, the Seventh Circuit evaluated a fact situation strikingly different from that in *Bos-*

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69. *Id.* at 432.

70. *Id.*

71. *Bostick*, 501 U.S. at 440 (Marshall, J., dissenting). Justices Blackmun and Stevens joined in the dissent. *Id.*

72. *Id.* at 434.

73. *Id.*

74. See *supra* note 56 and accompanying text for a discussion of the Supreme Court's holding in *Rodriguez*.

75. *Bostick*, 501 U.S. at 435.

76. *Id.*

77. *Id.* at 436.

78. See *supra* notes 65-66 and accompanying text for a discussion of the facts and holding in *Bostick*.

tick.<sup>79</sup> The *McDonald* case raises the issue of whether or not searches of the exterior of luggage on buses, without the presence or consent of passengers, are constitutional. In the majority opinion, Circuit Judge John L. Coffey concludes that such searches are indeed constitutional. Although the Supreme Court refused to review whether or not this interpretation is correct,<sup>80</sup> a closer look at the Seventh Circuit's decision in *McDonald*, reveals that the decision is based largely on flawed reasoning and misapplied precedent.

#### A. McDonald's Expectation of Privacy

In *United States v. McDonald*, the Seventh Circuit addressed whether a reasonable expectation of privacy existed after McDonald had voluntarily left her bags exposed on an overhead rack of a Greyhound™ bus.<sup>81</sup> The court begins its discussion of the privacy expectations bus passengers have with respect to their carry-on luggage by citing another Seventh Circuit decision in the case of *United States v. Rem*.<sup>82</sup>

In *Rem*, the court held that the defendant did not have a reasonable expectation of privacy in the contents of his suitcase.<sup>83</sup> The court's conclusion was based largely on the fact that the defendant had clearly abandoned the luggage on a train before police

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79. The facts in *McDonald* and *Bostick* are distinguishable. The Indianapolis Police boarded McDonald's bus while no passengers were on board and failed to receive, or even request, passenger consent before touching and manipulating the exterior of baggage in the overhead compartments. See *United States v. McDonald*, 100 F.3d 1320, 1322 (1996) (describing the Indianapolis Police Department's search of the passengers' luggage). In *Bostick*, however, Broward County Sheriff's officers boarded the bus while Bostick and other passengers were present and requested and received consent before conducting a search of Bostick's baggage. See *Florida v. Bostick*, 501 U.S. 429, 431 (1991) (describing the technique used by the Broward County Sheriff's Department during random bus searches).

80. Telephone interview with Robert R. Thomas, Attorney, Symmes, Voyles, Zahn, Paul & Hogan (Feb. 19, 1997).

Attorney Robert R. Thomas wrote and filed the petition for certiorari on behalf of LaShawn McDonald requesting that the U.S. Supreme Court review the Seventh Circuit's decision in *McDonald*. Thomas, an attorney with the Indianapolis law firm of Symmes, Voyles, Zahn, Paul & Hogan, also wrote the appellant's brief for the Seventh Circuit Court of Appeals. Attorney James H. Voyles, gave the appellant's oral argument before the Seventh Circuit Court of Appeals.

81. *McDonald*, 100 F.3d at 1325.

82. *Id.* at 1325-25 (citing *United States v. Rem*, 984 F.2d 806, 813 (7th Cir. 1993)) See also *United States v. Rem*, 984 F.2d 806, 813 (7th Cir. 1993) (holding that the defendant abandoned his suitcase and therefore had no legitimate expectation of privacy when police searched it without a warrant and discovered 18 kilograms of cocaine).

83. *Rem*, 984 F.2d at 813.

searched it.<sup>84</sup> The court concluded that the privacy interests of persons traveling on public buses, trains, and airplanes are generally given significantly less recognition than those recognized with respect to an individual's office, home, or other dwelling.<sup>85</sup>

The court in *McDonald* ultimately concluded that the defendant did not have a legitimate expectation that others would not handle her luggage.<sup>86</sup> In support of its conclusion, the Seventh Circuit cites cases by the Fifth and Sixth Circuit Courts of Appeal in *United States v. Lovell*<sup>87</sup> and *United States v. Guzman*.<sup>88</sup>

### B. Misapplication of Guzman

In *McDonald*, the court first mentioned the Sixth Circuit's decision in *Guzman* to support the conclusion that although passengers have an expectation of privacy in their luggage's contents, because the luggage is accessible to other individuals on the bus, that expectation does not include the exterior of luggage situated on overhead racks.<sup>89</sup> The Seventh Circuit described *Guzman* as being similar to *McDonald*.<sup>90</sup> In making this characterization,

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84. *Id.* at 807. Defendant Rem left his suitcase on a train he deboarded in Chillicothe, Ill. *Id.* at 807-808. An Amtrak™ police officer and two agents assigned to a DEA Task Force in Chicago located the suitcase after all the passengers had exited the train in Chicago (which is more than 100 miles away from Chillicothe). *Id.* at 808. After determining the suitcase belonged to the man who had jumped off the train in Chillicothe, the officers concluded that the suitcase had been abandoned; they therefore opened it without a warrant and discovered the cocaine. *Id.*

85. *See id.* at 812 (quoting *United States v. Whitehead*, 849 F.2d 849, 854 (4th Cir. 1988)).

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

87. *Id.* at 1325. *See also* *United States v. Lovell*, 849 F.2d 910, 913 (5th Cir. 1988) (holding that border patrol agents' conduct of removing a passenger's luggage from a conveyor belt and compressing the sides of the baggage to force air out enabling the luggage to be subjected to a canine sniff, was not a search in violation of the Fourth Amendment).

88. *McDonald*, 100 F.3d at 1325. *See also* *United States v. Guzman*, 75 F.3d 1090, 1095 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 266 (1996) (holding that a police officer's touching of the defendant's bag on an overhead luggage rack in a bus was not an unreasonable search in violation of the Fourth Amendment).

89. *McDonald*, 100 F.3d at 1325 (quoting *Guzman*, 75 F.3d at 1095).

90. *Id.* Memphis Police detectives observed Guzman when he arrived at a Greyhound bus station on a bus from Dallas. *Guzman*, 75 F.3d at 1095. The detectives had drug-detection dogs with them to check for drugs on arriving buses. *Id.* After Guzman exited the bus carrying a cloth bag, one of the detectives asked for his consent to allow her dog to sniff his luggage; Guzman put his bag on the ground for the dog to sniff. *Id.*

Detective Johnson testified that the dog showed interest in Guzman's bag, but did not sit down as the dogs are trained to do when they detect the presence of drugs. *Id.* at 1091-92. She also testified that Guzman picked up the bag before she could focus the dogs attention on the bottom of the bag. *Id.* The detective informed her partner, Detective Hoing, of the dog's interest in

however, the court seems to overlook several key factors in *Guzman* which distinguish it from *McDonald*.<sup>91</sup>

First, the police conduct in *Guzman* involved the assistance of a drug dog, which the Supreme Court recognized in *United States v. Place* as deserving of unique consideration.<sup>92</sup> Secondly, and perhaps most importantly, the defendant in *Guzman* was present during the search, and he gave the police permission to have a drug dog sniff his bags.<sup>93</sup> Once the dog showed interest in Guzman's bag, the police could easily argue that they had probable cause, or at least a reasonable suspicion, to justify further inquiry into the contents of the bag.<sup>94</sup>

The factual situation in *McDonald* was quite different from *Guzman*. First, no drug dog was involved in *McDonald*.<sup>95</sup> Second, McDonald did not consent to the search of her bags, nor was she present while the officer conducted the search.<sup>96</sup> Third, the police officers had no probable cause, or even reasonable suspicion, on which to base their actions.<sup>97</sup> Fourth, the officer's contact with the defendant's bag in *Guzman* involved merely placing his hand on

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Guzman's bag. *Id.* After the passengers reboarded the bus, the two detectives boarded the bus to determine the ownership of some of the bags. *Id.*

Detective Hoing put his hand on Guzman's bag and asked to whom it belonged. *Id.* Upon touching the bag, Detective Hoing felt several hard bricks inside and suspected them to be drugs. *Id.* Guzman responded that the bag was his and consented when Detective Hoing asked if he could look inside. *Id.* Detective Hoing placed the bag on an empty seat next to Guzman and began to open it, at which point Guzman said the detective needed "a piece of paper" before he could look inside the bag. *Id.* Detective Hoing testified that he took Guzman's comment to mean that he needed a search warrant; therefore, he stopped the search and asked Guzman to step off the bus. *Id.*

Outside the bus, Guzman once again consented to allowing a drug-detection dog to sniff his bag; two separate dogs independently gave positive responses to the bag. *Id.* The detective then transported Guzman to a police office, where he was detained until a search warrant was obtained. *Id.* Upon executing the warrant, the detectives discovered six bundles inside the bag that contained more than 6,000 grams of cocaine. *Id.* Each bundle was surrounded by axle grease and covered tightly by duct tape. *Id.*

91. See *McDonald*, 100 F.3d at 1325 (comparing *McDonald* to *Guzman* without noting the factual differences between the two cases).

92. See *United States v. Place*, 462 U.S. 696, 707 (1983). "[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and the content of the information revealed by the procedure." *Id.* *Black's Law Dictionary* defines *sui generis* as: "Of its own kind or class; i.e., the *only one* of its kind; peculiar." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990) (emphasis in original).

93. *Guzman* 75 F.3d at 1091.

94. *Id.* at 1096.

95. See *supra* notes 4-10 and accompanying text for a discussion of the facts leading to the search of McDonald's bags.

96. *United States v. McDonald*, 100 F.3d 1320, 1322 (7th Cir. 1996).

97. See *supra* notes 4-10 and accompanying text for a discussion of the facts leading to the search of McDonald's bags.

the bag,<sup>98</sup> while the officer in *McDonald* “sniffed and then felt the outside of the bags . . . [b]y manipulating the sides of the bags with her fingers.”<sup>99</sup> Finally, unlike the officers in *McDonald*, the detectives in *Guzman* never actually opened the defendant’s bags until they obtained a search warrant.<sup>100</sup>

### C. Misapplication of Lovell

The Seventh Circuit also cites the Fifth Circuit case of *United States v. Lovell* as being analogous to the *McDonald* case.<sup>101</sup> *Lovell*, however, like *Guzman*, is distinguishable from *McDonald*. First, the events in *Lovell* involved the use of drug dogs and occurred in an airport—a location which the Supreme Court traditionally recognizes as deserving of special protection from criminal activity.<sup>102</sup> Second, although the court did not specifically address the issue, it is arguable that in *Lovell*, the agents’ conduct was based upon probable cause, or, at the very least, a reasonable suspicion.<sup>103</sup>

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98. *Guzman*, 75 F.3d at 1092.

99. *McDonald*, 855 F. Supp. at 268.

100. *Guzman*, 75 F.3d at 1092.

101. *McDonald*, 100 F.3d at 1325. In *Lovell*, El Paso police allowed a drug dog to sniff the defendant’s luggage in an airline baggage area at the El Paso International Airport. *United States v. Lovell*, 849 F.2d 910, 911 (5th Cir. 1988). This occurred after United States Border Patrol agents observed the defendant’s suspicious behavior upon arriving at a Birmingham, Alabama airport. *Id.* After the drug dog repeatedly reacted to defendant’s suitcase, the agents contacted the DEA and obtained a search warrant before opening the suitcase to discover 68 pounds of marijuana. *Id.*

The following is a description of the agents’ observations and their own actions as a result of the defendant’s suspicious behavior:

Lovell appeared to be very nervous; he was visibly shaking and, after anxiously searching his pockets, Lovell fumbled with his money as he paid the taxi driver . . . [Agent] Williams, who was standing next to the skycap, watched as Lovell filled out the baggage claim checks. Williams noted that Lovell’s writing was erratic and that Lovell kept glancing around nervously as he wrote. [Agent] Jordan also observed that Lovell ‘had a toothpick in his mouth and it was going 90 miles an hour.’ Lovell then walked into the terminal, glancing frequently over his shoulder as he did so. At that point, the agents proceeded to the Southwest Airlines baggage area and [Agent] Williams removed Lovell’s suitcase from the conveyor belt. The agents noted that both suitcases were quite heavy and, when they felt the sides of the cases, the agents felt what appeared to be a solid mass. Both agents compressed the sides of the bags to force air out of them. They did this several times. Upon squeezing the bags, the agents ‘got a real faint smell of talcum powder and a real strong odor of marijuana. . . .’

*Id.*

102. *Lovell*, 849 F.2d at 911. See *supra* notes 43-48 and accompanying text for a discussion of the Supreme Court’s decision in *United States v. Mendenhall*, 446 U.S. 544 (1980) which held that airports deserve special protection from criminal activity.

103. *Lovell*, 849 F.2d at 912 n.2. The court assumed, without conclusively deciding, that the DEA agents lacked reasonable suspicion that Lovell’s bags

Furthermore, the agents' contact with Lovell's luggage merely consisted of picking up the bag to facilitate a sniff test.<sup>104</sup> The Fifth Circuit previously allowed such a test, stating that the airspace surrounding luggage is not considered an area to which an individual's reasonable expectation of privacy extends.<sup>105</sup> In *Lovell*, the Fifth Circuit determined that the same reasoning is appropriate in situations where law enforcement officers use their own sense of smell in detecting an odor of marijuana originating from luggage.<sup>106</sup> The police officers' conduct in *McDonald*, however, is in sharp contrast to the agents' conduct in *Lovell*. The officers in *McDonald* went beyond merely sniffing the air around the bags when they purposefully manipulated the exterior of the bags to determine their contents.<sup>107</sup>

Dicta in the Fifth Circuit's *Lovell* decision is significant because the court conceded that there are times when an officer's touching of a person's luggage may exceed permissible limits.<sup>108</sup> This concession is evident in the court's statement that although they were not addressing such a situation in *Lovell*, there could be times when a prepping process is "so violent, extreme and unreasonable in its execution" that it exceeds constitutional limitations.<sup>109</sup> The court in *McDonald* seems to overlook this statement by the Fifth Circuit and misapplies the *Lovell* decision. A better reasoned conclusion would have been for the Seventh Circuit to find the officer's squeezing and manipulating of the bags to be the type of process "so violent, extreme and unreasonable"<sup>110</sup> the Fifth Circuit contemplated in *Lovell*. Despite the *McDonald* decision, at least one of the judges, Circuit Judge Kenneth Ripple, realized the intrusive nature of the officer's conduct and wrote a strong dissent.<sup>111</sup>

#### D. Strong Dissent Explores Majority's Flawed Reasoning

In his dissenting opinion, Judge Ripple classifies the Seventh

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contained drugs prior to removing the luggage for the sniff test. *Id.* Therefore, the court did not opine whether Lovell's nervous disposition supported a reasonable suspicion. *Id.* See *supra* note 101 for a description of Lovell's suspicious behavior.

104. *Lovell*, 849 F.2d at 911.

105. See *United States v. Goldstein*, 635 F.2d 356, 360-61 (5th Cir. 1981) (holding that an officer's removal of the defendant's luggage from a baggage cart to allow a drug dog to sniff the bag's exterior was not a violation of the Fourth Amendment).

106. *Lovell*, 849 F.2d at 913.

107. See *United States v. McDonald*, 855 F. Supp. 267, 268 (S.D. Ind. 1994) (describing the details of the officers' search techniques).

108. *Lovell*, 849 F.2d at 913.

109. *Id.*

110. *Id.*

111. *United States v. McDonald*, 100 F.3d 1320, 1332 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 2423 (1997) (Ripple, J., dissenting).

Circuit's decision in *McDonald* as "a milestone in the unfolding of the Fourth Amendment jurisprudence of this [Seventh] circuit."<sup>112</sup> Judge Ripple explains that hundreds, if not thousands, of travelers board buses each day.<sup>113</sup> He also points out, however, that allowing law enforcement officials to board buses and manipulate passengers' luggage without their presence or consent in an attempt to determine its contents, does not, and should not, happen every day.<sup>114</sup> He concludes that the Fourth Amendment protects people from such invasions into their personal effects.<sup>115</sup> In reaching his conclusion, Judge Ripple examines the officers' lack of probable cause in *McDonald*, the defendant's expectation of privacy, and the issue of abandonment.<sup>116</sup> Judge Ripple also explores the effect that the majority's decision will have on commercial travel.<sup>117</sup>

### 1. *What's Missing from McDonald?*

Judge Ripple begins his dissent by listing the various elements of a lawful search that the Indianapolis Police officers lacked when they boarded the bus to conduct their search.<sup>118</sup> There was no probable cause, or even reasonable suspicion, to believe anyone on the bus was carrying drugs or other contraband.<sup>119</sup> The officers also lacked permission from McDonald and the other passengers to examine their luggage.<sup>120</sup> Furthermore, although the officers received the driver's permission to board the bus and inspect it without a search warrant, Judge Ripple points out that the record contained nothing to indicate that the bus driver gave a valid consent to allow police to search the bus passengers' possessions.<sup>121</sup>

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112. *Id.*

113. *Id.* at 1329.

114. *Id.*

115. *Id.*

116. *Id.* at 1329-33. The abandonment issue will not be discussed in the text of this Comment due to the author's belief that the officer's initial search was a violation of McDonald's Fourth Amendment rights, which would make the abandonment issue irrelevant.

An abandonment must be voluntary; if it results from a Fourth Amendment violation it is not deemed voluntary. [citation omitted] McDonald acted well within her rights in refusing to admit ownership of a bag that obviously had been the object of a great deal of police attention during her absence from the bus. The staged ritual of inquiring as to ownership was simply the next step in the illegal police inquiry that began when the bag was rubbed, squeezed and manipulated to ascertain the precise nature of its contents.

*Id.*

117. *Id.* at 1333-34.

118. *McDonald*, 100 F.3d at 1329-30.

119. *Id.* at 1329.

120. *Id.* at 1329-30.

121. *Id.* at 1330.

Additionally, the bus driver lacked authority over the property, and at no time did any of the passengers authorize the driver to make decisions regarding whether or not police could search their luggage.<sup>122</sup> Judge Ripple's dissent also states that unlike luggage searches conducted every day in airports, no signs existed at the bus station to inform passengers that their luggage was subject to police inspections or searches.<sup>123</sup> Judge Ripple also makes clear the distinction between the bus search at issue in *McDonald* and that the Supreme Court allowed in *Bostick*.<sup>124</sup> He concedes that if passengers consent, police officers may board a bus and question individuals without the officers' conduct amounting to a seizure.<sup>125</sup> In contrast to *Bostick*, the defendant in this case was never given a chance to refuse a request to search her bags.<sup>126</sup> In fact, the police officers never spoke with the bus passengers before searching their luggage outside of their presence and without their knowledge or consent.<sup>127</sup>

## 2. McDonald's Legitimate Expectation of Privacy

Judge Ripple's dissent further discusses whether or not the officer's actions invaded McDonald's legitimate expectation of privacy.<sup>128</sup> Judge Ripple agrees with the majority that by placing her bags in an area accessible to the public, McDonald's privacy expect-

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122. *Id.*

123. *Id.* at 1330-31 & nn.4-5 (citing *McGann v. Northeast Regional Commuter R.R. Corp.*, 8 F.3d 1174, 1179 (7th Cir. 1993)) (noting that courts generally find "that persons presenting themselves at security checkpoints in order to board an airplane . . . , knowing by way of a sign or other notice that doing so would subject the persons to search, have impliedly consented to the search performed"); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (approving border checkpoint stops for the purpose of limiting the flow of illegal aliens into the United States); *United States v. Johnson*, 991 F.2d 1287, 1293 (7th Cir. 1993) (noting that, in routine international border search, a person "could not have reasonably expected that her suitcase would pass through customs without being subjected to an X-ray examination").

The government quite properly does not attempt to justify the bus sweep operation by analogy to the warrantless search of luggage before boarding an aircraft or under the border search requirement . . . . In the case of airport searches, the passenger is given warning that the decision to utilize air transport implies a consent to search. The majority's equating of the situation at issue with the x-raying of luggage at an airport or upon entry to public buildings therefore finds no support in established law.

*McDonald*, 100 F.3d at 1331 n.5 (Ripple, J., dissenting).

124. *McDonald*, 100 F.3d at 1330 (Ripple, J., dissenting). See *supra* notes 65-73 and accompanying text for a discussion of the Supreme Court's decision in *Florida v. Bostick*, 501 U.S. 429 (1991).

125. *McDonald*, 100 F.3d at 1330 (Ripple, J., dissenting).

126. *Id.* at 1331.

127. *Id.* at 1330-31.

128. *Id.* at 1331.

tation was less than she would enjoy in her home.<sup>129</sup> He also states, however, that the level of privacy McDonald sacrificed is dependent upon the specific circumstances.<sup>130</sup> Furthermore, Judge Ripple notes that McDonald did not submit her bags to a search as a condition of her transportation on the bus.<sup>131</sup> Judge Ripple believes this indicates that she was justified in her expectation that the contents of her bags would remain private.<sup>132</sup> Nor did she check the luggage or do anything that would cause her to lose control of it during her journey.<sup>133</sup> Although she did temporarily leave the bus during the layover in Indianapolis, McDonald left her bags on the bus in the driver's care and did not contemplate that the driver would allow police to board the bus and search her bags.<sup>134</sup>

Perhaps one of the most persuasive authorities Judge Ripple cites in his dissent is found in his discussion of the 1984 Supreme Court case of *United States v. Jacobsen*.<sup>135</sup> In *Jacobsen*, the Supreme Court stated that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."<sup>136</sup> Furthermore, the Court agreed that society considers it reasonable for people to expect the contents of letters and packages sent through the mail will remain private.<sup>137</sup> The same argument can be made with respect to the *McDonald* facts.

It is fair to assume that people reasonably expect the contents of their carry-on luggage to remain private. Just as members of society expect their mail to be handled by others, Judge Ripple agrees that by placing a bag in an overhead luggage rack on a bus, a person runs the risk of having other passengers move the bag in an attempt to place their own belongings on the same rack.<sup>138</sup> However, in both the mail and luggage contexts, it cannot be doubted that members of society would reasonably expect the inner contents of both items to remain private despite the fact that mail and luggage are often handled by others.

Judge Ripple also believes that it is important to keep in mind that invasions of others' privacy are a matter of degree, and the constitutional difference determining the legality of a search is the level of intrusion involved.<sup>139</sup> He believes that the degree of the of-

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129. *Id.*

130. *Id.*

131. *McDonald*, 100 F.3d at 1331.

132. *Id.*

133. *Id.* at 1331.

134. *Id.*

135. 466 U.S. 109, 114 (1984) (acknowledging that when the post office or a private carrier delivers letters and packages, the public has a legitimate expectation that the contents of the letters and packages remain private).

136. *Id.* at 113.

137. *Id.* at 114.

138. *McDonald*, 100 F.3d at 1331-32 (Ripple, J., dissenting).

139. *Id.* at 1332 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)).

ficers' intrusiveness was unjustified.<sup>140</sup> Judge Ripple concluded that the inspection of McDonald's bags was unjustified because (1) it involved an overly intrusive technique intended to disclose the bags' contents; (2) the officers failed to obtain a warrant before conducting the search; and (3) the officers lacked probable cause.<sup>141</sup>

### 3. *The Practical Consequences of the McDonald Majority*

Judge Ripple dissented not only because he disagreed with the majority's reasoning, but also because of his apprehension of the decision's effect upon future law enforcement practices within

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(holding that police may seize non-threatening contraband detected by the officer's sense of touch during a protective patdown search as long as the limits of a "Terry-stop" are not exceeded)).

In *Dickerson*, the Supreme Court recognized a plain-feel doctrine similar to the previously established plain-view doctrine. *Dickerson*, 508 U.S. at 376. See generally *Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (stating that a police officer who sees contraband during a legitimate *Terry* search cannot be required to ignore it).

In recognizing the plain-feel doctrine, the Supreme Court in *Dickerson* stated that an officer who conducts a lawful patdown of a suspect's outer clothing, and feels an object whose shape or size makes apparent its identity, has not invaded the suspect's privacy beyond that already permitted by the weapons search. *Dickerson*, 508 U.S. at 375. The Court also stated, "if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76.

Many state and federal courts have recognized the "plain-feel" or "plain-touch" analogy to the plain-view doctrine. *Id.* *Dickerson* lists the following cases adopting the "plain-feel" doctrine: *United States v. Coleman*, 969 F.2d 126, 132 (5th Cir. 1992); *United States v. Salazar*, 945 F.2d 47, 51 (2nd Cir. 1991); *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States v. Williams*, 822 F.2d 1174, 1181-86 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983); *California v. Chavers*, 658 P.2d 96, 102-04 (Cal. 1983); *Dickerson v. Delaware*, 620 A.2d 857 (Del. 1993); *Wisconsin v. Guy*, 492 N.W.2d 311, 317-18 (Wis. 1992). *Dickerson*, 508 U.S. at 371 n.1.

Other state courts, including Illinois, Minnesota and New York, have not recognized the "plain-feel" analogy. *Dickerson*, 508 U.S. at 375. *Dickerson* lists the following cases rejecting the "plain-feel" doctrine: *New York v. Diaz*, 612 N.E.2d 298 (N.Y. 1993); *Arizona v. Collins*, 679 P.2d 80, 81-84 (Ariz. Ct. App. 1983); *Illinois v. McCarty*, 296 N.E.2d 862, 863 (Ill. App. Ct. 1973); *Oklahoma v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); *Washington v. Broadnax*, 654 P.2d 96, 101-03 (Wash. 1982). Cf. *Pennsylvania v. Marconi*, 597 A.2d 616, 621-23, & n.17 (Pa. 1991). *Dickerson*, 508 U.S. at 371 n.1.

140. *McDonald*, 100 F.3d at 1333 (Ripple, J., dissenting).

141. *Id.* at 1332-33. Ripple points to the trial judge's description of the officers actions of "manipulating the sides of the bags with her fingers" and "rubbing, squeezing, manipulating," to support his position. *Id.* Ripple believes that description is evidence of an examination quite different from the type of sporadic touching a traveler expects carry-on luggage to withstand in an overhead rack. *Id.* at 1333. Additionally, Ripple describes the police officer's conduct as "a tactile inspection by an expert examiner aimed at discovering the nature of the contents of the bag." *Id.*

the Seventh Circuit.<sup>142</sup> While Judge Ripple questions the effectiveness of the officers' search technique,<sup>143</sup> he is certain that innocent members of the traveling public will ultimately bear the burden of the inconveniences and intrusions created by the Seventh Circuit's decision.<sup>144</sup> He also criticizes the majority judges for imposing upon the general public an intrusion that neither of them would tolerate.<sup>145</sup> "No federal judge traveling by bus or rail would expect, or permit, a fellow passenger to rub, squeeze or manipulate his or her hand baggage in a concerted attempt to determine the contents. We should protect for others the privacy that we would demand for ourselves."<sup>146</sup>

### E. McDonald: An Overreaching Policy

Even disregarding the flawed reasoning of the Seventh Circuit's decision in *McDonald*, glaring issues still exist supporting the conclusion that the *McDonald* decision is poor policy. Some scholars and civil libertarians have questioned the effectiveness of the type of technique the police used in *McDonald*.<sup>147</sup> Furthermore, the *McDonald* technique may result in class and race-based discrimination which risks leading this nation down a slippery slope toward overly powerful law enforcement agencies which will abuse their authority and, in turn, undermine the citizens' trust in their government.<sup>148</sup>

#### 1. The McDonald Search: Is It Effective?

Questions remain as to how effective searches of the *McDonald* type will be in deterring interstate drug trafficking on com-

142. *Id.* "From now on, law enforcement officials in the Seventh Circuit, without probable cause or even reasonable suspicion, may walk throughout public buses and trains and randomly manipulate closed luggage to determine its contents." *Id.* at 1333 (Ripple, J., dissenting).

143. *Id.* "Any experienced drug courier will now quickly invest in a hard-shell bag." *Id.* at 1334 (Ripple, J., dissenting).

144. *Id.*

145. *Id.* at 1334.

146. *McDonald*, 100 F.3d at 1334.

147. See generally Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" To The Bill of Rights*, 38 HASTINGS L.J. 889 (1987) (examining how America's War on Drugs has undermined the personal freedoms the Constitution protects); See also Alexandra Coulter, Note, *Drug Couriers And The Fourth Amendment: Vanishing Privacy Rights For Commercial Passengers*, 43 VAND. L. REV. 1311 (1990) (discussing how attempts to stop drug trafficking have affected the Fourth Amendment rights of citizens traveling with commercial carriers).

148. See generally Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy Or Mutual Trust Between Government And Citizen?, 94 COLUM. L. REV. 1751 (1994) (proposing that recent Supreme Court decisions regarding the Fourth Amendment might differ if the Court put more emphasis on the need for government-citizen trust).

mercial transportation.<sup>149</sup> In *Florida v. Bostick*, Justice Thurgood Marshall, dissented from the ruling that random bus searches are not per se unconstitutional when made pursuant to passenger consent, questioned the effectiveness of such searches.<sup>150</sup> Justice Marshall asserted that only a small percentage of drug interdiction efforts are successful.<sup>151</sup> Furthermore, assuming the technique is effective, it is not necessarily justified. As Justice Marshall stated in *Bostick*, the mere fact a law-enforcement technique is successful is not necessarily an indication that it is constitutionally permissible.<sup>152</sup> Some scholars, however, believe that courts' desire to stop drug trafficking encourages them to turn away from traditional thinking and allow the ends to justify the means.<sup>153</sup>

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149. *McDonald*, 100 F.3d at 1333-34 (Ripple, J., dissenting).

150. *See generally Bostick*, 501 U.S. at 439 50 (Marshall, J., dissenting).

151. *Florida v. Bostick*, 501 U.S. 429, 442 (1991) (6-3 decision) (Marshall J., dissenting) (citing *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990) and describing a sweep of 100 buses that resulted in a total of only seven arrests). *See also Coulter*, *supra* note 147, at 1340 (discussing the frequency of privacy intrusions by police).

The effectiveness of surveillance or the extent to which drug enforcement procedure infringe the privacy of the innocent is difficult if not impossible to determine. . . . In an interview with the WASHINGTON POST, a spokesman for the Washington, D.C. DEA field office estimated that agents in Union Station stop, question, and search as many as fifty people for every arrest. [citation omitted] Unfortunately, victims rarely report violative searches that fail to produce contraband. [citation omitted] Consequently, the extent to which individual rights are violated by intrusive searches by law enforcement officials because of inexact surveillance techniques is difficult to ascertain.

*Coulter*, at 1340-41. *See also Dave Palermo, Task Force Tackles Drugs On The Move*, LAS VEGAS REV. J., Oct. 6, 1996 at 1B (discussing the effectiveness of a Las Vegas Police Department drug interdiction program headed by Captain Charlie Davidaitis, commander of the department's vice/narcotics bureau). "We believe we're scratching the surface," Davidaitis said. He is convinced, however, that without a national policy aimed at stemming the flow of drugs across the U.S. border, "we at the local level are hard pressed to keep our heads above water." *Id.*

Because the effectiveness of drug interdiction procedures such as that utilized in *McDonald* is questionable at best, courts should not allow police to conduct searches that are only minimally effective while having a maximum level of intrusion on the privacy rights of commercial travelers. The task of making laws to stop the flow of drugs into and throughout the United States is a job best left to the legislatures and should, therefore, not be taken up by the judicial system.

152. *Bostick*, 501 U.S. at 440 (Marshall, J., dissenting). "The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion notwithstanding the effectiveness of this method." *Id.*

153. *See, e.g., Coulter, supra* note 147, at 1338. "Courts respond to the antidrug hysteria by distorting traditional search and seizure analysis in order to produce an acceptable result at the expense of constitutional protections." *Id.*

## 2. *The McDonald Search: Is It Discriminatory?*

One argument against the type of search at issue in *McDonald* is that it inevitably involves discrimination. Justice Marshall initially raised this argument in his dissent in *Bostick*.<sup>154</sup> Justice Marshall argued that because police admittedly lack articulable suspicions when deciding whether or not to board a bus and question passengers, racial discrimination is likely to occur.<sup>155</sup>

Searches similar to the one used in *McDonald* will also inevitably involve an indirect form of class-based discrimination.<sup>156</sup> One scholar, Timothy P. O'Neill, believes that the decision will result in an unfair infringement on the rights of poorer travelers who are forced to travel on buses and trains.<sup>157</sup> Professor O'Neill asserts that unlike poorer travelers, wealthier travelers will continue to enjoy the luxury of travel on commercial airlines free from random physical searches of their carry-on luggage.<sup>158</sup> Judge Ripple's dis-

154. See *supra* notes 150-52 and accompanying text for a discussion of Justice Marshall's dissent in *Florida v. Bostick* and his belief that the majority's decision gives rise to the possibility of racial discrimination.

155. *Bostick*, 501 U.S. at 441 (Marshall, J., dissenting).

It does not follow, however, that the approach of passengers during a sweep is completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that race is a factor influencing his decision whom to approach. See *United States v. Williams*, No. 1:89CR0135 (N.D. Ohio, June 13, 1989), p. 3 ("Detective Zaller testified that the factors initiating the focus upon the three young black males in this case included: (1) that they were young and black. . . ."), *aff'd*, No. 89-4083 (6th Cir. Oct. 19, 1990), p. 7 (916 F.2d 714 (table)) (the officers "knew that the couriers, more often than not, were young black males"), vacated and remanded, 500 U.S. 901, 111 S. Ct. 1572, 114 L. Ed. 2d 74 (1991). Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.

*Id.* at 442 n.1.

156. See John Flynn Rooney, *Fourth Amendment Under Siege, Dissenting Judge Asserts In Drug Case*, CHI. DAILY L. BULL., Nov. 25, 1996 at 1 (discussing *United States v. McDonald*).

157. THE JOHN MARSHALL LAW SCHOOL CATALOG, 1995/96 at 20. Professor O'Neill is a recognized expert in the field of criminal law. *Id.* His accomplishments include the publication of legal writings in the NEW YORK TIMES, the CHICAGO TRIBUNE, and several other scholarly journals and textbooks. *Id.* He has written amicus briefs for the National Association of Criminal Defense Lawyers and the Illinois Attorneys for Criminal Justice. *Id.* He has also served as the Reporter to the Illinois Committee on Pattern Jury Instructions. *Id.*

158. Rooney, *supra* note 156, at 1. (quoting Professor O'Neill as saying, "[i]f a case like this ever happened on an airplane, I'm sure there would be an outrage")

This statement by Prof. O'Neill has previously proven to be true as such a search resulted in a lawsuit in the United States District Court for the Central District of Illinois in Peoria. See Michael Smothers, *Plane Passengers Say Search Violated Rights: Bloomington Residents Sue After Anonymous Tip Leads to Search, Delay of Plane*, PEORIA J. STAR, July 23, 1996 at B4. In that

sent in *McDonald* also supports Professor O'Neill's class-based discrimination argument.<sup>159</sup> The possibility of discrimination is among the many problems likely to occur if the nation's law enforcement agencies lose the footing which the Fourth Amendment once provided, and slide down the slippery slope that the Seventh Circuit created with its decision in *McDonald*.

### 3. *The McDonald Search: Is it a Slippery Slope For Law Enforcement Officials?*

Perhaps the most frightening aspect of the Seventh Circuit's decision in *McDonald* lies in what the court failed to address. If the intrusive police search conducted in *McDonald* is permitted, what will be permitted in the future? Courts have continued expanding the resources available to law enforcement officials in their battle against drug traffickers. Yet even the current arsenal is not enough; the drug dealers are winning and the men and women of law enforcement want more power.<sup>160</sup>

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case, four residents of Bloomington, Illinois filed suit against the Bloomington-Normal Airport Authority and the Bloomington Police Department. *Id.* The plaintiffs claim the airport authority and police violated their civil rights when their chartered flight was delayed by a drug search based on an anonymous tip. *Id.*

The four plaintiffs were among a group of 124 passengers on a April 10, 1996 charter flight from Bloomington to Nevada as part of a casino gambling package. *Id.* Airport officials reportedly received an anonymous tip that drugs were to be transported on the flight to Nevada. *Id.* Officials contacted the police, who conducted two searches of the plane using trained drug dogs. *Id.* The first search was conducted while the plane was empty. *Id.* Then, after the passengers boarded the plane with their luggage, police told them to leave their luggage behind and wait in the terminal; at that point, a second search was conducted. *Id.* Williams Allison, attorney for the plaintiffs, said the search led to the discovery of a small amount of marijuana in one woman's purse, but the woman was not charged. *Id.*

In the Peoria Journal Star article regarding the lawsuit, Allison states that an anonymous tip "by itself is not enough" to justify what amounted to a 45-minute "arrest" of the plaintiffs. *Id.* "They weren't allowed to leave that area or even go to the bathroom," Allison said of the passengers being forced to wait in the airport terminal while police used dogs to search the plane and their luggage. *Id.*

159. *United States v. McDonald*, 100 F.3d 1320, 1331 (7th Cir. 1996), cert. denied, 117 S.Ct. 2423 (1997) (Ripple, J., dissenting).

For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case. [citation omitted]

*Id.* (quoting *United States v. Ross*, 456 U.S. 798, 822 (1982)).

160. See Wisotsky, *supra* note 147, at 921.

The historic dynamic of the American drug control movement has been expansionary. Pretrial detention, longer and mandatory prison sentences, enhanced fines and property forfeitures, good faith exceptions to

As courts continue to give law enforcement officials unbridled power, some legal scholars shudder to think just how far the limits of this power will extend in the future.<sup>161</sup> One law professor, Steven Wisotsky, envisions the day when bounty hunters will be used to capture drug dealers, who will then be put on trial without indictment or the rights to counsel or trial by jury.<sup>162</sup> Even if that day is never realized, Professor Wisotsky believes that “[p]ersonal freedom is the inevitable casualty of the War on Drugs.”<sup>163</sup> The threat of law enforcement officials using extreme measures is but one way in which decisions like that in *McDonald* undermine the Fourth Amendment rights of American citizens. As courts continue to grant law enforcement officials increased power, the possibility of abusing that power increases as well.

William Pitt once said that “[u]nlimited power is apt to corrupt the minds of those who possess it.”<sup>164</sup> After all, if courts will allow law enforcement officers to board buses and trains to manipulate passengers’ luggage without their consent or knowledge, what is to prohibit officers from proceeding one step further? If passengers need not consent, nor even be present while their bags are touched and manipulated, officers can easily give zippers a light tug and sneak a peak inside without anyone to monitor the appropriateness of their conduct.<sup>165</sup> One commentator argues that

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the exclusionary rule, roadblocks, drug-detector dogs, wiretaps, informants, undercover agents, extradition treaties, tax investigations, computers, currency controls—the list grows and grows. And still it is not enough. Always the government needs more.

*Id.*

161. See generally Wisotsky, *supra* note 147 (discussing the effect the war on drugs has had on citizens’ constitutional rights); Coulter, *supra* note 147 (examining how efforts to stop drug trafficking have undermined the privacy rights of travelers).

162. Wisotsky, *supra* note 147, at 925. In his article in the *Hastings Law Journal*, Professor Wisotsky, of the Nova University Law Center, takes a somewhat extreme, yet thought-provoking look at the drastic measures that could accompany the continuing changes in the War on Drugs. *Id.*

Already, some of the authoritarian methods mentioned by the National Commission on Marihuana and Drug Abuse, such as pretrial detention, have become law. Why not go further and abolish the exclusionary rule altogether, authorizing drug agents to search for drugs, tap telephones, or seize financial records without warrant, probable cause or reasonable suspicion? Why not adopt a bounty hunter system for suspected drug dealers and teach school children to report their parents for drug possession? Why not, in fact, bypass entirely the cumbersome criminal justice system, with its tedious set of impediments to investigation, prosecution, and conviction . . . no need for grand jury indictment, right to counsel, or even for trial by jury.

*Id.*

163. *Id.*

164. *Id.* at 889 n.3 (citing Speech, *Case of Wilkes*, (Jan. 9, 1770)).

165. Interview with Robert R. Thomas, *supra* note 80. During the interview with Robert Thomas (an attorney for LaShawn McDonald), he agreed that the

the threat of such abuse increases as law enforcement personnel realize the current judicial trend of allowing more intrusive investigative techniques.<sup>166</sup>

Even if abuse does not occur during the actual search, there is the possibility for abuse during judicial proceedings. The fact that courts are giving law enforcement officials increasing latitude in conducting drug searches will likely encourage officers to extend that latitude to other areas of their work. For example, officers will be more likely to distort the facts to ensure the desired outcome in court.<sup>167</sup> Such abuse of an individual's rights is then unwittingly passed on to judges, who are faced with the dilemma of choosing to believe the testimony of sworn law enforcement personnel or that of a defendant who was arrested for possessing drugs.<sup>168</sup> If the current trend of judicial tolerance toward intrusive

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risk of the Seventh Circuit's decision in *McDonald* being abused is indeed a reality. *Id.* Thomas said he knows the police officers who conducted the search of the Greyhound™ bus and the luggage of McDonald and the other passengers. *Id.* He described the officers as "good, decent people," and said that while he realizes they were doing a very important job, he disagrees with their technique. *Id.*

"I have no problem with stopping drug couriers," Thomas said. *Id.* "If they [the police] have a set policy where they're not going to go in and manipulate everyone's bags, that's fine." *Id.*

Thomas said one of the biggest problems with the random technique the Seventh Circuit upheld in *McDonald*, is that it makes it difficult to monitor police conduct to ensure they don't abuse their power. *Id.* "We don't know because we weren't on the bus, but they may have opened it [McDonald's bag]," Thomas said. *Id.* "Overall, the Fourth Amendment is kind of being eroded." *Id.*

166. *Coulter, supra note 147, at 1314.* Coulter points out that the Supreme Court has authorized law enforcement activities that have become increasingly intrusive. *Id.* Furthermore, cases dealing with whether searches of drug couriers are constitutionally permissible are becoming increasingly fact specific. *Id.* This makes it difficult to establish a bright-line test for resolving the issue. *Id.* Therefore, courts are forced to use balancing tests to determine just how far such searches can go and whether any invasion of privacy is outweighed by the harm prevented. *Id.* Coulter believes this method of judicial decision making suggests that search and seizure regulations are unstable, making Fourth Amendment rights more and more difficult to delineate. *Id.* Coulter concludes that police officers, aware of the judiciary's increased tolerance of intrusive law enforcement techniques, will be less likely to respect the privacy rights of individuals. *Id.*

167. *Id.* at 1337. "One significant problem with the consent doctrine that largely is ignored by the courts is the incentive the consent doctrine provides for law enforcement personnel to misrepresent facts in order to protect the admissibility of improperly gained evidence." *Id.*

168. *Id.*

Trial judges faced with two DEA agents claiming consent and one or more defendants denying that consent was given understandably will be hesitant to accept the word of an individual caught trafficking in drugs. Despite the potential for abuse, however, courts refuse to install minimal safeguards such as requiring a warning that suspects have the right to refuse their consent.

law enforcement techniques continues, the frequency of abuse will increase commensurate with the powers of law enforcement. This will force citizens to ask themselves a difficult question: Just how much can we trust our government?<sup>169</sup>

### III. THE SUPREME COURT'S FAILURE TO REVIEW *McDONALD* BETRAYS THE FOURTH AMENDMENT AND CITIZENS' RIGHTS

Despite the Seventh Circuit's decision in *McDonald*, the abuse likely to occur following the ruling could have been prevented. The United States Supreme Court should have granted LaShawn McDonald's petition for certiorari and reversed the Seventh Circuit's decision, thereby preventing that abuse and preserving citizens' Fourth Amendment rights. Such a reversal would have sent a message to law enforcement personnel that they may not trample upon the constitutional rights of citizens in order to more easily accomplish their goal of stopping drug trafficking.

The Supreme Court should reversed *McDonald*, and ruled that the warrantless physical manipulation of an individual's baggage without that individual's consent is impermissible without probable cause or reasonable suspicion. A reversal of *McDonald* would not have left law enforcement personnel powerless in stopping interstate drug trafficking. They would still be permitted to make random luggage searches pursuant to passenger consent as the Court held in *Bostick*.<sup>170</sup>

Furthermore, because eliminating interstate drug trafficking is necessary to win the War on Drugs, individuals traveling on

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*Id.*

169. See Sundby, *supra* note 148, at 1777. Professor Sundby describes trust between the government and the citizenry as the underlying constitutional value behind the Fourth Amendment. *Id.* Sundby believes such an interpretation of the Fourth Amendment's purpose is based on the belief that an essential concept behind the Constitution and society's view of government is a reciprocal trust between the citizens and their government. *Id.* Because the government draws its authority from a trust voters place in their representatives when they choose them to govern, Sundby believes the government must act "so that it does not imperil the citizenry's ability to give its consent in an informed and free manner." *Id.* This can be done by trusting citizens to behave responsibly by following properly enacted laws and the standards adopted by society. *Id.* Sundby states that the source of the Constitution was a movement to change the government from one of aristocratic rule to one founded upon the belief that the citizenry was the source of governmental power. *Id.* at 1781. Professor Sundby also states that when the government vests citizens with certain rights it provides a shield against government power and recognizes citizens as responsible persons in whom the government places its trust. *Id.* Based on these concepts, Sundby believes that when the government uses intrusive searches and other techniques that indicate a lack of trust in citizens, the trust of the citizens in their government is also undermined. *Id.* at 1807.

170. See *supra* notes 65-73 and accompanying text for a discussion of the Supreme Court's decision in *Florida v. Bostick*.

buses and trains should be subjected to the same scrutiny that airline passengers experience before boarding commercial airplanes. Although much of the security measures used in airports are precautions against terrorism,<sup>171</sup> some airport security has effectively limited drug trafficking.<sup>172</sup>

However, if individuals traveling by buses and trains are to be subjected to the same security screenings used in airports, they should also be given notice that they are subject to such measures as a condition of their choosing to travel by commercial carrier. This system of screening passengers and their luggage with the passengers' knowledge and consent would help protect the Fourth Amendment rights of travelers while preserving the ability of law enforcement personnel to conduct drug interdiction activities.

By denying LaShawn McDonald's petition for certiorari, the Supreme Court has not only betrayed the principles of the Fourth Amendment but the citizens the amendment was drafted to protect. The Supreme Court's failure to review *McDonald* now leaves the thirteen appellate circuits to individually interpret cases similar to LaShawn McDonald's. This will inevitably lead to varying opinions regarding just how much protection the Fourth Amendment provides for the privacy of travelers. The end result could very well be thirteen different interpretations leaving travelers in the precarious situation of being protected or unprotected by a different Fourth Amendment in each circuit they enter.

#### CONCLUSION

LaShawn McDonald's conduct of trafficking the deadly drug of cocaine was illegal and should not be condoned. However, allowing police to board buses and manipulate luggage in an effort to determine its contents, without the consent or knowledge of the passengers, and without probable cause or a reasonable suspicion, is an intrusive search that should not be tolerated. The Seventh Circuit's decision in *United States v. McDonald* sets a dangerous precedent that will encourage law enforcement personnel to push the limits of the Constitution in their efforts to combat crime. Allowing such latitude in investigative techniques will increase the growing trend of allowing law enforcement authorities to trample on citizens' privacy rights in violation of the Fourth Amendment of the United States Constitution. Without the authoritative inter-

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171. See *supra* note 42 for a discussion of the airport security measures adopted to prevent airline hijackings. See also Sanford L. Dow, Comment, *Airport Security, Terrorism, And The Fourth Amendment: A Look Back And A Step Forward*, 58 J. AIR L. & COM. 1149 (1993) (discussing the government's attempts at preventing hijacking and other terrorism aimed at airlines).

172. See *supra* notes 43-64 and accompanying text for a discussion of Supreme Court decisions pertaining to airport security measures aimed at stopping drug trafficking.

pretation the United States Supreme Court has refused to provide, law enforcement practices in the United States may someday amount to an overly intrusive form of government. This is precisely what the drafters of the Fourth Amendment had hoped to prevent.

