SUPREME COURT OF THE UNITED STATES

No. 98–9349

STEVEN DEWAYNE BOND, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 17, 2000]

JUSTICE BREYER, with whom JUSTICE SCALIA joins, dissenting.

Does a traveler who places a soft-sided bag in the shared overhead storage compartment of a bus have a "reasonable expectation" that strangers will not push, pull, prod, squeeze, or otherwise manipulate his luggage? Unlike the majority, I believe that he does not.

Petitioner argues– and the majority points out– that, even if bags in overhead bins are subject to general "touching" and "handling," this case is special because "Agent Cantu's physical manipulation of [petitioner's] luggage 'far exceeded the casual contact [he] could have expected from other passengers.'" *Ante*, at 4. But the record shows the contrary. Agent Cantu testified that border patrol officers (who routinely enter buses at designated checkpoints to run immigration checks) "conduct an inspection of the overhead luggage by squeezing the bags as we're going out." App. 9. On the occasion at issue here, Agent Cantu "felt a green bag" which had "a brick-like object in it." *Id.*, at 10. He explained that he felt "the edges of the brick in the bag," *id.*, at 12, and that it was a "[b]rick-like object . . . that, when squeezed, you could feel an outline of something of a different mass inside of it." *Id.*, at 11. Although the agent acknowledged that his practice was to "squeeze [bags] very hard," he testified

that his touch ordinarily was not "[h]ard enough to break something inside that might be fragile." *Id.*, at 15. Petitioner also testified that Agent Cantu "reached for my bag, and he shook it a little, and squeezed it." *Id.*, at 18.

How does the "squeezing" just described differ from the treatment that overhead luggage is likely to receive from strangers in a world of travel that is somewhat less gentle than it used to be? I think not at all. See *United States* v. *McDonald*, 100 F. 3d 1320, 1327 (CA7 1996) ("[A]ny person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage'"); Eagan, Familiar Anger Takes Flight with Airline Tussles, Boston Herald, Aug. 15, 1999, p. 8 ("It's dog-eat-dog trying to cram half your home into overhead compartments"); Massingill, Airlines Ride on the Wings of High-Flying Economy and Travelers Pay Price in Long Lines, Cramped Airplanes, Kansas City Star, May 9, 1999, p. F4 ("[H]undreds of passengers fill overhead compartments with bulky carry-on bags that they have to cram, recram, and then remove"); Flynn, Confessions of a Once-Only Carry-On Guy, San Francisco Examiner, Sept. 6, 1998, p. T2 (flight attendant "rearranged the contents of three different overhead compartments to free up some room" and then "shoved and pounded until [the] bag squeezed in"). The trial court, which heard the evidence, saw nothing unusual, unforeseeable, or special about this agent's squeeze. It found that Agent Cantu simply "felt the outside of Bond's soft-side green cloth bag," and it viewed the agent's activity as "minimally intrusive touching." App. 23 (Order Denying Motion to Suppress). The Court of Appeals also noted that, because "passengers often handle and manipulate other passengers' luggage," the substantially similar tactile inspection here was entirely "foreseeable." 167 F. 3d 225, 227 (CA5 1999).

The record and these factual findings are sufficient to resolve this case. The law is clear that the Fourth Amendment protects against government intrusion that upsets an "actual (subjective) expectation of privacy" that is objectively "'reasonable.'" *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979) (quoting *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring)). Privacy itself implies the exclusion of uninvited strangers, not just strangers who work for the Government. Hence, an individual cannot reasonably expect privacy in respect to objects or activities that he "knowingly exposes to the public." *Id.*, at 351.

Indeed, the Court has said that it is not *objectively* reasonable to expect privacy if "[a]ny member of the public . . . could have" used his senses to detect "everything that th[e] officers observed." *California* v. *Ciraolo*, 476 U. S. 207, 213–214 (1986). Thus, it has held that the fact that strangers may look down at fenced-in property from an aircraft or sift through garbage bags on a public street can justify a similar police intrusion. See *ibid.*; *Florida* v. *Riley*, 488 U. S. 445, 451 (1989) (plurality opinion); *California* v. *Greenwood*, 486 U. S. 35, 40–41 (1988); cf. *Texas* v. *Brown*, 460 U. S. 730, 740 (1983) (police not precluded from "'ben[ding] down'" to see since "[t]he general public could peer into the interior of [the car] from any number of angles"). The comparative likelihood that strangers will give bags in an overhead compartment a hard squeeze would seem far greater. See *Riley*, *supra*, at 453 (O'CONNOR, J., concurring in judgment) (reasonableness of privacy expectation depends on whether intrusion is a "sufficiently routine part of modern life"). Consider, too, the accepted police practice of using dogs to sniff for drugs hidden inside luggage. See, *e.g.*, *United States* v. *Place*, 462 U. S. 696, 699 (1983). Surely it is less likely that nongovernmental strangers will sniff at other's bags (or, more to the point, permit their dogs to do so) than it is that such

actors will touch or squeeze another person's belongings in the process of making room for their own.

Of course, the agent's *purpose* here– searching for drugs– differs dramatically from the intention of a driver or fellow passenger who squeezes a bag in the process of making more room for another parcel. But in determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose, that matters. See *ante*, at 4, n. 2 ("[T]he issue is not [the agent's] state of mind, but the objective effect of his actions"); see also *Whren* v. *United States*, 517 U. S. 806, 813 (1996); *United States* v. *Dunn*, 480 U. S. 294, 304–305 (1987). Few individuals with something to hide wish to expose that something to the police, however careless or indifferent they may be in respect to discovery by other members of the public. Hence, a Fourth Amendment rule that turns on purpose could prevent police alone from intruding where other strangers freely tread. And the added privacy protection achieved by such an approach would not justify the harm worked to law enforcement– at least that is what this Court's previous cases suggest. See *Greenwood*, *supra*, at 41 ("[T]he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public"); *Ciraolo*, *supra*, at 212–213 (rejecting petitioner's argument that the police should be restricted solely because their actions are "motivated by a law enforcement purpose, and not the result of a causal, accidental observation").

Nor can I accept the majority's effort to distinguish "tactile" from "visual" interventions, see *ante*, at 3, even assuming that distinction matters here. Whether tactile manipulation (say, of the exterior of luggage) is more intrusive or less intrusive than visual observation (say, through a lighted window) necessarily depends on the particular circumstances.

If we are to depart from established legal principles, we

should not begin here. At best, this decision will lead to a constitutional jurisprudence of "squeezes," thereby complicating further already complex Fourth Amendment law, increasing the difficulty of deciding ordinary criminal matters, and hindering the administrative guidance (with its potential for control of unreasonable police practices) that a less complicated jurisprudence might provide. Cf. *Whren*, *supra*, at 815 (warning against the creation of trivial Fourth Amendment distinctions). At worst, this case will deter law enforcement officers searching for drugs near borders from using even the most non-intrusive touch to help investigate publicly exposed bags. At the same time, the ubiquity of *non*-governmental pushes, prods, and squeezes (delivered by driver, attendant, passenger, or some other stranger) means that this decision cannot do much to protect true privacy. Rather, the traveler who wants to place a bag in a shared overhead bin and yet safeguard its contents from public touch should plan to pack those contents in a suitcase with hard sides, irrespective of the Court's decision today.

For these reasons, I dissent.