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The Drug Courier Profile: All Seems Infected That Th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye

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ARTICLES

THE DRUG COURIER PROFILE: "ALL SEEMS INFECTED THAT TH' INFECTED SPY, AS ALL LOOKS YELLOW TO THE JAUNDIC'D EYE"*

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To combat the rising tide of illegal drugs in this country, agents of the Drug Enforcement Agency (DEA) have developed the "drug courier profile." The profile consists of numerous factors or characteristics that purportedly signal the agent whether a particular airline passenger carries drugs on his or her person. Relying on the profile, agents have observed putative drug couriers in airline terminals and then questioned, detained, and searched them. Judge Becton of the North Carolina Court of Appeals analyzes the inconsistencies and empirical inadequacies that adhere to the DEA's profile; he critiques the courts' apparent willingness to accept the profile's validity without careful scrutiny. In his conclusion, Judge Becton urges the courts to examine closely each proposed profile characteristic to determine its validity on traditional fourth amendment grounds.

I. INTRODUCTION

It was a maxim with Foxey . . . . "Always suspect everybody."[1]

Being the last passenger to disembark from a commercial airline flight that originated in Fort Lauderdale, Florida, the casually dressed black male nervously checked his watch, walked quickly through the concourse, and tried to leave the airport in a taxi. Before the passenger could enter the taxi, however, he was stopped for questioning by two Drug Enforcement Agency (DEA) agents. Why did the DEA agents stop this passenger? Was he a drug smuggler? Did the DEA agents violate any of the passenger's constitutional rights?

Between 1976 and 1986 over 140 reported cases involved airport stops by DEA agents based on the "drug courier profile."[2] These are in addition to the

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* 2 THE WORKS OF ALEXANDER POPE 68 (1871).

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1. United States v. Westerbann-Martinez, 435 F. Supp. 690, 692 (E.D.N.Y. 1977) (quoting C. DICKENS, THE OLD CURIOSITY SHOP (1841)).

2. This figure is based on the author's survey of reported cases as of November 1, 1986. One authority describes the DEA's use of drug courier profiles as follows:

> Since 1974, the federal Drug Enforcement Administration [DEA] has assigned agents to certain airports as part of a nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Fed-

substantial number of unreported cases.[3] This statistic does not include those airline passengers whom DEA agents stopped, questioned, and searched, but allowed to leave after discovering no drugs, and those airline passengers who, after an initial approach, refused to accompany an agent or consent to a search.[4] In light of its frequency and potential for abuse, the drug courier profile search raises significant constitutional and socio-statistical issues that require careful consideration.

Courts have characterized the drug courier profile as a "rather loosely formulated"[5] and "informal, apparently unwritten, checklist"[6] that purportedly indicates to an experienced DEA agent[7] that an airline passenger may be engaged in illicit drug activities. As part of the DEA's airline surveillance program to intercept illegal drugs, the drug courier profile focuses on the conduct and appearance of air travelers. Based solely on the fact certain airline passengers' behavior and appearance comport with the drug courier profile, DEA agents have identified possible narcotics couriers and then stopped, questioned, and arrested these individuals.[8]

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eral agents have developed "drug courier profiles" describing the characteristics generally associated with narcotics traffickers, and travelers with some of those characteristics are occasionally stopped at these airports for further investigation.

3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3, at 53 (Supp. 1986). The program was first implemented at Detroit Metropolitan Airport in the fall of 1974. *See* United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977) *cert. denied*, 434 U.S. 1011 (1978).

In its most recent effort to stem the flow of illicit drugs entering the country, the DEA has focused on airline baggage handlers and maintenance crew members. Large amounts of narcotics allegedly are stored on airplanes and in checked luggage. On February 13, 1986, the Associated Press announced that the Justice Department was "preparing indictments against about 50 employees of Eastern Airlines believed to be smuggling cocaine from South America . . . . The [baggage] handlers are said to be key to a narcotics pipeline bringing cocaine into the United States from Bogota, Columbia, by way of Miami, where the carrier is based." News and Observer (Raleigh, N.C.), Feb. 13, 1986, at 11A, col.6.

3. *See, e.g.*, United States v. Key, No. CR77-323A (N.D. Ga. Mar. 23, 1978).

4. The DEA does not keep comprehensive statistics on the drug courier profile program. *See* Brief for the United States at 32 n.24, United States v. Mendenhall, 446 U.S. 544 (1980) (No. 78-1821); 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 16.2(f), at 16-14 (2d ed. 1985). In none of the few cases citing statistical data as evidence of the program's success has the DEA presented statistics on the number of suspects whom agents have approached but not arrested. For example, in United States v. Place, 660 F.2d 44, 48-49 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983), the court said: "Some drug enforcement agents . . . were recognized as having made stops in a substantial number of past instances where their suspicions proved to be correct but without evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops." *Accord* United States v. Vasquez, 612 F.2d 1338, 1352 n.8 (2d Cir. 1979) (Oakes, J., dissenting), *cert. denied*, 447 U.S. 907 (1980); *see also* United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973) (discounting officer's testimony that he had made twenty to thirty arrests of illegal aliens during the two years preceding the stop in dispute because of the officer's failure to testify about the number of people he erroneously detained).

5. United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977).

6. United States v. Price, 599 F.2d 494, 502 n.10 (2d Cir. 1979).

7. In some of the earlier drug courier profile cases courts generally failed to list the experience of the testifying agent because they apparently presumed or failed to question the agent's experience. Notable exceptions include United States v. Vasquez, 612 F.2d 1338, 1343 (2d Cir. 1979) ("the fact that the luggage was not tagged gains significance from Whitmore's estimate that over 90 percent of the luggage he observes carries the identification required by the airlines.") and United States v. Price, 599 F.2d 494, 501 (2d Cir. 1979). In later cases, for example Florida v. Rodriguez, 469 U.S. 1, 2 (1984) (per curiam), the records contain explicit references to the agents' experience and training.

8. Many drug courier stops are based on tips (some anonymous, some from informants), prior

Each facet of this procedure carries fourth amendment implications.[9] These implications, in turn, invite courts to reexamine constitutional standards involving probable cause and reasonable suspicion:[10] the propriety of the initial stop, identification, and questioning of airline passengers; the moment of seizure, custodial detention, or arrest; and the consensual or nonconsensual nature of the search. Not surprisingly, the DEA's use of the drug courier profile has not escaped Supreme Court review.[11]

The drug courier profile raises a threshold socio-statistical question: "Is it sufficient that the behavioral characteristics of the suspect in a particular environment tend to place that suspect in a class which in the past has demonstrated a high probability of criminal conduct?"[12] A related question asks what types of conduct and appearance indicate that an airline traveler is carrying illegal drugs. Based solely on the fact the behavior described in the following—or substan-

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law enforcement investigations, and other factors in addition to the drug courier profile. *See* United States v. Andrews, 600 F.2d 563, 564 (6th Cir.) ("this case does not involve a stop based on the much abused drug courier profile, but represents a rare instance of an anonymous tip providing the basis for the stop"), *cert. denied,* 444 U.S. 878 (1979); *see also* United States v. Mendenhall, 446 U.S. 544, 573 n.11 (1980) (White, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("Indeed, the statistics Mr. Justice Powell cites on the successes of the program at the Detroit Airport . . . refer to the results of searches following stops 'based upon information acquired from the airline ticket agents, from [the agents'] independent police work,' and occasional tips, as well as observations of behavior at the airport.") (quoting United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978)).

In some instances airport security checkpoint personnel, who screen and may observe large bundles of cash in briefcases or hand luggage, alert DEA agents. United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977). In other instances airline ticket agents, using profile lists supplied by DEA agents, report suspicious behavior to the agents. *See* United States v. Saperstein, 723 F.2d 1221, 1222 (6th Cir. 1983); United States v. Morin, 665 F.2d 765, 766 (5th Cir. 1982); United States v. Allen, 644 F.2d 749, 750 (9th Cir. 1980); United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977); United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). *See generally* Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion in its Terminal Stage?,* 15 SUFFOLK U.L. REV. 217, 229-30 (1981) (discussing the DEA's use of the profile to combat domestic drug traffic, and the role played by tips from airline ticket agents).

9. The fourth amendment provides:

> The right of the people to be secure in their person, 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.

U.S. CONST. amend. IV.

10. As a matter of constitutional law, the courts require that a governmental official must base the apprehension and arrest of a criminal suspect on probable cause and reasonable suspicion. The Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), is a seminal case recognizing that fourth amendment protections extend to non-traditional arrests. For a discussion of *Terry* and the applicability of fourth amendment protections to airport stops, see *infra* notes 307-53 and accompanying text.

11. *See* Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam); United States v. Mendenhall, 446 U.S. 544 (1980).

12. Comment, *Profile Stops and the Fourth Amendment: Reasonable Suspicion or Inarticulate Hunches?,* 10 GOLDEN GATE U.L. REV. 112, 116 (1980); *see also* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment,* 88 YALE L.J. 1408 (1979) (discussing the process of prediction and the objections and reactions to particular prediction methods).

tially similar—scenarios comported with the drug courier profile, DEA agents have approached, detained, and arrested airline passengers:

(1) Arriving from Los Angeles, the white male had an "unusual limp" and "a very obvious, large bulge on the right inside calf."[13]

(2) The nervous Hispanic had no luggage and continued to look over his shoulder as he walked in an unusual pattern in the terminal, having completed his cross-continental flight from California.[14]

(3) After disembarking and then staring at two plain-clothed federal DEA agents, this female, who had purchased a one-way ticket from Los Angeles to the Dallas-Fort Worth airport with cash, rushed to the ladies' room with her new luggage.[15]

(4) "[Pulvano] was dressed in blue jeans and a wrinkled long-sleeve shirt with his shirt tail hanging out. It was this attire that first brought [Pulvano] to the attention of [the drug agents]. Particularly, Agent Mathewson thought appellant's appearance was 'disheveled' and not in conformance with that of the other passengers on the flight, most of whom appeared to be businessmen."[16]

(5) "Royer was first observed by [DEA agents] as he walked across the concourse of the [airport] towards the National Airlines ticket counter, carrying two apparently heavy-laden suitcases. . . . [T]hose aspects of Royer's behavior which attracted the attention of the officers . . . were the facts that (a) Royer was carrying American Tourister baggage of a type which 'seemed to be standard brand for marijuana smuggling'. . . . "[17]

(6) DEA agent Paul Markonni took just four minutes to select his suspect. "Williams was carrying a small tote bag which did not appear to be full" when he stepped off the flight from Miami at the Atlanta International Airport. "Williams walked away from the gate at a rapid pace and glanced twice back at the departing gate." He claimed no luggage, and, after exiting on the upper level, he glanced around quickly and walked toward the short-term parking lot.[18]

(7) As the last passenger to disembark from a commercial airline flight originating in Los Angeles, a source city,[19] the casually dressed black male nervously checked his watch, walked quickly

13. *See* United States v. Roundtree, 596 F.2d 672, 673 (5th Cir. 1979)

14. *See* United States v. Rogers, 436 F. Supp. 1, 2 (E.D. Mich. 1976).

15. *See* United States v. Key, No. CR-77323A (N.D. Ga. Mar. 23, 1978).

16. United States v. Pulvano, 629 F.2d 1151, 1152 (5th Cir. 1980).

17. Royer v. State, 389 So. 2d 1007, 1016 (Fla. Dist. Ct. App. 1979), *petition denied*, 397 So. 2d 779 (Fla. 1981), *aff'd*, 460 U.S. 491 (1983). American Tourister luggage allegedly is so well insulated that drug sniffing dogs have trouble detecting narcotics stored in it. *See* J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 223 (1985).

18. United States v. Williams, 647 F.2d 588, 589 (5th Cir. Unit B June 1981); *see* Bodine, *Selecting Drug 'Suspects': Use of Courier Profile at U.S. Airports Lands DEA in Controversy*, Nat'l L.J., July 27, 1981, at 1, col. 1.

19. A "source city" is a city from which dealers ship illegal drugs to other points for sale or further distribution. *See* United States v. Buenaventura-Ariza, 615 F.2d 29, 31 n.5 (2d Cir. 1980). The place of sale is the "use city." Occasionally, courts refer to the source city as the "shipping city." *See* United States v. Rogers, 436 F. Supp. 1, 3 (E.D. Mich. 1976).

through the concourse, and tried to leave the airport in a taxi.[20]

These scenarios provide just seven among hundreds of similar examples involving imaginative profile characteristics. DEA agents have used creative testimony to describe those factors they claim aroused their suspicion about particular passengers. They have justified a search based on the fact the passenger traveled with new suitcases,[21] had fair skin and displayed no tan,[22] methodically folded a ticket before discarding it,[23] or bounced a golf ball.[24] Some agents have admitted candidly that they stop passengers based on "anything that arouses [their] suspicions"[25] or on a "number of deviant characteristics" that allegedly are unique to persons who transport narcotics.[26] Notwithstanding these admissions, "uniqueness" does not constitute a *sine qua non.* Rather, it satisfies both agents—who deem it sufficient—and the courts—who accept it as significant—if the profile characteristics manifest themselves disproportionately in persons transporting narcotics.

Since 1980 the Supreme Court has had four occasions to consider drug courier profile issues.[27] *United States v. Mendenhall*[28] marked the Court's first foray into the drug courier profile thicket. Painting with a broad, albeit frayed, brush, the *Mendenhall* plurality elevated the profile to an undeservedly lofty perch by fashioning a "free to leave" test.[29] Under that test a seizure occurs, and fourth amendment analysis applies, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[30] Apparently appreciating the height at which the profile had been precariously perched, the Supreme Court in *Reid v. Georgia*,[31] decided just one month after *Mendenhall*, began to backtrack from its initial position. The *Reid* Court concluded that the drug courier profile was "too slender a reed to support the seizure in this case."[32] Later, in *Florida v. Royer*,[33]

20. *See* United States v. Rogers, 436 F. Supp. 1, 2 (E.D. Mich. 1976).

21. United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

22. In United States v. $84,000 U.S. Currency, 717 F.2d 1090 (7th Cir. 1983), *cert. denied*, 469 U.S. 836 (1984), the court stated: "The officers' attention was attracted to the two young men because of their anxious manner, suspicious conduct, casual dress and the fact that Holmes was fair-skinned and displayed no tan; all factors fitting the DEA 'drug courier profile'. . . ." *Id.* at 1092 (footnote omitted).

23. Knapper v. State, 629 S.W.2d 865, 867 (Tex. Ct. App. 1982).

24. People v. Blevins, 118 Ill. App. 3d 221, 222, 454 N.E.2d 802, 803 (1983).

25. United States v. Chamblis, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977) (admission of DEA agent Harold Wankel).

26. United States v. Floyd, 418 F. Supp. 724, 725, 728 (E.D. Mich. 1976) (admission of DEA agent Paul Markonni), *aff'd in part and vacated in part without opinion sub nom.* United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978).

27. *See* Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam); United States v. Mendenhall, 446 U.S. 544 (1980).

28. 446 U.S. 544 (1980).

29. *See id.*; *infra* text accompanying notes 280-83, 356-71.

30. *Mendenhall*, 446 U.S. at 554 (footnote omitted).

31. 448 U.S. 438 (1980) (per curiam).

32. *Id.* at 441. The *Reid* Court described the profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." *Id.* at 440. This description is not as favorable as that of the concurring justices in *Mendenhall*, who described the

which held that the drug agents' actions in that case exceeded the permissible bounds of an investigative stop,[34] Justice Rehnquist in his dissenting opinion said "the function of the 'profile' has been somewhat overplayed" and characterized the profile as "the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers."[35] In its latest airport-search case, *Florida v. Rodriguez*,[36] decided in November 1984, the Court never once used the words "drug courier profile" although the per curiam opinion is replete with drug courier profile concepts—source city, furtive actions, strange and unusual behavior, attempt to evade the officers, and the officers' special training in narcotics surveillance and apprehension.[37]

This Article explores whether the drug courier profile is based on science or alchemy and whether it can withstand the crucible of cross-examination. It also explores when and how profile searches implicate fourth amendment rights, and whether the Supreme Court's characterization of the profile as "well-planned and highly specialized" and the Court's commendable concern "in detecting those who would traffic in deadly drugs for personal profit"[38] led the Court initially to abdicate its responsibilities under the fourth amendment.[39] Although this Article discusses many federal cases and a few state cases, it focuses on the four United States Supreme Court cases on this issue,[40] illustrating why they have provided lower federal courts with little guidance in this area. Finally, in discussing the proper role of the drug courier profile in our legal system, the

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profile as a "highly specialized law enforcement operation." *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.).

33. 460 U.S. 491 (1983).

34. *Id.* at 507.

35. *Id.* at 525 n.6 (Rehnquist, J., dissenting). Now, even the DEA refers to the profile as an investigative technique. *See* J. MONAHAN & L. WALKER, *supra* note 17, at 223-24; Bodine, *supra* note 18, at 32, col. 4. The DEA originally argued that a traveler's conformance to the profile established the probable cause needed for an arrest, but courts generally rejected that argument. *See* United States v. Van Lewis, 409 F. Supp. 535, 543 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385, 389 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). DEA agents next argued that conformance with the profile established the reasonable and articulable suspicion justifying an investigatory stop. *See Mendenhall*, 446 U.S. at 568 n.1 (1980) (White, J., dissenting).

36. 469 U.S. 1 (1984) (per curiam).

37. *Id.* at 3-6. It is unclear whether the Supreme Court agreed with Professor Yale Kamisar that "[c]alling it a 'profile' makes it sound so scientific" when, in fact, it is not, Bodine, *supra* note 18, at 32, col. 2-3, or simply decided not to use the words "drug courier profile" in *Rodriguez*. Justice Powell in his concurring opinion in *Royer* may have provided a hint of things to come when he referred to *Royer* as "an airport 'stop for questioning' case." *Royer*, 460 U.S. at 508 (Powell, J., concurring).

38. *Mendenhall*, 446 U.S. at 561-62 (Powell, J., concurring). The House Select Committee on Narcotics, chaired by Charles Ringle (D-NY), in its March 7, 1985, Associated Press news release stated: "Narcotics sales in the United States have skyrocketed at a rate of $10 billion annually since 1978, grossing $110 billion for traffickers last year." *Narcotics Sales Keep Soaring*, Durham Morning Herald (Durham, N.C.), Mar. 7, 1985, at 1A, col. 5. Justice Rehnquist has stated that the smuggling of illicit narcotics is a "veritable national crisis." United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3309 (1985).

39. *See* Costantino, Cannavo, & Goldstein, *Drug Courier Profiles and Airport Stops: Is the Sky the Limit?*, 3 W. NEW ENG. L. REV. 175, 196 (1980); Greenberg, *Drug Courier Profiles,* Mendenhall *and* Reid*: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49, 53 (1981).

40. *See supra* notes 27-37 and accompanying text.

Article demonstrates why the *Mendenhall* "free to leave" test[41] is unworkable. In its place, the Article recommends the adoption of a bright line rule under which all airport stops based solely on the drug courier profile would constitute seizures for fourth amendment purposes. Thus, any such stop would trigger traditional fourth amendment analysis and require reasonable suspicion before further probing could be conducted.

II. THE DRUG COURIER PROFILE

A. *Origin*

Efforts to determine criminality through the observation of individual characteristics and behavioral traits are not recent phenomena. Since the beginning of time religious zealots, as well as sociologists and criminologists have sought to predict criminal behavior based on certain "deviant characteristics"; they have matched individuals to preconceived plans, guidelines, or profiles.[42] Although professional and lay efforts to predict criminal conduct prompt serious "questions of accuracy and questions of legitimacy,"[43] these efforts persist.

The use of profiles is an increasingly popular law enforcement tool.[44] Most prominent among the profiles in use today are those used to identify hijackers[45]

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41. In the lead opinion Justice Stewart, joined by Justice Rehnquist, concluded that, for fourth amendment purposes, a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554.

42. *See* Underwood, *supra* note 12, at 1413-14 (discussing modern ramifications of such efforts to predict criminal behavior).

43. Underwood, *supra* note 12, at 1409.

44. Bodine, *supra* note 18, at 1, col. 2.

45. The Federal Aviation Administration instituted a "hijacker profile" as part of a multipronged screening system that the agency used at domestic airports from 1968 to 1973. Note, *The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices*, 7 UCLA—ALASKA L. REV. 307, 307-08 (1978). One Article described the profile as follows:

> The profile was begun in October, 1968, by a task force of agencies including the FAA, the Department of Justice and the Department of Commerce. This task force completed a detailed study of the characteristics of all then known air hijackers and identified certain attributes supposedly distinguishing potential air hijackers from the general public. With some modification, these characteristics were eventually compiled into a "profile" of a potential skyjacker, consisting of approximately twenty-five characteristics . . . .
>
> Informed discussion about the profile is difficult because the characteristics are secret. However, these characteristics are ostensibly based on the behavioral characteristics of embarking passengers rather than on inherited or social characteristics . . . .
>
> As initially devised, a suspect selected by the profile (a "selectee") was subjected to an examination by a magnetometer to determine whether he was carrying a significant amount of metal.

McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293, 302-03 (1972) (footnotes omitted); *see also* Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004, 1008 (1973) (discussing psychological characteristics of hijackers).

One commentator has noted: "Studies asserted that application of the profile would clear 99.5% of air travellers, but would clear no potential hijackers." Comment, *supra* note 12, at 121 (citations omitted). One source describes the current status of the profile as follows:

> In 1973, the policy changed to the currently existing one, whereby all airline passengers, not just specially selected ones, pass through a magnetometer. There was then no need for a behavioral profile to identify persons likely to be in the possession of weapons, since the

and those used to identify persons who smuggle illegal aliens into the country.[46] Less prominent are the drug smuggling vessel profile,[47] the stolen car profile,[48] the stolen truck profile,[49] the alimentary-canal smuggler profile,[50] the battering

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magnetometer accomplished this task by screening everyone. The FAA therefore discontinued the use of the hijacker profile in 1973.

In 1980, however, there was a series of plane hijackings in which the hijacker had boarded the plane in possession of a plastic flask filled with gasoline and a cigarette lighter. The plastic flask had not activated the magnetometer. As of 1980, the FAA began to deploy the hijacker profile again in order to identify persons who would hijack a plane with the use of a nonmetalic weapon.

J. MONAHAN & L. WALKER, *supra* note 17, at 212 (citations omitted).

46. "In 1979, a total of 1,002,996, or 93 percent of all deportable aliens entered the United States in ways other than ports of entry; 99 percent of these were made across the Mexican border." Comment, *Immigration Roving Border Patrols: The Less Than Probable Cause Standard for a Stop*, 10 AM. J. CRIM. L. 245 n.1 (1982). In United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975), a random roving-patrol stop case, the United States Supreme Court discussed the following potential elements of an alien smuggling profile, on which officials could base reasonable suspicion: (1) traveling near the border; (2) on a lightly traveled road; (3) in a notorious smuggling area; (4) in a car that appears to be heavily loaded or has an extraordinary number of passengers, or has large compartments suitable for storing aliens; (5) driven by someone of Mexican ancestry; (6) who takes evasive action or drives erratically; and (7) who is carrying passengers exhibiting characteristics of Mexican residents who appear to be trying to hide. *See* Comment, *supra* note 12, at 117-18; *see also* United States v. Cortez, 449 U.S. 411, 418 (1981) (holding that a fourth amendment seizure occurred when border patrol officer stopped the vehicle but that the officer had a "particularized suspicion" that defendant was smuggling illegal Mexican aliens into the United States); United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (permitting stops of all vehicles at permanent checkpoints as well as questioning of the occupants, even though no reason exists to believe the stopped vehicle contains illegal aliens).

47. The United States Coast Guard employs a profile of vessels likely to be used in smuggling drugs into the country as part of its enforcement program. *See* Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 730 (1980) (officials often stop vessels based on convergence of profile characteristics with their observation of activity of vessels); Note, *supra* note 8, at 220 n.19. The profile characteristics include suspect vessels, United States v. Kleinschmidt, 596 F.2d 133, 135-36 (5th Cir.), *cert. denied*, 444 U.S. 927 (1979); burlap bags on deck, United States v. Caraballo, 571 F.2d 975, 976 (5th Cir. 1978); "improper markings, no permanently attached name or home port; failure to fly a flag; failure to identify itself; the condition of the vessel; and unusual activities aboard the vessel," United States v. May May, 470 F. Supp. 384, 389 (S.D. Tex. 1979).

48. To intercept vehicles "commonly stolen in Phoenix and Tucson," a team of federal and Arizona law enforcement officers stopped vehicles heading towards Mexico that met "a specified profile." United States v. Carrizoza-Gaxiola, 523 F.2d 239, 240 (9th Cir. 1975). In *Carrizoza-Gaxiola* the government argued that reasonable suspicion for the stop existed because:

> (1) a man appearing to be Mexican (2) was driving towards Nogales on a highway from Tucson (3) in a new-appearing late-model Ford LTD (4) with Sonora, Mexico license plates; in addition, (5) each week some, but less than 30, late-model Ford LTD's are stolen in the Tucson and Phoenix areas and remained unrecovered, and (6) some of those cars turn up in Mexico.

Id. at 241; *see also* State v. Taras, 19 Ariz. App. 7, 10, 504 P.2d 548, 551 (1972) (discussing the reasonableness of a decision to stop a car to check on ownership). *See generally* Comment, *supra* note 12, at 119 (discussing the stolen car profile).

49. In United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979), for example, FBI agent Thomas Summers, Jr., "conducting an inspection to locate stolen vehicles . . . as they entered the United States from Mexico [selected] late-model pick-ups, especially Fords and Chevrolets, as being likely to have been stolen in the United States and transported to Mexico." *Id.* at 546.

50. In 1983 United States customs officers detained Rosa Elvira Montoya de Hernandez because she fit the alimentary canal smuggler profile. Specifically, de Hernandez

> had paid cash for her ticket, came from a source port of embarcation, carried $5,000 in U.S. currency, had made many trips of short duration into the United States, had no family or friends in the United States, had only one small piece of luggage, had no confirmed hotel reservations, did not speak English, and said she was planning to go shopping using taxis for transportation.

parent profile,[51] and the poacher profile.[52] In 1983, based on interviews with alleged mass murderer Henry Lee Lucas, the Federal Bureau of Investigation (FBI) attempted to compile a serial killer profile.[53] To a lesser extent, profiles

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United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3313 n.2 (1985) (Brennan, J., dissenting, joined by Marshall, J.) (quoting United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 n.3 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985)). Significantly, officers discovered the factors listed above only after they had questioned Hernandez. She was detained and questioned solely because her passport revealed "that she had made at least eight recent trips to either Miami or Los Angeles." *Id.* at 3307. A rectal examination produced one cocaine-filled balloon that Hernandez had swallowed and was smuggling in her alimentary canal. After her arrest, officers discovered that she carried a total of 88 balloons. *Hernandez*, 105 S. Ct. at 3308.

Some court officials in the United States Court of Appeals for the Fifth Circuit refer to this profile as the "Columbian mule" profile, and middle-aged Columbian women are often the smugglers. Interview with Peter Beer, United States District Court Judge for the Eastern District of Louisiana (July 1985); *see* United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (75 balloons); *see also* United States v. Hernandez-Cuartas, 717 F.2d 552 (11th Cir. 1983) (listing Columbia as a leading source country). "Columbian mule" is a regional classification, however, and most courts continue to use the term "alimentary canal smuggler profile." *Cf.* People v. Warren, 91 A.D.2d 1007, 1008, 457 N.Y.S.2d 873, 874 (1983) (Defendant, after arriving in New York on a flight from India, a "source country," carrying only one piece of luggage, was subjected to a body cavity search that "produced nine condoms tied with dental floss and containing heroin.").

51. In State v. Loebach, 310 N.W.2d 58 (Minn. 1981), the Minnesota Supreme Court explained the testimony of Dr. ten Bensel:

> [T]he "battering parent" syndrome is an "inner [sic] generational phenomena" in that adults who abuse their children were often abused themselves. The doctor testified that abusing parents frequently experience role reversal and often expect their children to care for them. He also stated that battering parents often exhibit similar characteristics such as low empathy, a short fuse, low temper, short temper, low boiling point, high blood pressure, strict authoritarianism, uncommunicativeness, low self-esteem, isolation and lack of trust.

Id. at 62-63. In Sanders v. State, 231 Ga. 70, 303 S.E.2d 13 (1983), Dr. Kennedy, without citing a specific source for the profile or attempting to show its scientific validity,

> constructed a profile of the typical abusive [female] parent. He testified that the characteristics of an adult who abuses a child in a life threatening fashion almost always are, first, that the parent herself is the product of a violent, abusive environment and usually commits violent acts with growing frequency; second, that the parent is under some kind of chronic environmental stress; caused by, for example, money or housing problems, and is frequently a single parent; third, that the parent has a history of poor social judgment in that she tends to be impulsive or explosive under stress; fourth, that the child she abuses is the product of an unplanned, difficult and unpleasant pregnancy and is prematurely born; fifth, that the abused child is a chronically difficult child, either sickly or frequently crying.

Id. at 73-74, 303 S.E.2d at 16. The battering parent profile involves "past" conduct as opposed to "present" or "future" conduct. Courts hesitate to accept social science evidence to identify those who have committed crimes in the past. *See* J. MONAHAN & L. WALKER, *supra* note 17, at 228.

52. In State v. Tourillott, 289 Or. 845, 618 P.2d 423 (1980), the police established a roadblock to apprehend illegal hunters. The police stopped all cars, except cars containing "older people or others who did not appear to have been hunting," and questioned the drivers of the remaining vehicles. *Id.* at 848, 618 P.2d at 425.

53. The Justice Department's National Center for the Analysis of Violent Crimes "will focus on serial killers—who murder large numbers of strangers over a period of time, often across state lines and with no apparent motives .... Psychological profiles are based on information about a suspect's background, personality strengths and weaknesses, the crime scene, and victims' wounds ...." USA Today, July 11, 1984, at 3A, col. 4-6. In 1984 over $2.5 million was appropriated for the serial killer profile operation based in part on statistics from the last five years showing that "the number of unresolved killings has grown from 10% to 27%." *Id.*

Recently, Lucas' credibility has been undermined. An Associated Press news release stated:

> Case after case against alleged serial killer Henry Lee Lucas has unraveled, and many investigations are being reopened. Lucas, considered the deadliest serial killer in U.S. history after he began confessing to hundreds of murders after he was arrested in Texas in 1983, is now widely viewed as the perpetrator of a gigantic hoax. He "took a lot of people for a ride," said Texas Attorney General Jim Mattox. A *Dallas Times Herald* survey of

are developing to help identify serial rapists, child molesters, and arsonists, and the National Center for the Analysis of Violent Crimes plans to expand its operation in an effort to track down these criminals.[54]These profiles are narrower than the drug courier profile. They are regional in scope and implicate fewer people suspected of criminal activity. Thus, none is used as extensively as the drug courier profile.

Many of the drug courier profile characteristics are in fact empirically based. Before developing the drug courier profile, DEA agents learned the *modus operandi* of cross-country drug distributors and couriers through conversations with undercover operators, informants, and cooperative defendants—those arrested on drug charges as well as convicted codefendants who turned state's evidence. As DEA Agent Markonni explained in *United States v. McClain*,[55] "[t]he majority of our cases, when we first started, involved cases we made based on information from law enforcement agencies or from airline personnel. And as these cases were made, certain characteristics were noted among the defendants."[56]

DEA agents even relied on the hijacker profile to help them determine how a drug courier would act. For example, when Federal Aviation Administration (FAA) officers stopped Lee Skipwith III in 1971 because he fit the hijacker profile, they discovered not only that he possessed cocaine, but also that he carried

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lawmen in charge of investigating 191 murder cases closed by the Ranger-led Lucas Homicide Task Force shows that 90 now are considered unsolved.

Durham Morning Herald (Durham, N.C.), Nov. 30, 1985 at 14A, col. 3. Evidence placing Lucas far from the scenes of many of his confessed crimes likely will have little effect on the serial killer profile because many people remain convinced that Lucas killed numerous people. *Id.*

54. USA Today, July 11, 1984, at 3A, col. 3. As evidence of the widespread attempted use of profiles, see State v. Hickman, 337 N.W.2d 512 (Iowa 1983) (proffered testimony by the State concerning a "rapist" profile), and State v. Cavallo, 88 N.J. 508, 443 A.2d 1020 (1982) (proffered testimony by a defendant that he did not fit the profile of a rapist).

55. 452 F. Supp. 195 (E.D. Mich. 1977).

56. *Id.* at 199.

DEA agents also note certain characteristics exhibited by drug couriers who use ground, rather than air, transportation. A profile of drug smugglers who use the interstate highway system apparently has been developed. An October 27, 1986, news article revealed the following:

> N.C. Highway Patrol Trooper Terry L. Isaacs works a stretch on Interstate 95 in Cumberland County, catching drug smugglers with the subtle expertise of a fly fisherman.
>
> . . . .
>
> Isaacs is an example of the patrol's new focus on drug smugglers . . . .
>
> During a special training session taught by federal drug enforcement agents in Atlanta last spring, Isaacs and six other North Carolina troopers learned how routine traffic stops sometimes can lead to major drug arrests.
>
> For Isaacs, a 10-year veteran of the patrol, the results of his schooling were almost immediate. The day after he returned from Atlanta, he pulled a man traveling south on I-95 for going 75 mph and discovered $225,000 stashed in the bottom of two factory-sealed stereo speakers. Isaacs confiscated the money, which he believed to be drug related, because the man was not a U.S. citizen and by law could not be carrying more than $5,000 in cash.
>
> . . . .
>
> Since then, the busts have come almost weekly along I-95 in North Carolina. Some cases have been tricky, like the car Isaacs searched thoroughly before finding 400 grams of cocaine sewn inside the driver's sportcoat.

Davis, *N.C. State Troopers Break from Ticketing to Nab Drug Runner*, News and Observer (Raleigh, N.C.), Oct. 27, 1986, at 1A, col. 1.

no identificaton and had purchased his airline ticket using a false name.[57] Indeed, more than thirty-three percent of the persons stopped as suspected hijackers were carrying illegal drugs.[58]

At some point in time the DEA apparently undertook a nationwide effort to draw a composite picture of those persons likely to carry illegal drugs. The recidivism rate among drug offenders has always been high, and DEA agents maintain a list of suspected major drug dealers in central data banks.[59] It is reasonable to assume that in target cities the names of these major drug dealers are plugged into airline terminal computers, and that DEA agents are alerted when someone purchases a ticket in the name of a suspected major drug dealer.[60]

B. *Operation*

Many drug courier stops are based on tips (some anonymous, some from

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57. United States v. Skipwith, 482 F.2d 1272, 1273-74 (5th Cir. 1973); *see also* United States v. Legato, 480 F.2d 408 (5th Cir.) (airport search of package for explosives, which resulted in discovery of heroin, upheld), *cert. denied*, 414 U.S. 979 (1973); United States v. Moreno, 475 F.2d 44 (5th Cir.) (in view of defendant Moreno's unusual nervousness, a condition that seemed to intensify after he realized that he was being watched by members of the airport's anti-air piracy detail, and in view of the prominent bulge on the left side of his coat, the detention and airport search of Moreno that uncovered heroin did not offend the fourth amendment), *cert. denied*, 414 U.S. 840 (1973); United States v. Bell, 464 F.2d 667, 668 (2d Cir.) (warrantless airport search of Bell upheld because "Bell and the circumstances of his ticket purchase fell within the criteria of a 'hijacker profile' "), *cert. denied*, 409 U.S. 991 (1972). *See generally* Greene & Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 269 (1982) (hijacker profile noted as forerunner to drug courier profile).

58. United States v. Davis, 482 F.2d 893, 909 n.43 (9th Cir. 1973). In late November 1972 the New York Times reported that in almost two years of passenger screening there had been approximately 6,000 arrests. Less than 20% were on charges related to aircraft safety. Over 2,000 persons were arrested for possession of drugs, and the same number were arrested as illegal aliens. Lindsey, *Searches of Air Travelers Stir Fears of Civil Rights*, N.Y. Times, Nov. 26, 1972, at 1, col. 2; *see* Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036, 1037 n.6 (1973); McGinley & Downs, *supra* note 45, at 306.

59. In United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), the first reported drug courier profile case, the United States District Court for the Eastern District of Michigan noted that DEA agents exchange files on drug couriers. As early as 1976 almost 75 of these "general file investigations" were opened. *Id.* at 539; *see also* United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982) (After they placed his name in the Narcotics and Dangerous Drugs Information System computer, agents discovered that defendant Morin had previous narcotics convictions and was suspected of smuggling drugs from Columbia.); United States v. Rogers, 436 F. Supp. 1, 2 (E.D. Mich. 1976) ("Agent Black testified that he intended . . . to ascertain whether Rogers was among those persons on a Drug Enforcement Administration list.").

60. Interview with Leon Thompson, defendant McClain's California lawyer (July 1985); *see* United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977); *see also* United States v. Lewis, 556 F.2d 385, 387 (6th Cir. 1977) ("Mrs. Susan LeBlanc, a ticket agent for American Airlines at the Detroit Metropolitan Airport, informed DEA Special Agent Paul Markonni that a suspicious person by the name of 'J. Hall' had just purchased a first class ticket on a flight to Los Angeles, California, with currency of small denominations."), *cert. denied*, 434 U.S. 1011 (1978).

In drug cases, as opposed to hijacking cases, the airlines have no financial interest in ferreting out drug smugglers. Nevertheless, *McClain* and other cases suggest that airline personnel have been extremely helpful to narcotics agents. Surely, if drug couriers respond to police authority by cooperating and "consenting" to stops and searches, airline personnel would be expected to cooperate at least minimally. *See infra* notes 369-71 and accompanying text; *cf.* United States v. Walther, 652 F.2d 788, 790 (9th Cir. 1981) (airline employee opened an overnight case with the expectation that he would be compensated by DEA).

informants), prior law enforcement investigations, and other factors in addition to the drug courier profile.[61] However, the prototypical drug courier profile search, which this Article critiques, occurs when a DEA agent spots an individual who exhibits the relevant profile characteristics during an air terminal surveillance.

> Plainclothes agents station themselves in various parts of selected airports and observe travelers, especially those traveling between so-called "source" and "use" cities. Observation often begins at either the airline ticket counters or airport deplaning lounges. The agents attempt to ascertain whether any of the travelers exhibit characteristics matching those in the drug courier profle, making it likely that the person is carrying contraband.
>
> DEA agents intensify their surveillance when they spot a traveler matching some of the profile characteristics. For example, a person traveling between "use" and "source" cities, carrying little or no baggage, purchasing an airline ticket with a large number of small bills, and acting particularly nervous will usually qualify for closer attention .... [The agents] approach the person, display their credentials, and orally identify themselves as federal agents. The agents then ask for identification and airline ticket receipts showing the person's travel plans. More questions are asked .... Often, ... further profile characteristics are discerned during the encounter—a fictitious name, unusual travel itinerary, or increased nervousness.[62]

Once a suspect is identified, "it [is] incumbent upon the agent to detain that individual long enough to gather evidence which either corroborates or allays the agent's earlier suspicions."[63]

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61. *See supra* note 8.

62. Comment, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486, 1487-88 (1981) (footnotes omitted).

63. Greene & Wice, *supra* note 57, at 273. The following example describes how DEA agents have sought to corroborate or allay their suspicions. Although somewhat typical, this example admittedly combines ploys used by DEA agents at source, cross-road, and use cities, while most of the reported cases have involved DEA agents' activities only at use cities:

> And so based upon little else than travel to or from a particular city and unusual nervousness, an agent would spot a suspect and follow that person for a while .... [T]he next [step] would be unobtrusively to learn as much about the suspect without actually confronting him. Standing behind a suspect in a ticket line often revealed whether or not an individual was traveling without luggage (if there were no luggage checks attached to the traveler's ticket, it usually meant he was travelling light). An agent might also learn if the suspect had a rapid turnaround time for a lengthy flight or if the suspect had or was about to pay for a ticket with cash, usually small denominations ....
>
> Upon initial contact with a subject, it was DEA policy to "identify themselves and request that the people produce identification ...."
>
> The first request was always for a plane ticket to discover destination, turnaround time, and method of payment. The next request was for a driver's license to ascertain if the suspect was traveling under an alias ....
>
> [T]he agent was always careful to give the suspect the impression that he was never under arrest or in custody during the contact and was always free to go. Regardless of whether this was true, it was certain that the agent would testify to this sequence of events at trial. The next step was to explain the agent's purpose to the suspect and to ask him if he would consent to a cursory search of a bag or his person for narcotics. The agent always stresses that if the suspect is clean, they have nothing to worry about .... If the suspect was sharp enough to ask the agent what would happen in the event consent was not

C. *Predictive Value*

As a predictive scheme the drug courier profile constitutes a hybridization of clinical and statistical models. *Clinical predictions*, based on the subjective judgments of experienced decision-makers, focus on the uniqueness of individuals. *Statistical predictions* rely on "formulas that assign fixed weights to predetermined characteristics" of individuals.[64] Both methods of prediction prompt "questions of accuracy and questions of legitimacy."[65] Legal critics stress that predictive techniques are not legitimate because they fail to treat individuals as autonomous persons.[66]

However, some profiles obviously are more scientific and reliable than others. This and later sections of the Article assess the risks of error present when DEA agents rely on the drug courier profile. In other words, the Article analyzes the degree to which that profile, like other profiles, depends on incorrect presumptions or "false positives."[67]

In theory, the drug courier profile seeks to incorporate the subjective judgments of experienced narcotics agents into a statistical model that uses predeter-

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given, the agent would tell the traveler that he, the agent, would attempt to procure a search warrant from the nearest available magistrate to get into the suspect's bags. Occasionally, the agent would inform the suspect that if the consent to search were refused, the traveler could leave but the luggage would stay.

Id. at 272-73 (footnotes omitted).

64. Underwood, *supra* note 12, at 1408.

65. Underwood, *supra* note 12, at 1409.

66. Underwood, *supra* note 12, at 1409.

67. J. MONAHAN & L. WALKER, *supra* note 17, at 193-94. A certain amount of risk or probability of error adheres to any effort at predicting future acts or behavior; this premise especially applies to the drug courier profile search. One widely accepted analytical framework posits four possible outcomes of predictive decisions—true positive, true negative, false positive, and false negative. Monahan and Walker have noted:

> If one predicts that [an act] will occur and later finds that, indeed, it has occurred, the prediction will be called a "true positive." One has made a positive prediction, and it turned out to be correct or true. Likewise, if one predicts that [an act] will not occur and it in fact does not, the prediction is called a "true negative," since one has made a negative prediction . . . and it turned out to be true. These, of course, are the two outcomes one wishes to maximize in making predictions.
>
> One can also make two kinds of mistakes in predicting behavior. If one predicts that [an act] will occur and it does not, the outcome is called a "false positive." One made a positive prediction . . ., and it turned out to be incorrect or false. In practice, this kind of mistake usually means that a person has been unnecessarily detained . . . to prevent an act . . . that would not have occurred in any event. If one predicts that [an act] will not occur, and it does occur, the outcome is called a "false negative." . . . These two outcomes, obviously, are what predictors of violence try to minimize.

Id. at 193.

As noted in United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982), a "profile does not focus on the particular circumstances at issue. Nor does such a profile indicate in every case that a specific individual who happens to match some of the profile's vague characteristics is involved in action sufficiently suspicious as to justify a stop." *Id.* at 601. Other commentators have discussed the probabilistic and particularized approaches. *See* Underwood, *supra* note 12, at 1420-32.

Professor Sheri Lynn Johnson, who has noted that "[t]he Supreme Court has repeatedly commanded a unique calculation of the degree of suspicion generated by each particular fact pattern," opines that "[n]either the courts nor legal scholars have sufficiently stressed the necessary first step of such a calculation: separating facts that contribute to the likelihood of criminal activity from those that do not." Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 216 (1983). This conclusion is important because "the concept of reasonable suspicion 'does not deal with hard

mined profile characteristics based on an analysis of prior cases. In practice, however, even if the hybrid model produces decisions that often are correct, the courts' and agents' overreliance on an unwritten and expanding profile list generally overrides individualized decisionmaking.[68] Thus, the legitimacy of the drug courier profile as a predictive device depends on the narcotics agents themselves.

The agents can make orderly decisions based on individualized judgments, or they can make arbitrary decisions and rationalize them with after-the-fact compilations of characteristics suited to the individual detained by them. The agents have unchecked power to manipulate the predictive model. This reality presents an obvious danger: "That some agents have observed the couriers to be predominantly Hispanic, while others have observed them to be almost exclusively black females, suggests a self-fulfilling prophecy. Agents who look for Hispanic drug couriers find them, and agents who lie in wait for black females do not arrest white males."[69] Consequently, the analysis that follows considers "questions of accuracy and questions of legitimacy."[70]

D. *Primary and Secondary Characteristics*

In the first reported drug courier profile case, *United States v. Van Lewis*,[71] testimony indicated

> that the following constitute some of the characteristics of a drug courier: (1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases on trips which normally require extra clothing; and (4) travel under an alias.[72]

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certainties, but with probabilities,' " and "[m]istakes are therefore possible . . . ." *Id.* at 217 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

Commentator Peter Greenberg has called the DEA profile "an essentially non-specific probability determinant with at least colorable statistical validity." Greenberg, *supra* note 39, at 53.

68. Nevertheless, language in some of the Supreme Court drug courier profile cases suggests that courts as well as DEA agents make subjective, individualized judgment calls. *See, e.g., Reid*, 448 U.S. at 441 ("the fact that [defendant] preceeded another person and occasionally looked backward at him . . . relates to their particular conduct").

69. Johnson, *supra* note 67, at 240 (footnote omitted).

70. Underwood, *supra* note 12, at 1409.

71. 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

72. *Id.* at 538. In *Van Lewis* a "common evidentiary hearing was called by the court to develop more fully the facts underlying the Drug Enforcement Administration's (DEA) efforts to stop narcotics traffic" as a result of three separate searches for contraband drugs at Detroit Metropolitan Airport. *Id.* at 537. The three cases implicated five defendants—William Van Lewis, Paula Hughes, Robert McCaleb, Larry White, and Brenda Page. Presumably to prevent drug couriers from learning what specialized behavioral models DEA agents had developed, the characteristics, based on empirical data gathered during eighteen months surveillance at Detroit Metropolitan Airport, "were made available to the court in camera." *Id.* at 538; *accord* United States v. Allen, 421 F. Supp. 1372, 1374 (E.D. Mich. 1976); *cf.* United States v. Rogers, 436 F. Supp. 1, 3 (E.D. Mich. 1976) (noting that "[l]ittle testimony was presented concerning the source and content of the profile other than [DEA agent] Back's assertions that it is a composite given to him by his superiors and that the profile characteristics include direct flights from shipping cities, little or no luggage, and nervous mannerisms").

Significantly, nervousness, the quintessential characteristic found in approximately ninety percent of drug courier profile cases,[73] was not listed as a factor in testimony taken in open court. Perhaps DEA agents presciently anticipated that courts would not view nervousness exhibited by drug couriers as "perceptively different" from the nervousness "characteristic of 'white knuckle type' flyers or others who were just plain nervous people."[74] Alternatively, perhaps the agents knew that evidence elicited at the joint hearings in *Van Lewis* would establish that one of the five defendants actually appeared "very cool."[75] In any event, testimony in almost all subsequent cases has included nervousness as a primary factor.[76]

Indeed, the list of profile characteristics expanded greatly after *Van Lewis*. By 1979, while noting that the precise characteristics in the profile appear to vary, the United States Court of Appeals for the Fifth Circuit categorized some of the characteristics:

> The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.
>
> The secondary characteristics are: (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.[77]

A later section of this Article examines and critiques DEA agents' reliance on these characteristics.[78]

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73. This conclusion is based on the author's survey of reported and unreported cases.

74. Royer v. State, 389 So. 2d 1007, 1016 n.4 (Fla. Dist. Ct. App. 1980), *aff'd sub nom.* Florida v. Royer, 460 U.S. 491 (1983).

75. "Page appeared nervous, looking around. McCaleb was nervous and perspiring, but White appeared to be very cool." *Van Lewis*, 409 F. Supp. at 541.

76. In United States v. Buenaventura-Ariza, 615 F.2d 29 (2d Cir. 1980), the court stated: "The 'trained eye' of the narcotics agent has loomed more prominently in our most recent analyses of airport stops, as nervous behavior and perceived attempts by passengers to appear 'separate' have emerged as the *principal* conduct justifying the stop." *Id.* at 35 (emphasis added). Contrast this statement with that of DEA agents in another case, who admitted that certain drug courier profile characteristics "coupled with [defendant's] unusually nervous behavior" served as the basis for their suspicion. United States v. Sanford, 658 F.2d 342, 346 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 991 (1982). Judge Randall in his dissent stated that " '[u]nusual nervousness' is not an additional factor to be considered along with the drug courier's profile to establish reasonable suspicion, but is only a part of that profile," *id.* at 348 (Randall, J., dissenting) (footnote omitted), indicating that some judges do not view nervousness as a principal behavior characteristic justifying an airport stop.

77. Elmore v. United States, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

78. *See infra* notes 223-72 and accompanying text.

The primary drug courier profile characteristics have a common sense basis. For example, it is not surprising that Miami, New York, San Diego, and Los Angeles—major port, or near-port, cities—have earned the label "source cities" for the bulk of narcotics entering the United States.[79] And it logically—but not necessarily fairly—follows that Florida, with its extensive coastline and a longitudinal meridian placing it west of all major cities in South America, receives large shipments of South American cocaine and marijuana. The same common sense approach would explain a "use city" label.

> Added to this list [of source cities] were so-called "use-cities" or major population centers where the DEA knew suspected couriers would either pass through or end up with their loads. Two such centers were Detroit, where the drug courier profile would eventually debut, and Atlanta . . . . It went without saying, then, that the DEA would concentrate their efforts at airports in these source or use cities . . . .[80]

Primary characteristics derive from logical deductions about the practicalities of the drug business. Thus, it is logical that drug couriers, who theoretically wish to minimize the risk of detection or conviction, would use "the fastest available means of transportation—the commercial airlines;"[81] "would travel light—with little or no luggage in order to get in and out of an airport as quickly as possible;"[82] would depart from the "drop-off" or "use" city as soon as possible;[83] would use an alias;[84] and would not pay for airline tickets with checks or credit cards.[85]

The secondary drug courier profile characteristics have less of an empirically based common sense component. To be sure, some of these characteristics reflect the consensus that drug couriers always attempt to avoid surveillance and to conceal their identities. Nonetheless, the secondary characteristics clearly do not have the same correlational nexus with the predictive scheme as do the primary characteristics. In other words, the secondary characteristics are more likely to misidentify innocent travelers. This fact alone, however, does not require their disuse. Rather, it is critical to assess the relative frequency with which certain characteristics appear in drug smuggling versus non-drug smuggling populations.[86]

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79. *See supra* note 19.

80. Greene & Wice, *supra* note 57, at 270 (footnotes omitted).

81. *See* Comment, *Drug Trafficking at Airports—The Judicial Response*, 36 U. MIAMI L. REV. 91, 91-92 (1981).

82. Greene & Wice, *supra* note 57, at 271.

83. A "use city" is the city in which drugs are sold. *See supra* note 19.

84. *See infra* note 248.

85. In *Reid*, however, defendant did pay for his ticket with a credit card. *Reid*, 448 U.S. at 439.

86. Hypothetically, if 1% of the general flying population traveling from Miami to Detroit carries cocaine, and 10% of those who make excessively frequent flights (however defined) from Miami to Detroit carry cocaine, then the probability that an excessively frequent traveler who travels that route is smuggling drugs increases by a factor of 10. Nevertheless, a 90% "false-positive" probability exists that the person is not carrying cocaine. *See generally* J. MONAHAN & L. WALKER, *supra* note 17, at 193 (discussing "false-positive" probability).

E. *Proliferation of Profiles and Characteristics*

By 1982 hundreds of profile characteristics had proliferated either through DEA agents' testimony or the text of court decisions in drug courier profile cases.[87] Not surprisingly, the government, in its petition for certiorari in *Mendenhall* conceded that "there is no national profile; each airport unit has developed its own set of drug courier characteristics on the basis of that unit's experience .... Furthermore, the profile is not rigid, but is constantly modified in light of experience."[88]

Not only does each airport have a profile, but a single DEA agent may use multiple profiles of his or her own.[89] Paul Markonni, the person most often credited with developing the drug courier profile, and clearly the agent most often listed in drug courier profile cases,[90] has articulated several slightly varying profiles in reported cases.[91] One court has used different profiles for incom-

87. This conclusion is based on the author's survey of reported and unreported cases.

88. Petition for Certiorari at 17-18 n.17, *Mendenhall* (No. 78-1821); *see also* United States v. Vasquez, 612 F.2d 1338, 1349-50 (2d Cir. 1979) (Oakes, J., dissenting) (criticizing the courts for placing a "stamp of approval" on an abstract and amorphous test), *cert. denied*, 447 U.S. 907 (1980). The government in its petition for certiorari in *Mendenhall* suggested that each airport has a different profile, indicating why DEA agents often stop Hispanics at LaGuardia Airport. Yet the profile reportedly used in United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978),—a New Orleans airport stop—was relied on in three Atlanta airport drug stops made by DEA Agent Markonni. United States v. Turner, 628 F.2d 461, 463 (5th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); United States v. Hill, 626 F.2d 429, 431 n.2 (5th Cir. 1980); United States v. Robinson, 625 F.2d 1211, 1214 n.2 (5th Cir. 1980). Was the reference merely for illustrative purposes? Do couriers in Atlanta and New Orleans have identical characteristics? Or does the reference demonstrate the looseness with which the agents and courts treat the profile?

89. In United States v. Rico, 594 F.2d 320 (2d Cir. 1979), the court observed:

> The characteristics enumerated by [drug agent] Whitmore are not the same ones enumerated in the much more specific Detroit airport 'profile' discussed in United States v. McCaleb .... In this Circuit United States v. Westerbann-Martinez ... referred to a courier profile differing both from the Detroit profile and from the set of characteristics testified to by Whitmore in the present case.

Id. at 326. Similarly, in United States v. Buenaventura-Ariza, 615 F.2d 29, 35 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit analyzed those factors that it previously had accepted as contributing to reasonable suspicion, but that did not appear in the case at bar. In United States v. Westerbann-Martinez, 435 F. Supp. 690 (E.D.N.Y. 1977), the district court noted twelve factors that allegedly constituted part of the drug courier profile in other cases, yet which were not present in the case at bar. More important, the *Westerbann-Martinez* court stated: "Agent Rose, in this case, specifically denied that being the last to deplane ... and taking a circuitous route ... were part of the profile .... He had no knowledge whether the use of small denomination currency ... was part of the profile ...." *Id.* at 698-99.

90. *See* United States v. Ehlebracht, 693 F.2d 333, 335 n.3 (5th Cir. Unit B 1982) (listing the almost 20 reported cases involving Markonni up to 1982); United States v. Sanford, 658 F.2d 342, 343 (5th Cir. Unit B Oct. 1981) (noting that "Markonni has worked for several years with DEA airport details and has participated in more than 400 arrests of couriers carrying drugs through airports"), *cert. denied*, 455 U.S. 991 (1982).

91. Based on his activities in Detroit, Michigan, DEA agent Markonni has developed four different profiles. *See* United States v. McCaleb, 552 F.2d 717, 719-20 (6th Cir. 1977); United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977); United States v. Allen, 421 F. Supp. 1372, 1374 (E.D. Mich. 1976); United States v. Floyd, 418 F. Supp. 724, 725 (E.D. Mich. 1976), *aff'd in part and vacated in part sub nom.* United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978). Four others were developed as a result of Markonni's activities in Atlanta. *See* Reid v. Georgia, 448 U.S. 438, 440-41 (1980) (per curiam); United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979); United States v. Key, No. CR77-323A (N.D. Ga. Mar. 23, 1978); United States v. Thomas, No. CR78-223A (N.D. Ga. Nov. 3, 1978).

ing and outgoing flights.[92] The United States Court of Appeals for the Ninth Circuit in *United States v. Patino*[93] made reference to a "female" drug courier profile. The United States Court of Appeals for the Fifth Circuit referred to a regional profile in *United States v. Berry*,[94] and a profile associated with particular agents in *United States v. Elmore*.[95] And, contributing to the proliferation of the drug courier profile, state and local law enforcement agencies have instituted their own profile programs.[96]

Not surprisingly, profile proliferation has produced a corresponding exponential propogation of characteristics. Since 1978 narcotics sales in the United States have skyrocketed at a rate of ten billion dollars annually.[97] DEA airport surveillance has produced facially impressive statistics[98] and the Supreme Court

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92. *See* Robinson v. State, 388 So. 2d 286, 288 n.1 (Fla. Dist. Ct. App. 1980).

93. 649 F.2d 724, 725 (9th Cir. 1981).

94. 670 F.2d 583, 598-99 (5th Cir. Unit B 1982).

95. 595 F.2d 1036, 1039 n.3 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

96. *Royer*, 460 U.S. at 525 n.6 (Rehnquist, J., dissenting). *See generally* Comment, *The Supreme Court Further Defines the Scope of Fourth Amendment Protections in Airport Drug Stops*—Florida v. Royer, 103 S. Ct. 1319 (1983), 18 SUFFOLK U.L. REV. 32 (1984) (describing the proliferation of state, local, and national profile programs).

97. *See supra* note 38.

98. For example, during the first 18 months of the DEA's drug surveillance program at Detroit Metropolitan Airport, agents

> searched 141 persons in 96 airport encounters .... Some encounters led to more than one search. Agents found controlled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws. Of the 77 searches in which illegal drugs were found, the agents identified 26 consent searches. Forty-three searches were non-consensual. Illegal contraband was seized in all cases in which consent was not given and a search was made. In 15 to 25 consent searches, agents did not uncover any contraband drugs.

Van Lewis, 409 F. Supp. at 539. Justice Powell cited these statistics in his concurring opinion in *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring). However, the statistics are deceiving because they relate only to "encounters" from which a search ensued. *See* Government's Petition for Certiorari at 11 n.13, *Mendenhall*. Consequently, no one knows the number of encounters that never escalated into searches because the agents' suspicions abated during the initial encounters. And, as Justice White noted in his dissenting opinion in *Mendenhall*:

> [T]here is no indication that the asserted successes of the "drug courier program" have been obtained by reliance on the kind of nearly random stop involved in this case. Indeed, the statistics Mr. Justice Powell cites on the success of the program at the Detroit Airport ... refer to the results of searches following stops "based upon information acquired from the airline ticket agents, from [the agents'] independent police work," and occasional tips, as well as observations of behavior at the airport.

Mendenhall, 446 U.S. at 574 n.11 (White, J., dissenting). In effect, Justice White questioned "the methodology of the study" and concluded that "the design was confounded because not all of the 141 persons were searched because they fit the group profile. The agents had tips that some of them were carrying drugs, for example." Address by John Monahan to American Psychological Association, Washington, D.C. (Aug. 25, 1982). This statement must be considered along with Justice Rehnquist's statement in his dissent in *Royer*: "A DEA agent working at the La Guardia Airport in New York City estimated that some 60% percent [sic] of the persons identified as having 'profile' characteristics are found to be carrying drugs." *Royer*, 460 U.S. at 526 n.6 (Rehnquist, J., dissenting) (citing United States v. Price, 599 F.2d 494, 501 n.8 (2d Cir. 1979)).

In their book SOCIAL SCIENCE IN LAW, professors Monahan and Walker cite a more systematic study of the validity of the drug courier profile—namely, ZEDLEWSKI, THE DEA AIRPORT SURVEILLANCE PROGRAM: AN ANALYSIS OF AGENT ACTIVITIES (1984). According to Monahan and Walker, the empirical study was conducted by the National Institute of Justice and required DEA agents, during an eight week period in the summer of 1982, to complete

> an Encounter Report on all passengers they contacted in airports in the United States. In addition, they kept a log on the number of passengers observed on each arriving and departing flight. Of approximately 107,000 passengers observed during this period, 146 were

in *Mendenhall* failed to reject outright the drug courier profile. Rather, the Court praised the profile's use. The plurality of opinions in *Mendenhall* is replete with references to the expertise, training, and organization behind the use of the drug courier profile in the nation's airports.[99]

Some federal and state courts, like the Florida appellate court in *State v. Royer*,[100] have expressed concern about potential abuses and complained that almost any airline passenger could fit the profile.[101] Nevertheless, many courts

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approached by DEA agents, a contact rate of 1.3 per thousand passengers. The report stated . . .

A preponderance (120 of 146) of the encounters [82 percent] resulted from a combination of behavioral and demographic peculiarities exhibited by the subject which made the agent suspicious . . . . In the opinions of the agents filling out the reports, these behaviors were suspicious but not sufficient to detain the subject.

In 42 of the 146 contacts (29 percent), the agents permitted the passengers to proceed after questioning without searching them. In 81 contacts (55 percent) the passengers consented to being searched. In 15 cases (10 percent) the agents conducted a search either after obtaining a warrant or incident to arrest. There were "other" outcomes, such as "an alert call to the subjects' destination [or] referral to local police" in 8 cases (5 percent).

The study noted that "of the 103 searches conducted, 49 uncovered either contraband or evidence of some other crime. Thus the agent's suspicions were confirmed in nearly half [48%] of the occasions in which they sought a search."

J. MONAHAN & L. WALKER, *supra* note 17, at 226-27 (citing ZEDLEWSKI, *supra*).

99. For example, Justice Powell's concurring opinion in *Mendenhall* referred to "highly skilled agents," "a highly specialized law enforcement operation," and "specially trained agents [acting] pursuant to a well-planned, and effective, federal law enforcement program." *Mendenhall*, 446 U.S. at 562, 565 (Powell, J., concurring). Compare this statement with Markonni's statement in United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977), that the profile consists of characteristics that "normal travelers do not do . . . . These are things that even the ticket agents and airline personnel believe to be suspicious . . . ." *Id.* at 199.

100. 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980), *petition denied*, 397 So. 2d 779 (Fla. 1981), *aff'd*, 460 U.S. 491 (1983). The *Royer* court stated:

> It may be fairly said as to all of the officers' bases of 'suspicion' that, although they may indeed be characteristic of those who carry narcotics, they are at least equally, and usually far more frequently, consistent with complete innocence. The fallacy of the undistributed middle directly applies: all narcotics couriers act like parts of the profile, but most people who act like parts of the profile are not narcotics couriers.

Id. at 1016.

101. *See, e.g.*, United States v. Pulvano, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980) ("Careful review of those [drug courier profile] characteristics causes this Court serious concern that the use of such profile, without more, could result in the interrogation of honest law-abiding citizens as easily as it could the apprehension of criminals."); United States v. Andrews, 600 F.2d 563, 567 (6th Cir.) (DEA agents tend to characterize any and every city in the nation as a source or crossroads city), *cert. denied*, 444 U.S. 878 (1979).

In United States v. Westerbann-Martinez, 435 F. Supp. 690, 698 (E.D.N.Y. 1977), the court observed:

> The "Drug Courier Profile" which Agent Rose allegedly relied upon in stopping Torres and Westerbann, is not a "talisman"; its use does not obviate the need for traditional analysis. . . . Firstly, no evidence was offered in support of the accuracy of the profile. Secondly, the profile has a chameleon-like quality; it seems to change itself to fit the facts of each case. . . . Having concluded that individually, the factors present here are not by themselves "specific and articulable" facts upon which to base a reasonable suspicion, the court must still determine whether, when viewed collectively, they amount to a reasonable suspicion. They do not. Normally, nothing plus nothing equals nothing. Such is the case here.

Id. at 700-02. And in United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982), the court stated:

> Our own fear concerning use of the profile by the courts automatically to establish reasonable suspicion we have previously expressed: because most of the characteristics are applicable as much to innocent as to suspect individuals, the mechanistic use of the profile by the courts without examining the totality of the circumstances could result in blanket ap-

have seemed willing to lend their imprimatur to the "subjective avowals" of DEA agents who claimed that they could "tell a criminal when" they saw one and that they knew "from . . . experience that the guilty look and act differently from the innocent."[102] Some courts have gone further, viewing the profile as nearly sacrosanct. For example, in *State v. Grant*,[103] a Maryland appellate court stated: "Far from being unreasonable, the investigative behavior in the case was a model of both thoroughness and restraint. Had they done other than what they did, the police would have been derelict and the scourge upon our society that is the drug traffic would have gone on unabated."[104] Consequently, the flexible and moderately expansive, chameleon-like initial drug courier profile list rapidly grew into an acrodont reptile of gargantuan proportion.

Although the *Mendenhall* decision and its progeny played a major role in the proliferation of profiles and characteristics,[105] another factor unquestionably contributed greatly to the growth spurt. DEA agents in one of the earlier drug courier profile cases "made an *in camera* presentation to the court to establish [the drug courier profile characteristics'] reliability."[106] Because the court at the time was convinced of the profile's reliability, the "profile was not written down, nor was it made clear to agents exactly how many or what combination of the characteristics needed to be present in order to justify an investigative stop or an arrest."[107]

The fact the drug courier profile was unwritten and ever-expanding, coupled with the way in which courts discussed the profile, spurred its tremendous growth. For example, DEA agents often gave no testimony on the particular profile used. Rather, courts in some instances simply listed the observed charac-

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proval of police seizures of innocent citizens . . . . Compounding this fear is the facility with which profile characteristics may be manipulated by overzealous law enforcement officers.

Id. at 599.

As representative samplings of cases decided in the United States Courts of Appeals for the Fifth and Sixth Circuits that view profile characteristics as consistent with innocence, see United States v. Buenaventura-Ariza, 615 F.2d 29, 36 (2d Cir. 1980); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977). The "consistent with innocence" analysis does not end the inquiry.

102. *Royer*, 389 So. 2d at 1016 n.4. The full textual reference reads:

> [Officer] Johnson stated that he was able to detect a difference in the manner or type of wariness exhibited by a narcotics courier as opposed to the "perceptibly different type of nervousness" characteristic of "white knuckle type" flyers or others who were just plain nervous people. The effect of any such amateur forensic psychiatry must be completely disregarded. . . . [I]t would be gravely dangerous to the very basis of our system to attach any legal credence to the subjective avowals of a policeman (or anyone else) that he can tell a criminal when he sees one or that he knows "from his experience" that the guilty look or act differently from the innocent.

Id.

103. 55 Md. App. 1, 461 A.2d 524 (1983), *cert. dismissed*, 299 Md. 309, 473 A.2d 455 (1984).

104. *Id.* at 5-6, 461 A.2d at 525.

105. *See infra* notes 327-38 and accompanying text.

106. United States v. Allen, 421 F. Supp. 1372, 1374 (E.D. Mich. 1976); United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976) (discussing *in camera* hearings), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

107. United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

teristics supporting the agents' reasonable suspicions.[108] In other cases courts included the rational inferences drawn by DEA agents from their observations.[109] In still other cases, courts referred to one or more drug courier profiles testified to by DEA agents but then failed to clarify whether profile references were included for illustrative purposes or because agents claimed reliance on the profiles.[110]

Uncatalogued characteristics, which DEA agents brought to the attention of courts during suppression hearings,[111] often found their way into published opinions. Thus, it is not surprising that DEA agents and judges, reading previously published opinions, elevated conduct that originally did not constitute part of the profile to full-fledged profile status. For example, the fact a passenger took an "early morning flight" originally did not constitute a primary or secondary profile characteristic. Now, however, it is considered a significant profile characteristic. In the federal system the characteristic was first mentioned in the Supreme Court's June 1980 *Reid* decision.[112] Significantly, at that time only about fifty percent of the drug couriers at the Detroit airport—one of the airports with the most drug courier stops—arrived on early morning flights.[113] Similarly, one of the factors observed (but not identified as part of the drug courier profile) in the first reported drug courier profile case[114]—passengers who tried to conceal the fact they were traveling companions—became a drug courier profile characteristic in the second reported drug courier profile case.[115]

The lack of congruence between the facts in a particular case and the characteristics listed in a particular profile has not escaped judicial scrutiny altogether.[116] Even internal inconsistencies have been noted. For example, in

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108. *See* United States v. Rico, 594 F.2d 320, 325-26 (2d Cir. 1979).

109. *See* United States v. Bowles, 625 F.2d 526, 534-35 (5th Cir. 1980).

110. *See* United States v. Elmore, 595 F.2d 1036, 1039-40 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1979).

111. *See supra* text accompanying notes 72-85.

112. Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam).

113. *See, e.g.*, United States v. Chamblis, 425 F. Supp. 1330 (E.D. Mich. 1977) (late afternoon flight); United States v. Rogers, 436 F. Supp. 1 (E.D. Mich. 1976) (morning flight); United States v. Floyd, 418 F. Supp. 724 (E.D. Mich. 1976) (evening flight), *aff'd in part and vacated in part without opinion sub nom.* United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978); United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976) (morning flight), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

114. The first reported case, *Van Lewis*, actually involved five defendants and three separate arrests. Van Lewis was arrested on July 9, 1975, Pamela Hughes was arrested on October 6, 1975, and McCaleb, White, and Page were arrested as they deplaned on October 28, 1975. Following a joint hearing on the defendants' motions to suppress, the court entered its order on March 3, 1976. *See Van Lewis*, 409 F. Supp. 535.

115. *See* United States v. Floyd, 418 F. Supp. 724, 725 (E.D. Mich. 1976), *aff'd in part and vacated in part without opinion sub nom.* United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978).

116. In United States v. Ballard, 573 F.2d 913 (5th Cir. 1978), the court found prima facie evidence that supported only four of eleven listed characteristics, and then immediately discounted two of the characteristics because the DEA agent lacked the information at the time of the stop. *Id.* at 915. The Magistrate's Report in United States v. Thomas, No. CR-78-223A (N.D. Ga. Nov. 3, 1978), noted: "[T]he Drug Courier Profile as propounded in the stipulated testimony of agent Markonni in this case does not perfectly conform to descriptions of the Profile which appear in the reported cases." *Id.* at 11 n.2.

United States v. Westerbann-Martinez[117] the court stated:

> Agent Rose, in this case, specifically denied that being the last to deplane . . . and taking a circuitous route . . . were part of the profile. . . . He had no knowledge whether the use of small denomination currency . . . was part of the profile. . . . On the other hand, while Agent Rose testified that being Hispanic was part of the profile, that factor was not mentioned in any of the other cases.[118]

Nevertheless, DEA agents continue to use and testify about inconsistent drug courier profile characteristics.

As this Article discusses later,[119] the prototypical drug courier profile entails many inconsistent characteristics. Given the plethora of profile charactistics that DEA agents mention in their testimony and that courts explicitly or implicitly find significant, a great risk arises: Rather than use the profile as a reliable guideline, agents may selectively modify the profile during the initial stop and thereafter customize it to fit any hapless traveler who had the misfortune to catch the agent's "trained eye." The multiplicity of inconsistent profile characteristics stands in contrast to the Supreme Court's characterization of the profile's use as well planned and highly specialized.[120] This multiplicity of inconsistent characteristics strongly suggests that agents justify the great majority of airport drug courier stops retrospectively. Agents use what they learn after detaining an individual rather than match an individual to a preconceived, well-thought-out profile that operates as a reliable and accurate detection device.[121]

F. *Categorization of the Drug Courier Profile and Its Characteristics*

A mnemonic device simplistically illustrates the ease with which agents and the courts can categorize most profile factors—Environment, Evasion, Eccentricity, and Earmark. Environment factors are those from which DEA agents can infer access to drug distributors or users—for example, traveling between source cities and use cities. Evasion factors are those from which DEA agents can infer an attempt to avoid surveillance or conceal identity—for example, paying for a ticket with cash and checking no baggage. Eccentricity factors are those from which DEA agents can infer a state of emotional arousal—for exam-

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117. 435 F. Supp. 690 (E.D.N.Y. 1977).

118. *Id.* at 698. Later, in United States v. Vasquez, 612 F.2d 1338, 1353 n.10 (2d Cir. 1979), however, DEA agents listed ethnic background as an indicia of criminality.

119. *See infra* notes 126-90 and accompanying text.

120. *See supra* note 99.

121. In *Westerbann-Martinez,* the court stated:

> This court is not prepared to usher in the day in this country when, without stronger objective incriminatory evidence, any person may be subject to a police stop after arriving by plane in an airport merely because an agent subjectively concludes that repeated looking around is a manifestation of nervousness. It is not too difficult to see the eventual result of such a decision. When it becomes known that looking around will justify a conclusion of nervousness which in turn may justify an investigative stop, narcotics couriers will then deplane and proceed to their destinations without looking around. At that point, the government will presumably argue that people who look straight ahead after deplaning are subject to investigative stops.

Westerbann-Martinez, 435 F. Supp. at 699.

ple, rapid breathing and shaky hands. Earmark factors are related to status or personal appearance characteristics of the drug courier—for example, age, race, and gender.[122]

Simple categorization, however, neither illuminates the drug courier profile sufficiently for the uncritical eye, nor unmasks the presumptive, if not preclusive, significance courts accord the DEA agent's "trained eye."[123] For example, the travel habits of a drug courier are given preclusive significance by the courts despite their similarity to an innocent person's itinerary. The allegedly evasive conduct is so "common among the innocent that it does not predict criminality";[124] and the "use of personal characteristics to infer *propensity* to commit a crime [is] problematic."[125] Thus, this Article undertakes a more critical and detailed analysis of the profiles and of all factors influencing airport drug stops.

To demonstrate the extent to which drug courier profile characteristics have proliferated, this section of the Article examines those factors (conduct or characteristics) that DEA agents have deemed sufficiently significant to warrant the detention of airline passengers. The following discussion presents a list of factors categorized under seven topical headings: (1) Reservations and Ticket Purchases; (2) Airports and Flights; (3) Nervousness and Associated Behavior; (4) Significance of Luggage; (5) Companions (Traveled With or Picked Up By); (6) Personal Characteristics; and (7) Miscellany.

DEA agents, without regard to consistency, have testified that the factors discussed under these topical headings form part of the bases on which they decide to detain air travelers. Even a cursory look at drug courier profile cases reveals inconsistencies among some of the factors. A detailed and analytical review of the scores of reported and unreported drug courier profile cases demonstrates not only the inconsistency, but also the absurdity among some of the factors. The discussion contrasts and compares the more significant, recurring, and absurd profile factors.

1. Reservations and Ticket Purchases

In many cases drug agents testify without hesitation that drug couriers seldom make reservations, and that couriers instead prefer to purchase their airline tickets immediately before flight departure time.[126] With no less resolve drug agents testify also that drug couriers often make recent or short-notice reservations.[127] They also testify that a passenger's use of bogus or false telephone call-

122. *See generally* Johnson, *supra* note 67, at 218-22 (discussing the use of personal characteristics to infer propensity to commit a crime).

123. *See* United States v. Buenaventura-Ariza, 615 F.2d 29, 35 (2d Cir. 1980).

124. Johnson, *supra* note 67, at 219.

125. Johnson, *supra* note 67, at 220.

126. *See* United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977); United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977).

127. *See* United States v. Morin, 665 F.2d 765, 766 (5th Cir. 1982); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981); United States v. Hill, 626 F.2d 429, 431 (5th Cir. 1980).

back numbers[128] when making reservations is as significant as a passenger's failure to give any call-back number to the airline.[129] Similarly, while DEA agents accept as profile factors the purchase of round-trip tickets[130] and the purchase of one-way tickets,[131] they treat with equal significance "paying for an airline ticket in currency of small denominations"[132] and purchasing a ticket with large denominations of cash.[133] Furthermore, the testimony of DEA agents indicates that the purchase of a "coach" ticket may be as salient a profile factor as the purchase of a "first-class" ticket.[134]

2. Airports and Flights

When DEA agents first developed the drug courier profile, the "source city" designation became a preeminent profile factor.[135] Drug agents routinely monitored incoming flights from source cities. When it became necessary, however, drug agents testified not only about the relevance of source cities but also about the significance of use cities,[136] transshipment cities,[137] hub cities,[138] and

128. *See* United States v. Setzer, 654 F.2d 354, 356 (5th Cir. Unit B Aug. 1981), *cert. denied*, 459 U.S. 1041 (1982); United States v. Berd, 634 F.2d 979, 982 (5th Cir. Unit B Jan. 1981).

129. *See* United States v. Smith, 649 F.2d 305, 307 (5th Cir. Unit B June 1981), *cert. denied*, 460 U.S. 1068 (1983); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981).

130. *See* United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977).

131. *See* United States v. Lara, 638 F.2d 892, 894 (5th Cir. Unit B Mar. 1981); United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980).

132. *See* United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978); United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

133. *See* United States v. Patino, 649 F.2d 724, 725 (9th Cir. 1981); *see also* United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977) (listing as drug profile characteristics tickets "purchased with cash using bills of small or large denominations").

134. The significance of this factor—flying first class—is not readily apparent except to the extent drug couriers can afford a first class ticket and want to deplane first. DEA agent Markonni's deposition in Florida v. Ellis, No. 80-8114CF (17th Judicial Circuit), *rev'd*, No. 80-2044, slip op. (Fla. Dist. Ct. App. Aug. 26, 1981) (per curiam), nevertheless contains these revealing remarks:

> A. It was a first class seat. He was flying first class.
>
> Q. Does that make any difference?
>
> A. ... We do see some real—I hesitate to use the word—slimeballs, you know, some real dirt bags, that obviously could not afford, unless they were doing something, to fly first class.

Deposition of DEA Agent Paul J. Markonni at 20, *Ellis*.

135. For a definition of the term "source city," see *supra* note 19.

136. For a definition of the term "use city," see *supra* note 19. Few places can escape the use city designation. New York, Chicago, Detroit, and Atlanta are often mentioned as use cities, but drug couriers have been stopped on their way to Austin, United States v. Morin, 665 F.2d 765 (5th Cir. 1982); Birmingham, United States v. Elmore, 595 F.2d 1036 (5th Cir), *cert. denied*, 447 U.S. 910 (1979); Charlotte, State v. Grimmett, 54 N.C. App. 494, 284 S.E.2d 144 (1981), *disc. rev. denied and appeal dismissed*, 305 N.C. 304, 290 S.E.2d 706 (1982); Chattanooga, United States v. Bowles, 625 F.2d 526 (5th Cir. 1980); Dayton, United States v. Setzer, 654 F.2d 354 (1981), *cert. denied*, 459 U.S. 1041 (1982); Indianapolis, United States v. Moeller, 644 F.2d 518 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981); Kansas City, United States v. Fry, 622 F.2d 1218 (5th Cir. 1980); Newark, United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); and Tulsa, United States v. McCranie, 703 F.2d 1213 (10th Cir.), *cert. denied*, 464 U.S. 992 (1983), among other places.

Fort Lauderdale, Florida has the dubious distinction of being both a cocaine source city, *see* United States v. Smith, 649 F.2d 305, 307 (5th Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983), and a heroin use city, *see* United States v. Roundtree, 596 F.2d 672 (5th Cir.), *cert. denied*, 444 U.S. 871 (1979).

cross-road cities.[139] And, as expected, "outgoing flights" have become as important as "incoming flights."[140] A greater inconsistency surfaces, however, when DEA agents testify about frequent, short turn-around trips to and from source cities. With little regard for consistency, DEA agents testify that each of the following constitutes a prominent profile factor: (1) Non-stop or direct flights to and from source cities;[141] and (2) Circuitous routes or changing airlines or flights to and from source cities.[142]

3. Nervousness and Associated Behavior

Despite drug agents' testimony that they can detect "growing nervousness"[143] or tell-tale eyes,[144] there is no uniform or coherent list of profile factors relating to nervousness.[145] Walking quickly is considered a prime behavior factor,[146] but so is walking slowly.[147] Walking in an unusual pattern through the terminal[148] and rushing to the restroom after deplaning[149] appear just as significant as leaving the terminal in a hurried and nervous manner.[150] And although perspiring profusely,[151] shortness of breath,[152] and becoming nervous during an

137. Dallas/Ft. Worth, Detroit, Atlanta, San Diego, Los Angeles, New York, and San Juan have been classified as "transshipment," "crossroads" or "hub" cities—namely, cities through which couriers travel and make connections on flights to use cities. *See* United States v. Sanford, 658 F.2d 342 (5th Cir. Unit B Oct. 1981) (Dallas), *cert. denied*, 455 U.S. 991 (1982); United States v. Craemer, 555 F.2d 594 (6th Cir. 1977) (Los Angeles, New York, San Juan); United States v. McClain, 452 F. Supp. 195 (E.D. Mich. 1977) (San Diego); United States v. Allen, 421 F. Supp. 1372 (E.D. Mich. 1976) (Dallas/Ft. Worth).

138. United States v. Thomas, No. CR78-223A, slip op. at 5 (N.D. Ga. Nov. 3, 1978) (Atlanta).

139. United States v. Mendenhall, 446 U.S. 544, 564 (1980) (Powell, J., concurring) (Detroit).

140. *See* Robinson v. State, 388 So. 2d 286, 288 n.1 (Fla. Dist. Ct. App. 1980) ("incoming flight" profile).

141. *See, e.g.*, United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

142. *See, e.g.*, United States v. Hill, 626 F.2d 429, 431 (5th Cir. 1980).

143. *See, e.g.*, United States v. Elmore, 595 F.2d 1036, 1039 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

144. In Wilson v. Superior Court, 134 Cal. App. 3d 1062, 1065, 185 Cal. Rptr. 678, 681 (1982), *superseded*, 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983), *cert. denied*, 466 U.S 944 (1984), the drug agent testified that "the specific type of eye contact he had with [defendant] Rashan Wilson was similar to the eye contact he had with others who were drug couriers." In her Article, *Race and the Decision to Detain a Suspect*, Professor Sherri Lynn Johnson cautions against adding "the predictive power of [ethnology] and race to the predictive power of a furtive gesture," noting that "nonverbal cues, including eye contact, posture, and body movements, vary among subcultures." Johnson, *supra* note 67, at 238.

145. "[T]wo of the prime behavior factors relied upon are in apparent conflict: calmness displayed in the baggage area and nervousness exhibited while walking through the terminal." Comment, *supra* note 12, at 130 n.96

146. United States v. Jefferson, 650 F.2d 854, 855 (6th Cir. 1981); United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978); United States v. Van Lewis, 409 F. Supp. 535, 540 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

147. United States v. Mendenhall, 446 U.S. 544, 564 (1980); United States v. Bowles, 625 F.2d 526, 528 (5th Cir. 1980).

148. United States v. Elmore, 595 F.2d 1036, 1038 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

149. United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982); State v. Key, 375 So. 2d 1354, 1355 (La. 1979).

150. United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978).

151. United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982); United States v. Robinson, 625 F.2d 1211, 1213 (5th Cir. 1980).

identification stop,[153] comprise stock, boiler-plate profile factors—appearing "cool"[154] and exhibiting a "calm demeanor"[155]—also constitute profile factors.

4. Significance of Luggage

All air travelers fit at least one of the profile factors regarding the use of luggage. DEA agents deem it significant when air travelers check no luggage.[156] They also consider the following as decisive profile factors: Continuing to stare at a suitcase after checking it;[157] failing to claim luggage at the baggage claim area;[158] switching baggage claim stubs;[159] having a companion claim the luggage;[160] and placing an identification tag on checked luggage that differs from other forms of identification.[161] Similarly, DEA agents testify inconsistently regarding the amount of luggage an air traveler carries. Carrying no luggage is as noteworthy as carrying a small tote bag,[162] a medium-size bag,[163] two bulky garment bags,[164] "two apparently heavy-laden suitcases,"[165] or four pieces of luggage.[166] Furthermore, agents speak inconsistently regarding the significance of the manner in which air travelers handle their luggage or possessions. For example, both disassociative behavior towards a briefcase[167] and holding a briefcase firmly[168] appear as profile factors in the case law.

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152. United States v. Smith, 649 F.2d 305, 307 (5th Cir. Unit B June 1981), *cert. denied*, 460 U.S. 1068 (1983); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981).

153. United States v. Tolbert, 692 F.2d 1041, 1043 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981); United States v. Elmore, 595 F.2d 1036, 1038 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

154. United States v. Van Lewis, 409 F. Supp. 535, 541 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

155. *See* United States v. Andrews, 600 F.2d 563, 565 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979).

156. *See* United States v. Forero-Rincon, 626 F.2d 218, 220 (2d Cir. 1980); United States v. Elmore, 595 F.2d 1036, 1037-38 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979); United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977).

157. United States v. Patino, 649 F.2d 724, 725 (9th Cir. 1981).

158. *See* United States v. Westerbann-Martinez, 435 F. Supp. 690, 698 (E.D.N.Y. 1977).

159. United States v. Vasquez-Santiago, 602 F.2d 1069, 1071 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

160. United States v. Dewberry, 425 F. Supp. 1336, 1337 (E.D. Mich. 1977).

161. Few drug couriers would place their correct names and addresses on baggage that contained illegal drugs. *See* United States v. Ramirez Cifuentes, 682 F.2d 337, 342 (2d Cir. 1982).

162. United States v. Sanford, 658 F.2d 342, 343 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 991 (1982).

163. United States v. West, 495 F. Supp. 871, 872 (D. Mass. 1980), *aff'd*, 651 F.2d 71 (1st Cir. 1981), *vacated*, 463 U.S. 1201 (1983).

164. United States v. Borys, 766 F.2d 304, 306 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 852 (1986).

165. State v. Royer, 389 So. 2d 1007, 1016 (Fla. Dist. Ct. App. 1980), *petition denied*, 397 So. 2d 779 (Fla. 1981), *aff'd*, 460 U.S. 491 (1983).

166. United States v. Price, 599 F.2d 494, 500 (2d Cir. 1979).

167. United States v. Berd, 634 F.2d 979, 986 (5th Cir. Unit B Jan. 1981).

168. United States v. Post, 607 F.2d 847, 849 (9th Cir. 1979).

5. Companions

The following inconsistent profile factors regarding drug couriers and their companions appear repeatedly in drug profile cases: an individual traveling alone;[169] two or more people traveling together;[170] people who travel together, but attempt to appear separate;[171] and people who disclaim knowledge of traveling companions.[172]

6. Personal Characteristics

Depending on which case is read, a typical drug courier is either a black male,[173] a female,[174] a black female,[175] an Hispanic person,[176] or a young person[177] who may be "sloppily dressed"[178] or "smartly dressed."[179] And, of course, the drug courier can have a Fu Manchu mustache or collar-length hair.[180]

7. Miscellany

The topical heading "Miscellany," with its omnibus implications, dramatically illustrates how incongruous and fatuous drug courier profile factors have become. For example, drug agents treat the following drug courier profile factors with equal significance: being the first, or one of the first, passengers to deplane;[181] being the last passenger to deplane;[182] and deplaning from the mid-

169. A review of the more than 140 reported drug courier profile cases between 1976 and 1986 indicates that most of the drug couriers traveled alone. *See, e.g.*, United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978); United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

170. United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980).

171. Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam); United States v. Bowles, 625 F.2d 526, 535 (5th Cir. 1980).

172. United States v. Eerd, 634 F.2d 979, 982 (5th Cir. Unit B Jan. 1981).

173. Agent Markonni testified that "whites who indulge in controlled substances tend to prefer cocaine, while similarly situated blacks tend to favor heroin. It follows, then, that a black arriving from a major heroin distribution point arouses greater suspicion, *ceteris paribus*, than one arriving from a major cocaine distribution point." United States v. Coleman, 450 F. Supp. 433, 439 n.7 (E.D. Mich. 1978); *see also* United States v. Thomas, No. CR78-223A, slip op. at 9 (N.D. Ga. Nov. 3, 1978) (DEA agent stopped a black male over forty with a full beard, although the agent said race was an unimportant factor).

174. United States v. Patino, 649 F.2d 724, 725 (9th Cir. 1981); United States v. Scott, 545 F.2d 38, 40 n.2 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977).

175. United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977) (DEA agent Markonni testified that in the majority of cases drug couriers are black females.).

176. *See supra* note 118 and accompanying text.

177. The average age for the drug courier is the mid-twenties. United States v. Masiello, 491 F. Supp. 1154, 1156 n.1 (D.S.C. 1980).

178. United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977).

179. United States v. Van Lewis, 409 F. Supp. 535, 540 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

180. United States v. Borys, 766 F.2d 304, 306 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 852 (1986).

181. *See, e.g.*, United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983); United States v. Herbst, 641 F.2d 1161, 1164 (5th Cir.), *cert. denied*, 454 U.S. 851 (1981).

182. United States v. Mendenhall, 446 U.S. 544, 564 (1980).

dle.[183] By way of further example, making a local telephone call immediately after deplaning[184] constitutes a profile factor,[185] as does making a long-distance telephone call.[186] Similarly, drug agents have testified that leaving the airport by public transportation, especially taxi,[187] private vehicle,[188] limousine,[189] or hotel courtesy van[190] all constitute profile factors.

That some DEA agents commendably and candidly admit they stop air travelers when anything arouses their suspicions[191] does not obviate the need to cross-examine agents about the bases of their suspicions. Rather, such admissions highlight the inconsistencies among the factors relied on by drug agents and invite careful analysis of the purported logic behind the drug courier profile. A later section of this Article examines resulting fourth amendment implications.[192]

G. *Crucibles of Cross-Examination*

Although the drug courier profile is one of many useful indicia of criminality,[193] it alone does not provide a reliable barometer of criminal behavior. The drug courier profile cannot withstand the rigors of cross-examination. As indicated above, the vast variety of inconsistent factors characteristically attributed to drug couriers does not mesh with the concept of an "amalgam of traits that ineluctably leads"[194] to a reasonable suspicion of criminality. Furthermore, the critics' fear, presaged both before[195] and during the early use of the drug courier profile,[196] has become a reality. Many courts have accepted the profile, as well

183. United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980).

184. United States v. Jefferson, 650 F.2d 854, 855 (6th Cir. 1981); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981); United States v. Pulvano, 629 F.2d 1151, 1152 (5th Cir. 1980); United States v. Chamblis, 425 F. Supp. 1330, 1332 (E.D. Mich. 1977); United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976).

185. United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977).

186. United States v. Pulvano, 629 F.2d 1151, 1152 (5th Cir. 1980).

187. *See, e.g.*, United States v. Van Lewis, 409 F. Supp. 535, 540 (E. D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

188. *See, e.g.*, United States v. Floyd, 418 F. Supp. 724, 726 (E.D. Mich. 1976), *aff'd in part and vacated in part without opinion sub nom.* United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978).

189. United States v. Place, 660 F.2d 44, 46 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983).

190. United States v. Thomas, No. CR78-223A, slip op. at 9 (N.D. Ga. Nov. 1, 1978).

191. *See supra* text accompanying note 25.

192. *See infra* notes 307-53 and accompanying text.

193. *See supra* text accompanying notes 64-70.

194. United States v. Saperstein, 723 F.2d 1221, 1228 n.9 (6th Cir. 1983).

195. In 1972, professors McGinley and Downs made the following observations:

> [T]hat a person demonstrates certain normal and innocuous characteristics, which may have been coincidentally exhibited by a large number of prior skyjackers, can scarcely be considered sufficiently suspicious to justify an intrusion into the right of privacy. Otherwise it is only a short step to suggest that a profile or composite description of the typical mugger or narcotics addict be prepared for distribution to the police for use in high crime areas. To suggest further that the police could stop and search anyone matching the profile, and who also appears nervous, etc. would be to invite criticism.

McGinley & Downs, *supra* note 45, at 314 (footnote omitted).

196. "[T]he mechanistic use of the profile by the courts without examining the totality of the circumstances could result in blanket approval of police seizures of innocent citizens . . . . Com-

as the DEA's scattershot enforcement efforts, unquestioningly, mechanistically, and dispositively.

It is at best counterintuitive to attach special significance to certain, previously unreported, factors—for example, being fair-skinned.[197] It raises the brows of all except those with jaundiced eyes. This factor, as applied to most non-blacks and non-Hispanics, theoretically suggests a "short turn-around trip" to a source city in a southern state. However, its use by a court that fails to consider what fairly and intuitively follows—that some people shun the sun or do not tan easily—is disturbing. Analytically, however, the weight accorded "displaying no tan" does not differ from the weight reserved for many other weak, but often reported, profile factors—for example, rushing into the airport immediately prior to flight departure time,[198] being the last to deplane,[199] appearing nervous,[200] or placing a telephone call immediately after deplaning.[201]

Much of the objectively neutral, but assertedly suspicious, conduct of air passengers is readily and satisfactorily explainable. When, for example, DEA agents noticed baggage claim checks attached to defendant Collis' ticket folio and asked him why he was leaving the terminal without retrieving his luggage, Collis responded that he merely was checking to see if his brother had arrived to meet him.[202] In *United States v. Saperstein*[203] defendant Saperstein "had checked a large suitcase which appeared to be empty, and had scheduled [a return flight] at approximately 9:00 p.m. that evening."[204] Partially based on these observations, DEA agents questioned Saperstein, first, about the purpose of his trip and, second, about "why he would have such a large suitcase for a short business trip."[205] The court noted that "[a]n individual may be traveling to New York for a shopping spree, or to pick up materials, samples or docu-

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pounding this fear is the facility with which profile characteristics may be manipulated by overzealous law enforcement officers." United States v. Berry, 670 F.2d 583, 599 (5th Cir. Unit B 1982).

197. *See supra* note 22. An example of another previously unreported factor deemed significant is found in United States v. Allen, 644 F.2d 749, 750 (9th Cir. 1980) (defendant Allen "conformed to the profile in several respects [including the fact] he was to have a short layover in San Francisco before returning to Seattle").

198. United States v. Morin, 665 F.2d 765, 766 (5th Cir. 1982).

199. United States v. Mendenhall, 446 U.S. 544, 564 (1980).

200. *See, e.g.*, United States v. Tolbert, 692 F.2d 1041, 1043 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983).

201. *See supra* text accompanying note 184.

202. United States v. Collis, 766 F.2d 219, 220 (6th Cir. 1985). Explanations sometimes place suspects in "Catch 22" situations as in United States v. Borys, 766 F.2d 304 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 852 (1986). Defendant Borys did not make a "quick turnaround trip" to Florida. The actual length of his stay in Florida (10 days) as well as his false statement that he stayed 4 days explained why he carried bulky garment bags. The fact he was carrying the garment bags was used against him, however, because "first class passengers check through such luggage." *Id.* at 306. Similarly, it made no difference whether defendant Chamblis had taken public transportation or whether he had exited the upper level where no public transportation was available—in either case he would seemingly have faced immediate condemnation. United States v. Chamblis, 425 F. Supp. 1330, 1332 (E.D. Mich. 1977). The fact no one appeared to pick up Chamblis should provide only one-sided solace because, among other reasonable explanations, his brother could have been late. *Id.*

203. 723 F.2d 1221, 1222 (6th Cir. 1983).

204. *Id.* at 1222.

205. *Id.* at 1223.

ments in connection with his trade or business."[206] In a similar case, defendant Allen, to explain her quick turn-around trip, said that she came to Detroit to get her daughter and was returning to Los Angeles that day.[207]

In many cases the testimony of drug agents explains away the allegedly suspicious conduct of air passengers. Indeed, the admissions of drug agents have been as revealing as the explanations of defendants. In *Texas v. Kyno* [208] a drug agent admitted that by necessity someone is always first off the plane and someone is always last; that people often walk briskly at airports; and that it is not unusual for someone disembarking from an airplane to look around the terminal.[209] Similarly, a drug agent admitted that jogging to the airport restroom to use the urinal is as "consistent with the actions of a man in a hurry to use the bathroom . . . [as it is] with an intent to dispose of illegal narcotics by flushing them down the drain."[210]

Squeezed in the vise of cross-examination, drug agents have made even more telling admissions.

> [When] describing his conclusion that defendants were looking about "nervously," Agent Rose testified: "When a person looks to see if somebody is there to pick them up, they pick them up right away. These people turned around and looked for people over and over again. They looked as though they were looking to see if they were watched." When pressed as to how the "look" would be different "if you are looking for someone who is not there, like a person who is supposed to pick you up and is not there?" the agent admitted: "I can't really answer that."[211]

Also, consider Agent Markonni's response when backed into a corner on cross-examination in *United States v. Coleman*:[212] "[W]hile defendant was neither the only passenger without hand luggage nor the only one who did not go directly down to the baggage area, he was the first to proceed straight through the terminal and exit."[213] No other reported case before or after *Coleman* has listed as a profile factor the fact the suspect was the first passenger to proceed through and exit the terminal.

With hindsight and comparative review it is now easier to cross-examine DEA agents about the internal inconsistencies of some profile factors and about the inconsistencies contained in the testimony of different drug agents. It may

206. *Id.* at 1229.

207. United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976).

208. Cause No. 316,726 (183d Dist. Ct., Harris County, Tex. Feb. 1981).

209. Deposition of DEA Agent at 12-14, *Kyno*.

210. State v. Key, 375 So. 2d 1354, 1355 (La. 1979). Significantly, in *Key*, as in other cases involving individuals rushing to restrooms, drug agents had not accosted the suspects before the suspects felt the urge to go to the bathroom. *Id.*; *see* United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982) (Morin already stood at the "urinal in the otherwise empty restroom [when Officer Wolsch] stepped up to his right side"). Note, however, that the agents in *Key* believed Key had "discovered he was under surveillance" and ran "for the men's room when he realized he was unable to elude the following officers." *Key*, 375 So. 2d at 1359 (Summers, C.J., dissenting.)

211. United States v. Westerbann-Martinez, 435 F. Supp. 690, 699 (E.D.N.Y. 1977).

212. 450 F. Supp. 433 (E.D. Mich. 1978).

213. *Id.* at 435 n.2.

not be intuitive, but "[a]gent Anderson testified that drug couriers often disembark last in order to have a clear view of the terminal so that they more easily can detect government agents."[214] However, in *United States v. Westerbann-Martinez*,[215] agent Rose specifically denied that being last to deplane was part of the profile,[216] and Agent Whitmore in *United States v. Price*[217] noted that defendant "Price held up the line of disembarking passengers, apparently in order to scan the area before entering the corridor."[218] Even within the same judicial district, courts note the inconsistencies. In *United States v. Garvin*,[219] a rare case in that the judge found defendant's testimony on all crucial points more credible than the drug agent's,[220] the court observed:

> Like all the judges in this District Court, in different cases this Court has heard testimony from the O'Hare narcotics detail in which the deplaning passenger who is first off the plane coming in from Florida is suspect because in a hurry, the deplaning passenger who is among the last to emerge from the runway is suspect because obviously delaying, and the deplaning passenger who is in the middle of the emerging group is suspect because trying to lose himself or herself in the crowd. Much the same is true as to various other apsects of the observed conduct of incoming pasengers, such as the different paces at which they go from the arrival gate toward the terminal, the extent to which they look around while walking ("furtively" is the usual adverb attached to what, in a totally innocent and inexperienced plane traveler, might be looking around in simple wonderment at the masses of people encountered at O'Hare on a typical day) and the different things they do in the baggage area downstairs (where even the experienced traveler often has difficulty determining at which conveyor the baggage will be unloaded) and once at the baggage conveyor itself. Because the "drug courier profile" thus tends to become very blurred, as though the characteristics are shaped to fit the conduct instead of the other way around, the controlling decisions wisely require a showing of "specific and articulable facts" before the stopping officers are found to have demonstrated the basis for even a temporary stop of the passenger.[221]

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214. United States v. Mendenhall, 446 U.S. 554, 564 (1980); *accord* United States v. Vasquez, 612 F.2d 1338, 1340 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980); United States v. Garcia, 450 F. Supp. 1020, 1022 (E.D.N.Y. 1978).

215. 435 F. Supp. 690 (E.D.N.Y. 1977).

216. *Id.* at 698.

217. 599 F.2d 494 (2d Cir. 1979).

218. *Id.* at 500.

219. 576 F. Supp. 1110 (N.D. Ill. 1983).

220. The *Garvin* court stated:

> This Court credits Garvin and not Turney. It is not credible that, stopped for what Turney himself described as simply asking a 'few questions,' and lacking any identification save the 'R. Strapp' airline ticket, Garvin would give his real name and give cause for *immediate* suspicion when the discrepancy was bound to be revealed by the officer's natural next request to see the ticket. It is far more likely Garvin would initially have stayed with the only cover story he had available to him at that time: that he was indeed Ronnie Strapp.

Id. at 1112.

221. *Id.* at 1112 n.1.

The next section of this Article reexamines and critiques the use of certain drug courier profile characteristics.

III. CHARACTERISTICS REVISITED

An earlier section of this Article introduced the various characteristics of the drug courier profile and noted the inconsistencies among many of the factors.[222] This section examines each of the "blurred" primary and secondary drug courier profile characteristics microscopically to determine whether the characteristics are adjusted to fit the conduct or whether the conduct fits neatly into the profile mold. This section analyzes primary and then secondary profile characteristics. It reasons that each characteristic follows from certain questionable presumptions, or "theses," that in turn raise counter presumptions, or "antitheses."

A. *Primary Characteristics*

One thesis concerns the primary characteristic[223] of the "source city."[224] According to this thesis most narcotics smuggled into the United States come from South America,[225] Central America,[226] or the Far East.[227] Consequently, southeastern or southwestern United States port, near-port, or border cities[228] in which major drug dealers have contacts or in which Mafia activity occurs are considered major source cities.

This thesis generates its own antitheses. "Assuming arguendo the viability of this profile component, its usefulness is reduced when the flight in question stops over in a non-source city prior to arrival at its ultimate destination, because DEA agents cannot tell where the suspect boarded the plane without executing a stop."[229] For example, in *Westerbann-Martinez* DEA agent "Rose admitted . . . that prior to stopping Westerbann and Torres, he did not even know whether they had boarded the plane in the 'primary source city'—Chi-

222. *See supra* notes 122-92 and accompanying text.

223. *See supra* notes 72-85 and accompanying text.

224. *See supra* note 19.

225. The House Select Committee on Narcotics reported that 75% percent of cocaine sold in the United States is made in clandestine Columbian laboratories from coca paste smuggled in from Peru and Bolivia. *See Narcotics Sales Keep Soaring*, Durham Morning Herald (Durham, N.C.), Mar. 7, 1985, at 6A, col. 2; *see also* United States v. Hernandez-Cuartas, 717 F.2d 552, 553 (11th Cir. 1983) (noting that Columbia is a leading source country).

226. *See* United States v. Scott, 545 F.2d 38, 40 n.2 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977) (listing Los Angeles as a major distribution area for Mexican heroin).

227. *See* People v. Warren, 91 A.D.2d 1007, 1007, 457 N.Y.S.2d 873, 874 (1983) (identifying India as a "source country" for narcotics).

228. In United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977), DEA agent Markonni listed San Diego and some of the Texas border areas as the most significant sources of heroin distribution.

229. Comment, *supra* note 12, at 128. Note, however, that DEA agents stationed in source city airports notify agents in use city airports to watch certain passengers closely. For example, West, who was stopped in Miami, a source city, would not let DEA agents search his briefcase. The Miami agents telephoned Boston agents who informed West that if he refused to let them search his briefcase he might have to miss his connecting flight to Vermont. United States v. West, 651 F.2d 72, 73 (1st Cir. 1981), *vacated*, 463 U.S. 1021 (1983).

cago—or whether they had boarded the plane in Cincinnati."[230] Furthermore, DEA agents have an "ipse dixit"[231] tendency to classify any city as a drug trafficking center.

A second thesis provides that drug couriers either carry little or no luggage or, alternatively, that they carry large numbers of empty suitcases.[232] It reasons that by carrying little, empty, or no luggage, drug couriers can get in and out of airports quickly.[233] Empty suitcases provide a compartment for storing drugs purchased in source cities.

Its antithesis reasons otherwise. Travelers do not need much luggage for a short stay in the arrival city. Parenthetically, this antithetical premise illustrates how DEA agents can "have their cake and eat it too"—DEA agents get the benefit of two different profiles (little luggage and quick turnaround trip)[234] although one characteristic explains the other. Furthermore, advertisements by luggage manufacturers and retailers often emphasize the amount of storage space in small suitcases. In *United States v. Johnson*[235] the court reportedly commented that: "[t]o refute the primary characteristics of little or no luggage, [defendant] Williams' clothing bag which he carried the morning he was stopped was brought into court. It was significant that three days worth of clothing could easily fit within the bag."[236]

In many instances DEA agents stop defendants before ascertaining whether the defendants have checked other luggage.[237] In other instances they stop sus-

230. *Westerbann-Martinez*, 435 F. Supp. at 699. The *Westerbann-Martinez* court further pointed out that "[a]lthough Chicago has been classified as a primary source city, no evidence was introduced in support of that classification," and it "[assumed] that the overwhelming percentage of travelers from Chicago are not in any way connected with the heroin trade." *Id.* at 698. Similarly, but more caustically, the United States Court of Appeals for the Sixth Circuit in United States v. Andrews, 600 F.2d 563 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979), stated:

> [T]ravel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify—or help justify—the stopping of travelers from the nation's third largest city.

Id. at 566.

231. United States v. Place, 660 F.2d 44, 48 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983). In another case, the United States Court of Appeals for the Sixth Circuit observed:

> [O]ur experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

United States v. Andrews, 600 F.2d 563, 566-67 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979).

232. *See, e.g.*, United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

233. *See* Greene & Wice, *supra* note 57, at 271.

234. *See* United States v. Berd, 634 F.2d 979, 985 (5th Cir. Unit B Jan. 1981) (DEA agent Markonni stated that "little luggage [suggests] a quick turnaround trip, a practice frequently employed by couriers."). Moreover, carrying "little luggage" might also logically explain how someone can hurry out of the airport.

235. No. CR78-262A (N.D. Ga. Nov. 17, 1978).

236. *See* Kadish, Brofman & Kadish, *Drug Courier Characteristics: A Defense Profile*, 15 TRIAL 47, 50 (May 1979) [hereinafter Kadish]. Although the authors refer to Williams, one of the defendants, they cite the unreported *Johnson* case.

237. *See, e.g.*, United States v. Ballard, 573 F.2d 913, 915 (5th Cir. 1978).

pects before the suspects can make connecting flights, and thus, agents have little or no reason to believe the suspects are traveling "light."[238] Notably, Justice White, dissenting in *United States v. Mendenhall*,[239] said that Agent Anderson

> heard the ticket agent tell [defendant] Mendenhall that her ticket to Pittsburgh already was in order and that all she needed was a boarding pass for the flight. Thus it should have been plain to an experienced observer that Ms. Mendenhall's failure to claim luggage was attributable to the fact that she was already ticketed through to Pittsburgh on a different airline.[240]

Significantly, only a few reported cases involve empty suitcases, and in none of those cases was there a "large quantity of empty cases."[241] As one court noted, an individual may carry the empty suitcase "to pick up materials, samples or documents in connection with his trade or business."[242] Thus, the type and amount of luggage a passenger carries cannot reasonably justify an investigative search and seizure.

A third thesis provides that drug couriers have an unusual itinerary, such as rapid turn-around time for a very lengthy airplane trip.[243] Supposedly, drug couriers do not want to hold onto "hot drugs" or stay in drop-off cities long; therefore they make the quickest round-trip possible. Even when they take circuitous routes to avoid detection, a rapid turn-around time is noted.[244] Yet, it is equally true that people on business trips, people on shopping sprees, as well as people traveling to weddings, funerals, sporting events, or performing arts events often have "rapid turn-around time." Moreover, DEA agents generally do not know a traveler's length of stay until the agents have stopped and questioned the traveler and perused that person's airline ticket.

A fourth thesis concerns the use of an alias.[245] It reasons that to avoid detection and to conceal identity, especially because many drug couriers have criminal records[246] or are "known" drug dealers,[247] drug couriers use aliases.[248]

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238. *See* United States v. Mendenhall, 446 U.S. 544, 561 (1980); United States v. Robinson, 625 F.2d 1211, 1213 (5th Cir. 1980), *later appeal after retrials*, 690 F.2d 869 (11th Cir. 1982).

239. 446 U.S. 544 (1980).

240. *Id.* at 573 (White, J., dissenting.).

241. United States v. Saperstein, 723 F.2d 1221, 1229 n.10 (6th Cir. 1983).

242. *Id.* at 1229.

243. *See* United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

244. United States v. Hill, 626 F.2d 429, 431 (5th Cir. 1980).

245. *See* United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

246. *See, e.g.*, United States v. Van Lewis, 409 F. Supp. 535, 540 (E.D. Mich. 1976) ("The agents believed that they had probable cause for arrest based upon the following factors: [Van Lewis'] prior record of having been arrested for possession of heroin, . . ."), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); State v. Key, 375 So. 2d 1354, 1356 (La. 1979) ("Egan had obtained a printout from the narcotic computer indicating that Key had been arrested . . . at the Atlanta Airport [the year before] with a pound of heroin.") (Summers, C.J., dissenting).

247. *See, e.g.*, United States v. Oates, 560 F.2d 45, 60 (2d Cir. 1977) ("Agent Hammonds was thoroughly familiar with [defendant] Oates' reputed background in illicit drug peddling. . . ."); United States v. Lewis, 556 F.2d 385, 389 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); United States v. McClain, 452 F. Supp. 195, 196 (E.D. Mich. 1977) (Agent Markonni was familiar with the name of defendant John T. McClain "as a major narcotics distributor in California, and that the

However, it is not uncommon for someone other than the innocent passenger to purchase airline tickets.[249] Moreover, agents typically determine whether someone is traveling under an assumed name after a suspect's detention. As one agent in *Robinson v. State*[250] admitted, "well, we stop people—we look for certain things that individuals have on their possession, such as several identifications, maybe no identification at all, false I.D., and this type thing—that type of a person."[251]

A fifth thesis provides that drug couriers carry unusually large amounts of currency, often in excess of one or two thousand dollars.[252] It reasons that cash is the hallmark of criminal enterprises. Personal checks and credit cards provide unwanted means of identification. Given the enormous profits derived from narcotics trafficking[253] and the need to give or receive cash in exchange for narcotics, drug couriers usually carry large amounts of currency.

Again, however, an antithesis arises to refute this logic. Aside from the notable exception in which an agent sees a large amount of big denomination currency when a traveler purchases his or her airline ticket or has his or her carry-on luggage screened at airport security checkpoints,[254] drug agents cannot determine whether a person is carrying large amounts of currency until after they have stopped that person. Furthermore, only a few reported cases refer to monies in the many thousands of dollars.[255]

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address at 764 Doheny #1 was used by this John T. McClain to conduct narcotics transactions. [Markonni] had also previously obtained information from DEA agents in Los Angeles that John T. McClain used his nephews and sons as drug couriers.").

248. "Alias" as used in this Article refers not only to assumed names but also to slight variations in one's actual name, because the latter arouses further suspicion. For example, defendant John Eli Williams had a ticket issued to J. Elias Williams, Kadish, *supra* note 236, at 48, and Mico Rogers' ticket was made out to Michael Rogers, United States v. Rogers, 436 F. Supp. 1, 2 (E.D. Mich. 1976). The extent to which drug couriers are aware that airline computer printouts may contain their names is unclear. *See supra* notes 59-60 and accompanying text. It is clear, however, that DEA agents can run computer record checks of a traveler's history in narcotics trafficking. *See* United States v. Oates, 560 F.2d 45, 49 (2d Cir. 1977); United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) ; United States v. Rogers, 436 F. Supp. 1, 2 (E.D. Mich. 1976); United States v. Allen, 421 F. Supp. 1372 (E.D. Mich. 1976); State v. Key, 375 So. 2d 1354, 1355 (La. 1979).

249. In State v. Frost, 374 So. 2d 593, 595-96 (Fla. Dist. Ct. App.), *overruled by* Royer v. State, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1979), *petition for review denied*, 397 So. 2d 779 (Fla. 1981), *aff'd*, 460 U.S. 491 (1983), officer Johnson testified at the suppression hearing:

> A. . . . his airline ticket was in the name of Mr. Art Thompson, and his driver's license was in the name of Christopher Robert Frost . . . .
>
> Q. What did you do after receiving that information?
>
> A. We asked Mr. Frost why he was traveling under an alias and why he had come to Miami and so forth. He said he was visiting friends, that someone had made a reservation for him under another name, and that was why the discrepancy in names.

Id. at 595-96. Prosecutors admitted at the conclusion of the hearing that this was a " 'reasonable explanation' of the disparity in the names of the ticket and the driver's license." *Id.* at 596 n.1.

250. 388 So. 2d 286 (Fla. Dist. Ct. App. 1980).

251. *Id.* at 288.

252. United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir), *cert. denied*, 447 U.S. 910 (1979).

253. *See supra* note 38.

254. *See* United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977).

255. *See* United States v. $84,000 U.S. Currency, 717 F.2d 1090, 1093 (7th Cir. 1983), *cert. denied*, 105 U.S. 810 (1984).

A sixth and related thesis provides that drug couriers purchase airline tickets with a large amount of small denomination currency.[256] Theoretically, small bills arouse less suspicion than large bills, and cash avoids the need to show identification and leaves no permanent record of the transaction.[257] Most people who purchase tickets with cash, however, use small denomination currency. And although cash transactions provide anonymity, this factor is neutralized when passengers give their correct names to ticket agents or leave valid call back numbers. Also, many people do not have credit cards or personal checking accounts, and these people frequently use cash when they travel by plane. Interestingly, these people probably travel infrequently and, thus, may appear nervous as inexperienced flyers.

A seventh and final primary characteristic thesis rests on the presumption that drug couriers exhibit unusual nervousness as they enter and exit airline terminals. This thesis reasons that those who carry contraband, fearful of detection, look and act differently from innocent passengers and exhibit even more nervous tendencies when approached and questioned by drug agents.[258] However, the amateurish forensic assessment of "a person's psychological attitude involves great potential for abuse"[259] because nervousness and associated suspicious behavior may result from any one of the following: "innate personality syndrome, or a disorientation from a fear of flying or from having disembarked at a strange airport;"[260] fatigue; a "bumpy" flight;[261] "anticipating a long-awaited rendezvous with friends or family;"[262] "the need quickly to make connections for continuing one's journey, [and] the mere surprise from being accosted in a crowded airport concourse by a law enforcement officer for no apparent reason."[263]

B. *Secondary Characteristics*

One secondary profile characteristic[264] thesis rests on the presumption that drug couriers use public transportation almost exclusively, particularly taxi

256. *See* United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

257. This observation is based on the author's survey of drug courier profile cases.

258. In United States v. Allen, 421 F. Supp. 1372, 1376 (E.D. Mich. 1976), the court stated: "[T]he court believes that . . . Agent Markonni's assertion that he is able to distinguish innocent nervous behavior from the allegedly more agitated and distraught behavior of a drug courier is entitled to some weight." It is difficult to verify the validity of the narcotics agents' summary characterization of nervousness. Thus, the weight accorded this factor may impinge unduly on fourth amendment rights and cause narcotics agents to routinely list it as a determining factor. *See* State v. Perkerol, 77 N.C. App. 292, 294, 335 S.E.2d 60, 62 (1985) (agents deemed as significant the apparent nervousness of two people waiting for defendant Perkerol, whose flight had not even landed at the use city airport), *disc. review denied*, 315 N.C. 595, 341 S.E.2d 36 (1986).

259. Comment, *supra* note 12, at 129.

260. United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976), *aff'd in part and vacated in part without opinion sub nom.*, United States v. Roseborough, 571 F.2d 584 (6th Cir. 1978).

261. J. CHOPER, Y. KAMISAR, & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1979-1980, at 138 (1981).

262. United States v. Andrews, 600 F.2d 563, 566 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979).

263. United States v. Berry, 670 F.2d 583, 596 (5th Cir. Unit B 1982).

264. *See supra* notes 77-86 and accompanying text.

cabs, when they depart from an airport terminal.[265] This thesis reasons that highly accessible taxis provide ultimate privacy and the quickest means of transportation to distribution centers in use cities. Furthermore, drug couriers who live in source cities are unlikely to have family members or friends in use cities who can pick them up in private passenger vehicles.[266] And use city distributors often are unwilling to risk the chance of being recognized by local drug agents when they meet the source city couriers at the use city airports.[267] Nevertheless, it is glaringly obvious that because of their convenience, taxis are used by a host of innocent air travelers. Thus, the fact someone uses a particular mode of public transportation cannot reasonably justify an agent's search for contraband.

A second thesis provides that drug couriers typically make a telephone call immediately after they deplane.[268] This thesis reasons that a drug courier often advises his or her "source" city distributor (one higher up in the chain of distribution) as well as use city distributors that he or she has arrived undetected in the use city, and inquires whether complications have arisen.[269] However, telephones obviously appeared in airports long before the drug courier profile came into existence. Telephone calls to loved ones noting safe arrival, to business associates noting late arrival, or to friends who failed to meet the traveler are but some of the obvious and innocent uses of telephones at the airport.

A third thesis provides that, supposedly consistent with their efforts to conceal their identities and not reveal any information suggesting their whereabouts, drug couriers give false or fictitious telephone call-back numbers when making airline reservations.[270] However, innocent passengers can make clandestinely planned trips for licit and moral reasons as well as for illicit and immoral reasons. Furthermore, the possibility of innocent human error arises whenever someone records telephone numbers.

A fourth and final secondary profile characteristic thesis rests on the pre-

265. *See* United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

266. Few of the reported opinions discuss whether the drug courier travels from his or her home in source city to use city back to source city or from his or her home in use city to source city back to use city. A notable exception is United States v. McClain, 452 F. Supp. 195 (E.D. Mich. 1977), in which DEA agent Markonni knew of John T. McClain, a major narcotics distributor who lived in Los Angeles. *Id.* at 196.

267. In United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977), Agent Markonni "observed the defendants disembark from a flight arriving from Los Angeles. They were met by Michael Lee. Agent Markonni thought he remembered Mr. Lee as a drug trafficker from a prior narcotics case." *Id.* at 1337.

268. *See supra* text accompanying notes 184, 201.

269. Representative cases in which drug couriers made telephone calls include the following: United States v. Jefferson, 650 F.2d 854, 855 (6th Cir. 1981); United States v. Moeller, 644 F.2d 518, 519 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981); United States v. Pulvano, 629 F.2d 1151, 1152 (5th Cir. 1980); United States v. Garrett, 627 F.2d 14, 16 (6th Cir. 1980); United States v. McClain, 452 F. Supp. 195, 196 (E.D. Mich. 1977); United States v. Chamblis, 425 F. Supp. 1330, 1332 (E.D. Mich. 1977); United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976). In some cases narcotics agents believe suspects engage in counter-surveillance activity while pretending to make telephone calls. *See* United States v. Nembhard, 676 F.2d 193, 197 (6th Cir. 1982).

270. Representative federal cases that involved bogus call-back numbers include the following: United States v. Herbst, 641 F.2d 1161, 1164 (5th Cir.), *cert. denied*, 454 U.S. 851 (1981); United States v. Berd, 634 F.2d 979, 982 (5th Cir. Unit B Jan. 1981); United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980); United States v. Masiello, 491 F. Supp. 1154, 1156 n.1 (D.S.C. 1980).

sumption that drug couriers travel excessively to source or distribution cities.[271] The magnitude of the nation's drug smuggling problem is exceeded by the nation's drug use problem. Drug dealers use proceeds from drug sales to finance other drug purchases. Cost constraints and the relative unavailability of narcotics require drug couriers to make excessively frequent trips to and from source cities. However, businesspersons, casually dressed affluent people, and airline personnel and their dependents, among others, make excessively frequent trips to certain cities. Thus, for the purpose of determining what constitutes a reasonable and justifiable search, frequency of air travel does not distinguish the drug courier from the innocent passenger.

This section has focused only on the drug courier profile's primary and secondary characteristics. However, a similar analysis applies to almost all other profile characteristics. For example, the notion that drug couriers consciously shun peak hours[272] when they could get lost in the crowd is counterintuitive. Profile characteristics, even those considered to be primary, are often inaccurate. Others are so conducive to subjective application that they give virtually free rein to enforcement officials. And the profile itself is susceptible to abuse through retroactive application.

Although these dangers do not disappear in the absence of the profile, once DEA agents begin to rely on the profile as a proper or necessary surveillance technique, an additional danger arises: that they will use it as a checklist to the exclusion of other, nonprofile factors. Nevertheless, as section IV of this Article explains, perhaps the greatest danger arises when the courts introduce the drug courier profile into judicial decisionmaking.

IV. VIEW FROM THE TOP: THE SUPREME COURT AND DRUG COURIER PROFILE CASES

A. *Confusion at the Top?*

As the highest court in the land, the Supreme Court is looked to for guidance by the lower courts. However, the Supreme Court's decisions in *United States v. Mendenhall*,[273] *Reid v. Georgia*,[274] *Florida v. Royer*,[275] and *Florida v. Rodriquez*[276] have created confusion among the lower courts.[277] Notwithstanding strikingly similar facts, the Supreme Court affirmed defendant Mendenhall's conviction, but reversed the convictions of defendants Reid and Royer. In *Mendenhall* the Court could not agree whether the profile alone, or in combination with other factors, could justify a seizure. One month later the *Reid* Court con-

271. *See* United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir.), *cert. denied*, 447 U.S. 910 (1979).

272. In Reid v. Georgia, 448 U.S. 438 (1980) (per curiam), the Supreme Court noted that law enforcement activity diminishes during off peak hours. *Id.* at 441. The notion that drug couriers consciously shun peak hours when they could blend in with the crowds is, at best, problematic.

273. 446 U.S. 544 (1980).

274. 448 U.S. 438 (1980) (per curiam).

275. 460 U.S. 491 (1983).

276. 469 U.S. 491 (1984).

277. *See infra* notes 327-53 and accompanying text.

cluded that the suspects' conformance to four characteristics of a drug courier profile was insufficient to establish a reasonable suspicion that the suspects were engaged in narcotics smuggling. Three years later the *Royer* Court determined that no seizure had occurred when, based on the profile, DEA agents initially approached defendant Royer and questioned him. Finally, in November 1984 the Court in *Rodriquez* concluded that no fourth amendment rights were implicated when narcotics agents asked air travelers to step aside and talk with them. After a brief summary of these Supreme Court decisions, this Article examines whether the current state of the law in this area results from confusion at the top, or simply a narrowing of fourth amendment rights at airports.

1. *Mendenhall*

Two DEA agents observed defendant Silvia Mendenhall when she deplaned at Detroit Metropolitan Airport from a flight originating in Los Angeles. They believed her conduct was characteristic of a person carrying narcotics because (1) she arrived from a source city; (2) she "was the last person to leave the plane, appeared to be 'very nervous,' and 'completely scanned the whole area where [the agents] were standing;' " (3) she claimed no baggage; and (4) she changed airlines for her flight out of Detroit.[278] The agents approached Mendenhall as she walked through the concourse, identified themselves as federal agents, asked to see her identification and airline ticket, determined that her ticket had been issued in the name of Annette Ford, and discovered that she had spent only two days in California. When one agent identified himself as a narcotics agent, Mendenhall became extremely nervous. Without orally responding to a request, Mendenhall followed the agents to an office. A subsequent strip search by a female officer uncovered heroin in Mendenhall's undergarments.[279]

The *Mendenhall* case produced three separate analyses because the justices could not agree whether the DEA agents' initial encounter with Mendenhall, based solely on the drug courier profile, constituted a seizure. Two justices decided that the initial stop did not constitute a seizure because Mendenhall had no objective reason to believe she was not free to go.[280] Three justices assumed, arguendo, that a seizure had occurred—the seizure issue had not been considered by the lower court—and concluded that the agents had reasonable suspicions justifying the intrusion.[281] Four justices concluded that Mendenhall had been seized unlawfully because the stop was based on an "inchoate and unparticularized suspicion or 'hunch' " rather than on "specific reasonable inferences."[282] Applying a totality of the circumstances test, a majority of the justices concluded that Mendenhall voluntarily consented to accompany the agents to the DEA office and allow them to search her person.[283]

278. *Mendenhall*, 446 U.S. at 547 n.1.
279. *Id.* at 549.
280. *Id.* at 552-54 (Stewart, J., and Rehnquist, J.).
281. *Id.* at 560 (Burger, C.J., Powell, J., and Blackmun, J.).
282. *Id.* at 573 (White, J., Brennan, J., Marshall, J., and Stevens, J.).
283. *Id.* at 558.

2. *Reid*

Defendant Tommy Reid occasionally looked back in the direction of a man behind him as the two of them proceeded through the airport concourse. DEA agents believed the two men fit the Atlanta Airport Drug Courier Profile because (1) they had arrived from Fort Lauderdale, a cocaine source city; (2) they arrived in the early morning "when law enforcement activity is diminished";[284] (3) they appeared to conceal the fact they were traveling together; and (4) they apparently had only their shoulder bags as luggage. A DEA agent approached the men outside the terminal, identified himself, and obtained their airline ticket stubs and identification. When the agent discovered the two men had been in Fort Lauderdale[285] for only one day and observed their growing nervousness, he requested them to return to the terminal and to consent to a search. As they entered the terminal, Reid ran and later dropped his heroin-laden shoulder bag.[286]

In a per curiam opinion a five-member majority of the Court reversed Reid's conviction, holding that his conformance with the profile could not, as a matter of law, justify seizing him.[287] Specifically, the Court concluded that an investigatory stop of Reid could not be based on the mere fact Reid had preceded another person through the concourse and occasionally looked backward at him. The Court reached its conclusion notwithstanding that Reid had arrived on an early morning flight from a source city, tried to conceal that he was traveling with another, and apparently had no luggage other than his shoulder bag.[288] The Court noted further that the circumstances observed by the agent "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[289] In his concurring opinion in *Reid*, Justice Powell emphasized that the Supreme Court did not consider the initial seizure question as the state court had not considered that issue.[290]

3. *Royer*

Two Dade County narcotics agents observed defendant Mark Royer as he entered the airport terminal in Miami and purchased a one-way ticket to New York.

> [T]he [agents'] attention was attracted by the following facts which were considered to be within the profile: (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was

284. *Reid*, 448 U.S. at 441.

285. Fort Lauderdale is considered a cocaine "source city" and a heroin "use city." *See supra* note 136.

286. *Reid*, 448 U.S. at 439.

287. *Id.* at 441.

288. *Id.*

289. *Id.*

290. *Id.* at 443 (Powell, J., concurring). On remand, the Georgia Supreme Court ruled that Reid had not been seized when DEA agents approached him and asked him to produce his license and airline ticket. State v. Reid, 247 Ga. 445, 449-50, 276 S.E.2d 617, 621 (1981).

> young, apparently between 25-35, (c) he was casually dressed, (d) Royer appeared pale and nervous, looking around at other people, (e) Royer paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, Royer wrote only a name and the destination.[291]

The Court, in an opinion written by Justice White with three justices concurring, agreed with the State of Florida that drug agents acted legally in asking for and examining Royer's airline ticket and driver's license because he fit the drug courier profile.[292] According to the Court no seizure occurred at that point. However,

> when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.[293]

Thus, the Court overturned Royer's conviction.[294]

4. *Rodriguez*

In Rodriguez, labeled an "airport search" case rather than a drug courier profile case,[295] Dade County Public Safety Officer McGee observed Damasco Rodriguez at an airline ticket counter in the Miami airport around noon. The officer's suspicions were aroused because Rodriguez and two other men "behaved in an unusual manner while leaving the National Airlines ticket counter."[296] Later, "[b]efore the officers even spoke to the three confederates, one by one they had sighted the plainclothes officers and had spoken furtively to one another. One was twice overheard urging the others to 'get out of here.' "[297] Rodriguez then attempted to move away, and, in the words of officer McGee, "[h]is legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place."[298] Without advising Rodriguez that he could refuse consent, one officer told Rodriguez that he should let them look in his luggage. Rodriguez handed McGee the key, and the officers found cocaine in the luggage.[299]

In a per curiam opinion, a six-justice majority held that the "initial contact between the officers and respondent, where they simply asked if he would step

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291. *Royer*, 460 U.S. at 493 n.2.
292. *Id.* at 502.
293. *Id.* at 501.
294. *Id.* at 507-08.
295. *Rodriguez*, 469 U.S. at 5. The per curiam opinion discusses "principles of law governing *airport* stops" and refers to "*airport search*" cases, not drug courier profile cases. *Id.* (emphasis added).
296. *Id.* at 3.
297. *Id.* at 6.
298. *Id.* at 4.
299. *Id.* at 4.

aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest," and that even assuming "there was a 'seizure' for the purposes of the Fourth Amendment, . . . any such seizure was justified by 'articulable suspicion.' "[300]

B. *Synthesis: The Bottom Line*

All of the characteristics discussed in *Mendenhall*, *Reid*, and *Royer* form part of the drug courier profile. In none of these cases, however, did the Supreme Court attempt to articulate any other basis establishing the specific quantum of reasonable suspicion necessary to support an investigative stop. The *Mendenhall* holding was inconclusive on this issue;[301] the *Reid* Court concluded that defendant Reid's conformance with four drug courier profile characteristics would not establish the requisite reasonable suspicion;[302] and the *Royer* Court, without overuling *Reid*, concluded that defendant Royer's conformance with six drug courier profile characteristics was sufficient.[303]

Three points crystalize from the Supreme Court's drug courier profile cases: (1) Because the profiles vary from case to case, no "bright line" exists and each case must be judged on its own facts;[304] (2) profile factors that do not relate specifically to the "particular conduct" of the suspect will be discounted;[305] and (3) "nervousness," a highly particularized yet pliant and subjective factor, plays an important part in establishing reasonable suspicion.[306] Use of the profile was upheld in *Mendenhall* and *Royer*, and the only characteristic found in those cases but not in *Reid* was "nervousness." The chart below helps to crystalize these points.

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300. *Id.* at 5-6.

301. *See supra* text accompanying notes 278-83.

302. *Reid*, 448 U.S. at 441.

303. *Royer*, 460 U.S. at 520

304. *See Royer*, 460 U.S. at 525 n.6 (Rehnquist, J., dissenting); *Mendenhall*, 446 U.S. at 565 n.6 (Powell, J., concurring).

305. *Reid*, 448 U.S. at 441. One student commentator made the following observation concerning *Reid*:

> The Court stated that the agents' observation that Reid's behavior matched the courier characteristics of trying to conceal that he was traveling with another person was a "hunch," not a "fair inference," and was at any rate, "too slender a reed to support the seizure in this case." The Court discounted the other three characteristics—travel from a source city, arrival at a time of diminished law enforcement activity, and no checked baggage—on the ground that these characteristics did not relate to Reid's "particular conduct." This result suggests that the Court will assess profiles in a two-step process. The first step is to determine if the profile characteristics are particularized so that the police can differentiate the suspect from innocent travelers. The Court then discounts those factors that are not particular to a given suspect, as it did in *Reid*. In step two, the Court determines whether the particularized factors fairly support the reasonable suspicion to justify an investigative stop. The *Reid* Court established that the one particular characteristic—attempting to conceal travel with another person—along with the other three nonparticularized characteristics did not satisfy the test of reasonable suspicion.

Note, *Airport Drug Stops: Defining Reasonable Suspicion Based on the Characteristics of the Drug Courier Profile*, 26 B.C.L. REV. 693, 724 (1985).

306. *See supra* text accompanying notes 73-76.

	Mendenhall	Reid	Royer
Particularized Profile Characteristics	1. Very nervous 2. Scanned whole area	1. Concealed fact of traveling with another	1. Nervous 2. Inaccurately filled out airline ID card
Unparticularized Characteristics Consistent with Innocence	3. Source city 4. Last to deplane 5. Changed airlines	2. Source city 3. No checked baggage 4. Early arrival	3. Heavy luggage 4. Purchased ticket with cash 5. Casually dressed 6. Young

V. How and When Fourth Amendment Rights are Implicated

A. *Historical Overview*

Any police-citizen encounter potentially implicates fourth amendment considerations. In the drug courier context, lower federal courts, with little or no guidance from the Supreme Court, had to "sculpt out, at least theoretically, three tiers of police-citizen encounters: communications between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment; brief 'seizures' that must be supported by reasonable suspicion; and full-scale arrests that must be supported by probable cause."[307] The Supreme Court in *Royer* later adopted this three-tiered analysis of fourth amendment issues for drug courier profile cases.[308]

Historically, to justify a search or seizure law enforcement officers needed probable cause to believe that the person searched or seized had committed or was about to commit a crime.[309] And, for over half of a century courts equated seizures under the fourth amendment with arrests, custodial restraints, or full-blown searches.[310] Brief investigatory stops and frisks, which are less intrusive than arrests or full-blown searches, were not considered searches and seizures and did not trigger fourth amendment protection.[311] Since 1968, however, the Supreme Court has expanded the concept of seizure so that less intrusive investigatory detentions short of traditional arrests fall within the protection of the fourth amendment.[312]

307. United States v. Berry, 670 F.2d 583, 591 (5th Cir. Unit B 1982); *see also* United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982) (discussing three categories of police-citizen encounters), *cert. denied*, 460 U.S. 1068 (1983).

308. *Royer*, 460 U.S. at 497-99.

309. *Id.* at 498.

310. *See* Greenberg, *supra* note 39, at 49; Comment, *supra* note 96, at 34-35.

311. Comment, *supra* note 96, at 34-35. *See generally* LaFave, *"Street Encounters" and The Constitution:* Terry, Sibron, Peters *and Beyond*, 67 Mich. L. Rev. 40, 40-47 (1969) (discussing "stop and frisk" generally).

312. *See* Brown v. Texas, 443 U.S. 47 (1979) (police may demand citizen's identification when

In *Terry v. Ohio*,[313] a seminal case recognizing that fourth amendment protections extend to nontraditional arrests, the Court held that the public's interest in safety and effective law enforcement justifies a limited police stop and weapons pat-down based on a lesser showing of suspicion than that required for probable cause.[314] To balance the public interest against defendant Terry's privacy rights or his right to personal liberty free from governmental intrusion, the Court used a sliding scale approach requiring the police to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the police officer's suspicion of criminality.[315] In the words of one student commentator, "[b]y rejecting an all-or-nothing approach to fourth amendment analysis, the Court provided police with a flexible standard requiring less objective justification as the depth of the intrusion into the citizen's personal expectation of privacy decreased."[316]

Not everyone agrees that the flexibility afforded to police by *Terry* is a blessing.[317] Professor Anthony Amsterdam, for example, as if using the proverbial "heavy thumb on the scale" metaphor, suggests that the sliding scale approach of *Terry* favors police because vague standards will force courts to defer to police.[318] Despite this criticism, the *Terry* standard for determining the reasona-

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there is reasonable suspicion of criminality); *cf.* Dunaway v. New York, 442 U.S. 200 (1979) (custodial detention and interrogation indistinguishable from traditional arrest; thus, probable cause required); Delaware v. Prouse, 440 U.S. 648 (1979) (random license checks unconstitutional absent reasonable suspicion of criminal activity or the existence of observable motor vehicle violations); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (police may ask driver to get out of car after a lawful pull-over); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border patrol officers at permanent checkpoints do not need probable cause to stop and question suspects); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving border patrol may seize motorist based on reasonable suspicion that motorist is smuggling illegal aliens); Adams v. Williams, 407 U.S. 143 (1971) (officers may briefly detain person if reasonable under known circumstances); Terry v. Ohio, 392 U.S. 1 (1968) (limited stop and frisk for weapons within purview of fourth amendment).

313. 392 U.S. 1 (1968).

314. *Id.* at 20-22, 27; *see* Greenberg, *supra* note 39, at 50.

315. *Terry*, 392 U.S. at 21.

316. Note, *supra* note 8, at 235 (footnote omitted). Stated differently,

> *Terry* firmly rejects the monolithic model of the fourth amendment which recognizes two polarities: either the officer effectively restrains the liberty of a citizen, in which case a fourth amendment seizure has taken place and its validity depends upon the existence of probable cause to arrest, or else no restraint has taken place and therefore there is no seizure and the resultant conversation between officer and citizen is strictly voluntary. Instead *Terry* chooses a sliding-scale model of the fourth amendment, providing police with an "escalating set of flexible responses," in which "increasing degrees of intrusiveness requires increasing degrees of justification and increasingly stringent procedures for the establishment of that justification." To justify a stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts," warrant the intrusion. The test is objective: could an officer reasonably conclude, in light of experience, "that criminal activity may be afoot"? The initial stop must be justified, and the resultant inquiry must be "reasonably related in scope" to the justification for its initiation.

Comment, *supra* note 12, at 114 (footnotes omitted).

317. *See* Greenberg, *supra* note 39, at 50 n.12 (citing commentators who have criticized the *Terry* approach).

318. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 393-94 (1974). Specifically, Professor Amsterdam noted:

> The complaint is being voiced now that fourth amendment law is too complicated and confused for policemen to understand or to obey. Yet present law is a positive paragon of

bleness of a particular intrusion today enjoys good prospects. "[A]t a time when increased crime is understandably viewed as a major societal problem, *Terry's* focus on the enforcement need will probably continue to be interpreted broadly . . . ."[319]

B. *The Fourth Amendment and Airport Stops*

Although the *Terry* decision "recasts a fifty-year-old constitutional process of determining the sufficient level of probability to justify police action,"[320] it was not intended to bury the fourth amendment. The Supreme Court expressly limited *Terry* to protective searches—investigative stops to detect weapons.[321] Once the Court had carved *Terry* from the fourth amendment monolith, how-

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simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale. We would shortly slide back to the prescription stated in a now overruled 1950 decision of the Court which is generally regarded as the nadir of fourth amendment development: that "[t]he recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." Under that view, "[r]easonableness is in the first instance for the [trial court] . . . to determine." What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. The ultimate conclusion is that "the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id.

319. *See* Greenberg, *supra* note 39, at 78. Clearly, the Supreme Court has broadly interpreted *Terry*, while curtailing fourth amendment rights. *See* United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985) (*in communicado* detention of defendant Columbian national in bedless room for almost twenty-four hours was justified by custom officials' reasonable suspicion that she was an alimentary canal smuggler); United States v. Hensley, 469 U.S. 221, 222 (1985) (when police have reasonable suspicion that a suspect was involved in or is wanted in connection with a completed felony, officials may make a *Terry* stop to investigate that suspicion because checking identification in the absence of probable cause promotes the strong governmental interest in solving crimes and bringing offenders to justice); United States v. Place, 462 U.S. 696, 705-06 (1983) (expressly authorizing the seizure of personal luggage on less than probable cause so long as the investigative stop is properly limited in scope); Michigan v. Summer, 452 U.S. 692, 705 (1981) (a search warrant based on probable cause gives limited authority to detain occupants while premises are searched).

For examples indicating the extent to which lower courts have relaxed fourth amendment protections in airports, see United States v. Borys, 766 F.2d 304 (7th Cir. 1985) (DEA agents were justified in detaining defendant briefly because he fit the drug courier profile, *id.* at 309; the agents' 90-minute seizure of defendant's luggage was not a violation of the fourth amendment, *id.* at 313; and the agents' statement to defendant that they meant to try to secure a warrant for luggage if he did not consent, did not, by itself, invalidate defendant's consent to search, *id.* at 314), *cert. denied*, 106 S. Ct. 852 (1986); United States v. Swayne, 700 F.2d 467, 472 (8th Cir. 1983) (concluding that travel companions' close association with supposed drug seller, his partial conformance to drug courier profile, and fact he took physical possession of some of their luggage, were sufficient to establish probable cause supporting arrest of companion).

320. Greenberg, *supra* note 39, at 49.

321. In his concurring opinion in *Royer*, Justice Brennan emphasized that *Terry*

was a very limited decision that expressly declined to address the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. . . . *Terry* simply held that under certain carefully defined circumstances a police officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him.

Royer, 460 U.S. at 509-10 (Brennan, J., concurring) (quoting *Terry*, 392 U.S. at 19 n.16, 30).

ever, it was inevitable that other chips would fall from the structure. Today, *Terry* and its progeny have become guideposts in airport drug search cases.

These airport drug search cases have presented the Court with clear fourth amendment issues: Does the initial stop of a traveler by a DEA agent constitute a seizure? Does the drug courier profile provide a constitutionally permissible basis to justify the investigative stop? When do DEA agents have reasonable suspicion to stop the airline traveler in the first place? When, after the initial encounter, does reasonable suspicion arise?[322] When does a traveler voluntarily consent to continue an interview or relocate to a private office? If the traveler is seized illegally, but then voluntarily consents to a search, must the court exclude the seized contraband from evidence at trial?

Prior to *Mendenhall* and *Reid* federal courts, applying *Terry*'s "restraint of freedom" standard,[323] uniformly condemned the drug courier profile as a constitutionally insufficient basis to warrant an investigative stop, and they routinely found fourth amendment seizures based on these initial encounters between DEA agents and suspected drug couriers.[324] Indeed, prior to *Mendenhall*, "the government had conceded that seizures occurred at the initial encounter. . . . On appeal to the Supreme Court in *Mendenhall*, however, the government changed tactics."[325]

Justice Stewart, in his lead opinion in *Mendenhall*, joined only by Justice Rehnquist, approved the government's argument. These two justices found "nothing in the record [to suggest] that [Mendenhall] had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way," and they therefore concluded that "the agents' initial approach . . . was not a seizure" requiring fourth amendment scrutiny.[326] The next sections of this Article discuss the consequences of this conclusion.

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322. Some issues produce multiple sub-issues: After the initial encounter does reasonable suspicion arise when questioning begins? When the traveler's identification card or airline ticket is obtained? Or when the traveler's demeanor reflects a consciousness of guilt?

323. *See Terry*, 392 U.S. at 19 n.16 (noting that the critical inquiry is whether a police officer has "restrained the liberty" of a person); *see also* Brown v. Texas, 443 U.S. 47, 50 (1979) (citing *Terry* and stating that fourth amendment protection attaches when the police curtail the citizen's liberty and restrain the citizen's freedom of movement).

324. United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978); United States v. Pope, 561 F.2d 663, 667 (6th Cir. 1977); United States v. Craemer, 555 F.2d 594, 597 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

As Professor Ringel has stated,

> [w]hatever its validity, the circuit courts handling the bulk of the DEA airport search cases unanimously recognized that the satisfaction of a number of elements in the drug courier profile could never replace the *Terry* requirement that the intrusion of a stop be justified on the basis of specific and articulable facts.

See W. RINGEL, *supra* note 4, § 16.2(f), at 16-14.2.

325. Note, *supra* note 8, at 239 n.165. The government attorneys may have relied on United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980), the first case to conclude that airport drug stops do not constitute seizures under the fourth amendment.

326. *Mendenhall*, 446 U.S. at 554. Justice Stewart's free to leave test had first been suggested in United States v. Wylie, 569 F.2d 62, 67 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978), and later was used in United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979), *cert denied*, 447 U.S. 910 (1980).

C. *The Impact of* Mendenhall *and* Reid

Immediately after *Mendenhall* and *Reid* confusion abounded among the lower courts.[327] Not only did the Supreme Court decline the opportunity presented in those cases to invalidate the drug courier profile—as many lower courts had done[328]—but it left unanswered questions certain to arise with greater frequency following its decisions. For example, at what point during a profile stop does a seizure occur? And what circumstances justify a determination that an airline traveler has consented to a further intrusion or a search?

Whether commentators viewed *Mendenhall* and *Reid* as "conflicting"[329] or as "[exacerbating] the 'state of morass' currently surrounding fourth amendment law,"[330] two things seemed clear. First, lower courts generally upheld investigatory stops following the decisions, and, second, the courts no longer dwelled on profile characteristics and the concept of reasonable suspicion.[331] Furthermore, the courts addressed the question whether the facts known to DEA agents at the moment of the initial encounter constituted reasonable suspicion in rather summary fashion. This result stemmed from the fact airline travelers often inexplicably consented to searches that they knew would uncover illegal drugs.[332] This convenient fact obviated the need for courts to address the reasonable suspicion issue in a rigorous manner. And even when courts discussed "initial encounters" and "reasonable suspicion," some of them did so without citing *Mendenhall*;[333] others relegated *Mendenhall* to a footnote;[334] and

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327. *See, e.g.*, United States v. Berry, 670 F.2d 583, 592 (5th Cir. Unit B 1982) ("The fractured legal conclusions of the majority in *Mendenhall* leave us without guidance . . ."); *Supreme Court Review—Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. & CRIMINOLOGY 499, 516 (1980).

328. See cases cited *supra* note 324.

329. Greenberg, *supra* note 39, at 49.

330. Note, *supra* note 8, at 253 (quoting Association of Trial Lawyers of America Annual Convention, 49 U.S.L.W. 2077 (July 29, 1980) (comments of John A. Burgess)).

331. For example, according to one student commentator, in United States v. Allen, 644 F.2d 749 (9th Cir. 1980),

> the Ninth Circuit Court of Appeals limited its discussion to whether the nonconsensual search and seizure of the suspect's briefcase were valid. . . . Although aware of the *Mendenhall* opinion, the court avoided the issue of whether the initial encounter constituted a seizure.
>
> The Fifth Circuit Court of Appeals also sidestepped the seizure issue in *United States v. Fry*, a case decided one month after *Reid*. In *Fry* the Court held that because the facts before the court were so similar to the facts of *Mendenhall*, the issue of whether the initial encounter was a fourth amendment seizure was inapposite and *Mendenhall* controlled. The court found, therefore, that regardless of whether the initial questioning constituted a seizure, that encounter did not violate the fourth amendment.

Note, *supra* note 8, at 230-31 (footnotes omitted). Shortly thereafter, the United States Court of Appeals for the Fifth Circuit noted in United States v. Robinson, 625 F.2d 1211, 1215 (5th Cir. 1980) that *Mendenhall* did not resolve the seizure issue. *See* Note, *supra* note 8, at 229 n.91.

332. *See, e.g.*, United States v. Ramirez-Cifuentes, 682 F.2d 337, 340 (2d Cir. 1982).

333. *See* United States v. Moeller, 644 F.2d 518 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 1097 (1981).

334. *See* United States v. Ramirez-Cifuentes, 682 F.2d 337, 343 n.6 (2d Cir. 1982) (The court stated that because *Mendenhall* provides little guidance, it would decline to accept the government's invitation to rule that the initial encounter was not a seizure. The court concluded that "[s]ince the stop was completely justified by an application of the principles of our traditional standard, we see no need to reach beyond them in the circumstances here.").

still others returned to *Terry* for guidance.[335]

In short, the Supreme Court in *Mendenhall* provided DEA agents with far more time in which to establish reasonable suspicion. Under *Mendenhall* the agents could glean more profile characteristics during an initial stop so as to justify their actions retroactively. Thus, the role of reasonable suspicion was limited to questions concerning the justification for asking a suspect to consent to accompany agents to a private office and to consent to an ensuing search.

To illustrate the significance of this boon to the DEA, it is useful to reconsider *Royer*, the Supreme Court's third drug courier case. Defendant Royer's conformance to the drug courier profile provided officers with all the justification they needed to stop and question Royer.[336] And when another profile characteristic—traveling under an assumed name—was discovered during the questioning, the officers had "adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage."[337] Indeed, the *Royer* decision effectively cast shadows on whatever ray of hope suspected drug couriers had after *Reid*—a chimerical hope at best. The *Reid* Court never considered whether a seizure in fact had occurred. The only factor mildly suggesting any criminal activity in *Reid* was the agents' belief that Reid and his companion were attempting to conceal the fact they were traveling together, and this was "too slender a reed to support the seizure."[338] Following *Royer*, however, an articulable suspicion of criminality could rest on one additional factor—but no less fragile a reed—traveling under an assumed name. This additional factor became known, of course, only after agents had temporarily detained and questioned Royer.

D. Royer: *The Attempt to Clarify*

The Supreme Court obviously viewed those present in *Royer* as quantitatively and qualitatively different from those present in *Reid*. Royer exhibited eccentric and evasive behavior before the agents approached him. Royer appeared pale and nervous, whereas Reid became nervous only after the stop. Royer paid for his ticket in cash using a large number of bills, but DEA agents did not discover until after they stopped him that Reid used a credit card. Finally, Royer wrote only a name and destination on the airline identification tag.[339]

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335. In United States v. Saperstein, 723 F.2d 1211 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit lamented the lack of strong legal precedent and suggested a return to *Terry*: "*Terry* provides lower courts with the only clear majority statement of the interests to be considered in this context." *Id.* at 1229 n.11.

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

337. *Id.* The plurality opinion in *Royer* actually suggested that "travelling under an assumed name" is not a profile factor—Royer's conformance with the profile, in conjunction with the fact he was traveling under an assumed name "were adequate grounds for suspecting Royer of carrying drugs." *Id.* However, the DEA and other courts treat use of an alias as a drug courier profile factor. *See, e.g.*, United States v. Fry, 622 F.2d 1218, 1221 n.2 (5th Cir. 1980); United States v. Lewis, 556 F.2d 385, 387 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

338. *Reid*, 448 U.S. at 441.

339. *Royer*, 460 U.S. at 493.

The *Royer* Court sought to distinguish *Reid* and attempted to clear the waters "muddied" by *Mendenhall*.[340] In *Royer* seven justices—a four member plurality and three dissenters—concluded, in effect, that the initial encounter between the officers and Royer was not a seizure for fourth amendment purposes.[341] The seven justices also implicitly subscribed to the *Mendenhall* "free to leave test,"[342] which originally had received the express endorsement of only two justices.[343] In addition, the *Royer* decision supports a number of propositions.

First, a law enforcement officer can stop and question any citizen, and the encounter is not converted into a seizure when the officer identifies himself or herself as a narcotics agent.[344] Second, if the citizen refuses to listen or walks away, the officer cannot detain the citizen even momentarily without reasonable objective grounds for doing so.[345] Third, when the public interest involved concerns suppression of illegal transactions in drugs or any other serious crime, a temporary detention for questioning—investigative interrogation—is warranted if the officer has an articulable suspicion of criminality.[346] Fourth, when only a reasonable suspicion of criminality exists, the investigative interrogation must not be transformed into a custodial interrogation or a full search of the citizen or his or her effects—in other words, the investigative interrogation must be temporary (lasting no longer than is necessary to effectuate the purpose of the stop), and the investigative methods employed should be limited in scope (the least intrusive means reasonably available to verify or dispel the officer's suspicion).[347] Last, the government bears the burden to establish that the seizure was "sufficiently limited in scope and duration."[348]

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340. United States v. Nembhard, 676 F.2d 193, 201 n.7 (6th Cir. 1982).

341. Justice White's plurality opinion stated that:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, [and] by asking if he is willing to answer some questions . . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of justification.

Royer, 460 U.S. at 497. In his dissent, Justice Rehnquist stated: "I agree with the plurality's intimation that when the detectives first approached and questioned [defendant] Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked." *Id.* at 523 n.3 (Rehnquist, J., dissenting).

342. The plurality concluded that the circumstances surrounding Royer's detention "surely amount[ed] to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' " *Id.* at 502 (quoting *Mendenhall*, 446 U.S. at 554). By noting the absence of "any evidence of objective indicia of coercion," *id.* at 532, surrounding Royer's detention, three dissenting Justices suggested that Royer was free to leave. Specifically, Justice Rehnquist noted:

> Royer was not told that he had to go to the room, but was simply asked, after a brief period of questioning, if he would accompany the detectives to the room. Royer was informed as to why the officer wished to question him further. There were neither threats nor any show of force. . . . The detectives did not touch Royer and made no demands.

Id. at 531 (Rehnquist, J., dissenting).

343. *Mendenhall*, 446 U.S. at 554.

344. *Royer*, 460 U.S. at 497.

345. *Id.* at 498.

346. *Id.* at 498-99.

347. *Id.* at 500.

348. *Id.*

Applying the above principles to the facts, the *Royer* Court concluded that "when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known [that Royer's conduct fit the drug courier profile] . . . were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage."[349] The Supreme Court affirmed the reversal of Royer's conviction, however, because the investigative interrogation was not sufficiently limited in scope or duration and, thus, it had become a custodial interrogation and detention. By holding the "free to leave" test inapplicable when factors suggest that a reasonable person is not free to leave, *Royer* limits *Mendenhall* and places perimeters on police-citizen encounters.

E. Rodriguez: *A Bad Response To A National Crisis*

The Court's decision in *Rodriguez* added little to the legal analysis in *Royer*. *Rodriguez* demonstrates, however, that the Supreme Court views furtive and evasive actions as significant indicia of criminality, and, as Justice Stevens noted in his dissent, that the Court has become "transfixed by the spectre of a drug courier escaping the punishment that is his due."[350] In addition to ignoring substantial procedural irregularities suggesting that the Court never should have heard the case,[351] the *Rodriguez* Court strained its discussion of the substantive issue by suggesting that agents could justify a seizure based on the appropriate facts. In *Rodriguez*, for example, defendant "ran in place" after seeing the officers and after a cohort had told him twice to "get out of here."[352]

The Court's reasoning in *Rodriguez* appears blatantly incongruous with its "free to leave" test. When a defendant flees upon the approach of DEA agents, that act does not suggest that he or she felt free to leave. The Court, however, reasoned that such conduct creates a reasonable suspicion of criminality.[353] If Rodriguez had stopped and answered questions, reasonable suspicion might never have surfaced. Only after a deepening of the intrusion, such that Rodriguez reasonably felt he was not free to walk away, would a seizure have ensued.

A review of the Supreme Court's decisions in drug courier profile cases unfortunately leaves lower courts with far more questions than answers. The procedure by which drug agents either corroborate or allay their suspicions is fraught with unanswered fourth amendment issues. However, the "free to leave" test is the only guidance provided by the Supreme Court. This Article now examines and critiques that test.

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349. *Id.* at 502.
350. *Rodriquez*, 469 U.S. at 7 (Stevens, J., dissenting).
351. *Id.*
352. *Id.* at 3-4.
353. *Id.* at 6.

VI. PROGNOSIS AND CONCLUSION

"Will you walk into my parlour?"
Said the spider to a fly.
(You may find you have consented,
Without ever knowing why.)[354]

A. *The "Free To Leave" Test: Alive But Terminally Afflicted*

The Supreme Court generally has treated the airport as if it were a world apart.[355] As this Article has demonstrated, the Court initially placed too much credence in the drug courier profile and deferred too often to the "trained eye" of DEA agents. The *Mendenhall* "free to leave" test constitutes but one example of a response designed to avert "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics."[356]

Nonetheless, the test suffers from numerous deficiencies[357] that warrant careful review and scrutiny by the courts. First, the "free to leave" test is inconsistent with *Terry*.[358] The specific issue addressed in *Terry* was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons" when no probable cause exists to justify the arrest of that person.[359] "Given the narrowness of this question," the Court expressly declined to rule on the constitutionality of the initial stop.[360] The *Terry* Court expressed concern that overly technical definitions would remove initial stops from judicial scrutiny and create a bright-line model such that nearly identical police conduct could fall on either side of the seizure/nonseizure definitional line.[361]

The *Mendenhall* Court abandoned this concern and renewed attempts at

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354. *Mendenhall*, 446 U.S. at 577 n.15 (White, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

355. Under traditional *Terry* analysis, fourth amendment protections would not disappear on the utterance of the magic words "drug courier profile." Today, however, courts no longer deny that they have created a separate genre of rules for airport stop cases. As Justice Blackmun stated in his dissent in *Royer*:

> Here, Royer was not taken from a private residence, where reasonable expectations of privacy perhaps are at their greatest. Instead, he was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude, certainly no greater than the reasonable privacy expectations of travelers in automobiles.

Royer, 460 U.S. at 515 (Blackmun, J., dissenting).

Justice Blackmun reasoned from a flawed premise, however, because DEA agents generally target most investigative stops against deplaning passengers who not only have passed beyond security checkpoint areas but who are leaving the airport. Thus, no airport security policy is implicated, and the traveler's reasonable expectations of privacy are not "of significantly lesser magnitude."

356. United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3309 (1985).

357. *See, e.g.*, Greenberg, *supra* note 39, at 68; Comment, *supra* note 62, at 1493-1502.

358. *See* Comment, *supra* note 62, at 1493-99.

359. *Terry*, 392 U.S. at 15.

360. *Id.* at 16; *see also*, Comment, *supra* note 62, at 1495 (discussing how the *Terry* Court analyzed the "frisk" issue without deciding whether the police had reasonable grounds to confront Terry).

361. *Terry*, 392 U.S. at 17 & n.15.

haphazard line-drawing.[362] Under *Mendenhall* and *Royer* DEA agents need not advance an objective justification for their initial stops, because purely subjective and arbitrary drug profile characteristics provide sufficient justification. This result arises even if a court views the initial encounter as intrusive rather than de minimis.[363]

Second, the "free to leave" test is difficult to apply.[364] Ordinarily, a judge must determine what a reasonable person would have done under the circumstances.[365] Under *Mendenhall* the judge must determine if a reasonable person who did not walk away nevertheless would have "[believed] that he [was] free to ignore an inquisitive officer and walk away."[366] The "psychological nature of this factual question [makes] it unlikely that courts can realistically and uniformly apply the *Mendenhall* test to determine whether liberty has been restrained."[367] And a conclusion about a particular defendant's belief ordinarily

362. *See Mendenhall*, 446 U.S. at 552-55. Instead of focusing on the *Terry* Court's suggestion that courts not distinguish between stops and seizures, the *Mendenhall* Court seized on "selected dicta" in *Terry*—whenever a police officer accosts an individual and restricts his or her freedom to walk away a seizure occurs, *Terry*, 392 U.S. at 19 n.16,—to support its free to leave test. *See* Comment, *supra* note 62, at 1495; *see also* Constantino, Cannovo & Goldstein, *supra* note 39, at 197:

> *Terry* and its progeny indicate that the proper inquiry concerning police intrusions based on less than probable cause must focus squarely on the dangers and demands of a particular situation. In adopting this "totality of the circumstances" approach to general investigatory stops, a vast array of police conduct has been subjected to the general proscriptions of the fourth amendment. The fourth amendment consequently has become a vehicle for deterring a wide range of police misconduct.
>
> The *Mendenhall* Court, however, focused its analysis upon the distinctions between intrusive behavior and nonintrusive behavior and thereby displaced the *Terry* balancing test with a rigid model of regulation. The implications are ominous. Once special police conduct is sanctioned in airports, it also may be tolerated in other public places.

Id.

363. *See* Greenberg, *supra* note 39, at 68. Professor Greenberg expanded on this notion:

> Justice Stewart's *Mendenhall* opinion erred at the outset by taking the faulty *de minimus* [sic] intrusion analysis of *Martinez-Fuerte* and *Mimms* a further step in the wrong direction. By finding no "seizure" in the initial airport contact, Justice Stewart also analytically returned to the pre-*Terry* technique of authorizing obvious governmental intrusions without any probability support by finding that no right guaranteed by the fourth amendment was implicated. Moreover, in light of Justice Rehnquist's joinder, and the refusal of Chief Justice Burger, Justice Powell and Justice Blackmun to reject Justice Stewart's view, the Stewart pre-*Terry* analysis may eventually win a Court majority.
>
> To justify the stop as "an encounter that intrudes upon no constitutionally protected interest," Justice Stewart turned to the concurring opinions in *Terry*. Quoting Justices White and Harlan, Justice Stewart concluded that there could be no "seizure" cognizable under the fourth amendment absent restraint on a person's movement, either by physical force or by "a show of authority."
>
> Justice Stewart, however, simply avoided the key initial inquiry. Regardless of whether a citizen is free to walk away, the preliminary police encounter *itself* well may be viewed as intrusive, depending upon the factual context. Merely because Justice Stewart would not tolerate *subsequent* severe intrusions that prevent walking away does not mean that the *initial* stop is a *de minimis* intrusion, or worse yet, not a seizure.

Id. at 68-69 (footnotes omitted).

364. *See* Comment, *supra* note 62, at 1498.

365. *See* Comment, *supra* note 62, at 1498.

366. *See* Comment, *supra* note 62, at 1498.

367. *See* Comment, *supra* note 62, at 1498. *Compare* United States v. Bowles, 625 F.2d 526, 531-33 (5th Cir. 1980) (seizure upheld) *with* United States v. Elmore, 595 F.2d 1036, 1038 (5th Cir. 1979) (court found as one of the distinguishing factors the fact defendant Bowles scurried down the concourse, whereas defendant Elmore was sitting), *cert. denied*, 447 U.S. 910 (1980). Furthermore,

must be inferred because defendants rarely testify at suppression hearings.[368]

Last, the "free to leave" test ignores real social pressures that impel people to cooperate with the police.[369] Reasonable people who believe they are free to walk away from a police encounter seldom do so because (1) they feel strong social pressure to respond to police questioning;[370] (2) they fear the ramifications of not cooperating; or (3) they fear that walking away would create more suspicion.[371] Thus, it defies logic to assume that suspected drug couriers feel "free to leave" when DEA agents approach and arrest them, even if such suspects are otherwise reasonable people.

B. *The Proper Role of the Profile*

Primarily relying on the Supreme Court's "free to leave" test,[372] lower courts have sanctioned profile stops with increasing regularity.[373] Several reasons may explain this phenomenon. First, perhaps judges have sympathized with the DEA's efforts to curb narcotics trafficking, so that they cannot pay proper homage to the rights of air passengers suspected of carrying narcotics.[374] Second, perhaps the retrospective realization that the suspected courier actually possessed narcotics subconsciously has influenced judges, so that they cannot

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even reasonable judges have found it difficult to reconcile Mendenhall's belief that she was free to go with Royer's belief that he was not free to go. This explains the various dissents and concurring opinions in those cases. *See supra* text accompanying notes 280-83, 292-94.

368. This conclusion is based on the author's experience as a judge and criminal defense trial attorney.

369. *See* Comment, *supra* note 62, at 1498-99.

370. The Supreme Court in Miranda v. Arizona, 384 U.S. 436, 477-78 (1966), recognized that a citizen has a responsibility to cooperate with the police.

371. One student commentator has noted:

> People cooperate with the police because they have been trained to submit to the wishes of persons in authority or because they fear that refusal to cooperate will create further suspicion. But according to the American Law Institute (ALI), "regardless of the motive, the cooperation is clearly a response to the authority of the police."
>
> The ALI's conclusion that cooperation with the police is largely a response to police authority is strongly supported by a seminal study of police field stops. The study's author observed more than four hundred field stops in two different states. The author found that some of the questions would have been intolerable if asked by someone other than a police officer. Of three hundred field stops observed in Chicago alone, not once did a confronted person refuse to answer the interrogator. "The only conclusion that can be drawn from these observations is that the presence of a police officer, no matter how pleasant his demeanor, implies the potential use of force—force at least to effectuate the stop if not to compel the answers." Given this perceived potential use of force by the officer should the person refuse to cooperate, it is not surprising that, when confronted, a person does not ignore the officer.

Comment, *supra* note 62, at 1500 (footnotes omitted) (quoting ALI MODEL CODE OF PREARRAIGNMENT PROC. 259-60 (1975); Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 465, 473 (1967)).

372. *Mendenhall*, 446 U.S. at 554.

373. Green & Wice, *supra* note 57, at 284.

374. Courts tend to narrow the scope of defendants' rights when weighty governmental interests tilt the fourth amendment scales. *See supra* note 319. Even now the exclusionary rule hangs precariously in the balance. *See* Mertens & Wasserstrom, *The Exclusionary Rule on the Scaffold: But was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984).

exercise the requisite degree of "disassociative objectivity."[375] Last, perhaps the drug courier profile itself places too high a premium on the subjective avowals of "law enforcement officers whose actions are being reviewed."[376]

Whatever reasons impel the Supreme Court's continued countenance of investigative stops based solely on the drug courier profile, and however thin becomes the line between subjective hunch based on statistical possibility and objective fact, courts should not allow the drug courier profile to obviate the need for traditional fourth amendment analysis.[377] It cannot be denied that some profile characteristics, when properly applied, accurately predict criminality. In many cases, however, DEA agents improperly use profile characteristics as a substitute for judgment; they attempt to apply those characteristics after the initial stop. In other cases drug agents combine numerous weak factors that do not amount to "reasonable suspicion," and courts passively accept the results by relying on the drug agents' use of the drug courier profile. Thus, the profile simply is too susceptible to selective enforcement and retrospective application to support a retreat from *Terry*'s requirement of objective factfinding.[378]

Courts must assess the objective bases of profile encounters with due regard for the timing of DEA agents' observations and intrusions. Furthermore, courts must not give excessive deference to DEA agents' assertions. That agents have in fact caught many drug couriers in the *Mendenhall* and *Royer* dragnet does not alleviate the baleful impact of those cases on fourth amendment jurisprudence. With the entrenchment of the drug courier profile, agents may randomly stop citizens for arbitrary reasons or for innocent differences in their appearance from fellow passengers. Agents then may detain citizens until the agents gather enough evidence to "call out the dogs"[379] or conduct a search themselves. The more significant indicia of criminality usually remain undiscovered until a stop

375. *See* Magistrate's Report at 6-7, United States v. Thomas, No. CR78-223A (N.D. Ga. Nov. 1, 1978).

376. *See* United States v. Price, 599 F.2d 494, 502 n.10 (2d Cir. 1979).

377. The "free to leave" test is at odds with the *Terry* balancing test; it departs from traditional fourth amendment analysis that requires objective fact finding and it treats airports as if they were a world apart. *See* Constantino, Cannavo & Goldstein, *supra* note 39, at 197-98.

378. Constantino, Cannavo & Goldstein, *supra* note 39, at 197-98.

379. The *Royer* Court suggested that the use of trained dogs "to detect the presence of controlled substances in luggage" was "feasible and available." *Royer*, 460 U.S. at 505-06. When given the opportunity to rule directly on that issue, the Court concluded that dog sniffs do not constitute searches. *See* United States v. Place, 462 U.S. 696, 698 (1983).

Place represents another chink in fourth amendment monolithic armor. *Place* is the first Supreme Court decision authorizing the seizure of personal property (luggage), as opposed to the brief detention of persons, on less than probable cause. The *Place* Court itself implied that it had to resolve an issue of first impression:

> In this case, the Government asks us to recognize the reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion. Specifically, we are asked to apply the principles of Terry v. Ohio . . . to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime. In our view, such application is appropriate.

Id. at 702.

has occurred.[380] Furthermore, the drug courier profile generally precludes a particularized focus.[381] Thus, dependence solely on the profile tends to emasculate the requirement that courts consider the totality of the circumstances before upholding a search and seizure.

Consequently, courts should consider the profile as "nothing more than an administrative tool of the police."[382] It may guide an agent toward a person to determine whether that particular individual is a drug courier.[383] It may alert the agent to initiate surveillance. This use, however, would not support the particularized suspicion of narcotics trafficking. The proper role of the drug courier profile is not to establish in court that agents had a reasonable suspicion before the stop. Rather, it should serve as a tool for DEA agents to use in identifying suspects, following or investigating further, and stopping suspects once reasonable suspicion actually exists.

Because the courts cannot monitor the profile effectively and should not attempt to do so, use of the profile in enforcement should be curtailed. Courts should consider only those factors that, in advance, intuitively or demonstrably relate to drug courier conduct or those characteristics that do not also include large numbers of innocent travelers. Courts should also require a showing in each case that the agent had reasonable suspicion to stop and detain a person from observations judged on their own merit, rather than as part of a larger composite and all encompassing profile. This last requirement is important not to give drug couriers "fair warning," but to assure proper police enforcement practices and to ensure that stops are based on specific reasonable inferences.

Nothing said in this Article, or left unsaid, converts ordinary police-citizen encounters, whether the typical "street encounter" or otherwise, into fourth amendment seizures. Nor does any postulate advanced herein preclude the use of all drug courier profile characteristics in establishing reasonable suspicion so as to justify an investigative stop.[384] When, however, a narcotics agent has stopped an air traveler based solely on the drug courier profile, the agent must articulate the particular individualized factors that raised his or her suspicion and justified the initial encounter.[385] Courts should require objective justifica-

380. *See Royer*, 460 U.S. at 494.

381. *See* J. MONAHAN & L. WALKER, *supra* note 17, at 193-94.

382. United States v. Berry, 670 F.2d 583, 600 (5th Cir. Unit B 1982).

383. *Id.* at 600 n.21.

384. As the court stated in *Berry*:

> If an officer can demonstrate why some factor, interpreted with due regard for the officer's experience and not merely in light of its presence on the profile, was, in the particular circumstances of the facts at issue, of such import as to support a reasonable suspicion that an individual was involved in drug smuggling, we do not believe that a court should downgrade the importance of that factor merely because it happens to be part of the profile. Our holding is only that we will assign no characteristic greater or lesser weight merely because the characteristic happens to be present on, or absent from, the profile.

Id. at 601. This emphasis on a "totality of circumstances" analysis requires narcotics agents to "have a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981).

385. *See* 3 W. LAFAVE, *supra* note 2, § 9-3, at 48 (Supp. 1986); *see also In re* Tony, 21 Cal. 3d 888, 582 P.2d 957, 48 Cal. Rptr. 366 (1978) (officer must provide objective justification when a police-citizen encounter is initiated because the officer suspects the citizen of criminal activity).

tion based on a particularized focus when the agent's intent in initiating the encounter was to satisfy his or her suspicion of narcotics trafficking.

A resulting bright-line rule emerges that should govern all drug courier profile cases: All airport drug stops based solely on the drug courier profile constitute seizures requiring reasonable suspicion before further probing by the police. This bright-line rule would alert narcotics agents to the perimeters of what they can and cannot do. It overrides case by case adjudications and, therefore, eliminates some of the fine distinctions and minor gradations that have plagued fourth amendment jurisprudence.[386] Equally important, this rule does not thwart the DEA's efforts to stem the flow of narcotics from passing through airports. It merely requires (1) a necessary paring of drug courier profile characteristics; (2) more multiple airport surveillance;[387] and (3) a specific focus on salient or particularized factors. Agents can identify many of the salient factors—for example, use of an alias, abnormal and obvious bulge visible under clothing, informants' tips, association with known narcotics dealers, positive narcotics dog sniff, bogus "call-back" number, and switching baggage claim stubs[388]—prior to an initial encounter with a suspected drug courier.

In short, "the strength of a society's interest in overcoming the extraordinary obstacles to the detection of drug traffickers"[389] "cannot excuse [courts] from exercising [their] unflagging duty to strike down official activity that exceeds the confines of the Constitution . . . [or] blind[s] us to the peril to our free society that lies in [courts] disregard[ing] the protections afforded by the Fourth Amendment."[390] The bright line rule proposed by this Article does not overprotect trafficking in drugs just because it deems initial encounters between drug agents and travelers as seizures. Rather, the government simply has to justify the seizure by satisfying the articulable and reasonable suspicion standard.

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386. *See* Amsterdam, *supra* note 318, at 393-94.

387. Drug couriers make roundtrip flights to source cities. Observations of profile-conforming passengers at source and hub city airports has proven fruitful even when the passengers are not detained. Data obtained as a result of these observations and follow-up investigations are transmitted to law enforcement officials in use city airports. These officials, drawing inferences from their observations and from the specific individualized data transmitted, will have a more objective basis for suspecting the person under surveillance for narcotics trafficking.

For example, in United States v. Morin, 665 F.2d 765, 766 (5th Cir. 1982), the nervous defendant used cash to purchase his one-way ticket to Dallas/Ft. Worth minutes before the noon departure time. A suspicious airline ticket agent contacted a Miami police officer whose subsequent investigation revealed the following: (1) Morin left a callback number for the Marriott Hotel; (2) the hotel clerk reported that Morin used a $100 bill to pay for his room and did not get his $24 change; and (3) Morin had prior narcotics convictions and was a suspected smuggler in a Columbian drug operation. This information was transmitted to law enforcement officials in Dallas who placed Morin under surveillance and subjected his checked luggage to a narcotics dog sniff test. The test proved negative. Morin was later detained when he deplaned in Austin. *Id.* at 766-67. The detention was considered an arrest and Morin's conviction was subsequently reversed. *Id.* at 770; *see* United States v. West, 651 F.2d 71, 72 (1st Cir. 1981) (discussing multiple airport surveillance), *vacated*, 463 U.S. 1201 (1983). Other multiple airport surveillance cases include United States v. Chapman, 573 F.2d 565, 566-67 (9th Cir. 1978); and United States v. Van Lewis, 409 F. Supp. 535, 539-40 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

388. *See, e.g.*, United States v. Ehlerbracht, 693 F.2d 333, 336 (5th Cir. Unit B 1982) (unusual protrusion under defendant's trouser leg; bogus call-back number).

389. *Royer*, 460 U.S. at 513 (Blackmun, J., dissenting).

390. *Id.* at 512-13 (Brennan, J., concurring).

Finally, to instill any meaning into the second tier of police-citizen encounters—brief seizures—"reasonable suspicion" must mean more than a subjective judgment based on an amorphous statistical data so obviously susceptible to bias, misuse, and arbitrary enforcement. Otherwise, law enforcement officials must make constitutional gray area decisions on an ad hoc basis. The fourth amendment simply weighs too much for the drug courier profile's "slender reed" to support[391]—at least as courts presently understand and interpret the meaning of that profile.

391. Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam).

APPENDIX

The proliferation of drug courier profile characteristics is best illustrated by a nearly exhaustive list of factors—conduct or characteristics—deemed sufficiently significant by DEA agents to warrant the detention of airline passengers, categorized under the following topical headings:

1. Reservations and Ticket Purchases
2. Airports and Flights
3. Nervousness and Associated Behavior
4. Significance of Luggage
5. Companions (traveled with or picked up by)
6. Personal Characteristics
7. Miscellany

Without regard to consistency, DEA agents have testified that the factors listed under these topical headings form part of the bases on which they detain air travelers. Even a cursory review of the factors will disclose inconsistency and, perhaps, absurdity, among some of these factors. The list of factors is based on the author's survey of the hundreds of reported and unreported drug courier profile cases.

Charts on the pages that follow list the factors that chronicle the drug courier profile cases from three of the most active courts in this area of the law—the United States Courts of Appeals for the Fifth and Sixth Circuits, and the United States District Court for the Eastern District of Michigan. Using the seven topical headings and the corresponding alphabetical entries, one can determine the factors known to DEA agents at the time the defendants in each of the listed cases were searched. The cases are listed in chronological order and *Mendenhall* and *Reid* are included on each chart for comparative review. Cases that involved international flights or that focused on issues other than the drug courier profile have been excluded from the listed cases.

LEGEND

RESERVATIONS AND TICKET PURCHASES

A = No reservation
B = Ticket purchased immediately before flight departure time
C = Recent or short-notice reservation
D = No call-back number given to airline
E = Bogus or false telephone call-back number
F = Use of motel call-back number
G = Use of alias
H = Cancelling reservations
I = Skipping flights
J = Round-trip ticket
K = One-way ticket
L = First-class ticket
M = Any ticket purchased with cash, especially small denominations
N = Any ticket purchased with cash, especially large denominations
O = Any ticket purchased with cash, small or large denominations
P = Any ticket purchased with cash from large roll of bills
Q = Use of separate tickets when a single ticket could have been obtained for the same trip
R = Quick turn-around trip
S = Early morning flights
T = Early morning arrival (off-peak)
U = Early weekday morning return flight
V = Short layover

AIRPORTS AND FLIGHTS

A = Source city
1. Frequent flights to and from source city
2. Short turn-around trip to source city
3. Non-stop flight to and from source city
4. Direct flights to and from source city
5. Unusual itinerary—taking circuitous routes from source city
6. Changing airlines or flights en route to source city
7. Taking connecting flights to and from source city
8. "On a flight from the west coast"

B = Use city
C = Transshipment city
D = Hub city
E = Cross-roads city
F = Incoming flights
G = Outgoing flights

NERVOUSNESS AND ASSOCIATED BEHAVIOR

A = Tell-tale eyes
B = Rushing to restroom after deplaning
C = Unusual conduct in restroom
D = Leaving terminal directly in hurried and nervous manner
E = Looking over shoulder often while walking
F = Walking quickly
G = Walking slowly
H = Walking in unusual pattern through terminal
I = Unusual manner of walking
J = Wobbling
K = Bumping into people
L = Hesitating while passing through magnetometer
M = Hesitating before proceeding past security checkpoint
N = Staring directly at DEA agent
O = Nervous mannerisms
P = Recognizing agent or reacting to agent's presence by growing nervousness
Q = Being very tense
R = Becoming nervous during identification stop, rapid breathing, shaking hands
S = Shortness of breath
T = Perspiring profusely
U = Appearing "cool"
V = Calm demeanor
W = Hesitating before speaking
X = Choppy speech
Y = Quivering voice
Z = False statement blurted out without reason
AA = Scanning arrival or baggage area
BB = Continuing to stare at suitcase after checking it
CC = Holding one's luggage in an unusual manner

SIGNIFICANCE OF LUGGAGE

A = Checking no luggage
B = Carrying no luggage
C = Checking large empty suitcase
D = Use of empty, or near-empty, suitcase
E = Carrying small gym bag, tote bag, or little luggage
F = Carrying bags with only a few hangers on cross-country flight
G = Carrying medium-size bag
H = Carrying two bulky garment bags
I = Carrying "two apparently heavy-laden suitcases"
J = Carrying large, light-colored man's purse
K = Carrying luggage with small padlock identical to those observed twice before by agents on bags containing narcotics
L = Carrying American Tourister luggage (standard brand for marijuana smugglers)
M = Traveling with new suitcases
N = Carrying heavily perfumed suitcases
O = Carrying leather briefcase
P = Carrying Haliburton briefcase
Q = Carrying two pieces of luggage that lack identification
R = Two people carrying identical unmarked suitcases
S = Discrepancy in identification tag addresses and other identification
T = No baggage claim stub attached to ticket
U = Attempting to disclaim luggage
V = Failing to claim baggage at claim area
W = Switching baggage claim stubs
X = Having person who picked traveler up claim luggage at claim area
Y = Exchanging luggage
Z = Continuing to stare at suitcase after checking it
AA = Disassociative behavior towards briefcase
BB = Holding one's luggage in an unusual manner
CC = Holding briefcase firmly
DD = Manner of lifting suitcase previously thought to be empty
EE = Refusing to consent to search of bag at initial encounter
FF = Holding fairly large shopping bag in front of torso

COMPANIONS (TRAVELED WITH OR PICKED UP BY)

A = Individual traveling alone
B = Two or more people traveling together
C = Traveling together, but attempting to appear separate
D = Disclaiming knowledge of traveling companions
E = Meeting known drug dealers
F = Suspicious hand signals; secretly passing piece of paper

PERSONAL CHARACTERISTICS

A = Black male
B = Female
C = Black female
D = Hispanic
E = Youth
F = Age
G = Unusual clothing
H = Sloppily dressed
I = Disheveled appearance
J = Casual dress
K = Wrinkled suit
L = Non-businessman attire
M = Failure to change clothes
N = Collar-length hair
O = Fu Manchu mustache
P = Beard
Q = Smartly dressed (e.g. expensively tailored denim pantsuits)

MISCELLANY

A = First, or one of the first, to deplane
B = Last to deplane
C = Deplaning from the middle
D = Deplaning two-thirds of the way in
E = Holding up the line to scan area
F = Deplaning after fifteen passengers
G = Deplaning after twenty-five to thirty passengers
H = Placing local phone call immediately after deplaning
I = Placing long-distance phone call immediately after deplaning
J = "[T]he first to proceed straight through the terminal and exit"
K = Unusual limp or manner of walking
L = Attempting to leave the airport immediately, especially by way of taxi
M = Attempting to use public transportation to leave airport
N = Exiting terminal at upper level where there is no access to public transportation
O = Using limousine to leave airport
P = Using hotel courtesy van
Q = Attempting to leave airport in private vehicle
R = Going to large nearby hotel after deplaning
S = Rushing or running into airport immediately prior to flight departure time
T = Giving false answers to DEA agents
U = Giving DEA agents deceptive answers
V = Stating to DEA agents that they are recognized
W = Refusing to consent to search of bags at initial encounter while allowing search of boots
X = Having money or drugs in boots
Y = Abnormal and obvious bulge visible under clothing
Z = Traveling with large amounts of currency
AA = Having no identification
BB = Anything that arouses agent Wankel's suspicion
CC = Fair-skinned and displaying no tan
DD = Fumbling for ticket
EE = Methodically folding ticket before discarding it
FF = Bouncing a golf ball
GG = Carrying candy and measuring spoons
HH = Not having a ticket folder
II = Anonymous tips
JJ = Informants' tips
KK = Known smuggler
LL = Rental of apartment under surveillance
MM = Association with known narcotics dealer
NN = Multiple airport surveillance
OO = Narcotics dog sniff positive

DISPOSITION OF MOTION TO SUPPRESS

A = Affirmed
R = Reversed
G = Granted
D = Denied
RS = Reasonable suspicion
NRS = No reasonable suspicion
PC = Probable cause
NPC = No probable cause

CASES AND PROFILE FACTORS: FEDERAL DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN

CASES	ORIGIN/ DESTINATION	TOA	AGENT(S)	RESERVATIONS/ TICKET PURCHASE	AIRPORTS & FLIGHTS	NERVOUSNESS	LUGGAGE	COMPANIONS	PERSONAL CHARACTERISTICS	MISCELLANY	DISPOSITION
VAN LEWIS	Los Angeles - Detroit	6:43 a.m.	Markonni	G M R	A2	O P	B D	A	M	KK LL	D: PC
HUGHES	Los Angeles - Detroit	4:00 p.m.		G	A3	F O	A E	B	B Q	L	G: NPC
ROGERS	Los Angeles - Detroit	a.m.	Back Macek	G	A3	E F O AA	A E O	A		L AA	G: NRS
FLOYD	Los Angeles - Detroit	7:40 p.m.	Markonni		A3	O	A F	C		Q	G
E. ALLEN	Los Angeles - Detroit	10:14 a.m.	Markonni	G	A7	O AA		A	C	H/I L U AA MM	D: PC
CHAMBLIS	Los Angeles - Detroit	4:30 p.m.	Wankel		A3	O	E	A		H/I N	G: RS (stop) NPC (arrest)
DEWBERRY	Los Angeles - Detroit	8:00 p.m.	Markonni Anderson		A		X U	B	B	T MM	D: RS
McCLAIN	Los Angeles - Detroit	7:18 p.m.	Markonni		A	O		A		H/I	G
COLEMAN	Los Angeles - Detroit	mid-day	Markonni	G	A3	P	A B	A	A	J	G
MENDENHALL	Los Angeles - Detroit - Pitts.	early	Anderson	G T	A2 A6	E G O R AA	V	A	C	B	
REID	Ft. Lauderdale - Atlanta	early	Markonni	T		E	A E	C			
COLLIS	Miami - Detroit		Anderson Demmink		A	F N R	E	A	L	A	G: NPC

CASES AND PROFILE FACTORS: SIXTH CIRCUIT

CASES	ORIGIN/ DESTINATION	TOA	AGENT(S)	RESERVATIONS/ TICKET PURCHASE	AIRPORTS & FLIGHTS	NERVOUSNESS	LUGGAGE	COMPANIONS	PERSONAL CHARACTERISTICS	MISCELLANY	DISPOSITION
McCALEB	Los Angeles - Detroit		Markonni	M R	A2 A3	B O U	A E S	B	B M	H/I T	R: NRS, NPC
CRAEMER	Cleveland - Miami	3:25 a.m.	Magouh	J P R	A2	O	A	B	B H	JJ KK	A: NPC
VAN LEWIS	Los Angeles - Detroit	6:43 a.m.	Markonni	G M R	A2	O P	B E		M	KK LL	A: PC
POPE	Los Angeles - Cleveland		Magouh Johnson	P	A	E P	A E	A			R: (other grounds) PC (flight)
SMITH	Los Angeles - Detroit		Seward	G	A3	D	A E	A	B E	Y	A: PC
ANDREWS	Los Angeles - Detroit	4:00 p.m.	Markonni		A	O V		C	A	II	R: NPC
MENDENHALL	Los Angeles - Detroit - Pitts.	early	Anderson	G T	A2 A6	E G O R AA	V	A	C	B	
REID	Ft. Lauderdale - Atlanta	early	Markonni	T		E	A E	C			
GARRETT	Los Angeles - Dallas - Cincin	9:00 a.m.	Handorf	G M T	A			A	A	H/I JJ	R: NPC
JEFFERSON	Los Angeles - Detroit		Markonni		A	F P AA		A	A	H/I JJ	R: NRS
NEMBHARD	New York - Detroit		Moorsitt		A	E F O P AA	Y A	C	A	A T H/I L	R: RS
MOORE	Ft. Lauderdale - Detroit		Dunn McCoy	B L	A	R AA	A	C		A T L	A: RS, PC
TOLBERT	Miami - ATL - Detroit		Chapman Barkhalter	A B G J M		E O R	E	A	B	T	R: RS
SANDERS	Miami - ATL - Memphis	a.m.	Markonni Griggs	G K M Q S		R	V	A	B	NN OO	R: NPC
SAPERSTEIN	Detroit - NY - Detroit	p.m.	Demmink	C J M R	A2		C	A	F P	T	Vacated: NRS

CASES AND PROFILE FACTORS: FIFTH CIRCUIT

CASES	ORIGIN/ DESTINATION	TOA	AGENT(S)	RESERVATIONS/ TICKET PURCHASE	AIRPORTS & FLIGHTS	NERVOUSNESS	LUGGAGE	COMPANIONS	PERSONAL CHARACTERISTICS	MISCELLANY	DISPOSITION
BALLARD	Los Angeles - New Orleans	3:39 a.m.	Donald	T	A	F O	A E	A	A	II	R: NRS, NPC
ELMORE	Detroit - ATL - Birmingham	5:00 p.m.	Chapman Markonni	G R	A2 B	E H O P R	B T	A		T KK	A: No seizure
ROUNDTREE	Los Angeles - ATL - Ft. Lauderdale	p.m.	Markonni	G	A6 B	I	B T	A		K T Y	A: RS
MENDENHALL	Los Angeles - DET - Pittsburgh	early	Anderson	G T	A2 A6	E G O R AA	V	A	C	B	
REID	Ft. Lauderdale - Atlanta	early	Markonni	T		E	A E	C			
FRY	Miami - ATL - Kansas City		unidentified	A C G	A6 B	E N	E T	B		B NN	A: no seizure, then consent
BOWLES	Los Angeles - ATL - Chattanooga	7:15 p.m.	Dorsett	B G	A3	G N O R		C	A	T KK	A: seizure, but RS
ROBINSON	Miami - ATL - Birmingham	3:15 p.m.	Markonni Dorsett	G	A	E G N O AA	A E O T	A		II	Remand re seizure issue
HILL	Los Angeles - ATL - Raleigh/ Durham	5:30 a.m.	Markonni	C T	A2 A5			A	A G	KK	R: seizure, and NPC
TURNER	Miami		Markonni	G	A3	R	A B	C	G	Q Y	A: consent
PULVANO	West Palm Beach - ATL - Newark	8:45 a.m.	Chapman Mathewson	C D E K M	A3 B		E T	A	G I	I T	A: no seizure, then consent
BERD	Miami - ATL - Memphis	5:30 a.m.	Markonni	C E G T	A3		A E T	D C			no seizure, A: then RS & seizure
GOLDSTEIN	Orlando - Washington, DC	6:45 a.m.	Maroney Fletcher	G K S T	A		S	C	G P	Z OO	A: (positive PC dog sniff)

CASES AND PROFILE FACTORS: FIFTH CIRCUIT (CONTINUED)

CASES	ORIGIN/ DESTINATION	TOA	AGENT(S)	RESERVATIONS/ TICKET PURCHASE	AIRPORTS & FLIGHTS	NERVOUSNESS	LUGGAGE	COMPANIONS	PERSONAL CHARACTERISTICS	MISCELLANY	DISPOSITION
BERRY	Miami - ATL	11:30 a.m.	Markonni	G	A	E F N O R		C	B	B L T KK	no seizure, A: then RS & seizure
LARA	Miami - Washington DC	3:15 p.m.	Johnson Titus	G K M	A		E U	A	D F	T OO	Remand re seizure issue
HERBST	Ft. Lauderdale - ATL	p.m.	Markonni	C E G M	A	O AA	A G	C		A T AA	volunteered A: statement provided RS
MOELLER	West Palm Beach - ATL - Indianapolis	8:55 a.m.	Mathewson	C D K M	A	O R	A E T	A		H/I	A: no seizure, then consent
WILLIAMS	Miami		Markonni	J	A2	E F R	A D E T	A		N AA	A: no seizure, then consent
SMITH	Ft. Lauderdale - ATL - Detroit		Mathewson	D E H K M	A	R S	A E T	A			A: no seizure, then consent
SETZER	Miami - ATL - Dayton	3:00 p.m.	Markonni	E H R		O	B A	A			no seizure, A: before confession
SANFORD	Los Angeles - Dallas - ATL		Markonni	C E H M O	A A7 C	P R	D E T	A		H/I	A: no seizure, then consent
MORIN	Miami - Dallas - Austin		Wolsch Nesteroff	B F G K M Q	A	B O T	U	A		B T NN	R: arrest w/o PC
EHLEBRACHT	Miami - ATL - Kansas City	8:45 a.m.	Markonni Burkhalter	R M E	A		E T		F	J Y T	A: RS + consent