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## Fourth Amendment--Airport Searches and Seizures: Where Will the Court Land

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## FOURTH AMENDMENT—AIRPORT SEARCHES AND SEIZURES: WHERE WILL THE COURT LAND?

United States v. Mendenhall, 100 S. Ct. 1870 (1980).  
Reid v. Georgia, 100 S. Ct. 2752 (1980).

### I. INTRODUCTION

The Supreme Court in the preceeding term once again took up the issue of *Terry* stops.<sup>1</sup> The Court placed in a new context its application of the fourth amendment<sup>2</sup> standard of reasonable suspicion of criminal activity, but did not necessarily expand its interpretation of that standard.<sup>3</sup>

In *United States v. Mendenhall*,<sup>4</sup> the Court upheld the stop of an airline passenger by DEA<sup>5</sup> agents and a subsequent consent search that uncovered heroin. The majority divided on whether the initial stop was a seizure; two of the Justices maintained that no seizure took place, while the other three assumed the stop to be a seizure supported by a reasonable suspicion of criminal activity.<sup>6</sup> All five

<sup>1</sup> *Terry* stops are stops of citizens by law enforcement officers for informational or investigatory purposes. They were first recognized by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), from which the name is derived.

<sup>2</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, . . . U.S. CONST. amend. IV.

<sup>3</sup> The Court is applying the standard of reasonable suspicion to more types of police-citizen encounters. The application of the standard is expansive. However, the Court is making the government's task of showing reasonable suspicion more difficult. In other words, the Court appears increasingly willing to apply the standard and increasingly unwilling to find the standard satisfied by the government's proof.

<sup>4</sup> 100 S. Ct. 1870 (1980).

<sup>5</sup> Drug Enforcement Administration. Agents are stationed at major airports to observe arriving passengers for drug courier-related characteristics. This is part of a nationwide program in existence since 1974 to intercept narcotics couriers transporting their contraband between the major drug producing cities and the major drug distribution centers via the airlines. *United States v. Mendenhall*, *Id.* at 1881.

<sup>6</sup> Justices Stewart and Rehnquist believed there was no seizure, and Justices Powell and Blackmun along with Chief Justice Burger believed the seizure to be justified by reasonable suspicion.

joined in finding an effective consent to search.<sup>7</sup> *Mendenhall* represented the first time the Supreme Court upheld the conviction of an individual for narcotics possession when the officer<sup>8</sup> seizing the evidence had acted on less than probable cause.<sup>9</sup>

In *Reid v. Georgia*,<sup>10</sup> the Court never reached the question of consent. A majority of the Court held *per curiam* that the federal agents did not have a reasonable suspicion of criminal activity to justify detaining two passengers as they left the terminal, so their possible "consent" was irrelevant.

The cases taken together do not provide clarity as to the substance of the standard of reasonable suspicion. The facts of both cases are similar; the analysis applied by the Court is similar, yet the outcomes differ.<sup>11</sup> *Mendenhall* provided a more expansive interpretation of what constituted reasonable suspicion than did *Reid*.

The Court did not decide the initial stop issue. Both cases presented the Court with an opportunity to finally decide when a stop by an officer constitutes a seizure. Although in *Mendenhall* more is written on this issue than on any other, the Court provided no set guidelines. It sidestepped the issue, with the likely result being continued uncertainty and confusion in the courts below.

The one clear aspect of both cases is that the standard of reasonable suspicion,<sup>12</sup> an outgrowth

<sup>7</sup> *United States v. Mendenhall*, 100 S. Ct. at 1880.

<sup>8</sup> In neither *Mendenhall* nor in *Reid* did the government claim probable cause led to the stops. Neither was probable cause alleged for the search in *Mendenhall*.

<sup>9</sup> In *Ybarra v. Illinois*, 100 S. Ct. 338 (1979), the Court struck down the conviction of Ybarra based on narcotics seized by an officer during a weapons frisk.

<sup>10</sup> 100 S. Ct. 2752 (1980).

<sup>11</sup> *United States v. Mendenhall*, 100 S. Ct. at 1876; *Reid v. Georgia*, 100 S. Ct. at 2753.

<sup>12</sup> The reasonable suspicion standard was not labeled as such in *Terry*. The *Terry* Court denoted the standard with the phrase "reason to conclude in light of his experience that criminal activity is afoot." *Terry v. Ohio*, 392 U.S. at 30.

of *Terry v. Ohio*,<sup>13</sup> has been accepted by all members of the Court as the standard to use to determine whether a seizure was reasonable and therefore justified. Prior to *Terry*, the rights guaranteed by the fourth amendment<sup>14</sup> were protected by the standard of probable cause.<sup>15</sup> The judicially favored way of ensuring that the government did not intrude unnecessarily on the privacy of its citizens was to require that a warrant be obtained from a magistrate prior to the intrusion.<sup>16</sup> Over the years, exceptions to the general requirement of a warrant have been accepted.<sup>17</sup> *Terry* was such an exception.

<sup>13</sup> 392 U.S. 1 (1968). In *Terry*, a policeman approached three men whom he believed, based upon his observations, to be casing a store for a robbery, and asked for their names. When he received only a mumbled response, and because he believed the men to be armed and dangerous, the officer grabbed the petitioner, spun him around, and patted him down, finding a gun.

<sup>14</sup> "The basic purpose of the amendment . . . recognized in countless decisions of this Court is to safeguard the privacy and the security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is 'based on a free society.'" *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Another essential purpose is to require that a standard of reasonableness be applied to the exercise of discretion by governmental officials. *See Delaware v. Prouse*, 440 U.S. 650, 653-54 (1979); *accord*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). *See generally* O'Brien, *Reasonable Expectations of Privacy: Principles and Politics of Fourth Amendment Protected Privacy*, 13 *NEW ENG. L. REV.* 662 (1978).

<sup>15</sup> 100 S. Ct. at 1875. Probable cause is determined by deciding "whether at that moment [when an arrest occurs] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Carroll v. United States*, 267 U.S. 132, 162 (1924).

<sup>16</sup> "It is well settled under the Fourth and Fourteenth amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . .'" *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . ." *Terry v. Ohio*, 392 U.S. at 20; *see Beck v. Ohio*, 397 U.S. at 96; *Katz v. United States*, 389 U.S. 347, 356-57 (1967). *See also* Note, *Schneekloth v. Bustamonte: The Question of Noncustodial and Custodial Consent Searches*, 66 *J. CRIM. L. & C.* 286, 286 (1975).

<sup>17</sup> A search without a warrant is not unreasonable if it falls within a recognized exception. The exceptions developed out of the belief that in some instances it was more reasonable for a law enforcement agent to take action without obtaining a warrant first. Some of the established exceptions include searches and seizures incident to a valid arrest, *see United States v. Chadwick*,

The Court in *Terry* realized that in certain situations intrusions of a lesser nature than an arrest were necessary for the well-being of the public and the police officer.<sup>18</sup> Since the intrusions were less severe than an arrest, the standard to justify them could be less demanding than probable cause.<sup>19</sup>

A reasonable suspicion of criminal activity has evolved into the lesser standard. This lesser standard is now denoted by the phrase "a reasonable suspicion of criminal activity." The standard is based on two sources of information that when added together must cause a reasonable man to believe that the action taken was proper:<sup>20</sup> 1) the "specific and articulable facts" known to the officer, and 2) any inferences the officer could reasonably draw from those facts in light of his experience as an officer.<sup>21</sup> The scope of the intrusion is limited by the justification produced by the initial determination of reasonableness.<sup>22</sup> The Court applied this standard in *Reid* and *Mendenhall*.

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433 U.S. 1, 14 (1977); *Chimel v. California*, 395 U.S. 752, 768 (1969); inventory searches of automobiles held at police stations, *see South Dakota v. Opperman*, 428 U.S. 364, 370-71 (1976); *Cooper v. California*, 386 U.S. 58, 62 (1967); seizures of items in plain view when the seizing officer has a right to be at the place where the item can be seen, *see Air Pollution Control Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Ker v. California*, 374 U.S. 23, 43 (1963); seizures to prevent possible escape or the destruction of evidence, *see Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *Warden v. Hayden*, 387 U.S. 294, 298 (1967); consent searches, *see Schneekloth v. Bustamonte*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); searches by customs officials, *see United States v. Ramsey*, 413 U.S. 606, 616 (1977); and searches or seizures while in hot pursuit, *see Warren v. Hayden*, 387 U.S. at 298.

<sup>18</sup> *Terry v. Ohio*, 392 U.S. at 24.

<sup>19</sup> The Court recognized that the fourth amendment extended to ensure the privacy of persons on the street from unreasonable intrusions by government agents. *Id.* at 9. However, because often it would be impractical or impossible for an officer reacting to spontaneous situations on the street to obtain a warrant, and because many of the encounters on the street were of a lesser nature not requiring a warrant, such actions by an officer were not to be judged by the warrant clause of the fourth amendment. Instead, they were to be judged by the reasonableness of the action. *Id.* at 20.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 21. This standard is applied to the two tiers: the initial intrusion and the scope of the intrusion, both recognized in *Terry*.

<sup>22</sup> *Id.* at 21. The officer in *Terry* was justified in frisking the individual when he had reason to believe the individual was armed and dangerous. The justification was safety of the officer and the public. The scope of the intrusion was limited to a patting of the outer clothing for weapons. *Id.* at 28-30.

## II. UNITED STATES v. MENDENHALL

Sylvia Mendenhall landed at the Detroit Metropolitan Airport to switch planes on her flight from Los Angeles to Pittsburgh. She was the last passenger off the plane. Two DEA agents watched her scan the terminal and then proceed slowly to the baggage area. Instead of claiming any baggage, she asked an airline employee for the location of the Eastern Airlines ticket counter. She then proceeded to that counter to pick up her boarding pass for her flight to Pittsburgh.<sup>23</sup>

As Mendenhall walked through the terminal the agents approached her, identified themselves as federal agents, and asked her for some identification. She gave them her driver's license, but the name on it did not match the name on her airline ticket. She gave them no explanation other than that she felt like using another name. She also told the agents, upon questioning, that she had been in Los Angeles two days.

One agent then identified himself as a federal narcotics agent, at which point Mendenhall appeared to become quite nervous. After returning the license and the ticket, the agent asked Mendenhall if she would accompany him to the DEA office in the airport. She did so.<sup>24</sup> At the DEA office the agent asked her if she would consent to a search of her purse and her person, and told her that she could refuse. She said, "Go ahead." A female officer arrived to conduct the body search. She too asked Mendenhall if she consented and told her again that she could refuse. Mendenhall still consented. The officer then told her to remove her clothes. Mendenhall hesitated and mentioned that she had a plane to catch. When the officer assured her that she would make the flight if the search turned up no narcotics, she began to undress, and removed heroin from her undergarments.<sup>25</sup>

Mendenhall was charged with possessing heroin with intent to distribute.<sup>26</sup> The district court denied

<sup>23</sup> The dissent indicates that Mendenhall went to the Eastern counter to pick up her boarding pass, not to buy a new ticket. *United States v. Mendenhall*, 100 S. Ct. at 1887.

<sup>24</sup> The record provided no indication of her consent, only that she had gone with the agents. *Id.* at 1874.

<sup>25</sup> *Id.* at 1873-74.

<sup>26</sup> Although the Court does not set out the specific statute under which the respondent was convicted, the applicable statute is probably 21 U.S.C. § 841(a)(1) (1970): "(a) except as authorized by this subchapter, it will be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; . . ."

her motion to suppress the evidence obtained during the body search as the product of an unlawful search and seizure.<sup>27</sup> It concluded that the agents' approach constituted a valid investigatory stop, that the respondent voluntarily went to the DEA office with the agents so that no arrest occurred at that time, and that respondent had consented to the search.<sup>28</sup>

The Sixth Circuit Court of Appeals reversed, based solely on its prior decision in *United States v. McCaleb*,<sup>29</sup> a factually similar case.<sup>30</sup> A rehearing *en banc* resulted in the same conclusion.<sup>31</sup>

Justice Stewart wrote the five-member majority opinion reversing the court of appeals' decision. According to him, three issues were presented for determination: whether the initial stop of Mendenhall by the agents constituted a seizure, whether Mendenhall voluntarily consented to accompany the agents to their office, and whether Mendenhall freely and voluntarily consented to the body search.<sup>32</sup>

The majority of the Court upheld the initial stop as valid, but for different reasons. For Justices Stewart and Rehnquist, the stop did not constitute a seizure, so the determination of reasonable sus-

<sup>27</sup> The district court's opinion has not been reported.

<sup>28</sup> *United States v. Mendenhall*, 100 S. Ct. at 1874.

<sup>29</sup> 552 F.2d 717 (6th Cir.), rehearing *en banc*, 556 F.2d 385 (1977). In *McCaleb*, the court held that reasonable suspicion to stop was not present when the only information upon which the stop was based was the comparison of defendant's behavior with the drug courier profile. *Id.* at 720. It also held that asking the defendant to accompany the agents to the DEA office constituted an arrest. *Id.* Finally, the court ruled the consent invalid because it was the "fruit" of an unconstitutional detention. *Id.* at 721.

For cases holding that in such a situation no arrest occurred, see *United States v. Chapman*, 573 F.2d 565, 567 (9th Cir. 1977); *United States v. Oates*, 560 F.2d 45, 57 (2d Cir. 1977); *United States v. Salter*, 521 F.2d 1326, 1328-29 (2d Cir. 1975); *United States v. Richards*, 500 F.2d 1025, 1027-29 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975).

<sup>30</sup> The broad facts are similar. The defendants were observed by DEA agents, and their behavior coincided with the airport's drug courier profile. The agents approached the defendants, asked them a few questions, and then asked the defendants to accompany them to the DEA office for a search. *Id.* at 717. There is an important difference between *McCaleb* and *Mendenhall*. Only in *Mendenhall* was the suspect told that she could refuse to consent to the search. The suspects in *McCaleb* were told if they did not consent they would be detained while a search warrant was obtained.

<sup>31</sup> *United States v. Mendenhall*, 100 S. Ct. at 1875.

<sup>32</sup> This division coincided with the issues presented by the government. See Brief for Petitioner *passim*, *United States v. Mendenhall*, 100 S. Ct. 1870.

picion was unnecessary.<sup>33</sup> Justice Powell, along with Chief Justice Burger and Justice Blackmun, assumed that the stop constituted a seizure and held that the seizure was supported by the agents' reasonable suspicion of criminal activity.<sup>34</sup> The dissent likewise viewed the stop as a seizure, but found no basis for reasonable suspicion.<sup>35</sup>

The majority agreed that Mendenhall voluntarily accompanied the agents to their office<sup>36</sup> and that, in light of all the circumstances, she had effectively consented to the search of her purse and her person.<sup>37</sup> The dissent viewed the trip to the office as a seizure akin to an arrest, therefore requiring probable cause.<sup>38</sup> The dissent further believed that Mendenhall's illegal detention tainted the evidence found in the search, and should have resulted in suppression.<sup>39</sup>

Justice Stewart's opinion placed the case within the confines of the fourth amendment. He noted that the fourth amendment extended to Mendenhall its protection against unreasonable searches and seizures as she walked through the airport.<sup>40</sup> Before proceeding with his argument, he set out the government's position, that although Mendenhall was searched without a warrant or probable cause, Mendenhall's consent validated the search. The court of appeals, according to Justice Stewart, mistakenly took the position that Mendenhall's

consent was the product of earlier conduct by the agents which violated the fourth amendment.<sup>41</sup>

Following this overview of the parties' positions, Justice Stewart addressed the issue of whether the stop of Mendenhall was a seizure.<sup>42</sup> He immediately placed the issue within the confines of the analysis of *Terry v. Ohio*, thus implicitly steering it into the reasonable search and seizure clause of the fourth amendment.<sup>43</sup> *Terry* required the application of an objective standard to all seizures,<sup>44</sup> but did not maintain that every contact between an individual and an officer constituted a seizure.<sup>45</sup>

Justice Stewart turned directly to the facts of *Terry* to establish the difference between a seizure and a mere encounter. He reasoned that since the Court in *Terry* did not deal with the initial stop, no seizure occurred until the officer grabbed the petitioner and restrained him from leaving.<sup>46</sup> He

<sup>41</sup> *United States v. Mendenhall*, 100 S. Ct. at 1875.

<sup>42</sup> Justice Stewart at this point was writing only for himself and Justice Rehnquist.

<sup>43</sup> *Terry* implicitly recognized the dichotomy in the fourth amendment between the warrant clause and the reasonable search and seizure clause. The fourth amendment does not forbid all searches and seizures without a warrant, rather "what the Constitution forbids is . . . unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. at 9. See note 19 *supra*.

<sup>44</sup> *United States v. Mendenhall*, 100 S. Ct. at 1876. Of course, seizures that equalled an arrest still required probable cause, and even seizures falling short of an arrest could require probable cause as the objective standard to be met. See *Dunaway v. New York*, 442 U.S. 200, 216 (1979).

<sup>45</sup> *United States v. Mendenhall*, 100 S. Ct. at 1876. Justice Stewart drew upon a footnote in *Terry*. "[O]bviously not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry v. Ohio*, 392 U.S. at 19 n.16. Prior to the note, the Court had already recognized that police-citizen encounters are "inherently rich in diversity," ranging from friendly conversations to hostile confrontations. *Id.* at 13.

Many such encounters are susceptible to abuse. These are known as "aggressive preventive patrol" and include 1) vice control practices, 2) weapons confiscation, 3) control of gangs and juveniles, 4) disturbance control, 5) control of public drinking, 6) traffic control. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 61-62 (1968).

<sup>46</sup> *United States v. Mendenhall*, 100 S. Ct. at 1876. Justice Stewart viewed *Sibron v. New York*, 392 U.S. 40 (1968), a companion case of *Terry*, similarly. In *Sibron* an officer observing Sibron most of the day approached him while he sat in a cafe. The officer asked Sibron to step outside and Sibron did. Once outside, Sibron reached

<sup>33</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877.

<sup>34</sup> *Id.* at 1880.

<sup>35</sup> *Id.* at 1886.

<sup>36</sup> *Id.* at 1879.

<sup>37</sup> *Id.* at 1880.

<sup>38</sup> *Id.* at 1887.

<sup>39</sup> *Id.* at 1889.

<sup>40</sup> *Id.* at 1875. "[T]he inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. at 8-9. The Court in *Terry* recognized that all seizures, even those of a brief duration, are covered by the protections of the fourth amendment. See *Ybarra v. Illinois*, 100 S. Ct. at 342 (public places); *Delaware v. Prouse*, 440 U.S. at 663 (transportation).

How long is brief? Most courts do not set a time limit. However, often it is viewed as the amount of time it takes for identification and an explanation for the suspicious behavior. Van Sicklen, *Terry Revisited: Critical Update on Recent Stop-and-Frisk Developments*, 1977 WIS. L. REV. 877, 877 n.1, reprinted in 1 CRIM. L. REV. 147 (1979).

For a case allowing a "brief" detention of two hours, see *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974).

The American Law Institute has set twenty minutes as the time limit for a stop not requiring probable cause or consent. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) at 5.

accepted the views of Justices White and Harlan, concurring in *Terry*, that like any other citizen, an officer has the right to question anyone he meets. Conversely, the individual questioned has the right to ignore the officer's questions just as he would if any other citizen was questioning him.<sup>47</sup>

To bolster his position, Justice Stewart explained that if all encounters are viewed as seizures, much contact between police and citizens would be eliminated. He reasoned that as long as an individual is free to walk away, no intrusion upon the individual's constitutional rights occurs.<sup>48</sup> Second, calling all such encounters seizures would not better protect any fourth amendment rights, but to the contrary would hamper legitimate law enforcement techniques.<sup>49</sup> He concluded "that a person has been

into his pocket causing the officer to reach in the pocket also. The pocket contained narcotics, but the search was ruled unlawful. The Court stated that the record was bare as to whether Sibron voluntarily accompanied the officer out of the cafe or did so submitting to a show of authority by the officer. *Id.* at 63. Justice Stewart maintained that if the latter was a seizure, then the former must not be a seizure.

<sup>47</sup> *United States v. Mendenhall*, 100 S. Ct. at 1876. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. at 34 (White, J., concurring). The police have the same right as everyone else to address questions to other persons, but "ordinarily the person addressed has an equal right to ignore his interrogator and walk away; . . ." *Id.* at 32-33 (Harlan, J., concurring).

<sup>48</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877. "As long as the person to whom questions are put remains free to disregard the questions and walk away there has been no intrusion upon a person's liberty or privacy . . ." *See note 14 supra.*

<sup>49</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877. Justice Stewart noted that the Court had previously recognized the effectiveness of police questioning as an investigative tool, protecting the innocent and apprehending the guilty. Without it the "security of all would be diminished." *Schnecko v. Bustamonte*, 412 U.S. at 225; *Haynes v. Washington*, 373 U.S. 503, 515 (1963). The discussion provides an example of the balancing process that determines reasonableness. Justice Stewart concluded that it was reasonable not to view all intrusions as seizures because to do so would harm societal interests without concurrently increasing protection of individual liberty. In other words, the trade off or compromise was negative; society lost, but the individual did not gain.

For a general discussion of the inappropriateness of applying the exclusionary rule to investigatory stops because other police citizen encounters can be abusive, *see Terry v. Ohio*, 392 U.S. at 12-15.

Other encounters where it is reasonable for an officer to stop the individual without probable cause include: individual matches an informant's tip, individual matches general description provided by a victim or

'seized' within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave."<sup>50</sup>

A reasonable belief could arise however, without the individual being physically restrained from leaving. Justice Stewart provided several examples of a seizure without physical restraint, including the presence of several officers, the display of a weapon by an officer, the officer touching the individual, or the officer using certain language or a tone of voice indicating a demand for compliance.<sup>51</sup> He compared these examples to the facts of the case to conclude that there was no reason for the respondent to believe that she was not free to leave when approached by the DEA agents.<sup>52</sup>

Justice Stewart then rejected other arguments raised in support of the *Mendenhall* encounter being a seizure. He initially rejected an argument based on *Mendenhall's* imputed lack of knowledge. Although *Mendenhall* did not know she was free to leave, under the Court's ruling in *Schnecko v. Bustamonte*<sup>53</sup> that knowledge is irrelevant: voluntariness does not depend upon being informed of the right to refuse.<sup>54</sup> In similar fashion, this time without case support, he rejected the notion that *Mendenhall*

witness, individual leaving an area where the officer has been summoned for help, individual carrying an item in a way that suggests the individual obtained the item unlawfully, and the individual is with someone arrested by the officer. *LaFave, supra* note 45, at 77.

<sup>50</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877. The government made the same argument. Brief for Petitioner at 20-21, *United States v. Mendenhall*, 100 S. Ct. 1870.

<sup>51</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877. These examples were listed in the Brief for Petitioner at 25 n.19, *United States v. Mendenhall*, 100 S. Ct. 1870. The petitioner obtained them from 3 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 9.2 at 54 (1978).

<sup>52</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877-78. Justice Stewart relied upon the following factors to support his conclusion that there was not a seizure: the approach occurred in a public place, the agents approached the respondent rather than summoning her to them, the agents did not demand, but requested to see respondent's license and plane ticket. The respondent was not seized just because she provided her ticket and license to the agents, nor because the person doing the asking was a federal agent.

<sup>53</sup> 412 U.S. 218 (1973). *Schnecko* is currently the leading case on what constitutes an effective consent. For a discussion of *Schnecko*, *see Note, supra* note 16.

<sup>54</sup> *United States v. Mendenhall*, 100 S. Ct. at 1878. Knowledge of the right to refuse is only one factor in the determination of whether the consent was voluntary. It is not the *sine qua non* of an effective consent. *Schnecko*

denhall's action against her self-interest was proof that she had been seized. He noted that the issue was voluntariness rather than self-protection.<sup>55</sup> Third, he distinguished *Brown v. Texas*,<sup>56</sup> a case relied on by Mendenhall. In *Brown*, a frisk occurring over the suspect's protest constituted a seizure,<sup>57</sup> but in *Mendenhall* the suspect had consented, without protesting.<sup>58</sup> Finally, he dismissed any reliance on the cases involving investigatory stops of automobiles.<sup>59</sup> Justice Stewart maintained that just because stopping an automobile was a seizure did not mean that stopping a pedestrian was a seizure, because stopping a pedestrian was less intrusive than stopping an automobile.<sup>60</sup>

After dismissing Mendenhall's seizure arguments, Justice Stewart, now with a majority of the Court, dealt with the second issue—whether Mendenhall consented to accompany the agents to the DEA office. He began by chastising the court of appeals for substituting its view of the evidence for that of the district court when the latter's view was supported by the record.<sup>61</sup> The majority agreed with the district court that the respondent had consented to go to the DEA office, and that her consent was voluntary.<sup>62</sup> The fact that she was asked to go to the DEA office, rather than ordered, that there was no show of force, that she had been detained only briefly prior to being asked, and that

Schneckloth v. Bustamonte, 412 U.S. at 227.

her ticket and license had been returned prior to being asked carried the day for the government.<sup>63</sup> Demographic factors such as age, education, and race, tending to invalidate consent, were relevant, but not determinative.<sup>64</sup>

Finally, the majority turned to the last issue—the consensual body search. As with the previous issue, the discussion was brief. Initially, Justice Stewart noted that because the seizure was lawful, it could not have tainted Mendenhall's consent.<sup>65</sup> He cited several reasons for finding that the consent was freely and voluntarily given.<sup>66</sup> One was Mendenhall's age and education.<sup>67</sup> Another was the fact that Mendenhall had been told twice by the very people who were asking her consent that she did not have to consent.<sup>68</sup> Third, Mendenhall had

<sup>63</sup> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. at 548.

<sup>64</sup> *United States v. Mendenhall*, 100 S. Ct. at 1879. The consent was not coerced simply because respondent was twenty-two, black, female, and a high school dropout confronted by two white male federal agents. *Schneckloth* listed factors that have been considered in determining effective consent: youth, e.g., *Haley v. Ohio*, 332 U.S. 596 (1948); education, e.g., *Payne v. Arkansas*, 356 U.S. 560 (1958); intelligence, e.g., *Fikes v. Alabama*, 352 U.S. 191 (1957); lack of advice on constitutional rights, e.g., *Davis v. North Carolina*, 384 U.S. 737 (1966); length of detention, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940); nature of the questioning, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); physical punishment, e.g., *Reck v. Pate*, 367 U.S. 433 (1961). *Schneckloth v. Bustamonte*, 412 U.S. at 226. No one single criterion emerges from these cases as controlling. Each case looked at the factual circumstances, their psychological impact on the individual, and the legal significance of the individual's reaction.

<sup>65</sup> *United States v. Mendenhall*, 100 S. Ct. at 1879.

<sup>66</sup> *Id.* at 1879-80.

<sup>67</sup> *Id.* at 1879. She was twenty-two and had an eleventh grade education.

<sup>68</sup> *Id.* Even though knowledge of the right to refuse was not the *sine qua non* of consent, the Court based its decision upon that knowledge, especially since it was provided by those seeking the consent. One wonders how effective such information is when it comes from the very party seeking consent. Even Justice Stewart admitted that such things as language used and tone of voice can be coercive. 100 S. Ct. 1277-78. See text accompanying note 52 *supra*.

Such warnings have been argued as the answer to this problem. See ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1(2), at 3; § 240.2(2), at 149, 261 & n.10, 533-35; LaFave, *supra* note 45, at 96-99. LaFave set out the differences between field interrogations and station house interrogations. At the station house one is cut off from the outside world in unfamiliar surroundings, subjected to longer interrogations, and faced with the

v. Bustamonte, 412 U.S. at 227.

<sup>55</sup> *United States v. Mendenhall*, 100 S. Ct. at 1878. It does not matter if an individual makes a statement he later regrets to an officer, if it was made voluntarily. The notion that a damaging response cannot be voluntary was also rejected by the ALI. ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1, at 260.

<sup>56</sup> 443 U.S. 47 (1979).

<sup>57</sup> *Id.* at 50.

<sup>58</sup> *United States v. Mendenhall*, 100 S. Ct. at 1878. Respondent did not testify at the hearing. *Id.* at 1888. However, it can hardly be maintained that respondent consented to the initial stop by stopping when approached by the agents. She would seem to have had no choice.

<sup>59</sup> See *Delaware v. Prouse*, 440 U.S. 650 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>60</sup> *United States v. Mendenhall*, 100 S. Ct. at 1878. The distinction is not clear. In both situations a traveler has his progress impeded so that a law officer can investigate.

Petitioners had argued that the airport stop was analogous to the stop in *Brignoni-Ponce*. Brief for Petitioner at 36-37, *United States v. Mendenhall*, 100 S. Ct. 1870.

<sup>61</sup> *United States v. Mendenhall*, 100 S. Ct. at 1879.

<sup>62</sup> *Id.* at 1879. "[W]hether a consent . . . was in fact voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances."

already unequivocally consented not once, but twice. Fourth, the statement that she had a plane to catch was not relevant, being merely an expression of concern for time.<sup>69</sup> Fifth, Mendenhall did undress when assured she would catch her flight if the search did not uncover narcotics.<sup>70</sup> Finally, the atmosphere of a DEA office itself was not inherently coercive.<sup>71</sup>

Because the lower courts had assumed the initial stop to be a seizure, the remaining Justices in the majority<sup>72</sup> did not discuss the issue.<sup>73</sup> Instead Justice Powell, writing for the three, also assumed the stop to be a seizure, and concluded that it had been reasonable under the fourth amendment.<sup>74</sup> He weighed the public interest in the seizure, i.e., stemming the flow of deadly drugs by organized crime,<sup>75</sup> the nature and the psychological scope of

possibility of physical abuse, subterfuge, or wholesale arrests so that by chance a confession will be obtained.

Both the FBI and the Bureau of Narcotics and Dangerous Drugs use a consent form in situations like the one in which Mendenhall found herself. *Id.* at 535.

<sup>69</sup> *United States v. Mendenhall*, 100 S. Ct. at 1880.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See notes 53 & 69 *supra*. The fact that, according to the district court, the respondent had voluntarily accompanied the agents to the office indicated that the office was not inherently coercive.

<sup>72</sup> Burger, C.J., Powell and Blackmun, JJ.

<sup>73</sup> *United States v. Mendenhall*, 100 S. Ct. at 1880. The issue had not been raised below. The concurrence and the dissent, although dealing with the issue at length, believed that it should not be decided by the Court. The issue was raised for the first time in the Brief for Petitioner at 13-26, *United States v. Mendenhall*, 100 S. Ct. 1870.

However, Justice Powell made clear that he did not necessarily disagree with Justice Stewart's analysis of the encounter-seizure dichotomy. This was not the proper time to apply it, nor was he sure that, even under the standard set out by Justice Stewart, no seizure had occurred. *Id.* at 1880 n.1.

<sup>74</sup> *Id.* at 1880. The petitioner claimed that the stop was reasonable because it was analogous to *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The government claimed the facts that led to the reasonable suspicion in *Brignoni-Ponce* had counterparts in Mendenhall. The source city was similar to the characteristics of the area; respondent's scanning the terminal, flight arrangements, and nervousness matched the driver's behavior, the absence of luggage could be considered like the aspects of the auto, and the factors present fit only a small number of passengers, unlike in *Brignoni-Ponce* where all individuals of Mexican heritage were suspect. Brief for Petitioner at 36-37, *United States v. Mendenhall*, 100 S. Ct. 1870.

<sup>75</sup> *United States v. Mendenhall*, 100 S. Ct. at 1881. "Few problems . . . cause greater concern. . . [T]he obstacles to detection of illegal conduct [trafficking] may be unmatched . . ."

For a view of the narcotics problem, see W. SEYMOUR, *THE YOUNG DIE QUIETLY: THE NARCOTIC PROBLEM IN AMERICA* (1972).

the intrusion,<sup>76</sup> and the facts relied upon by the agents in light of their experience.<sup>77</sup> He concluded that the stop was reasonable and that the agents had acted on an "articulable suspicion of criminal activity."<sup>78</sup>

Justice White's vigorous dissent began by taking note of the majority's division. According to Justice White, a majority of the Court found that Mendenhall had been seized, while only three Justices specifically found the seizure to be reasonable.<sup>79</sup> He argued initially that all intrusions are "seizures" covered by the fourth amendment,<sup>80</sup> but that even

<sup>76</sup> *United States v. Mendenhall*, 100 S. Ct. at 1881-82. The scope of the intrusion is a central element of the analysis. This intrusion was modest. Two plainclothes agents approached respondent in a public place, identified themselves, asked to see her identification, but did not physically restrain her, nor display any weapons. The initial questioning was brief. "In those circumstances, [Mendenhall] . . . could not reasonably have been frightened or isolated from assistance." *Id.*

The Court is concerned with the psychological impact of the government's intrusion. Fright and anxiety were important considerations in the auto cases. See *Delaware v. Prouse*, 440 U.S. at 657; *United States v. Martinez-Fuerte*, 428 U.S. at 557-60; *United States v. Brignoni-Ponce*, 422 U.S. at 881-83.

<sup>77</sup> *United States v. Mendenhall*, 100 S. Ct. at 1882. Justice Powell cited four factors: 1) the agent's knowledge of the methods used recently by criminals, 2) the characteristics of persons engaged in criminal activity, 3) the characteristics of the area, and 4) the behavior of the individual, especially if he appeared to be trying to avoid police contact. The fact that the respondent appeared nervous, appeared to be trying to evade detection, got off the plane last, scanned the area, walked slowly to the baggage area, failed to claim any luggage, and obtained a pass for another airline, provided the agents with reason to stop the respondent. *Id.*

Justice Powell seemed willing to defer to the agent's expertise. First, he took cognizance of the fact that they were trained to observe things that appear innocent to the untrained. Second, this particular agent had ten years experience and had been involved in over 100 arrests in drug related incidents in the past year at the airport. Finally, the agents are part of a "well defined, effective, federal law-enforcement program." *Id.* at 1882-83.

<sup>78</sup> *Id.* at 1883.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1884. The majority and the dissent borrowed from a footnote in *Terry* to establish their position. "[T]he sounder course is to recognize that the fourth amendment governs all intrusions by agents of the public upon personal security, and to make the scope of a particular intrusion in light of all the exigencies of the case a central element in the analysis of reasonableness." *Terry v. Ohio*, 392 U.S. at 18 n.15.

At least one author believes that *Adams* supports this view. "*Adams* recognized that any on the street investigatory stop by the police inevitably involved a restraint on the citizen's freedom to walk away and therefore is subject to the fourth amendment's reasonableness re-



if not all intrusions are seizures this intrusion certainly was. He carefully pointed out that the government failed to argue below that the stop was not a seizure, but rather argued that the seizure was reasonable.<sup>81</sup> He believed that Justice Stewart was wrong to apply a "totality of the circumstances assessment" to reverse the holding below because the seizure issue was factually laden and had not yet been litigated.<sup>82</sup>

Justice White maintained that even under Stewart's test Mendenhall had been seized when stopped by the agents. The agents, although not physically restraining Mendenhall nor telling her she could not leave, would not have allowed her to leave if she had attempted to do so.<sup>83</sup> Justice White also argued that if evidence was lacking to show that Mendenhall reasonably believed that she was not free to leave, that absence was due to the lack of a hearing.<sup>84</sup> Second, the taking of Mendenhall's driver's license and plane ticket supported a reasonable belief that she was not free to leave.<sup>85</sup> Third, some of Justice Stewart's own examples of seizures without physical restraint<sup>86</sup> could have provided the basis for a determination that Mendenhall had been seized. However, due to the assumption below that the stop was a seizure, these possibilities were not explored.<sup>87</sup> Finally, he felt that Justice Stewart, in distinguishing *Brown* and the auto cases from the Mendenhall situation, had confused the issue of seizure with the issue of the quantum of reasonable suspicion necessary to justify the seizure.<sup>88</sup>

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quirement." Caraccappa, *Terry v. Ohio and the Power of Police to Accost Citizens Absent Probable Cause to Arrest: A Critical Look at the Pennsylvania Experience*, 16 DUQUESNE L. REV. 499, 505 (1977-78).

<sup>81</sup> United States v. Mendenhall, 100 S. Ct. at 1884 n.1.

<sup>82</sup> *Id.* at 1884-85.

<sup>83</sup> *Id.* at 1885. The dissent's emphasis seemed to be on the subjective intent of the officers throughout their contact with Mendenhall. Conversely, Justice Stewart emphasized the objective standard of reasonable belief.

Another recent case has focused on the subjective intent of the officers. See *Dunaway v. New York*, 442 U.S. 200 (1979); Note, *Fourth Amendment—Admissibility of Statements Obtained During Illegal Detention*, 70 J. CRIM. L. & C. 446, 450 (1979).

<sup>84</sup> United States v. Mendenhall, 100 S. Ct. at 1885. No hearing was held below because both parties assumed that the stop was a seizure.

<sup>85</sup> *Id.* at 1885 n.3.

<sup>86</sup> See note 52 & accompanying text *supra*.

<sup>87</sup> United States v. Mendenhall, 100 S. Ct. at 1885 n.4. See note 52 *supra*.

<sup>88</sup> United States v. Mendenhall, 100 S. Ct. at 1885-86 & n.5.

Holding that there was a seizure, the dissent concluded that the agents did not have specific and articulable facts upon which to base a reasonable suspicion of criminal activity. The only facts available were obtained by observing the respondent at the airport.<sup>89</sup> Nothing in her behavior provided a basis for reasonable suspicion.<sup>90</sup> If anything, her conduct should have negated any suspicion that the agents might have had.<sup>91</sup> Also, the dissent was not impressed with Justice Powell's faith in the success of the DEA plan.<sup>92</sup>

Finally, the dissent maintained that even if there was no seizure up to that point, a seizure occurred when Mendenhall accompanied the agents to the DEA office. Based upon *Dunaway v. New York*,<sup>93</sup>

<sup>89</sup> The concurrence relied on more than the facts available from observing the respondent. Policy considerations were important to Justice Powell.

<sup>90</sup> The dissent maintained that the facts relied upon for reasonable suspicion were irrelevant. The fact that Mendenhall came from a source city was not as incriminating as associating with narcotic addicts, but the latter does not support a seizure. 100 S. Ct. at 1886 n.8; see *Ybarra v. Illinois*, 100 S. Ct. 338 (1979). Mendenhall's failure to pick up any luggage was explained by the flight change. The agent knew that Mendenhall was switching flights prior to stopping her, and admitted that he did not believe the lack of luggage was therefore suspicious. *United States v. Mendenhall*, 100 S. Ct. at 1887 n.9. Nor would Mendenhall getting off the plane last or walking slowly provide a basis for reasonable suspicion. *Id.* at 1886.

<sup>91</sup> *Id.* at 1886-87. The Court had previously recognized, and reaffirmed as recently as *Brown v. Texas*, 433 U.S. 47, 52 n.2 (1979), that an experienced police officer trained in a particular field can recognize suspicious behavior in conduct that to most people would appear to be innocent. The dissent believed that likewise there could be behavior that appeared suspicious to the casual observer, but should appear innocent to the trained, experienced agent. *United States v. Mendenhall*, 100 S. Ct. at 1887 n.10.

The dissent seemed to be holding the agents to a higher standard of reasonable suspicion due to their experience and training. This would be consistent with the *Terry* analysis of reasonable inferences drawn in light of the officer's experience. *Terry v. Ohio*, 392 U.S. at 27.

<sup>92</sup> The dissent noted Justice Powell's reliance on the success of the DEA program in finding reasonable suspicion. However, to them it was not so clear that the success of the program was built on "nearly-random" stops. The success was attributable to numerous factors including: information from ticket agents, independent police work, and occasional tips. *United States v. Mendenhall*, 100 S. Ct. at 1887 n.11.

<sup>93</sup> 442 U.S. 200 (1979). In *Dunaway*, the Court ruled that a person who had accompanied the police to the station house had been seized and that the applicable standard was probable cause.

The government distinguished *Dunaway*. Mendenhall had aroused suspicion, and the agents knew they had to

Mendenhall's going to the office constituted a seizure akin to an arrest.<sup>94</sup> That being the case, probable cause was required before ordering Mendenhall to the office. Besides, the record did not show that Mendenhall actually consented to go to the office, only that she did go. Since mere acquiescence<sup>95</sup> or an absence of proof of resistance is not enough to prove consent,<sup>96</sup> the government did not carry its burden.<sup>97</sup>

Mendenhall's consent to the search of her person was dealt with in one sentence. All evidence should have been suppressed because it was tainted by the previous illegal detention.<sup>98</sup>

### III. HISTORY OF THE REASONABLE SUSPICION STANDARD

The authors of each opinion placed the case within the framework of *Terry v. Ohio*. In that case the Court first recognized that the fourth amendment protects citizens from police activity, such as a stop and frisk, even though such activity is less intrusive than arrests and searches.<sup>99</sup> The reasona-

act quickly or lose the suspect. They approached her in a public place, asked her a few questions, and then asked her to the office. This was all very brief. Brief for Petitioner at 58-59, *United States v. Mendenhall*, 100 S. Ct. 1870.

<sup>94</sup> *United States v. Mendenhall*, 100 S. Ct. at 1888. The government listed four reasons showing that it was reasonable to ask Mendenhall to accompany the agents to the DEA office. One was a safety factor—by asking the respondent to go the DEA office the agents decreased any danger to themselves and the public from confidants of the respondent. Another reason was practical—the conversation was more easily understood away from the noise. The third reason was important to the future success of the program. The agents did not want to attract undue attention to themselves by remaining in the concourse. Finally, retiring to the office would prevent unnecessary embarrassment to Mendenhall. Brief for Petitioner at 52, *United States v. Mendenhall*, 100 S. Ct. 1870.

<sup>95</sup> *United States v. Mendenhall*, 100 S. Ct. at 1889.

<sup>96</sup> *Id.* (citing *Bumper v. North Carolina*, 392 U.S. at 548-49).

<sup>97</sup> *United States v. Mendenhall*, 100 S. Ct. at 1889.

<sup>98</sup> *Id.*

<sup>99</sup> Prior to *Terry*, unreasonable search and seizure analysis was based on arrest, probable cause for arrest, and warrants based on probable cause. *Dunaway v. New York*, 442 U.S. at 207-08.

They [*Terry* and *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40 (1968)] were the first cases in which this Court explicitly recognized the concept of "stop and frisk" and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest.

bleness of such lesser intrusions is determined by balancing the societal need for the intrusion with the severity of the intrusion into the individual's privacy.<sup>100</sup> The Court used a two-tier analysis in

*Adams v. Williams*, 407 U.S. at 153 (Marshall, J., dissenting). See *Caracappa, supra* note 80, at 506; Miles, *From Terry to Mimms: The Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police Citizen Confrontations*, 16 AM. CRIM. L. REV. 127, 127 (1978); Note, 7 AM. J. CRIM. L. 385, 387 (1979).

The *Terry* Court also noted that it was dealing in a new area of police activity, see *Terry v. Ohio*, 392 U.S. at 9-10.

The issue of a temporary detention based on less than probable cause was posed in a case prior to *Terry*. See *Brinegar v. United States*, 338 U.S. 160, 178-79 (1949) (Burton, J., concurring).

A search warrant on less than probable cause based on a particularized factual situation was upheld prior to *Terry*. See *Camara v. Municipal Court*, 387 U.S. 523 (health and safety inspection of residence); See *v. City of Seattle*, 387 U.S. 541 (health and safety inspection of commercial building).

<sup>100</sup> *Terry v. Ohio*, 392 U.S. at 21. "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion the search [or seizure] entails.'" *Camara v. Municipal Court*, 387 U.S. at 534-35 (brackets in original). The balancing process weighs three factors: the public interest in the intrusion, the extent of the intrusion into one's privacy, and the extent the intrusion advanced the public's interest. See *Brown v. Texas*, 443 U.S. at 50-51; *Delaware v. Prouse*, 440 U.S. at 654; *United States v. Martinez-Fuerte*, 428 U.S. at 555; *United States v. Brignoni-Ponce*, 422 U.S. at 878.

Arguably, the balancing approach that began with *Camara* and was adopted by *Terry* and its progeny is really no different than the basic analysis of whether probable cause exists. Probable cause exists when all the factors are weighed and it is determined that a crime has been committed and that the suspect more probably than not was involved.

One author views reasonable suspicion as being no different in form than probable cause. It is an objective analysis as is probable cause and will come to be no more vague than probable cause once it has been interpreted in a number of cases. The difference between the two standards may be no more than the degree of probability that must be present to satisfy each. *LaFave, supra* note 45, at 68-73. "The permissible grounds for a stop can be made just as precise as the grounds for arrest; and, the permissible grounds for a stopping can be set forth in objective terms." *Id.* at 84. Probable cause represents a compromise between preventing crime and insuring individual privacy. Balancing represents the means to the compromise. Probable cause has been set as the minimum standard to justify arrests and searches. *Id.* at 54, 57. The Court in *Carroll v. United States*, 267 U.S. 132, 161 (1924), concluded that the substance of all the definitions of probable cause was a "reasonable ground for belief in guilt." This is not much different from a reasonable suspicion of criminal activity.

The Court recently reaffirmed these same sentiments.

examining police-citizen encounters: first it determined the justification for the intrusion,<sup>101</sup> then it determined whether the scope of the intrusion had exceeded its initial justification.<sup>102</sup>

The *Terry* Court believed it had set out a narrow exception to the general requirement of probable cause.<sup>103</sup> It held that when a law officer has reason to believe that criminal activity is afoot and that the person suspected of such activity is armed and dangerous, then the officer may act to ensure his and others' safety during the investigation by frisking the suspect for weapons.<sup>104</sup> *Terry* did not stand for the proposition that a seizure was justified based on a reasonable suspicion of any criminal activity, only on a reasonable suspicion that the suspect being investigated was armed and dangerous.<sup>105</sup>

Justice Douglas, the lone dissenter in *Terry*, did not view the case as a narrow exception to the general probable cause requirement, but did hope that governmental intrusions based on reasonable suspicion would be limited to the context of violent crimes.<sup>106</sup> He foresaw the specter of totalitarianism

in the watering down of the fourth amendment rights by the "hydraulic pressures" of our time, symbolized by the abandonment of the strict application of probable cause for searches and seizures.<sup>107</sup> In light of the development of the reasonable suspicion standard and its application in contexts other than violent crimes, Justice Douglas' fears, although possibly overstated, were neither misplaced nor unfounded.

The use of the reasonable suspicion standard by the Supreme Court and the lower courts indeed has gone beyond its expected application.<sup>108</sup> The case that followed *Terry*, *Adams v. Williams*,<sup>109</sup> lim-

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olent crimes. Second, if investigatory stops are limited to only violent crimes there will be less public resentment because it will be easier to see the justification in relation to violent crimes. Finally, such a limit will decrease the opportunities for abuse—fishing expeditions for evidence will be severely restricted. W. LAFAVE, *supra* note 51, at 27. See Caracappa, *supra* note 80, at 510.

As the number of stops increases so does the hostility of the community toward the police. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 at 262 (1975).

<sup>107</sup> *Terry v. Ohio*, 392 U.S. at 37. Justice Douglas felt strongly that to move away from probable cause, which provided certainty and was deeply rooted in our history, would give the police more power than the magistrate, leading inevitably to totalitarianism. Such a choice should be made by the people, not the Court.

Some writers view investigatory seizures as a means of circumventing probable cause requirements and believe that the exercise of power unlimited by probable cause will become the exercise of arbitrary power. See Caracappa, *supra* note 80, at 527-28. See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974) (quoting *amicus curiae* Brief for NAACP Legal Defense and Education Fund, Inc. at 56-57, *Terry v. Ohio*, 392 U.S. 1).

<sup>108</sup> See note 103 *supra*.

<sup>109</sup> 407 U.S. at 147. A policeman approached the respondent in a high-crime area late at night. Respondent was seated in a car. The officer asked him to get out of the car. His response was to roll down the window. When he did so the officer reached in and grabbed respondent's gun. The officer acted solely on the tip. He had not observed any suspicious behavior, nor prior to seizing the gun had the officer asked to see respondent's permit to carry a gun (Connecticut allowed the carrying of a handgun with a permit). Also there was some question as to the informant's reliability, *id.* at 156-57 (Marshall, J., dissenting).

The informant's information would not have provided probable cause for an arrest or search under the reliable-credible test. The test requires two things. First, a showing that the informant was reliable in the past is required. Second, the information provided is required to form the basis for deciding that defendant is involved in a criminal activity. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). Neither requirement was met in *Adams*.

For a general overview of the argument against the majority's holding, see Miles, *supra* note 99, at 138-39.

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"The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the reasonableness requirement of the Fourth Amendment, and provides relative simplicity and clarity necessary to the implementation of a workable rule." *Dunaway v. New York*, 442 U.S. at 213.

<sup>101</sup> See text accompanying notes 21 & 22 *supra*.

<sup>102</sup> *Terry v. Ohio*, 392 U.S. at 20. "The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 19.

<sup>103</sup> The Court recognized that it stated the question narrowly. *Id.* at 15. After balancing the interests the Court provided officers with "a narrowly drawn authority" to seize weapons without probable cause when the officer has reason to believe that the individual is armed and dangerous. *Id.* at 27. The search was to be limited to weapons only. After all, that was the basis for the initial intrusion. *Id.* at 29. Other cases have mentioned the limited nature of the *Terry* search. See *Ybarra v. Illinois*, 100 S. Ct. at 343; *Dunaway v. New York*, 442 U.S. at 210; *Adams v. Williams*, 407 U.S. at 146, 157 (Marshall, J., dissenting).

<sup>104</sup> *Terry v. Ohio*, 392 U.S. at 24, 30.

<sup>105</sup> See note 103 *supra*.

<sup>106</sup> *Adams v. Williams*, 407 U.S. at 151 (Douglas, J., dissenting). Others, too, have maintained that the reasonable suspicion standard should not be extended beyond violent crimes. *Id.* at 151 (Brennan, J., dissenting); *id.* at 154 (Marshall, J., dissenting).

Three reasons for not extending the standard are provided by one recent work on search and seizure. One reason to limit the standard to violent crimes is that the necessity for immediate action (a factor in the *Terry* Court's reasoning) is not as great with minor and nonvi-

ited the application of the standard to violent crimes,<sup>110</sup> but allowed the officer's reasonable suspicion to be based solely on an informant's tip.<sup>111</sup>

Neither officer safety nor violent crimes were involved in the next group of cases involving stops of automobiles. In one, the Court required the border patrol to have a reasonable suspicion that the car stopped was carrying illegal aliens.<sup>112</sup> In the next case, not even reasonable suspicion was required for the border patrol to set up a road block to check all cars for illegal aliens.<sup>113</sup>

The decisions in the lower federal courts provide other examples of expansion. Like the Supreme Court, these courts have based decisions to allow intrusions on general policy considerations rather than the particularized circumstances of a given situation.<sup>114</sup> Also, police activity of a less intrusive nature than a stop and frisk has been approved on a standard less exacting than reasonable suspicion.<sup>115</sup>

<sup>110</sup> The dissent below believed that *Adams* had enlarged the *Terry* mandate from violent, serious crimes to crimes of possession. See *Williams v. Adams*, 436 F.2d 30, 38-39 (2d Cir. 1971) (Friendly, J., dissenting).

<sup>111</sup> The officer had no observation from which to draw in establishing articulable facts or reasonable inferences. Further, even with the information obtained, the officer had no reason to believe the suspect was dangerous.

<sup>112</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873. The Court balanced the public's interest in keeping illegal aliens out of the country because of the economic costs and social problems they cause, *id.* at 878, against the modest intrusion of stopping the vehicle and asking a few questions, *id.* at 879-90. Significantly the Court broke away from the violent crimes limitation; no attempt was made to justify the stop on that basis.

However, any intrusion that went beyond the initial questions required probable cause or consent of the individual. *Id.* at 882-83.

It has been maintained that *Brignoni-Ponce* increased the protection afforded minorities against intrusions on their privacy. The Court's reasonable suspicion standard replaced the patrolman's reliance on race as the determining factor in stopping a vehicle. Van Sicklen; *supra* note 40, at 157 n.6.

<sup>113</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). *Brignoni-Ponce* was distinguished. *Id.* at 577-60.

For another case where a general concern outweighed the cases's particularized factual situation, see *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (officer's safety was the general concern). The Court upheld the authority of an officer to order the occupants of an auto stopped for a traffic violation to step out of the car.

<sup>114</sup> *Miles*, *supra* note 99, at 147 (citing *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1978); *In re H.B.*, 75 N.J. 243, 381 A.2d 759 (1979)). See *Caracappa*, *supra* note 80, at 501; Note, *People v. DeBour: The Power of the Police to Stop and Frisk Citizens*, 30 SYRACUSE L. REV. 893, 907 (1979).

<sup>115</sup> *Miles*, *supra* note 99, at 147 (citing *People v. De Bour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 325 N.E.2d 562

Recently, however, the Supreme Court's application of the reasonable suspicion standard has had a limiting effect on governmental intrusions. In *Ybarra v. Illinois*,<sup>116</sup> the Court failed to find the necessary reasonable suspicion to allow the frisk of an individual who happened to be in a bar when the police, armed with a search warrant for the bar and bartender, came to search.<sup>117</sup> Similarly, the standard had a limiting effect in *Delaware v. Prouse*,<sup>118</sup> where the Court refused to allow random stops of automobiles. To make a license or registration check stop, the officer must have a reasonable suspicion that there is a license or registration violation involving the stopped auto.<sup>119</sup>

The Court in *Dunaway v. New York*<sup>120</sup> gave notice that the reasonable suspicion standard had not replaced probable cause in determining the reasonableness of every intrusion short of a search or an arrest. The Court refused to extend the reasonable suspicion standard to custodial interrogation.<sup>121</sup>

(1976). See note 114 *supra*.

<sup>116</sup> 100 S. Ct. 338 (1979). See Note, *Fourth Amendment—Search of an Individual Pursuant to a Warrant to Search the Premises*, 71 J. CRIM. L. & C. 558 (1980).

<sup>117</sup> Justice Rehnquist argued in dissent that reasonable suspicion existed due to the individual's proximity to the bartender, a suspected drug dealer, the fact that the police could have feared for their safety, and that a frisk therefore would have been appropriate. Such a search would then have supplied probable cause for the officer to believe that the individual was carrying narcotics. Alternatively, he maintained that the warrant satisfied all fourth amendment requirements. 100 S. Ct. at 352.

<sup>118</sup> 440 U.S. 650 (1979). See Note, *Reasonable Expectations of Privacy in Automobile Searches*, 70 J. CRIM. L. & C. 498 (1979).

<sup>119</sup> *Delaware v. Prouse*, 440 U.S. at 663. The Court relied heavily on *Brignoni-Ponce* and *Martinez-Fuerte* in reaching its conclusion, so the outcome is not surprising. *Id.* at 656. Also the traffic safety interest was not advanced to the extent necessary to make this intrusion reasonable without a reasonable suspicion basis. *Id.* at 659-60.

This decision actually expanded the privacy afforded to occupants of vehicles. Although the *Brignoni-Ponce* decision four years earlier contained a similar holding, the Court in that case did not extend it to cover stops necessary by state and local authorities to enforce state and local traffic laws. *United States v. Brignoni-Ponce*, 422 U.S. at 883 n.8.

The *Prouse* decision caught many by surprise, but in 1924 the Court laid the foundation by ruling that Prohibition agents could not stop autos at random in the hope of finding liquor, rather probable cause was required. *Carroll v. United States*, 267 U.S. at 153-54.

<sup>120</sup> 442 U.S. 200 (1979). See Note, *supra* note 83.

<sup>121</sup> *Dunaway v. New York*, 442 U.S. at 213. The *Dunaway* Court cited *Brignoni-Ponce* as guidance. The Court held that probable cause and not reasonable suspicion should be the standard for custodial seizures for three reasons. *Id.* at 216. One, *Brignoni* noted that only a few

Finally, in *Brown v. Texas*<sup>122</sup> the Court applied the reasonable suspicion standard narrowly to the facts to determine that no reasonable suspicion of criminal activity existed.<sup>123</sup> Based on *Ybarra*, *Prouse*, *Dunaway*, and *Brown* the Court appeared to be moving in the direction of a more conservative interpretation of the reasonable suspicion standard. *United States v. Mendenhall* does not fit such a trend.

#### IV. THE REASONABLE SUSPICION STANDARD IN MENDENHALL

The *Mendenhall* Court spent much time on the issue of whether the initial stop was a seizure, even though seven of the Justices believed that the issue did not warrant a decision by the Court.<sup>124</sup> The Justices apparently believed that they were staking out positions on the issue, but upon examination the actual positions are not clear.

A majority of the Justices appear to accept the Stewart standard of "a reasonable belief that one is not free to leave" to be the basis for determining when a stop constitutes a seizure.<sup>125</sup> Justice Stewart, while asserting that not all stops are seizures, failed to delineate between informational stops and investigatory stops. This approach to the seizure question is simplistic. A situation where a citizen stopped by an officer would reasonably believe himself free to turn and walk away, ignoring any question put to him, is difficult to visualize. Likewise, it is unclear how *Mendenhall* could reasonably have believed she was free to leave and thus avoid the agent's questions when she was approached by him and asked for items without

which he would not leave. Although Justice Stewart notes that the police have the same right as any ordinary citizen to ask questions of anyone they meet, being questioned by a stranger in a public place is different from being questioned by a stranger who identifies himself as a federal agent. The former can be ignored if one desires, but who can reasonably believe he is free to ignore the questions of an officer when that officer has made a point of stopping the individual? Every stop by an identified officer should constitute a seizure under the Stewart standard. The officer has used his authority to restrain the individual's freedom of action,<sup>126</sup> and the individual could not reasonably believe himself to be free to leave.

Justice Stewart distinguished the auto cases, maintaining that every pedestrian stopped was not seized just because the Court had previously held that every time a vehicle was stopped it was seized. He believed the intrusion to be greater in the latter case. The difference in the two situations, however, is not so obvious. In both, the officer by some show of authority has halted the movement and restricted the freedom of the detainee.<sup>127</sup> The only difference is that one detainee is in a car and the other is on foot. The framers of the fourth amendment surely could not have intended to favor the driver over the pedestrian.

Justice Stewart also distinguished *Brown v. Texas*.

<sup>126</sup> This is part of Justice Stewart's test. See *United States v. Mendenhall*, 100 S. Ct. at 1877.

<sup>127</sup> There is some doubt regarding one's psychological ability to voluntarily consent in such a situation. It is a "sociological reality that most individuals submit to a police officer's authority." Only one reason is based on a wish to voluntarily cooperate. Fear of the police and a belief that noncooperation will lead to arrest are two other major reasons. See Note, *supra* note 114, at 901 n.30 (citing L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 17 (1967)).

The Court in *Prouse* (one of the auto cases distinguished) gave four reasons for requiring the officer to have a reasonable suspicion of a traffic violation before stopping the auto. *Delaware v. Prouse*, 440 U.S. at 657. The four reasons the Court put forth apply equally to the stop of a pedestrian. The officer has interfered with one's freedom of movement whether he stops an auto or a pedestrian. The stop takes the time of both the driver and the pedestrian. Anxiety over being approached by an officer occurs in either case, whether one is involved in innocent or criminal conduct. Finally, when an officer pulls an auto over, a show of authority is required. The same is true for the pedestrian. Lights may not flash nor sirens screech, but the agent identifies himself as a law officer. This establishes his authority to stop the individual and ask him some questions. The identification serves the purpose of preventing the individual from reacting as he would normally to a stranger who was pestering him with questions or intruding upon his privacy.

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questions would be allowed during a stop based on reasonable suspicion, otherwise probable cause or consent was required. Two, *Terry* was the exception and not the rule. Three, custodial interrogations were more like arrests than investigatory stops. *Id.* at 211-12. To apply the reasonable suspicion standard would cause the exception to swallow the rule. *Id.* at 212.

<sup>122</sup> 443 U.S. 47 (1979).

<sup>123</sup> The Court examined *Terry* and its progeny, followed their analysis, and determined that the facts were not sufficient to establish a reasonable basis for the stop. Even though the area was a high-crime area, it was late at night, the police saw the petitioner approach another man in an alley but avoid him when he saw the police, and the petitioner refused to give his name to the police. The Court ruled that suspicion was not reasonable. *Id.* at 51-52.

<sup>124</sup> See note 74 *supra*.

<sup>125</sup> *United States v. Mendenhall*, 100 S. Ct. at 1877, 1881 n.1 (Powell, J., concurring). Although the concurrence was not dissatisfied with the standard set forth, it did not actually accept the standard or apply it in *Mendenhall*.

The *Brown* Court viewed the stop of a pedestrian to ascertain his identity to be a seizure.<sup>128</sup> Justice Stewart believed that no seizure occurred in *Brown* until Brown was frisked over his protest.<sup>129</sup> But the *Brown* opinion seems to indicate that a seizure occurred when Brown was stopped. Mendenhall, too, was stopped for identification. Even though Mendenhall provided identification and Brown did not, that would not be a distinguishing factor on the stop issue. There is no distinguishing feature. Both were stopped while walking in public places by officers for identification purposes. If one case requires reasonable suspicion, should not the other?

The dissent applied Stewart's standard, without accepting it, to show that no reasonable suspicion existed,<sup>130</sup> yet it proposed no alternative standard. At one point the dissent indicated that all stops of citizens by the police are seizures.<sup>131</sup> However, Justice White had recognized in *Terry* that not all street encounters are seizures.<sup>132</sup> Whether Justice White actually meant in *Mendenhall* that all stops, or only stops for investigative purposes, constitute seizures is never explicitly made clear.

What is more puzzling about the dissent is its view of the standard applicable to the seizure. Justice White's analysis was based on the reasonable suspicion standard,<sup>133</sup> but he wrote at times as

<sup>128</sup> *Brown v. Texas*, 443 U.S. at 50.

<sup>129</sup> *United States v. Mendenhall*, 100 S. Ct. at 1878.

<sup>130</sup> *Id.* at 1884-85.

<sup>131</sup> *Id.* at 1884; see note 81 and accompanying text *supra*.

<sup>132</sup> *Terry v. Ohio*, 392 U.S. at 34 (White, J., concurring). Also, all four of the dissenters were in the majority in *Dunaway* when the Court refused to adopt a "multifactor balancing test" to determine "reasonable police conduct under the circumstances" to cover all seizures that are less intrusive than an arrest. The majority felt that such a notion, balancing each situation, would destroy the protections intended by the framers in the fourth amendment. *Dunaway v. New York*, 442 U.S. at 213. The majority went on to clarify its position against a sliding scale test. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 213-14.

In a concurrence Justice White maintained that the key to the fourth amendment was not probable cause, but balancing. "[I]f courts and law enforcement officers are to have workable rules . . . this balancing must in large part be done on a categorical basis—not on an ad hoc, case by case fashion by individual police officers." *Id.* at 214 (White, J., concurring).

<sup>133</sup> *United States v. Mendenhall*, 100 S. Ct. at 1887. The dissent impliedly recognizes the question of a seizure as an issue. See note 89 *supra*. If they recognize the issue then they must not mean that all stops are seizures, because if all stops are seizures, there would be no issue.

if he were willing to abandon a blanket reasonable suspicion standard and institute a case-by-case balancing approach.<sup>134</sup> The danger of this approach is that it lowers the requisite factual standard which separates privacy from intrusion. Not only would some intrusions require less of a factual basis, but no consistent standard would govern intrusions short of a custodial search.<sup>135</sup> Each court hearing a case involving a lesser police intrusion would have the freedom to set its own standard. Police would have no standard to govern their conduct, and citizens would not know what protections they had until a court ruled on the point.

The Court is faced with a dilemma in determining when a stop is a seizure. The majority position, while seeming to give officers more latitude in dealing with crime, may actually restrict an officer's options if reasonable suspicion is required every time an individual submits to official authority by stopping. Conversely, the language used by the dissent, despite its intent to expand the protections of the fourth amendment, provides a basis for opening individual privacy to intrusions based on less than a reasonable suspicion.<sup>136</sup>

The controversy surrounding the fourth amendment centers on the tension between society's need for effective crime control and an individual's right to privacy. Borrowing from each of the positions taken by the Court might provide a beneficial compromise to this tension—it should establish an investigational purpose test. The Court should recognize the difference between stopping an individual for information to aid an investigation, and stopping an individual for the purpose of investigating that individual.<sup>137</sup> The latter clearly is more intrusive because the individual by his own words or deeds could incriminate himself, while in the former case the individual is surrendering information that would indirectly benefit him as a member of society. Whenever an officer stops an individual to investigate him, rather than to inquire about an occurrence or another person, the officer should be required to have a reasonable

<sup>134</sup> See note 89 *supra*.

<sup>135</sup> The dissent relied on the agent's testimony that if Mendenhall had tried to walk away she would have been stopped. *United States v. Mendenhall*, 100 S. Ct. 1881 n.12.

<sup>136</sup> See note 81 *supra*. "[W]hen the Supreme Court speaks in a manner that is favorable to the government, its words will not long remain confined to the context of the particular case in which they are spoken." Miles, *supra* note 99, at 158. *Terry* is an example. The Court in *Terry* did not countenance the extended application of its ruling. See Caracappa, *supra* note 80, at 510.

<sup>137</sup> *Terry v. Ohio*, 392 U.S. at 13.

suspicion that the person stopped is involved in criminal activity. This would protect the individual's rights regardless of whether that individual reasonably believes he is or is not free to leave.

Developing an objective standard for distinguishing an informational from an investigatory stop could be difficult.<sup>138</sup> The Court could solve the problem by requiring a reasonable suspicion to exist any time a stop led to the production of evidence that could be used against the individual stopped. This requirement seems to coincide with an individual's reasonable expectation of freedom from any intrusion that causes divulgence of self-incriminating information. This standard would not be based on the officer's subjective intent; the only relevant fact would be the information or evidence gained by the stop. This would involve hindsight, but at least the standard would be based on the articulable facts and reasonable inferences known to the officer prior to the stop, and would thus protect individual privacy.

The Stewart position does not provide this protection. If an individual does not heed an officer's approach, but continues on his way, there is no seizure problem because there has been no intrusion. Similarly, if the individual attempts to continue on his way and the officer acts to stop him, a seizure has occurred. The problem arises when the individual stops upon initiation of a conversation without the officer doing anything other than identifying himself. Under Justice Stewart's interpretation this is not a seizure, but the officer, by observing the individual and using information gained from the conversation, could develop reasonable suspicion to "seize," or even probable cause to arrest the individual. By merely stopping for an officer's question, the individual allows his actions and knowledge to be subjected to a form of "search" without the officer having to justify the initial intrusion. Justice Stewart treats this as if the individual has consented to the "search" by stopping.<sup>139</sup> In light of the psychological bias toward

stopping when approached by an officer, some threshold is required to safeguard individual privacy. The proposed investigational purpose test would require reasonable suspicion for the officer to obtain evidence from a person that could actually be used against him. If, however, the only information gained was not incriminating, then reasonable suspicion would not be required for the stop. The police would retain flexibility in the information gathering process.

Justice Powell's concurrence focuses more on the reasonable search and seizure clause of the fourth amendment than on the *Terry* reasonable suspicion standard.<sup>140</sup> Although he did hold that a "reasonable and articulable suspicion of criminal activity" existed to justify stopping Mendenhall, he did not rely solely on the facts known to the agents, nor on their inferences in reaching his conclusion.<sup>141</sup> The need for a highly trained experienced group of agents acting within a well-defined plan to limit the trafficking of deadly drugs was important to him, indeed overshadowing the particular situation.<sup>142</sup> Such acquiescence to police skills, although arguably opening the way for more intrusions, may in fact better protect the individual from governmental intrusion of a more restrictive nature.<sup>143</sup>

<sup>140</sup> See *United States v. Mendenhall*, 100 S. Ct. at 1881 (Powell, J., concurring). Justice Powell believed *Terry* stood for the proposition that a reasonable investigatory seizure does not offend the fourth amendment.

<sup>141</sup> *Id.* at 1883; see text accompanying notes 76 & 77 *supra*.

<sup>142</sup> Justice Powell was not the first to place an emphasis on official planning. Planning was recognized in *Martinez-Fuerte* as a means of decreasing field officer discretion which in turn limited the potential for abuse. *United States v. Martinez-Fuerte*, 428 U.S. at 558-60. *Brown* placed planning on a par with specific and articulable facts.

To this end balancing the public interest against the right to be free from intrusion and to protect one's reasonable expectation of privacy from arbitrary intrusions the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure of the particular interest, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

*Brown v. Texas*, 443 U.S. at 51.

<sup>143</sup> Probable cause may in fact be strengthened by the adoption of an additional lesser standard. The standard previously was watered down to encompass a lesser standard. This watered down standard in turn was applied to arrests and searches. With establishment of the reasonable suspicion standard, there would be no need to diminish the requirements for probable cause. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 271-73; LaFave, *supra* note 45, at 123-24.

<sup>138</sup> See note 101 *supra*.

<sup>139</sup> The fourth amendment requires "that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion is applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth v. Bustamonte*, 412 U.S. at 228.

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and silent deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Justice Powell impliedly establishes two restrictions in addition to requiring reasonable suspicion: a major national problem<sup>144</sup> and an artfully crafted plan to solve the problem.

The discussion of the consent issue was anticlimactic.<sup>145</sup> The majority contended that Mendenhall had accompanied the agents to their office and had consented twice to a body search while being informed that she did not have to consent. The weakness in the majority position is that the agents did not inform Mendenhall that she was free to decline to go to the office. Why did the agents wait until Mendenhall was in the DEA office before telling her she could refuse to consent?<sup>146</sup> It is not clear why the majority should place so much reliance on Mendenhall being informed that she did not have to consent to the body search but overlook the lack of informed consent at the initial stop.<sup>147</sup>

Also, the Court seemed to grant a broad interpretation to what Mendenhall consented to when she accompanied the agents to the office. The agent asked her if she was willing to go to the DEA office for further questioning.<sup>148</sup> He did not ask her if she would accompany the agents to the office for a search of her purse and her person. Even if one can voluntarily consent without knowing that he is free to refuse, one must surely know first what is being requested. Yet, the Court accepts as sufficient the fact that Mendenhall consented merely to accompany the agents.

Finally, *Mendenhall* represented the first time the Court had considered the drug courier profile<sup>149</sup> as

<sup>144</sup> The Court has been concerned with issues of national importance: *United States v. Mendenhall*, 100 S. Ct. 1873 (1980) (illegal drugs); *Delaware v. Prouse*, 440 U.S. 650 (1979) (highway safety); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (social and economic costs of illegal aliens); and *Terry v. Ohio*, 392 U.S. 1 (1968) (crime).

<sup>145</sup> The concurrence said nothing separate on the issue.

<sup>146</sup> See *United States v. Mendenhall*, 100 S. Ct. at 1889 n.18. "Will you walk into my parlor?" said the spider to the fly; (You may find you have consented, without ever knowing why.)"

<sup>147</sup> See note 69 and the accompanying text *supra*.

<sup>148</sup> *United States v. Mendenhall*, 100 S. Ct. at 1874.

<sup>149</sup> The drug courier profile is "a loosely formulated list of characteristics common to persons using airports for narcotics traffic." *United States v. Pope*, 561 F.2d 663, 666 (6th Cir. 1977). Each airport has its own drug courier profile based on the experience of the DEA agents working at that particular airport. The profile is constantly being updated in light of current experience. The basic purpose of the file is to inform the agent, not substitute for his own judgment. *Petition for Certiorari* at 17 n.17, *United States v. Mendenhall*, 100 S. Ct. 1870.

As of 1977 the Detroit Metropolitan Airport drug

courier profile included the following characteristics: 1) use of small denomination currency for ticket purchases, 2) travel to and from major drug centers within a short period of time, 3) the use of an empty suitcase or no luggage, 4) nervousness, 5) the use of an alias in purchasing the ticket. *United States v. McCaleb*, 552 F.2d at 719-20. In *McCaleb* the court noted that this profile is not written down, and it is not made clear to the agents what combination of these characteristics must be present to justify a stop. *Id.* at 719-20.

The profile of the New Orleans airport is made up of: 1) unusual nervousness, 2) limited or no luggage, 3) carrying a large sum of cash in small denominations, 4) an itinerary that includes circuitous routes from major drug source cities, 5) arriving from a source city, 6) paying for the ticket in small currency, 7) one way tickets, 8) use of an alias, 9) using a false telephone number on a flight reservation, 10) placing a call immediately on arrival, 11) travel by a known trafficker. *United States v. Ballard*, 573 F.2d 913, 914-15 (5th Cir. 1978).

At La Guardia in New York City the profile includes: 1) the passenger is not carrying luggage, 2) the passenger attempts to immediately leave the airport, 3) nervousness, 4) the individual always seems to be checking to see if he is being followed, 5) the individual is dressed abnormally for the flight, 6) if the individual does have luggage, the luggage has no identification tags, 7) individuals traveling together attempt to conceal that fact. *United States v. Rico*, 594 F.2d 320, 325 (2d Cir. 1979).

Profiles have been used and accepted in other contexts, including the detection of airline hijackers, see *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974); *United States v. Palazzo*, 488 F.2d 942 (5th Cir. 1974); *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973); smuggling, see *United States v. Forbicetta*, 484 F.2d 645 (5th Cir. 1973), and auto theft, see *State v. Ochan*, 112 Ariz. 582, 544 P.2d 1097 (1976).

<sup>150</sup> See, e.g., *United States v. Rico*, 594 F.2d at 326; *United States v. Troutman*, 590 F.2d 604, 605 (5th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Ballard*, 573 F.2d at 916; *United States v. McCaleb*, 552 F.2d at 720; *United States v. Chamberliss*, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977); *United States v. Loyd*, 418 F. Supp. 724, 728 (E.D. Mich. 1976). *Contra*, *United States v. Pope*, 561 F.2d 882 (6th Cir. 1978) (drug profile relied on to provide reasonable suspicion to justify stop).

For examples of cases using the drug courier profile in congruence with other factors, see *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Van Lewis*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).



suspicion.<sup>151</sup> Finally and most importantly, the concurrence relied on more than the drug courier profile to determine that the seizure was reasonable.<sup>152</sup> Still, the reasonable suspicion aspect of Justice Powell's analysis was based on the profile characteristics.<sup>153</sup>

In short, *United States v. Mendenhall* is a step backward for those who believed that the expansive interpretation of the reasonable suspicion doctrine was being curtailed.

#### V. REID v. GEORGIA

DEA agents at the Atlanta airport observed Reid arriving early in the morning from Fort Lauderdale. A companion deplaned a few persons behind Reid. Both carried similar shoulder bags. Neither claimed any luggage, and both continued to the main lobby of the terminal, where they reunited and left together. An agent approached them outside the terminal, identified himself as a federal narcotics agent, and asked to see identification and airline tickets. He learned that Reid purchased both tickets, that both suspects had stayed in Fort Lauderdale only one day, and he observed that both seemed nervous. The suspects agreed to return to the terminal and have their bags searched, but once inside the terminal, Reid tried to run away. Before agents apprehended him, he abandoned his shoulder bag. The agent found cocaine in the bag.<sup>154</sup>

The trial court granted Reid's motion to suppress based on an illegal seizure.<sup>155</sup> A Georgia court of appeals reversed,<sup>156</sup> citing *Terry v. Ohio* and holding that the stop based on the drug courier profile was permissible, that Reid consented to return to the terminal to be searched, and that Reid's attempted flight provided probable cause to search the abandoned bag.<sup>157</sup> The Supreme Court, *per curiam*, vacated the lower court's order and remanded the case for further proceedings.

The Court began by explicitly recognizing that the case belonged under the rubric of *Terry*.<sup>158</sup> The

key question was whether the agents had reasonable suspicion that Reid was carrying narcotics. The Court considered the drug courier profile characteristics relied on by the appellate court,<sup>159</sup> but decided that they did not provide a basis for reasonable suspicion.<sup>160</sup> Too much of the behavior relied upon by the agents was innocent. Accepting such behavior as the basis for stops would allow virtually random seizures of innocent travelers.<sup>161</sup> The Court did leave itself an out by noting that there could be instances where totally innocent behavior could provide the basis for reasonable suspicion of criminal activity.<sup>162</sup>

Justice Powell wrote again for a concurrence of three.<sup>163</sup> He briefly restated the position of Justices Stewart and Rehnquist on the seizure issue in *Mendenhall*.<sup>164</sup> He then recapped the position of the concurrence in *Mendenhall* and restated that he was not necessarily in disagreement with the position taken by Justices Stewart and Rehnquist in analyzing the issue.<sup>165</sup> He noted that since *Mendenhall* did not decide the initial seizure question, and the Court did not consider the issue in *Reid*, the question remained open, to be decided by the state courts in light of the *Mendenhall* decision.<sup>166</sup>

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ment. Any curtailment of liberty must be supported by an articulable suspicion of criminal activity.

<sup>159</sup> *Id.* at 2753-54. The petitioner arrived from Fort Lauderdale, a source city. He arrived early in the morning. The petitioner and his companion appeared to be trying to conceal the fact that they were traveling together. Neither carried more luggage than a shoulder bag.

<sup>160</sup> *Id.* at 2754. Lower courts have not upheld stops based on the profile because the behavior which provided the basis for the agent's reasonable suspicion was consistent with innocent behavior. *See, e.g., United States v. McCaleb*, 552 F.2d at 720.

<sup>161</sup> *Reid v. Georgia*, 100 S. Ct. at 2754. The Court previously has refused to sanction random seizures of innocent people without a reasonable suspicion. *See Delaware v. Prouse*, 440 U.S. 650; *United States v. Brignoni-Ponce*, 422 U.S. 873.

The government has argued contrary to this position that a standard of "consistent with innocent behavior" is actually more severe than reasonable suspicion, probable cause, and even reasonable doubt. Or, if it means more consistent with criminal than innocent behavior, then it is another definition for probable cause. *See* Petition for Certiorari at 15 n.15, *United States v. Mendenhall*, 100 S. Ct. at 1873.

<sup>162</sup> *Reid v. Georgia*, 100 S. Ct. at 2754. Neither the opinion nor *Terry*, cited to support the view, provide an example of innocent behavior supporting a reasonable suspicion.

<sup>163</sup> Burger, C.J., Powell and Blackmun, J.J.

<sup>164</sup> *Reid v. Georgia*, 100 S. Ct. at 2754.

<sup>165</sup> *Id.* at 2755

<sup>166</sup> *Id.* This would indicate that at least in the context

<sup>151</sup> Justice Powell also pointed out that reliance on the drug courier profile did not per se provide reasonable suspicion. *United States v. Mendenhall*, 100 S. Ct. at 1883 n.6.

<sup>152</sup> *Id.* at 1883.

<sup>153</sup> *Id.* at 1882.

<sup>154</sup> *Reid v. Georgia*, 100 S. Ct. 2753 (1980). *See* note 27 *supra*.

<sup>155</sup> *Id.* at 2753.

<sup>156</sup> The decision of the Georgia Court of Appeals has not been reported.

<sup>157</sup> *Reid v. Georgia*, 100 S. Ct. at 2753.

<sup>158</sup> *Id.* All seizures are covered by the fourth amend-

Justice Rehnquist dissented along two lines. He believed the conduct of the agent in stopping Reid and obtaining his consent did not fall under fourth amendment protections.<sup>167</sup>

#### VI. ANALYSIS

Reid reaffirmed the application of the standard of reasonable suspicion of criminal activity to stops based on the belief that the individual stopped is carrying narcotics. The Court again applied the *Terry* analysis. It looked to the articulable facts and the officer's inferences to determine if a basis for reasonable suspicion existed. The suspicion of criminal activity was not reasonable.

The difference in the decisions in *Reid* and *Mendenhall* is hard to explain. In each case the Court applied the same *Terry* analysis to similar facts.<sup>168</sup> *Mendenhall* and *Reid* both arrived in the early morning from a city known as a major source of narcotics for the area in which each landed. Both had stayed only a short time in that city. Neither picked up any luggage, and both appeared to be avoiding detection. Both were stopped by agents, and appeared nervous during the questioning. Also, both "agreed" to accompany the agents without being told they could decline to do so. Not only were the facts almost identical, but the same social concern and the same well-defined plan to deal with the concern were present.<sup>169</sup>

Although the drug courier profile differs<sup>170</sup> at each airport, the Court did not distinguish the cases based on an inadequacy in the profile of the Atlanta airport. The profile does not appear to be the distinguishing factor. Indeed, the Court provided no distinguishing factor at all between *Reid* and *Mendenhall*. The only Justices to even recognize *Mendenhall* were Justice Powell, but only on the issue of the initial stop, and Justice Rehnquist, who dissented based on *Mendenhall*. How could the Court ignore *Mendenhall*, a nearly identical case decided only a month prior to *Reid*? Based on the facts, it cannot simply be stated that in *Mendenhall* there was a reasonable suspicion and in *Reid* there was no reasonable suspicion.<sup>171</sup> The Court fails to come to grips with its inconsistency.

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of airport seizures the lower courts are still to draw their own conclusions about reasonable suspicion and the drug courier profile.

<sup>167</sup> *Id.* He maintained his position in *Mendenhall*.

<sup>168</sup> *Id.* (Powell, J., concurring).

<sup>169</sup> The *per curiam* opinion did not go through the same balancing analysis that Justice Powell had applied in the concurrence in *Mendenhall*.

<sup>170</sup> See note 150 *supra*.

<sup>171</sup> Justice Powell maintained in *Mendenhall* that nei-

Actually, labeling the entire Court as inconsistent is not fair. A majority of the Court remained true to the positions they took in *Mendenhall*. Justice Rehnquist continued to believe that no seizure had occurred. Also, the dissenters in *Mendenhall* who could find no reasonable suspicion on those facts consistently found no reasonable suspicion in *Reid*. The baffling change in view came from the Justices making up the concurrence in both cases, and Justice Stewart, who wrote the majority opinion in *Mendenhall*.

The *per curiam* opinion assumed that the stop was a seizure. The investigational purpose test would have provided the same result, but based on more than an assumption. The test presumes any stop is a seizure when it produces evidence that will be used against the individual stopped. Cocaine found in the abandoned suitcase was obtained from the stop of Reid and used to convict him. The stop was therefore a seizure.

Once it is determined that the stop was a seizure, the next step is to determine if the seizure was reasonable. The basis for such a determination is the articulable facts and reasonable inferences available to the officer prior to the stop. The Court concluded on this basis that the agents did not have reasonable suspicion to seize Reid.

The investigational purpose test does not assume all stops to be seizures. It protects individual privacy by requiring reasonable suspicion prior to a stop which produces evidence used against the person stopped, and by disallowing its development during the stop. The test eliminates involuntary "consent" stops without eliminating police flexibility in information gathering.

*Reid* and *Mendenhall* are different in one respect. *Mendenhall* "consented" to the search that produced the evidence, whereas Reid did not consent to having his bag checked, attempting instead to escape. Reid's behavior prior to reaching the DEA office was actually more suspicious than *Mendenhall*'s. Yet *Mendenhall*'s conviction, rather than Reid's, was upheld. This highlights *Mendenhall*'s subsequent consent as the actual distinguishing factor, but does not clarify the Court's analysis of reasonable suspicion. If *Mendenhall*'s consent was the distinguishing feature, then it is no longer clear that the Court followed the *Terry* analysis which requires a decision on the issue of reasonable suspicion first. Alternatively if reasonable suspicion

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ther the success of the program nor the profile were determinative—each case must be decided on its own facts. *United States v. Mendenhall*, 100 S. Ct. at 1883 n.8.

was first analyzed, it is questionable whether the Court relied solely on the facts known to or the inferences drawn by the arresting officers prior to the seizure. An examination of those facts and inferences, consistently conducted, should have resulted in the same holding in both cases.

*Reid* confirmed post-*Mendenhall* lower court holdings that drug courier profiles cannot provide reasonable suspicion.<sup>172</sup> Matching the profile was not enough to constitute reasonable suspicion.<sup>173</sup> The lower courts' position also was bolstered by the Court's recognition that much of the behavior found in the profile constituted innocent behavior.<sup>174</sup> *Reid* is thus consistent with previous decisions abhorring random stops.<sup>175</sup>

Finally, the threshold issue of whether the stop constituted a seizure was again not addressed by the Court.<sup>176</sup> Justices Rehnquist and Powell reaffirmed without elaboration their positions in *Mendenhall*, but the other seven Justices have yet to speak.

## VII. CONCLUSION

*Reid* seems to reverse the direction of *Mendenhall*, if not the case itself. But the *per curiam* opinion did not provide enough of the Justices' reasoning to provide any hints of a trend. In both cases the Court had the opportunity to distinguish between a stop and a seizure, if there is a distinction, but failed to do so. No objective guidelines or criteria were given to the lower courts to deal with this crucial threshold issue.<sup>177</sup> The Court does not seem to feel that the issue is ready for determination.<sup>178</sup>

<sup>172</sup> After *Mendenhall* it could have been inferred that the drug courier profile did provide a reasonable suspicion for a stop. At a minimum, relying on the profile was not *per se* unreasonable.

<sup>173</sup> The same DEA plan and same national drug problem so important to the concurrence in *Mendenhall* was also present in *Reid*.

<sup>174</sup> *Reid v. Georgia*, 100 S. Ct. at 2754.

<sup>175</sup> See *Delaware v. Prouse*, 440 U.S. 650 (1979); *United States v. Brignoni-Pounce*, 422 U.S. 873 (1975).

<sup>176</sup> *Reid v. Georgia*, 100 S. Ct. 2752.

<sup>177</sup> *Terry v. Ohio*, 392 U.S. at 20 n.16. "We thus decide nothing today concerning the constitutional propriety of an investigatory 'seizure' upon less than probable cause for the purposes of detention and/or interrogation." *Id.*

One writer has listed two ways the lower courts are distinguishing an encounter from a seizure. One way attempts to measure the amount of coercion used by the officer to stop and hold the individual. See, e.g., *People v. DeBour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375, (1976). The other requires the examination of both the amount of force and the purpose of the encounter. See, e.g., *State v. Evans*, 16 Or. App. 189, 517 P.2d 1225 (1974); *Van Sicklen*, *supra* note 40, at 888 nn.73, 79, 889 n.81.

<sup>178</sup> Justice Stevens noted this issue in *Mimms*.

Justice Powell closed his concurrence in *Reid* by inviting the lower courts to take up the issue themselves.<sup>179</sup> The dissent in *Mendenhall*, which was the bulk of the *per curiam* majority in *Reid*, opened the way for wide expansion of less demanding justifications for intrusions other than reasonable suspicion, even while they were applying that standard.<sup>180</sup>

The role of the drug courier profile also was left unsettled. The Court cannot expect to curtail unreasonable intrusions without providing some guidance as to when the standard of reasonable suspicion has been met.<sup>181</sup> Federal agents learned from *Reid* that they cannot always rely on the profile, but also that innocent behavior can sometimes support a reasonable suspicion of criminal activity. In *Mendenhall* a majority could not reach an agreement on the profile's proper role.

The Court is clear only in its continued acceptance of the standard of reasonable suspicion of criminal activity for lesser intrusions than an arrest or a search. The standard had not been seriously questioned since *Adams*, when Justices Marshall and Brennan dissented along with Justice Douglas.<sup>182</sup> Justice Douglas dissented in *Terry* because he feared the creation of a broad expansive doctrine.

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I am acutely aware that almost every decision of this Court holding that an individual's Fourth Amendment rights have been invaded makes law enforcement somewhat more difficult and hazardous. That, however, is not a sufficient reason for this Court to reach out to decide every new Fourth Amendment issue as promptly as possible. In this area of constitutional adjudication, as in all others, it is of paramount importance that the Court have the benefit of differing judicial evaluations of an issue before it is finally resolved on a nationwide basis.

*Pennsylvania v. Mimms*, 434 U.S. at 117 (Stevens, J., dissenting).

<sup>179</sup> *Reid v. Georgia*, 100 S. Ct. at 2755 (Powell, J. concurring). The Fifth Circuit has done so. In *United States v. Robinson*, No. 79-5252 (5th Cir. Sept. 17, 1980), it remanded a drug courier profile/airport seizure case in order to determine at what point the seizure occurred. In remanding, Judge Randall espoused the same concerns as this writer in placing a boundary on the evidence gathered. *Id.* The Fifth Circuit maintains that a seizure occurs when the person stopped no longer has reason to believe, in light of the totality of the circumstances, that he is free to leave. *Id.*

<sup>180</sup> See note 136 & accompanying text *supra*.

<sup>181</sup> "By specifying factors to be considered without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond the intended limits . . ." *United States v. Brignoni-Ponce*, 422 U.S. at 891 (Douglas, J., concurring in judgment).

<sup>182</sup> See note 106 *supra*.

The standard's application has expanded to new contexts,<sup>183</sup> but in the late 1970s it was not as broadly interpreted by the Court in those new contexts. If *Reid* marks the direction of the Court, it is a continuation of the recent trend. *Mendenhall*, conversely, would represent a reversal. Even though *Reid* came after *Mendenhall*, it did not cite *Mendenhall* while dealing with the same factual situation and refused to find reasonable suspicion. The fact that the opinion is short and that *Mendenhall* was not refuted or distinguished makes it impossible to predict the Court's direction.<sup>184</sup> Any time the Court decides two almost identical cases

in opposite ways using the same analysis, confusion is likely to result.

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The options of the police do appear greater today than they did before *Terry*.

The continuation of field interrogation as a police investigative technique depends upon a police willingness to develop policies which carefully distinguish field interrogation from clearly illegal street practices and to take administrative steps to demonstrate that a proper field interrogation program can be carried out without it leading also to indiscriminate stopping and searching of persons on the street. As yet, police have failed to make this kind of demonstration, and thus today field interrogation as a police investigative technique remains in jeopardy.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 23 (1967).

<sup>183</sup> The exception is *Dunaway v. New York*, see note 93 *supra*.

<sup>184</sup> At least one commentator believes the Court is retreating from the supervision of police activity and allowing the lower courts to fill the gap. Miller, *supra* note 99, at 142. See also note 181 *supra*. This however, was prior to *Ybarra*, *Prouse*, *Dunaway*, and *Brown*.