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Hon. Mark A. Costantino

Vito A. Cannavo

Ann Goldstein

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DRUG COURIER PROFILES AND AIRPORT STOPS: IS THE SKY THE LIMIT?

HON. MARK A. COSTANTINO*

VITO A. CANNAVO**

ANN GOLDSTEIN***

To most observers, Sylvia Mendenhall appeared to be a typically nervous air traveler. Her behavior, however, was viewed as suspect by agents who believed that it fit the pattern of a drug courier.¹ She arrived on a flight from Los Angeles, a drug source city;² she was the last person to deplane and appeared very nervous;³ she scanned the entire area;⁴ she proceeded past the baggage area without claiming any luggage;⁵ and she changed airlines for her

* United States District Judge, Eastern District of New York; LL.B., Brooklyn Law School, 1947.

** A.B., State University of New York at Stony Brook; J.D., Cornell Law School, 1978; former law clerk to Hon. Mark Costantino; associate in the law firm of Simpson Thacher & Bartlett, New York, New York.

*** B.A., Vassar College, 1975; J.D., Albany Law School of Union University, 1979; law clerk to Hon. Mark Costantino.

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1. *United States v. Mendenhall*, 100 S. Ct. 1870, 1873 n.1 (1980).

2. A source city is a city from which drugs are shipped to other points for sale or further distribution. Source cities include, *inter alia*, Miami, Florida; Los Angeles, California; and Chicago, Illinois. *See United States v. Vasquez*, 612 F.2d 1338, 1342 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069, 1072 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1039 (5th Cir. 1979); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977); *United States v. Scott*, 545 F.2d 38, 39 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977).

3. *See United States v. Vasquez*, 612 F.2d 1338, 1342 (2d Cir. 1979), *cert. denied*, 100 S.Ct. 2991 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069, 1072 (2d Cir. 1979); *United States v. Price*, 599 F.2d 494, 496 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320, 322 (2d Cir. 1979); *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

4. *See United States v. Forero-Rincon*, 626 F.2d 218, 222 (2d Cir. 1980); *United States v. Vasquez*, 612 F.2d 1338, 1342-43 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069, 1071 (2d Cir. 1979).

5. *See United States v. Forero-Rincon*, 626 F.2d 218, 222 (2d Cir. 1980); *United States v. Vasquez*, 612 F.2d 1338, 1343 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991

flight out of Detroit.⁶ Based upon that behavior pattern, agents of the Drug Enforcement Administration (DEA) stopped Sylvia Mendenhall, asked her for identification, brought her to the airport drug enforcement office, and searched her person.⁷ Subsequently, Sylvia Mendenhall was arrested, indicted, and convicted for possession of heroin.⁸ Presented with these facts, the United States Supreme Court held that Sylvia Mendenhall's fourth amendment rights were not violated when she was detained and questioned by the drug enforcement agents.⁹

The validity of the procedures used by agents in stopping domestic airline passengers who exhibit behavior characteristic of drug couriers remains an open question¹⁰ despite the recent decision in *United States v. Mendenhall*.¹¹ This article analyzes the constitutionality of stopping people in airports solely because their appearance and behavior correspond to traits listed in a "drug courier profile."¹² The propriety of such law enforcement action will be viewed in light of the fourth amendment¹³ requirements and the standards which have developed in the area of stop-and-frisk.¹⁴

(1980); *United States v. Price*, 599 F.2d 494, 496 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320, 322 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1039 (5th Cir. 1979); *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977).

6. *See United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. Oates*, 560 F.2d 45, 60 (2d Cir. 1977); *United States v. Riggs*, 474 F.2d 699, 703 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

7. *United States v. Mendenhall*, 100 S. Ct. 1870, 1873-74 (1980).

8. *Id.* at 1874.

9. *Id.* at 1873.

10. The issue has arisen in many cases before many courts. *See United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979); *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979); *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979), *rev'd & remanded*, 100 S. Ct. 1870 (1980); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977); *United States v. Scott*, 545 F.2d 38 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *United States v. Diaz*, 503 F.2d 1025 (3d Cir. 1974).

11. 100 S. Ct. 1870 (1980). *See* notes 91, 92, 119 & 121 *infra* and accompanying text.

12. *See* notes 44-63 *infra* and accompanying text.

13. *See generally Beck v. Ohio*, 379 U.S. 89 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949).

14. *See generally Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). *See also Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

I. THE FOURTH AMENDMENT AND THE *TERRY* STOP

The fourth amendment to the United States Constitution guarantees that no arrest will be made without probable cause.¹⁵ This guarantee provides not only one of the most fundamental protections under the law,¹⁶ but it also guides the daily interaction between law enforcement officials and suspected criminal offenders.¹⁷ The essential purpose of the fourth amendment proscriptions is to impose a standard of reasonableness on the exercise of discretion by government officials.¹⁸ This requirement of reasonableness varies with the degree of governmental intrusion upon personal freedom.¹⁹ When the official intrusion is an arrest,²⁰ the full panoply of fourth amendment protections is summoned.²¹ Specifically, probable cause must exist before an arrest may occur.²² It is well established that an officer has probable cause to arrest at the moment when the facts and circumstances within his knowledge, and of which he has reasonably trustworthy information, are sufficient

15. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). The fourth amendment to the United States Constitution reads:

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

16. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891). The Court stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

17. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Linkletter v. Walker*, 381 U.S. 618, 629-35 (1965).

18. See *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). See also *Brown v. Texas*, 443 U.S. 47 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

19. See *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Elkins v. United States*, 364 U.S. 206, 222 (1960). See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

20. See *Dunaway v. New York*, 442 U.S. 200 (1979). The *Dunaway* Court explained that only brief and narrowly circumscribed intrusions may be judged by a standard other than that required for arrests. *Id.* at 212.

21. See *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Johnson v. United States*, 333 U.S. 10, 14 (1948). See generally 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 437-76 (1978).

22. See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Warden v. Hayden*, 387 U.S. 294 (1967); *Ker v. California*, 374 U.S. 23 (1963); *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949).

to warrant a prudent person to believe that an offense has been or is being committed.²³ While the standard of probable cause is simple to state, its meaning takes form only after an analysis of the underlying circumstances of each particular case.²⁴ The standard is not technical in nature; rather, it is designed to address the factual and practical considerations of everyday life.²⁵ In essence, the general requirements of the fourth amendment and its specific requirement of probable cause are based upon a "quantum of evidence" standard.²⁶

While the boundary lines of probable cause gradually crystallized,²⁷ a second issue arose concerning the permissible scope of interaction between law enforcement officials and citizens.²⁸ Uncertainty developed over the circumstances which would justify police activity in the absence of facts supporting a finding of probable cause to arrest.²⁹ In light of the fourth amendment's purpose to safeguard the privacy and security of individuals against unreason-

23. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

24. See *Beck v. Ohio*, 379 U.S. 89 (1964). For example, probable cause may be established solely on the basis of information from an informant, or on such information and some corroborating facts. See, e.g., *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

25. *Brinegar v. United States*, 338 U.S. 160 (1949). The *Brinegar* Court stated that the rule of probable cause is a practical conception which accommodates opposing interests. "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.* at 176.

26. See *Ker v. California*, 374 U.S. 23, 34 (1963); *Draper v. United States*, 358 U.S. 307 (1959); *Giordenello v. United States*, 357 U.S. 480 (1958). When the constitutional validity of an arrest is challenged, it is the function of the court to determine whether the facts establish probable cause. Courts will examine what the agent or informant saw, heard, smelled, or otherwise perceived. *Beck v. Ohio*, 379 U.S. 89, 94 (1964).

27. By way of example, case law indicates that where probable cause is based upon an informant's information, the government must show: (1) That the informant was credible and (2) that the informant received his information in a reliable way. *Aguilar v. Texas*, 378 U.S. 108 (1964). The underlying circumstances, including those portions of the information verified by the police, may be considered in determining whether the information supplied was sufficient to constitute probable cause. *United States v. Harris*, 403 U.S. 573 (1971); *United States v. Miley*, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975); *United States v. McCoy*, 478 F.2d 176 (10th Cir.), cert. denied, 414 U.S. 828 (1973).

28. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

29. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). *Terry*, for example, involved a brief, on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an arrest. 392 U.S. at 1.

able invasions by government officials,³⁰ it was unclear whether the seizure of a person without probable cause was per se unreasonable.³¹

In the 1968 decision of *Terry v. Ohio*,³² the United States Supreme Court clarified some of these issues by analyzing encounters between citizens and police which fell short of an arrest in fourth amendment terms.³³ The *Terry* decision established that a police officer may stop and question a person upon less than probable cause.³⁴ While a particular contact may not amount to a technical arrest, the intrusion may be considered a fourth amendment seizure and thus be subject to the amendment's reasonableness requirement.³⁵ Accordingly, under *Terry*, the reasonableness of investigatory stops is to be decided on the facts of the particular case.³⁶ The Court explained that in making an assessment of the

30. See generally *United States v. Ortiz*, 422 U.S. 891 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978); *United States v. Tripp*, 468 F.2d 569 (9th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973).

31. See *Ker v. California*, 374 U.S. 23 (1963); *Brinegar v. United States*, 338 U.S. 160 (1949).

32. 392 U.S. 1 (1968).

33. The *Terry* Court explained that "[t]he distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19. Thus, the Court rejected the notion that the fourth amendment did not come into play as a limitation upon police conduct if the officers stop short of a technical arrest. *Id.* See also *People v. Rivera*, 14 N.Y.2d 441, 445, 201 N.E.2d 32, 34, 252 N.Y.S.2d 458, 461 (1964), *cert. denied*, 379 U.S. 978 (1965).

34. See also *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969).

35. The *Terry* Court explained that the sound "course is to recognize that the Fourth Amendment governs all intrusions by agents . . . and to make the scope of the particular intrusion in light of all the exigencies of the case, a central element in the analysis of reasonableness." 392 U.S. at 18 n.15. See also *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972). The Court in *Davis v. Mississippi*, 394 U.S. 721 (1969) warned that:

[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Id. at 726-27.

36. See *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

reasonableness of a particular stop, it is imperative that the facts be weighed against an objective standard.³⁷ When an intrusion is minimal,³⁸ the facts upon which the intrusion is based must meet an objective, but less stringent, standard of reasonable suspicion.³⁹ Thus, under the Court's holding in *Terry*, a stop is justified under the fourth amendment if specific, articulable facts and the surrounding circumstances demonstrate that the intrusion was based upon reasonable suspicion.⁴⁰

The potential impact of *Terry* was unclear.⁴¹ Had the Court expanded the reach of constitutional regulation in order to place limits upon police action, or had the Court weakened the scope of fourth amendment safeguards? While permissible police activity

37. 392 U.S. at 21-22. See also *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Scott v. United States*, 436 U.S. 128 (1978). The *Brown* Court explained that a central concern of the Constitution is to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions. "To this end, 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 individual. . . ." 443 U.S. at 51.

38. It is essential to realize that *Terry* defined a special category of fourth amendment seizures which were substantially less intrusive than arrests. 392 U.S. at 10. See also *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979).

39. 392 U.S. at 21. The theory is explained in *People v. Rivera*, 14 N.Y.2d 441, 445, 201 N.E.2d 32, 34, 252 N.Y.S.2d 458, 461 (1964):

[T]he evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest.

40. See *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976); *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974). The demand for specificity in the information upon which police action is predicated is the essential teaching of fourth amendment jurisprudence. See, e.g., *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Ker v. California*, 374 U.S. 23, 34-37 (1963); *Wong Sun v. United States*, 371 U.S. 471, 479-84 (1963); *Draper v. United States*, 358 U.S. 307, 312-14 (1959); *Johnson v. United States*, 333 U.S. 10, 15-17 (1948); *United States v. Di RE*, 332 U.S. 581, 593-95 (1948).

41. Compare *United States v. Mendenhall*, 100 S. Ct. at 1870 with *Dunaway v. New York*, 442 U.S. 200 (1979) and *Brown v. Texas*, 443 U.S. 47 (1979). See also Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681 (1978); Telling, *Arrest and Detention—The Conceptual Maze*, 1978 CRIM. L. REV. 320; Note, *Modern Approach to the Fourth Amendment: The Reconciliation of Individual Rights With Governmental Interests*, 39 LA. L. REV. 623 (1979); Comment, *The Theory of Probable Cause and Searches of Innocent Persons: The Fourth Amendment and Stanford Daily*, 25 UCLA L. REV. 1445 (1978); Comment, *Terry Revisited: Critical Update on Recent Stop-and-Frisk Developments*, 1977 WIS. L. REV. 877.

was broadened,⁴² such activity was conversely circumscribed by the dictates of the Constitution.⁴³

II. THE FOURTH AMENDMENT AND THE AIRPORT STOP

Recently, a new perspective has emerged concerning the circumstances which justify police activity in the absence of facts to support a finding of probable cause.⁴⁴ Specifically, the quantum of evidence necessary to sustain a valid *Terry* stop is being tested in the context of investigatory stops of domestic airline passengers.⁴⁵ The question raised by such airport stops is whether the expertise of an officer and an agency can support a *Terry* stop.

Faced with a growing drug trade, the DEA has developed new methods of identifying potential narcotics violators.⁴⁶ One such method employed at airports is a "drug courier profile."⁴⁷ The profile is a loose grouping of characteristics which indicate to an experienced agent that an airline passenger may be involved in illicit drug activity.⁴⁸ Among the factors incorporated into the profile are:

42. 392 U.S. at 26-27. *See also* *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976).

43. The *Terry* Court emphasized that:

[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

392 U.S. at 20. *See also* *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).

44. *See* notes 51-55 *infra* and accompanying text.

45. *See* *United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979); *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979); *United States v. Mendenhall*, 596 F.2d at 706; *United States v. Roundtree*, 596 F.2d 672 (5th Cir. 1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Scott*, 545 F.2d 38 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *United States v. Diaz*, 503 F.2d 1025 (3d Cir. 1974).

46. *See, e.g.*, *United States v. Asbury*, 586 F.2d 973 (2d Cir. 1978).

47. *See* *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States v. Asbury*, 586 F.2d 973 (2d Cir. 1978); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

48. Similarly, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court detailed several factors involved in determining whether there is reasonable

Use of small denomination currency for ticket purchases; travel to or from cities which are major sources of illegal drugs; excessive nervousness; loose fitting or bulky clothing; inadequate luggage; avoidance of travel companions; and evasive or contradictory answers.⁴⁹ At first blush, many of the characteristics appear to be more consistent with innocent behavior than with specific facts indicating criminal activity.⁵⁰ The checklist, however, is considered to be a barometer of criminal behavior: when an individual's characteristics match those listed, a *Terry* stop is justified.⁵¹ Moreover, the checklist stands as a guide for the conduct of enforcement agents.

In light of the profile's accusatory nature, two questions must be addressed. The first question is whether the drug courier profile sufficiently demonstrates the articulable, objective facts required to justify a *Terry* investigatory stop.⁵² The second question is whether institutional expertise and the collective experience of an agency can constitute specific and articulable facts. At issue is the point at which the fourth amendment draws a line between constitutional stops based upon reasonable suspicion and unconstitutional stops based either upon a trained agent's subjective hunch⁵³ or upon alleged institutional expertise.

An examination of the most recent cases demonstrates that while the profile is recognized as a useful tool for law enforcement, the notion that the profile alone constitutes a sufficient basis for instituting a *Terry* stop has been rejected.⁵⁴ In the area of airport

suspicion to stop a car near an international border. Officers may consider: Characteristics of the area in which they encounter a vehicle, evasive patterns of driving, and aspects of the vehicle itself. *Id.* at 884-85.

49. See notes 2-6 *supra*.

50. See *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977).

51. Courts reason that some patterns of behavior which may seem innocuous to the untrained eye may not appear so innocent to the trained officer who has witnessed similar scenarios. Compare *United States v. Vasquez*, 612 F.2d 1338, 1343 (2d Cir. 1979) and *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977) with *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979). For a discussion of these three cases, see note 64 *infra*.

52. See text accompanying note 40 *supra*.

53. See *Terry v. Ohio*, 392 U.S. at 22. See also *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980). In *Brown v. Texas*, 443 U.S. 47 (1979), the Court cautioned that there must be a line separating investigatory stops supported by objective facts from those stops which take place at the unfettered discretion of officers. *Id.* at 51.

54. See, e.g., *United States v. Elmore*, 595 F.2d 1036, 1039 (5th Cir. 1979);

stops, courts have opposed using the profile as the sole basis for determining when to initiate a drug investigation and instead have decided to view the totality of suspicious factors, including those which make up a drug courier profile.⁵⁵ This stance is consistent with the requirements of the fourth amendment and with the expectations of *Terry*: minimal governmental intrusions which do not constitute an arrest must be judged by a balancing test.⁵⁶ Indeed, the central inquiry under the fourth amendment, when limited stops and minimally intrusive behavior are involved, is the reasonableness of the particular governmental intrusion upon a citizen's personal security in light of all the circumstances.⁵⁷ Thus, while some degree of suspicion is a prerequisite to a valid governmental intrusion, the fourth amendment does not demand a fixed quantum of evidence to support a finding of reasonable suspicion.⁵⁸ Indeed, the essence of the *Terry* holding is that the reasonableness of a stop should be determined by the facts of each case.⁵⁹ Viewed in this light, the reasonableness of law enforcement conduct can be determined only by measuring the totality of relevant facts for each case against an objective standard of review.

Sole dependence on a checklist of characteristics, however, emasculates the requirement that an officer view the totality of the

United States v. Roundtree, 596 F.2d 672, 674 (5th Cir. 1979); United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1979). Courts explain that the need for a stop depends upon such factors as the seriousness of the offense, the consequence of delay, and the likelihood of the detainee's involvement in the offense. *E.g.*, United States v. Vasquez, 612 F.2d 1338, 1342 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980). Thus, the determination of reasonableness is reached by balancing the need for the stop against the gravity of the intrusion. United States v. Magda, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977) (citing *Terry v. Ohio*, 392 U.S. at 21). Such balancing takes into account governmental and private interests. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). *Terry* teaches that only specific and articulable facts can be considered in striking the balance between competing interests. 392 U.S. at 21.

55. See United States v. Buenaventura-Ariza, 615 F.2d 29 (2d Cir. 1980); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

56. See *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979). See also *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); *Cady v. Dombrowski*, 413 U.S. 433 (1973). See generally notes 18-26 & 32-40 *supra*.

57. 392 U.S. at 21. See also United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); *Berger v. New York*, 388 U.S. 41 (1967); *Johnson v. United States*, 333 U.S. 10 (1948). See generally notes 35-40 *supra*.

58. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). See generally note 26 *supra*.

59. 392 U.S. at 19.

circumstances when making an informed, independent determination of criminal activity.⁶⁰ Concomitantly, undue reliance upon an agent's subjective articulation of suspicious circumstances, based upon a prepackaged checklist of characteristics, weakens the constraints on unfettered police conduct and limits the extent of review by the courts.⁶¹ Accordingly, courts have been loath to sanction a system of law enforcement based upon a national profile which serves as a substitute for an agent's determination that a crime is about to be, or has been, committed.⁶² Thus, the requirement of specific and articulable facts, beyond the mere recitation of a uniform list of traits, has not been discarded explicitly by the courts.⁶³

In essence, the dilemma that the courts face involves an implicit struggle between constitutional safeguards and institutional expertise. On the one hand, the *Terry* requirement of specific and articulable facts prevents unregulated police intrusion. On the other hand, the profile is the product of a governmental agency's expertise, developed from its aggregate of experience. It is argued that the agency's expertise alone can meet the specific and articulable facts standard established by *Terry*. Indeed, if the agency's expertise were not deferred to, agency guidelines designed to protect the public from capricious action could be undermined.

60. Minimal intrusions, since *Terry*, have been sanctioned on the basis of an analysis of governmental and private interests and the scope of the intrusion. Such a balance is examined in light of objective facts presented to the court that the particular individual is involved in criminal activity. Thus, the basis of police action is such that it can be reviewed judicially by an objective standard. See *Brown v. Texas*, 443 U.S. 47, 51 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Scott v. United States*, 436 U.S. 128, 137 (1968); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979).

61. 392 U.S. at 17-18. The *Terry* Court illustrated the dangers of excluding from constitutional regulation the initial phases of police conduct by examining the course of the adjudication in the New York Court of Appeals. Specifically, in *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), cert. denied, 379 U.S. 978 (1965), the court held that a frisk was not a search. In a later case, *People v. Taggart*, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967), the court recognized that what it had authorized in *Rivera* was a search upon less than probable cause. Yet, it still defined search as it had in *Rivera* and merely noted that the cases which had upheld police intrusions went far beyond the original limited concept of frisk. In failing to consider limitations upon the scope of searches in individual cases as a potential mode of regulation, the court of appeals arrived at the position that the Constitution must be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. *Id.* at 340, 229 N.E.2d at 585, 283 N.Y.S.2d at 6. See *Terry v. Ohio*, 392 U.S. at 18 n.15.

62. See note 50 *supra*.

63. See notes 54 & 55 *supra*.

Thus, courts are faced with the issue of when the expertise and experience of an institution, in and of itself, can constitute specific and articulable facts. This basic question has been masked by the courts in either of two ways. First, judicial decisions have tended to discuss at length the requirements of the specific and articulable facts standard. As will be explored, those facts which have been found to satisfy the constitutional requirements for a stop clearly resemble the characteristics of the agency's drug profile. Courts consequently sidestep the issue of whether the profile alone may justify a stop. Second, some courts hold that questioning by agents in airports does not constitute a stop or seizure and thus does not implicate the fourth amendment. In this situation courts need not address whether a drug courier profile meets the *Terry* specific and articulable facts standard. Whether the first or second approach is followed, one result is clear: when minimally intrusive investigatory behavior is involved, *Terry's* safeguards will be weakened unless the courts directly confront the issue of whether agency expertise should prevail over a suspect's constitutional rights.

III. TERRY'S METAMORPHOSIS

It is submitted that the requirement of specific and articulable facts is meaningless if *any* list of suspicious circumstances compiled by an agent will meet the *Terry* standard. A reading of a few representative cases reveals the position taken by the courts with regard to the quality of evidence which constitutes specific and objective facts⁶⁴ sufficient to warrant an airport stop.

64. In light of the fact that the United States Court of Appeals for the Second Circuit has been vocal in the area of airport stops, its cases are particularly instructive. A survey of three such cases decided within a span of three years indicates that fewer and fewer objective facts are needed to satisfy the threshold of reasonable suspicion. In *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the agent was thoroughly familiar with the defendant's reputed background in illicit drug peddling. The defendant was travelling with a person who was obviously a narcotics addict. They appeared nervous and avoided any appearance of knowing each other. The agent noticed distinct bulges in the clothing of the defendant's travelling companion. The defendant had just come from a rendezvous with a man personally known to the agent as being involved in the drug culture. Based upon these facts, the court concluded that the stop was justified by reasonable suspicion. The court explained that, when the circumstances were considered as a whole, there were far too many inter-related factors to have been the result of pure coincidence. *Id.* at 61.

Two years later, the Second Circuit dealt with the facts of a second airport stop. In *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979), the relevant circumstances included: A defendant who walked with an odd gait; three companions, who travelled

The specific and articulable facts enunciated in the most recent cases closely resemble the characteristics of a drug courier profile.⁶⁵ For example, the United States Court of Appeals for the Second Circuit, in *United States v. Forero-Rincon*,⁶⁶ found an airport stop to be based upon reasonable suspicion because the suspects arrived from a source city, carried identical, untagged bags, tried to appear separate, scanned the airport, looked behind them, reunited after leaving the terminal, continued to look back toward the lobby after exiting, and accelerated their pace after observing a plainclothes agent.⁶⁷ The *Rincon* court explained that the arrival from the source city of Miami, the untagged shoulderbags, the furtive whispers, and the concerted attempt to appear separate provided the agent with more than a subjective hunch that the two suspects were involved in narcotics trafficking.⁶⁸

with unmarked luggage and who constantly looked and nodded at each other, yet gave the appearance of being separate; and one defendant, who for no apparent reason, volunteered an explanation for his presence at the airport. The court found that the stop was not justified by reference to the "profile"; rather, the conduct observed would have made an experienced officer suspect that the travellers were transporting narcotics. *Id.* at 326. Yet, the court cautioned that the set of characteristics outlined by the agent had little specifiable content and "only narrowly sufficed" to justify a stop. *Id.* at 325. The decision emphasized that a "check list of recurrent characteristics can do no more than alert a special agent to initiate surveillance. More is required to warrant the intrusion of an investigative stop." *Id.* at 326.

Finally, in *United States v. Vasquez*, 612 F.2d 1338, 1342-43 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980), the court listed eight observations which, taken as a whole, amounted to reasonable suspicion: (1) The two suspects arrived on a flight from Chicago, a "source" city; (2) the suspects were the last to disembark; (3) the suspects, while travelling together, tried to appear separate; (4) they walked in tandem and frequently glanced behind and scanned the airport; (5) their bags bore no identification; and (6) one suspect approached the other to correct the destination given by the companion to a skycap and then immediately moved away. The reasonableness standard of *Terry* was recited but then the court concluded that the composite picture appeared "sufficiently suspicious, at least to the trained eye" of a drug enforcement agent. *Id.* at 1343.

65. Compare *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) and *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977) and *United States v. Scott*, 545 F.2d 38 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977) with *United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980) and *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980) and *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980) and *United States v. Mendenhall*, 100 S. Ct. at 1870 and *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). It is submitted that while the former group of cases present to the court an array of specific, articulable facts, the latter do little more than recite the characteristics endemic to a drug courier profile.

66. 626 F.2d 218 (2d Cir. 1980).

67. *Id.* at 222.

68. *Id.* at 222-24.

The absence of objective facts, other than those traits constituting a profile, raises the question of the vitality of *Terry* in the corridors of an airport.⁶⁹ As fact patterns repeat themselves and the drug courier profile becomes established as the basis for narcotics arrests, the proposition emerges that special police conduct in airports falls outside the requirements of the fourth amendment.⁷⁰ Examination of the specific and articulable facts which have been presented to the courts reveals that the *Terry* standard is being diluted to include the course of conduct practiced by drug enforcement agents at airports.⁷¹ Most significantly, this newly conceived test of reasonableness, which is based upon what has become a profile system of law enforcement, leaves the *Terry* balancing analysis behind.⁷²

In finding a valid *Terry* airport stop, despite the paucity of objective facts, courts stress the limited scope of the intrusion.⁷³

69. See *United States v. Mendenhall*, 100 S. Ct. at 1883 (White, J., dissenting); *United States v. Vasquez*, 612 F.2d 1338, 1348-52 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980) (Oakes, J., dissenting). Most significantly, *Dunaway v. New York*, 442 U.S. 200 (1979), seemed to say that *Terry* has been interpreted too generously. Referring to *Terry*, the Court stated that "it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause . . . could be replaced by a balancing test." This test examines specific facts measured against an objective standard. *Id.* at 209-10. A predetermined check list which is invoked in lieu of a balancing test further weakens the already diluted reasonable suspicion test and threatens to swallow the general rule that fourth amendment seizures are reasonable only if based on probable cause. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Ingram, *Are Airport Searches Still Reasonable?*, 44 J. AIR L. & COMM. 131 (1978).

70. See notes 64 & 65 *supra*.

71. Most telling is the Supreme Court decision in *United States v. Mendenhall*, 100 S. Ct. at 1870, in which the Court emphasized that the "specially trained agents" acted pursuant to "a well-planned, and effective, federal law enforcement program." *Id.* at 1883. See also *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980).

72. A determination of reasonableness is reached by balancing the need for the stop against the gravity of the intrusion. 392 U.S. at 21. The need for the stop depends, *inter alia*, upon the seriousness of the offense, the consequences of delay, and the likelihood of the detainee's involvement. *Id.* Furthermore, only specific facts can be considered in striking this balance. *Id.* The analysis set forth by the *Forero-Rincon* court, 626 F.2d 218 (2d Cir. 1980), and the *Vasquez* court, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980), seems to equate reasonable suspicion with the unparticularized hunches of trained agents. See 100 S. Ct. at 1887 (White, J., dissenting).

73. See *United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980). "The stop was clearly only minimally intrusive. It lasted only five to ten minutes and occurred in a public place. There is no suggestion that Iglesias intimidated, harassed or humiliated Yepes or Forero." *Id.* at 224. *United States v. Vasquez*, 612 F.2d 1338, 1343

Terry, however, made it clear that only specific and articulable facts would be considered in striking the balance between the need for a stop and the gravity of the intrusion.⁷⁴ The narrow parameters of *Terry* require more than suspicion. Some reasonable ground must be shown for singling out the person stopped as one who was involved in, or was about to become involved in, criminal activity.⁷⁵ The expectations of *Terry* require that even minimal intrusions must be based upon specific facts and the rational inferences that can be drawn from those facts.⁷⁶

The trend, however, is apparent: the most recent cases contain fewer and fewer objective facts linking a suspect to drug smuggling. Consequently, an agent's perception of a suspect's objectively neutral conduct and the collective experience and expertise of the DEA take on added importance.⁷⁷ The question remains, however, whether it is wise to reduce *Terry* to a standard which inextricably ties the standard of reasonableness to a list of characteristics and behavioral traits that purportedly distinguishes the guilty from the innocent.⁷⁸ A further question is whether judicial deference to agency experience supports the existence of an institutional standard which encourages making airport stops.

(2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Magda*, 547 F.2d 756, 759 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977).

74. 392 U.S. at 21. *See also* *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979). *See generally* notes 37-40 & 56-59 *supra*.

75. 392 U.S. at 21-22. The *Terry* Court stated that:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Id. at 21-22 (footnote & citations omitted). *See* *Dunaway v. New York*, 442 U.S. 200, 209 (1979). *See also* *Ybarra v. Illinois* 444 U.S. 85 (1979); *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979). *See generally* note 69 *supra*.

76. *See* notes 33-40 *supra*.

77. *Terry v. Ohio*, 392 U.S. at 17. Furthermore, the *Terry* Court cautioned that if intrusions could be based upon something less than specific facts measured against an objective standard, they would eventually be allowed on the basis of inarticulated hunches. *Id.* at 22. *See also* *Dunaway v. New York*, 442 U.S. 200 (1979); *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

78. This standard is in contradistinction to the balancing test set forth in *Terry*. *See* notes 56-59, 69, 73 & 74 *supra*.

IV. *UNITED STATES V. MENDENHALL*

The Supreme Court, in *United States v. Mendenhall*,⁷⁹ had the opportunity to answer these questions and to clarify the role of the drug courier profile vis-à-vis the requirement of specific and articulable facts dictated by *Terry*. The Court, however, did little to clarify the confusion surrounding airport investigatory stops.⁸⁰

The Court upheld the agents' conduct in initially approaching Mendenhall, asking to see her ticket and identification, and then requesting her to accompany them to the DEA office for questioning and a strip search.⁸¹ The agents' conduct, it was explained, did not amount to an arrest or a *Terry* stop: it was viewed as an encounter that intruded upon no constitutionally protected interest.⁸² The Court adhered to the view that constitutional safeguards are to be invoked only if an intrusion amounts to a seizure, that is, when freedom of movement is restrained.⁸³ Because Mendenhall

79. 100 S. Ct. at 1870.

80. Few airport stop cases hinged their decisions on the fact that the brief encounter between the agent and citizen involved no seizure or stop and therefore was beyond the pale of constitutional scrutiny. See note 10 *supra*. But see *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979). Indeed, most courts stress the *de minimis* nature of the intrusion; but then rely upon an examination of facts to support a finding of reasonable suspicion. See notes 63 & 73 *supra* and accompanying text. Most significantly, case law is replete with the finding that an "investigatory stop" ordinarily occurs when an agent approaches the individual, identifies himself, and asks the suspect to produce identification or explain his actions. See *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 n.3 (2d Cir. 1980) and cases cited therein. The government, more often than not, has conceded this point. See, e.g., *United States v. Roundtree*, 596 F.2d 672, 674 n.1 (5th Cir. 1979). The *Terry* Court never explicitly defined the line between investigatory stops, minimal intrusions, and arrests. Indeed, the Court never spoke to the issue of the propriety of an investigatory stop based upon less than probable cause: it dealt with a frisk for weapons. 392 U.S. at 19 n.16. Subsequent case law has sought to clarify this issue. *Brown v. Texas*, 443 U.S. 47 (1979), has at least partially answered the question concerning what constitutes a seizure. The *Brown* Court explained that "when the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment." *Id.* at 50. Indeed, it was *only* because certain intrusions fell so far short of the kind of intrusion associated with an arrest that the Supreme Court felt constrained to depart from the long-prevailing standard of probable cause. *Dunaway v. New York*, 442 U.S. 200, 212 (1979). See also *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

81. *United States v. Mendenhall*, 100 S. Ct. at 1873-74.

82. *Id.* at 1878.

83. *Id.* at 1877. See also *Sibron v. New York*, 392 U.S. 40 (1968); *United States v. Almond*, 565 F.2d 927 (5th Cir. 1978), *cert. denied*, 439 U.S. 824 (1979); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. McCain*, 556 F.2d 253

consented to her search, there was no need to examine the function of the drug courier profile. The Court held that the agents acted lawfully regardless of whether there was any reasonable ground for suspecting Mendenhall of criminal activity.

In concurring, Justice Powell, with whom Chief Justice Burger and Justice Blackmun joined, offered a second perspective.⁸⁴ They found that the fourth amendment was implicated and that the intrusion constituted a valid *Terry* stop in light of the defendant's behavior.⁸⁵ In analyzing the reasonableness of the stop, the concurring Justices took into account three factors: The public interest served by the seizure;⁸⁶ the minimal scope of the intrusion;⁸⁷ and the objective facts upon which the agents relied.⁸⁸ In so doing, they paralleled the inquiry set forth in *Terry*. Yet, in concluding that the agents possessed articulable suspicion in light of Mendenhall's conduct, the concurring Justices accepted behavior which conformed to the loose grouping of characteristics reminiscent of the drug courier profile as the basis for the agents' suspicion.⁸⁹ Most significantly, their finding that the fourth amendment was not transgressed was based, in part, upon the fact that "specially trained agents acted pursuant to a well-planned, and effective, federal law enforcement program."⁹⁰

Taken as a whole, *Mendenhall* seems inconsistent with *Terry*⁹¹

(5th Cir. 1977); *United States v. Brunson*, 549 F.2d 348 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977); *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973). An examination of these cases indicates that the concept of "restraint of movement" often involves semantics and ambiguities. It thus seems foolhardy to preclude all constitutional regulation when an officer seeks to question an individual for investigatory purposes on the basis of whether the individual was free to ignore the officer and proceed on his way.

84. 100 S. Ct. at 1880.

85. *Id.* at 1881-83.

86. The Court explained that the public has a compelling interest in detecting those who traffic in deadly drugs. *Id.* at 1881.

87. The Court explained that the intrusion in this case was "quite modest." Here, the stop was in a public place, no weapons were displayed, and the agents identified themselves and asked brief questions. *Id.* at 1881-82.

88. The agents observed an individual who appeared very nervous, deplaned only after all other passengers had left the aircraft, scanned the gate area, walked very slowly toward the baggage area, claimed no baggage, and asked a skycap for directions to the Eastern Airlines ticket counter while carrying an American Airlines ticket for a flight from Detroit to Pittsburgh. *Id.* at 1882.

89. Compare note 88 *supra* and accompanying text with note 49 *supra* and accompanying text.

90. 100 S. Ct. at 1883. See notes 71 & 72 *supra* and accompanying text.

91. *Terry* specifically enunciated a balancing test based upon an analysis of objective facts for those encounters which fall far short of the kind of intrusion asso-

and with the more recent cases which indicate that fourth amendment requirements are triggered even when the purpose of a stop is limited and the detention is brief.⁹² Indeed, in *Dunaway v. New York*,⁹³ the United States Supreme Court made it clear that *Terry* represented a "narrow exception" to the general rule that probable cause must be present to make fourth amendment seizures reasonable. The narrow *Terry* exception was drawn to accommodate those intrusions which fell "so far short" of the kind of intrusion associated with an arrest.⁹⁴

The suggestion of the *Mendenhall* Court that the defendant was not seized, since a reasonable person would have believed that she was free to leave, is inconsistent with the rationale of *Terry* and *Dunaway*. The conclusions that no seizure occurred and that the defendant consented to all that transpired pinpoint the dangers inherent in the *Mendenhall* analysis. In essence, since the strip search was not preceded by an impermissible seizure or stop, the Court believed it was impossible to argue that the subsequent consent was tainted by an unlawful detention. In contrast, *Terry* does not rely on mere "consent," an approach which has tremendous potential for abuse. A finding that the initial contact amounted to an intrusion upon a constitutionally protected interest would have triggered a balancing analysis consistent with the requirements of *Terry*.

Indeed, the recent cases dealing with law enforcement intrusions upon privacy and liberty interests in areas other than airport searches reject any suggestion that even the most minimal stop may be judged by anything short of specific facts based upon an

ciated with an arrest. 392 U.S. at 21-22. Thereafter, the reasonableness of a particular stop was gauged by comparing the degree of the intrusion with the grounds for the suspicion. *Id.* at 17-19. The need for a balancing analysis, however, in the area of encounters between citizens and police for investigatory questioning perforce is dispensed with once such encounters are placed beyond the pale of constitutional regulation. *Id.* at 19 n.16. Secondly, *Terry* emphasized that the wiser course is to govern all police intrusions by constitutional regulation. *Id.* at 18 n.15. *Accord*, *Brown v. Texas*, 443 U.S. 47 (1979).

92. See *Brown v. Texas*, 443 U.S. 47 (1979) (detention for identification triggered the requirements of the fourth amendment); *Delaware v. Prouse*, 440 U.S. 648 (1979) (stop of motorist to check driver's license and registration); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (detention by border patrol at permanent check points a lesser intrusion on fourth amendment rights); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (stops by roving border patrols held to intrude on fourth amendment rights). See also *Dunaway v. New York*, 442 U.S. 200 (1979) (arrest and interrogation on insufficient information and lack of probable cause).

93. 442 U.S. 200 (1979).

94. *Id.* at 212.

objective standard of review.⁹⁵ To illustrate, notwithstanding important governmental interests, roving border patrols⁹⁶ and random automobile stops⁹⁷ have been held to violate the fourth amendment insofar as the procedures sanction police conduct which is not based upon articulable suspicion. The courts in those cases emphasized that the lack of an appropriate factual basis for suspecting a particular individual, prompted by mere inarticulable hunches, in-

95. Courts have rejected stops based upon the hunches of an agent in a multiplicity of cases. Similar issues also have arisen in the following cases: *United States v. Ramsey*, 431 U.S. 606 (1977) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (border searches); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967) (inspection of premises); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (inspection of packages); *Ybarra v. Illinois*, 444 U.S. 85 (1979) and *United States v. Di RE*, 332 U.S. 581 (1948) (generalized searches). *But see* *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973). The Court in these two cases emphasized that a subpoena to appear before a grand jury is not a seizure in the fourth amendment sense and that the procurement of exemplars is not a search because no person can have a reasonable expectation that others will not know the characteristics of his voice or handwriting. *United States v. Dionisio*, 410 U.S. at 9, 13; *United States v. Mara*, 410 U.S. at 21.

96. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), agents' practice of conducting roving border patrols in areas near the international border was held to violate the fourth amendment. Notwithstanding the important government interests involved, the Court analogized the roving patrol stop to a *Terry* stop and found that the officers on roving patrol could detain vehicles only if they were aware of specific articulable facts, which reasonably warranted the suspicion that the vehicle contained illegal aliens. *Id.* at 881. One year later, the Court again was faced with the constitutionality of border patrol stops. In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court sustained the constitutionality of border patrol checkpoint operations. In this case, the Court felt compelled to sanction the fixed checkpoint operation because of the lesser intrusion upon the motorists' fourth amendment interests. *Id.* at 557. The method of intrusion, when examined in light of the concerns or fears experienced by lawful travelers, was deemed to be appreciably less in the case of a checkpoint stop than in a roving patrol stop. *Id.* at 558. Certainly, airport stops are more akin to roving patrols than to fixed checkpoint stops. Furthermore, the issue regarding the drug courier profile involves domestic air travel as opposed to international border matters.

97. *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse*, the constitutionality of investigatory stops of automobiles was at issue. The government analogized random stops of automobiles to the checkpoint stops sanctioned in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). *Delaware v. Prouse*, 440 U.S. at 656-57. The Court rejected this proposition and found that, except in those situations in which there is at least an articulable suspicion that a motorist is unlicensed, stopping an automobile in order to check the driver's license is unreasonable under the fourth amendment. *Id.* at 663. The Court explained that an individual is not shorn of all fourth amendment protection when he steps from his home onto a public sidewalk or into an automobile. *Id.* *But see* *Adams v. Williams*, 407 U.S. 143 (1972) (police officer was justified in stopping an automobile based solely on a reliable informant's tip that the occupant was armed).

vites intrusions upon constitutionally guaranteed rights.⁹⁸ Similarly, even when minimal police intrusions are based on something more palpable than random selection, the courts nonetheless apply a *Terry* balancing analysis.⁹⁹ For example, in a case decided in 1979, *Brown v. Texas*,¹⁰⁰ the United States Supreme Court overturned the conviction of a man who was initially stopped in an alley located in a high crime area, in part because he looked "suspicious."¹⁰¹ The Court held that requiring the defendant to identify himself constituted a seizure subject to the objective factfinding requirement of the fourth amendment.¹⁰²

The government may predicate a search upon something less than reasonable suspicion in one area, the customs search. In *United States v. Ramsey*,¹⁰³ the United States Supreme Court noted that a person crossing our national boundaries may be required to submit to a search of his baggage and personal effects and may be subjected to questioning, even though the intrusions are not based upon even the slightest suspicion. Historically, this sort of intrusion has been justified by national security. Significantly, even in the case of a customs search, the courts are quick to impose two limits: First, a stop-and-search initiated beyond the parameters of the customs area requires reasonable suspicion,¹⁰⁴ second, a search of the person that goes beyond search of personal effects requires reasonable suspicion.¹⁰⁵ Thus, even concern with national protection does not give the government an unlimited right to search. Moreover, to extend the unique standard applicable to a customs search to the search of a domestic airline passenger would undermine the protections afforded by the Constitution. An individual has the option of not leaving or not entering this country. If we impose a customs search standard onto domestic

98. See generally *Davis v. Mississippi*, 394 U.S. 721, 726 (1969); *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960).

99. See note 95 *supra*.

100. 443 U.S. 47 (1979).

101. *Id.* In *Brown*, two officers observed the defendant and another man walk away from one another in an alley located in an area with a high incidence of drug traffic. *Id.* at 48-49. They stopped the defendant and asked him to identify himself and to explain what he was doing. *Id.* When the defendant refused to identify himself, he was arrested. *Id.* at 49.

102. *Id.* at 51.

103. 431 U.S. 606 (1977).

104. *United States v. Asbury*, 586 F.2d 1973 (2d Cir. 1978).

105. *Id.*

travel, however, a chilling effect on rights secured by the Constitution could result.

Case law indicates that even minimal governmental intrusions traditionally have triggered the protections of the fourth amendment, requiring a determination as to the legality of the intrusion. This determination is made by balancing the need for the particular stop against the gravity of the intrusion and by considering only specific and articulable facts in light of all the circumstances.¹⁰⁶ From an examination of the case law, however, it appears that courts employ one standard for airport stops and another for automobile and street stops.¹⁰⁷ Unless it can be explained why an airport is so fundamentally different from a highway, public forum, or high crime area, the departure seems unwarranted.

In *Reid v. Georgia*¹⁰⁸ the United States Supreme Court appeared implicitly to deny the vitality of the *Mendenhall* analysis. Indeed, the facts of *Reid* are similar to the facts of *Mendenhall*. In *Reid*, the petitioner arrived on an airline flight from Florida in the early morning hours. After deplaning, a man who carried luggage identical to the petitioner's remained separate from him, yet the petitioner occasionally looked back in his direction. Finally, the two men spoke briefly to one another and left the terminal building. The officer then approached them, asked several questions, and asked them to return to the terminal for a search of their luggage. One bag was found to contain cocaine.

In reversing the lower court's decision that the officer "lawfully seized" the petitioner, the Supreme Court made two interesting observations. First, the Court explicitly stated that "any" curtailment of a person's liberty by the police must be supported by reasonable and articulable suspicion that the person seized is engaged in criminal activity.¹⁰⁹ Second, the Court concluded "as a matter of law" that the agent, on the basis of these facts, could not reasonably have suspected the petitioner of criminal activity.¹¹⁰ The Court reasoned that if reasonable suspicion could arise from

106. See notes 95-97, 101 & 102 *supra* and accompanying text.

107. Compare *Ybarra v. Illinois*, 444 U.S. 85 (1979) and *Brown v. Texas*, 443 U.S. 47 (1979) and *Delaware v. Prouse*, 440 U.S. 648 (1979) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) with *United States v. Mendenhall*, 100 S. Ct. at 1870 and *United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980) and *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980).

108. 100 S. Ct. 2752 (1980).

109. *Id.* at 2753.

110. *Id.* at 2754.

such observations, a large category of innocent travelers would be subjected to virtually random seizures.¹¹¹

It is important to note that in *Mendenhall* the petitioner allegedly acquiesced to the wishes of the officer, while in *Reid* the petitioner began to return to the terminal with the officer but then turned away and attempted to flee. It would be illogical to assert that an initial contact, following consent to a search, did not amount to a seizure which would implicate the fourth amendment, while contact following an attempt to flee would implicate the fourth amendment. Further, the Court stated that insofar as the lower court decision rested on the determination that the officer "lawfully seized" the petitioner, the judgment had to be reversed.

V. A RECOMMENDED APPROACH

In essence, the investigatory stop-and-frisk decisions since *Terry* represent a sliding scale approach to the fourth amendment in that police action without probable cause is sanctioned as long as it is based upon specific and articulable facts and is not unreasonably intrusive.¹¹² Under the sliding scale analysis of the fourth amendment, use of the drug courier profile cannot be sustained, for its applicability does not depend upon specific and articulable facts. Clearly, suspicion based on an inchoate and unparticularized hunch, rather than on specific and reasonable facts, cannot justify a *Terry* stop.¹¹³ Indeed, nothing in the history of the fourth amendment can be interpreted to give an officer free rein to act on his own suspicions.¹¹⁴ The fact that an officer is experienced does not require a court to accept all his suspicions as reasonable.¹¹⁵ Simi-

111. *Id.*

112. Since the evidence needed to make a stop was not of the same degree of conclusiveness as that required for an arrest, the *Terry* Court opted for a balancing test which examined the reasonableness of a particular seizure on the basis of the particular circumstances. 392 U.S. at 21. Furthermore, the scope of the particular intrusion, in light of all the exigencies of the case, was made a central element in the analysis of reasonableness. *Id.* at 17-18.

113. See notes 35-40 & 98 *supra* and accompanying text.

114. Indeed, the purpose of the fourth amendment is to protect against arbitrary intrusions. See *United States v. Ortiz*, 422 U.S. 891 (1975); *Berger v. New York*, 388 U.S. 41 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978).

115. See *Brown v. Texas*, 443 U.S. 47 (1979). The training and expertise of special agents do not serve as a substitute for the courts' review of specific facts. See *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2d Cir. 1980); *United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320, 323-24 (2d Cir. 1979); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977). The *Price* court

larly, a court should not automatically accept as reasonable the suspicions enumerated by an agency when they are based solely upon that agency's collective experience. On the contrary, it is well established that the basis of police action must be such that it can be reviewed judicially by an objective standard.¹¹⁶ When the government is unable to articulate the specific facts which point to an individual's involvement in criminal activity, even if the individual is present at the place of the criminal act,¹¹⁷ the investigatory stop-and-frisk must be unlawful.¹¹⁸

The analysis set forth in *Mendenhall*¹¹⁹ departs drastically from the principles recently enunciated in the area of stop-and-frisk.¹²⁰ For whether a general investigatory airport encounter is deemed to fall outside the parameters of the fourth amendment, or whether reasonable suspicion can be based upon a drug courier profile, the Court has placed special police conduct beyond the scope of constitutional examination. The danger of adopting such a rigid model of regulation for airport stops is twofold.¹²¹ First, it isolates certain in-

explained that awareness of the unusual and a proper resolve to keep a sharp eye are not the same as an articulated suspicion of criminal conduct. 599 F.2d at 500 n.7.

116. See *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2d Cir. 1980); *United States v. Vasquez*, 612 F.2d 1338, 1342 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2991 (1980); *United States v. Roundtree*, 596 F.2d 672, 674 (5th Cir. 1979); *United States v. Rico*, 594 F.2d 320, 324 (2d Cir. 1979); *United States v. Scott*, 545 F.2d 38, 39 (8th Cir.), *cert. denied*, 429 U.S. 1066 (1977). See generally notes 37, 39 & 40 *supra* and accompanying text.

117. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

118. In *Ybarra*, the Court held that mere presence at the place of the criminal act was not a reasonable justification for conducting a *Terry* frisk. The police in this case possessed a valid warrant to search a tavern. Upon entering the tavern, the officers advised those present that they were going to conduct a cursory search for weapons. *Id.* at 88. During the course of one such frisk, the officers retrieved a cigarette pack containing heroin. *Id.* at 89. The Court held the frisk unconstitutional since it was not supported by a reasonable belief that Ybarra was armed. "In short, the state is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous." *Id.* at 93. Furthermore, the Court stressed that nothing in *Terry* can be understood to allow a generalized cursory search. *Id.* at 94. Similar safeguards should apply to general investigatory stops.

119. *Mendenhall* implicitly sets forth two propositions, the potential ramifications of which are ominous. First, general investigatory questioning by police, in some situations, falls beyond the scope of constitutional regulation. 100 S. Ct. at 1876. Second, the concurring Justices found reasonable suspicion on facts which mirrored the characteristics of a drug courier profile. *Id.* at 1881-82.

120. See notes 91 & 95-106 *supra* and accompanying text.

121. *Terry v. Ohio*, 392 U.S. at 17. Indeed, the danger of holding that general investigatory questioning by Drug Enforcement Administration agents transcends constitutional scrutiny cannot be overstated. The snowball effect of *Mendenhall* may

itial stages of contact between the officer and the citizen from constitutional scrutiny. Second, it obscures the utility of constraints placed upon the scope of police actions by means of constitutional regulation.

It therefore seems the wiser course to govern all general investigatory intrusions by fourth amendment standards.¹²² This limitation would not preclude police action. Instead, it would subject law enforcement conduct to the standard of reasonableness and would establish the scope of the particular intrusion as a central element in the analysis.¹²³

Terry and its progeny indicate that the proper inquiry concerning police intrusions based on less than probable cause must focus squarely on the dangers and demands of a particular situation.¹²⁴ In adopting this "totality of the circumstances" approach to general investigatory stops, a vast array of police conduct has been subjected to the general proscriptions of the fourth amendment.¹²⁵ The fourth amendment consequently has become a vehicle for deterring a wide range of police misconduct.¹²⁶

The *Mendenhall* Court, however, focused its analysis upon the distinctions between intrusive behavior and nonintrusive behavior and thereby displaced the *Terry* balancing test with a rigid model of regulation. The implications are ominous. Once special police conduct is sanctioned in airports, it also may be tolerated in other public places. The risk of arbitrary and abusive practices increases enormously when the encounters between citizens and police are not judged by objective criteria examined in light of all the circumstances.¹²⁷

be enormous, for it now can be invoked by government attorneys and judges in resolving matters which move beyond the corridors of an airport.

122. *Id.* at 18 n.15.

123. Thus, the determination of reasonableness would be reached by balancing the need for the stop against the gravity of the intrusion which the stop entailed. *Id.* at 20-21. See generally note 112 *supra*.

124. See notes 91-106 *supra* and accompanying text.

125. See *Terry v. Ohio*, 392 U.S. at 1. The *Terry* Court rejected the notion that the fourth amendment did not come into play as a limitation on police conduct falling short of an arrest. Instead, the Court stressed the importance of limiting the scope, as well as the initiation, of police action through constitutional regulation. *Id.* at 17, 19.

126. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

127. See *Dunaway v. New York*, 442 U.S. at 200; *Davis v. Mississippi*, 394 U.S. 721 (1969); *Johnson v. United States*, 333 U.S. 10 (1948). The *Johnson* Court rea-

VI. CONCLUSION

While a set of facts may arise which coincide with certain profile characteristics claimed to constitute reasonable suspicion, the drug courier profile in a particular case may not provide the specific and articulable facts that reasonably warrant an investigatory stop. In judging the constitutionality of these profiles, courts should evaluate even minimal intrusions on a person's freedom by nothing less than the reasonableness requirement of the fourth amendment. The fourth amendment would be appreciably damaged if the validity of a stop could be proven by something less than evidence of reasonable grounds for suspecting a particular person of a crime. Due to the potential erosion of fourth amendment protection, it would be unwise to relax the requirements of *Terry* to meet the exigencies of airport drug trafficking.

The premises set forth in *Terry* clearly indicate the need for a rational link between otherwise innocent behavior and drug-related activity.¹²⁸ While the usefulness of the profile in law enforcement activity is apparent, courts should be unwilling to depart from *Terry's* requirement of objective factfinding. Most significantly, the claim that the fourth amendment is not implicated by general investigatory stops used at airports sets a dangerous precedent. Without constitutional regulation in this area, an officer's behavior would be unhampered by the constraints of the Constitution while innocent acts frequently associated with air travel could assume a suspicious tint in the eyes of law enforcement officers faced with the serious problem of narcotics smuggling. A finding, either explicitly or implicitly, that an airport *Terry* stop is justified solely on the basis of a drug courier profile may trigger the development of similar profiles for other kinds of travel or social behavior. Expansion of *Mendenhall* to other areas of law enforcement would diminish the protections against arbitrary governmental interference and would spread a chilling effect upon the very rights safeguarded by the Constitution.

soned that the intent of the framers of the Constitution could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases when the balancing is done in the first instance by police officers engaged in the often competitive enterprise of ferreting out crime. *Id.* at 14.

128. For a thorough discussion on this point, see *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980). See also notes 35-40, 56 & 61 *supra* and accompanying text.