The Drug Enforcement Agency's Use of Drug Courier Profiles: One Size Fits All

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THE DRUG ENFORCEMENT AGENCY'S USE OF DRUG COURIER PROFILES: ONE SIZE FITS ALL

When the Framers drafted the United States Constitution, they shared a common underlying objective: to protect citizens and safeguard future generations from abusive and overzealous control on the part of the newly created federal government. Similarly, the Bill of Rights was adopted to dispel the fear shared by American citizens of an intrusive and unrestrained government pursuing policy goals separate from those of the people it governed. The Fourth Amendment in particular provides that "the right of the people to be secure in their persons, houses, papers, and effects, against un-

1. See Steven Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 Hastings L.J. 889, 889 (1987). "The framers of the Constitution, animated by the spirit of William Pitt's dictum that '[u]nlimited power is apt to corrupt the minds of those who possess it,' carefully parcelled out governmental power and controlled its exercise." Id. (alteration in original) (footnote omitted).

2. The Bill of Rights encompasses the first ten amendments to the Constitution, providing for the guarantee of individual rights and freedoms. BLACK'S LAW DICTIONARY 168 (6th ed. 1990). After the ratification of the Constitution in 1787, the "central constitutional preoccupation with limiting governmental power manifested itself in the call for adoption of a Bill of Rights." Wisotsky, supra note 1, at 889. "[T]he core of the Bill of Rights [constitutes] a code of criminal procedure designed to ensure fair treatment and make it difficult for the government to secure a criminal conviction." Id.

reasonable searches and seizures, shall not be violated." This right to personal security protects people, not places.\(^4\)

Today, the United States Supreme Court balances individual rights against society's need for effective law enforcement in determining the extent to which the government may infringe upon an individual's personal liberties.\(^5\) This interplay between the individual, society and the government\(^7\) is driven by the needs of society, achieved through the control elements of go-

\(^4\) U.S. CONST. amend. IV. In order to search a person, the Fourth Amendment requires that a warrant be issued upon probable cause, that it be supported by oath or affirmation, and that it describe with particularity the location to be searched and the individuals or items to be seized. \(Id.\) In United States v. Mendenhall, 446 U.S. 544 (1980), Justice Stewart, writing for the majority, referred to the need for police questioning as an important tool in the effective enforcement of criminal laws. As long as the individual to whom the questions are addressed remains free to walk away, there has been no intrusion and no "seizure" of that person within the meaning of the Fourth Amendment. \(Id.\) at 554. Justice Stewart reasoned that characterizing every street encounter between an individual and the police as a seizure would impose wholly unrealistic restrictions on law enforcement, and would not enhance in any appreciable way the interest secured by the Fourth Amendment. \(Id.\) \(See also\) Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (holding that a limited exception to the probable cause rule, circumscribed by the "specific and articulable facts" standard, is in keeping with the Court's Fourth Amendment jurisprudence). With law enforcement's need to interact with and investigate individuals clearly in mind, the Mendenhall Court also noted that "'[w]ithout such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.'" \(Mendenhall,\) 446 U.S. at 554 (citation omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 255 (1973)). The Supreme Court's decisions concerning Fourth Amendment search and seizure issues have not indicated any consistent approach for the government to take in their efforts to ensure the protection of individual rights. Alec Farmer, \(Note,\) Criminal Procedure — "Drug Courier Profile" Characteristics are Sufficient to Establish Reasonable Suspicion of Criminal Conduct, 12 U. ARK. LITTLE ROCK L.J. 407, 408-09 (1989).

\(^5\) Katz v. United States, 389 U.S. 347, 351 (1967). "[W]herever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." \(Terry,\) 392 U.S. at 9 (citation omitted). In Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891), the Supreme Court recognized, "[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.

\(^6\) Tracey Maclin, The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 75 CORNELL L. REV., 1258, 1264 (1990); see, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (holding that reasonable suspicion of criminal activity and a sufficient governmental interest is enough to warrant a temporary detention for limited questioning); \(Terry,\) 392 U.S. at 20-21 (holding that in the interest of effective law enforcement, police have the authority to make an investigatory stop based on reasonable suspicion). \(See infra\) notes 33-35 and accompanying text.

\(^7\) The United States Supreme Court assumes a very deferential posture toward majoritarian decisionmaking, which reflects the conservative ideology of those who sit on the bench. As a result, the government generally wins constitutional cases, and as a consequence the Court is unresponsive to the need for protection of individual rights. Erwin Chemerinsky, \(Foreword: The Vanishing Constitution,\) 103 HARV. L. REV. 43, 56-57 (1989). \(See, e.g.,\) United States v. Sokolow, 490 U.S. 1, 10-11 (1989) (holding that a DEA agent's use of a drug courier profile does not detract from the requisite "specific and articulable" basis for a finding of rea-
ernment, and tempered by the rights of the individual. Changes in societal norms and the resultant social policies demonstrate the constant ebb and flow of power between the government and those governed by it. Today, the courts must strike a new balance between governmental power and individual rights against a pressing, pervasive and destructive force: the war on drugs. In a number of recent decisions, federal courts have addressed the issue of drug courier profiles and their constitutional acceptability as a way

8. The balance between individual rights and governmental power is in a constant state of flux. "The gradual accretion of enforcement powers moves so slowly as to be invisible to the untrained eye. The rights of citizens recede by gradual erosion, by relentless nibbling, rather than gobbling." Wisotsky, supra note 1, at 923.

9. On October 2, 1982, President Reagan gave a speech denouncing illegal drugs. This speech reflected the prevailing attitude that cracking down on illegal drugs had become a national imperative, and law enforcement agencies would be accorded greater power to achieve this goal. Wisotsky, supra note 1, at 890-95; see also infra note 17.

10. As of 1982, over 3000 parents' groups had become actively involved with the National Federation of Parents for Drug Free Youth. Wisotsky, supra note 1, at 891. Based on citizen concern and the danger related to illegal drug trafficking, the fight to stop illegal drug importing and sale in the United States is now a national priority. "Since the early 1980s, the prevailing attitude has been that cracking down on drugs is imperative. As a result, the three branches of government have deferred very little to constitutional and nonconstitutional limits on the exercise of governmental power in the domain of drug enforcement." Id. at 890. Following the President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, President Reagan requested and received:

(1) more personnel—1020 law enforcement agents for the Drug Enforcement Agency (DEA), Federal Bureau of Investigation (FBI), and other agencies, 200 Assistant United States Attorneys, and 340 clerical staff; (2) more aggressive law enforcement—creating 12 (later 13) regional prosecutorial task forces across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises, and to destroy the operations of those organizations;" (3) more money—$127.5 million in additional funding and substantial reallocation of the existing $702.8 million budget from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space—the addition of 1260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws—a "legislative offensive designed to win approval of reforms' with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule; (6) better interagency coordination—bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a Cabinet-level committee chaired by the Attorney General; and (7) improved federal-state coordination, including federal assistance to state agencies by training their agents. Id. at 890-91 n.10 (citing President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 WEEKLY COMP. PRES. DOC. 1311, 1313-14 (Oct. 14 1982)). The United States has spent $475 million in military, law enforcement and economic aid in South American drug-producing countries in an effort to stem the tide of drugs. Douglas Farah & Michael Isikoff, 'Drug Summit' to Convene as Supply Surges, WASH. POST, Feb. 25, 1992, at A5. Despite this aid, there is no indication that there is less cocaine coming out of South America. Id. See also infra note 17 (explaining the Reagan administration's attempt to make law enforcement efforts to curtail illegal drug trafficking more efficient).
to enforce laws designed to stem the flow of illegal drugs. The drug courier profile, formulated by the Drug Enforcement Agency (DEA), is a response to the DEA’s growing need for effective tactics to gain the upperhand in the war on drugs. The profile is a compilation of personal characteristics which experience has shown may be indicative of an individual’s involvement in illegal drug trafficking activity. In order to establish the reasonable suspicion necessary to stop and question a suspect, the officer must be able to demonstrate with specific and articulable facts a reasonable belief that the suspect is committing or has just committed a crime. Unfortunately, the inconsistent application of facets of the drug courier profile by DEA agents leads to inconsistent tests used by the United States courts of appeals concerning the scope of the drug courier profile. The result of this inconsistency, however, raises serious constitutional questions regarding drug courier profiles.

United States v. Hooper, a recent case handed down by the Second Circuit addressing the issue of drug courier profiles, embodies the federal courts’ attempt to facilitate the war on drugs at all levels of government by broadening the powers accorded to law enforcement agencies and officials. The Hooper decision helps illustrate the problems that accompany drug courier profiles and their use by law enforcement officials in establishing the requisite reasonable suspicion to support any resultant stop and search of the

11. See also United States v. Bradley, 923 F.2d 362, 365 (5th Cir. 1991) (upholding agents’ use of the drug courier profile as a means of establishing reasonable suspicion); United States v. Taylor, 917 F.2d 1402, 1407-10 (6th Cir. 1990) (holding that the agents’ use of the drug courier profile violated the defendant’s Fourth Amendment protections); United States v. Johnson, 910 F.2d 1506, 1510 (7th Cir. 1990) (upholding agents’ use of drug courier profile and passenger list as a means of establishing reasonable suspicion), cert. denied, 111 S. Ct. 764 (1991); United States v. Lee, 916 F.2d 814, 820 (2d Cir. 1990) (upholding agents’ use of drug courier profile in a consensual encounter between defendant and law enforcement officials). Since 1974, the DEA has assigned “highly skilled agents to the major airports as part of a nationwide program to intercept drug couriers.” Florida v. Royer, 460 U.S. 491, 508 n.2 (1983) (Powell, J., concurring). These agents use a “drug courier profile” to identify certain characteristics that experience has shown to be “relevant in identifying suspects” known for drug importing. Id. See also United States v. Mendenhall, 446 U.S. 544, 562 (1980) (noting that federal agents have developed drug courier profiles that outline characteristics generally associated with those involved in illegal drug activity).

12. See infra notes 57-61 and accompanying text.
13. See infra notes 57-58 and accompanying text.
14. See infra part 1A.
15. See infra part IV.
individual. In *Hooper*, the United States Court of Appeals for the Second Circuit attempted to infuse some credibility and tangible form to a practice which is, by design, nebulous in nature. Confusion remains, however, regarding the characteristics necessary to establish the requisite reasonable suspicion for a stop and search of an individual.

This Comment focuses on the use of "drug courier profiles" by law enforcement officials as a foundation for establishing the reasonable suspicion necessary to seize an individual within the meaning of the Fourth Amendment. First, this Comment examines the use of profiles and the growing body of case law that is redefining the parameters of the relationship which exists between the citizens and their government. Next, this Comment examines whether the circuit courts’ attempt to facilitate the efforts of law enforcement is leading our society down a dangerous path of diminishing individual rights.

This Comment suggests that the circuit court decisions demonstrate that the inconsistencies of the drug courier profile provide an opportunity for arbitrary and abusive governmental intrusion. This Comment concludes that the nebulous nature of the drug courier profile sacrifices fundamental rights to facilitate administrative efficiency on the part of law enforcement. This Comment proposes, therefore, that a consistent test be applied by the courts to guarantee that individual rights are adequately protected.

I. EFFECTIVE LAW ENFORCEMENT—AT WHAT PRICE?

A. Protection of Fourth Amendment Rights

Traditionally, law enforcement officials had to show probable cause to justify both the issuance of a warrant and to support a warrantless search and

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17. See 28 C.F.R. § 0.85(a), 0.102 (1986). The Reagan administration acted to "streamline operations and force more cooperation among enforcement agencies. It placed the FBI in charge of the Drug Enforcement Administration (DEA) and gave it major drug enforcement responsibility for the first time in history." Wisotsky, supra note 1, at 892; see also id. (outlining the Reagan administration’s efforts to construct what amounted to a "Maginot Line" defense consisting of surveillance and interdiction measures to prevent the drug flow along the United States coastline, and the creation of a network of Organized Crime Drug Enforcement Task Forces in order to increase prosecutorial efficiency).

18. *Hooper*, 935 F.2d at 484.


20. Case law has shown that there is no one drug courier profile, but rather, there are an "infinite [number of] drug courier profiles ... [T]he profiles do not predetermine just what combination of suspicious factors must exist for a lawful stop, an especially critical matter given that some of those factors (for example, traveling from a source city) ‘describe a very large category of presumably innocent travelers.’ ” Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 482-83 (1990).

21. Id. See also infra notes 245, 252, 259-60.
seizure. This threshold requirement is met "where 'the facts and circumstances within . . . [the officers'] knowledge and of which [they] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution . . . that' an offense has been or is being committed." In Terry v. Ohio, the Supreme Court created new caveats in the common law rule that the arrest of an individual was a seizure of that person, and could only be justified by a showing of probable cause by the officer making the arrest. In Terry, a police officer observed the defendants repeatedly walking back and forth in front of a store window. Suspecting that the defendants were casing the store before robbing it, the officer approached the defendants and asked for identification. After preliminary questioning, the officer grabbed Terry and patted down the outside of his clothing. The search produced a gun from Terry's overcoat pocket. Terry and the codefendants were then placed under arrest.

22. Wong Sun v. United States, 371 U.S. 471, 479 (1963) (holding that a relaxation of the probable cause requirement would expose law abiding citizens to overzealous law enforcement tactics). Prior to Terry, the Court had clearly established that a citizen "was entitled to the protection of the Fourth Amendment as he walked down the street." Terry v. Ohio, 392 U.S. 1, 9 (1968). Probable cause requires "that the facts and circumstances within [the officer's knowledge are] . . . sufficient in themselves to warrant a man of reasonable caution in the belief that" the suspect has committed or is committing an offense. Carroll v. United States, 267 U.S. 132, 162 (1925). This common law standard served as the brightline rule for assessing "the legitimacy of seizures of the person" prior to Terry. Maclin, supra note 6, at 1268.


25. The Terry Court was urged to make distinctions between a "stop" and an "arrest" and between a "frisk" and a "search," thereby allowing law enforcement officials to stop a person and detain him briefly for investigative questioning upon the officer's reasonable suspicion. Id. at 10. Reasonable suspicion requires the officer to have a reasonable suspicion supported by articulable facts that criminal activity "may be afoot." Id. at 30. The officer's reasonable suspicion requires "some minimal level of objective justification" for making the stop. INS v. Delgado, 466 U.S. 210, 217 (1984). See Farmer supra note 4, at 416.

26. Terry, 392 U.S. at 5.

27. Id. The officer was patrolling in plain clothes when he first noticed the defendants. Id. He testified that he had never seen the men before and was unable to say what exactly drew his attention to them. Id.

28. Id. at 6. Drawing on his 39 years of experience, the police officer testified that he suspected the defendants of "casing a job." Id.

29. Id. at 6-7.

30. Id. at 7. When the defendants mumbled an answer in response to the officer's demand for identification, he grabbed Terry and patted down his overcoat, where he felt a pistol. Id.

31. Id.

32. Id. The officer patted down the other two defendants and found another gun in a second defendant's overcoat. Id. The officer testified that he only patted the defendants down to see whether they had weapons, and that he did not put his hands beneath the outer garments until he felt their guns. Id.
The majority in *Terry* created legally recognized, intermediate gradations of suspicion not amounting to probable cause, but serving as an adequate legal basis for police interaction. The resulting compromise between the needs of law enforcement and the rights of the individual permits the police to make what is commonly referred to as a "*Terry* stop." The Court stated that law enforcement officials should be allowed to "stop" a person and detain him briefly for questioning if the law enforcement official can demonstrate, based on the totality of the circumstances, a "reasonable suspicion" that "crime is afoot." If, after the initial stop, the officer has a reasonable suspicion that the individual may be armed, the officer has the power to "frisk" him for weapons to ensure the officer's personal safety. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, the officer is empowered to make a formal "arrest" and a full search of the person incident to that arrest.

The Court's requirement that the officer point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion," provided a greater degree of latitude to of-

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33. *Id.* at 16-20. The *Terry* Court determined that there must be a narrowly drawn authority to permit a stop and incidental search of an individual for the protection and safety of the police officer. Where the officer can show a reasonable suspicion that the individual was involved in an illegal activity, and that the individual was armed and dangerous, he can effect a stop and frisk without probable cause. *Id.* at 27.

34. On the one hand, the Court recognized law enforcement's "need [for] an escalating set of flexible responses, graduated in relation to the amount of information they possess" in order to deal with "often dangerous situations [unfolding] on city streets." *Id.* at 10. On the other hand, the Court recognized that "the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." *Id.* at 11. See generally Maclin, *supra* note 6, at 1269 (summarizing the compromise between Fourth Amendment protections and effective law enforcement embodied in the *Terry* limited exception).

35. *Terry*, 392 U.S. at 10. In fashioning this new limited exception, the Court was responding to law enforcement's need to deal with potentially dangerous situations. *Id.* The Court focused on the governmental interest justifying the intrusion upon an individual's Fourth Amendment rights for guidance in determining the reasonableness of a *Terry*-type stop. *Id.* at 19-22.

36. *Id.*

37. *Id.*

38. *Id.* at 21. Subsequent to the initial stop, *Terry* provided for a narrowly focused search of the individual if the officer could demonstrate a reasonable belief that the suspect was carrying a weapon. *Id.* at 21-22. The scope of the search must be limited to a pat-down search or, to what is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Id.* at 23-25. This limited search has been characterized by the Court as amounting to less than a "full" search even though it remains a serious intrusion. *Id.* at 26. This limited search balanced the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," against the need of the individual to be secure in his person and from unreasonable searches by law enforcement agents. *Id.* at 23. When the officer has a reasonable belief that the individual is engaged in criminal activity, the focus of
ficers who suspect an individual but fall short of probable cause. By doing so, Terry provided law enforcement officials with new parameters for police/citizen interaction through the creation of an objective test which allows law enforcement officials to predict the ramifications of their conduct and ensures a uniform application of Fourth Amendment protection. To enforce its holding, the Terry Court held that evidence gained in violation of the Fourth Amendment would be excluded from trial.

In Sibron v. New York, the Court added substance to the newly created framework of the Terry "reasonable suspicion" limited exception to the "probable cause" common law rule. The Sibron Court held that an officer could make an investigative stop of an individual based on less than probable cause. The Sibron majority found that not every encounter between a law interest shifts from protection of the individual's Fourth Amendment rights to investigating the crime. Id.

39. The Terry Court emphasized the need for effective crime prevention and detection, stating that it is this interest "which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Id. at 22.

40. In order to ensure the uniform application of Fourth Amendment protections to all individuals, the Terry Court required an objective finding of reasonable suspicion by the officer, noting that if the Court were to follow a subjective "good faith" test, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Id. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)). In Terry, the Court held that an officer may make a brief investigative stop of an individual so long as that stop is supported by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. Mark G. Ledwin, The Use of the Drug Courier Profile in Traffic Stops: Valid Police Practice or Fourth Amendment Violation?, 15 OHIO N.U. L. REV. 593, 596 (1988). The Terry standard of "reasonable suspicion" is the underlying principle to the primary issue in Hooper. In Hooper, the court looked to see if observations made by the agents pursuant to the characteristics outlined in the profile gave rise to a foundation of reasonable suspicion sufficient to justify the stop. United States v. Hooper, 935 F.2d 484, 490-92 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991).

41. To insure strict compliance on the part of law enforcement officials, the Court required that any evidence gathered as a result of the stop be declared as legally obtained only if the officer establishes the requisite reasonable suspicion for the initial stop. Id. at 12-13. Citing Weeks v. United States, 232 U.S. 383 (1914), the Terry Court held that, in order to protect fundamental Fourth Amendment principles, the only effective deterrent to police misconduct in the criminal context is to exclude from evidence at trial any evidence obtained as the result of an illegal search and seizure of an individual. Terry, 392 U.S. at 12. Failure to show reasonable suspicion to support the initial stop, and the subsequent formation of probable cause prior to a prolonged detention or extended search of the individual would result in the inadmissibility of all evidence obtained as a result of the illegal stop and search, pursuant to the exclusionary rule set forth in Weeks. See Weeks, 232 U.S. at 4 (holding that evidence seized in violation of the Fourth Amendment is inadmissible against the defendant, thereby discouraging police misconduct by removing the incentive for illegal searches and seizures).

42. 392 U.S. 40 (1968).

43. Id. at 43-44, 63-65. In Sibron, a police officer observed the defendant for a period of hours talking to a number of known narcotics addicts. Id. at 45, 62. The officer did not
enforcement officer and a citizen qualified as an intrusion requiring an objective justification. The Court held that a person is seized within the meaning of the Fourth Amendment only when, by show of authority or by means of physical force, his freedom of movement is restrained. Moreover, the protections of the Fourth Amendment are not at issue if the person questioned by law enforcement officials remains free to disregard the questions and walk away. Decided on the same day as *Terry*, *Sibron* represented the Court's initial attempt to clarify the nature and quality of police-citizen interaction.

The rules outlined in *Terry* and *Sibron* establish the proper procedure to classify and analyze interaction between police and citizens. This threshold determination dictates the legal standards a court must use in reaching an objective determination as to a police officer's right to investigate balanced against the individual's right to be free from arbitrary and unjustifiable investigations. The principles set forth by the Court in *Terry* and

overhear any of these conversations and saw nothing pass between Sibron and the others. *Id.* The Court concluded that the officer could not reasonably infer, based on who Sibron was talking to, that he was involved in criminal activity. *Id.* Later that evening, after observing the conversation between Sibron and the others, the officer observed Sibron enter a restaurant. *Id.* at 45. The officer then entered the restaurant and asked Sibron to step outside. *Id.* Sibron complied, and was arrested following a subsequent unlawful search by the officer. *Id.*

44. *Id.* at 62-66.

45. *Id.* at 63. The Court found no indication in the record whether the defendant accompanied the officer outside "in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." *Id.*

46. *Id.*

47. See Maclin, *supra* note 6, at 1268 n.45 (explaining how *Terry* and *Sibron* are used as foundation for later "reasonable suspicion" cases). See also *Terry* v. Ohio, 392 U.S. 1, 30-31 (1968) (setting forth the reasonable suspicion exception); United States v. Mendenhall, 446 U.S. 544, 553 (1980) (noting that not every encounter between an individual and a police officer is an intrusion for Fourth Amendment purposes, and that an individual is seized for Fourth Amendment purposes only when, "by means of physical force or a show of authority, his freedom of movement is restrained."). *Id.*

48. The post-*Terry* cases, including *Sibron*, clearly defined a new right-to-inquire rule to allow law enforcement officials to stop, and in some cases, search an individual for investigatory purposes where probable cause is lacking. See *Davis* v. Mississippi, 394 U.S. 721, 727-28 (1969) (acknowledging that there may be instances where an individual may be seized in order to obtain fingerprints without running afoul of the Fourth Amendment); *Adams* v. Williams, 407 U.S. 143, 145-47 (1972) (holding that a police officer had not violated Fourth Amendment protections when he approached a vehicle occupied by the defendant, and based on an informant's tip which amounted to less than probable cause, reached in and grabbed a revolver from the defendant's waistband).

49. The growing confusion among courts concerning the threshold level of suspicion required to support a stop of an individual by law enforcement officials has shifted the balance in favor of effective law enforcement by the government. As evidenced by one commentator, "the Court's message is obvious: The lower courts need not formulate concrete standards for
Sibron constitute the basis for lower courts’ analysis associated with cases involving the use of drug courier profiles.\textsuperscript{50}

\textbf{B. Fourth Amendment Protections and the Drug Courier Profile}

In 1968, the Federal Aviation Administration (FAA) created the first “profile.”\textsuperscript{51} The FAA designed the profile based on DEA agents’ testimony and court decisions to serve as a screening device to detect and deter possible hijackings of United States airliners.\textsuperscript{52} While the DEA’s list of characteristics which comprise the profile have never been publicly disclosed, the profile is based on twenty-five behavioral characteristics of airline passengers.\textsuperscript{53} In the mid-1970s, the DEA began compiling traits commonly associated with individuals engaged in the drug trade.\textsuperscript{54} From 1977 to 1982, the DEA’s use of the “drug courier profile” flourished in many airports.\textsuperscript{55} Additionally, many local law enforcement agencies created modified versions based on localized traits of individuals involved in the drug trade in a given geographical area.\textsuperscript{56}

In \textit{United States v. Elmore}, the Fifth Circuit developed what is now known as the Elmore profile, which has gained widespread popularity with enforcement agencies across the United States.\textsuperscript{57} This profile includes seven primary characteristics: (1) arriving or departing from a known drug city; (2) carrying large quantities of empty luggage, or carrying little or no luggage; (3) traveling by an unusual itinerary; (4) traveling under a name other than one’s own; (5) carrying unusually large amounts of cash; (6) purchasing an airline ticket with cash, particularly in small denomination currency; and (7) displaying nervous or hurried behavior.\textsuperscript{58}

investigatory searches and seizures. The Court has little interest in constitutional checks on police discretion.” Maclin, supra note 6, at 1317.

\textsuperscript{50} See supra note 40. See also infra note 61 (listing profile traits).

\textsuperscript{51} Farmer, supra note 4, at 412.

\textsuperscript{52} Id.

\textsuperscript{53} Charles L. Becton, \textit{The Drug Courier Profile: “All Seems Infected that Th’ Infected Spy, as all Looks Yellow to the Jaundic’d Eye,”} 65 N.C. L. REV. 417, 423 n.45 (1987).

\textsuperscript{54} United States v. Mendenhall, 446 U.S. 544, 562 (1980). See also infra note 61 (listing profile traits relied on by the Court).

\textsuperscript{55} Id. See supra note 4, at 413.

\textsuperscript{56} Id. See also Becton, supra note 53, at 433.

\textsuperscript{57} 595 F.2d 1046 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980). DEA agent Paul Markonni is credited with developing this, the first drug courier profile. Id. at 1039 n.3.

\textsuperscript{58} Id. Four secondary characteristics are: (1) using public transportation (i.e., taxicabs) to leave the airport, (2) using a public phone immediately after deplaning, (3) providing the airline with a fictitious call-back number, and (4) traveling to source cities with unusual frequency. Id. See Farmer, supra note 4, at 414. The DEA agents who detained Elmore had their suspicions roused by the defendant’s arrival from a source city, his use of an alias, his purchase of his airline ticket with cash, and his one-day stay-over in Detroit. \textit{Elmore}, 595 F.2d at 1038-40. A “source city” is a city from which drug dealers ship illegal drugs to other
Subsequent to the creation of the Elmore profile, the Supreme Court heard several profile cases. These decisions, however, only led to confusion surrounding law enforcement's use of the profile. While the Court never cited the Elmore profile in its holdings, at least four of the characteristics were found in each case. In United States v. Mendenhall, the Court applied the principles of Terry to the DEA's use of its drug courier profile and held that the agents' use of a profile did not invalidate the investigatory stop. In Mendenhall, law enforcement agents stopped the defendant as she was departing from her flight at Detroit Metropolitan Airport. The agents used the DEA's drug courier profile in determining that Mendenhall warranted locations for further distribution or sale to individuals. Reid v. Georgia, 448 U.S. 438, 440-41 (1980) (per curiam). See Sean W. Bezark, Note, Gold Chains, Jumpsuits and Hunches: The Use of Drug Courier Profiles After United States v. Sokolow, 21 Loy. U. Chi. L.J., 193, 200 (1989) (outlining the generally accepted profile characteristics); Farmer, supra note 4, at 414 (discussing common profile traits).

59. United States v. Sokolow, 490 U.S. 1 (1989) (holding that the agents had reasonable suspicion when they stopped the defendant); Florida v. Royer, 460 U.S. 491 (1983) (holding that the agents did not have reasonable suspicion when they stopped the defendant); Reid v. Georgia, 448 U.S. 438 (1980) (holding the profile characteristics that the agents relied on to be indicative of nothing more than innocent travel); United States v. Mendenhall, 446 U.S. 544 (1980) (holding that the agents' use of a profile did not invalidate the investigatory stop).

60. Unless the Supreme Court creates a clearly defined set of profile characteristics, the courts will have to follow "a case-by-case analysis to determine . . . reasonable suspicion, . . . thereby adding to the already confusing past of the profile." Farmer, supra note 4, at 420.

61. See Mendenhall, 446 U.S. at 547 n.1 (focusing on four Elmore profile traits: (1) defendant's arrival from a source city; (2) defendant's nervous appearance; (3) defendant's failure to claim any luggage; and (4) defendant's change of airlines for her return flight); Reid v. Georgia, 448 U.S. 438, 441 (1980) (using the same four characteristics focused on in Mendenhall); Florida v. Royer, 460 U.S. 491, 493 n.2 (1983) (focusing on defendant's: (1) nervous appearance; (2) payment for ticket in cash with small bills; (3) use of alias on airline identification tag; (4) defendant's casual dress; (5) agent's assessment of defendant's age as between 25-35 years old; and (6) defendant's use of sturdy luggage); United States v. Sokolow, 490 U.S. 1, 3-4 (1989) (focusing on defendant's: (1) payment for ticket in cash with small bills; (2) travel under an alias; (3) traveling to a source city; (4) nervous appearance; (5) short time spent at destination (48 hours); (6) failure to check any luggage).


63. Id. at 551. Justice Stewart, citing Terry, concluded that the Constitution does not prevent law enforcement officials from addressing questions to anyone on the street. Id. at 554-55. Thus, officers using drug courier profiles could approach an individual and ask questions without triggering the Fourth Amendment. See also Maclin, supra note 6, at 1273 (discussing the nature of an investigatory stop).

64. Experience supported the DEA's conclusion that considerable drug traffic flows through Detroit Airport. Mendenhall, 446 U.S. at 547 n.1. Justice Powell, concurring in part and concurring in the judgment, warned, however, that these statistics alone do not establish the reasonableness of the search at issue, "[n]or would reliance upon the 'drug courier profile' necessarily demonstrate reasonable suspicion." Mendenhall, 446 U.S. at 565 n.6. Each case raising a Fourth Amendment issue must be judged on its own facts. Id.
further investigation, and then subsequently arrested her for drug possession.\textsuperscript{65}

The majority in \textit{Mendenhall} concluded that a seizure within the meaning of the Fourth Amendment occurs when, given all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave.\textsuperscript{66} Factors that constitute the "totality of the circumstances" include the threatening presence of several officers, the use or display of a weapon by an officer, any physical touching of the person, or an officer's use of language or tone of voice which indicates that the citizen's compliance with an officer's request might be compelled.\textsuperscript{67} Any consent given by the individual to law enforcement officials must be voluntary.\textsuperscript{68} The individual's refusal to stop or to answer questions does not, in and of itself, provide the law enforcement official with a basis which will support even a temporary seizure of the individual.\textsuperscript{69} The \textit{Mendenhall} Court found nothing in the record to indicate that based on the "totality of the circumstances," the defendant could not reasonably believe that she was free to walk away.\textsuperscript{70} The Court also found that the defendant freely and voluntarily

\textsuperscript{65} The DEA agent testifying at trial stated that Mendenhall's behavior fit the DEA drug courier profile. \textit{Id.} at 547 n.1. In this case, the agents thought it relevant that:

(1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, 'appeared to be very nervous,' and 'completely scanned the whole area where [the agents] were standing'; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit. \textit{Id.} at 547 n.1 (alteration in original).

\textsuperscript{66} \textit{Id.} at 554. \textit{See also} Dunaway v. New York, 442 U.S. 200, 207 n.6 (1979) (explaining a number of factors, including display of a weapon or physical touching by an officer, which would indicate to a reasonable person that they are not free to leave).

\textsuperscript{67} \textit{Id.} \textit{See also} Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (holding that not all personal intercourse between law enforcement officials and individuals constitutes a "seizure" under the Fourth Amendment, but rather, 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").

\textsuperscript{68} In deciding this issue, the Court looked to see whether the consent was in fact voluntary, or the product of express or implied duress or coercion by law enforcement officials. \textit{Id.} at 554.

\textsuperscript{69} In the absence of voluntary consent, the individual "may not be detained even momentarily without reasonable, objective grounds for doing so." \textit{Florida v. Royer}, 460 U.S. 491, 498 (1982). The government must prove that the defendant consented voluntarily rather than as a result of express or implied coercion. \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 222-27 (1973).

\textsuperscript{70} \textit{Mendenhall}, 446 U.S. at 555. The Court noted that the encounter took place in a public area, the agents were plainclothed and displayed no weapons, and approached the defendant as opposed to summoning her. In addition, the agents requested but did not demand the defendant's identification and tickets. \textit{Id.}
consented to follow the officers to the DEA office. Based on these findings, the Mendenhall Court held that the officers' actions did not violate the defendant's Fourth Amendment rights.

One month after Mendenhall, the Court found the use of drug courier profiles unreliable in determining reasonable suspicion. In Reid v. Georgia, the defendant was initially stopped as a result of a law enforcement officer's use of a drug courier profile. The officers noted that Reid had arrived from Fort Lauderdale, a source city, carrying no luggage, and had attempted to conceal that he was traveling with a companion. After showing the officers their personal identification and initially consenting to follow the officers to the airport DEA office, Reid's companion fled, abandoning his shoulder bag which was found to contain cocaine. The Reid Court recognized that most of the characteristics used to create the DEA profile could also be used to describe presumably innocent travelers, and therefore, could not be relied upon to establish an objective foundation of reasonable suspicion. The Court concluded that the cocaine was the product of an illegal search and that the trial court had properly granted Reid's motion to suppress the cocaine.

Three years later in Florida v. Royer, the Court added additional guidelines that law enforcement officials must follow when determining whether there is reasonable suspicion to stop a suspect. In Royer, the defendant

71. Id. at 555, 557-58.
72. The Court concluded that the defendant consented to the search "freely and voluntarily" and therefore her Fourth Amendment protections were not triggered by the encounter with the agents. Id. at 559-60.
74. Id. at 440. The Reid Court held that the drug courier profile used by the agents did not provide a sufficient foundation for the requisite reasonable and articulable suspicion that the individual was engaged in criminal activity. Id. at 441. See supra note 61 (describing the four profile characteristics relied on by the agents). See Farmer, supra note 4, at 415 (discussing Reid).
75. Reid, 448 U.S. at 441.
76. Id.
77. The Reid Court recognized that the defendant's attempt to conceal that he was traveling with another person was suspicious, but was insufficient to support the seizure. Id. at 441. See Bezark, supra note 58, at 202 (explaining how the Reid Court recognized that "although the characteristic of concealing the fact of traveling with another person was quite suspicious, that characteristic by itself was 'too slender a reed to support the seizure' " (quoting Reid, 448 U.S. at 441)).
78. An individual's conformity with four of the characteristics set forth in a drug courier profile will not support a seizure of the individual. Reid, 448 U.S. at 441.
79. Id. at 441-42.
81. Id. at 493 n.2. The Court added two profile characteristics to the four relied on in Reid: (1) the defendant's payment for his ticket in cash; and that (2) the defendant's age being between 25-35 years. Id. See supra notes 58-61.
purchased a one-way airline ticket from Miami to New York City. The detectives observing Royer, believed that his characteristics fit the DEA's drug courier profile. As the defendant proceeded through the concourse area leading to the airline boarding area, he was approached by two detectives. Royer presented his airline ticket and driver's license upon the officers' request, but without verbally consenting. After preliminary questioning and at the detective's request, Royer was lead to a small room adjacent to the concourse area. After further questioning, the officers opened Royer's suitcase, found marijuana, and arrested him. Approximately fifteen minutes elapsed from the time the detectives initially approached Royer until his arrest.

Justice White, writing for the Royer plurality, stressed the need for consent to search Royer's suitcase. The Court noted that where the validity of a search rests on the purported consent of the individual, the State must prove that the requisite consent was freely and voluntarily given. If, upon being approached by a law enforcement officer, an individual is willing to listen to the officer or voluntarily answer questions put to him by an officer, no Fourth Amendment protections have been violated. Nevertheless, the Court stated that the police may not detain an individual who is subject to

82. Id. at 493. In addition, Royer also checked two suitcases, placing an identification tag bearing the name “Holt” on each of the suitcases. Id. at 493.

83. The “drug courier profile” as applied in Royer included the following factors: Royer was (a) carrying unusually heavy American Tourister luggage; (b) young, apparently between the ages of 25-35; (c) casually dressed; (d) appeared nervous, “looking around at other people;” (e) paid for his airline ticket in cash; and (f) only wrote a name and the destination on the airline identification tag. Id. at 493 n.2.

84. Detectives Johnson and Magdalena were in plainclothes while on duty at the Miami International Airport. Both detectives were with the Public Safety Department of Dade County, Florida and were assigned to the County’s Organized Crime Bureau, Narcotics Investigation Section. Id. at 493.

85. The airline ticket, like the baggage identification tags, bore the name “Holt,” while the driver’s license which Royer produced bore Royer’s correct name. Id. at 494.

86. Johnson and Magdalena did not return Royer’s airline ticket and driver’s license prior to escorting him to a room forty feet away. Id.

87. Id. Royer did not orally respond to the detectives’ request to open the suitcase, but did produce a key and proceeded to unlock the suitcase. One of the detectives then opened it without seeking further assent from Royer. Id. at 494-95.

88. Id. at 495.

89. Id. at 497.

90. “[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.” Id.

91. The police “do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place” to ask him questions, so long as the individual voluntarily consents to listen and respond. Id. See United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982) (outlining the three categories of judicially defined encounters between police officers and citizens), cert. denied, 460 U.S. 1068 (1983).
the encounter arising from the agent’s use of the drug courier profile even momentarily without reasonable, objective grounds established by the officer.\textsuperscript{92} Furthermore, an individual’s refusal to stop his forward progress, to listen to questions, or to answer those questions does not, without other independent factors, furnish the grounds for a \textit{Terry} stop.\textsuperscript{93}

In considering the governmental interest required to support a temporary seizure of an individual,\textsuperscript{94} the \textit{Royer} Court grafted the specific facts and circumstances of the case onto the general guidelines set forth in the \textit{Terry} limited exception.\textsuperscript{95} The \textit{Royer} Court considered several factors,\textsuperscript{96} and concluded that Royer had indeed been effectively “seized.”\textsuperscript{97}

Another recent drug courier profile case, \textit{United States v. Sokolow},\textsuperscript{98} “marked the first time the Court has taken a firm position on the issue [of drug courier profiles].”\textsuperscript{99} In \textit{Sokolow}, the Supreme Court held that because the agents established a foundation of reasonable suspicion that Sokolow was transporting drugs independent of the profile, the agents’ use of the DEA’s

\textsuperscript{92} \textit{Royer}, 460 U.S. at 498.
\textsuperscript{93} \textit{Id.} See also \textit{United States v. Mendenhall}, 446 U.S. 544, 556 (1980) (analogizing to the Court’s decision in \textit{Brown v. Texas}, 443 U.S. 47, 52-53 (1979), where police officers arrested the defendant for his failure to stop and answer the officers’ questions).
\textsuperscript{94} The governmental interests involved include crime prevention and detection. Likewise, “the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for profit,” \textit{Royer}, 460 U.S. at 508 (Powell, J., concurring), and “it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” \textit{Terry v. Ohio}, 392 U.S. 1, 22 (1968).
\textsuperscript{95} \textit{Royer}, 460 U.S. at 497-98. See also \textit{United States v. Brignoni-Ponce}, 422 U.S. 873, 881 (1975) (holding that “in appropriate circumstances the Fourth Amendment allows a properly limited ‘search’ or ‘seizure’ on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime”); \textit{Adams v. Williams}, 407 U.S. 143, 146-49 (1972) (holding that an informant’s report that an unnamed individual was carrying narcotics and a gun presented a governmental interest sufficient to satisfy the \textit{Terry} exception). These cases illustrate the Court’s individualized determination of the nature of the governmental interest, balanced against the nature and quality of the intrusion upon the individual’s Fourth Amendment rights.
\textsuperscript{96} These factors included the officers identifying themselves as narcotic agents, informing Royer that he was suspected of transporting narcotics, and asking him to accompany them to the police room in the airport terminal, thereby exercising some degree of control over his person. \textit{Royer}, 460 U.S. at 502. In addition, the officers had in their possession Royer’s ticket, identification, and his seized luggage. The agents never informed Royer that he was free to board the plane if he so chose. Therefore, Royer could reasonably believe he was being detained. \textit{Id.} at 503.
\textsuperscript{97} \textit{Id.} While asking for and examining Royer’s airline ticket and his driver’s license were no doubt permissible, the combination of these and other factors amounted to a seizure. \textit{Id.} at 501.
\textsuperscript{98} 490 U.S. 1 (1989).
\textsuperscript{99} Farmer, \textit{supra} note 4, at 418.
The defendant, returning to Hawaii from a three day trip to Miami, was stopped by DEA agents at Honolulu Airport. The agents compared Sokolow's behavioral characteristics to the DEA profile. These characteristics included Sokolow's purchase of his airline tickets with $2,100 in cash, his use of an alias, his destination, his plan to stay in Miami for only forty-eight hours, the fact that he did not check any luggage, and his black jumpsuit, gold jewelry and nervous appearance.

The Sokolow Court, reversing the Ninth Circuit's holding that the agent's stop was impermissible, noted at the outset that the agents did not need to establish probable cause in order to stop Sokolow for investigative purposes. Rather, law enforcement officials need only demonstrate a basis of reasonable suspicion supported by articulable facts: that criminal activity may be afoot. In determining reasonable suspicion, the Court focused on the totality of the circumstances at hand, and noted that any one factor set forth in the DEA's profile, by itself, is not dispositive proof of illegal conduct, but may amount to reasonable suspicion when considered together

100. Sokolow, 490 U.S. at 3. The Court held that the agents' use of the DEA profile did not detract from the trained agent's analysis of the evidentiary factors. Id. at 10.
101. Id. at 4. Sokolow purchased two round-trip tickets from United Airlines. The tickets were purchased in the names of "Andrew Kray" and "Janet Norian" and both tickets had open return dates. Id. at 4.
102. Id. at 4-5.
103. Id. at 4. Sokolow payed the $2,100 in cash from a roll of twenty-dollar bills containing nearly twice that amount of cash. Id. The ticket agent at the United Airlines counter noted that Sokolow was dressed in a black jumpsuit, wore gold jewelry and appeared nervous. Id. In addition, neither Sokolow nor Janet Norian checked any luggage when they purchased the tickets. Id. at 4.
105. Id. at 1417. The United States Court of Appeals for the Ninth Circuit held that the DEA agents did not have reasonable suspicion to justify the initial stop. Id. at 1423. The majority divided the facts bearing on reasonable suspicion into two categories. The first category included characteristics indicating "ongoing criminal activity," such as the use of an alias or evasive movement while moving through the airport. Id. at 1419. The majority required that at least one characteristic in this category be met in order to support a finding of reasonable suspicion. Id. The second category, "personal characteristics," included such factors as cash payment for tickets, a short trip to a major drug city, nervousness, type of attire and the absence of checked luggage. Id. at 1420. The majority believed these characteristics to be relevant only if there was evidence of ongoing criminal behavior as set forth in the first category. Id. Applying its two-part test, the majority found no evidence of ongoing criminal behavior to support Sokolow's demonstrated personal characteristics. Id. at 1422-23. Further, the court went on to note that the characteristics exhibited by Sokolow could be shared by the traveling public at large. Id. Thus, the court held the stop to be impermissible, and this, in turn, rendered the agent's subsequent seizure of Sokolow impermissible. Id. at 1423.
106. Sokolow, 490 U.S. at 7.
107. Id. at 7-9.
with other indicia of criminal activity.\textsuperscript{108} Therefore, the Court accepted the
drug courier profile as an investigative tool, but qualified its use by requiring
that law enforcement agents demonstrate a basis of reasonable suspicion
founded upon several of the DEA profile characteristics before stopping the
suspect.\textsuperscript{109}

"\textit{Mendenhall, Reid} and \textit{Royer} failed to provide the lower courts with any
conclusive test as to the validity of drug courier profiles as an investigative
tool."\textsuperscript{110} The lack of substantive guidelines led to inconsistent interpreta-
tions of the drug courier profile.\textsuperscript{111} The Court's decision in \textit{Sokolow}\textsuperscript{112} re-
resulted in the acceptance of profiles as an investigative tool.\textsuperscript{113} Now,
however, broad discretion as to the existence of reasonable suspicion is
placed in the hands of the officer on the street, and inconsistent interpreta-
tions of the drug courier profile flourish.\textsuperscript{114}

II. \textbf{Profiles—Consistently Inconsistent: The Federal Courts' Acceptance of DEA Profiling to Prove Reasonable Suspicion}

The use of the DEA drug courier profile represents the threshold step in
the process by which an agent gains reasonable suspicion enabling him to
make an initial stop, which may lead to probable cause and the subsequent
arrest of illegal drug traffickers.\textsuperscript{115} The case-specific information making up
the "totality of the circumstances" is, to a large extent, founded upon the

\begin{footnotes}
\item[108] \textit{Id.} at 8. The Court stated that "[a]ny one of these factors is not by itself proof of any
illegal conduct and is quite consistent with innocent travel. But we think taken together they
(plurality opinion of Justice White); \textit{id.} at 515-16 (Blackmun, J., dissenting); \textit{id.} at 523-24
(Rehnquist, J., dissenting).
\item[109] \textit{Sokolow}, 490 U.S. at 9.
\item[110] Bezark, \textit{supra} note 58, at 202.
\item[111] The Court's failure to provide substantive guidelines in \textit{Mendenhall, Reid} and \textit{Royer}
"left unanswered the basic question of what particular methods should (or should not) be used
by law enforcement officers when conducting a search or seizure." \textit{Farmer, supra} note 4, at
409.
\item[112] 490 U.S. 1 (1989).
\item[113] \textit{Id.} at 9-11. \textit{See also} \textit{Farmer, supra} note 4, at 419 (citing the Court's reasoning in
\textit{Sokolow} as "giv[ing] law enforcement officials the Court's blessing to use profiles as a valid
police tool").
\item[114] \textit{Farmer, supra} note 4, at 419.
\item[115] A DEA agent's application of the profile with regard to a particular individual is the
first step in the agent's effort to establish the requisite reasonable suspicion basis to support a
subsequent stop. "It is perhaps arguable that simply matching the drug courier profile might
establish probable cause to search or at least reasonable suspicion to stop and question an
individual." Arnold H. Loewy, \textit{The Fourth Amendment as a Device for Protecting the Inno-
\end{footnotes}
profile characteristics an agent uses in establishing reasonable suspicion. The acceptance by the lower courts of characteristics of the drug courier profile to establish reasonable suspicion has been mixed and inconsistent, with no clear delineation of a broadly accepted body of profile characteristics.

A. The Fifth Circuit

In United States v. Bradley, the United States Court of Appeals for the Fifth Circuit upheld the use of a drug courier profile by law enforcement officials. The defendant, a twenty-four year old black female who was eight months pregnant, was observed by DEA officials as she deplaned at Dallas-Fort Worth International Airport after a direct flight from Los Angeles. The agents noted that Bradley was dressed in maternity pants, a long T-shirt, a heavy denim jacket, and was carrying a purse and one bag. After preliminary observations, the agents noted that Bradley "stopped and looked around more than the usual harried passenger." Based on these observations, the agents confronted Bradley, identified themselves, and asked to speak with her. After examining her airline ticket, the agents noticed a bulge in the front of her pants not caused by her late-term pregnancy and asked her to submit to a search. Bradley was arrested after the search yielded a large quantity of cocaine.

116. DEA agents have come to rely on the drug courier profile as a means of establishing the reasonable suspicion necessary to make a stop. "The profile . . . is intended to establish which air travelers are probably drug couriers, which is a specific factual determination, that is, one concerning the sufficiency of suspicion regarding particular individuals." LaFave, supra note 20, at 481.

117. The profile has received mixed acceptance by the appellate courts. "[One] reason the drug courier profile has deservedly not received deference from the appellate courts is that the profile fails to limit meaningfully the discretion of agents in the field . . . ." Id. at 482. Before courts accept the drug courier profile as a valid and effective law enforcement tool, "they are certainly obliged 'to require that the government provide satisfactory empirical evidence that the profile is "valid" and actually "works."' No such showing has been made." Id. at 481-82 (quoting Morgan Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas, 65 B.U. L. REV. 843, 873 (1985)).

118. 923 F.2d 362 (5th Cir. 1991).
119. Id. at 365.
120. Id. at 363. Bradley was ticketed on a roundtrip from Los Angeles to Texarkana, with a return three days later. Id.
121. Id.
122. Id. at 364.
123. Id. Bradley agreed to speak with the agents and permitted their examination of her ticket. Id.
124. Id.
125. Upon the officer's request for identification, Bradley bent over to look through her purse which she had placed on a chair. As Bradley leaned over, both officers noticed a bulge in her waistband. Id. A nearby female agent was then summoned and Bradley was asked to
The court found that based on the totality of the circumstances, the officers had a reasonable suspicion that Bradley was engaged in an illegal activity. The court hurdles over the requisite reasoning in support of the officers' initial suspicion, discounting such factors as Bradley's race, age, itinerary, and cash-paid ticket as being indicative of nothing more than innocent travel. The court went on to note that Bradley's hurried and watchful behavior in the airport only suggested characteristics of an uncertain and worried traveler trying to make a connection. The majority concluded that the bulge in Bradley's pants and her lack of personal identification constituted a sufficient basis to support the officers' suspicions, and the reasonable suspicion for the resultant search. It is within the interstices of the court's reasoning that the officers' use of the drug courier profile falls, effectively removing it from court's analysis of the officers' actions.

B. The Sixth Circuit

In United States v. Taylor, the United States Court of Appeals for the Sixth Circuit rejected the use of profiling as a basis for reasonable suspicion. In Taylor, the defendant, Eddie Louis Taylor, was arrested by plainclothed officers of the Memphis Police Department at Memphis International Airport. Having observed Taylor deplane a flight from Miami, the arresting officers noted that Taylor, a middle-aged black man, appeared different from the other passengers on that flight. The officers found Taylor's character...

126. Id. at 365.
127. Id. The court concluded that "Bradley's race, age, itinerary, and cash-paid ticket (with short round-trip as opposed to an open return), alone were not grounds to base a reasonable suspicion that the she was anything other than an innocent traveler." Id. at 365. But see Florida v. Royer, 460 U.S. 491, 493 n.2, 502 (1983) (stating that the defendant's age, cash purchase of an airline ticket, pale and nervous appearance and partial completion of the airline luggage identification tag were worthy of heightened suspicion).
128. Bradley, 923 F.2d at 365.
129. Id.
130. 917 F.2d 1402 (6th Cir. 1990).
131. The arresting officers were Sergeant Joe Eldridge, who led the investigation, Officer Bonnie Bevel and Officer Forest Britt Roberts. Sergeant Eldridge has been with the Memphis Police Department for twenty-two years, yet at the time of the encounter with Taylor, he had only been with the airport drug task force for six months. Id. at 1403, 1408.
132. Id. at 1403. Taylor was wearing dark slacks, a work shirt and a hat, while other passengers were wearing business clothes and vacation attire. Id. See infra note 158. Taylor was carrying a new designer travel bag, and was the only black person on the flight. Id. The officers characterized Taylor as acting excited and constantly looking around while walking briskly through the airport terminal. Id. See infra notes 200, 205.
istics to be consistent with the DEA profile, and concluded that he was worthy of further investigation. One of the officers approached Taylor, identified herself to the defendant, and asked him some preliminary questions concerning his destination and travel plans. A subsequent search of Taylor's bag yielded two packages of cocaine and resulted in Taylor's arrest. The court held that the officers' actions toward Taylor constituted an unlawful seizure within the meaning of the Fourth Amendment. The majority evaluated the factors that the officers considered in making the initial determination that Taylor was involved in illegal activity and found that the defendant's nervous and hurried behavior was the type of behavior to be expected of travelers in an airport terminal. As to Taylor's attire,

133. Id. at 1408. See supra note 11. See also part IB of the text and accompanying footnotes.

134. The officers had no general information indicating that a drug courier might be on that particular flight, and had not received any "tip" that Taylor was involved in drug trafficking. Id. at 1403.

135. Id. at 1404. But see Bruce Montecalvo, Lemming-Like Assent, Manhattan Law., May 1990, at 10 (explaining how police officers have testified that "[t]he few travelers who do invoke their theoretical rights not to be searched are . . . immediately suspected of having something to hide").

136. Taylor's bag contained two kilograms of cocaine, and the police found $1,000 in cash hidden in his socks, pockets and wallet. Taylor, 917 F.2d at 1404.

137. Id. at 1412. The Court considered the officers' failure to inform Taylor during the stop "that he did not have to cooperate and was free to withhold his consent" as a factor in Taylor's reasonable belief, based on the totality of the circumstances, that he was not free to leave. Id. at 1411. None of the officers informed Taylor that he was under no obligation to speak or to allow them to search his bag. Id. Taylor, on the other hand, testified that "Sergeant Eldridge grabbed his arm, forced him back from the curb, shoved a police badge in his face and ordered him to stop." Id. Taylor also noted that he saw Eldridge's gun on the officer's right hip. Id. According to Eldridge, he approached Taylor in the airport parking lot, identified himself, and ordered Taylor to stop so he could talk to him. Id. Generally, in determining whether a suspect was in fact seized, or whether, based on an individual in the suspect's position, he would have reasonably believed he was free to walk away, courts look to see if the officer informed the suspect that he was not obligated to answer. See supra note 68, 69. Informing a suspect that he is not obligated to answer questions, however, is not constitutionally required. See United States v. Mendenhall, 446 U.S. 544, 555 (1980) (holding that no seizure occurred even though "the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry"); United States v. Hooper, 935 F.2d 484, 489 (2d Cir.) (stating that the agents' failure to inform the defendant that he had no duty to respond to the preliminary questioning was not constitutional), cert. denied, 112 S. Ct. 663 (1991).

138. See supra note 132.

139. Taylor, 917 F.2d at 1409. But see United States v. Millan, 912 F.2d 1014, 1017 (8th Cir. 1990) (noting how defendant's hurried behavior while moving through the terminal roused the agent's suspicions). See also infra note 200.

140. Taylor, 917 F.2d at 1409. The court found that a black man walking quickly through an airport terminal should not raise the suspicion of criminal activity. Id. at 1412.
the court stated that no dress code exists for airline passengers.\textsuperscript{141} The court found that based on the totality of the circumstances, Taylor did not believe he was free to leave when the officers first approached him.\textsuperscript{142} While recognizing law enforcement's need to wage an effective battle in the "war on drugs,"\textsuperscript{143} the court refused to allow law enforcement officers to disregard Fourth Amendment rights and to "subject individuals to random invasions of their privacy"\textsuperscript{144} in order to curtail illicit drug use in our society.\textsuperscript{145}

\textbf{C. The Seventh Circuit}

In \textit{United States v. Johnson},\textsuperscript{146} the Court of Appeals for the Seventh Circuit upheld the use of drug courier profiling.\textsuperscript{147} In \textit{Johnson}, the defendant arrived at Union Station in Chicago aboard an Amtrak train she had boarded in Los Angeles.\textsuperscript{148} As she moved through the terminal, Johnson was stopped by two officers of the Chicago police department.\textsuperscript{149} The officers used a drug courier profile in determining that Johnson warranted fur-

\textsuperscript{141} \textit{Id.} at 1409.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} President Reagan's "War on Drugs" harnessed "a preexisting momentum" for an effective government response to the ever-increasing drug trade. Wisotsky, \textit{supra} note 1, at 891. In addition to widespread popular support, pressures from within the government had been building for some time, with "[t]he Attorney General's Task Force on Violent Crime . . . recommend[ing] 'an unequivocal commitment to combating international and domestic drug traffic.'" \textit{Id.} (quoting \textit{ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 28 (1981)}).
\textsuperscript{144} \textit{Taylor}, 917 F.2d at 1405. The court concluded that Taylor was not simply tapped on the shoulder, but was grabbed forcefully, that the officers surrounded Taylor, that the officers presented a 'threatening presence,' and that Taylor did not flee or escape, but answered the officer's questions because he felt compelled to do so. \textit{Id.} at 1406 (quoting \textit{United States v. Mendenhall}, 466 U.S. 544, 544 (1980)). In support of Fourth Amendment protections, the Sixth Circuit referred to its decision in \textit{United States v. Radka}, 904 F.2d 357 (6th Cir. 1990), in which it held that, in spite of the urgent need to address the plague of illegal drug importation that has besieged this nation, the "Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society." \textit{Id.} at 361. The \textit{Radka} majority concluded that "[t]he drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties." \textit{Id.}
\textsuperscript{145} The Court concluded that "[a]lthough we recognize the importance of curtailing illicit drug use in our society, the 'War on Drugs' can never license law enforcement officials to disregard the rights guaranteed by the fourth amendment of our Constitution." \textit{Taylor}, 917 F.2d at 1412.
\textsuperscript{146} 910 F.2d 1506 (7th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 764 (1991).
\textsuperscript{147} \textit{Id.} at 1509-10.
\textsuperscript{148} \textit{Id.} at 1506. Johnson was looking about for her fiance when the officers first noticed her. When she did not see her fiance, she went to a public telephone and called him, asking if he could pick her up. \textit{Id.} at 1506-07.
\textsuperscript{149} \textit{Id.} at 1507. The two officers were Richard Boyle of the Chicago Police Department, assigned to the DEA Task Force at Union Station, and Amtrak policeman Robert Suave. \textit{Id.} Boyle was a twenty-two year veteran of the Chicago Police Department, spending the last seven years in drug interdiction. \textit{Id.}
ther investigation. Subsequently, Johnson was arrested after police uncovered a kilogram of cocaine from Johnson's attache case.

The *Johnson* court turned to the three basic categories of police-citizen interactions to determine the appropriate standard for the court's subsequent analysis: the arrest, the investigatory stop and the contact. The *Johnson* majority found that based on the "totality of the circumstances," Johnson could have reasonably believed that she was free to walk away from the officer's questioning. As to the officers' initial suspicion that Johnson was involved in illegal activity, the court afforded great weight to such factors as Johnson's arrival from Los Angeles, her nervous and hurried behavior while in the station and her cash-paid ticket. Based on these and other factors, the court upheld the officer's finding of reasonable suspicion that Johnson was involved in an illegal activity.

150. *Id.* The officers used a computer printout of information about passengers on the train from Los Angeles. Boyle learned from the printout that Johnson had purchased a one-way ticket for $453 in cash. *Id.* After the officers identified themselves and asked several preliminary questions including a request to search her handbag, Johnson refused to consent to the search or to any further questioning and walked fifteen feet to a public telephone to call her attorney. *Id.* At that point the officers stopped Johnson and grabbed her purse, suitcase and handbag. A subsequent search aided by a drug sniffing dog, uncovered a kilogram of cocaine. *Id.*

151. *Id.* at 1507-08.

152. *Id.* at 1508. See also United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982) (setting forth the categories for police-citizen interaction in relation to the Fourth Amendment), *cert. denied*, 460 U.S. 1068 (1983). For a valid arrest, the Fourth Amendment requires that the police have probable cause to believe a person is committing or has just completed the commission of a crime. *Johnson*, 910 F.2d at 1508. *See* Beck v. Ohio, 379 U.S. 89, 91-92 (1964) (holding that law enforcement officials need probable cause to make an arrest). An investigatory stop is limited to a brief, non-intrusive detention. *Johnson*, 910 F.2d at 1508. Under the Fourth Amendment, this category of interaction qualifies as a "seizure," but the officer need only have "specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime." *Id.* See United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (holding that the officer must have a basis of specific and articulable facts to support a finding of reasonable suspicion). The third category, contact, does not qualify as a "seizure" because the nature and quality of the interaction involves no restraint on the citizen's liberty. *Johnson*, 910 F.2d at 1508. *See* United States v. Mendenhall, 446 U.S. 544, 553-55 (1982) (holding that a person is seized only when his freedom of movement is restrained by a show of authority or physical force). This type of interaction is most frequently characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. *Johnson*, 910 F.2d at 1508.

153. *Johnson*, 910 F.2d at 1508-10.

154. *Id.*

155. *Id.* at 1510.
D. The Second Circuit

In *United States v. Lee*, the Second Circuit addressed the use of investigative stop by law enforcement officials using the drug courier profiles. In *Lee*, law enforcement officials observed the defendant as he purchased an airline ticket at Buffalo International Airport. One uniformed officer noted that Lee appeared nervous and would not engage in direct eye contact. Other factors which the officer noticed included Lee's traveling to Tampa, Florida, his payment for the airline ticket in cash, and his carrying of what appeared to be an empty suitcase. When Lee returned from Florida the next day, he was stopped by DEA agents, questioned, and after a search of his bag, he was arrested.

In concluding that the nature and quality of the agent's interaction with Lee did not meet the requisite level of intrusiveness for a seizure within the meaning of the Fourth Amendment, the majority touched on various aspects of a police-citizen interaction which bear on the individual's perception of his ability to walk away from the officers and return to answer their questions. The court considered several factors in determining whether the circumstances constituted a seizure: the threatening presence of several of-
ficers; the display of a weapon by an officer; the physical touching of the individual by an officer; any language or tone used by the officer which would support the individual’s reasonable belief that he was not free to walk away; and any prolonged retention of the personal effects of the individual such as airline tickets or personal identification. The Second Circuit concluded that the effect of these factors, when taken together, would not preclude a reasonable man from thinking that he was free to leave.

The court noted that the officers did not display their weapons in a threatening manner toward Lee, made no show of force, and did not threaten Lee in their conversation with him. The court determined that the officers’ request that Lee move to a less congested area was motivated only by a desire to move out of the flow of pedestrian traffic. In addition, after examining Lee’s driver’s license and airline tickets, the officers promptly returned them to Lee. In light of these facts, the court concluded that the encounter between Lee and the agents was consensual.

The Second Circuit’s recent treatment of drug courier profiling is set forth in United States v. Hooper. On May 15, 1989, Daniel Allman, an agent with the United States Border Patrol, and Thomas Gerace, an officer with the Niagara Frontier Transportation Authority, were on duty in plain clothes at Buffalo International Airport. Using the DEA profile, the agents scrutinized deplaning passengers to determine whether any of their

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164. Id.

165. In reaching its conclusion, the court noted that only two of the four officers present actually approached Lee, the encounter took place in a public area, the officers were not in uniform, the officers displayed no weapons, and there was no show of force or physical touching. Id. Based on the totality of the circumstances, the court concluded there was no seizure within the meaning of the Fourth Amendment. Id. See also United States v. Mendenhall, 446 U.S. 544 (1980) (finding that the officers did not use threats or show of force when the defendant consented to the search).

166. Lee, 916 F.2d at 819. This is similar to the Second Circuit’s treatment of an officer’s request that the defendant move to another part of the concourse. In United States v. Hooper, 935 F.2d 484 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991), the court viewed the motivation behind an agent’s request to move as merely an effort to avoid impeding the flow of pedestrian traffic moving through the airport. Id. at 487.

167. Lee, 916 F.2d at 819.

168. Id. at 819-20.


170. Agent Gerace, the officer who stopped the defendant in Lee, and agent Allman received, as part of their training, instruction as to characteristics which experience has shown to indicate an individual’s involvement in drug trafficking. These characteristics, taken cumulatively, constitute the drug courier profile used in the instant case. Id. at 487.

171. Both agents had been “assigned to a DEA task force that enforces immigration, drug, and currency laws at the airport and at other Buffalo transportation centers.” Id. As part of their training, agents on the task force were “familiarized with certain characteristics that constitute a profile of persons that may be engaged in illicit narcotics activity.” Id.
characteristics matched those of the profile. At approximately 4:25 p.m., Agents Gerace and Allman were watching passengers from United Airlines Flight 948, which originated in Oakland, California, a source city, and terminated in Buffalo, New York, with one stop-over in Chicago. In addition to his flight from a source city, Hooper did not have any carry-on luggage, traveled alone, and was one of the last passengers to leave the plane.

Based on their preliminary observations, Gerace and Allman decided that Hooper warranted a greater degree of scrutiny and began to follow him through the airport terminal. Hooper was "looking from side to side" as he entered the concourse area. Hooper then entered a video game room, stayed for approximately two minutes, but did not play any games. Hooper then left the game room, headed for an escalator, but then stopped at a public telephone. Gerace and Allman followed Hooper down the escalator to the lower level of the airport, where Hooper "retrieved a green hard shell bag that was wrapped in airline tape" from the United Airlines baggage claim area.

As Hooper headed for the exit, Gerace and Allman approached him, identified themselves as DEA agents, displayed their identification, and asked if they could speak with him. Hooper consented to speak with the agents. After initial questioning, Gerace informed Hooper that the agents were "concerned with narcotics coming through the airport and asked Hooper if he could look in his suitcase." Hooper responded that he did.
not have a key. After further questioning concerning the ownership of the bag, Gerace informed Hooper that he would seize the suitcase and obtain a search warrant. After following Gerace and Allman to the airport DEA office to obtain a receipt for the bag, Hooper proceeded to the taxi stand and left the airport. The following day, after a search of the suitcase yielded a cache of illegal drugs, an arrest warrant was issued for Hooper's arrest. Hooper was finally arrested several months later, and was charged with possession of cocaine with intent to distribute along with a related weapons charge.

The Second Circuit sketched an overview of characteristics attributed to Hooper which were commensurate with the DEA profile. A majority of the Second Circuit treated Hooper's arrival from a "source city" as the first profile characteristic giving rise to the agents' heightened suspicion. The fact that Hooper was the last to deplane was the second "specific and articulable" characteristic that aroused the agents' suspicions. Another such characteristic was Hooper's choice to travel alone. The court found that based on the agents' testimony, individuals traveling alone were in keeping with the characteristics of those engaged in illegal activity pursuant to the DEA profile, and this factor could be used in a "totality of the circumstances" determination by law enforcement officials in their formation of

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184. Id. at 488.
185. Id. at 488. Gerace asked Hooper if he owned the bag. Hooper responded that it was not his bag, although some of his possessions were inside. Id. at 488.
186. Id. Hooper followed Gerace and Allman to the DEA office. Once there, Hooper gave the agents the address and telephone number of where he was staying, and the agents gave Hooper a receipt for the suitcase which contained the address and telephone number of the DEA office. The agents then informed Hooper that he could leave. Id.
187. Id. at 489.
188. Id. at 487.
189. Id. at 487.
190. Id. at 493-94.
191. Id. at 487. The majority seized upon the agents' testimony concerning this aspect of the profile, with little reflection as to its true probative value or the existence of any inconsistent holdings on this point in other decisions. See infra part III.
192. Id. at 487.
reasonable suspicion. The fourth "specific and articulable" factor was Hooper's lack of luggage. According to the agent's testimony, the absence of luggage on Hooper's person as he deplaned heightened their suspicion. The majority concluded that in keeping with the characteristics set forth in the DEA profile, the absence of luggage warranted heightened suspicion.

The fifth "specific and articulable" factor considered by the court was Hooper's general behavior. Gerace and Allman testified to Hooper's roundabout path through the airport terminal after deplaning. The agents noted that Hooper kept "looking from side to side," and that Hooper proceeded to the airport game room where he stayed for approximately two minutes, without playing any games. The majority accepted the agents' interpretation of Hooper's behavior as consistent with the DEA profile, finding Hooper's nervousness as a valid factor in the agents' "totality of the circumstances" determination of reasonable suspicion.

III. INCONSISTENCIES SPAN THE CIRCUITS: INTERPRETATION OF DRUG COURIER PROFILE FACTORS IN THE CIRCUIT COURTS

The circuit courts' continued use of the drug courier profile to prove reasonable suspicion has led to the inconsistent interpretation of profile characteristics. Inconsistencies in the application and formulation of the drug courier profile are most readily apparent when the factors that make up the profile are analyzed, individually, across all circuits.

One example of the inconsistency in the application of drug courier profiles is the courts' interpretation of plane deboardings. The courts have failed to find common ground with respect to the significance of the point at

193. Id.
194. Id.
195. Id.
196. The Hooper court failed to reconcile this finding with any of the conflicting findings by other courts concerning this aspect of the profile. See infra notes 219, 225; see also United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977) (holding that the suspect's lack of luggage could be listed as a characteristic profile trait). But see United States v. Sanford, 658 F.2d 342, 343 (5th Cir. 1981) (viewing suspect's possession of a gym bag as a characteristic profile trait), cert. denied, 455 U.S. 991 (1982).
197. Hooper, 935 F.2d at 487.
198. Id.
199. Id.
201. See supra notes 118, 130, 146, 169 and accompanying text. See infra part III. See also infra notes 217-25, 243, 244.
which an individual deplanes from a flight.\textsuperscript{202} In United States v. Millan,\textsuperscript{203} the defendant was one of the first to deplane.\textsuperscript{204} There, the Eighth Circuit held this characteristic to be in line with those set forth in the DEA profile.\textsuperscript{205} In United States v. Buenaventura-Ariza,\textsuperscript{206} on the other hand, the defendant departed from the plane in the middle of the deplaning process.\textsuperscript{207} The Second Circuit found this also to be characteristic of an individual involved in drug trafficking activity.\textsuperscript{208} Finally, in United States v. Mendenhall,\textsuperscript{209} the profile came full circle, with the Supreme Court finding the agents' heightened suspicion warranted because the defendant was one of the last passengers to depart from the plane.\textsuperscript{210}

Recalling the United States federal court's recent articulation of the "specific and articulable" facts standard in United States v. Hooper,\textsuperscript{211} the defendant was in a "no win" situation. Hooper was the last to deplane, but perhaps Hooper had the unwitting misfortune of sitting at the rear of the plane and was therefore left with no other choice than to simply wait his turn. Based on other circuit holdings, it is apparent that changing Hooper's seating arrangements on the plane would have been to no avail, for it appears that deplaning at any point during the procedure raises the suspicion of law enforcement officials.

In Hooper, an individual traveling alone also indicated illegal activity under the DEA's profile.\textsuperscript{212} Again, however, the circuits are in conflict on this point.\textsuperscript{213} In United States v. Garcia,\textsuperscript{214} the First Circuit gave great weight to the agents' testimony that their suspicions were aroused when they

\textsuperscript{202} See infra note 205.
\textsuperscript{203} 912 F.2d 1014 (8th Cir. 1990).
\textsuperscript{204} Id. at 1015.
\textsuperscript{205} Id. See also United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982) (finding defendant, as one of the first to deplane, gave rise to heightened suspicion), cert. denied, 460 U.S. 1068 (1983). But see United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (explaining how the defendant being one of the last to deplane gave rise to heightened suspicion); United States v. Sterling, 909 F.2d 1078, 1079 (7th Cir. 1990) (holding that deplaning at any point during the procedure raises the suspicion of law enforcement officials).
\textsuperscript{206} 615 F.2d 29 (2d Cir. 1980).
\textsuperscript{207} Id. at 31.
\textsuperscript{208} Id.
\textsuperscript{209} 446 U.S. 544 (1980).
\textsuperscript{210} Id. at 547 n.1.
\textsuperscript{211} 935 F.2d 484, 498 (2d Cir.) (supporting the agents' claim that they had reasonable suspicion based on the profile characteristics and the defendant's responses to their questions), cert. denied, 112 S. Ct. 663 (1991).
\textsuperscript{212} Hooper, 935 F.2d at 487.
\textsuperscript{213} The circuits have found that traveling alone and traveling with a companion are indicative of illegal drug trafficking. See infra notes 215, 217.
\textsuperscript{214} 905 F.2d 557 (1st Cir.), cert. denied, 111 S. Ct. 522 (1990).
observed the defendant traveling with a companion.\textsuperscript{215} In United States v. White,\textsuperscript{216} the defendant was traveling alone. The Seventh Circuit found this characteristic to be indicative of illegal activity.\textsuperscript{217} Therefore, an individual traveling alone—or with a companion—cannot be grounds for suspicion if an agent's finding of reasonable suspicion is to comport with the Terry limited exception.

The Hooper court found the absence of any carry-on luggage to be another factor pointing to illegal activity.\textsuperscript{218} There is, however, a long line of inconsistent holdings concerning this aspect of the DEA profile. In Florida v. Royer,\textsuperscript{219} agents observed that the defendant carried American Tourister luggage which "appeared to be heavy,"\textsuperscript{220} a characteristic they considered to be within the profile.\textsuperscript{221} In United States v. Sanford,\textsuperscript{222} the defendant carried a small gym bag.\textsuperscript{223} The agents considered that to be a characteristic within the profile and the Fourth Circuit agreed.\textsuperscript{224} Decisions which mention luggage, or the lack thereof, carried by the defendant, span the entire spectrum without consistency as to possible configurations, combinations, and descriptions of luggage.\textsuperscript{225} The Hooper court failed to provide any guidance, noting

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\item \textsuperscript{215} Id. at 559. See also United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980) (explaining how defendant traveling with a companion was in line with the profile).
\item \textsuperscript{216} 890 F.2d 1413 (8th Cir. 1989), cert. denied, 111 S. Ct. 77 (1990).
\item \textsuperscript{217} Id. at 1415. See also United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978) (where defendant traveling alone gave rise to heightened suspicion).
\item \textsuperscript{218} United States v. Hooper, 935 F.2d 484, 487 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991).
\item \textsuperscript{219} 460 U.S. 491, 493 (1983) (explaining that the American Tourister luggage that Royer was carrying appeared to be heavy, and that this characteristic fit within the profile). Compare with United States v. Taylor, 917 F.2d 1402, 1403 (6th Cir. 1990) (holding that the new designer bag was a characteristic fitting the drug courier profile); United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980) (explaining that defendant's brand new luggage fit within the profile and was, when viewed with other characteristics, worthy of heightened suspicion by the DEA agents), cert. denied, 450 U.S. 923 (1981).
\item \textsuperscript{220} Royer, 460 U.S. at 493 n.2.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} 658 F.2d 342, 343 (5th Cir. 1981), cert. denied, 455 U.S. 991 (1982).
\item \textsuperscript{223} Id. at 343, 345.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Royer, 460 U.S. at 491 (finding defendant's carrying of American Tourister luggage, which appeared to be heavy, to fit within the profile); Sanford, 658 F.2d at 343 (finding defendant's carrying of a small gym bag to fit within the profile); United States v. Taylor, 917 F.2d 1402, 1408-10 (6th Cir. 1990) (finding defendant's carrying brand new luggage to fit within the profile). Even if the profile were to specifically deem the presence of luggage on the person of the individual as indicative of drug trafficking activity, there is no consistency as to the type, size, weight and appearance of the luggage. Id.
only that Hooper was observed to have no luggage on his person and thus fit within the profile.226

The courts also have treated an individual’s nervousness while in the airport terminal in an inconsistent manner, with decisions indicating what amounts to the entire range of human behavior as suggestive of illegal activity. In United States v. Millan,227 agents observed the defendant walking rapidly through the airport terminal.228 According to the Eighth Circuit, this behavior warranted a heightened level of suspicion under the DEA profile.229 In United States v. Gomez-Norena,230 the defendant appeared to walk aimlessly through the airport terminal.231 The Ninth Circuit found the agent’s testimony pertaining to the suspect’s behavior in keeping with the drug courier profile.232 In light of these decisions, the DEA’s profile is inconsistent even as to the most basic and outward aspects of an individual’s behavior. A similar line of cases covers the entire spectrum of an individual’s outwardly manifested behavior, ranging from individuals who were perceived as too nervous to those who were perceived as too calm.233 In keeping with its treatment of other elements within the profile, the Hooper majority failed to provide any substantive support for law enforcement’s use of the profile as a valid means of creating a sufficient level of suspicion.234

IV. The Effectiveness of DEA Profiling: Protection of the People or Infringement of Individual Rights?

Courts today feel increased pressure to provide the tools necessary to wage an effective battle in the war on drugs. The result is inchoate if not incoherent jurisprudence concerning Fourth Amendment principles at a time when law enforcement and citizens need clearly defined substantive guidelines. In addressing the use of the DEA profile by law enforcement

226. United States v. Hooper, 935 F.2d 484, 487 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991). The court gave weight to the agents’ testimony, listing the absence of luggage on Hooper’s person as he deplaned as one of the factors giving rise to heightened suspicion. Id. 227. 912 F.2d 1014 (8th Cir. 1990).
228. Id. at 1017.
229. Id. See also United States v. Rose, 889 F.2d 1490, 1491 (6th Cir. 1989) (where defendant walked rapidly through the airport).
231. Id. at 498.
232. Id. at 497-98.
officials, the majority in *Hooper* painted only a one-sided picture. In failing to point out inconsistencies in the formulation and application of the profile across a spectrum of varying fact patterns, the Second Circuit undermined the credibility and merit of the drug courier profile. The Second Circuit's profile is only consistent as to its documented inconsistencies: the profile seems to encompass every possible characteristic that one can observe a human being to possess or exhibit.

The Second Circuit, in analyzing Hooper's stop under the limited exception to the Fourth Amendment of *Terry v. Ohio*, upheld the agent's use of the DEA profile. The majority based its decision on the *Terry* limited seizure doctrine. In so doing, however, the *Hooper* majority effectively undermined the "specific and articulable" language in the *Terry* "reasonable suspicion" exception, which the Supreme Court intended as a safeguard against unjustifiable intrusions on the Fourth Amendment rights of individuals by law enforcement officials. Consistent with other circuits' interpretation of the drug courier profile, the Second Circuit selectively incorporated only the favorable facts, and defused those which were unfavorable. This approach fosters inconsistent interpretations of the drug courier profile and heightens the possibility of Fourth Amendment violations.

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235. *Id.* at 499-500 (Pratt, J., dissenting) (illustrating how the court failed to reconcile any of the conflicting case law pertaining to characteristics outlined in the drug courier profile with those exhibited by Hooper).

236. See *supra* part III.


238. *Hooper*, 935 F.2d at 493-94 (finding defendant's characteristics to be consistent with the drug courier profile and acknowledging that although the agents drew inferences from the profile, that "does not entitle those inferences to any greater or lesser weight in determining whether there was reasonable suspicion"). *Id.* at 494.

239. *Id.* at 493. To justify a *Terry* stop, "a law enforcement officer must have 'a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."' *Id.* See *supra* part IA.

240. See *supra* note 38.

241. See United States v. Hooper, 935 F.2d 484 (2d Cir.), *cert. denied*, 112 S. Ct. 663 (1991). See *supra* part III, notes 217-25 and accompanying text. The *Hooper* court defined "source city" as "a city from which narcotics are transported to Buffalo." *Id.* at 487. The *Hooper* court selectively incorporated this "specific and articulable" fact while omitting any mention of the government's concession at oral argument that "a 'source city' for drug traffic [is] virtually any city with a major airport." *Id.* at 499 (Pratt, J., dissenting). Judge Pratt, in his dissent, noted that this concession "was met with deserved laughter in the courtroom." *Id.* Characterizing every United States city with a major airport as a "source city" does little to form a narrowly construed profile useful to establish reasonable suspicion consistent with *Terry*.

242. See *supra* notes 196, 200, 205, 219, 234 and accompanying text.
Hooper represents a growing trend of weakening Fourth Amendment protections against unreasonable search and seizure.\textsuperscript{243} This trend is the result of an effort by the courts to fashion what is perceived as the proper alignment of governmental power in relation to individual rights in light of society's growing need and desire to fight the war on drugs.\textsuperscript{244}

The use of drug courier profiles by law enforcement officials may appear as a benign, administrative matter when weighed against the evils of the present day drug crisis.\textsuperscript{245} As a society, however, we must protect the fundamental Fourth Amendment values at stake with each new case.\textsuperscript{246} In \textit{Coolidge v. New Hampshire},\textsuperscript{247} Justice Stewart asserted, “[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.”\textsuperscript{248} As a society, we

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\item \textsuperscript{243} See U.S. CONST. amend. IV; United States v. Sokolow, 490 U.S. 1, 12-13 (1989) (Marshall, J., dissenting) (expressing fear that officers' reliance on the drug courier profile detracts from their ability to make an individualized determination of reasonable suspicion of any given individual, thereby reducing the constitutional safeguards provided by the requisite particularized probable cause for an arrest); Florida v. Royer, 460 U.S. 491, 512-13 (1983) (Brennan, J., concurring) (recognizing the drug trade as a pressing national concern, but refused to excuse the Court from its duty to strike down official conduct that exceeds the confines of the Constitution); United States v. Hooper, 935 F.2d 484, 500 (2d Cir.) (noting that of the 600 suspects the agents detained in 1989, only 10 were arrested—the Fourth Amendment rights of 590 people were sacrificed in the process) (Pratt, J., dissenting), cert. denied, 112 S. Ct. 663 (1991); United States v. Taylor, 917 F.2d 1402, 1412 (6th Cir. 1990) (holding that the war on drugs could never serve as a license for law enforcement officials to disregard an individual's Fourth Amendment rights). See also Becton, \textit{supra} note 53, at 430 (noting that law enforcement agents can misuse drug courier profiles to support arbitrary decisions with "after-the-fact compilations of characteristics suited to the individual detained by them," thereby giving the agents "uncheked power to manipulate the predictive model"); Wisotsky, \textit{supra} note 1, at 909 (finding that "[t]he result of the War on Drugs is thus a gradual, but inexorable, expansion of enforcement powers at the expense of personal freedoms")
\item \textsuperscript{244} See United States v. Mendenhall, 446 U.S. 544, 561 (1980) (recognizing that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit"); United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990) (recognizing "the devastation wrought by drug trafficking in communities nationwide"); \textit{Royer}, 460 U.S. at 513 (Blackmun, J., dissenting) (recognizing that "the strength of society's interest in overcoming the extraordinary obstacles to the detection of drug traffickers," found the agents' use of the profile to establish the requisite particularized suspicion for an investigative stop). "Currently, it is estimated that drug trafficking [sic] is a $110 billion a year business. The magnitude of the problem is enormous." Bezark, \textit{supra} note 58, at 203 n.80 (citing Watson, \textit{Can Bush Win the Drug War?}, \textit{CHICAGO SUN-TIMES}, February 15, 1990, at 39).
\item \textsuperscript{245} The emerging drug exception to the Fourth Amendment and the attendant "crack-down attitude penetrate every aspect of the contemporary federal criminal justice system—legislation, adjudication, investigation, and prosecution—it also reaches into lives of ordinary people not accused of crime." Wisotsky, \textit{supra} note 1, at 891.
\item \textsuperscript{246} See \textit{supra} notes 1-3 and accompanying text.
\item \textsuperscript{247} 403 U.S. 443 (1971).
\item \textsuperscript{248} \textit{Id.} at 455.
\end{itemize}
\end{footnotesize}
must not allow our need for effective law enforcement to overshadow our fundamental Fourth Amendment protections. The DEA and other law enforcement agencies must be limited to a profile that provides a basis of specific and articulable facts that are in keeping with the carefully circumscribed reasonable suspicion exception in Terry. The profile must provide substantive guidelines, thereby insuring the preservation of individual rights under the Fourth Amendment. Currently, the DEA profile, in providing a legal basis to stop a suspect, is formulated to be general in both its scope and application. Unfortunately, the profile serves as a virtual panacea for law enforcement officials in forming reasonable suspicion for a stop and search.

Gerace and Allman, the agents who stopped the defendants in Hooper and Lee, detained 600 suspects in 1989 using the drug courier profile. Of these 600 stops, only ten led to arrests, resulting in the sacrifice of the Fourth Amendment rights of 590 individuals. If these numbers are indicative of the work of DEA agents using the profile at airports nationwide, the scale of this wholesale infringement on individual rights becomes clear. In addition, the courts see only the cases in which the investigative stop resulted in an arrest, as the innocent “have little incentive to sue.” Few law enforcement agencies keep statistics on “the percentage of such searches [that] turn up evidence of a crime,” but “logic suggests the number of innocents put on the spot by police dwarfs the number found to have drugs.” Former Supreme Court Justice Thurgood Marshall has noted that the nebulous definition of drug courier profiles results in inconsistent and arbitrary applications by law enforcement officials. With such a great degree of discretion in the hands of the officer, judges may no longer have the power to provide

250. Id. See Terry, 392 U.S. at 21-2.
251. Hooper, 935 F.2d at 499-500 (Pratt, J., dissenting).
252. Id. “It appears that they have sacrificed the fourth amendment by detaining 590 innocent people in order to arrest ten who are not—all in the name of the ‘war on drugs.’” Id.
253. Id.
255. Id.
256. Id. “Some federal courts have suggested that refusal to cooperate—when combined with other ‘suspicion’ [sic] conduct such as walking fast, looking around ‘nervously,’ having no checked luggage . . . will create the kind of ‘reasonable suspicion’ necessary to justify temporary detention.” Id.
257. Justice Marshall attributed such broad applications to “the profile’s chameleon-like way of adapting to any particular set of observations.” United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987)).
independent oversight with respect to Fourth Amendment issues arising from investigatory stops carried out by law enforcement officials.\textsuperscript{258}

In order to safeguard Fourth Amendment protections, the DEA profile used by law enforcement officials as a tool to establish reasonable suspicion must be narrowly defined in both its scope and application.\textsuperscript{259} Inconsistencies must be purged so that agents may use the profile in an unarbitrary manner to establish specific and articulable facts tending to show a suspect's involvement in the drug trade.\textsuperscript{260} To create a uniform application, the Supreme Court must draw on past case experience and formulate a drug courier profile consisting of a set of characteristics that are clearly defined and open to little interpretation by the officer applying the profile to an individual, and must reconcile any approved profile with the spirit of the \textit{Terry}
limited exception. If the Court is unable to develop a profile that does not offend Fourth Amendment principles, the use of the profile should be eliminated. In its present form the costs simply outweigh the benefits.

As a society, we cannot afford to fret away the civil rights that are at the very heart of our system of government by making reactionary decisions in face of what has now become a national crisis. The courts must heed the warnings of those who have not lost sight of values which are fundamental to our continued enjoyment of a society free from arbitrary governmental control. If we choose to focus on problems which are of an immediate and sensational nature, and lose sight of the principles that are responsible for our society's allocation of power between the government and the individual, then we may win the battle against drugs but lose a far more important war against governmental intrusion on individual freedom.

V. CONCLUSION

Terry v. Ohio cautiously limited the enigma of governmental encroachment on individual liberties, and was intended to prevent broad and over-reaching law enforcement tactics such as the drug courier profile. Subsequent cases, however, have gone beyond the limited exception set forth

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261. See Terry v. Ohio, 392 U.S. 1, 21-2 (1968). If a law enforcement agent relies solely on the profile characteristics in making a stop, "the Terry standard probably will not be met, since the police officer simply is not in a position to learn enough specific and articulable facts which would give rise to a reasonable suspicion of criminal activity." Ledwin, supra note 40, at 609 (explaining how a police officer in his car is not in a position to establish reasonable suspicion using a drug courier profile). Personal freedom has become a casualty in the war on drugs. "The zealous pursuit of drug offenders . . . [has resulted in] more aggressive investigative and prosecutorial initiatives, generally supported by judicial validations." Wisotsky, supra note 1, at 925. The measures that the courts have been willing to adopt in the war on drugs "dishonors our legacy of limited government and natural rights, those 'principles of justice so rooted in the tradition and conscience of our people as to be ranked fundamental.'" Id. at 926. Even where there is no evidence of racial characteristics used as profile factors, "a question remains as to the predictive value of profiles. Some profiles are undoubtedly more reliable than others." Farmer, supra note 4, at 419. By using broad-based profiles, law enforcement officials will only observe couriers who exhibit profile traits. Agents looking for Hispanic female couriers would not arrest white male couriers. Id. at 420.

262. See United States v. Taylor, 917 F.2d 1402, 1405 (6th Cir. 1990) (holding that "the valiant efforts of our law enforcement officers to rid society of the drug scourge cannot be done in total disregard of an individual's constitutional rights"); United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990) (asserting that "[t]he drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties"). "Despite the devastation wrought by drug trafficking . . . nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'" Id. See also supra notes 245, 258.

263. See supra notes 1-3, 6-7.

264. See supra notes 1-3, 6-7.

265. See supra notes 260-62.

266. See supra notes 260-62.
in *Terry* and allowed for arbitrary governmental intrusion in hopes of stemming the illegal flow of drugs into the United States.

The Court must establish the parameters of the drug courier profile within the limited Fourth Amendment exception already articulated in *Terry*. In facing this nation's drug problem, we, as a society, must avoid the loss of Fourth Amendment protections. Our system of government has survived because society has maintained proper safeguards and restraints on government power. The courts must carefully maintain the delicate balance between individual freedom and liberty and the needs of society for an effective government. An uneven allocation of power in an effort to facilitate the war on drugs will, in the long run, come at the expense of both individual liberty and the effectiveness of government.

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