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Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers

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I. INTRODUCTION

Increased drug enforcement initiatives within the United States parallel the international[1] escalation of the war on drugs.[2] Curbing the

1. *See generally* Special Project, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259 (1990).

2. The drug enforcement initiatives of the Reagan and Bush administrations commonly have been couched in jingoistic terminology. The executive has referred to federal drug enforcement

flow of narcotics into the country has seemed an unconquerable task.[3] The tremendous influx of illegal substances and the heightened domestic production of both natural[4] and synthetic[5] drugs prompt govern-

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initiatives as the "War on Drugs" since an October 2, 1982, presidential radio broadcast by Ronald Reagan from Camp David, Maryland. Introducing what he hailed as a bold new strategy to prevent drug abuse and drug trafficking, the former president set the tone for drug enforcement rhetoric in the 1980s when he said: "The mood toward drugs is changing in this country, and the momentum is with us . . . . Drugs are bad, and we're going after them. As I've said before, we've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs." President's Radio Address to the Nation on Federal Drug Policy, 18 WEEKLY COMP. PRES. DOC. 1249, 1250 (Oct. 2, 1982); *see also* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890-92 & n.10 (1987).

3. In his opening statement to a 1986 congressional hearing on federal drug control initiatives, Representative Charles B. Rangel, Chairman of the House Select Committee on Narcotics Abuse and Control, decried the inadequacy of the federal response to the drug problem, citing government estimates that 150 tons of cocaine, 12 tons of heroin, 30 to 60 tons of marijuana, and 200 tons of hashish would enter the United States in the coming year. *The Federal War on Drugs; Past, Present, and Future: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 99th Cong., 2d Sess. 53 (1986) [hereinafter *Federal War on Drugs Hearing*] (opening statement of Charles B. Rangel, Chairman). The Chairman called for federal action to address the problem: "To win this war, we need a national commitment to a comprehensive anti-drug policy. On the Federal level, this means an assertive foreign policy which promotes the eradication of drugs in source countries and aggressive drug enforcement to halt the flow of narcotics across our borders." *Id.* at 61.

Congress's 1986 Session passed the Anti-Drug Abuse Act of 1986, which increased funds and personnel devoted to the drug war with the goal of instituting an aggressive drug enforcement policy. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Despite dramatic across-the-board increases in funding and personnel authorized by the bill, *see* HOUSE SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 100TH CONG., 1ST SESS., IMPLEMENTATION OF THE ANTI-DRUG ABUSE ACT OF 1986, at 1-10 (Comm. Print 1987), little success, measured in terms of reduction of drug use or importation, has been shown. A 1987 Drug Enforcement Administration (DEA) publication on intelligence collection pessimistically described the status of the war on drugs:

> A survey of current public opinion leads unequivocally to the opinion that the war against the narcotics traffic has been lost by law enforcement. Everyday one can find news articles on previously unheard of quantities of all types of drugs being found or seized. These seizures represent only the tip of the iceberg in terms of the actual volume of illegal drugs which are being produced and sold, but which evade the attention of police authorities. It can be safely concluded tbat the drug menace is a more significant threat to civilized societies than ever before. This situation exists in spite of increased efforts on the part of law enforcement autborities worldwide to stem the tide.

DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, INTELLIGENCE COLLECTION AND ANALYTICAL METHODS introduction (1987) (Intelligence Collection).

4. In 1987 the DEA reported a total of 71,845 marijuana plots sighted and 62,363 plots eradicated in the United States. DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, 1987 DOMESTIC CANNABIS ERADICATION/SUPPRESSION PROGRAM FINAL REPORT 4 (1987). Even with the extensive DEA eradication program, only one of nineteen DEA divisional offices reported diminished supplies of marijuana during the same time period, *id.* at 20, and the wholesale price of marijuana actually declined from 1986 levels. NAT'L NARCOTICS INTELLIGENCE CONSUMERS COMM., THE NNICC REPORT 1987: THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES 5 (1988) [hereinafter NNICC REPORT 1987]. The number of plots sighted in 1988 declined to 48,349, of wbich 38,531 were eradicated. DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, 1988 DOMESTIC CANNABIS ERADICATION/SUPPRESSION PROGRAM FINAL REPORT 5 (1988). The survey of DEA divisional offices in the 1988 report did not state whether supplies of marijuana were diminished for the same period. The re-

ments at every level to attempt to restrict drug trafficking within the United States.[6] The enforcement escalation is highlighted by a vociferous executive and congressional commitment to the eradication of the drug problem, improved drug detection technology, and a dedication of increased manpower and resources to enforcement efforts.[7]

Detecting illegal substances during transportation is a logical and convenient focus of drug control efforts. Imports of drugs are concentrated along the coasts, through international airports, and along the southern borders. After the drugs enter the United States drug traffickers must transport their goods throughout the country for distribution.[8] Seizing the opportunity to contain the flow of illegal substances, the police and other drug enforcement officials enhance surveillance of commercial transportation systems, highways, private planes, and boats in

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port implied that the eradication program had not experienced overwhelming success, but suggested that the fault lay witb the criminal justice system:

> The criminal justice system's laxity in dealing with offenders does not encourage defendants to cooperate with authorities. Growers are aware that they face a minimal chance of conviction and incarceration. Fines are viewed as a cost of doing business. There is no deterrence when the profit potential exceeds the potential loss. The lack of defendants cooperating detracts from the intelligence data base regarding marijuana cultivation activities.

Id. at 20.

5. The number of clandestine drug laboratories producing drugs such as PCP, methamphetamine, cocaine, and other chemically manufactured or refined drugs appears to be increasing. Between 1984 and 1987, the number of laboratories seized in the United States rose from 290 to 682. NNICC REPORT 1987, *supra* note 4, at 41. The NNICC reported that all of the PCP and the majority of the methampbetamines and amphetamines illegally sold in the United States are believed to be produced in clandestine laboratories. *Id.*

6. *See generally The Drug Enforcement Crisis at the Local Level: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 101st Cong., 1st Sess. (1989).

7. President Busb enthusiastically assumed control of the drug war upon taking office. In a recent address regarding drug control strategy, the President recommended extensive expansions in the criminal justice system, drug-free workplace policies, drug abuse treatment services, and an increase of 1990 funding to $7.9 billion, a $2.2 billion increase over 1989 levels. White House Fact Sheet on the National Drug Control Strategy, 25 WEEKLY COMP. PRES. DOC. 1308, 1308-10 (Sept. 5, 1989). Congress also has spent considerable time and energy addressing the drug problem. *See, e.g., National Drug Policy Board Strategy Plans: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100tb Cong., 2d Sess. (1988) [hereinafter *Drug Policy Hearing*]; *Federal War on Drugs Hearing*, *supra* note 3.

8. Trafficking trends vary depending on the drug and its source. *See* DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, SPECIAL REPORT: THE ILLICIT DRUG SITUATION IN THE UNITED STATES AND CANADA, 1984-1986 (1987). Marijuana generally arrives in Florida via boat from Columbia or by air from Jamaica and Belize, but most Mexican marijuana passes through Texas primarily by land transportation. *Id.* at 6. Cocaine arrives primarily in South Florida, but also enters along the Gulf Coast and the Southwest by air, boat, or land. *Id.* at 13. Heroin arrives primarily by commercial air from Asia, though some Mexican heroin is shipped over land. *Id.* at 21. John F. Kennedy International Airport in New York is considered the primary entry point for heroin smuggled into the United States. *See Narcotics Trafficking Through John F. Kennedy Airport: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 1st Sess. 103 (1987) (statement of Arthur K. Stiffel, Special Agent in Charge, U.S. Customs).

order to detect couriers during transit.[9] Increasingly, however, surveillance efforts challenge established concepts of privacy.

Fourth amendment issues concerning drug enforcement surveillance programs continually confront the courts. Agents fostering the extraterritorial war on drugs act pursuant to the sovereign's right to protect its borders, but consequently cause the diminution of the privacy rights of entrants.[10] Domestic travelers expect a greater degree of privacy and freedom from governmental intrusion than those entering the country.[11] Not surprisingly, these expectations frequently clash with expedient and effective drug enforcement efforts to stem the flow of illegal drugs. Successful drug enforcement efforts inevitably intrude on the privacy and security interests of the individual, raising questions of when and how much intrusion is permissible.

During the last twenty years, the Supreme Court generally has responded by legitimizing increasingly intrusive enforcement activities.[12] Cases analyzing the constitutionality of searches of drug couriers typically have been fact specific, precluding the emergence of bright line tests.[13] Courts commonly utilize a balancing test to determine the

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9. *See Drug Policy Hearing, supra* note 7, at 7-8 (testimony of Francis A. Keating II, Acting Chairman of the Enforcement Coordinating Group of the Nat'l Drug Policy Board, describing the DEA's drug interdiction system for air, land, and maritime smuggling).

10. In order to protect itself, the sovereign has plenary customs power and may control who and what may enter the country. *See* United States v. Ramsey, 431 U.S. 606, 616-21 (1977). Consequently, the customs service may conduct routine searches and seizures at the border without probable cause or a warrant. *See id.* at 616-17.

11. One court stated:

> Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. . . . [N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.

United States v. Montoya de Hernandez, 473 U.S. 531, 539-40 (1985) (citation omitted).

12. Supreme Court decisions significantly impacting the privacy rights of traveling passengers include: Florida v. Rodriguez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980); Terry v. Ohio, 392 U.S. 1 (1968); and to a lesser extent regarding passenger searches, but with increasing importance, New York v. Belton 453 U.S. 454 (1981). For a detailed discussion of each of these cases, see *infra* notes 97-103 and accompanying text (*Rodriguez*); *infra* notes 92-96 and accompanying text (*Royer*); *infra* notes 134-47 and accompanying text (*Mendenhall*); *infra* notes 46-68 and accompanying text (*Terry*); and *infra* notes 30-31 and accompanying text (*Belton*).

13. Five factually similar cases decided by the Supreme Court since 1980 demonstrate the Court's adherence to factual analysis and consequent inability to establish a controlling precedent in cases involving DEA searches of drug couriers in airports. *See, e.g., Mendenhall*, 446 U.S. at 544 (holding that a seizure had not occurred and that a search of the suspect was consensual). The concurring opinion found a seizure justified by reasonable suspicion. *Id.* at 560 (Powell, J., concurring); *see also* United States v. Sokolow, 109 S. Ct. 1581 (1989) (holding that the investigative stop of suspect was justified by reasonable suspicion); *Rodriguez*, 469 U.S. at 1 (holding that the investigative stop of suspect was justified by reasonable suspicion); *Royer*, 460 U.S. at 491 (holding that a seizure was justified by reasonable suspicion, but agents exceeded the bounds of a temporary

proper extent of a search and whether the harm to be prevented by the search outweighs any invasion of privacy.[14] This trend suggests that rules governing search and seizure are not static, rendering fourth amendment rights increasingly difficult to delineate. Law enforcement personnel, alert to the judiciary's shift from protecting privacy interests to bolstering law enforcement, have little incentive to respect individual privacy rights.[15]

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investigatory detention by retaining the suspect's ticket and identification and asking him to accompany the agents away from the public corridor into a private room); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam) (holding that the seizure of a suspect was unconstitutional because it was not justified by reasonable suspicion). For a discussion of the *Sokolow* decision, see *infra* notes 107-18 and accompanying text.

Commentators have expressed similar dissatisfaction with the Court's balancing approach. *See* Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988). Professor Sundby explains that the limitless application of the reasonableness balancing test approach to the fourth amendment originally articulated in Camara v. Municipal Court, 387 U.S. 523 (1967), a case involving administrative inspections, and later applied to the warrantless stop and search of an individual in *Terry*, has resulted in a "piecemeal approach to fourth amendment analysis." Sundby, *supra*, at 406.

14. The Supreme Court first adopted a balancing test for fourth amendment analysis in a case concerning a regulatory search. Writing for the majority, Justice Byron White stated: "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara*, 387 U.S. at 536-37. A year later the Court applied the *Camara* balancing test to determine the constitutionality of a policeman's stop and frisk of an individual believed to be planning an armed robbery. *Terry*, 392 U.S. at 21. Since *Terry*, courts commonly have applied the balancing test to determine whether a search violates the fourth amendment. *See generally* Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988); Sundby, *supra* note 13.

15. A Nashville attorney's experience illustrates potential abuses and dangers when individual rights are circumscribed under the fourth amendment. Three black male defendants had been arrested for trafficking in cocaine after they were stopped by a highway patrolman on Interstate 65 in Williamson County, Tennessee. The defendants told their attorney that they had not violated any traffic ordinances at the time that they were apprehended. After pulling them over, the patrolman separated them and searched the car. Finding cocaine, the officer arrested the suspects and had them sign a consent to tow and search the car. The suspects later denied knowledge of the consent to search. Suspecting that the investigatory stop and subsequent search were based on the fact that three black men were driving a car with Florida license tags north on an interstate highway, the attorney decided to conduct his own investigation in order to support his theory that the suspects impermissibly were seized and searched. The attorney hired a black male detective who, with two black male schoolteachers, rented a Cadillac with Florida tags. The three men drove north along the same portion of the interstate and were stopped on their first pass through Williamson County by the same patrolman. The officer ignored the detective's inquiries into the reasons for the stop. The officer separated the three men and called for support. When the other officers arrived, the first patrolman requested permission to search the vehicle. When the occupants denied permission, the officer asked again commenting that if the occupants had nothing to hide they should not object to an inspection of the car's contents. When the occupants refused once again, the officer nevertheless proceeded to search the car as well as two closed suitcases in the trunk and a paper bag in the back seat that had been stapled closed. After detaining the three men for over 30 minutes without finding any illegal substances, the officer ticketed the driver for an illegal lane change and failure to wear seat belts. When the detective later challenged the tickets in court, the district attorney argued that because the detective was trying to get stopped, he

Fourth amendment jurisprudence in the transportation context suggests that there is little or no reasonable expectation of privacy during travel via commercial transportation.[16] Recognized exceptions to the fourth amendment's warrant requirement are used to justify warrantless searches of passengers,[17] luggage,[18] and sleeping compartments.[19] Courts frequently apply the stop and frisk,[20] consent,[21] and automobile[22] exceptions to justify searches in these situations. Subordinating privacy interests to drug enforcement efforts alters the concept of

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violated traffic laws in order to provoke the patrolman into initiating the investigation. The judge refused to consider any evidence regarding the illegal search and upheld the traffic fines. Telephone interviews with Dale Quillen, Esq., and Charles Scott, Private Detective (Jan. 4, 1990).

Regardless of whether the detective's or the patrolman's version of the story is more accurate, the anecdote illustrates the potential for abuse inherent in both the current system for detecting illegal drugs and the analysis of the legitimacy of governmental intrusion after it has been accomplished. While the detective may have had an incentive to violate traffic laws so that his investigation would produce the desired results, the patrolman equally was interested in vigorously defending the legitimacy of his actions, possibly to the extent of fabricating charges against the detective. Most drug searches, like this incident, are witnessed only by drug enforcement officials and the suspects.

16. This Note does not suggest that the narrowing of fourth amendment protections is confined to the context of commercial transportation. Stephen Wisotsky, Professor of Law at Nova University in Florida, has argued persuasively that the war on drugs erodes privacy interests with practices such as wiretapping, stopping cars on public highways, monitoring students and school personnel, and creating data information systems to keep drug files on private citizens. *See* Wisotsky, *supra* note 2, at 913-19. Unlike these other contexts, however, airports have a brief but substantial history of surveillance and search dating back to the institution of systematic screening of passengers as a measure to prevent skyjacking. *See infra* notes 69-96 and accompanying text. This history and the similarity among the cases that arise from airport surveillance provide substantial material from which trends in fourth amendment jurisprudence may be analyzed. It is also possible under the circumstances to review the predictions of commentators who suggested that skyjacker screening systems would lead to an eventual demise in the right to privacy of airline passengers. *Id.* Similar train station and bus terminal cases have been added to illustrate both the expansion of drug surveillance in response to acceptance of DEA practices in airports and the additional curtailment of privacy resulting from that development.

17. *See, e.g.*, Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam) (search of a passenger justified by the stop and frisk exception).

18. *See, e.g.*, United States v. Place, 462 U.S. 696 (1983) (justifying a temporary seizure of personal property under *Terry*); United States v. Johnson, 862 F.2d 1135 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3223 (1989) (applying the automobile exception to luggage in a bus terminal). *But see* United States v. Chadwick, 433 U.S. 1 (1977) (holding that the automobile exception did not justify the search of a trunk that had been taken to a police station after being seized from train passengers who loaded it into a waiting automobile).

19. United States v. Tartaglia, 864 F.2d 837 (D.C. Cir. 1989) (holding that an extension of the automobile exception to the warrant requirement of the fourth amendment justified the warrantless search of defendant's roomette on train); *see also infra* notes 156-65 and accompanying text.

20. Terry v. Ohio, 392 U.S. 1 (1968); *see infra* notes 46-68 and accompanying text.

21. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see infra* notes 191-92 and accompanying text.

22. Carroll v. United States, 267 U.S. 132 (1925). The automobile exception may be applied to airport or other commercial transportation searches to the extent that its rationale is based on mobility. *See infra* notes 148-89 and accompanying text.

fourth amendment rights in the context of commercial transportation. Because airline, train, and bus transportation is intrinsically public, drug interdiction programs have diminished passengers' expectations of privacy substantially.

This Note primarily analyzes drug surveillance programs operated in airports, but also examines surveillance in train stations and bus terminals. Focusing on surveillance techniques and legal justifications for searches of suspected drug couriers, this Note reviews the stop and frisk doctrine, the development of airport surveillance and drug courier profiles, the expansion of the automobile exception to commercial forms of transportation, the use of investigatory stops, the legitimacy of consensual searches, and the appropriateness of a balancing test for determining the reasonableness of any given search. The purpose of the survey is to examine the impact of drug enforcement surveillance on fourth amendment jurisprudence and to determine whether passengers' seeming inability to vindicate unconstitutional searches[23] negates any meaningful right to privacy.[24]

II. *KATZ*—FOURTH AMENDMENT ANALYSIS IN TERMS OF PRIVACY

Before 1967, courts analyzed searches under the fourth amendment as physical invasions.[25] If law enforcement officials did not physically penetrate a secured area, a search did not occur, and the activity was not governed by the strictures of the fourth amendment.[26] The fourth amendment applies only to actual searches and seizures[27] and prohibits

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23. This Note will not address the exclusionary rule, but will consider the general receptiveness of the judiciary to fourth amendment arguments.

24. Privacy is an elusive concept in the realm of fourth amendment jurisprudence. In Katz v. United States, 389 U.S. 347 (1967), the Court explained that the fourth amendment does not translate into a general right to privacy, instead that which an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52; *see also* United States v. Chadwick, 433 U.S. 1, 11 (1977) (stating that "a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home" (footnote omitted)); Jones v. United States, 357 U.S. 493, 498 (1958) (stating that "the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy") *quoted in* Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

25. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a) (2d ed. 1987); *see also* Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1086-91 (1987); Recent Development, Florida v. Riley: *The Emerging Standard for Aerial Surveillance of the Curtilage*, 43 VAND. L. REV. 275, 279-81 (1990).

26. 1 W. LAFAVE, *supra* note 25, § 2.1(a).

27. "The words 'searches and seizures' . . . are terms of limitation. Law enforcement practices are not required by the Fourth Amendment to be reasonable unless they are either 'searches' or 'seizures.'" *Id.* § 2.1, at 299 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974)).

those that are unreasonable.[28] The fourth amendment does not limit other law enforcement activity. Therefore, if an activity does not rise to the level of a search or a seizure, it is not governed by the fourth amendment.[29]

Under traditional fourth amendment jurisprudence, government officials must have probable cause to believe that the subject of a search is involved in illegal activity before searching the person or his property.[30] After a showing of probable cause, a magistrate may issue a warrant.[31] Any search conducted without a warrant is per se unreasonable unless the search falls within the scope of a recognized exception.[32]

In *Katz v. United States*[33] the Supreme Court reformulated fourth amendment analysis by defining a search in terms of expectations of privacy.[34] The petitioner, Katz, was convicted of transmitting wagering information over the telephone.[35] Without showing probable cause and obtaining a warrant, Federal Bureau of Investigation (FBI) agents had attached a listening device to the outside of the public telephone booth from which the petitioner called.[36] Because the agents in *Katz* did not physically enter the booth, the lower courts determined that no search had occurred.[37] If the agents did not conduct a search, then a showing of probable cause and a warrant were unnecessary.[38]

On appeal the Supreme Court recognized that electronic technology had rendered the physical trespass view of searches obsolete.[39] Consequently, Justice John Harlan's concurrence replaced the physical trespass rule with a test focusing on an individual's reasonable expectation of privacy.[40] The Court found that a reasonable expectation of pri-

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28. *Id.*

29. *Id.*

30. *See* New York v. Belton, 453 U.S. 454, 457 (1981) (stating that "[i]t is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so").

31. *Id.*

32. Katz v. United States, 389 U.S. 347, 357 (1967).

33. 389 U.S. 347 (1967).

34. *Id.* at 361 (Harlan, J., concurring); *see also* Wilkins, *supra* note 25, at 1086-91 (1987).

35. *Katz*, 389 U.S. at 348.

36. *Id.*

37. *Id.* at 348-49 (citing 369 F.2d 130, 134 (9th Cir. 1966)).

38. *Id.*

39. The Court stated:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id. at 353; *see also id.* at 362 (Harlan, J., concurring) (stating that "reasonable expectations of privacy may be defeated by electronic as well as physical invasion").

40. *Id.* at 361 (Harlan, J., concurring).

vacy exists regarding a conversation held from a public phone booth.[41] Therefore, evidence obtained by the unlawful listening device was inadmissible.[42]

Justice Harlan proposed a two-tier analysis that became the accepted formula for determining whether certain activity is a search.[43] The test first looks to an individual's actual, or subjective, expectation of privacy, determining whether the individual knowingly exposed activities, objects, or statements to the public.[44] If an individual actually expects to keep these activities, objects, or statements private, the expectation of privacy must be objectively reasonable.[45] If an application of the *Katz* test shows that an individual held an actual expectation of privacy and that expectation was objectively reasonable, investigative activity which intrudes upon that privacy will be considered a search. Only if activity constitutes a search under the *Katz* test will courts apply the fourth amendment to determine whether the search was reasonable.

III. Warrantless Searches Conducted Without Probable Cause: *Terry v. Ohio* and the Stop and Frisk Doctrine

The stop and frisk doctrine originated in 1968 in *Terry v. Ohio*.[46] In *Terry* the Supreme Court ruled that a policeman who has a reasonable, articulable suspicion that an individual is armed and dangerous may conduct a limited search of the individual, confined to a pat down of the individual's outer clothes.[47] The Court based its decision on concern for the safety of police officers,[48] recognizing that practical precautionary measures and the state interest in crime control necessitate some limited right to search.[49] Drawing the stop and frisk exception narrowly, the Court limited its use to a search for weapons when an officer reasonably suspects that the subject of the frisk is armed and dangerous.[50]

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41. *Id.* at 352.
42. *Id.* at 359.
43. *Id.* at 361.
44. *Id.*
45. *Id.*
46. 392 U.S. 1 (1968).
47. *Id.* at 30-31.
48. The Court stated:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Id. at 27.
49. *Id.* at 22.
50. *Id.* at 27.

Under *Terry*, two strict criteria limit the stop and frisk exception.[51] First, the officer must have a specific and articulable justification for the search.[52] Based on the officer's experience, inferences may be made regarding an individual's behavior.[53] An inarticulate hunch, however, will not justify an official invasion upon the constitutionally protected interests of the private citizen.[54] Second, the scope of the search may not exceed what the circumstances justify.[55] Although the safety rationale behind *Terry* is explicit,[56] it is no longer a necessary factor in the *Terry* formula.[57] The analysis for determining whether a stop and frisk search is unconstitutionally intrusive balances governmental interest against the degree of intrusion.[58] Thus, governmental interests other than police officer safety also might justify limited searches. *Terry* has spawned its own line of cases incorporating the balancing test and the reasonable suspicion requirement.[59] The safety rationale that originally justified the stop and frisk exception, however, soon evaporated.[60]

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51. *Id.* at 19-20.

52. *Id.* at 21.

53. *Id.* at 27.

54. *Id.* at 22.

55. *Id.* at 20. The Court described the acceptable extent of a search under the *Terry* circumstances as "a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault [the police officer]." *Id.* at 30.

56. *See supra* note 48; *see also* Florida v. Royer, 460 U.S. 491, 510 (1983) (Brennan, J., concurring) (stating that "the purpose of the 'limited' weapons search was 'not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence' " (quoting Adams v. Williams, 407 U.S. 143, 146 (1972))); Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036, 1053 (1973) (stating that "*Terry* permitted a narrow exception to the probable cause rule for the sole purpose of protecting the officer").

57. *See Royer*, 460 U.S. at 498-99 (stating that the public interest in the suppression of illegal drugs or any other serious crime will justify temporary detention for limited questioning); United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (stating that seizure of defendant was justified because "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit").

58. *Terry*, 392 U.S. at 21. Critics have called for replacement of the balancing test with an analysis requiring officials to use the least restrictive means because of the alleged overvaluation of governmental needs and undervaluation of individual interests that occurs in the balancing analysis. *See infra* notes 201-07 and accompanying text.

59. *See generally* Sundby, *supra* note 13.

60. In a *Terry* companion case, the Supreme Court found that a narcotics search "was not reasonably limited in scope to the accomplishment of the *only goal* which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." Sibron v. New York, 392 U.S. 40, 65 (1967) (emphasis added). Despite the uncompromising language of *Sibron*, however, this view evolved into a general acceptance of *Terry* searches aimed at detecting narcotics. The transition from *Sibron* to cases such as *Royer* and *Mendenhall*, *see supra* note 57, seems to have been triggered initially by lower court rulings that permitted the admission of narcotics discovered in the course of weapons frisks. As one author has noted: "After exhaustively analyzing whether the information developed by the screening system justified a protective weapons frisk of the defendant, the opinions then tended to reject summarily the argument that any nonweapon contraband discovered should not be admissible in a criminal prosecution." Gora, *supra* note 56, at 1050. Acceptance was particularly alarming at this early stage because statistics

Many commentators initially rejected the validity of the diminished level of suspicion required by the stop and frisk exception especially as applied to possessory offenses when the suspect poses no immediate safety threat.[61] Although the application of the stop and frisk doctrine to possessory offenses is no longer an issue in fourth amendment cases, critics continue to fear that the combination of an unavoidably subjective balancing test with a suspicion requirement less exacting than probable cause may give rise to automatic acceptance of completed and successful searches.[62] Generally, if contraband was discovered, then suspicion must have been reasonable.[63]

The debate regarding the reasonable suspicion standard has been attenuated, especially in cases involving drug couriers.[64] Views concerning the importance of the governmental interest in detecting illicit drug couriers differ substantially.[65] Much of the early debate addressed the validity of expanding *Terry* to allow limited searches of individuals suspected of carrying drugs.[66] The Court resolved that debate by determin-

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suggested that officials who screened passengers were frequently looking not for weapons, but for drugs. *Id.* at 1053.

61. Justice William Douglas, the sole dissenter in *Terry*, objected to the Court's empowering the police to conduct a search based on less than probable cause. "We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again." *Terry*, 392 U.S. at 36 (Douglas, J., dissenting) (footnote omitted). Later, however, the Court's subtle expansion of the stop and frisk doctrine brought more dissension. In *Adams v. Williams*, 407 U.S. 143 (1972), Justice Thurgood Marshall, joined by Justice William Douglas, objected to the search of an individual suspected of concealing a weapon, but who posed no immediate threat to the officer or the public. *Id.* at 159 (Marshall, J., dissenting). The dissent pointed out that in order for a search to satisfy *Terry* requirements, the suspect must be "both armed and *dangerous*." *Id.* (emphasis in original); *see also* Gora, *supra* note 56, at 1052-53.

62. *See* Becton, *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, 469-70 (1987).

63. *Id.* Conversely, if no contraband is discovered, courts are more likely to find suspicion unreasonable. *See* Brown v. Texas, 443 U.S. 47 (1979) (holding that the seizure and unsuccessful frisk of a suspect was unreasonable after no contraband was discovered). Because victims of unreasonable searches are unlikely to report the intrusion and little recourse exists for those who do, courts will rarely face situations such as *Brown* in which a search fails to reveal contraband. *See infra* notes 215-17 and accompanying text.

64. *See, e.g.*, United States v. Sokolow, 109 S. Ct. 1581, 1587-88 (1989) (Marshall, J., dissenting) (stating that the majority's finding of reasonable suspicion in upholding the conviction of the defendant "diminishes the rights of *all* citizens 'to be secure in their persons' as they traverse the Nation's airports" (emphasis in original) (citation omitted)). *See generally* Becton, *supra* note 62.

65. *See generally Legalization of Illicit Drugs: Impact and Feasibility: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess., pt. 1 (1988) (containing testimony for and against the legalization of illegal drugs); *see also* France, *Should We Fight or Switch?*, A.B.A. J., Feb. 1990, at 43 (discussing the pros and cons of legalizing drugs in light of the perceived failures of the war on drugs).

66. *See* Florida v. Royer, 460 U.S. 488, 498 (1983) (stating that "*Terry* created a limited exception to [the fourth amendment's probable cause requirement]: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is

ing that governmental interests other than officer safety may outweigh individual privacy interests so that a limited search is justified.[67] The issue now central to a court's analysis of a *Terry* search is limited to the question of whether suspicion was reasonable.[68]

A. The Origins of Airport Surveillance

Because of an increase in hijackings, the Federal Aviation Administration (FAA) in 1968 developed a "skyjacker personality profile" in order to identify individuals who posed a potential safety risk.[69] Additionally, many airlines began using magnetometers either selectively, through application of the profile, or comprehensively in order to determine whether passengers carried weapons.[70] Persons meeting the profile characteristics or identified as carrying metal by the magnetometer could be frisked and their hand luggage searched.[71]

The institution of these precautionary measures provoked outcries from civil libertarians who found the searches inconsistent with fourth amendment values.[72] Despite the encroachment on privacy rights, however, courts in the early 1970s were persuaded that the threat of hijackings and terrorist attacks justified the airport searches.[73] When searches for weapons produced drug stashes instead of handguns, courts usually allowed admission of the evidence to secure narcotics convictions.[74]

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about to commit a crime"). Justice Thurgood Marshall, who framed the strong dissent in *Adams*, joined the *Royer* majority that stated the general rule. *See supra* notes 57 & 61.

67. In the early 1970s, for example, courts found that the threat posed by hijackers justified extensive screening systems in the Nation's airports. *See infra* notes 69-71 and accompanying text.

68. *See, e.g., Sokolow*, 109 S. Ct. at 1581 (1989); United States v. Moore, 872 F.2d 251 (8th Cir. 1989); United States v. Tomaszewski, 833 F.2d 1532 (11th Cir. 1987) (holding that suspicious behavior gave rise not only to reasonable suspicion, but actually gave officers probable cause to conduct a search).

69. *See* Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004 (1973); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971). Initially, the FAA relied on profiles to pinpoint potential hijackers, but eventually it instituted a comprehensive screening system whereby all passengers were searched via magnetometer (metal detector). Ironically, the implementation of the widescale magnetometer search generated more controversy than the searches based on the profile. *See* Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657, 660-61 (1974); Gora, *supra* note 56.

70. *See* Note, *supra* note 69, at 1040.

71. *See* Andrews, *supra* note 69, at 660-61.

72. *See* Gora, *supra* note 56, at 1038.

73. *See id.* at 1039-46.

74. *See, e.g.*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972) (holding that cocaine discovered after defendant triggered magnetometer was properly admitted against defendant in his trial for possession of cocaine); United States v. Bell, 464 F.2d 667 (2d Cir.) (upholding conviction of defendant for drug charges based on heroin discovered in airport antihijacker search), *cert. denied*, 409 U.S. 991 (1972); *see also* Gora, *supra* note 56, at 1043. *But see* United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972) (overturning defendant's conviction for possession of amphetamines because scope of search was excessive), *aff'd*, 481 F.2d 884 (8th Cir. 1973). One author

Noting the FAA's success in interdicting potential hijackers as well as the frequent interception of illegal drugs in the process, the Drug Enforcement Administration (DEA) recognized an opportunity to establish its own surveillance program targeted at drug couriers rather than hijackers.[75]

B. The Drug Courier Profile As a Basis for Reasonable Suspicion

1. The DEA Drug Courier Profile

The DEA initiated a nationwide program to intercept drug couriers in 1974.[76] The DEA compiled profiles of ostensibly objective characteristics likely to be displayed by individuals who illegally transport drugs. The profiles were designed to provide guidelines for the detection of drug couriers by agents assigned to airports.[77] Theoretically, persons displaying characteristics associated with drug couriers provide reasonable cause for suspicion.[78] Under *Terry*, if suspicion based on conformity with the supposedly objective characteristics is considered reasonable, then a limited search is justified.

Several characteristics distinguish the use of drug courier profiles from the hijacker personality profile.[79] First, the threat posed by drug couriers is not related to their status as passengers on commercial transport. Therefore, any threat posed by drug couriers is not as immediate as the threat of hijacking. Second, the FAA generally used the hijacker personality profile as one factor in a multipart evaluation of suspects.[80] Suspects selected by the hijacker profile usually were asked for identification and tested with a magnetometer[81] before more intrusive searches were conducted.[82] Third, the FAA profile was much nar-

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noted that the majority of arrests generated from the use of the hijacker profile were for possession of drugs or violation of other nonrelated laws. Gora, *supra* note 56, at 1037.

75. *See* Greene & Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 269 (1982).

76. 3 W. LAFAVE, *supra* note 25, § 9.3.

77. DEA Special Agent Paul Markonni is credited with creating the original drug courier profile while assigned to surveillance duty at Detroit International Airport. *See* Greene & Wice, *supra* note 75, at 269-70.

78. *See* Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843, 848 (1985).

79. *See* Note, *Miles of White Lines: Use of the Drug Courier Profile by State Law Enforcement Agencies on the Highway As Reasonable Suspicion to Detain Motorists*, 30 ARIZ. L. REV. 949, 951-52 (1988). Unlike the drug courier profile, elements of the skyjacker personality profile were never made public. *Id.* at 951 n.14, 965-66. Therefore, comparisons between the two mechanisms are speculative to some degree.

80. *See id.* at 951.

81. The magnetometer, or metal detector, is a less intrusive form of search than a body search. It does not require the suspect to disrobe or to be physically touched in any way.

82. *See* Andrews, *supra* note 69, at 660-61.

rower than the DEA counterpart.[83] Only one-half of one percent of air travelers fit the FAA's hijacker profile.[84] The DEA profile, on the other hand, does not appear to be nearly as selective.[85] Finally, the FAA program targeted only those persons who actually were going to board a plane, but the DEA profile may be applied to anyone who enters the airport terminal.[86]

The Supreme Court appears hesitant to endorse unconditionally the use of drug courier profiles to establish reasonable suspicion. The Court first addressed the profile as a legitimate basis for establishing reasonable suspicion in *Reid v. Georgia*.[87] A DEA agent in the Atlanta airport identified the defendant Reid and his companion as potential drug couriers because they displayed certain profile characteristics.[88] A subsequent search revealed that the suspects were carrying cocaine.[89] The Supreme Court held that the investigatory stop was not justified by reasonable suspicion.[90] Reasoning that many innocent passengers could be subjected to intrusive searches if suspicion based on inherently innocent activity were deemed reasonable, the Court found that the profile characteristics displayed by the defendant provided an inade-

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83. *See* Gora, *supra* note 56, at 1040.

84. *See id.*

85. *See* Becton, *supra* note 62, at 418.

86. A consent rationale generally justified hijacker screening searches. Although courts differed on the point at which consent became irrevocable, all courts agreed "that up to some point a traveler [was] free to leave and that screening ultimately rest[ed] on the consent manifested by a choice to continue beyond that point." Andrews, *supra* note 69, at 664.

87. 448 U.S. 438 (1980) (per curiam). The Court decided United States v. Mendenhall, 446 U.S. 544 (1980), a month earlier. *Mendenhall* also involved the use of drug courier profile in an airport setting. In *Mendenhall*, however, the Court never reached the issue of whether the profile supported reasonable suspicion. Instead, the Court ruled that the agents' stop of the defendant was not a seizure. *Id.* at 554; *see infra* notes 134-41 and accompanying text.

88. *Reid*, 448 U.S. at 439. Reid arrived on an early flight when surveillance is perceived to be low, carried a shoulder bag, and occasionally looked backward at a man behind him who carried an identical bag. The second man caught up with Reid and spoke with him briefly before the two exited the terminal. *Id.* A DEA agent approached the two men, asked to see their identification and airline tickets, and requested consent to a search. The two men initially agreed to accompany the agent back into the terminal and permit him to conduct a body search and a luggage inspection. *Id.* The agent saw that the men had spent only one day in Fort Lauderdale, Florida and that they seemed nervous when he spoke to them. *Id.*

89. *Id.* Upon entering the terminal, the petitioner ran in an attempt to evade the officers. He abandoned the shoulder bag he had carried before the agent apprehended him. The agent searched the abandoned bag and discovered that it contained cocaine. *Id.* Although there is no privacy interest in abandoned property, if the initial stop constituted an illegal seizure, the evidence discovered subsequently was tainted by this illegality and was thus inadmissible. *See* Florida v. Royer, 460 U.S. 491, 507-08 (1983).

90. *Reid*, 448 U.S. at 441; *see also* Cloud, *supra* note 78, at 865 & n.93. Although the Fulton County Superior Court originally suppressed evidence on a motion by the defendant, the Georgia Court of Appeals found that reasonable suspicion justified the investigatory stop. State v. Reid, 149 Ga. App. 685, 686, 255 S.E.2d 71, 72 (1979), *vacated*, 448 U.S. 438 (1980).

quate basis for reasonable suspicion.[91]

In *Florida v. Royer*[92] the Supreme Court determined that because the defendant's characteristics fit the drug courier profile, suspicion was reasonable.[93] Because DEA agents took Royer to a secluded room, however, Royer's confinement exceeded the bounds of an investigative seizure.[94] Drug investigators were justified in temporarily detaining the suspect for questioning under the *Terry* standard,[95] but the Court noted that a lawful seizure cannot be excessive in scope and duration.[96]

2. Legitimization of the DEA's Airport Surveillance Program

In *Florida v. Rodriguez*[97] the Supreme Court ruled that a Florida state trial court wrongfully suppressed evidence obtained by police officers who stopped to question defendants after observing them speak furtively to one another and attempt to evade the officers.[98] The Court strongly endorsed the right of a police officer to detain temporarily an individual suspected of carrying drugs.[99] Although the Court never referred explicitly to a profile, certain characteristics identified by the police officers as suspicious, terms such as "source city,"[100] and the fact that the police officers had special training in narcotics surveillance and apprehension suggest that suspicion was in fact based on the display of profile characteristics.[101] Regardless of whether the use of a profile provided the basis for the stop, the Court's opinion nevertheless reflects a willingness to deem characteristics commonly contained on profile lists as a basis for reasonable suspicion.[102] *Rodriguez* may be viewed as an intentional legitimization of the DEA's airport surveillance program.[103]

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91. The Court found that the basis for suspicion was "simply too slender a reed to support the seizure in this case." *Reid*, 448 U.S. at 441.

92. 460 U.S. 491 (1983).

93. *Id.* at 502-03.

94. *Id.* at 503.

95. *Id.* at 502.

96. *Id.*

97. 469 U.S. 1 (1984) (per curiam).

98. *Id.* at 6.

99. *Id.* at 5 (stating that "a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry v. Ohio*, and is permissible because of the 'public interest involved in the suppression of illegal transactions in drugs or of any other serious crime' " (citation omitted) (quoting *Royer*, 460 U.S. at 498-99)).

100. The term "source city" is commonly used to designate a city from which dealers ship drugs to a "use city," or place of sale. Becton, *supra* note 62, at 420 n.19.

101. *See id.* at 422.

102. *See id.*

103. *Rodriguez* has an unusual procedural history. The case came to the Supreme Court on an appeal by the State of Florida. *Rodriguez*, 469 U.S. at 2. A Florida trial judge originally excluded evidence that had been found on the defendant Rodriguez after hearing testimony by the narcotics officer involved in the investigation. *Id.* The trial court ruled that no reasonable suspicion

The use of drug courier profiles as a basis for suspicion arouses much skepticism among legal commentators.[104] Although the compilation of characteristics that comprise the drug courier profile suggests an objective basis for determining whether suspicion of any individual is reasonable, studies demonstrate that the profiles are susceptible to manipulation.[105] Thus, the profiles lend an arguably false sense of legitimacy to searches based on no more than an artfully disguised hunch.[106]

In *United States v. Sokolow*[107] the display of profile characteristics motivated drug enforcement agents to perform a search. The Court refused to address the DEA's use of a drug courier profile,[108] but simply determined that the agents had reasonable suspicion to search the defendant.[109] The Court's inquiry focused on whether factors articulated by the agents who stopped and searched the suspect constituted reasonable suspicion.[110]

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existed to justify a constitutional search of the defendant. *Id.* at 4. The Florida district court of appeals affirmed the decision of the trial court. *Id.* at 2. Because the Florida Supreme Court does not hear cases involving trial judge error, but relies on the district courts of appeal to oversee such error, Florida's Attorney General appealed the case to the Supreme Court. *Id.* at 10 (Stevens, J., dissenting). In his dissent, Justice John Paul Stevens argued that the Court did not possess the supervisory responsibility for acting in a pure error-correcting capacity for cases arising from a state tribunal. *Id.* at 7. He also criticized what he perceived to be the majority's preoccupation with the need to punish drug couriers. *Id.* Justice Stevens focused not on the merits of the case, but on the inappropriateness of the Court's reviewing factual findings of a state trial court de novo. *Id.* at 12. "The unusual action the Court takes today illustrates how far the Court may depart from its principal mission when it becomes transfixed by the specter of a drug courier escaping the punishment that is his due." *Id.* at 7. "The single-minded achievement of results in individual cases is not a virtue that should characterize the work of this Court." *Id.* at 13. Justice Stevens was joined by Justice William Brennan. Justice Thurgood Marshall dissented without a written opinion. *Id.* at 7.

104. *See, e.g.*, Becton, *supra* note 62; Cloud, *supra* note 78.

105. *See* Becton, *supra* note 62, at 438. For an empirical analysis of the drug courier profile, see generally Cloud, *supra* note 78, at 884-920. Professor Cloud concludes that the characteristics are too broad to have meaning and reflect subjective evaluations of behavior by the police rather than objective criteria. *Id.* at 920.

106. *See* Cloud, *supra* note 78, at 884.

107. 109 S. Ct. 1581 (1989).

108. The Court stated:

> We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the DEA's "drug courier profiles." A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

Id. at 1587 (footnote & citations omitted).

109. *Id.*

110. *Id.* at 1586. Focusing on the majority analysis in *Rodriguez*, Professor Cloud suggested that an approach that evaluates the reasonableness of suspicion without considering the influence of the DEA profile is consistent with traditional fourth amendment methodology and most effectively balances the competing interests of the government and the individual. Cloud, *supra* note 78, at 882.

Justices William Brennan and Thurgood Marshall dissented, criticizing the majority for its failure to confront whether drug courier profiles may establish reasonable suspicion.[111] The dissent found the profiles suspect because of their susceptibility to manipulation,[112] reliance on stereotypes,[113] and potential to target innocent passengers.[114] In a brief survey of federal cases, the dissent illustrates how profile characteristics not only vary from case to case but frequently are contradictory.[115] Three of the cases cited, for example, identify the timing of the exit from the plane as one of the profile characteristics displayed by a particular defendant.[116] One case finds it significant that the defendant was the last to deplane, another that he was the first, and a third that he exited in the middle.[117] The dissent concludes that reasonable suspicion derived from inherently innocent behavior, which happens to conform to an unproven and demonstrably flawed profile, undermines constitutional protections under the fourth amendment.[118]

3. Train and Bus Surveillance

Although the majority of commercial transportation drug courier cases address passengers traveling on commercial airlines, cases recently have arisen concerning train or bus passengers.[119] Drug courier profiles are applied in train stations despite the reduced significance of some of the designated characteristics when removed from the original airport context.[120] Some courts find that a suspect's exhibition of drug courier

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111. *Sokolow*, 109 S. Ct. at 1589 (Marshall, J., dissenting).

112. *Id.* at 1588.

113. *Id.* Justice Thurgood Marshall implies that the majority has succumbed to the persuasiveness of impermissible stereotypes as well, pointing to the repeated mention of the black jumpsuit and gold jewelry worn by Sokolow in the majority opinion. *Id.* at 1590.

114. *Id.* at 1588.

115. *Id.* at 1588-89.

116. *Id.*

117. United States v. Mendenhall, 446 U.S. 544, 564 (1980) (suspect was last to deplane); United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982) (suspect was first to deplane), *cert. denied*, 460 U.S. 1068 (1983); United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980) (suspect deplaned from middle).

118. *Sokolow*, 109 S. Ct. at 1590-91.

119. *See, e.g.*, United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) (defendant caught with drugs on train); United States v. Johnson, 862 F.2d 1135 (5th Cir. 1988) (police discovered cocaine in defendants' luggage in bus station), *cert. denied*, 109 S. Ct. 3223 (1989); United States v. Hammock, 860 F.2d 390 (11th Cir. 1988) (defendant caught with drugs aboard hus); United States v. Whitehead, 849 F.2d 849 (4th Cir.) (defendant caught with drugs on train), *cert. denied*, 109 S. Ct. 534 (1988).

120. *See* United States v. Tavolacci, 704 F. Supp. 246 (D.D.C. 1988) (referring to drug interdiction unit of the Amtrak police department that targets potential drug couriers traveling via train). Profile characteristics identified in cases involving train passengers mirror those seen in the airport drug courier profile. *See, e.g., Colyer*, 878 F.2d at 471 (defendant departed from "source city," made reservation the day before departing, and paid for his ticket with cash a few minutes

profile characteristics sufficiently merits a finding of reasonable suspicion.[121] Others recognize problems in adopting this simple approach.[122]

In *United States v. Tavolacci*[123] one court found that drug enforcement agents had reasonable suspicion to detain and question a defendant who purchased a one-way ticket on Amtrak from Florida to Chicago. The investigating agent articulated the following factors as the basis for his decision: twenty-four hours before departure, the defendant reserved for himself an expensive roomette usually occupied by two persons; he paid for the ticket with cash; he left an invalid callback number; and he could make the trip more quickly by plane than by Amtrak.[124] The agent alerted Amtrak police, who detained the suspect in order to search his luggage with a drug sniffing dog.[125]

In a similar case, the District of Columbia Circuit Court found in *United States v. Battista*[126] that suspicion raised by a passenger targeted as a drug courier did not rise to the level of reasonable suspicion. In *Battista*, however, the agents did not rely on the drug courier profile to initiate a search of the suspect, but brought a drug dog to the

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before departure); United States v. Trayer, 701 F. Supp. 250, 251-52 (D.D.C. 1988) (defendant paid for ticket with cash the evening before departure); United States v. Liberto, 660 F. Supp. 889, 890-91 (D.D.C. 1987) (defendant paid for ticket with cash, left no call-back number or address). Although few train cases exist, a common characteristic identificd as suspicious is the defendant's payment in cash. Although an airline passenger who pays for expensive tickets with cash may justifiably raise suspicion, *see Sokolow*, 109 S. Ct. at 1583 (defendant paid $2100 in cash for two tickets), paying for less expensive train tickets with cash is less startling and arguably should not be sufficient to justify a search of the passenger. *See, e.g., Colyer*, 878 F.2d at 471 (defendant paid $210 for ticket); *Trayer*, 701 F. Supp. at 251 (defendant paid $327 for ticket).

121. *See, e.g., Tavolacci*, 704 F. Supp. at 246 (holding that the defendant's conformity with a drug courier profile, nervousness, and attempt to explain alias when questioned by police sufficiently justified a *Terry* search).

122. *See, e.g., Trayer*, 701 F. Supp. at 254 n.7 (stating that "it is very doubtful that the officers, based solely upon the drug courier profile information, had a reasonable suspicion which would have permitted the search"). Note that in the few train cases, courts usually have avoided close inspection of the drug courier profile. Because train passengers ride in roomettes adjacent to public corridors on the train, drug agents first identify suspected couriers by applying the profiles. Agents then board the train with a drug dog, which sniffs the vents to the roomette. If the dog signals an alert, inspectors have probable cause to search the roomette. *See Colyer*, 878 F.2d at 469; United States v. Tartaglia, 864 F.2d 837 (D.C. Cir. 1989); United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988). Several courts have held that the use of drug dogs in the public corridor of a train is not a search because there is no intrusion upon a legitimate expectation of privacy in the corridor and a diminished expectation of privacy within the roomette as compared to a home or hotel room. *See, e.g., Colyer*, 878 F.2d at 469 (holding that sniff by drug dog at the door of roomette was not a search and did not, therefore, implicate fourth amendment concerns); *Whitehead*, 849 F.2d at 849 (holding that police did not have to have probable cause before they could bring a drug dog into a sleeping compartment because of the reduced expectation of privacy on a train, minimal intrusiveness of the search, and the law enforcement interest at stake).

123. 704 F. Supp. 246 (D.D.C. 1988).

124. *Id.* at 247.

125. *Id.* at 248.

126. 876 F.2d 201 (D.C. Cir. 1989).

door of the defendant's room.[127] The dog's positive response from sniffing an air vent rather than the profile characteristics gave the agents probable cause to confront the suspect, who then consented to a search of his compartment.[128]

4. Diminution of Travelers' Privacy Expectations

Despite criticism of the drug courier profile and the Supreme Court's refusal to endorse the profile explicitly, case law evidences the overwhelming acceptance of the profile in cases involving commercial passengers.[129] The acceptance of the profile may be attributed not only to the present uncompromising political attitude toward drugs, but also to the perception that passengers on commercial transport do not have the same privacy interests as persons in their homes or even on the street.

When commentators in the 1970s criticized the FAA's hijacker surveillance program, they suggested that systematic searches would condition passengers to expect a lesser degree of privacy when traveling and therefore erode constitutional protections under *Katz*.[130] Judicial analysis of cases under the drug courier profile suggests that this prediction has come true. In his dissent in *Royer*, for example, Justice Harry Blackmun states that the defendant was apprehended in an international airport where, "due in part to extensive anti-hijacking surveillance and equipment, *reasonable privacy expectations are of significantly lesser magnitude.*"[131] If surveillance for hijackers served to lessen the expectation of privacy of commercial passengers, then the new wave of drug surveillance possibly will serve to further circumscribe, if not obliterate completely, the fourth amendment rights of commercial passengers.

IV. Investigatory Stop or Voluntary Encounter?: *Mendenhall* and the Free to Leave Doctrine

From *Rodriguez* to *Sokolow*, the Supreme Court's recent encounters with cases addressing limited searches of drug couriers confirm

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127. *Id.* at 203.

128. *Id.* at 206.

129. An acceptance of the use of drug courier profiles to target suspects on highways is also growing. *See* Note, *supra* note 79.

130. Andrews, *supra* note 69, at 707-12. Professor Andrews suggests, but strongly rejects, the possibility that actual police practices should determine the extent of constitutional protection awarded under the *Katz* test. He does, however, concede that conditioning air travel on consent to even a limited search constitutes an erosion of fourth amendment protections. *See id.*

131. Florida v. Royer, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting) (emphasis added), *quoted in* Florida v. Rodriguez, 469 U.S. 1, 6 (1984).

the rule that drug enforcement agents may conduct an investigatory stop and a limited search of passengers reasonably suspected of trafficking in illegal drugs. Traditionally, however, the Court has refused to characterize certain police confrontations with citizens as seizures requiring justification under the fourth amendment.[132] When a confrontation does not reach the level of a search or seizure, whether suspicion is reasonable is not an issue.[133]

The Supreme Court in *United States v. Mendenhall*[134] established that if in view of all the circumstances a reasonable person would feel that he was "free to leave," no seizure has occurred.[135] In *Mendenhall* two DEA agents approached the defendant after determining that she demonstrated characteristics common to drug couriers.[136] Mendenhall was a twenty-two year old black woman with less than a high school education.[137] The two male agents, both of whom were white, identified themselves, asked to see the suspect's drivers license and ticket, and, after noting a discrepancy between the two, returned the items and asked if she would accompany them to the airport's DEA office.[138] The Supreme Court found that the agents did not seize the defendant when they asked her to accompany them to their office.[139] Articulating the "free to leave" doctrine, the Court found that unless some display of force or show of authority curtails an individual's freedom of movement, no seizure has occurred.[140] Absent a search or a seizure, the activ-

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132. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). This language was reiterated by the Court in United States v. Mendenhall, 446 U.S. 544, 552 (1980), when it established the free to leave doctrine.

133. *See supra* note 29 and accompanying text.

134. 446 U.S. 544 (1980).

135. *Id.* at 554.

136. *Id.* at 547 & n.1.

137. *Id.* at 558; *see also infra* note 144.

138. *Mendenhall*, 446 U.S. at 547-48, 558. At the office, the agent asked Mendenhall if she would consent to a search of her person and her handbag, but explained that Mendenhall was not required to consent. *Id.* at 548. Mendenhall agreed to the search. A female officer arrived to conduct the body search and again asked the defendant whether she consented. *Id.* at 548-49. Mendenhall said that she did consent, but when told that she would have to disrobe stated that she had a plane to catch. *Id.* at 549. The female officer replied that if Mendenhall carried no drugs, there would not be a problem, at which point the suspect disrobed, removed packages containing heroin from her undergarments, and handed them to the policewoman. *Id.*

The district court convicted the defendant on the basis of the discovered evidence. *Id.* The Sixth Circuit reversed the conviction, finding that the agents' request that the suspect accompany them to another room constituted an arrest. *Id.* at 549-50. The arrest was unconstitutional because it lacked probable cause. *Id.* at 550. Consequently, the defendant's consent was invalid, and the evidence discovered was tainted and inadmissible. *Id.* Both lower court opinions were unpublished. *Id.* at 549.

139. *Id.* at 557-58.

140. *Id.* at 554. Ironically, the Court determined that Mendenhall should have believed that

ity is not subject to the reasonableness requirements of the fourth amendment.[141]

Mendenhall effectually legitimized the practice of approaching and questioning suspected drug traffickers, an important development regarding the legitimization of drug-targeted surveillance efforts. Provided that officers do not display force, they may question suspects and request permission to search a suspected drug courier's person or belongings.[142] Any suspicion raised during an officer's contact with a citizen may give rise to reasonable suspicion and legitimize a frisk or other cursory search, which may produce probable cause for which the officer may place the suspect under arrest.[143]

The free to leave doctrine, while conceptually sound, is troublesome in application. The assertion that most persons in Mendenhall's situation should feel free to leave absent a display of force rings hollow.[144] Consequently, although few critics suggest that every confrontation should constitute a seizure, many would argue that courts should weigh facts in a manner more favorably disposed towards the citizen rather than attribute to the citizen a freedom to leave that he or she is unlikely to feel when confronted by an officer.[145]

Dissension on this issue stems from differing perceptions of what

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she was free to leave even though the DEA agent responsible for the arrest testified that he intended to detain the respondent if she attempted to leave. *Id.* at 575 n.12 (White, J., dissenting) (quoting excerpt from cross-examination of DEA Agent Anderson). The dissent argued that Mendenhall's acquiescence to authority should not be equated with consent. *Id.* at 566-67.

141. *See supra* notes 27-29 and accompanying text.

142. The law is unclear about whether a failure to cooperate will give agents reasonable suspicion to search the suspect. Reason dictates that this flagrant bootstrapping should not be the case or suspects will find themselves in a "damned if you do, damned if you don't" situation. *Mendenhall*, however, leaves open the idea that refusal to cooperate may provide adequate suspicion. *But see* United States v. Nunley, 873 F.2d 182 (8th Cir. 1989) (citing *Royer* for the proposition that refusal to cooperate would not furnish a basis for detention).

143. *See, e.g.*, United States v. Savage, 889 F.2d 1113 (D.C. Cir. 1989) (holding that officers' initial contact with the passenger at the door of his sleeping cabin was consensual and that an investigative stop was justified after officers discovered that the suspect was traveling under an alias); United States v. Ehlebracht, 693 F.2d 333 (5th Cir. Unit B 1982) (holding that the initial approach and questioning of the defendant did not constitute a seizure for fourth amendment purposes, but suspect's subsequent lying about his true identity was a violation of local law and gave the agent probable cause to arrest and search the defendant).

144. In its analysis the Court briefiy considered then rejected the defendant's argument that she was not free to leave. The Court stated:

> [I]t is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, neither were they decisive . . . .

Mendenhall, 446 U.S. at 558 (citation omitted).

145. *See* Becton, *supra* note 62, at 467-69; Comment, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CAL. L. REV. 1486, 1493-1502 (1981).

the freedom from unreasonable search and seizure entails. Those who advocate the legitimacy of the investigatory encounter suggest that the fourth amendment has little to do with privacy and a great deal to do with property.[146] On the other hand, those who desire greater restrictions on the use of the investigatory encounter believe that the fourth amendment essentially entitles the individual to be free from governmental intrusion unless openly flaunting disrespect for the law.[147] How much privacy individuals should retain and under what circumstances government intrusion should be permitted remain the core of each fourth amendment inquiry.

V. The Automobile Exception Applied to Commercial Transportation—Mobility As an Exigent Circumstance

Prompted by the intrinsic mobility of automobiles, the Supreme Court in *Carroll v. United States*[148] ruled that officers can conduct a warrantless search of an automobile if they have probable cause to believe that the vehicle contains evidence of a crime. The Court reasoned that securing a warrant before such a search is impractical because evidence quickly can be removed from the jurisdiction.[149] Failure to secure a warrant, therefore, is justified in order to prevent the removal or destruction of evidence.[150] In *Carroll* the Supreme Court created the automobile exception to the fourth amendment long before most United States citizens owned cars.

As society has become increasingly mobile and transient, the scope of the automobile exception has broadened to incorporate searches of

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146. This conclusion is not immediately apparent as courts continue to couch fourth amendment analysis in terms of privacy. *See Mendenhall*, 446 U.S. at 554 (stating that "[a]s long as the person to whom questions are put remains free to . . . walk away, there bas been no intrusion upon that person's liberty or privacy"). Obviously the Supreme Court of today has rejected concepts of the fourth amendment previously reflected in opinions. *See* Winston v. Lee, 470 U.S. 753, 758 (1985) (stating that "[t]he fourth amendment protects 'expectations of privacy'—the individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men' " (citation omitted) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Some commentators have identified a sbift back to a trespass view of the fourth amendment in which legitimate privacy interests are given little weight. *See* Comment, *Reviving Trespass-Based Search Analysis Under the Open View Doctrine:* Dow Chemical Co. v. United States, 63 N.Y.U. L. Rev. 191 (1988).

147. Justices Thurgood Marshall and William Brennan continuously have endorsed this view in their largely unsuccessful effort to steer the Court back towards a pure privacy based analysis. *See* United States v. Sokolow, 109 S. Ct. 1581, 1587-91 (1989) (Marshall, J., dissenting); United States v. Montoya de Hernandez, 473 U.S. 531, 545-67 (1985) (Brennan, J., dissenting); *Mendenhall*, 446 U.S. at 566-77 (Wbite, J., dissenting, joined by Justices Brennan, Marshall, and Stevens).

148. 267 U.S. 132 (1924).

149. *Id.* at 153.

150. *Id.*

closed containers within a car,[151] mobile homes,[152] and searches conducted even after a vehicle is controlled by authorities and the threat of mobility extinguished.[153] To justify searches of automobiles even after the removal of any mobility threat, the Court adopted a post-*Katz* theory that individuals have a reduced expectation of privacy in their automobiles because of the automobile's primary function as a means of transportation and the government's interest in automobile regulation.[154]

Some courts justify warrantless searches of passengers or luggage by reasoning that these searches closely parallel the automobile exception.[155] Mobility and governmental interest in regulation easily adapt to the commercial transportation context. Thus, courts are beginning to apply the automobile exception in the context of commercial transportation.

In *United States v. Tartaglia*[156] the District of Columbia Circuit applied the automobile exception to justify a warrantless search of the defendant's roomette on a passenger train. After reviewing the passenger manifest, an Amtrak police officer targeted a passenger who had paid cash for a ticket from Miami to New York.[157] Several officers intercepted the train during a brief early morning stop in Washington, D.C.[158] The officers boarded the train with a drug sniffing dog, which alerted the officers to the presence of narcotics at the vent of the suspect's roomette.[159] The inspector searched the roomette and discovered five hundred grams of cocaine in a closed knapsack under the bed.[160]

The defendant claimed that the inspector and officers violated his

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151. United States v. Ross, 456 U.S. 798 (1982).

152. California v. Carney, 471 U.S. 386 (1985).

153. Cardwell v. Lewis, 417 U.S. 583 (1974).

154. United States v. Chadwick, 433 U.S. 1, 12-13 (1977).

155. *See, e.g.*, United States v. Whitehead, 849 F.2d 849, 854-55 (4th Cir.) (holding that mobility of trains and regulation of train travel meant that roomette should be treated more like an automobile than a home or hotel room for fourth amendment purposes), *cert. denied*, 109 S. Ct. 534 (1988); United States v. Johnson, 862 F.2d 1135 (5th Cir. 1988) (holding that a warrantless search of a bus passenger's luggage was justified because suspects were about to catch a bus); United States v. Trayer, 701 F. Supp. 250, 253 (D.D.C. 1988) (holding that the distinction in fourth amendment jurisprudence between fixed and mobile locations meant that a train passenger has only a limited expectation of privacy). *But see Chadwick*, 433 U.S. at 13-15 (stating that the treatment of automobiles differs from that of other property, and generally a search is not justified if it is remote in time or place from the reason for its inception).

156. 864 F.2d 837 (D.C. Cir. 1989).

157. *Id.* at 839.

158. *Id.*

159. *Id.* at 840. When the suspect answered, the inspector identified himself as a police officer and asked Tartaglia if he would consent to a search of the compartment. When Tartaglia refused, the inspector asked him to dress and exit the compartment. *Id.*

160. *Id.* Tartaglia was convicted in the United States District Court for the District of Columbia of possession with the intent to distribute cocaine. *Id.* at 838-39.

fourth amendment rights by searching the private roomette on the train without first securing a warrant.[161] The court first held that the officers had probable cause to search Tartaglia's room based on both an out-of-service callback number listed for the defendant and the drug dog's alert at the roomette door.[162] Citing the train's brief stop at the Washington, D.C. station and the possibility that the suspected drugs might be removed, the court applied the automobile exception to uphold the reasonableness of the search.[163]

The court found that both rationales of the automobile exception justified the search of the Amtrak roomette. First, the brevity of the stop and mobility of the train presented a risk that the suspect and any illicit substances would disappear before police could secure a warrant to search the train.[164] Second, the court determined that government regulation of railroad travel causes train passengers to have a lesser expectation of privacy when traveling than when in their homes.[165]

The Fifth Circuit similarly applied the automobile exception to a warrantless search of a bus passenger's luggage in *United States v. Johnson*.[166] In *Johnson* a Fort Worth police dispatcher received a call from an unidentified informant claiming that two armed men intended to pick up narcotics contained in suitcases stored in bus station lockers and transport the narcotics to Houston on the bus.[167] The officers went to the station where they observed the suspects retrieve the suitcases.[168] A porter intercepted the bags and opened them pursuant to instructions from the police.[169] Upon finding the bags filled with crack cocaine, the police arrested the defendants, who were later convicted of possession with the intent to distribute.[170]

On appeal, the defendants argued that under *United States v. Chadwick*[171] or *Arkansas v. Sanders*[172] the officers could not search the bags without a warrant once they controlled the suitcases.[173] In *Chadwick* federal drug agents confiscated a locked footlocker from the trunk of a car after it was unloaded from a train by suspected drug couriers and returned with it to Boston's federal building where it was searched

161. *Id.*
162. *Id.* at 841.
163. *Id.*
164. *Id.*
165. *Id.*
166. 862 F.2d 1135 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3223 (1989).
167. *Id.* at 1136.
168. *Id.* at 1136-37.
169. *Id.* at 1137.
170. *Id.*
171. 433 U.S. 1 (1977).
172. 442 U.S. 753 (1979).
173. *Johnson*, 862 F.2d at 1138.

two hours after the suspects had been arrested.[174] The Court found that the suspects had a reasonable expectation of privacy in the contents of the locked trunk,[175] and that because the trunk was in the exclusive control of federal agents at a time and place remote from its initial seizure, the agents were required to secure a warrant before performing a search of the trunk's contents.[176] Similarly in *Sanders* the Supreme Court found that the automobile exception did not justify the search of a suitcase taken from the trunk of a taxi.[177]

The *Johnson* court, however, distinguished *Chadwick* and *Sanders* because the suspects in both cases had been detained by the police at the time of the incident.[178] The Fifth Circuit held that because the suspected drug dealers were preparing to leave on a bus and were reasonably believed to be armed, exigent circumstances were created that justified the warrantless search of the suitcases.[179] The court asserted that detaining the suspects until the officers obtained a search warrant would be more intrusive than searching the bags in the back of the bus terminal.[180] Consistent with *Chambers v. Maroney*,[181] the court found that a warrantless search is justified because the search is no more intrusive than detaining suspects until a magistrate issues a warrant.[182]

In *Chambers* police conducted a search of a suspect's car at the station after the suspect had been taken into custody.[183] Because of the delay between arrest and search, the Supreme Court ruled that the search did not qualify as a search incident to arrest. The Court, however, upheld the constitutionality of the search, ruling that probable cause will justify the warrantless search of an automobile, even if the search is not contemporaneous with arrest, because the alternative is to hold the car and its occupants until a warrant can be issued.[184] The Court distinguished a car from a home or office because of its mobility.[185]

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174. *Chadwick*, 433 U.S. at 1. The Supreme Court refused to accept the prosecution's proposal for a luggage exception to the warrantless search or to characterize the search of the trunk as a search incident to arrest. *Id.* at 12-13.

175. *Id.* at 11.

176. *Id.* at 15-16.

177. *Sanders*, 442 U.S. at 753.

178. *Johnson*, 862 F.2d at 1138.

179. *Id.* at 1139.

180. *Id.*

181. 399 U.S. 42 (1970); *see also infra* notes 183-85 and accompanying text.

182. *Johnson*, 862 F.2d at 1140.

183. *Chambers*, 399 U.S. at 44.

184. *Id.* at 47.

185. *Id.* at 52. Along with Carroll v. United States, 267 U.S. 132 (1924), *Chambers* is frequently cited as the cornerstone of the automobile exception. *See* Note, *Search and Seizure: From* Carroll *to* Ross, *The Odyssey of the Automobile Exception*, 32 CATH. U.L. REV. 221, 225-28 (1982).

The *Johnson* dissent criticized the majority's finding of exigent circumstances and its application of the automobile exception to a search of a bus passenger's luggage.[186] Arguing that *Chadwick* established that individuals hold a reasonable expectation of privacy in luggage that does not exist in automobiles, the dissent rejected the greater or lesser intrusion rationale of the majority.[187] By limiting the automobile exception to automobiles, the dissent reasoned that bright line boundaries delineated by the Court and justified by the uniqueness of automobiles should not be obscured.[188] Applying the automobile exception to nonautomobile cases would destroy the boundaries without offering any limiting principles to guide discretionary police activity.[189]

It is not clear that *Chadwick* should preclude the holding in *Johnson*. Unlike the search of the trunk in *Chadwick*, the suitcase seized in *Johnson* was searched at the time and place of seizure. Additionally, the threat posed by the fear that the suspects were armed adds an element not present in *Chadwick*, and the consequent need for caution undeniably influenced the officers to proceed with the search without first approaching the suspects. On the other hand, the surreptitiousness of the search—that it was conducted out of public view and without the owner's knowledge—is troubling. It is perhaps this factor more than any other that the dissent found ominous.

VI. Consensual Searches

Consent searches differ conceptually from other exceptions to the fourth amendment's warrant requirement. Unlike the stop and frisk or automobile exceptions, if an individual consents to a search, the official conducting the search need not show cause, suspicion, or exigency of any kind.[190] The state must show only that the consent was voluntary and was not the product of duress or coercion.[191] Suspects need not know of their right to refuse consent for a court to find that consent was given voluntarily.[192] The prosecution maintains the burden of proving that the defendant freely and voluntarily consented to the search.[193] If suspects consent to an official search, the search is limited to the

186. *Johnson*, 862 F.2d at 1141, 1143 (Goldberg, C.J., dissenting).

187. *Id.* at 1143-46.

188. *Id.* at 1152.

189. *Id.*

190. 3 W. LaFave, *supra* note 25, § 8.1.

191. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973). Whether a consent to search is voluntary is a question of fact to be determined by the totality of the circumstances. *Id.* at 248-49.

192. Therefore, suspects do not have a fourth amendment equivalent of *Miranda* rights. The waiver of the right to refuse consent need not be knowing or intelligent. *Id.* at 246-49.

193. *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

extent of their permission.[194]

Drug enforcement officers commonly approach individuals that they suspect and request permission to search their belongings or their person.[195] If the suspect accedes to the request, the officials may conduct a search without justifying their suspicions.[196] By first obtaining the consent of the suspect, therefore, authorities can reduce the risk of having any subsequently discovered evidence suppressed at trial.

United States v. Mendenhall[197] illustrates the typical use of the consensual search in an investigatory encounter. Other cases demonstrate that similar situations frequently arise in which suspects consent to a search that they know will produce evidence.[198] Just as the free to leave doctrine is based on a fiction that individuals approached by police will feel free to walk away, the consent doctrine assumes that consent is voluntary if not openly coerced.[199] Both doctrines ignore the implicit coercion engendered solely by the officer's position of authority. Because of this implicit coercion, suspects often consent to searches and answer questions asked by police officers even when incriminating evidence surely will be revealed.[200]

One significant problem with the consent doctrine that largely is ignored by the courts is the incentive the consent doctrine provides for law enforcement personnel to misrepresent facts in order to protect the admissibility of improperly gained evidence. Trial judges faced with two DEA agents claiming consent and one or more defendants denying that consent was given understandably will be hesitant to accept the word of an individual caught trafficking in drugs. Despite the potential for abuse, however, courts refuse to install minimal safeguards such as requiring a warning that suspects have the right to refuse their consent.

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194. *See* Walter v. United States, 447 U.S. 649, 656-57 (1980).

195. This practice is frequently reflected in the case law. *See, e.g.*, United States v. Savage, 889 F.2d 1113 (D.C. Cir. 1989) (defendant consented to policeman's request to search cardboard box where the officer found three kilos of cocaine); United States v. Battista, 876 F.2d 201 (D.C. Cir. 1989) (suspect allowed officer to search suspect's roomette including a suitcase holding more than 500 grams of cocaine); United States v. Nunley, 873 F.2d 182 (8th Cir. 1989) (suspect allowed officer to search her purse, which contained cocaine).

196. *See supra* note 190 and accompanying text.

197. 446 U.S. 544 (1980). In *Mendenhall* DEA investigators asked for and received permission to conduct a body search of the suspect. *Id.* at 548; *see also supra* note 138.

198. *See supra* note 195 and accompanying text.

199. This assumption is supported by the Court's adherence to the view that consent will be deemed voluntary in the absence of physical force. *Mendenhall*, 446 U.S. at 554. The Court rejected an argument that the situation might have seemed coercive to the defendant in light of psychological factors including the defendant's relative youth, minimal education, and the fact that she was a black female alone in the presence of white officers. *Id.* at 558.

200. *See supra* note 195 and accompanying text.

VII. THE BALANCING TEST—SHOULD GOVERNMENTAL INTEREST IN ENFORCING DRUG LAWS OUTWEIGH PERSONAL LIBERTY?

Several theories are proffered to interpret the current trend in fourth amendment jurisprudence. Some commentators criticize the perceived result-oriented "drug exception" to the fourth amendment and to civil rights in general.[201] Proponents of this theory persuasively argue that an exaggerated governmental response to the drug problem reflected in jingoistic rhetoric subordinates individual rights to the enforcement effort.[202] Courts respond to the antidrug hysteria by distorting traditional search and seizure analysis in order to produce an acceptable result at the expense of constitutional protections.[203]

Alternatively, the subordination of individual rights may be viewed as a consequence of the tremendous weight courts give to the governmental interest in preventing drug trafficking and abuse.[204] Because courts employ a balancing approach to the fourth amendment, the weight given to drug enforcement initiatives legitimizes increasingly intrusive means of detection. Although this view is not inconsistent with the "drug exception" described above, it does not necessarily implicate the judiciary in a failure to uphold fourth amendment rights. Instead, the theory implies that some societal concerns may rise to a critical level at which individual freedoms are circumscribed in order to make law enforcement viable.

Commentators suggest that the balancing test is inappropriate for fourth amendment analysis because courts tend to give full weight to governmental interests, but fail to address privacy concerns beyond the specific interest of the individual subject to the search.[205] The judiciary's failure to recognize the by-products of drug courier targeted surveillance supports the theory that individual interests receive insufficient weight when balanced against governmental interests.[206] In

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201. *See generally* Wisotsky, *supra* note 2. .

202. *Id.*

203. *See id.* at 907-10.

204. *See supra* note 57.

205. Professor Strossen explains that the costs of any search are typically undervalued "because the individuals who assert fourth amendment rights in many cases are guilty of criminal conduct, [and] the Court often . . . loses sight of the fact that the search and seizure standards approved for the guilty will also apply to the innocent." Strossen, *supra* note 14, at 1195. Conversely, the Court overvalues the benefits derived from a search by making "conclusory statements about the gravity of the law enforcement problem at issue and the contribution of the challenged law enforcement tecbnique to resolving it." *Id.* at 1200.

206. Professors Sundby and Strossen argue that governmental interests are given too much weight, based on an unsupported assumption that each successful search has a positive effect on the effort to curb drug fiow and consequently drug use. On the other hand, the weight given to individual interest is limited to the interest an individual possesses in not being searched. This typical formulation fails to account for unsuccessful searches and the cumulative diminishment of

order to avoid the errors and value judgments that result from applying the balancing test to constitutional rights, these commentators recommend substituting a least intrusive means standard.[207]

The shifting trends in fourth amendment jurisprudence may result from an irrational focus on drug control at any cost, including the loss of individual liberties. On the other hand, judicial approval of intrusive search techniques may stem from an inaccurate balancing test, which could be remedied by shifting to the more exacting least intrusive means standard. Regardless of the source behind the shift, however, current drug enforcement initiatives derive legitimacy from the expansion of fourth amendment exceptions to include search techniques that make surveillance programs viable.

VIII. Is There an Assertable Right to Privacy in the Commercial Transportation Context?

The fourth amendment ideally allows the police sufficient discretion to enforce laws, but at the same time protects individuals against undue governmental intrusions.[208] In *Terry* the judiciary recognized the practical necessity of permitting law enforcement officers to protect themselves by searching individuals suspected of concealing weapons.[209] Extension of the *Terry* exception to possessory offenses involving narcotics, however, results in a continual erosion of fourth amendment protection and a consequent subordination of individual privacy interests.

Airline passengers have been particularly vulnerable to post-*Terry* analysis. Judicially sanctioned screening measures to protect against hijacking first circumscribed the privacy interest of passengers. Initiatives stemming from the war on drugs now threaten to eliminate the right altogether. In the course of surveillance efforts, law enforcement officials today routinely conduct personal searches, not because the officials fear for their own safety or the immediate safety of the public, but in order to intercept drug traffickers. What implications do the regular and systematic surveillance and frequent search of commercial passengers have for expectations of privacy in the transportation context?

Justice Potter Stewart prefaced his majority opinion in *United States v. Mendenhall*[210] by commenting that the defendant unquestion-

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privacy for the population as a whole. *See* Strossen, *supra* note 14, at 1195-1204; Sundby, *supra* note 13, at 439 (stating that "[a]n intrusion cannot be considered in a vacuum; the balancing test should account for the intrusion's *cumulative* effect on the individual's right to be left alone" (emphasis in original)).

207. *See* Strossen, *supra* note 14, at 1254-60; Sundby, *supra* note 13, at 430-47.

208. 3 W. LaFave, *supra* note 25, § 9.1(d).

209. Terry v. Ohio, 392 U.S. 1 (1968); *see supra* notes 47-50 and accompanying text.

210. 446 U.S. 544 (1980); *see supra* notes 135-47 and accompanying text.

ably possessed a right to personal security as she made her way through the airport terminal.[211] The opinion, however, reduced that constitutionally protected right to little more than the right not to cooperate. The Court implicitly rejected an interpretation of the fourth amendment that would give citizens the right to be left alone, unhindered by official interference.[212]

The Court fails to provide an acceptable solution to the questions raised by search and seizure in the transportation context. Courts attempt to retain the traditional framework for fourth amendment cases established by decisions of the late 1960s and early 1970s, but fail to provide guidance for the extent to which travelers may expect personal rights of privacy and security to be respected. *Terry* was intended to ensure that policemen have discretion adequate to protect themselves from criminals.[213] It serves a crucial purpose in empowering law enforcement personnel to frisk and disarm dangerous individuals. The use of the stop and frisk search as a means to intercept drug traffickers, however, is less defensible. Furthermore, the systematic use of profiles by drug enforcement agencies to legitimize the targeting of suspicious individuals during surveillance is especially bothersome.

The effectiveness of surveillance or the extent to which drug enforcement procedures infringe the privacy of the innocent is difficult if not impossible to determine. Drug courier profiles are both under and overinclusive primarily because they rely on stereotypes in order to isolate potential offenders for further investigation. Once suspected offenders are isolated, the liberal interpretation courts have given to consent promotes law enforcement techniques that assault the integrity of the fourth amendment. The prosecution defending a particular search often presents evidence demonstrating a high rate of accuracy in searching those suspected of carrying drugs.[214] In an interview with the

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211. *Mendenhall*, 446 U.S. at 550.

212. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there bas been no intrusion upon that person's liberty or privacy as would under tbe Constitution require some particularized and objective justification." *Id.* at 554.

The Court found that Mendenhall was not seized because she was free to leave even though agents admitted that in fact they would not have allowed tbe defendant to exit had she attempted to do so. *Id.* at 554 & n.6. In a concurring opinion by Justice Lewis Powell, tbree Justices found that the defendant was in fact seized, but that the agents bad reasonable grounds on which to justify a seizure. *Id.* at 560 (Powell, J., concurring).

Consequently, after *Mendenhall* police may make an investigatory stop witbout sbowing cause, provided that no threats or force curtail the detainee's liberty. The fiction behind *Mendenhall*, that an ordinary citizen approached by the police would feel free to leave if the police employed no overt threats or force, undermines the Court's assertion that a person walking tbrough a public terminal reserves his right to personal security.

213. *Terry*, 292 U.S. at 30.

214. In *Mendenhall*, for example, the concurring opinion found that seizure of the defendant

Washington Post, the spokesman for the Washington, D.C. DEA field office estimated that agents in Union Station stop, question, and search as many as fifty people for every arrest.[215] Unfortunately, victims rarely report violative searches that fail to produce contraband.[216] Consequently, the extent to which individual rights are violated by intrusive searches by law enforcement officials because of inexact surveillance techniques is difficult to ascertain.

Despite Justice Stewart's assertion that an individual in a public terminal possesses the constitutional right of personal security,[217] general trends in search and seizure jurisprudence suggest otherwise. Drug enforcement surveillance initiatives necessarily clash with fourth amendment protections. As courts increasingly become reluctant to deem searches stemming from drug enforcement initiatives unreasonable, passengers in airport corridors and train or bus stations will continue to find their rights to personal security circumscribed.

IX. CONCLUSION

Regular and systematic surveillance evokes images of an omnipotent and intrusive government. Despite suggestions of abuse and unfairness, however, the Court shows no inclination to safeguard fourth amendment rights against efforts to target drug couriers. By resorting to a fact specific balancing test, courts continue to subordinate individual privacy rights to an elevated governmental interest in enforcing drug laws. The result indicates an elimination of any expectation of privacy rights for passengers.

*Alexandra Coulter**

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was justified in light of the success rate demonstrated by DEA agents in the Detroit Airport. In the first 18 months of the DEA's Detroit program agents searched 141 persons and arrested 122 of those searched. *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring).

215. *Civil Liberties Caught in Antidrug Cross Fire; Aggressive Law Enforcement Gains Support*, Wash. Post, Mar. 20, 1989, at D1, col. 5.

216. *Id.*

217. *See supra* note 211 and accompanying text.

* The Author wishes to thank Professor Donald J. Hall for his comments and suggestions. This Note is dedicated to the memory of Ransom Harvey Coulter.