

# Reformulating Seizures— Airport Drug Stops and the Fourth Amendment

To combat the escalating use of narcotics, the Drug Enforcement Administration (DEA) in 1974 developed an airport surveillance program designed to intercept drug couriers transporting narcotics between major drug source and distribution centers in the United States.<sup>1</sup> In their quest to stem the air transport of narcotics, DEA agents, armed with a so-called “drug courier profile,”<sup>2</sup> stop and question numerous persons using the nation’s airports. These confrontations have resulted in significant amounts of litigation in the federal courts.<sup>3</sup> Before 1979, courts faced with these encounters assumed them to be seizures within the fourth amendment and applied the “reasonable suspicion” standard developed by the Supreme Court in *Terry v. Ohio*<sup>4</sup> to ascertain the constitutionality of the police conduct. Recently, however, the Fifth Circuit in *United States v. Elmore*<sup>5</sup> and two Justices of the Supreme Court in the lead opinion in *United States v. Mendenhall*<sup>6</sup> found these events to be “nonseizure” contacts that do not implicate fourth amendment freedoms.

This Comment examines this new development in the law of search and seizure. Part I describes the DEA airport operations and the use of the drug courier profile. Part II describes the facts and opinions of the *Elmore* and *Mendenhall* cases as well as the most recent Supreme Court airport drug stop case, *Reid v. Georgia*.<sup>7</sup> Part III argues that the prevailing test enunciated in *Mendenhall* for determining

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1. See *United States v. Mendenhall*, 446 U.S. 544, 562 (1980) (Powell, J., concurring).

2. See notes 8-11 and accompanying text *infra*.

3. See, e.g., *United States v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981); *United States v. Post*, 607 F.2d 847 (9th Cir. 1979); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), *cert. denied*, 444 U.S. 878 (1980); *United States v. Roundtree*, 596 F.2d 672 (5th Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D.N.Y. 1977); *United States v. Chamblis*, 425 F. Supp. 1330 (E.D. Mich. 1977).

4. 392 U.S. 1 (1968). See, e.g., *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976).

5. 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 2998 (1980).

6. 446 U.S. 544 (1980). The two Justices are Justice Stewart and Justice Rehnquist. *But see* note 40 *infra*.

7. 100 S. Ct. 2752 (1980).

whether a seizure has occurred is inconsistent with the principles of *Terry*, the case on which it purports to rely, and is inherently unworkable. Part IV offers a multifactor analysis for determining whether police conduct has effected a seizure, and argues that this broader inquiry is superior to the single factor *Mendenhall* test. The final part of the Comment applies this multifactor analysis to the airport drug stop paradigm and discusses the effect of applying *Terry*'s balancing test to seizures effected during airport drug stops.

## I

### THE AIRPORT DRUG STOP AND THE DRUG COURIER PROFILE

The DEA airport surveillance program focuses on the actions and appearances of air travelers. Plainclothes agents station themselves in various parts of selected airports and observe travelers, especially those traveling between so-called "source" and "use" cities.<sup>8</sup> Observation often begins at either the airline ticket counters or airport deplaning lounges. The agents attempt to ascertain whether any of the travelers exhibit characteristics matching those in the drug courier profile, making it likely that the person is carrying contraband.

DEA agents intensify their surveillance when they spot a traveler matching some of the profile characteristics. For example, a person traveling between "use" and "source" cities, carrying little or no baggage, purchasing an airline ticket with a large number of small bills, and acting particularly nervous will usually qualify for closer attention.<sup>9</sup> After further observation, the agents decide whether their surveillance warrants an encounter with the person under observation. If the agents decide to initiate contact, they approach the person, display their credentials, and orally identify themselves as federal agents. The agents then ask for identification and airline ticket receipts showing the

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8. "Source" and "use" cities are, respectively, centers for importation and distribution of narcotics. Among the cities presently considered "source" cities are Detroit, *see* *United States v. Elmore*, 595 F.2d at 1037, and Los Angeles, Miami, San Diego, and New York. *See* *United States v. Mendenhall*, 446 U.S. at 562 (Powell, J., concurring). At least one court has observed that the DEA could characterize every major U.S. population center as a "use" city. *See* *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980).

9. Other characteristics include: unusual travel itinerary, like a rapid turnaround time for a lengthy airplane trip; carrying unusually large amounts of currency on one's person or in one's baggage; the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; immediately making a telephone call upon deplaning; leaving a fictitious call-back telephone number with the airline reservation agent; and excessively frequent travel to source or use cities. *See* *United States v. Elmore*, 595 F.2d at 1039 n.3. It should be noted that the more significant indicia of criminality—like use of an alias and unusual travel itinerary—are not ascertained until after the stop has been effected. There are slight variations in the profile as presently used in some cities. *See* Note, *Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?* 71 J. CRIM. L. & CRIMINOLOGY 499, 513 n.149 (1980).

person's travel plans. More questions are asked. The contact ends if the agents' suspicions are allayed during this initial encounter. Often, however, further profile characteristics are discerned during the encounter—a fictitious name, unusual travel itinerary, or increased nervousness. In these latter instances, the agents ask the person to accompany them to the DEA airport office, or a similar location, for further questioning.

The purpose of the office questioning is to obtain permission to search the suspect's person and luggage for narcotics. The agents inform the suspect that he has a constitutional right to refuse to consent to the search, but that if he does refuse, the agents may seek a search warrant authorizing the search.<sup>10</sup> A search is made if the suspect consents. The suspect is formally placed under arrest if narcotics are found.

The DEA's drug courier profile has proved to be a valuable tool in the fight against the air transport of narcotics.<sup>11</sup> Nonetheless, its constitutionality continues to be questioned. This Comment focuses on the initial stop, identification, and questioning of airport travelers by DEA agents using the profile. As noted earlier, before 1979 courts uniformly treated airport drug stops as seizures and therefore automatically subject to fourth amendment scrutiny.<sup>12</sup> Two recent cases, however, have concluded that airport drug stops do not constitute seizures for fourth amendment purposes.

## II

### THE AIRPORT DRUG STOP CASES

#### A. *United States v. Elmore*

*United States v. Elmore*,<sup>13</sup> a Fifth Circuit opinion, was the first case to recognize a category of airport drug stops that does not amount to a seizure within the fourth amendment. In *Elmore*, DEA agents Chapinan and Markonni observed Elmore walk from a deplaning area at the Atlanta airport toward the main terminal. While walking, Elmore "looked back several times."<sup>14</sup> When Elmore stopped to examine an overhead electronic flight monitor, the agents noticed that he had no baggage claim receipts attached to his ticket.

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10. *See United States v. Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

11. While the DEA apparently does not compile statistics in terms of a percentage of successful observations, it has been estimated that an experienced agent can have a 60-70% "hit" rate. Interview with Bill Gellerman, Special Agent for DEA, in San Francisco, California (Mar. 2, 1981) [hereinafter cited as Gellerman Interview].

12. *See* note 4 and accompanying text *supra*.

13. 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 2998 (1980).

14. *Id.* at 1037.

Elnore then proceeded to a Delta Airlines ticket counter and received information about a flight from Atlanta to Birmingham, a so-called "use" city.<sup>15</sup> Agent Chapman, standing in line behind Elnore, also discovered that Elnore had flown into Atlanta from Detroit, a so-called "source" city. Elnore eventually proceeded to the gate from which the flight to Birmingham would depart, again "look[ing] back several times."<sup>16</sup> He checked in, received a boarding pass, and took a seat in the waiting area.

At this point the DEA agents initiated contact with Elnore because "his moves were sort of strange."<sup>17</sup> Agent Chapman identified himself as a federal agent and asked to see Elnore's ticket. Elnore produced a ticket issued to E. Gray. The agents requested additional identification. Elnore, visibly nervous, produced a driver's license with his correct name, explaining that his brother-in-law, Gray, had purchased the ticket for him in advance. Agent Chapman now knew that "something was wrong" because it was contrary to airline policy to release prepaid tickets without prior identification.<sup>18</sup>

Agent Markonni took Elnore's ticket to the Delta counter to verify Elnore's explanation. Meanwhile, Agent Chapman informed Elnore that he was under narcotics surveillance. Elnore then became "extremely nervous." The ticket check revealed that Elnore had flown from Birmingham to Detroit the previous day and had remained there only sixteen hours. The agents asked Elnore to submit to a search. Elnore consented. Heroin was found in both socks.

The question before the Fifth Circuit was whether Elnore was seized when the agents first approached him and asked to see his ticket. The court assumed that the reasonable suspicion standard<sup>19</sup> had not been satisfied at the time of this initial contact. Thus, if a seizure occurred at that time, the subsequent discovery of heroin would be suppressed as the fruits of an unreasonable, and thus illegal, seizure. However, if there was no seizure until the ticket was removed from Elnore's presence, the seizure and the subsequent discovery of contraband would be legal. The information gleaned during the initial "nonseizure" contact, in conjunction with the otherwise insufficient precontact observations, would satisfy the reasonable suspicion test and make the police action legal.

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15. See note 8 *supra*.

16. 595 F.2d at 1038.

17. *Id.*

18. *Id.*

19. The reasonable suspicion standard, established by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), is satisfied when the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." For a more detailed discussion of *Terry*, see text accompanying notes 49-62 *infra*.

The court read the Supreme Court's decisions in *Terry v. Ohio*<sup>20</sup> and its companion case, *Sibron v. New York*,<sup>21</sup> as distinguishing between encounters that constitute seizures and that trigger fourth amendment scrutiny despite the lack of a full-scale arrest, and certain investigative encounters that are not seizures and do not receive constitutional protection. The *Elmore* court reasoned that a seizure occurs only when the police use force, physical restraint, or a blatant show of authority.<sup>22</sup> However, when the individual is "free to choose whether to enter or continue an encounter and elects to do so," there is no seizure.<sup>23</sup> The court concluded that Elmore was not seized when first approached because the only show of authority—the agents' initial identification—was insufficient to convert the encounter into a seizure.<sup>24</sup> The court found that the tone of the conversation and the events that ensued indicated Elmore was not compelled to continue the encounter.

### B. United States v. Mendenhall

One year after *Elmore*, the Supreme Court for the first time considered the fourth amendment ramifications of airport drug stops in *United States v. Mendenhall*.<sup>25</sup> There, two DEA agents observed Mendenhall deplane at Detroit Metropolitan Airport from a flight originating in Los Angeles. Because the agents believed Mendenhall's conduct to be characteristic of a person carrying narcotics,<sup>26</sup> "the agents approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket."<sup>27</sup> Her identification bore her true name, but the ticket was issued to Annette Ford, a name that she "just felt like using."<sup>28</sup> After discovering that she had spent only two days in California, one agent specifically identified himself as a narcotics agent. Mendenhall then "became quite shaken, extremely nervous" and "had a hard time speaking."<sup>29</sup> In response to one agent's request, she accompanied him

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20. 392 U.S. 1 (1968).

21. 392 U.S. 40 (1968).

22. 595 F.2d at 1041.

23. *Id.* (quoting *United States v. Brunson*, 549 F.2d 348, 357 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977)).

24. *Id.* at 1042. Apparently, Agent Chapman's identification as a federal narcotics agent and subsequent request for Elmore's ticket and identification was not a "blatant" show of authority.

25. 446 U.S. 544 (1980).

26. The characteristics deemed relevant by the agents in *Mendenhall* were (1) that Mendenhall arrived from a "source" city; (2) that she was the last person to deplane, was "very nervous," and "scanned" the deplaning area; (3) that she claimed no baggage, and (4) that she changed airlines for her trip out of Detroit. 446 U.S. at 547 n.1.

27. *Id.* at 547-48.

28. *Id.* at 548.

29. *Id.*

to the DEA's airport office. A subsequent search uncovered heroin in Mendenhall's undergarments.

The Supreme Court, without a majority opinion, voted five to four to reverse the Sixth Circuit and reinstate the trial court's denial of Mendenhall's motion to suppress the heroin. Justice Stewart wrote the lead opinion, joined by Justice Rehnquist. This opinion "adhere[d] to the view that a person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained" because "as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty . . . ." <sup>30</sup> Accordingly, the lead opinion concluded that a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." <sup>31</sup> Applying this standard to the facts before it, the lead opinion concluded that "nothing in the record suggests that [Mendenhall] had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way . . . ." <sup>32</sup> Thus, "the agents' initial approach . . . was not a seizure," <sup>33</sup> and it was therefore not subject to fourth amendment scrutiny.

Justice Powell, joined by Justice Blackmun and the Chief Justice, wrote a concurring opinion. These Justices did "not necessarily disagree" with the lead opinion's conclusion that a seizure had not occurred, but they assumed for purposes of argument that there was a seizure. <sup>34</sup> However, because the agents had a reasonable suspicion that Mendenhall was engaged in criminal activity, the seizure did not violate the fourth amendment. The concurring Justices agreed with the lead opinion's conclusion that Mendenhall accompanied the agents to the DEA office and submitted to the search voluntarily.

Justice White, speaking for himself and three other Justices, <sup>35</sup> vigorously dissented from the conclusions of both the lead and concurring opinions. The dissenting opinion, like the concurring opinion, did not

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30. *Id.* at 553-54. The government did not raise the issue whether a seizure had occurred in the lower courts or even in its petition for certiorari, first arguing the point in its brief to the Court. Despite the Court's policy of refusing to hear matters neither raised nor decided below, *see, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Youakim v. Miller*, 425 U.S. 231 (1976), the lead opinion considered the government contention that there had been no seizure because the lower court's contrary "assumption" rested upon a "serious misapprehension of federal constitutional law." 446 U.S. at 551 n.5.

31. 446 U.S. at 554.

32. *Id.* at 555.

33. *Id.*

34. *Id.* at 560 n.1 (Powell, J., concurring). The concurring opinion did not reach the seizure determination because neither of the lower courts considered the question. *Id.* at 560 n.1 (Powell, J., concurring).

35. Justices Brennan, Marshall, and Stevens joined Justice White's dissent.

reach the question whether a seizure had occurred at the time of the initial contact.<sup>36</sup> Assuming the stop to be a seizure subject to the limitations of the fourth amendment, the dissenting opinion found the stop unreasonable because it was based on an "inchoate and unparticularized suspicion or 'hunch'" rather than on "specific reasonable inferences."<sup>37</sup> The dissenting opinion further found that an arrest requiring probable cause had occurred when the agents escorted Mendenhall to the DEA office and that the lead and concurring opinions' finding that Mendenhall voluntarily accompanied the officers was unsupported by the record.<sup>38</sup>

### C. Reid v. Georgia

The Supreme Court once again considered the constitutionality of airport drug stops in *Reid v. Georgia*.<sup>39</sup> In *Reid*, a DEA agent observed Reid and another man proceed separately through the Atlanta airport concourse. Each carried similar shoulder bags. Reid occasionally glanced backward toward the second man as they proceeded through the concourse. The second man approached Reid and spoke with him briefly. They left the terminal building together. The agent approached them outside the terminal, identified himself as a narcotics agent, and asked Reid and his companion to produce identification and ticket stubs. The stubs revealed that the men had flown in from Fort Lauderdale and had been in that city for only one day. The men appeared nervous. They agreed to a request to return to the terminal for a search; but as they entered the terminal, Reid abandoned his bag and ran. He was apprehended. Cocaine was found in the bag.

In a *per curiam* opinion, a five-Justice majority<sup>40</sup> concluded that the agent's observations were an insufficient basis for suspecting Reid of criminal activity. Thus, the lower court's determination that Reid was lawfully seized could not be sustained. The three Justices who concurred in *Mendenhall*—Justices Powell, Blackmun, and the Chief Justice—also concurred in *Reid*. Finding the case "remarkably similar" to *Mendenhall*,<sup>41</sup> these Justices again assumed the defendant had been seized. Applying the *Terry* reasonable suspicion standard to the

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36. The dissenting opinion attacked the lead opinion's finding that "exceptional circumstances" justified the Court's consideration of an issue neither raised nor decided below. *See id.* at 569 n.2 (White, J., dissenting) and notes 30 & 34 *supra*.

37. 446 U.S. at 573 (White, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. at 27).

38. *Id.* at 574-77 (White, J., dissenting).

39. 100 S. Ct. 2752 (1980).

40. This majority was composed of the four dissenters in *Mendenhall* and Justice Stewart, who switched sides after *Mendenhall* despite the "remarkably similar" facts in *Reid*. *See* text accompanying note 41 *infra*. *See also* Note, *supra* note 9, at 515-16.

41. 100 S. Ct. at 2754 (Powell, J., concurring).

police conduct in question, the concurring Justices this time found the conduct unreasonable and hence unconstitutional. Justice Rehnquist dissented. He would have upheld the agent's action as within the lead opinion's analysis in *Mendenhall* because, in Justice Rehnquist's view, the contact did not constitute a seizure.<sup>42</sup>

The Supreme Court did not reach the issue of the constitutionality of the initial stop because the lower court merely assumed Reid had been seized without considering whether the initial identification stop constituted a seizure for fourth amendment purposes. The concurring opinion expressly noted that "that issue remains open for consideration by [other] courts in light of the opinions in *Mendenhall*."<sup>43</sup>

### III

#### PROBLEMS ASSOCIATED WITH THE *MENDENHALL* TEST

To determine whether the airport drug stop constituted a seizure, the *Mendenhall* lead opinion formulated a test that is both contrary to the fourth amendment principles emphasized by the *Terry* Court and inherently unworkable.

##### *A. The Mendenhall Test is Inconsistent With Terry's Fourth Amendment Principles*

The *Mendenhall* lead opinion found that a seizure did not occur when the agents stopped Mendenhall in the Detroit airport. Though carefully submerged in the lead opinion's discussion of the facts, Mendenhall was indeed "stopped" by the agents: "[t]he agents approached her *as she was walking through the concourse*, identified themselves as federal agents, and asked to see her identification and airline ticket."<sup>44</sup> Mendenhall produced her driver's license and ticket and began answering questions.<sup>45</sup> We are not told, but may safely assume from these facts, that at some point Mendenhall stopped walking in response to the agents' action. The crucial inquiry was whether this action constituted a seizure.

In answering this question, the lead opinion purported to rely on *Terry v. Ohio*.<sup>46</sup> It cited *Terry* for the proposition that a seizure occurs when an officer "has in some way restrained the liberty of a citizen."<sup>47</sup>

42. *Id.* (Rehnquist, J., dissenting).

43. *Id.* 100 S. Ct. at 2755 (Powell, J., concurring).

44. 446 U.S. at 547-48 (emphasis added).

45. *Id.* at 548.

46. 392 U.S. 1 (1968). The Court also relied on *Sibron v. New York*, 392 U.S. 40 (1968), a companion case to *Terry* that was decided the same day. For a discussion of *Sibron*, see note 53 *infra*.

47. *United States v. Mendenhall*, 446 U.S. at 552.



From this it concluded that stopping Mendenhall was not a seizure because a "seizure occurs only if, in view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>48</sup> This definition of seizure, however, does not comport with the true teaching of the *Terry* case.

In *Terry*, a plainclothes officer of considerable experience observed the defendants repeat a pattern of behavior believed indicative of "casing" a store for an armed robbery. The officer confronted the men, identified himself, and asked for their names. When they "inmumbled something" in response to his inquiry, the officer grabbed Terry, spun him around, and patted down the outside of Terry's clothing. He discovered a pistol in Terry's left breast pocket. Terry was subsequently convicted of carrying a concealed weapon.<sup>49</sup>

The Supreme Court affirmed the conviction, concluding that the officer's actions did not violate the fourth amendment's prohibition against "unreasonable searches and seizures,"<sup>50</sup> and that the pistol thus was properly admitted as evidence against Terry.<sup>51</sup> In doing so, the Court recognized a narrow exception to the traditional "probable cause" requirement: a police "stop and frisk" is valid when objective facts known to the officer give rise to a "reasonable suspicion" that the suspect is involved in criminal activity, even if these same facts are insufficient to justify an arrest. The officer's suspicion is reasonable, and the frisk is thus constitutional, if "the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate."<sup>52</sup> To justify the intrusion the officer must be able to point to "specific and articulable facts" that warrant the action taken.<sup>53</sup>

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48. *Id.* at 554.

49. 392 U.S. at 4-8.

50. U.S. CONST. amend. IV.

51. 392 U.S. at 30.

52. *Id.* at 22.

53. *Id.* at 21. The Court also applied this reasoning in a companion case, *Sibron v. New York*, 392 U.S. 40 (1968), but there it reached a contrary result. In *Sibron*, the defendant was observed speaking to at least nine known narcotics addicts within an 8-hour period. The officer approached Sibron in a restaurant while the suspect was eating and asked him to come outside. Once outside, the officer stated, "You know what I'm after." Sibron reached into his pocket, but the officer thrust his hand into the same pocket and removed several envelopes containing heroin.

This search was found unreasonable and thus unconstitutional because the mere act of talking with a number of known addicts was an insufficient basis to support the action taken. *Sibron* thus stands in stark contrast to *Terry*, where the basis for the officer's action was such that "[i]t would have been poor police work indeed for an officer of thirty years' experience . . . to have failed to investigate this behavior further." 392 U.S. at 23.

Treatise writers have suggested at least two further distinctions accounting for the affirmance of the conviction in *Terry* and the reversal in *Sibron*. Professor LaFave argues that the seriousness of the crime suspected—armed robbery versus a narcotics offense—is one factor accounting for the different results. See 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH

It is important to note, however, that the *Terry* Court expressly declined to rule on the constitutionality of the initial stop.<sup>54</sup> Rather, the Court proceeded to the frisk issue without deciding whether the officer had reasonable grounds to confront Terry in the first place.<sup>55</sup> It resolved the admissibility of the pistol found during the frisk on the reasonableness of the officer's grounds to make physical contact with Terry in a weapons search *subsequent* to the initial encounter. Thus, the *Mendenhall* lead opinion's reliance on *Terry* with respect to initial confrontations between DEA agents and air travelers is based only on selected dicta.<sup>56</sup> To be truly faithful to the principles of *Terry*, courts should consider not only this dicta, but all the statements in the opinion relevant to defining the term "seizure," and thus the scope of fourth amendment protection.

Despite its failure to rule on the constitutionality of the initial stop, the *Terry* Court did provide a useful guideline for defining "seizures." It indicated that "stops" should not be distinguished from "seizures" for the purpose of determining when fourth amendment scrutiny is required.<sup>57</sup> The Court discerned a twofold danger lurking in "overly technical definitions" that would place "stops" outside the fourth amendment.<sup>58</sup> The first danger is the isolation of the initial stages of police-citizen contact from constitutional safeguards.<sup>59</sup> The Court feared that removal of judicial scrutiny would eliminate "the only ef-

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AMENDMENT § 9.1, at 14 n.51 (1978). Professor Whitebread argues that the officer's motive—search for weapons versus search for an object that was not dangerous to the officer—is another distinguishing factor. See C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 175 (1980).

54. Because the Court framed the issue narrowly, it was not necessary for it to examine the constitutionality of the initial stop. The question posed was "whether it is *always* unreasonable for a policeman to seize a person and subject him to a limited search for weapons" in the absence of probable cause to arrest. 392 U.S. at 15 (emphasis added). The Court noted that "[g]iven the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him." *Id.* at 16.

The Court's refusal to discuss this issue did not go unnoticed. Justice Harlan admonished the Court for not addressing the issue, *see id.* at 31-33 (Harlan, J., concurring), and at least one commentator has criticized the Court's "unwise" detour around this "threshold issue." 3 W. LAFAVE, *supra* note 53, § 9.3, at 64 (1978).

*Sibron*, the companion case to *Terry*, similarly did not require a decision on whether the fourth amendment was implicated by the confrontation prior to physical contact. *See* 392 U.S. at 63.

55. *See* 3 W. LAFAVE, *supra* note 53, § 9.3, at 63-64.

56. The *Terry* Court's two dicta concerning seizures are: a seizure occurs when official action "has in some way restrained the liberty of a citizen," 392 U.S. at 19 n.16, and a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." *Id.* at 16.

57. *Id.* at 17.

58. *Id.*

59. *Id.*

fective deterrent to police misconduct in the criminal context.”<sup>60</sup> The second danger is that differentiating stops from seizures would lead to a rigid all-or-nothing model of fourth amendment protection.<sup>61</sup> The Court was concerned that such a model would make some police activity subject to complete judicial regulation while similar police conduct that fell on the other side of the definitional line because it stopped just “short of something called a ‘technical arrest’ ” would not be subjected to any constitutional limitations.<sup>62</sup> Any test formulated to define the term “seizure” should reflect a concern for both of these fears.

The *Mendenhall* test fails to adequately address these fears. First, by finding the airport drug stop in *Mendenhall* to be outside the fourth amendment, the lead opinion ruled by implication that no objective justification need be put forth by the officers in support of their conduct. Fifth Circuit opinions in the wake of *Mendenhall* have explicitly absolved “nonseizure” airport drug stops from any justification requirement.<sup>63</sup> The absence of a justification requirement is undesirable because it opens the door to potentially arbitrary police conduct or to conduct based on the officer’s subjective “hunch”—the very conduct that *Terry* sought to prevent.<sup>64</sup>

By permitting airport drug stops in the absence of police justification, courts are inviting abuse of the airport traveler’s freedom to be let alone. Judicial oversight of police conduct—“the only effective deterrent to police misconduct in the criminal context”<sup>65</sup>—is removed when police need not explain the basis for their actions to courts. Thus, as long as police conduct falls on the “nonseizure” side of the *Mendenhall* definitional line, an airport drug stop can be predicated solely on arbitrary factors like the length of a traveler’s hair, the style of the traveler’s dress, the traveler’s race or nationality, or any other capricious predi-

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60. See *id.* at 12. The deterrent effect of judicial scrutiny is accomplished by application of the “exclusionary rule,” whereby incriminating evidence is rendered inadmissible in court against the accused if obtained pursuant to police misconduct. The theory behind the rule is that police are less likely to overreach if the fruits of their excessive action cannot be used in a subsequent prosecution. For general discussions of the application of, exceptions to, and attacks against the exclusionary rule, see 1 W. LAFAVE, *supra* note 53, at 1-220; C. WHITEBREAD, *supra* note 53, at 1-55.

61. See 392 U.S. at 17-19. For a discussion of the “all-or-nothing” and sliding scale approaches to fourth amendment analysis, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388-94 (1974).

62. 392 U.S. at 19. In addition, the “all-or-nothing” aspect of definitional line drawing is typically accompanied by uncertainty as to where the line actually lies: “[W]here the consequences that turn upon the line are . . . out of all proportion to the differences between the cases lying close on either side, courts are likely to be impelled to wiggle the line or to keep it fuzzy.” Amsterdam, *supra* note 61, at 388.

63. See, e.g., *United States v. Goldstein*, 635 F.2d 356, 362 n.9 (5th Cir. 1981).

64. See 392 U.S. at 22.

65. *Id.* at 12. See text accompanying note 60 *supra*. For a discussion of the value of this and other functions performed by judicial overview of police conduct, see notes 131-34 and accompanying text *infra*.

cate. In short, "nonseizures" may be as unreasonable as the police choose to make them.<sup>66</sup> While the bulk of DEA's airport operations do not evince a goal of such purposeful misconduct, in the absence of a justification requirement, there is nothing to stop agents from acting on wholly subjective factors, directly contravening both *Terry's* "demand for specificity in the information upon which police action is predicated"<sup>67</sup> and the "imperative that the [basis for police action] be judged against an objective standard."<sup>68</sup>

The second failing of the *Mendenhall* test is that its all-or-nothing approach will result in subjecting some police stops to the fourth amendment's reasonableness requirement while nearly identical police conduct may fall on the other side of the definitional line and thus go unchecked. It is not hard to conjure examples of practically identical police actions straddling the definitional line in the airport drug stop context. For example, a stop in the middle of an airport concourse could be deemed to fall on the "nonseizure" side of the line, but the same stop accompanied by a request to move to one side of the concourse to get out of the way of airport pedestrian traffic might very well be deemed a circumstance in which a reasonable person would not believe himself free to go where and when he pleases. The latter police conduct would thus fall into the "seizure" category.<sup>69</sup> Situations like this would validate one court's observation that airport drug stop cases "often turn on minute factual differences in the cases."<sup>70</sup> This result is undesirable and is contrary to one of the central teachings of the *Terry* opinion.

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66. See *Amsterdam*, *supra* note 61, at 388. The need for requiring some objective justification for police conduct in the airport drug stop context is particularly acute, given the equivocal nature of the factors often used as predicates for the stops. For a description of the drug courier profile used by the DEA, see notes 8-11 and accompanying text *supra*. Most of the profile factors are quite consistent with innocent behavior. See *United States v. Berry*, 636 F.2d 1075, 1080 n.8 (5th Cir. 1981). DEA agents made airport drug stops in *Mendenhall* and *Elmore* in part because *Mendenhall* "appeared to be very nervous," see 446 U.S. at 547 n.1, and because *Elmore's* "moves were sort of strange." See 595 F.2d at 1038. A "sixth sense" often plays a significant role in the agent's evaluation of the suspect's conduct. Gellerman Interview, *supra* note 11. The Supreme Court has consistently disdained police interference with individual liberty on the basis of hunches because that permits stops to be almost random. See *Reid v. Georgia*, 100 S. Ct. at 2754; *Beck v. Ohio*, 379 U.S. 89, 93-97 (1964). See also *United States v. Berry*, 636 F.2d at 1080 n.8 (noting that the absence of fourth amendment protection permits "absolutely random, although brief, stops of innocent citizens").

67. 392 U.S. at 21 n.18.

68. *Id.* at 21.

69. This hypothetical was suggested by DEA Special Agent Bill Gellerman. Gellerman Interview, *supra* note 11.

70. *United States v. Berry*, 636 F.2d 1075, 1077 (5th Cir. 1981).

## B. *The Mendenhall Test is Unworkable*

### 1. *It is Difficult to Apply*

While *Mendenhall's* seizure test may be one possible formulation for a test attempting to determine when liberty is restrained, thus bringing the fourth amendment into play, it is inherently difficult to apply. The test asks judges to determine whether a reasonable person *would believe* that he is free to ignore an inquisitive officer and walk away.<sup>71</sup> Traditional reasonable person tests require fact finders to determine what a reasonable person might *do*. This inquiry poses little difficulty because the conclusion is based on community experience and observation. But the question of what a reasonable person *thinks* in a given situation is one that judges seldom are called upon to make. Because of the subtle psychological nature of this factual question,<sup>72</sup> it is unlikely that courts can realistically and uniformly apply the *Mendenhall* test to determine whether liberty has been restrained.<sup>73</sup> It is therefore not surprising that the courts have had much difficulty in consistently applying *Mendenhall* and *Elmore*.<sup>74</sup>

The inconsistent results reached by the Fifth Circuit in applying the *Mendenhall/Elmore* test to similar fact patterns illustrate the shortcomings of the test. In *United States v. Bowles*,<sup>75</sup> one of the suspects was walking rapidly down an airport concourse. A DEA agent followed, passed Bowles, and turned toward him. The agent held out his credentials and stood in the suspect's path. The agent then identified himself, requested the suspect's identification and airline ticket, and began questioning him. On these facts, the court concluded that there was a sufficient restraint of movement to conclude that a seizure had occurred.<sup>76</sup> It distinguished *Elmore* on the ground that in *Elmore* the

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71. *United States v. Mendenhall*, 446 U.S. at 554.

72. See text accompanying notes 79-91 *infra*.

73. See Tiffany, *The Fourth Amendment and Police-Citizen Confrontations*, 60 J. CRIM. L.C. & P.S. 442, 451 (1969).

74. The Fifth Circuit cases following *Mendenhall* cite the lead opinion's seizure test but correctly conclude that the lead opinion does not constitute binding precedent because it does not reflect the views of a majority of the Court. See, e.g., *United States v. Hill*, 626 F.2d 429, 433 n.6 (5th Cir. 1980). However, in following its own *Elmore* case as precedent, the Circuit has recognized that it is applying "essentially the same definition of a 'seizure' as that advocated by [the lead opinion] in *Mendenhall*." *Id.* As stated by Judge Randall, "[a]lthough the *Elmore* court did not explicitly set out the proper standard for determining when a 'seizure' has occurred, it appears that the court adopted the same objective test delineated in *Mendenhall* . . . whether, under the totality of the circumstances, a reasonable person would have thought that he was not free to leave." *United States v. Robinson*, 625 F.2d 1211, 1216 (5th Cir. 1980). Accord, *United States v. Berry*, 636 F.2d 1075, 1078-79 (5th Cir. 1981). Other cases adopting the *Mendenhall* test include *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Jodoin*, No. 80-273 (D. Mass. filed Jan. 16, 1981); *United States v. Place*, 498 F. Supp. 1217 (E.D.N.Y. 1980).

75. 625 F.2d 526 (5th Cir. 1980).

76. *Id.* at 532.

suspect had been seated when approached, whereas in *Bowles* the suspect was walking.

Two months after *Bowles*, the Fifth Circuit again faced similar issues in *United States v. Pulvano*.<sup>77</sup> There, a DEA agent identified himself as a federal narcotics officer as the suspect approached a row of lockers. The agent began questioning the suspect and asked to see the suspect's identification and airline ticket. The court concluded that there had been no seizure. Apparently the court did not believe the suspect was restrained in such a way that he was not free to leave. *Pulvano* puts to rest any suggestion that a seizure determination will turn on the dubious basis of whether the suspect was stationary or mobile, but the case leaves the test's application uncertain because the court did not indicate why Pulvano was free to leave when Bowles was not.<sup>78</sup>

## 2. *The Mendenhall Test is Ineffective*

Even if courts were able to ascertain what reasonable people would think when confronted by a police officer, the *Mendenhall* test remains an ineffective method for determining whether a person's liberty has been restrained. A reasonable person on occasion may *believe* that he *can* walk away. The fact remains, however, that reasonable people almost never *will* walk away. Thus, there may be an infringement of a citizen's liberty within the scope of the fourth amendment in cases that would be found to be nonseizures under the *Mendenhall* test.

A number of factors contribute to the rational belief that one confronted by the authority of the state will not simply ignore that authority, as *Mendenhall* assumes, and proceed on one's merry way. The first of these factors is that reasonable people feel a social pressure to respond to all police inquiries. To completely ignore an officer approaching in a public place to ask a question is an extremely discourteous action. Theoretically, the person approached and questioned can ignore the interrogator.<sup>79</sup> As a practical matter, however, the person will feel obligated to stop and answer. Ignoring the interrogator would be "at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime."<sup>80</sup> Citizens defer to police authority and answer questions despite inconvenience, embarrassment or indignity because

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77. 629 F.2d 1151 (5th Cir. 1980).

78. Recently, the Ninth Circuit affirmed a lower court finding that a seizure occurred during a typical airport drug stop even though the court found the facts before it "strikingly similar" to *Mendenhall*. See *United States v. Patino*, 649 F.2d 724, 728 (9th Cir. 1981).

79. See *Terry v. Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring).

80. *United States v. Coleman*, 450 F. Supp. 433, 439 (E.D. Mich. 1978).

they instinctively believe that they should.<sup>81</sup> Indeed, the Supreme Court has recognized that citizens have a responsibility to cooperate with the police.<sup>82</sup> In reality, then, there is at least a social pressure preventing reasonable people from walking away from inquisitive police officers.

The pressure to respond courteously to questions addressed to one in a public place is particularly strong when the interrogator has identified himself as a police officer. Any cooperation with the police in this context, while seemingly voluntary, is largely a response to the second pressure—the presence and exertion of police power. People cooperate with the police because they have been trained to submit to the wishes of persons in authority or because they fear that refusal to cooperate will create further suspicion.<sup>83</sup> But according to the American Law Institute (ALI), “regardless of the motive, the cooperation is clearly a response to the authority of the police.”<sup>84</sup>

The ALI’s conclusion that cooperation with the police is largely a response to police authority is strongly supported by a seminal study of police field stops.<sup>85</sup> The study’s author observed more than four hundred field stops in two different states.<sup>86</sup> The author found that some of the questions would have been intolerable if asked by someone other than a police officer.<sup>87</sup> Of three hundred field stops observed in Chicago alone, not once did a confronted person refuse to answer the interrogator.<sup>88</sup> “The only conclusion that can be drawn from these observations is that the presence of a police officer, no matter how pleasant his demeanor, implies the potential use of force—force at least to effectuate the stop if not to compel the answers.”<sup>89</sup> Given this perceived potential use of force by the officer should the person refuse to cooperate, it is not surprising that, when confronted, a person does not ignore the officer.

A third pressure preventing a reasonable person from simply walking away is the fear of the ramifications of ignoring a police officer’s questions. In the vast majority of cases a suspicious police officer

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81. ALI MODEL CODE OF PREARRAIGNMENT PROC. 258 (1975).

82. See *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966).

83. ALI MODEL CODE OF PREARRAIGNMENT PROC. 259.

84. *Id.* at 259-60.

85. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465 (1967). The study defined “field stop” as “any situation in which a police officer asks questions, pertaining to a crime or a suspected crime, of a citizen prior to the time when the citizen is taken, by force or consent, to a police station for further processing.” *Id.* The definition of “field stop” encompasses the typical airport drug stop situation.

86. The observations took place in Chicago, Illinois, and Corpus Christi, Texas. *Id.*

87. *Id.* at 473.

88. *Id.* at 491.

89. *Id.* at 473.

will not take such action lightly. A refusal to cooperate is often viewed by the police as an indication of guilt as well as an affront to the officer's authority.<sup>90</sup> In addition, an initial refusal to cooperate will often evoke a further attempt by the officer to obtain cooperation because "[a]ny agent worthy of the calling expects cooperation and knows how to get it."<sup>91</sup> In short, anyone choosing to walk away from an inquisitive officer is likely to be the subject of continuing investigation by an officer now more determined than ever to obtain answers to his inquiries. Thus, it is not surprising that most reasonable people find it preferable to stop and answer the interrogator. This pressure to avoid further police attention makes the freedom to walk away a theoretical right, but not a practical alternative.

The Supreme Court's application of the *Mendenhall* test to the facts before it illustrates the test's ineffectiveness. The lead opinion examined a cold and insufficiently developed record<sup>92</sup> and found that *Mendenhall* had no reason to believe that she was not free to unilaterally end the encounter. This reasoning is simplistic and contrary to our knowledge of how reasonable people react to confrontation by law enforcement officers. It is perhaps true that *Mendenhall* had a theoretical freedom to unilaterally end the encounter. In reality, however, it is highly unlikely that such freedom would ever actually be exercised. Given the strong pressures forcing people to cooperate with the police—pressures not considered by the *Mendenhall* lead opinion—a finding that *Mendenhall* could have ignored her interrogators and walked away is both unrealistic and naive. When DEA agents approach airport travelers for questioning, the traveler is often indignant, but rarely uncooperative.<sup>93</sup> In view of the pressures to cooperate, it is not surprising that very few people actually attempt to walk away. To suggest that no seizure has occurred because the travelers are free to walk away is to exalt a theoretical convenience over practical reality in derogation of constitutional protection.<sup>94</sup>

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90. Tiffany, *supra* note 73, at 451. That DEA agents view a refusal to cooperate in the airport drug stop context as an indication of criminal activity was confirmed during the Comment author's interview with DEA Special Agent Bill Gellerman. Gellerman Interview, *supra* note 11.

91. Illinois Migrant Council v. Pilliod, 389 F. Supp. 882, 889 (N.D. Ill. 1975), *aff'd*, 540 F.2d 1062 (7th Cir. 1976).

92. See 446 U.S. at 569-71 (White, J., dissenting).

93. Gellerman Interview, *supra* note 11.

94. This exaltation may be due to a judicial attempt to avoid the rigors of the exclusionary rule. The rule has come under attack, *see, e.g.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (The exclusionary rule "is both conceptually sterile and practically ineffective in accomplishing its stated objective."); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621; Miles, *Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio*, 27 CATH. U. L. REV. 9 (1977), because, in the classic phrase of Justice Cardozo, it is undesirable that "the criminal is to go free because the constable has blundered." See *Elkins v. United States*, 364 U.S. 206, 216 (1960) (quoting People



In sum, looking to whether a reasonable person would have believed he was free to walk away to determine whether a seizure has occurred is undesirable for two reasons. First, as people will in fact almost never walk away, there frequently will be restraints of liberty that will be found to be nonseizures. Second, the test is inherently difficult to apply and will thus lead to inconsistent decisions. In many cases the results will be contrary to the important fourth amendment principles emphasized by the *Terry* Court. Thus, a more effective test is needed to determine when fourth amendment protection is warranted.<sup>95</sup>

#### IV

##### A PROPOSED FOURTH AMENDMENT "SEIZURE" ANALYSIS

In his concurring opinion in *Terry*, Justice Harlan criticized the majority for "unwise[ly] . . . detour[ing] around the threshold issue" of whether the initial confrontation between the police officer and Terry constituted a seizure for fourth amendment purposes.<sup>96</sup> Soon after the announcement of the *Terry* decision, Professor LaFave voiced a similar criticism and also noted that "[t]here is no ready solution" to the problem of determining whether a seizure has occurred.<sup>97</sup> It is surprising that the Court, in the thirteen years following the *Terry* case, has had little opportunity to close this gap in fourth amendment jurisprudence.

In determining whether a seizure has occurred, the critical inquiry, according to *Terry*, is whether a police officer has "restrained the liberty" of a person.<sup>98</sup> As Part III of this Comment demonstrates, the *Mendenhall* test for determining whether a seizure has occurred is fraught with fatal difficulties.<sup>99</sup> The *Mendenhall* test attempts to ascertain whether the officer's conduct has restrained the person's liberty by

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v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)). It is possible to view *Elmore* and the *Mendenhall* lead opinion as attempts to escape the ramifications of this much-criticized rule. If the police conduct can be defined as a "nonseizure," then any contraband uncovered would be admissible as evidence against the defendants even if the police conduct was unreasonable, because there would be no constitutional violation to redress by applying the exclusionary rule. Granted, this approach makes it almost certain that the defendants—who were indeed involved in transporting narcotics—would be convicted. But if courts want to avoid the rigors of the exclusionary rule, they should forthrightly jettison that particular method of protecting fourth amendment guarantees. For general discussions of alternatives to the exclusionary rule, see 3 W. LAFAVE, *supra* note 53, § 1.2, at 30-39; C. WHITEBREAD, *supra* note 53, at 37-53.

95. For a contra analysis, see Note, *Reexamining Fourth Amendment Seizures: A New Starting Point*, 9 HOFSTRA L. REV. 211 (1980).

96. 392 U.S. at 31-32 (Harlan, J., concurring). See notes 54-55 and accompanying text *supra*.

97. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 64 (1968).

98. 392 U.S. at 19 n.16.

99. See text accompanying notes 71-94 *supra*.

focusing on a single, unilluminating and even fictional factor—whether a reasonable person would have believed that he was free to ignore the officer and simply walk away. Instead, the determination of whether police action has restrained individual liberty should focus on three relevant factors that are more probative of whether the police officer has indeed restrained individual liberty.

To ascertain whether police action has restrained an individual's liberty on the facts of a given case, courts should examine three objective<sup>100</sup> factors: whether the police conduct was investigatory in nature, whether it caused the individual to undertake significant, burdensome action, and whether it would be deemed offensive contact if initiated by a fellow private citizen. These factors should not be viewed as exclusive; changing social conditions and varying criminal contexts may suggest other relevant channels of inquiry. However, as will be discussed in Part V of this Comment, these three factors are directly relevant to the airport drug stop context. Moreover, each finds support in the case law.

#### A. Investigative Conduct

One factor that is probative of whether police conduct has restrained a person's liberty is whether the police initiated the contact pursuant to an investigation of the person as a suspect, or pursuant to some other police function.<sup>101</sup> Investigatory techniques are typically more intrusive than other police actions.<sup>102</sup> In addition, the pressures to cooperate with the police, inherent in all encounters between the police and private individuals,<sup>103</sup> are likely to be more acute during investigative encounters because investigative action implies suspicion or even accusation. Investigative action is thus more likely to necessitate exculpatory action by the citizen, and his liberty to do as he pleases is correspondingly reduced. In contrast, liberty is less likely to be curtailed during noninvestigative police-citizen contacts. For example, police interviews with witnesses to crime or accident scenes or police contacts to render aid to persons needing assistance are not likely to involve restraining police conduct.<sup>104</sup>

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100. The factors must be objective. Professor LaFave has convincingly shown that tests focusing on the subjective beliefs of the officer, the citizen, or both, are unworkable. *See* 3 W. LAFAVE, *supra* note 53, § 9.2, at 50-52.

101. The term "investigative conduct," as used here, refers to police activity designed to gather data for potential prosecution of a suspect believed to be involved in criminal enterprise. Thus, police activity designed to obtain information from citizens for nonprosecutorial purposes, while nominally "investigative," should not be deemed encompassed by this factor.

102. *See* Note, *supra* note 9, at 511.

103. *See* text accompanying notes 79-91 *supra*.

104. The California Supreme Court has apparently adopted an approach quite similar to the

The Supreme Court has indicated support for considering this factor in determining when scrutiny of police conduct is required. In *Davis v. Mississippi*<sup>105</sup> the Court noted that investigatory conduct is subject to fourth amendment review: "[t]o argue that the fourth amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the fourth amendment."<sup>106</sup>

In most criminal contexts the investigatory nature of the police activity alone should indicate that a seizure has occurred. It is true, as *Terry* noted, that police-citizen contacts occur for a wide variety of purposes.<sup>107</sup> Of course, not all of these motivating purposes will lead to restraining police conduct. But when police officers confront citizens with a view to obtaining the data necessary to detect crime and to subject the suspect to prosecution, the suspect rarely will retain his full measure of freedom to do and go as he pleases.<sup>108</sup> Rather, the suspect must respond to the confrontation. Still, in some cases the investigatory nature of the stop may not unambiguously resolve the question whether liberty has been restrained. In these cases, the remaining two factors are useful in ascertaining whether the police conduct at issue effected a seizure.

### B. Performance of a Significant Burdensome Act

Another factor that should be examined in determining whether the officer's conduct has effected a restraint of liberty is whether the officer's action has caused the person to perform some significant and burdensome action (or inaction) that the person would not have per-

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investigative-noninvestigative factor. In *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978), the court found that:

A more fruitful approach focuses on the *purpose* of the intrusion itself. If the individual is stopped or detained because the officer suspects he may be personally involved in some criminal activity, his Fourth Amendment rights are implicated. . . . But similar safeguards are not required if the officer acts for other proper reasons.

*Id.* at 895, 582 P.2d at 961, 148 Cal. Rptr. at 370 (emphasis added). In applying this test to the facts before it, the court found that a seizure had occurred because the officer's stop of the defendant and his companion to seek their identities was pursuant to a belief that they were involved in criminal activity.

105. 394 U.S. 721 (1969).

106. *Id.* at 726. The Court recently affirmed this observation in *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

107. 392 U.S. at 13.

108. See text accompanying notes 79-94 *supra*. The Ninth Circuit's recent airport drug stop case is in conformity with a seizure test inquiring whether the police action was initiated for investigative purposes. In finding that the airport drug stop in *United States v. Patino*, 649 F.2d 724 (9th Cir. 1981), constituted a seizure, the court noted:

This was not just a casual encounter with the police at the airport; the officers had definitely identified her as a suspect for investigation and the district judge could have considered that the manner in which she was stopped conveyed an air of authority indicating she was not free to leave.

*Id.* at 727.

formed but for the officer's conduct. If so, then it is more likely that the person's liberty has been restrained.<sup>109</sup> For example, when a police car flags down a motorist, it is clear that the police conduct has caused the motorist to act in a manner in which he would otherwise not have acted. The action caused—the discontinuance of the drive—can, in many cases, be both significant and burdensome to the motorist. In such cases, it is very likely that the person has suffered a restraint of liberty. It is therefore not surprising that the Supreme Court has held that this type of police conduct is a seizure.<sup>110</sup>

If, however, the person continues to act as he would have acted despite the police conduct, then it is more likely that no restraint of the person's liberty has occurred.<sup>111</sup> The officer's action has not induced the person to undertake any significant and burdensome action that would not have been undertaken in the absence of the police action.

The Supreme Court has also recognized the importance of this factor. In *Brown v. Texas*,<sup>112</sup> police officers stopped the defendant as he exited an alley in an area known for its high incidence of drug traffic "because the situation 'looked suspicious and [the officers] had never seen that subject in that area before.'"<sup>113</sup> Brown refused to identify himself and angrily asserted that the police had no right to stop him. He was subsequently arrested pursuant to a Texas statute authorizing arrests for refusal to provide identification to a police officer who has effected a lawful stop.<sup>114</sup> Chief Justice Burger, speaking for a unanimous Court, said unequivocally, and with no further discussion of this issue, that "[w]hen the officers detained Brown for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment."<sup>115</sup> The police

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109. Of course, to make a difference in the seizure context, the action caused by the officer's conduct must be both significant and burdensome. If the police conduct causes only insignificant or unburdensome action, it is unlikely that the person's liberty has been restrained.

110. See *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

111. For example, in *People v. Juarez*, 35 Cal. App. 3d 631, 110 Cal. Rptr. 865 (2d Dist. 1973), a police officer responding to a burglary report noticed Juarez walking alone within five blocks of the burglary scene. The officer pulled his police car alongside the curb and while both the car and citizen were moving down the street, the policeman asked some questions. When Juarez's answers became increasingly unsatisfactory, the officer parked the car and stopped Juarez. Contraband was eventually discovered. The initial contact did not cause the defendant to stop walking or deviate from his course. The court found that the officer's action of pulling his car alongside the curb to question Juarez did not constitute action calling forth the constitutional limitations on police conduct. *Id.* at 635, 110 Cal. Rptr. at 867. These limitations became operative only when the officer stopped Juarez, causing him to cease walking.

112. 443 U.S. 47 (1979).

113. *Id.* at 49.

114. TEX. PENAL CODE ANN. tit. 8, § 38.02(a). Brown eventually identified himself while en route to jail.

115. 443 U.S. at 50. Brown's conviction was reversed because the Court also found that there was no reasonable suspicion supporting the seizure. *Id.* at 51-52.

action forced Brown to stop and to provide identification—significant, burdensome actions that he would not have performed in the absence of police action.<sup>116</sup> This factor may account, at least in part, for the Court's rather summary conclusion that Brown was seized.<sup>117</sup>

### C. Ordinarily Offensive Conduct

A third factor that should be considered is suggested by Professor LaFave. If the officer has "conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens," then the conduct is less likely to constitute a seizure.<sup>118</sup> The relevance of this factor is that a person's liberty seldom is restrained when he is merely confronted with conduct by others that is common to that encountered in every day life in society.

If, however, the officer's conduct contains an element that would be viewed as offensive or threatening if emanating from a fellow pri-

116. Indeed, Brown was willing to go to jail rather than perform the acts. See note 114 *supra*.

117. It is unfortunate that the Chief Justice's opinion does not explain the reason for the rather summary seizure determination. In any event, the *Mendenhall* lead opinion gives the *Brown* opinion short shrift. It asserts that Brown was not seized until he was "forcibly detained." See 446 U.S. at 556. The *Brown* opinion, however, does not indicate that forcible detention was the basis for the seizure determination. And, as Justice White's dissent correctly points out, in *Brown* "the Court recognized that a 'seizure' had occurred without inquiring into whether a reasonable person would have believed that he was not free to leave." 446 U.S. at 570 n.5 (White, J., dissenting).

118. 3 W. LAFAVE, *supra* note 53, § 9.2 at 53.

The *Terry* opinion, in a footnote, suggested a related factor that can be examined in connection with whether there has been a restraint of individual liberty. *Terry* noted that "not all *personal* intercourse between policemen and citizens involves 'seizures' of persons." 392 U.S. at 19 n.16 (emphasis added). This observation suggests that individual liberty is less likely to be curtailed during police-citizen encounters involving "friendly exchanges of pleasantries or mutually useful information," *id.* at 13, or the like than during contacts surrounded by an official aura. Contacts preceded by official action—in the words of *Terry*, a "show of authority," *id.* at 19 n.16—are more likely to be accompanied by a restraint of liberty due to the pressures inherent in official police action. See text accompanying notes 79-91 *supra*. These pressures, while not wholly absent, are a less coercive element in police contacts with a personal bent. Courts can look to the officer's demeanor and the tone of the conversation during the encounter to determine whether the police action more closely resembles "personal intercourse" as opposed to official action. See *United States v. Mendenhall*, 446 U.S. at 570 n.4 (White, J., dissenting). Demeanor may be one relevant factor in the airport drug stop context, *United States v. Elmore*, 595 F.2d at 1042, because apparently it is standard DEA operating procedure to politely "request," rather than "demand," production of identification. *Id.* *Terry's* concurring Justices noted that a policeman, like any other person, may address questions to people he meets on the street. 392 U.S. at 32 (Harlan, J., concurring); *id.* at 34 (White, J., concurring). When those questions are pursuant to "personal intercourse" and not significantly more restraining than questions normally addressed by any other fellow citizen, it is less likely that the "personal intercourse," without more, has effected a restraint of liberty.

It should be noted that the "personal intercourse" factor also has considerable overlap with the investigatory-noninvestigatory factor that is discussed in text accompanying notes 101-08 *supra*. Much investigatory conduct is performed pursuant to official rather than personal action.

vate citizen, a seizure may be indicated.<sup>119</sup> Examples of such threatening or offensive action would include following the person after he has indicated a disinclination to talk, physical touching by a total stranger, or extensive questioning about matters thought to be "personal." Conduct that is threatening or offensive when performed by private individuals is likely to be thought of as even more offensive or threatening when performed by a police officer. In such cases, it is highly likely that the officer's offensive or threatening conduct has restrained the person's liberty and thus that a seizure has occurred.

Courts should find that a seizure has occurred if a review of these three probative factors indicates that police conduct restrained a person's liberty. However, the analysis should not involve a mere tallying of the factors indicating seizure versus those that do not. Any one factor may be so probative in any given case that it overwhelms the less probative but possibly numerically greater contrary indicators. In many cases, for example, the investigatory nature of the initial contact alone may indicate that the person's liberty was restrained. Thus, to determine whether a seizure has occurred, courts must not only examine the factors that are logically probative of the restraint issue, they must also determine the significance, if any, that each factor has in that particular case. If this analysis indicates that it is more likely than not that a restraint of liberty was effected by the police action in question, then the person has been seized within the meaning of the fourth amendment.

In scrutinizing police conduct under the analysis proposed in this Comment, courts should resolve all doubts as to whether the requisite restraint of liberty occurred in favor of finding a seizure. Admittedly, this will result in more police actions being found to be seizures. This is an appropriate and desirable result, however, because, in the words of Professor Amsterdam:

to exclude any particular police activity from [fourth amendment] coverage is essentially to exclude it from judicial control and the command of reasonableness, whereas to include it is to do no more than to say that it must be conducted in a reasonable manner. With the question put in this fashion the answer should seldom be delivered against coverage.<sup>120</sup>

In short, finding that a seizure has occurred will not of itself invalidate the police action; it will simply require the court to review the police conduct to determine whether it was reasonable under the principles

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119. 3 W. LAFAVE, *supra* note 53, § 9.2, at 54.

120. Amsterdam, *supra* note 61, at 393 (footnote omitted). Professor Amsterdam warns, however, that fourth amendment analysis could become as indefinite as "one immense Rorschach blot" if courts subject all police activity to a "sliding scale" reasonableness test. *Id.* at 393-95.

espoused in *Terry*. In close cases such judicial review is necessary and desirable to safeguard individual liberty interests.

Any test for determining the reach of the fourth amendment must also allay the dual concerns of *Terry*.<sup>121</sup> First, the initial stages of police contacts with private individuals must not be isolated from constitutional scrutiny. Second, essentially similar police conduct in two different cases should not fall on opposite sides of a possibly artificial definitional line. The multifactor analysis proposed in this Comment meets both of these concerns far more successfully than the single factor test of the *Mendenhall* lead opinion. Under the multifactor analysis, the initial stages of police-citizen contacts will be subject to careful constitutional scrutiny to determine whether there has been a restraint of individual liberty. In addition, the multifactor analysis eliminates the possibility that essentially similar police conduct could fall on opposite sides of a definitional line, a problem inherent in any single factor seizure test. Close cases will still be difficult, but a multifactor analysis broadens the inquiry and thus eliminates the reliance on a single, often faint dividing line. Moreover, resolving close cases in favor of finding a seizure will reduce the risk that courts will treat two very similar cases differently.

## V

### APPLICATION OF THE MULTIFACTOR ANALYSIS IN THE AIRPORT DRUG CONTEXT AND THE USEFULNESS OF THE *TERRY* BALANCE

In applying the multifactor analysis described in Part IV, courts should find that the typical airport drug stop constitutes a seizure within the meaning of the fourth amendment. As discussed earlier,<sup>122</sup> DEA agents approach, stop, and question air travelers and request the production of identification and travel documents when, based on the presence of characteristics from a drug courier profile, they suspect that the person is transporting narcotics.

All three factors of the proposed analysis indicate that these drug stops should be deemed seizures. First, the typical airport drug stop is purely investigatory in nature. These stops are not initiated for one of a "wide variety" of police functions but with a single, pointed aim—potential prosecution of a suspect believed to be involved in criminal activity. Second, most people would agree that such police conduct does cause the individual encountered to perform significant and burdensome actions that would not be performed in the absence of the

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121. See text accompanying notes 58-62 *supra*.

122. See notes 8-11 and accompanying text *supra*.

police conduct. Third, this type of police conduct would usually be considered offensive if initiated by a private citizen. Most people would feel quite irritated by such conduct if performed by their fellow citizens, and would be reluctant, to say the least, to comply with the request to produce identification and travel itinerary. Thus, when police officers perform these actions, persons complying with the requests are likely to have undergone a restraint of liberty.

Once the drug stop is held to constitute a seizure, courts must determine whether the stop was reasonable under the principles espoused in *Terry*. That decision promulgated a balancing test to determine whether police conduct is reasonable, and thus constitutional, under the fourth amendment.<sup>123</sup> This balancing process involves an examination of both the governmental interest justifying the police action and the duration and scope of the intrusion on individual liberty.<sup>124</sup> In striking an accommodation between these competing interests in a particular case, the interests are qualified by the amount of "specific and articulable facts," and rational inferences drawn from those facts, adduced by the officer in justification for his action.<sup>125</sup> The governmental interest is likely to be more heavily weighted, and the action is more likely to be held reasonable, if the officer can point to many objective factors indicating criminal activity than if the same intrusion is based upon a more limited set of data. The likelihood that an intrusion will be found reasonable thus varies directly with the number and strength of objective indicia of criminal behavior justifying the intrusion.

The balance takes cognizance of the factors necessary to an effective policing of the nation's airports without sacrificing the important judicial check on police action that is essential to meaningful operation of the fourth amendment. The great concern over the "escalating use of controlled substances" and the ease of concealment of such substances for air travel<sup>126</sup> that led to the institution of the airport drug stop program can be easily factored into the balance by recognizing the substantial nature of the government's interest in making airport drug stops of persons suspected of transporting narcotics. Similarly, that these stops are brief in duration and limited in scope can be recognized in the balance by assigning a somewhat reduced weight to the individual liberty interest when the stop makes a lesser intrusion upon that interest than is made during a full-scale arrest. The quantity and quality of suspicion generated by the use of the drug courier profile and extraneous information, such as an informant's tip or the results of a

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123. 392 U.S. at 20-21, 24.

124. *Id.*

125. *Id.* at 21.

126. *See* United States v. Mendenhall, 446 U.S. at 561-62 (Powell, J., concurring).



previous investigation, color these interests in each case, with the government interest becoming more compelling as the factors giving rise to suspicion increase. If DEA airport operations uncover sufficient objective indicia that a certain individual is carrying controlled substances, a brief stop to ascertain the suspect's identity and pose a few questions should be deemed reasonable.

This is precisely the approach taken by the *Terry* Court on the facts before it. *Terry* first recognized a substantial government interest in allowing a police officer to stop and frisk a citizen under suspicion of planning an armed robbery that is greater than and in addition to the usual government interest in detecting crime.<sup>127</sup> The Court next considered the reduced liberty interest implicated by the stop-and-frisk of *Terry*, an action found less intrusive than a full-scale arrest.<sup>128</sup> In light of the quality and quantity of the objective data justifying the action, the *Terry* Court's balancing of those interests found the officer's actions reasonable.<sup>129</sup> More importantly, *Terry* upheld the officer's action while simultaneously assuring *Terry* that the only neutral party to the criminal justice process—the court—had examined the circumstances surrounding the encounter. This assurance is important because “[t]he scheme of the fourth amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”<sup>130</sup>

This assurance of judicial scrutiny of the reasonableness of the officer's conduct, absent in the *Mendenhall* test, is essential to the meaningful operation of a system that values individual liberty. Judicial overview of police conduct—through application of the exclusionary rule or otherwise—serves at least three important functions. First, as noted earlier, it is a deterrent to police misconduct.<sup>131</sup> Second, “the imperative of judicial integrity”<sup>132</sup> is guaranteed when courts refuse to become party to lawless police conduct by refusing to admit evidence obtained as fruits of unlawful conduct.<sup>133</sup> The third, and perhaps most important, function is one of “assuring the people—all potential victims of unlawful government conduct—that government would not profit from its lawless behavior, thus minimizing the risk of seriously

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127. 392 U.S. at 22-24.

128. *Id.* at 24-27.

129. *Id.* at 27-28.

130. *Id.* at 21.

131. See note 60 and accompanying text *supra*.

132. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

133. *Terry v. Ohio*, 392 U.S. at 12-13.

undermining popular trust in government."<sup>134</sup>

Application of the *Terry* balance to airport drug stops can validate DEA authority to make limited airport drug stops based upon the use of the drug courier profile,<sup>135</sup> while concomitantly fulfilling the three important functions described above. The flexibility of the *Terry* reasonableness balance also permits the court to consider both the strong government interest in stemming the flow of drugs through the nation's airports and the relatively small intrusion upon individual liberty in many airport drug stops. In close cases, therefore, it is best to conclude that an airport drug stop constitutes a seizure for fourth amendment purposes. That conclusion does nothing more than trigger the application of the *Terry* balance, which, in turn, only requires that the police conduct be "reasonable" under the circumstances.

### CONCLUSION

Justice Douglas, *Terry's* lone dissenter, feared that recognition of police power to confront citizens absent probable cause would be "a long step down the totalitarian path."<sup>136</sup> While this fear has not materialized, the *Mendenhall* lead opinion sets a dangerous precedent by permitting the police to stop airport travelers free from fourth amendment restraints whenever a court finds in retrospect that a reasonable person would have believed that he was free to ignore the police. This single factor test is not an effective method of determining when a restraint of liberty constituting a seizure has occurred. Such a determination is more accurately made with a multifactor analysis that takes account of all factors that are probative of whether the police conduct constitutes a restraint of individual liberty guaranteed by a fourth amendment. In applying the multifactor analysis, courts should usual-

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134. *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

135. Of course, the DEA could argue that its airport program would be far more effective if the agency were not put to the trouble of complying with the reasonableness requirement. This argument, however, would prove too much because it would allow for the circumvention of constitutional limitations whenever conducive to successful police work. The Constitution recognizes that individual liberty entails a higher cost in terms of police work than would otherwise be necessary. In fact, the fourth amendment "denies government the desired means and at times conceded *efficient means*, to obtain legitimate and laudable objectives. . . . [T]he framers . . . were willing to pay such a price [for their freedom]." Caracappa, *Terry v. Ohio and the Power of Police to Accost Citizens Absent Probable Cause to Arrest: A Critical Look at the Pennsylvania Experience*, 16 DUQ. L. REV. 499, 500 (1977) (emphasis in original).

The Constitution does recognize, however, that there is a point at which the price exacted exceeds that necessary to maintain individual liberty. The fourth amendment proscribes only "unreasonable" police conduct. *Terry* recognized that there is no test for determining reasonableness except a balancing of the competing interests involved. 392 U.S. at 21. Thus, the DEA should not expect authority to make airport drug stops that are unreasonable in light of the competing interests of individual liberty and efficient police work.

136. 392 U.S. at 38 (Douglas, J., dissenting).

ly find that airport drug stops are seizures. This is a desirable result because the finding will not automatically invalidate the stop but will only trigger application of the *Terry* reasonableness balance. This balance accommodates the government's significant interest in validating DEA airport operations while simultaneously serving the important interests furthered by judicial oversight of police conduct.

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