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**DRUG COURIER PROFILES, AIRPORT STOPS AND THE
INHERENT UNREASONABLENESS OF THE
REASONABLE SUSPICION STANDARD
AFTER *UNITED STATES V.
SOKOLOW***

I. INTRODUCTION AND BACKGROUND

In *United States v. Sokolow*,¹ the United States Supreme Court concluded that a drug enforcement agent may stop a suspect based on a standard of reasonable suspicion² if, considering a totality of the circumstances, the agent believes the suspect to be engaged in illegal drug related activity.³ In so holding, the Court sanctioned the use of a “drug courier profile” as a basis for reasonable suspicion to support a stop.⁴ The Court, however, declined to set forth a rule delineating the composition of a drug courier profile.⁵ Instead, the Court concluded that an of-

1. 490 U.S. 1 (1989).

2. Reasonable suspicion is a lesser standard than the constitutionally mandated standard for searches or seizures—that of probable cause. See U.S. CONST. amend. IV. Probable cause, however, is a somewhat amorphous standard. “Probable cause lies somewhere between bare suspicion and proof beyond a reasonable doubt.” Philip N. Armentano, *The Standards for Probable Cause under the Fourth Amendment*, 44 CONN. B.J. 137, 144 (1970). For a further discussion of the probable cause standard, see *infra* note 14 and accompanying text.

3. *Sokolow*, 490 U.S. at 10.

4. *Id.* at 10 & n.6. Drug courier profiles are informal compilations of characteristics thought common to persons transporting narcotics. Joseph P. D’Ambrosio, Note, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273, 275 (1987). The use of profiles was first instituted in Detroit by the FAA in 1968 to discourage hijacking attempts. See Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 847 (1985). The use of profiles in the drug courier context was developed by Paul Markonni, a Drug Enforcement Administration (DEA) agent, for use in the Detroit Airport to combat drug smuggling, and was first implemented in 1974. *United States v. Sokolow*, 831 F.2d 1413, 1425 n.1 (9th Cir. 1987) (Wiggins, J., dissenting), *rev’d*, 490 U.S. 1 (1989). The original drug courier profile developed by Agent Markonni consisted of seven primary characteristics: (1) arrival or departure from source city; (2) little or no luggage; (3) unusual itinerary; (4) use of an alias; (5) carrying large amounts of cash; (6) buying ticket with cash in small denominations; (7) unusually nervous. Four secondary characteristics were also defined: (1) exclusive use of public transportation; (2) making call after deplaning; (3) leaving false call-back number with airline; (4) excessive travel to and from source cities. *Id.*

Typically, when an agent observes a passenger displaying one or more of the profile characteristics, he or she follows the suspect through the airport concourse and decides whether to make a stop. D’Ambrosio, *supra*, at 276. At this point, if the agent decides to make a stop, he or she will approach the suspect and identify himself or herself as a law enforcement officer and proceed with a preliminary investigation. *Id.*

5. *Sokolow*, 490 U.S. at 10. Rather, the Court validated the use of profiles in the most

ficer has sufficient cause to stop a suspect if, based on a totality of the circumstances, the traditional bases for a stop founded on reasonable suspicion are met.⁶ By endorsing a reasonable suspicion stop based on a drug courier profile, but neglecting to define standards or limitations for these profiles, the Court allows a reasonable suspicion stop to be predicated upon an officer's subjective interpretation of what characteristics a drug courier should display,⁷ regardless of whether these characteristics are indicia of ongoing criminal activity,⁸ or whether the characteristics could be classified as innocent behavior.⁹ The rules, or lack thereof, derived from *Sokolow* contradict the limits of reasonable suspicion stops based on objective reasonableness that the Court has previously defined,¹⁰ and in effect sanction stops based on nothing more than hunches and subjective stereotypes.

This Note analyzes the Supreme Court's decision in *United States v. Sokolow* in the context of the Court's prior analyses of Fourth Amendment detention issues. This Note then addresses the implications of *Sokolow* in light of subsequent decisions by the Court.

This Note concludes that the Court, in validating a reasonable suspicion stop based on a determination that can be derived from subjective factors, seriously impinges upon the Fourth Amendment rights of those stopped pursuant to drug courier profiles who display innocent behavior. Of equal significance is the potential for violation of the rights of innocent travelers in the nation's airports who could become subjected to overbearing and harassing police conduct, the consequences of which could be drastic in light of subsequent decisions by the Court.¹¹ Finally, this Note proposes that an analysis by investigating officers that is consistent with previous formulations of the reasonable suspicion standard should be adopted, and recommends the elimination of drug courier profiles. Instead, articulable facts indicating *criminal* activity based on

general of terms, stipulating that "the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance." *Id.*

6. *Id.*; see *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

7. See *infra* notes 189-210 and accompanying text.

8. This factor has been required by the Court to uphold such stops since the Court set forth the standard for reasonable suspicion stops in *Terry*, 392 U.S. 1. See *infra* notes 37-40 and accompanying text.

9. Indeed, under *Sokolow*, acts which in isolation are considered consistent with innocent travel may nonetheless, when considered together, establish cause for further investigation. *United States v. Hooper*, 935 F.2d 484, 493 (2d Cir. 1991) (citing *United States v. Sokolow*, 490 U.S. 1, 8 (1989)).

10. See *infra* notes 42-43 and accompanying text.

11. See *infra* notes 286-90 and accompanying text.

objective reasonableness must be established before a suspect may be stopped if believed by the officers to be engaged in crime.

A. *The Fourth Amendment and the Reasonable Suspicion Standard*

1. Scope of the Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees the right of all citizens to be free from unreasonable searches and seizures,¹² and provides that "no warrants shall issue, but upon probable cause."¹³ Thus, the Fourth Amendment protects citizens against unreasonable governmental intrusions.¹⁴ An intrusion is deemed subject to Fourth Amendment protection if it involves an intrusion in an area where a citizen has a reasonable expectation of privacy.¹⁵ A privacy interest will be deemed reasonable if a person has: (1) an actual, subjective expectation of privacy; and (2) this expectation is one that society is prepared to recognize as objectively reasonable.¹⁶

An intrusion will be deemed per se reasonable, and a warrant to

12. U.S. CONST. amend. IV. "[T]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." *Id.* There is an exclusionary remedy for violations of a defendant's constitutional rights, first espoused by the Supreme Court in *Weeks v. United States*, 232 U.S. 383, 398 (1924) and applied to the states in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule prohibits the use of evidence or testimony obtained by government officials through means violative of the Constitution. *Mapp*, 367 U.S. at 648; *see also Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963). Thus, all evidence obtained in a manner in which governmental agents have less than the constitutionally mandated degree of suspicion necessary to proceed will be deemed invalid and cannot be used as evidence against a defendant at trial if it can be established that the evidence was obtained in a manner which amounts to a constitutional violation. *Mapp*, 367 U.S. at 655. In addition, evidence subsequently derived from evidence defectively obtained will be deemed invalid under the fruit of the poisonous tree doctrine. *Wong Sun*, 371 U.S. at 484. Under the fruit of the poisonous tree doctrine, an unconstitutional search or seizure "taints" all evidence that stems therefrom and renders the evidence inadmissible. *Id.* Further, all evidence subsequently derived from the tainted evidence will also be inadmissible unless the connection to the tainted evidence is so attenuated as to "purge the taint." *Id.* at 487-88.

13. U.S. CONST. amend. IV.

14. A governmental intrusion is deemed to be unreasonable unless the intrusion has been sanctioned by the issuance of a warrant by a detached and disinterested magistrate, based upon a showing of probable cause, or an exception to the warrant requirement applies. *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967). "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person to be arrested].'" *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). *See generally* 2 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 515-27 (1987).

15. *Katz*, 389 U.S. at 351-52.

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

search may be issued, if there is a showing of probable cause.¹⁷ Probable cause to search may be found to exist when the facts and circumstances would cause a man of reasonable caution to believe that seizable objects are located in the place to be searched.¹⁸

In certain instances, particularly under exigent circumstances, a warrant may not be necessary and thus some searches may take place without a warrant provided that they are supported by probable cause.¹⁹ In certain situations, however, the Court has employed a "balancing test"²⁰ and has allowed searches and seizures on a showing of less than probable cause, such as reasonable suspicion. The first case that sanctioned this approach was *Terry v. Ohio*.²¹

2. *Terry v. Ohio* and the foundations of the reasonable suspicion standard

In *Terry v. Ohio*,²² the United States Supreme Court addressed the question of whether it is always unreasonable for a police officer to seize a person and subject him to a limited search for weapons upon less than probable cause for an arrest.²³ The Court held that the stop of a suspect for a brief detention could be constitutionally permissible in certain situations despite a lack of probable cause for a full arrest or search.²⁴ The Court, however, acknowledged a balancing of interests to justify this intrusion.²⁵ The Court concluded that a stop—a seizure tantamount to a

17. See U.S. CONST. amend. IV.

18. *Carroll*, 267 U.S. at 162. Prior to 1967, Supreme Court cases appeared to forbid search warrants for items other than fruits or instrumentalities of a crime, or contraband. CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 155 (1986). However, in *Warden v. Hayden*, 387 U.S. 294 (1967), the Court held that warrants could be issued for evidence which did not fit into one of the three aforementioned categories, provided there was a "nexus" between the evidence and the criminal behavior. *Id.* at 310.

19. An in-depth examination of exigent circumstances and other situations justifying searches without warrants exceeds the scope of this Note. The traditional exceptions to the warrant requirement are: hot pursuit of a criminal suspect; destruction of evidence imminent; emergencies; automobiles; searches of items in plain view when an officer is already at a lawful vantage point; search incident to a lawful arrest; administrative inspections; inventory searches pursuant to an arrest; and consensual searches. WHITEBREAD & SLOBOGIN, *supra* note 18, at 144-293.

20. See *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). Under a balancing test approach, the court will balance the governmental interest served against the relative intrusiveness to the individual. *Id.* at 534-37; see also *infra* notes 266-75 and accompanying text.

21. 392 U.S. 1 (1968).

22. *Id.*

23. *Id.* at 15.

24. *Id.* at 30-31.

25. *Id.* at 21. The Court provided that as a general proposition:

[I]t is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,

brief detention²⁶—could be based on reasonable suspicion rather than probable cause, because a brief detention is less intrusive than a seizure invoking Fourth Amendment protection and thus requiring probable cause.²⁷

The circumstances in *Terry* involved two men who were “casing” a jewelry store.²⁸ The officer who observed the men testified that in light of his thirty-five years of experience, he believed the men were about to engage in a “stick-up,”²⁹ and that he feared that “they may have a gun.”³⁰ The officer approached the men, identified himself as a police officer and asked for their names.³¹ One of the men mumbled something, and then the officer grabbed Terry, spun him around and patted down the outside of his clothing.³² The officer found a pistol in Terry’s coat pocket,³³ and then removed Terry’s coat and found a revolver in Terry’s possession, as well as weapons possessed by the other man.³⁴ The weapons were seized and the men were charged with carrying concealed weapons.³⁵ The officer testified at trial that he never placed his hands beneath Terry’s garments.³⁶ The Court rationalized such a stop based on the need to deal quickly with dangers of impending criminal activity in rela-

for there is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.

Id. at 20-21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967)). The Court also acknowledged that “[t]he scope of the search must be ‘strictly tied to and justified’ by the circumstances which rendered its initiation permissible.” *Id.* at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

26. *Id.* at 16. “[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Id.*

27. *Id.* at 26. The threshold question under *Terry* is whether a brief detention is actually an arrest (a prolonged detention), in which case Fourth Amendment protection would be invoked, and probable cause to stop would be necessary. Factors which can be analyzed to determine whether a confrontation is a stop or a brief detention include: (1) the duration of the stop; (2) whether the police actions were threatening; (3) whether the person detained was touched by the police; (4) whether the detention took place in a closed area or open to public view; and (5) whether from an objective standpoint the person detained would have reasonably felt that he was free to leave. WHITEBREAD & SLOBOGIN, *supra* note 18, at 229. *But see infra* notes 287-90 and accompanying text (analyzing recent Supreme Court cases which considerably limit scope of what can be classified a stop, and broaden purview of “voluntary encounters”).

28. *Terry*, 392 U.S. at 6.

29. *Id.*

30. *Id.*

31. *Id.* at 6-7.

32. *Id.* at 7.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

tion to the relatively minor intrusion of a brief detention.³⁷

The Court, however, sanctioned a stop to allow an officer to search for *weapons*³⁸ in the interest of the officer's *safety*;³⁹ such stops to search for evidence of crime were strictly proscribed.⁴⁰ In subsequent cases, the Court has reinforced that an officer may not stop and frisk a suspect under *Terry* to search for *evidence* without probable cause.⁴¹ The Court has emphasized that justification for a "*Terry* stop" must be based on an *objective* standard,⁴² and there must be articulable facts that lead the officer to reasonably conclude that the suspect with whom he or she is dealing is armed and presently dangerous.⁴³

The aspects of *Terry* most relevant in the drug courier context are the Court's articulation of the requirements for application of the reasonable suspicion standard and the guidelines for application of that standard.

The Supreme Court has stated that in determining the applicability of a standard of less than probable cause, it is necessary to first "focus upon the governmental interest which allegedly justifies official intrusion

37. *Id.* at 26-27. "Distinctions should be made between a 'stop' and 'arrest,' (or 'seizure' of a person), and between a 'frisk' and a 'search.'" *Id.* at 10. Thus, it was argued, the police should be permitted to "stop" a person and detain him or her briefly for questioning based upon the suspicion that he or she may be connected with criminal activity. *Id.* at 24. Upon suspicion that the person may be armed, the police should have the authority to "frisk" him or her for weapons. *Id.* If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of that person. *Id.* at 26-27. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," *id.* at 10, which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion. *Id.* at 10-11.

38. *Id.* at 24-25.

39. *Id.* at 24.

40. *Id.* at 29. The Court provided that "[t]he sole justification of the search . . . [was] the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Id.* "[S]uch a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Id.*; see also *Sibron v. New York*, 392 U.S. 40, 63-65 (1968) (seizure of contraband unconstitutional under *Terry* standard when officer did not have adequate justification to search for weapons).

41. See *Sibron*, 392 U.S. at 65 (search of suspected narcotics dealer "unreasonable" because not motivated by officer's concern for his safety—the sole justification for frisk in *Terry*); *Terry*, 392 U.S. at 29.

42. *Terry*, 392 U.S. at 21-22.

43. *Id.* at 29-30. For example, the officer must observe the suspect "engage in unusual conduct leading to a reasonable suspicion that criminal activity has occurred, is occurring, or is about to occur and can point to specific and articulable facts to warrant the suspicion." WHITEBREAD & SLOBOGIN, *supra* note 18, at 229.

upon the constitutionally protected interests of the private citizen."⁴⁴ Furthermore, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁴⁵ In making such an assessment, an objective standard must be applied.⁴⁶ The proper inquiry being, "would the facts available to the officer at the moment of the seizure or the search, warrant a man of reasonable caution in the belief that the action taken was appropriate?"⁴⁷ The Court acknowledged the importance of providing specific justifications for the stop in order for the reasonable suspicion standard to be consistent with Fourth Amendment protections.⁴⁸ Finally, the Court recognized the risks inherent in allowing application of the reasonable suspicion standard and acknowledged the need to provide a judicial check on police conduct.⁴⁹

3. Post-*Terry* applications of the reasonable suspicion standard

In light of *Terry*, and in the wake of a more conservative Supreme Court, the reasonable suspicion standard has been extended and relaxed.⁵⁰ The Court has construed *Terry* to mean that "the validity of any seizure short of an arrest and any accompanying frisk is governed by the Fourth Amendment's amorphous 'reasonableness' standard rather than the precise guidelines set out in *Terry*."⁵¹ Thus, the determinative question in cases that follow *Terry* is whether a stop can be justified as reasonable within the meaning of the Fourth Amendment.

44. *Terry*, 392 U.S. at 20-21 ("[T]here is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.").

45. *Id.*; see also *Beck v. Ohio*, 379 U.S. 89 (1964) (search and seizure incident to arrest invalid when probable cause for arrest does not exist); *Ker v. California*, 374 U.S. 23 (1963) (evidence seized incident to lawful arrest, supported by probable cause, admissible).

46. *Terry*, 392 U.S. at 21-22.

47. *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

48. *Id.* at 11 ("The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution.").

49. *Id.* at 15.

Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

Id.

50. See *infra* notes 52-71 and accompanying text.

51. WHITEBREAD & SLOBOGIN, *supra* note 18, at 204.

Following *Terry* the Court has attempted to apply this "reasonable-ness" standard. The first case that applied a "softened" approach to the reasonable suspicion standard was *Adams v. Williams*.⁵² *Williams* is significant because it broadened the permissible basis for a *Terry* stop. The Court concluded that it was permissible to justify a reasonable suspicion stop based not just on the officer's own observations,⁵³ but on an informant's tip.⁵⁴ In *Williams*, however, the justification for the stop was premised on a need to protect the safety of the officer, not to search for contraband.⁵⁵ Thus, the *Williams* decision did not clarify what degree of criminality is necessary to invoke *Terry*, and to which stops the reasonable suspicion standard will apply.

In *United States v. Brignoni-Ponce*,⁵⁶ application of the reasonable suspicion standard was reexamined. The case involved enforcement of immigration laws by roving patrol cars near the United States and Mexico border.⁵⁷ In overturning Brignoni-Ponce's conviction, the Court reaffirmed that all encounters between police and people whom they may

52. 407 U.S. 143 (1972). *Williams* involved a police officer who received information from an informant that the defendant Williams, who was seated in a nearby car, was carrying drugs and had a gun concealed in his car. *Id.* at 144-45. The officer approached and asked Williams to open the door of the car. *Id.* at 145. When Williams rolled down the car window, the officer reached in and removed a revolver from Williams' waistband, although it was not visible from outside the car. *Id.* The officer then arrested Williams for unlawful possession of a revolver and for possession of heroin. *Id.* The heroin was produced by a subsequent search incident to that arrest. *Id.* The Court found that the information from the informant was sufficient to justify the stop of the car and the subsequent search that produced the contraband was valid. *Id.* at 146-47.

53. *Id.* at 147.

54. *Id.* Further, the Court held that the informant's tip may provide reasonable suspicion for a stop and frisk even if the officer perceives no unusual conduct on the part of the suspect, and even if the tip is not sufficiently reliable to provide probable cause to support the issuance of a warrant. *Id.* at 147-49.

55. *Id.* at 147-48.

56. 422 U.S. 873 (1975).

57. *Id.* at 875. Brignoni-Ponce's car was stopped by a roving patrol car. *Id.* The two officers later admitted that their only reason for stopping the car was that the three occupants appeared to be of Mexican descent. *Id.* After questioning, it was revealed that his two passengers had entered the country illegally. *Id.* All three occupants of the car were arrested and Brignoni-Ponce was subsequently convicted for transporting illegal aliens. *Id.* The government argued that it should be permissible to stop any person near the border for limited questioning about their immigration status. *Id.* at 876-77. The Supreme Court, however, in a unanimous decision, concluded "[w]e are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops." *Id.* at 882. The Court reasoned that except at a fixed checkpoint on the border, where security of the country could justify a stop based on less than reasonable suspicion, border patrol officers are prohibited from stopping vehicles unless they know of specific articulable facts that a particular vehicle contains illegal aliens. *Id.* at 884; see *United States v. Ortiz*, 422 U.S. 891 (1975) (vehicle stop at fixed checkpoint 66 miles north of border not supported by probable cause and thus invalid); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)

suspect to be engaged in criminal activity must be grounded on at least reasonable suspicion.⁵⁸ The Court emphasized that the sole justification for the stop was that Brignoni-Ponce and his companions appeared to be of Mexican origin.⁵⁹ The Court reasoned that this factor alone could not justify a stop.⁶⁰

The Court applied a similar line of reasoning in *Brown v. Texas*.⁶¹ In analyzing the situation presented in *Brown*, the Court stated that the reasonableness required by the Fourth Amendment of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.⁶² Applying this balancing test approach, the Court concluded that reasonable suspicion did not exist on these facts to justify the stop, reasoning that the stop was unjustified because there was no claim of any specific misconduct on Brown's part, nor did the officers believe that he was armed.⁶³ The Court held that a stop must be based on reasonable suspicion that the person stopped "was engaged [in] or had engaged in criminal conduct."⁶⁴ Vague suspicion is not enough. Officers must have reasonable suspicion based on objective facts.⁶⁵

(stops by roving border patrols near United States and Mexico border and accompanying vehicle search impermissible unless there is reasonable suspicion to support stop).

58. *Brignoni-Ponce*, 422 U.S. at 884.

59. *Id.* at 885-86.

60. "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id.*

61. 443 U.S. 47 (1979). In *Brown*, two police officers observed the defendant and another man walking away from one another in an alley. *Id.* at 48. The officers testified that they believed that their presence either broke up or prevented a meeting between the two men. *Id.* One officer got out of the car and asked Brown to identify himself and explain what he was doing in the alley. *Id.* Brown refused and asserted that the officer had no right to detain him. *Id.* at 49. The officer replied that Brown was in an area with a high drug problem. *Id.* The officer then frisked him, but found nothing. *Id.* (A frisk authorized under *Terry* is a limited type of search whereby a suspect is briefly detained and the outer surfaces of the suspect's clothing are patted down to search for weapons. *Terry*, 392 U.S. at 29-31.). Brown was arrested and later convicted under a Texas statute that makes it a crime for a person to refuse to give his name and address to an officer who lawfully stopped him to request information. *Brown*, 443 U.S. at 49.

62. *Id.* at 50-51 ("Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.").

63. *Id.* "There is no indication in the record that it was unusual for people to be in the alley. The fact that the appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Id.* at 52.

64. *Id.* at 53.

65. *Id.* at 51-52.

Application of the reasonable suspicion standard was again reviewed in *Dunaway v. New York*.⁶⁶ *Dunaway* demonstrates the Court's unwillingness to apply the reasonable suspicion standard in all instances. In *Dunaway*, the Court recognized that the *Terry* Court had departed from the traditional Fourth Amendment analysis by "defin[ing] a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test."⁶⁷ Thus, the majority in *Dunaway* found *Terry* inapplicable⁶⁸ because a stop and frisk implicates only a "limited violation of individual privacy,"⁶⁹ while advancing substantial "interests in [both] crime prevention and detection and in the police officer's safety,"⁷⁰ yet the seizure in *Dunaway* protected none of these concerns. *Dunaway* emphasized that not all seizures can be justified by reasonable suspicion: "For all but . . . narrowly defined intrusions, seizures are 'reasonable' only if supported by probable cause."⁷¹

4. Sliding scale approach

Despite limitations on its application, the reasonable suspicion standard has been expanded to apply to situations outside the scope of a *Terry* stop. In a number of situations, the stop of a suspect based on less than probable cause or even with no degree of suspicion whatsoever may be justified when weighed against a competing interest that is more compelling.⁷² Such compelling interests include: (1) protecting police officers from suspects whom they stop on the road;⁷³ (2) protecting society

66. 442 U.S. 200 (1979). In *Dunaway*, the defendant was taken into custody in the course of the investigation of an attempted robbery and murder. *Id.* at 203. The police did not have probable cause to detain Dunaway. *Id.* at 206-07. Yet, Dunaway was convicted based on information obtained during this detention. *Id.* at 203. The Supreme Court reversed, indicating that a detention for custodial investigation requires probable cause. *Id.* at 216.

67. *Id.* at 210 ("[A]pplication of this balancing test led the [*Terry*] Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.")

68. *Id.* at 212-13.

69. *Id.*

70. *Id.*

71. *Id.* at 211-14.

72. To determine the reasonableness of the intrusion, it is necessary to balance the public interest served by the seizure against the nature and scope of the intrusion in relation to the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise. *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring).

73. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may order a suspect out of a car when stopped for even routine traffic violations. *Id.* at 109-11. This may be done even if the officer has no reasonable suspicion that the driver poses a threat to the officer's safety.

from the threat of people driving stolen cars;⁷⁴ and (3) protecting society against railway workers or federal customs employees from using drugs in the workplace.⁷⁵

This "sliding scale" approach is premised on a balancing test theory,⁷⁶ that requires a "focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."⁷⁷ Hence, in certain instances if there is a compelling government interest that outweighs the relative intrusiveness to a citizen, governmental intrusions may be justified on less than probable cause outside the realm of a *Terry* stop situation. Under the balancing test approach, however, it is necessary to analyze not just the relative gravity of the intrusion against a defendant,⁷⁸ but also against the right of all citizens to be free from unreasonable searches and seizures.⁷⁹ It is with these competing interests in mind that the Supreme Court's decisions in the drug courier area must be examined.

Id. The Court justified this on the *de minimus* nature of the intrusion when weighed against protecting officers from being assaulted. *Id.* at 111.

74. See *New York v. Class*, 475 U.S. 106, 118-19 (1986) (once officer has suspect out of car, permissible for officer to reach in and remove objects obscuring dashboard to expose vehicle identification number).

75. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 633-34 (1989) (mandatory drug testing permissible, without prior suspicion, in railway industry in interest of prevention of train accidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (permitting suspicionless, mandatory urine testing of United States Customs Service Employees applying for promotion to positions requiring handling firearms or classified materials).

76. See *Camara*, 387 U.S. at 534-35. "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-66.

77. *Camara*, 387 U.S. at 534-35. "There is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 536-37.

78. See *Brown v. Texas*, 443 U.S. 47, 50 (1979) ("The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." (citations omitted)).

79. See U.S. CONST. amend. IV. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry*, 392 U.S. at 9 (quoting *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251 (1891)).

B. *The Supreme Court's Analysis and Application of the Reasonable Suspicion Standard in Drug Courier Cases Prior to United States v. Sokolow*

1. *United States v. Mendenhall*

*United States v. Mendenhall*⁸⁰ was the first Supreme Court case to analyze the drug courier profile⁸¹ in the context of the reasonable suspicion standard. In *Mendenhall*, a twenty-two year old black woman was confronted in the Detroit airport by two plain clothes Drug Enforcement Administration (DEA) agents because her conduct appeared to the agents to be "characteristic of persons unlawfully carrying narcotics."⁸² The agents identified themselves and asked Mendenhall for her ticket and identification.⁸³ The agents inquired as to why Mendenhall's ticket was not in her name.⁸⁴ When Mendenhall became shaken and nervous, the DEA agents asked her to accompany them to a private room at the airport⁸⁵ and she complied.⁸⁶

Justices Rehnquist and Stewart, in a plurality opinion, believed that this confrontation was not a seizure.⁸⁷ Rather, it was deemed a voluntary encounter and therefore the Fourth Amendment reasonable suspicion analysis was not invoked.⁸⁸ The Court, however, did offer an analysis for determining when a stop constitutes a seizure within the meaning of the Fourth Amendment.⁸⁹ The Court's test proposed that a seizure invoking Fourth Amendment protection has occurred only when "a reasonable person would have believed that he [or she] was not free to leave."⁹⁰

The Court in *Mendenhall* concluded that there had been no unlawful seizure because of the defendant's voluntary compliance.⁹¹ The dis-

80. 446 U.S. 544 (1980).

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

82. *Mendenhall*, 446 U.S. at 547. The agents testified that Mendenhall's behavior fit a "drug-courier profile." *Id.* at 548 n.1.

83. *Id.* at 547-48 & n.1.

84. *Id.* at 548.

85. *Id.*

86. *Id.* at 548-49.

87. *Id.* at 555.

88. *Id.* at 554-55.

89. *Id.* at 553-54.

90. *Id.* at 554. The Court gave some examples of circumstances which might indicate a seizure: "[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* Thus, the Court in *Mendenhall* was far from clear on the issue of exactly what may be deemed to constitute a seizure in the context of an encounter with a suspected drug courier at an airport.

91. *Id.* at 557-58.

sent noted, however, that her behavior was "the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal,"⁹² and labeled the officers' suspicions based on profile factors a "hunch" rather than suspicion based on "specific reasonable inferences."⁹³

2. *Reid v. Georgia*

In *Reid v. Georgia*,⁹⁴ the defendant arrived in Atlanta on a commercial flight originating in Fort Lauderdale, Florida.⁹⁵ The passengers left the plane in a single file and proceeded through the concourse.⁹⁶ Reid was observed by a DEA agent who was in the airport to uncover drug smuggling operations.⁹⁷ Separated from Reid by several persons was another man who carried a shoulder bag similar to Reid's.⁹⁸ As the passengers proceeded through the concourse past the baggage claim area, Reid occasionally glanced in the direction of the other man.⁹⁹ When the two men reached the main lobby of the terminal, the second man caught up with Reid and they spoke briefly.¹⁰⁰ The two men then left the terminal together.¹⁰¹

A DEA agent approached Reid and his companion outside of the building, identified himself as a DEA agent, and asked them to display their identification and ticket stubs.¹⁰² Both men complied.¹⁰³ The tickets, which had been purchased with Reid's credit card, revealed that both men had been staying in Fort Lauderdale only one day.¹⁰⁴ According to the agent's testimony, the men appeared nervous during this encounter.¹⁰⁵ The agent then asked the men if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags.¹⁰⁶ The agent testified that Reid nodded his head affirmatively, and that the other responded "yeah, okay."¹⁰⁷ As the three men reentered

92. *Id.* at 572 (White, J., dissenting).

93. *Id.* at 573 (White, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

94. 448 U.S. 438 (1980).

95. *Id.* at 439.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

the terminal, however, Reid began to run. Before he was apprehended, he abandoned his shoulder bag.¹⁰⁸ The bag, when recovered, was found to contain cocaine.¹⁰⁹ Reid was subsequently charged with possession of cocaine.¹¹⁰

The Court in *Reid* held that as a matter of law these facts did not give rise to a reasonable and articulable suspicion of criminal activity,¹¹¹ and therefore did not justify a *Terry* stop.¹¹² Specifically, the Court found that reasonable suspicion of criminal activity does not exist when a person: gets off of a plane from Fort Lauderdale at a time in the morning when law enforcement activity is minimal; has no luggage other than a shoulder bag; apparently makes efforts to conceal that he is traveling with someone else; and occasionally looks back at that person.¹¹³ “[These] circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.”¹¹⁴

3. *Florida v. Royer*

In *Florida v. Royer*,¹¹⁵ the Court again addressed the reasonable suspicion standard in the drug courier context, and also addressed the related issue of whether a seizure had actually occurred when agents encountered the suspect. Royer was observed at Miami International Airport by two plainclothes detectives.¹¹⁶ The detectives believed that Royer’s appearance, mannerisms, luggage and actions fit the “drug courier profile.”¹¹⁷ As Royer made his way through the airport, the two

108. *Id.*

109. *Id.*

110. *Id.* at 441.

111. *Id.*

112. *Id.* It is interesting to note, however, that the Georgia Court of Appeals had upheld the stop *precisely because* Reid, “in a number of respects, fit a ‘profile’ of drug couriers compiled by the [Drug Enforcement Administration].” *Id.* at 440-41.

113. *Id.*

114. *Id.* The Court reasoned that the relevant evidence in this case was more an “inchoate and unparticularized suspicion or hunch” and was “simply too slender a reed to support the seizure in this case.” *Id.*

115. 460 U.S. 491 (1983).

116. *Id.* at 493.

117. The Court in *Royer* indicated:

[T]he “drug courier profile” is an abstract of characteristics found to be typical of persons transporting illegal drugs. In Royer’s case, the detectives [sic] attention was attracted by the following facts which were considered to be within the profile: (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash

detectives approached him, and asked if he had a moment to speak with them.¹¹⁸ Royer replied "yes," and upon request produced for the detectives his airline ticket and his driver's license.¹¹⁹ Royer's ticket bore a different name than his baggage identification tags.¹²⁰ When the detectives inquired about this discrepancy, Royer became nervous.¹²¹ The two detectives did not return his airline ticket and identification, but asked Royer to accompany them to a room, approximately forty feet away.¹²² Royer said nothing in response, but went with the officers as he had been asked to do.¹²³ Royer was then asked if he would consent to a search of his luggage.¹²⁴ Without providing a verbal response, Royer produced a key to one of the suitcases and unlocked it.¹²⁵ Drugs were found in the suitcase.¹²⁶ Royer stated that he did not know the combination to his second suitcase, but gave the officers permission to break it open.¹²⁷ When they did, the officers found marijuana inside.¹²⁸ Royer was then arrested and charged with possession of marijuana.¹²⁹

Prior to trial, Royer made a motion to suppress the evidence. The trial court denied the motion because it found that Royer's consent to the search was "freely and voluntarily given."¹³⁰ The Florida District Court of Appeal reversed Royer's conviction,¹³¹ holding that Royer had been involuntarily confined without probable cause,¹³² and that the involuntary detention had exceeded the limited restraint permitted by *Terry*.¹³³

The Supreme Court affirmed,¹³⁴ holding that the police conduct constituted a seizure under the Fourth Amendment.¹³⁵ The Court con-

with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, he wrote only a name and the destination.

Id. at 493 n.2.

118. *Id.* at 494.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 495.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 507-08.

135. *Id.* at 501.

cluded that this "stop," which may have been valid under *Terry*'s reasonable suspicion standard, was transformed into an illegal arrest¹³⁶ as the detention continued and Royer was moved into the room at the airport.¹³⁷ The Court considered this stop to be "more intrusive than necessary."¹³⁸

Although a majority of the Court in *Royer* concluded that the police actions were unduly intrusive, *Royer* may represent a broadening of the *Terry* stop analysis; the Court seemed willing to allow the police to stop and question the defendant to investigate criminal activity, but not merely as a protective measure.¹³⁹

4. *Florida v. Rodriguez*

In *Florida v. Rodriguez*,¹⁴⁰ the Court had yet another opportunity to apply the reasonable suspicion standard to a temporary detention of a person for questioning at an airport. *Rodriguez* did not involve the use of drug courier profiles per se, and so will not be discussed at length in this Note. However, the Court in *Rodriguez* did conclude that a stop was justified based on reasonable suspicion when, in the concourse of a major international airport: (1) the accused and two companions were observed by two plainclothes narcotics officers to speak furtively with one another after each had spotted the officers; (2) one of the companions was heard urging the others to "get out of here"; (3) the accused attempted to run away, but despite pumping his legs up and down very fast was unable to get very far; (4) after handing one of the officers an airline ticket with three names on it, the accused and one of his companions both claimed to have one of the three names; (5) the officers asked for consent to search the accused's luggage, and the accused, after first denying that he had the key, produced the key; and (6) one officer opened the accused's suitcase and found cocaine inside.¹⁴¹

136. *Id.* at 502. The stop was illegal in the sense that it was not supported by the constitutionally mandated degree of suspicion necessary to justify an arrest—probable cause. *Id.*; see U.S. CONST. amend. IV.

137. *Royer*, 460 U.S. at 501.

138. *Id.* at 504.

139. *Id.* at 500.

140. 469 U.S. 1 (1984).

141. *Id.* at 3-4. The Court supported its holding in *Rodriguez* by positing that the public interest involved in the suppression of illegal transactions in drugs or other serious crimes negated the need for probable cause for such a detention and thus justified application of the less stringent standard of reasonable suspicion. *Id.* at 5.

II. *UNITED STATES V. SOKOLOW*A. *Statement of the Case and Background of the Supreme Court Decision*

Andrew Sokolow, a traveler arriving at Honolulu International Airport, was approached by DEA agents while hailing a cab,¹⁴² after the agents noticed that Sokolow's behavior "had all the classic aspects of a drug courier."¹⁴³ On the basis of this information, one agent displayed his credentials, grabbed Sokolow's arm, and moved him back to the sidewalk, asking for his ticket and identification.¹⁴⁴ Sokolow told the agent that he had neither, that his name was "Sokolow," but that he was traveling under his mother's maiden name.¹⁴⁵

Sokolow and his companion were taken to the DEA office at the airport where the couple's luggage was sniffed by a narcotics-detecting dog,¹⁴⁶ which alerted the agents to Sokolow's brown Louis Vuitton shoulder bag.¹⁴⁷ The agents arrested Sokolow and advised him of his constitutional rights.¹⁴⁸ The agents then obtained a warrant to search the bag and found that it contained no drugs, but did contain some suspicious documents that referenced Sokolow's involvement in drug-related activities.¹⁴⁹ Because it was late in the evening, the agents could not obtain a second warrant for the remaining luggage.¹⁵⁰ The agents allowed Sokolow to leave for the night but kept his luggage.¹⁵¹ The next morning, after a second dog confirmed the first dog's alert, the agents obtained

142. *United States v. Sokolow*, 490 U.S. 1, 5 (1989).

143. *Id.* at 10 n.6. The agents noticed that: (1) he paid \$2,100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for drugs; (4) he stayed only 48 hours, even though a round trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage. *Id.* at 3.

144. *Id.* at 5.

145. *Id.*

146. *Id.* The use of drug-detecting dogs to sniff luggage has been sanctioned by the Court, and has been found not to constitute a search because the intrusion is thought to be negligible. *United States v. Place*, 462 U.S. 696, 707 (1983). "As to the examination of inanimate objects, the general rule is that a canine sniff is not a search. The Fourth Amendment therefore does not limit such investigations. However, if the object must first be removed from the possession of its owner, that removal is a seizure and the seizure—not the sniff—must be based on reasonable suspicion." Jeffrey T. Even, *The Fourth Amendment and Drug-Detecting Dogs*, 48 MONT. L. REV. 101, 117-18 (1987).

147. *Sokolow*, 490 U.S. at 5.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

a warrant and found 1063 grams of cocaine inside Sokolow's luggage.¹⁵²

Sokolow was indicted for possession of cocaine with the intent to distribute.¹⁵³ The United States District Court for Hawaii denied Sokolow's motion to suppress the seized cocaine,¹⁵⁴ finding that the DEA agents had a reasonable suspicion that Sokolow was involved in drug trafficking when they stopped him at the airport.¹⁵⁵ Sokolow then entered a conditional guilty plea to the offense charged.¹⁵⁶

The United States Court of Appeals for the Ninth Circuit reversed Sokolow's conviction,¹⁵⁷ holding that the DEA agents did not have reasonable suspicion to justify the stop.¹⁵⁸ In so doing, the court set forth a two-step framework for analyzing stops made pursuant to a drug courier profile. First, a threshold determination must be made as to whether there were sufficient facts indicating ongoing criminal activity to justify the stop, such as the use of an alias, or evasive movement through the airport.¹⁵⁹ The court indicated that one such factor is always needed to support a finding of reasonable suspicion.¹⁶⁰

The second step in the analysis is an examination of the facts describing personal characteristics of drug couriers, for example, payment for tickets with cash or short trips to a source city.¹⁶¹ Such facts only become relevant if there are facts falling into the first category as well, such that there is a basis for reasonable suspicion.¹⁶² Facts of the second type are not relevant in and of themselves because they describe the behavior of "significant numbers of innocent persons."¹⁶³

In applying this two-part analysis in Sokolow's case, the court found that there was no evidence of ongoing criminal activity and thus the agents' stop was impermissible.¹⁶⁴ The dissent, however, argued that the majority's approach was "contrary to the case-by-case determination of

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 5-6.

156. *Id.* at 6.

157. *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989). This decision was issued after the government petitioned for rehearing of an earlier decision (*United States v. Sokolow*, 808 F.2d 1366 (9th Cir. 1987)) on the grounds that "the court had erred in considering each of the facts known to the agents separately rather than in terms of the totality of the circumstances." *Sokolow*, 490 U.S. at 6 n.2.

158. *Sokolow*, 831 F.2d at 1419.

159. *Id.*

160. *Id.*

161. *Id.* at 1420.

162. *Id.*

163. *Id.*

164. *Id.* at 1422.

reasonable articulable suspicion based on *all* the facts.”¹⁶⁵

B. The Supreme Court Decision

After several years of avoiding the drug courier profile issue, the United States Supreme Court in *United States v. Sokolow*¹⁶⁶ attempted to address when and how characteristics found in drug courier profiles can be utilized in airport stops. In reversing the Ninth Circuit,¹⁶⁷ the Court found critical whether the agents had sufficient reasonable suspicion, based on a totality of the circumstances, to stop Sokolow when they initially encountered him at the airport.¹⁶⁸ The Court criticized the approach taken by the Ninth Circuit, indicating that the two-part test “create[s] unnecessary difficult[ies] in dealing with one of the relatively simple concepts embodied in the Fourth Amendment.”¹⁶⁹ The Court, however, failed to articulate what can constitutionally comprise a drug courier profile in the airport stop context, leaving lower courts the burden of interpreting drug courier issues on a case-by-case basis.¹⁷⁰

1. Majority opinion

Justice Rehnquist, writing for the majority, rejected the reasoning of the Ninth Circuit¹⁷¹ which attempted to implement a rule requiring objective indicia of ongoing criminal activity before reasonable suspicion could be found.¹⁷² The Court reasoned that the concept of reasonable suspicion “is not ‘readily, or even usefully, reduced to a neat set of legal rules.’”¹⁷³ Instead, the Court implemented a totality of the circumstances approach to determinations of reasonable suspicion.¹⁷⁴ In so

165. *Id.* at 1426 (Wiggins, J., dissenting).

166. 490 U.S. 1 (1989).

167. *Id.* at 7.

168. *Id.*

169. *Id.* at 7-8.

170. As Justice Marshall notes in his dissent in *Sokolow*, “the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.” *Id.* at 14 (Marshall, J., dissenting).

171. *Id.* at 7.

172. See *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989). See *supra* notes 142-65 and accompanying text for a discussion of the Ninth Circuit analysis.

173. *Sokolow*, 490 U.S. at 7 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

174. *Id.* at 7-8. The Court adopted the reasoning of *United States v. Cortez*, 449 U.S. 411 (1981), as rationalization for a totality of the circumstances approach. *Sokolow*, 490 U.S. at 8. Under a totality of the circumstances approach, the “whole picture” is taken into account to determine whether there is sufficient factual justification to stop a suspect. *Cortez*, 449 U.S. at 417. Thus, “[b]ased upon the whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Id.* at 417-18. The Court in *Cortez* set forth two elements that must be present *before* a stop is

doing, the Court acknowledged that factors which ordinarily are indicative of innocent behavior can, when taken in totality, be the basis for reasonable suspicion to support a stop.¹⁷⁵

The Court acknowledged that the characteristics that supported the stop in Sokolow's case were components of a drug courier profile, yet this did not detract from their evidentiary significance.¹⁷⁶ The majority did not, however, set forth what characteristics could constitutionally comprise a drug courier profile used to support a reasonable suspicion stop beyond the situation presented in *Sokolow* itself. Rather, the Court stated that "[a] court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to th[e] conclusion [to stop a suspect]."¹⁷⁷

Finally, the majority disagreed with Sokolow's contention that the DEA agents were obligated to use the least intrusive means to verify or dispel their suspicions that he was a drug smuggler, rather than detaining him by force.¹⁷⁸

2. Dissent

Justice Marshall, with whom Justice Brennan joined, dissented from the majority opinion on the grounds that in upholding Sokolow's conviction, the court seriously impinged upon the Fourth Amendment rights of all persons who utilize the nation's airports.¹⁷⁹ The dissent noted that reasonable suspicion, based on specific and articulable facts, is required in order to support an airport stop to "deter egregious police behavior,"¹⁸⁰ and that the facts set forth in *Sokolow* do not support a stop

permissible under a totality of the circumstances approach: (1) "the assessment must be based upon all of the circumstances"; and (2) the assessment "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418. The Court in *Cortez*, in reference to the second prong of the analysis, quoted Chief Justice Warren in *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968): "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Cortez*, 449 U.S. at 418 (emphasis in original). However, in adopting this approach, the Court in *Cortez* acknowledged that the process of assessing the validity of a stop "does not deal with hard certainties, but with probabilities." *Id.* Thus, law enforcement officers, like jurors, are permitted to "formulate[] certain common-sense conclusions about human behavior" to serve as a basis for stopping a suspect. *Id.*

175. *Sokolow*, 490 U.S. at 9.

176. *Id.* at 10.

177. *Id.*

178. *Id.* at 11 ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.")

179. *Id.* at 11-12 (Marshall, J., dissenting).

180. *Id.* at 12 (Marshall, J., dissenting).

based on reasonable suspicion.¹⁸¹ Furthermore, the dissent recognized the dangers inherent in relying on drug courier profiles to support such stops.¹⁸² Finally, the dissent acknowledged the majority's willingness "when drug crimes or anti-drug policies are at issue to give short shrift to constitutional rights,"¹⁸³ and in so doing in this case, found that the majority disobeyed important constitutional commands of the Fourth Amendment.¹⁸⁴

D. Analysis

1. Subjectifying an objective standard

The Court's decision in *United States v. Sokolow*¹⁸⁵ and the resultant validation of drug courier profiles as a basis for reasonable suspicion based on a totality of the circumstances is constitutionally problematic.¹⁸⁶ By permitting factors described in a profile to provide a basis for a reasonable suspicion determination,¹⁸⁷ the decision allows officers to determine reasonable suspicion based largely on their subjective interpretation of whether a suspected drug trafficker fits their *individual* drug courier profile.¹⁸⁸ However, the constitutional standard for a reasonable

181. *Id.* at 13 (Marshall, J., dissenting).

182. *Id.* (Marshall, J., dissenting) ("Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention.").

183. *Id.* at 17 (Marshall, J., dissenting).

184. *Id.* at 18 (Marshall, J., dissenting). Whereas, "[i]n requiring that seizures be based on at least some level of criminal conduct, the Court of Appeals was faithful to the Fourth Amendment principle that law enforcement officers must reasonably suspect a person of criminal activity before they can detain him." *Id.* at 18-19 (Marshall, J., dissenting).

185. 490 U.S. 1 (1989).

186. As a preliminary matter, the Court's application of a totality of the circumstances approach set forth in *United States v. Cortez*, 449 U.S. 411 (1981), may be misplaced. *Cortez* was a case that involved transportation of illegal aliens, and so arguably the Court's reliance on *Cortez* as justification for a totality of the circumstances analysis in the drug courier context may be inconsistent with the limitations of *Cortez*, since prior to the *Cortez* decision, the government had already defined a compelling interest in protecting the nation's borders, justifying application of a lesser standard of suspicion in that context. See 8 U.S.C. § 1357(a)(3) (1988) (immigration agents may make warrantless searches within reasonable distance from any external boundary of country in order to detect importation of illegal aliens); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (vehicle stops at fixed checkpoints near border for questioning of occupants permissible even absent suspicion that particular car contains aliens).

187. *Sokolow*, 490 U.S. at 10.

188. See *Cloud*, *supra* note 4, at 844. "Judicial approval of [the drug courier profile] formula permits law enforcers, the very people whose activities are subject to fourth amendment scrutiny, to define the standards by which their conduct is reviewed. It is difficult to imagine a concept more foreign to traditional fourth amendment jurisprudence, or one more likely to evoke skepticism from the judiciary." *Id.*

suspicion determination is an *objective* standard:¹⁸⁹ whether a reasonable person, similarly situated, would believe that the suspect was engaged in criminal activity.¹⁹⁰ This standard is diluted by utilizing drug courier profiles. As one authority has noted, unlike *Terry*, under drug courier profile cases "DEA agents need not advance an objective justification for their initial stops, because purely subjective and arbitrary drug profile characteristics provide sufficient justification."¹⁹¹

The Court's subjectification of the reasonable suspicion standard derives from its departure from the traditional standard for a reasonable suspicion stop set forth in *Terry*.¹⁹² Rather than requiring that a suspect be stopped on the basis of specific evidence of "ongoing criminal activity,"¹⁹³ *Sokolow* allows a suspect to be stopped on the basis of reasonable suspicion, which can be garnered from factors in a drug courier profile.¹⁹⁴ These factors do not necessarily represent objective indicia of ongoing criminal activity, but rather describe a class of people that is predominantly criminal.¹⁹⁵ Thus, the Court endorses an approach to reasonable suspicion that can be composed entirely of "probabilistic" elements.¹⁹⁶ Rather than focusing on objective facts that indicate that the

189. See, e.g., *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). "The fourth amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

190. See *Terry*, 392 U.S. at 27. The *Terry* Court, in justifying an investigatory stop founded on the reasonable suspicion standard, reasoned: "Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the *objective* evidentiary justification which the Constitution requires." *Id.* at 15 (emphasis added); see also *United States v. Mendenhall*, 446 U.S. 544 (1980), where, in the drug courier context, the Court stipulated: "The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person . . ." *Id.* at 551.

191. Charles L. 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, 468 (1987).

192. 392 U.S. 1. *Terry* requires that justify a stop, a governmental agent "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The Court added that "in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or of the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* at 21-22.

193. See, e.g., *Brown*, 443 U.S. at 51; *Terry*, 392 U.S. at 30.

194. *Sokolow*, 490 U.S. at 10.

195. *United States v. Sokolow*, 831 F.2d 1413, 1419 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989).

196. Probabilistic elements are characteristics that drug couriers may display, but are equally displayed by the public at large. See *Sokolow*, 831 F.2d at 1420. Thus, when using such evidence to prosecute a defendant, an officer "testifies not about his own trained observation of criminal activity, but instead about the probability that drug couriers generally exhibit

particular suspect may be engaged in crime, the focus is on behavior that a criminal *may* be engaged in,¹⁹⁷ or on behavior generally indicative of criminality. This approach is inequitable in that it increases the chance that an innocent traveler may be subjected to an unwarranted governmental intrusion, and is also directly inconsistent with prior cases in which the Court has addressed the reasonable suspicion issue.¹⁹⁸

The Ninth Circuit's opinion in *Sokolow* recognized the constitutional hazards of basing reasonable suspicion on a drug courier profile comprised largely of factors that do not objectively indicate criminal activity.¹⁹⁹ In its decision, the Ninth Circuit found that the DEA did not

certain external characteristics." *Id.* Such characteristics include: a destination or departure from a drug source city; manner of dress; time of flight; position among disembarking passengers; method of payment for tickets; and type of luggage. *Id.*; see also *infra* note 254 and accompanying text.

197. *Sokolow*, 392 F.2d at 1418. Profiles do not identify conduct as a basis for reasonable suspicion that is particular to a crime or suspect, but instead focus on patterns of behavior. Cloud, *supra* note 4, at 853 ("The profile's focus is literally not upon an individual's unique conduct, but upon that conduct's alleged similarity to the behaviors of others.").

198. See, e.g., *Terry*, 392 U.S. at 21. The Court specifically noted that before a stop is appropriate, an officer must be able to "point to specific and articulable facts" that warrant the intrusion. *Id.* The Court emphasized that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of [the] Court's Fourth Amendment jurisprudence." *Id.* n.18.

A comparison with the facts presented in *Terry* is appropriate. In *Terry*, the suspects were stopped because an officer believed that they were "casing" a jewelry store for a robbery. *Id.* at 6. The Court in *Terry* found that the suspects' behavior was "consistent with the officer's hypothesis that these men were contemplating a daytime robbery," *id.* at 28, and thus there were adequate indicia of ongoing criminal activity to support a stop based on the officer's reasonable suspicion. *Id.* at 30. However, the stop in *Terry* was not premised on the fact that "Terry and his cohort 'looked like' robbers, but instead that their actions betrayed an involvement in a developing crime." *Sokolow*, 831 F.2d at 1419. "The drug-courier profile, if used as a measure of reasonable suspicion, operates in a different manner than did the officer's trained evaluation that warranted the stop in *Terry*." *Id.*

This inconsistency in application of the reasonable suspicion standard was identified by the Ninth Circuit in *Sokolow* when, in reversing *Sokolow*'s conviction, the court stated: "The [evidence] presented by the government . . . fails to form an image of ongoing criminal activity but a class of people that is predominantly criminal. The Supreme Court, by contrast, requires that the reasonable suspicion supporting an investigative stop be reasonable suspicion of ongoing crime, and thus forecloses the result requested by the government." *Id.*; see also *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("Based upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."); *Brown*, 443 U.S. at 51 ("[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual."); *Brignoni-Ponce*, 422 U.S. at 884 ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.").

199. *Sokolow*, 831 F.2d 1413.

have sufficient reasonable suspicion to stop Sokolow because, based on the factors that the agents cited as the justification for their stop, there was not sufficient indication that Sokolow was engaged in criminal activity.²⁰⁰ In reaching this conclusion, the Ninth Circuit reasoned that to justify a stop based on factors found in a drug courier profile, there must be at least one factor objectively indicating ongoing criminal activity.²⁰¹ Only when there is at least one such factor present may "probabilistic evidence"²⁰² be used.²⁰³

In *Sokolow*, the Supreme Court rejected this analysis, finding the Ninth Circuit's formulaic approach too complicated.²⁰⁴ However, what the Court offered in place of the Ninth Circuit analysis may sacrifice Fourth Amendment protection for administrative convenience. In resorting to a totality of the circumstances approach, rather than sanctioning a more ardent standard for a reasonable suspicion determination, stops can be based not on an objective indication of ongoing criminal activity, but on what an officer believes are characteristics a drug courier should possess.²⁰⁵ It is *this* approach that complicates one of the simple concepts embodied in the Fourth Amendment—the notion that some level of objective justification is constitutionally mandated before a governmental intrusion is permissible.²⁰⁶

Furthermore, under the totality of the circumstances approach set forth in *Sokolow*, reasonable suspicion may be based on behavioral characteristics that can be equally typical of innocent behavior.²⁰⁷ An officer's expertise and experience in spotting criminal behavior may be taken into account in determining whether the particular behavior displayed is sufficiently suspect to warrant a reasonable suspicion stop.²⁰⁸ This approach creates a subterfuge for law enforcement, because in the context of the *Sokolow* decision, reasonable suspicion may be based upon innocent behavioral characteristics that do not necessarily justify this de-

200. *Id.* at 1424.

201. *Id.* at 1421-22.

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

203. *Sokolow*, 831 F.2d at 1423 ("[Criminal] behavior cannot be intuited from a hodgepodge assembly of 'factors' about individual character rather than criminal acts.").

204. *Sokolow*, 490 U.S. at 7-8.

205. See *infra* notes 262-63 and accompanying text.

206. See *Terry*, 392 U.S. at 21. To deter such egregious police behavior, a suspicion is not reasonable unless officers have based it on specific and articulable facts "which would warrant a man of reasonable caution in the belief that criminal activity is afoot." *Id.*; see also *Brignoni-Ponce*, 422 U.S. at 884.

207. Under certain circumstances, "wholly lawful conduct might justify the suspicion that criminal activity was afoot," *Sokolow*, 490 U.S. at 9, depending upon "the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* at 10.

208. *Terry*, 392 U.S. at 30.

gree of suspicion, yet are part of a particular officer's drug courier profile.²⁰⁹ Thus, by equating behavior that a criminal may engage in with behavior indicating crime, reasonable suspicion stops may become based not on evidence of ongoing criminal activity, but on whether the particular suspect fits a particular officer's *subjective* interpretation of what a drug courier should look like. This practice contravenes the limitations for a totality of the circumstances approach as set forth by the Court in *United States v. Cortez*,²¹⁰ and undermines the Fourth Amendment's guarantee against unreasonable searches and seizures, as is evidenced by prior Supreme Court cases that address the drug courier issue.²¹¹

2. *Sokolow* is inconsistent with prior Supreme Court formulations of reasonable suspicion in the drug courier context

In *Reid v. Georgia*,²¹² the Supreme Court held that there was an insufficient basis for establishing reasonable suspicion²¹³ when the defendant was stopped based on the facts that he arrived from a source city,²¹⁴ preceded another person and looked back at him,²¹⁵ arrived in the early morning,²¹⁶ concealed the fact that he and a companion were traveling together,²¹⁷ and had no luggage other than a shoulder bag.²¹⁸ The Court in *Reid* was concerned with the implications of allowing a "whole picture" analysis to serve as the basis for reasonable suspicion when the factors individually were typical of innocent behavior.²¹⁹ Thus,

209. See *infra* notes 244-46 and accompanying text.

210. 449 U.S. 441 (1981). In *Cortez*, the Court stated that in determining whether to stop a person, a totality of the circumstances must be taken into account. Based upon the "whole picture," (1) the officers must have a particularized and *objective* basis for suspecting the particular person stopped of engaging in criminal activity; and (2) there must be a suspicion raised that the particular person being stopped is engaged in wrongdoing. *Id.* at 417-18 (emphasis added).

211. As the Ninth Circuit recognized in its decision in *Sokolow*: "The [Supreme] Court has consistently looked beyond the profile to determine whether a reasonable suspicion exists of a criminal enterprise. Searches based solely on the personal characteristics of a suspect have been rejected as unreasonable." *Sokolow*, 831 F.2d at 1421; see, e.g., *Florida v. Royer*, 460 U.S. 491, 502 (1983) (only once evidence of ongoing criminal activity was established did other factors become relevant to support or controvert reasonableness of officers' suspicion); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (rejecting definition of reasonable suspicion not predicated on ongoing criminal activity—particular conduct of ongoing criminal enterprise required; evidence regarding type of person suspected doesn't suffice).

212. 448 U.S. 438 (1980).

213. *Id.* at 441.

214. *Id.* at 439 (Miami, Florida).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 441 ("[C]ircumstances [that] describe a very large category of presumably inno-

under *Reid*, the most general of profile characteristics cannot support a *Terry* stop without particularized evidence of suspicious activity.²²⁰

The Court in *Sokolow* acknowledges this requirement.²²¹ The decision, however, falls short of the standard set forth in *Reid*. Sokolow was stopped by DEA agents upon his arrival at Honolulu International Airport based on the following information possessed by the agents at the time of the stop: (1) he paid \$2100 for two airplane tickets from a roll of \$20 bills;²²² (2) he traveled under a name that did not match the name under which his telephone was listed;²²³ (3) his original destination was Miami, a source city for drugs;²²⁴ (4) he stayed in Miami for only forty-eight hours;²²⁵ (5) he appeared nervous during his trip;²²⁶ and (6) he checked none of his luggage.²²⁷ Of these characteristics, the facts that Sokolow checked none of his luggage and was flying to Miami, a source city for drugs, are insufficient to establish reasonable suspicion under the Court's decision in *Reid*.²²⁸ The fact that Sokolow appeared nervous while traveling should not, in itself, be conclusive as to any level of criminality, because it is common knowledge that air travelers are often nervous.²²⁹ That Sokolow's phone was not listed in his name should also not be conclusively indicative of criminality. It was later revealed that the phone number that Sokolow gave was listed to his roommate.²³⁰

Thus, the only facts that the Court in *Sokolow* should have relied upon, based on *Reid*, are that Sokolow paid \$2100 in cash from a roll of \$20 bills, and that he stayed in Miami for only forty-eight hours, even though a round-trip flight from Honolulu to Miami takes twenty hours. However, the fact that Sokolow paid for his ticket with a large sum of cash is not indicative of ongoing criminal activity. As the dissent in *Sokolow* recognized, possessing large amounts of cash would be evidence of *past* and not necessarily present criminal activity,²³¹ or even an aversion to or an inability to pay by any other means,²³² and thus should not

cent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.").

220. *United States v. Erwin*, 803 F.2d 1505, 1511 (9th Cir. 1986).

221. *Sokolow*, 490 U.S. at 7.

222. *Id.* at 3.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Reid*, 448 U.S. at 441.

229. *Sokolow*, 831 F.2d at 1423.

230. *Sokolow*, 490 U.S. at 4.

231. *Id.* at 16-17 (Marshall, J., dissenting).

232. *Id.* (Marshall, J., dissenting).

be the basis for reasonable suspicion in this case. The sole factor left to justify the stop is the unusually short turnaround time for Sokolow's flight, which may be suspicious, but certainly is not sufficient in itself to find reasonable suspicion.

It is difficult to rationalize how the factors set forth in *Sokolow* are more suggestive of criminality than those in *Reid*.²³³ Yet in *Sokolow*, unlike *Reid*, the Court found it permissible to base reasonable suspicion on facts that, standing alone, do not seem indicative of ongoing criminal activity.²³⁴ For this reason, after *Sokolow*, adopting a totality of the circumstances approach makes justifying a reasonable suspicion intrusion more simple because the factors standing alone do not need to be indicative of criminal behavior, but can be equally characteristic of innocent conduct.²³⁵

3. *Sokolow* diminishes constitutional guarantees of all citizens

By resorting to a totality of the circumstances approach, *Sokolow* not only diminishes the constitutional guarantees of potential defendants, but of equal significance, "diminishes the rights of *all* citizens to be secure in their persons' . . . as they traverse the Nation's airports"²³⁶—a result that is constitutionally impermissible.²³⁷

The DEA does not keep statistical data of the percentage of people stopped pursuant to drug courier profiles who do have drugs,²³⁸ yet some statistics have been developed. The percentage of those stopped is suffi-

233. *Id.* at 15 (Marshall, J., dissenting) ("The facts known to the DEA agents at the time they detained the traveler in this case are scarcely more suggestive of ongoing criminal activity than those in *Reid*.").

234. The bases for the agents' stop in *Sokolow* was that Sokolow paid for tickets with cash, traveled to Miami for a short trip with only carry-on luggage, and appeared nervous. *Id.* at 3. The Court included the fact that Sokolow traveled using a name that did not match the name under which his phone number was listed as a factor that the agents used to establish reasonable suspicion to support their stop. *Id.* It was later revealed, however, that the name under which Sokolow's phone was listed was that of his roommate. *Id.* at 4. The agents were unaware of this at the time of their stop. *Id.*

235. As the Court acknowledged in approving the agents' conduct in *Sokolow*, "[a]ny of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." *Id.* at 9.

236. *Id.* at 11-12 (Marshall, J., dissenting).

237. See U.S. CONST. amend. IV; cf. *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (what person seeks to preserve as private, even in area accessible to public, may be constitutionally protected; bypassing constitutional check of warrant procedure leaves citizens vulnerable to Fourth Amendment violations).

238. Francis K. Toto, Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion In Its Terminal Stage?*, 15 SUFFOLK U. L. REV. 217, 221 (1981).

ciently below those who actually carry drugs²³⁹ to indicate that there is significant infringement on the rights of innocent travelers in the nation's airports,²⁴⁰ particularly if viewed in light of the fact that the statistics may include stops based on less than a constitutionally mandated degree of suspicion.²⁴¹

The purpose of the reasonable suspicion standard as a prerequisite to such seizures is to protect innocent persons from being subjected to "overbearing or harassing" police conduct, carried out solely on the basis of imprecise stereotypes of what criminals should look like or solely on the basis of characteristics such as race.²⁴² Such bases for stops have been strictly abrogated previously by the Court.²⁴³ But after *Sokolow*, a drug courier profile serving to support a stop can be based on a totality of the circumstances in light of an officer's experience,²⁴⁴ which inevitably will include elements that an officer believes characterize drug couriers. This may be a dangerous constitutional infringement to all citizens, as the result may be an increase in stops based on stereotypes²⁴⁵ and prejudice, particularly racial prejudice.²⁴⁶

239. See *infra* note 240 and accompanying text.

240. See, e.g., *United States v. Hooper*, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (DEA agents testified at trial that in 1989 they had detained 600 suspects and of those stops only 10 resulted in arrests); *United States v. Cordell*, 723 F.2d 1283, 1287-88 (7th Cir.) (Sygert, J., concurring) (government admitted that at O'Hare Airport 6 to 12 stops a day were made and only 30% of encounters involved searches which resulted in seizure of narcotics; court noted "many innocent people were being stopped and questioned"), *cert. denied*, 465 U.S. 1209 (1983); *United States v. Price*, 599 F.2d 494, 501 n.8 (2d Cir. 1979) (agent reported that 60% of people stopped had drugs); *United States v. Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976) (during first 18 months of drug courier program, agents watching Detroit Airport searched 142 persons in 96 encounters; controlled substances were found in 77 of these encounters), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

241. As the dissent in *Mendenhall* indicated:

Mr. Justice Powell's conclusion that there were reasonable grounds for suspecting Ms. Mendenhall of criminal activity relies heavily on the assertion that the DEA agents "acted pursuant to a well-planned, and effective, federal law enforcement program." Yet there is no indication that the asserted successes of the "drug courier program" have been obtained by reliance on the kind of nearly random stop involved in this case.

Mendenhall, 446 U.S. at 573 n.11 (White, J., dissenting).

242. *Sokolow*, 490 U.S. at 12 (Marshall, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 14-15 & n.11 (1968)).

243. See *Brignoni-Ponce*, 422 U.S. at 886.

244. *Sokolow*, 490 U.S. at 9-10.

245. Note the repeated reference to what *Sokolow* was wearing (black jump suit and gold chains) in the *Sokolow* opinion. *Id.* at 4-5. This reference to "stereotypical drug dealer attire" had no place in the majority's analysis. "That *Sokolow* was dressed in a black jumpsuit and wore gold jewelry provides no grounds for suspecting wrongdoing." *Id.* at 16 (Marshall, J., dissenting).

246. "Although the DEA has refused to commit the entire [drug courier] profile to writing, the profile clearly contains a racial component." Sheri L. Johnson, *Race and the Decision to*

4. Problems of administration and application

The discrepancy in application of drug courier profiles indicates that their application as a basis for reasonable suspicion has been difficult for courts. Courts must determine "whether in each particular case the combination of facts present and the manner in which they are exhibited justifies a stop."²⁴⁷ This problem of interpretation may be greatly advantageous for law enforcement, as it renders all drug courier profile stops "experimental." That is, an agent will not know if he or she has enough suspicion to justify a stop until a case goes to court—after the possibly invalid encounter has already occurred. In addition, even if it is ultimately found that the agent lacked reasonable suspicion when making the stop, the evidence derived from the stop will in some instances still be admitted.²⁴⁸

The fact that courts have little guidance is additionally problematic. With unclear guidelines courts cannot effectively serve as administrators of the drug courier profile system. By basing reasonable suspicion on a totality of the circumstances that can be derived from a drug courier profile,²⁴⁹ but by failing to articulate what types of factors should comprise a workable drug courier profile, the Court in *Sokolow* reinforces the profile as a subjective tool for law enforcement. Rather than establishing a framework for the profile's application, the Court defers administration to the DEA and its agents.²⁵⁰ Thus, the creation and implementation of

Detain a Suspect, 93 YALE L.J. 214, 234 (1983); see, e.g., *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990) (court invalidated seizure in which suspect was stopped largely because he was black), *petition for reh'g filed* (U.S. May 16, 1991) (No. 90-17638); *United States v. Taylor*, 917 F.2d 1402, 1408-09 (6th Cir. 1990) (defendant was only black person who had deplaned; officer admitted that there was no true drug courier profile, and that he had stopped defendant because he looked "different" from other travelers; court concluded "agents more apt to stop [a defendant] because of race"), *vacated, reh'g granted*, 925 F.2d 990 (1991); Mark Curriden, *Drug Profile Hit*, A.B.A. J., May 1991, at 25 (black former baseball star Joe Morgan prevailed in suit against Los Angeles Police Department after being wrongfully detained as suspected drug courier and beaten to ground).

247. *United States v. Saperstein*, 723 F.2d 1221, 1228 (6th Cir. 1983).

248. See *United States v. White*, 890 F.2d 1413 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 77 (1990), in which the court found that the officers lacked reasonable suspicion to stop the defendant and to detain his luggage to procure a search warrant, however, the court admitted the evidence of contraband because the officers acted in "good faith." *Id.* at 1419. The good faith exception to the exclusionary rule, defined by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984), provides that evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid. *Id.* at 918.

249. *Sokolow*, 490 U.S. at 10. Referring to the factors used to establish reasonable suspicion in *Sokolow's* case, the Court stipulated that "the fact that these factors may be set forth in a [drug courier] 'profile' does not somehow detract from their evidentiary significance." *Id.*

250. Indeed, as one commentator has noted:

drug courier profiles—a profile that the Court sanctions as being a valid basis for a stop with a lesser degree of protection than previously has been mandated²⁵¹—is in the hands of those whom the Fourth Amendment is designed to check.²⁵² With so little guidance, courts will have difficulty monitoring the profile effectively.²⁵³

This notion is illustrated by the inconsistent application of *Sokolow* by the lower courts. The Court's decision in *Sokolow* leaves lower courts only with the vague facts set forth in *Sokolow* as guidance, and these factors may be constitutionally deficient to justify a reasonable suspicion stop in many instances.²⁵⁴ The practical effect of the Court's decision in

The most remarkable attribute of the judicial response to the drug courier profile has been the willingness of the courts to accept government claims that a traveler's conduct conformed to the profile in the absence of any specific definition of the characteristics comprising it. Defining the profile is a prerequisite to interpreting its impact on constitutional decisionmaking. For if there are characteristic behaviors which justify intrusions upon interests protected by the Fourth Amendment because they are common to drug couriers, the government must be able to identify these characteristics in order to rely upon them.

Cloud, *supra* note 4, at 869.

251. See *supra* notes 14-21.

252. See *infra* notes 260-64 and accompanying text. "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

253. Becton, *supra* note 191, at 472.

254. See, e.g., *Taylor*, 917 F.2d at 1409 (no reasonable suspicion found to support stop of black suspect who arrived on flight from Miami, dressed in casual manner, and hurried through terminal clutching his luggage); *United States v. Millan*, 912 F.2d 1014, 1017 (8th Cir. 1990) (insufficient bases to support reasonable suspicion stop when agent, at time he stopped suspect, knew that he had arrived on early morning flight, was one of first passengers to deplane, carried garment bag and checked no luggage, walked rapidly through airport without distraction, purchased one-way ticket with cash day before flight, and had bulge in his coat); *White*, 890 F.2d at 1417 (court compared characteristics displayed by suspect to those in *Reid*, and found no basis for reasonable suspicion stop of suspect or his luggage when suspect deplaned from source-city, arrived in early morning, purchased one-way ticket with cash, held carry-on bag closely with both hands, appeared nervous as he walked through airport, but seizure subsequently upheld based on good faith exception). *But see United States v. Rose*, 889 F.2d 1490, 1496 (6th Cir. 1989) (reasonable suspicion found to support stop when suspect arrived from source-city carrying only duffel bag, walked rapidly and nervously through terminal, stopped to make several hurried phone calls, and then rapidly departed airline terminal and proceeded to car parked in short-term parking lot); *United States v. Malone*, 886 F.2d 1162, 1165 (9th Cir. 1989) (DEA agents had reasonable, articulable suspicion of drug courier activity which warranted brief detention of defendant and his bag when suspect was young, black male wearing gang colors, traveled on airline favored by gang members transporting drugs, glanced around airport furtively, had no identification, gave agent "hard" look, and carried only one bag for three-day stay); *United States v. Ayarza*, 874 F.2d 647, 651 (9th Cir. 1989) (state trooper had reasonable and articulable suspicion at time he stopped defendant even though passenger neither traveled under alias, nor used evasive route through airport, but

Sokolow is to make it possible for an agent to stop a suspect based on little more than his or her gut instinct that a suspect may be trafficking drugs.²⁵⁵

5. "Chameleon-like quality"

Absent a judicial standard, the inherent malleability of drug courier profiles is troubling. Drug courier profiles are not written down and they are ever-changing.²⁵⁶ "Some commentators and courts have even suggested that profiles completely change from one occurrence to another, allowing an agent to stop almost anyone."²⁵⁷ The approach taken in *Sokolow* falls short of constitutional protection because it allows reasonable suspicion to be based on a set of factors which often have "a chameleon-like way of adapting to any particular set of observations."²⁵⁸ "Rather than use the profile as a reliable guideline, agents may selectively

made short trip to known source city, walked quickly through airport, seemed to be evading security, and repeatedly glanced at window which reflected interior of concourse), *cert. denied*, 110 S. Ct. 847 (1990).

255. This is especially supported by the fact that an officer's experience is a component of the decision to stop a suspect. See *Terry*, 392 U.S. at 30. However, the DEA has trained narcotics officers to identify drug smugglers on the basis of circumstantial evidence seen in a drug courier profile. *Sokolow*, 490 U.S. at 10 n.6. Thus, any check that there may be to guard against stops based on an officer's subjective interpretation of what a drug courier should look like is removed. See, e.g., *Rose*, 889 F.2d 1490, 1497 (Martin, J., concurring) (United States declared that defendant must have satisfied drug courier profile, because when searched, he had drugs).

256. See *Becton*, *supra* note 191, at 418, 438. "The characteristics to which officers, and some courts, attach significance in defense of narcotics-related airport stops are disconcertingly interchangeable." *White*, 890 F.2d at 1418.

257. See *Becton*, *supra* note 191, at 433-38. One agent candidly admitted that the profile in a particular case consists of anything that arouses suspicion. *United States v. Chamblis*, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977).

258. *Sokolow*, 831 F.2d at 1418. Compare *Mendenhall*, 446 U.S. at 564 (suspect last to deplane) with *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980) (deplaned from middle) and *United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982) (among first to deplane), *cert. denied*, 460 U.S. 1068 (1983); *United States v. Millan*, 912 F.2d 1014, 1017 (8th Cir. 1990) (one-way ticket) with *United States v. Jaramillo*, 891 F.2d 620, 623 (7th Cir. 1989) (open return date), *cert. denied*, 110 S. Ct. 1791 (1990) and *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (round-trip ticket); *Sokolow*, 831 F.2d at 1415 (paid for tickets with cash from roll of \$20 bills) with *Reid*, 448 U.S. at 439 (paid for tickets with credit card); *Sokolow*, 831 F.2d at 1418 (changed planes) with *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (non-stop flight); *Mendenhall*, 446 U.S. at 547 (no luggage) with *Reid*, 448 U.S. at 441 (shoulder bag) and *Buffkins*, 922 F.2d at 467 (luggage and teddy bear) and *Royer*, 460 U.S. at 494 n.2 (American Tourister luggage which looked heavy) and *White*, 890 F.2d at 1414 (holding small carry-on bag tucked under arm with both hands instead of using shoulder strap) and *United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979) (one carry-on and two checked pieces of luggage); *Reid*, 448 U.S. at 441 (traveling together but attempting to appear separate) with *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980) (traveling with companion) and *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978) (traveling alone).

modify the profile during the initial stop and thereafter customize it to fit any hapless traveler who had the misfortune to catch the agent's 'trained eye.'²⁵⁹

6. Promotes retroactive validation and "voluntary" encounters

Adopting a totality of the circumstances approach based on drug courier profiles creates the dangerous possibility of retroactive validation of a stop of a suspected drug courier.²⁶⁰ That is, by sanctioning drug courier profiles to support reasonable suspicion, but by failing to define components of drug courier profiles, the Court leaves open the possibility that an officer may stop a suspect based on a hunch,²⁶¹ and then later justify the stop by saying that the officer had reasonable suspicion that the suspect, under a totality of the circumstances, fit the particular officer's drug courier profile.²⁶² The profile, in this case, could change to match the particular suspect's characteristics after the stop.²⁶³ This possibility is increasingly difficult to overcome in a Fourth Amendment argument, because added to the danger of retroactive validation is the argument that the initial encounter between the officer and the suspect was voluntary, and thus not invoking Fourth Amendment protection.²⁶⁴

259. *Becton*, *supra* note 191, at 438.

260. *See* *Cloud*, *supra* note 4, at 858 ("Proof that the profile characteristics relied upon were defined in advance of a seizure is an essential first step for effective judicial review. Otherwise the profile can be adjusted to apply to the facts of individual cases after the seizure has occurred.").

261. This is a practice clearly proscribed by Fourth Amendment constitutional guarantees. *See Terry*, 392 U.S. at 27.

262. The danger is that officers may label characteristics "drug courier profiles" just to justify a stop. The "use of the words 'drug courier profile' . . . adds nothing to the factors observed; those factors must rise to the level of reasonable suspicion or fall to the level of a mere hunch on their own." *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D.N.Y. 1977). Indeed, when questioned by the court about his stop of Sokolow, Agent Kempshall testified that he "had all the classic aspects of a drug courier." *Sokolow*, 490 U.S. at 10 n.6.

263. *See Becton*, *supra* note 191, at 438 ("Multiplicity of inconsistent [profile] characteristics strongly suggests that agents justify the great majority of airport drug courier stops retrospectively.").

264. Not all police-citizen encounters invoke Fourth Amendment protection. "[Police officers enjoy] the liberty (again, possessed by every citizen) to address questions to other persons for ordinarily, the person addressed has an equal right to ignore his [or her] interrogator and walk away." *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [it be deemed] that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16. The Court adopted this approach in *Mendenhall*, 446 U.S. at 551. The standard adopted by the Court in determining whether an encounter was voluntary, and thereby not invoking Fourth Amendment protection, is whether a reasonable person similarly situated would have believed that they were free to leave. *Id.* at 552-53. In *Mendenhall*, the Court concluded that "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away,

As law enforcement officers may initially deem an encounter to be voluntary, information that they gather during this "voluntary" encounter may become the basis for their reasonable suspicion later.²⁶⁵

E. Balancing Test

To justify an intrusion based on less than probable cause, there must be a balancing between the relative intrusiveness to a citizen, and a legitimate governmental objective.²⁶⁶ Thus, to determine the constitutionality of such stops, it is necessary to consider whether the relative intrusiveness of the governmental action is outweighed by a compelling governmental interest in combatting drug trafficking. In certain instances, the United States Supreme Court has employed a "balancing test" to justify

there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* at 554.

265. See D'Ambrosio, *supra* note 4, at 282. The "free to leave" standard of *Mendenhall* has been criticized as "artificial" and as based on the false assumption that ordinary citizens believe that they are normally free to cut police inquiries short. Edmund J. Butterfoss, *Bright Line Seizures: The Need For Clarity In Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988). Indeed, the Court has noted that "[d]rug interdiction efforts have led to the use of police surveillance at airports, train stations and bus depots. Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions." *Florida v. Bostick*, 111 S. Ct. 2382, 2384 (1991). This is precipitated by problems associated with defining limitations of voluntary police encounters.

In general, not all police encounters invoke Fourth Amendment protection. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring). Rather, police are free to approach a suspected traveler, provided that a reasonable person would understand that they were free to leave. *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991). This "free to leave" standard is nebulous at best. The Court has previously ruled that a suspect does not have to be informed that he or she is free to leave for an encounter to be deemed voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973). Furthermore, in the past year alone the Court has held that a person is not seized—free to leave for the purposes of the Fourth Amendment—until actually tackled to the ground when being pursued by police. *Hodari D.*, 111 S. Ct. at 1559. Further, passengers on a bus are not seized when approached by officers, even though physically restrained from leaving the bus. *Bostick*, 111 S. Ct. at 2387. As the Court noted, "when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter [T]he mere fact that [a suspect] did not feel free to leave the bus does not mean that the police seized him." *Id.* This notion is particularly threatening in light of the Court's acknowledgement that "[t]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime." *Florida v. Jimeno*, 111 S. Ct. 1801, 1804 (1991).

266. *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967). The permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989).

stops based on less than probable cause,²⁶⁷ or, in limited instances, has required no level of suspicion whatsoever.²⁶⁸ However, "[a] central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."²⁶⁹

The Court in *United States v. Sokolow*,²⁷⁰ in effect, has justified stops on less than the degree of suspicion that the Court has mandated in previous decisions addressing reasonable suspicion stops,²⁷¹ yet has employed no balancing test to justify this practice. Furthermore, in previous situations in which the Court has applied a balancing test approach, the Court has emphasized a lack of discrimination in who will be subject to the intrusion,²⁷² a lack of discretion in administration,²⁷³ and has demonstrated the impracticability of utilizing less intrusive means.²⁷⁴ The Court in *Sokolow* has not identified any of these considerations in its analysis. This practice represents intellectual dishonesty in a blatant form.²⁷⁵

F. *The Implications of United States v. Sokolow*

Although there is a compelling need in this country to curtail illicit drug use,²⁷⁶ "the 'War on Drugs' can never license law enforcement offi-

267. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

268. *See, e.g., id.* (mandatory drug testing of certain customs workers permissible in light of governmental interest in safety, limited discretion in administering test, and relatively minor nature of intrusion).

269. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

270. 490 U.S. 1 (1989).

271. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1967); *see also supra* notes 192-94 and accompanying text.

272. *See, e.g., Van Raab*, 489 U.S. at 666 (every employee applying for transfer to covered position must take drug test and is made aware of this requirement).

273. *See, e.g., Brown*, 443 U.S. at 49. "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.*; *see also Camara*, 387 U.S. 523, 532 (1967), noting absence of "discretion of the official in the field."

274. *Skinner*, 489 U.S. at 619.

275. Justice Brennan characterized this practice in his dissenting opinion in *Michigan v. Sitz*, 110 S. Ct. 2481, 2488-89 (1990) (Brennan, J., dissenting):

The majority opinion creates the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures. . . . This is not the case. In most cases, the police must possess probable cause for a seizure to be judged reasonable . . . only when a seizure is *substantially* less intrusive . . . than a typical arrest is the general rule replaced by a balancing test.

Id. (Brennan, J., dissenting).

276. Indeed, the Court has identified the "veritable national crisis in law enforcement

cial to disregard the rights guaranteed by the Fourth Amendment of our Constitution."²⁷⁷ The Fourth Amendment embodies dual concerns of protecting privacy and avoiding arbitrariness and abuse.²⁷⁸ "The obvious necessity for police interdiction of drug couriers and traffickers does not outweigh the constitutional standards for police intrusions into the affairs of ordinary citizens."²⁷⁹ This is so even if an airport encounter is deemed to be relatively nonintrusive.²⁸⁰ Precisely because the need for action against illegal drug trafficking is so compelling, the need for vigilance in protection of constitutional interests becomes great.²⁸¹

The reasonable suspicion standard is a standard implemented to allow for governmental action based on less than probable cause when there is a compelling government interest.²⁸² Nevertheless, the decision in *United States v. Sokolow*²⁸³ and its subsequent application dangerously jeopardizes the guarantees of the Fourth Amendment by making it possible for government agents to sidestep the safeguards meant to be provided by the reasonable suspicion standard. These constitutional safeguards are necessary to guard the rights of all citizens. "[S]imple good faith on the part of [an] officer . . . is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure only in the discretion of the police."²⁸⁴ The use of drug courier profiles as sanctioned in *Sokolow* allows for stops based on less than the minimum mandated by the Fourth Amendment, and increases the possibility of police harassment of innocent travelers. This result is constitutionally suspect. "That the [Fourth] [A.]mendment may, at times, protect the criminal is the price that must

caused by the smuggling of illicit narcotics" as "one of the greatest problems affecting the health and welfare of our population." *National Treasury Employees Union v. Van Raab*, 489 U.S. 656, 668 (1989).

277. *United States v. Taylor*, 917 F.2d 1402, 1412 (6th Cir. 1990), *vacated, reh'g granted*, 925 F.2d 990 (1991).

278. *Brown*, 443 U.S. at 51.

279. *United States v. Rose*, 889 F.2d 1490, 1497 (6th Cir. 1989) (Martin, J., concurring).

280. "Countenancing large numbers of minor, though unwarranted, intrusions erodes the principle of freedom from official interference guaranteed by the Fourth Amendment, and invites the use of arbitrary or discriminatory principles of selection abhorrent to the Fourth Amendment." *United States v. Cordell*, 723 F.2d 1283, 1288 (7th Cir. 1983) (Swygert, J., concurring), *cert. denied*, 465 U.S. 1029 (1984).

281. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 635 (1989). As Justice Marshall notes in his dissent: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure When we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Id.* (Marshall, J., dissenting).

282. *See Terry v. Ohio*, 392 U.S. 1, 23-25 (1968).

283. 490 U.S. 1 (1989).

284. *Beck v. Ohio*, 379 U.S. 89, 97 (1964).

be paid if we are to keep these protections alive for all people."²⁸⁵

The decision in *Sokolow* is particularly foreboding in light of subsequent decisions by the Court. After *Sokolow*, the Court has recognized: (1) that information to support a reasonable suspicion stop can be less reliable than that required to support a stop based on probable cause;²⁸⁶ (2) law enforcement officers may, with no degree of suspicion whatsoever, approach passengers on buses and request to search their luggage, despite the fact that the bus passengers may not physically be free to leave;²⁸⁷ and (3) a stop will be deemed to be a voluntary encounter up until the point that a suspect is tackled to the ground.²⁸⁸ As the dissent aptly points out in *Florida v. Bostick*,²⁸⁹ "[i]n this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America."²⁹⁰

III. RECOMMENDATION: ABROGATE THE USE OF DRUG COURIER PROFILES

By adopting a totality of the circumstances approach in *United States v. Sokolow*,²⁹¹ the United States Supreme Court subjects innocent travelers of the nation's airports to unconstitutional harassment by drug enforcement agents, and allows these agents to stop suspects based on reasonable suspicion garnered from characteristics that can be completely benign.²⁹² The approach validated by the Court is neither a minor intrusion, nor is it an effective means of halting drug trafficking. There is a need to analyze not just the relative gravity of the intrusion

285. *Cordell*, 723 F.2d at 1288.

286. *Alabama v. White*, 110 S. Ct. 2412 (1990).

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Id. at 2416.

287. *Florida v. Bostick*, 111 S. Ct. 2382 (1991). The Court in *Bostick* posited that these encounters would still be voluntary; *see supra* notes 264-65 and accompanying text. The Court also specifically indicated that the rule set forth in the case applies equally "to encounters that take place on a city street or in an airport lobby." *Bostick*, 111 S. Ct. at 2389.

288. *California v. Hodari D.*, 111 S. Ct. 1547, 1552 (1991). The Court reasoned that the suspect was free to leave up until the point that he was actually knocked to the ground. *Id.* at 1551-52. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 1550.

289. 111 S. Ct. 2382.

290. *Id.* at 2391 (Marshall, J., dissenting).

291. 490 U.S. 1 (1989).

292. *See supra* note 207 and accompanying text.

against a potential defendant, but also against the *public at large*,²⁹³ especially when viewed in relation to subsequent decisions by the Court.

To protect the Fourth Amendment interests of all citizens, the Court should do away with drug courier profiles as a basis of reasonable suspicion to support airport stops of suspected drug traffickers. Drug courier profiles have been characterized as "prejudicial because of the potential they have for including innocent citizens as profiled drug couriers,"²⁹⁴ have been rejected by some courts as evidence at trial because of their inherent unreliability,²⁹⁵ and have come to serve as an artificial means for agents to justify intrusions based on reasonable suspicion.²⁹⁶ Furthermore, drug courier profiles have questionable legitimate efficacy.²⁹⁷ Drug courier profiles are not necessary; protection of the nation's airports can be achieved just as effectively through other means. There are two compelling alternatives.

First, rather than basing reasonable suspicion on an amorphous and malleable set of characteristics, which has proven to be problematic for several of the reasons outlined above, the Court should go back to a traditional *Terry*-type analysis for airport stops. That is, rather than relying on a "drug courier profile" to stop a suspect, an officer must have reasonable, articulable facts supporting a finding that "criminal activity may be afoot."²⁹⁸ This analysis would protect the Fourth Amendment interests of both innocent travelers, and potential defendants, by preventing stops from being based on less than reasonable suspicion, and by preventing arrests from being retroactively justified based on facts constructed after a suspect has been stopped on less than reasonable suspicion.

This approach would ensure more fairness to those invoking Fourth Amendment protection, and would simultaneously ease enforcement and

293. See *United States v. Sokolow*, 831 F.2d 1413, 1425 (9th Cir. 1987) (Wiggins, J., dissenting), *rev'd*, 490 U.S. 1 (1989).

294. *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983).

295. See, e.g., *United States v. Lui*, No. 89-50557, 1991 U.S. App. LEXIS 17413, at *5 (9th Cir. Aug. 5, 1991), in which the court noted:

Drug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity. Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation.

Id.

296. See *supra* notes 260-65 and accompanying text.

297. "Even if such profiles had reliable predictive value, their utility would be short-lived, for drug couriers will adapt their behavior to sidestep detection from profile-focused officers. *Sokolow*, 490 U.S. at 14 n.1 (Marshall, J., dissenting).

298. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

administration because it would not be necessary for courts to continually evaluate the ever-changing drug courier profiles on a case-by-case basis.²⁹⁹ The Court should adopt guidelines similar to those advised by the Ninth Circuit in *United States v. Sokolow*,³⁰⁰ such that before "drug courier" stops are upheld as being validly based on reasonable suspicion, an officer must satisfy a threshold determination of whether there existed specific, articulable facts sufficient to *objectively* justify a stop.³⁰¹

An alternative recommendation that would achieve the desired effect of thwarting drug trafficking, would support ease of administration, and that is more constitutionally sound, is to subject *all* travelers at airports to a "search" in a truly *de minimis* fashion, for example, by having all luggage sniffed for drugs by drug-detecting dogs. This is consistent with the "searches" that all airline travelers must currently undergo for weapons before boarding aircraft.³⁰² A traveler who feels that such a

299. This is especially true since judges do not have access to profiles, but must rely on what officers report the profile characteristics to be. See D'Ambrosio, *supra* note 4, at 294.

300. 831 F.2d 1413.

301. *Id.* at 1428. The necessity of a return to this approach has also been recognized by the Sixth Circuit in *United States v. Saperstein*, 723 F.2d 1221, 1229 n.11 (6th Cir. 1983):

A return to *Terry v. Ohio* is the clearest way to resolve the Fourth Amendment issues raised in the [drug courier] context. . . . In light of the Supreme Court's refusal to issue a clear statement on the use of the profile and the facially inconsistent results reached in the case by case treatment of the issue, both in the Supreme Court and in most lower courts, a return to the majority statement in *Terry* is only logical. The inquiry necessarily narrows to the bounds of *Terry*; whether there are reasonable, articulable facts and rational inferences from those facts which would justify any stop and, if so, whether the intrusion is sufficiently limited to remain justifiable absent probable cause. It is only in terms of this basic Fourth Amendment analysis that the drug courier profile can be properly addressed.

Id. When *Saperstein* was decided in 1983, the only non-plurality decision by the United States Supreme Court that addressed the reasonable suspicion standard in the context of drug courier profiles was *Reid v. Georgia*, 448 U.S. 438 (1980), and *Reid* was a per curiam decision. *Saperstein*, 723 F.2d at 1229 n.11. Although both *Mendenhall* and *Sokolow* have been decided subsequent to *Saperstein*, in light of the absence of guidelines provided by the United States Supreme Court in the drug courier context, the reasoning on this point in *Saperstein* remains sound.

302. This approach is also consistent with the position that the Supreme Court has taken in the area of random stops of automobiles in *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse*, the Court deemed that purely random stops of automobiles were not constitutionally permissible, but suggested alternatives that could be acceptable, such as stopping every tenth car, *id.* at 664 (Blackmun, J., concurring), or stopping all oncoming traffic at road-block type stops, *id.* at 657 (Blackmun, J., concurring). The Court reasoned that this type of stop is less intrusive than a random stop because it would not involve an unconstrained exercise of discretion, and at traffic checkpoint stops a person can see that there are others being stopped, and there are visible signs of officers' authority, such that a person stopped is much less likely to be frightened or annoyed by the intrusion. *Id.* (Blackmun, J., concurring). The approach suggested in *Prouse* has recently been adopted by the Court in *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990), in which the Court deemed that stopping *all* cars at sobriety checkpoints is constitutionally permissible. *Id.* at 2488.

search is unduly intrusive could find alternative means of transportation. Since trafficking drugs by means other than air-travel may be impractical, if not impossible, at least some drug trafficking would be thwarted. In addition, the randomness and concomitant constitutional violations, which the use of drug courier stops seems to advance, would be abated.

IV. CONCLUSION

The United States Supreme Court's decision in *United States v. Sokolow*,³⁰³ which supports the notion that reasonable suspicion based on a totality of the circumstances can be founded on factors loosely defined as a "drug courier profile," is inherently unreasonable. The decision promotes the application of profiles to justify stops based on subjective factors—factors that can be equally indicative of innocent behavior. This result is inconsistent with the Court's established standard of objective indicia of ongoing criminal activity to support stops based on reasonable suspicion.³⁰⁴ Society's interest in deterring drug smuggling does not outweigh the guarantees of constitutional protection to all citizens against overbearing and harassing police conduct when there are less arbitrary means of enforcing anti-smuggling programs.

Rather than allowing airport stops to be based on drug courier profiles, the Court should abrogate the use of such profiles and mandate that airport stops be governed, as stops in other circumstances, by a traditional reasonable suspicion analysis. In the alternative, the Court should require that all airport travelers be subject to identical scrutiny when traveling through the nation's airports—a result that is consistent with airport security in other contexts, and a result that would eliminate random governmental intrusions based on factors that fail to satisfy the guarantees of the Constitution.

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303. 490 U.S. 1 (1989).

304. See *supra* notes 189-93 and accompanying text.

