

# MILES OF WHITE LINES: USE OF THE DRUG COURIER PROFILE BY STATE LAW ENFORCEMENT AGENCIES ON THE HIGHWAY AS REASONABLE SUSPICION TO DETAIN MOTORISTS

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In an effort to stem the transportation of drugs upon the nation's highways, some law enforcement agencies now routinely conduct investigatory detentions of motorists based solely upon a "drug courier profile."<sup>1</sup> That is, upon identifying certain characteristics in a passing motorist,<sup>2</sup> the officer signals him to pull over for questioning, which may or may not culminate in a search of the vehicle and seizure of drugs. The justification advanced for this procedure is that the drug courier profile, standing alone, supports valid reasonable suspicion to conduct a *Terry*<sup>3</sup> investigative detention.

The detention of motorists based upon their exhibition of drug courier profile characteristics originated from the drug courier profile first implemented by the federal Drug Enforcement Agency (DEA) in the mid-1970s.<sup>4</sup> This profile was developed to detect those carrying illegal drugs through airports. In turn, the airport drug courier profile originated from the Federal Aeronautics Administration's (FAA) "anti-skyjacking" profile.<sup>5</sup> The

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1. The drug courier profile is a smorgasboard of objective and subjective characteristics thought to distinguish those who are carrying illicit narcotics through airports and on highways from the innocent traveling public. One court has referred to the profile as a "rather loosely formulated list of characteristics" used by the Drug Enforcement Agency in airports. *United States v. McCaleb*, 552 F.2d 717, 719 (6th Cir. 1977).

2. For discussion of specific characteristics of the profile used on the highways, see *infra* notes 72-91 and accompanying text.

3. *Terry v. Ohio*, 392 U.S. 1 (1968). The term "*Terry* stop" has become constitutional shorthand for detention of a citizen based on something less than probable cause, but more than an unparticularized hunch. This intermediate standard is known as *reasonable suspicion*. In *Terry*, the officer observed particular behavior of three men which led him to believe, based upon his experience in law enforcement, that the crime of robbery was imminent. Upon attempting to question one of the men, the officer received a "mumbled response," insufficient to allay his suspicions. The officer then seized one of the men and patted down his outer clothing for weapons. Feeling a gun, he reached inside and withdrew the weapon. The *Terry* principle allowing authorities to detain persons briefly based upon reasonable suspicion also applies to motor vehicle stops. *Delaware v. Prouse*, 440 U.S. 648 (1979). Furthermore, a protective search of the passenger compartment of the vehicle for weapons is reasonable under *Terry*. *Michigan v. Long*, 463 U.S. 1032 (1983).

4. *State v. Cohen*, 103 N.M. 558, 565, 711 P.2d 3, 11 (1985) (Hendley, J., dissenting).

5. Chardak, *Airport Drug Stops: Redefining Reasonable Suspicion Based on the Characteristics of the Drug Courier Profile*, 26 B.C.L. REV. 693, 694 n.13 (1985).

purpose of the FAA profile was to detect people who were smuggling weapons aboard commercial airplanes.

This Note examines the high fourth amendment standard set by the FAA skyjacker profile and the failure of its less illustrious progeny, the DEA's drug courier profile, to live up to that standard. Additionally, it examines the extension of the DEA's airport drug courier profile to the highway setting. Finally, it analyzes the reaction of courts to this latest development in the evolution of criminal profiles.

### SELECTIVE, OBJECTIVE, AND ACCURATE: HISTORY OF THE FAA SKYJACKER PERSONALITY PROFILE

In 1968, the FAA appointed a task force to develop a means of combating the numerous skyjackings suffered by the airline industry. The task force's main purpose was to reconcile the needs and concerns of public air transportation with an effective means of skyjacker detection.<sup>6</sup> The task force was composed not only of FAA and airline personnel, but of representatives of the Justice and Commerce Departments, including individuals trained in psychology, law, engineering, and administration.<sup>7</sup> This diversified task force studied the characteristics of all known skyjackers to date<sup>8</sup> and compiled a list of as many as thirty characteristics which differentiate the skyjacker from the general air traveling public.<sup>9</sup> These characteristics were not revealed to the public, nor were they revealed to the accused skyjackers at trial. It was not unusual for a court to receive *in camera* testimony regarding the skyjacker profile characteristics and to expressly uphold the necessity for secrecy of the profile.<sup>10</sup>

At trial, concealing from the skyjacking defendant what special characteristics he exhibited made it difficult for him to dispute his selection as a possible skyjacker. This insulation from public scrutiny represented the skyjacker profile's greatest potential for abuse by those doing the screening.<sup>11</sup> One commentator has suggested that interposing the judiciary between the public and the FAA is the next best thing to public disclosure of the profile, and permits preservation of the secrecy needed to prevent skyjackers from simulating acceptable profiles.<sup>12</sup> Whatever the reasons be-

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6. *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).

7. *Id.*

8. *Id.*

9. *Id.* at 1086. It has been suggested that either only a few of the 25-30 profile characteristics were given at one time to the screener, or that a traveler could be selected for further screening based upon matching only a couple of the characteristics. Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657, 713 n.305 (1974).

10. For example, the Eastern District Court of New York in *United States v. Lopez* excluded the defendant from an *in camera* hearing concerning the profile factors. Defense counsel was permitted to hear the elements of the profile allegedly exhibited by his client after being instructed not to reveal them. *Lopez*, 328 F. Supp. at 1086. The defendant in *Lopez* had been selected by an airline employee as fitting the profile and upon activating the magnetometer, he was requested to produce identification, which he failed to do. After another failed attempt to pass through the magnetometer, airline security agents removed defendant to a private area where his outer clothing was frisked. Agents discovered a tinfoil-wrapped package of heroin. *Id.* at 1082.

11. Andrews, *supra* note 9, at 733.

12. *Id.*

hind secrecy, the FAA successfully withheld the contents of the skyjacker profile from the public for a number of years.

The skyjacker profile generally survives judicial review.<sup>13</sup> There are several reasons for this uniform judicial approval of the FAA's profile. One is the profile's neutrality toward characteristics such as race, ethnicity, affluence, and grooming factors such as manner of dress or hairstyle.<sup>14</sup> Courts also approve of the profile because fewer than one-half of one percent of air travelers fit the description. This suggests that the profile is both reliable and selective.<sup>15</sup> Statistically, the profile was also quite accurate, with over 90% of skyjackers surveyed during the test period meeting the profile.<sup>16</sup>

Another reason for favorable treatment by the judiciary is that the skyjacker profile can be—and usually is—applied by non-law enforcement personnel. Non-law enforcement screeners, such as airline ticket clerks, generally have not invested their professional credibility in identifying suspects, and therefore may have less personal interest in identifying suspects.<sup>17</sup> Personal involvement, it is feared, may cause an unconscious warping of the profile factors, allowing the screener to provoke unwarranted confrontations.<sup>18</sup>

### *Mechanics of the Skyjacker Profile*

Observation of travelers under a profile is only one part of the FAA's three-pronged screening procedure, which at one time contained as many as seven components.<sup>19</sup> When the system was first implemented, the FAA anticipated that only those travelers who exhibited profile characteristics, activated the magnetometer (metal detector) at the boarding gate and failed to produce identification when asked by a sky marshal would be subject to a baggage or body search.<sup>20</sup> The FAA later omitted failure to produce identification as a profile factor, as there was no conclusive evidence that this factor correlated to skyjacking tendencies.<sup>21</sup>

The thrust of the skyjacking profile was that the FAA took only the least intrusive measures first. Observation of a passenger for profile factors involved no contact with his person and the FAA interposed several steps between observation of a passenger and the last resort of searching his person.<sup>22</sup> Where those administering the entire screening procedure omitted

13. The leading decision approving use and secrecy of the skyjacker profile is *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971). Other favorable opinions include: *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

14. *United States v. Slocum*, 464 F.2d 1180, 1183 (3d Cir. 1972). Since the skyjacker profile is secret, the public must rely upon judicial assurances that the factors listed in the text are, in fact, not considered. For a more detailed discussion, see *supra* notes 146-55 and accompanying text.

15. Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036, 1040 (1973).

16. *Lopez*, 328 F. Supp. at 1086.

17. *Andrews*, *supra* note 9, at 728.

18. *Id.*

19. *Id.* at 716-19.

20. *Id.* at 660.

21. *Id.* at 721-22.

22. *Id.* at 719. After the screener "selected" a person through application of the profile, security agents subjected the "selectee" to magnetometer check and wand sweep. The selectee was also

steps, or took steps in improper sequence, judicial approval of the profile and the screening system in general was more hesitant.<sup>23</sup>

Through the successful use of the skyjacker profile at the nation's airports, the FAA paved the way for the DEA to use the same tool in its battle against narcotics traffic.<sup>24</sup> A profile was devised whereby DEA agents, stationed at strategic points in an airport terminal, could distinguish the drug courier or "drug mule" from the innocent air traveler. The resulting detentions of contraband-carrying passengers based on this drug courier profile predictably generated litigation. Federal courts were confronted with the question of whether drug courier profiles were a constitutionally acceptable law enforcement tool.<sup>25</sup>

### THE POTENTIAL FOR ABUSE: DRUG COURIER PROFILE FACTORS APPLIED TO THE AIRPORT SETTING

Unlike the skyjacker profile, the drug courier profile is not secret.<sup>26</sup> The elements of the drug courier profile can be divided into three categories. First, there are those characteristics the DEA agent may observe before making contact with the suspect; second, those observed during the initial contact/questioning; and third, those which are normally observed during the subsequent search of the suspect.<sup>27</sup>

#### *Before Initial Contact*

The first factor the DEA agent considers when applying the profile is

questioned in a private area, and, prior to 1973, airline security agents asked selectees for their identification. *Id.*

23. *Id.* For example, see *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974)(search of the person must be preceded by less intrusive measures).

24. Chardak, *supra* note 5, at 694 n.13.

25. Credit for the creation of the drug courier profile is generally attributed to Special Agent Paul Markonni, who, while assigned to the Detroit Drug Enforcement Agency Office, "compiled a list of characteristics which he and his colleagues felt most couriers of illicit narcotics who came through the Detroit Airport, possessed." Green & Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 269-70 (1982).

In 1981, the Fifth Circuit opened its opinion in *United States v. Williams* with this comment: "In this appeal we are once again asked to determine whether the evidence taken pursuant to one of the unerring hunches of the ubiquitous Agent Paul Markonni should have been suppressed . . . . While not whole heartedly (sic) endorsing the drug courier profile . . . we affirm appellant's conviction." 647 F.2d 588, 589. In *United States v. Berd*, the court similarly observed that: "This case presents yet another chapter in the life of DEA Special Agent Paul Markonni." 634 F.2d 979, 981 (5th Cir. 1981). Other cases involving Markonni seizures include: *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

26. It is unclear whether the DEA ever requested that its elements not be revealed.

27. Agent Markonni preferred to divide profile characteristics into "primary" (of greater significance) and "secondary" (of lesser significance) categories. *Primary characteristics*: (1) arrival from or departure to an unidentified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying large amounts of currency in many thousands of dollars; (6) purchase of airline tickets with large amounts of small bills; (7) unusual nervousness beyond that ordinarily exhibited by passengers. *Secondary characteristics*: (1) the almost exclusive use of public transportation, especially taxis, in leaving the airport; (2) immediately making a phone call upon deplaning; (3) leaving a false or fictitious call-back number with airline reservations; (4) excessively frequent travel to source or use cities. *Elmore*, 595 F.2d at 1039 n.3. For the purposes of this Note, the three categories listed in the text will be used.

whether the suspect arrived from a "source" city, a major city through which drugs enter the United States—most notably, Los Angeles, San Diego, Miami and New York.<sup>28</sup> Corresponding to source cities are "use" cities, destinations to which the drug couriers travel to dispose of their cargoes. Thus, air travel between certain cities, by itself, distinguishes all individuals on a particular flight as suspects who merit further DEA observation.<sup>29</sup>

The DEA agent then continues surveillance of passengers from the selected flight to see whether any of them exhibit additional profile factors such as: being the last person off the plane,<sup>30</sup> having little, empty, or no luggage;<sup>31</sup> trying to conceal the fact that one is traveling with a companion;<sup>32</sup> placing a telephone call immediately upon arrival,<sup>33</sup> being a recognizable drug trafficker;<sup>34</sup> looking around to see that one is not being followed;<sup>35</sup> or exhibiting unusual nervousness.<sup>36</sup> Other factors the DEA agent may observe without making contact with the suspect include the purchase of airline tickets with a large number of small denomination bills,<sup>37</sup> and the use of public transportation in departing the airport.<sup>38</sup> Sometimes the agent will observe other suspicious factors, such as unusual clothing or arrival on an early morning flight.<sup>39</sup>

It is not clear how many characteristics of the airport drug courier profile must match the suspect's appearance and behavior to trigger the DEA agent's decision to make contact. Some cases suggest that the agent must rely on more than just one or two profile characteristics before initiating contact with the suspect.<sup>40</sup>

### *Threshold Objections to the Drug Courier Profile*

Two aspects of the DEA's drug courier profile present a strong potential for abuse: the profile characteristics' resemblance to innocent behavior, and uncertainty regarding what actually are profile factors.<sup>41</sup> Various elements of the profile have been attacked because, viewed objectively, they are

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28. *United States v. Mendenhall*, 446 U.S. 544, 562 (1980).

29. The court in *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980) refused to consider source and use cities seriously: "[We are convinced] of the tragic fact that every population center in this country has become a home for drug traffickers." *Id.* at 1155 n.1.

30. Theoretically, being the last person off the plane enables the drug courier to observe potential law enforcement surveillance. *Mendenhall*, 446 U.S. at 547 n.1.

31. *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979).

32. *United States v. Rico*, 594 F.2d 320, 325 (2d Cir. 1979).

33. *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1977).

34. *Id.*

35. *United States v. Williams*, 647 F.2d 585, 589 (5th Cir. 1981).

36. Of all the drug courier profile factors, this subjective perception of the suspect's "nervousness" provokes the most judicial irritation. Nervousness "may result from a fear of flying or from having disembarked at a strange airport." *Westerbann-Martinez*, 435 F. Supp. at 699. Even a "nervous scanning of the area" construed as a search for law enforcement surveillance may actually be a search for someone who was supposed to meet the suspect at the airport and who failed to come. *Id.*

37. *Elmore*, 595 F.2d at 1039.

38. *Id.* at 1039 n.3.

39. *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980).

40. *See, e.g., Reid v. Georgia*, 448 U.S. 438 (1980)(mere nervous glancing over the shoulder by suspect carried insufficient weight as a profile characteristic to support reasonable suspicion).

41. "[T]he drug courier profile has a chameleon-like quality; it seems to change itself to fit the facts of each case." *Westerbann-Martinez*, 435 F. Supp. at 698.

not suspicious conduct from which an agent reasonably may infer criminal behavior. There are often reasonable and logical explanations for the types of behavior listed in the profile.<sup>42</sup> Furthermore, it is not always clear either to the public or to the agent which characteristics of the drug courier profile are used in each case.<sup>43</sup> This uncertainty encourages the agent to incorporate into the profile virtually anything that serves to arouse his suspicions.<sup>44</sup> Judicial review may be an inadequate mechanism to check abuses, for it is impossible in most cases to determine whether a given profile factor was actually observed prior to the initial contact or observed afterward, or even fabricated to bolster the "gut instinct" of the agent.

### *Agent-Suspect Initial Contact*

Once contact is initiated, the DEA agent requests the suspect's identification and airline ticket.<sup>45</sup> Failure to produce identification, or identification which bears a name different from that on the suspect's airline ticket, are drug courier profile characteristics in the second category of post-contact factors.<sup>46</sup> From the airline ticket, additional profile factors that the agent might learn are: an unusual travel itinerary, such as rapid turnaround time for a very long trip;<sup>47</sup> circuitous routes from source<sup>48</sup> to use cities;<sup>49</sup> no claim tags on the ticket folder, indicating no checked luggage,<sup>50</sup> or switching claim

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42. For example, to refute the "little or no luggage" factor, a defense attorney may demonstrate to a jury that the defendant's piece of luggage can easily hold three days' worth of clothing, perhaps the appropriate size for the defendant's journey. Kadish, *Drug Courier Profile Characteristics: A Defense Profile*, 15 TRIAL 47, 50 (May, 1979). In addition, at least one court has noted that a small amount of luggage on a trip with a rapid turnaround time is not only unsuspecting, but is in fact logical. *Westerbann-Martinez*, 435 F. Supp. at 700. Still, the profile characteristic dealing with luggage has been upheld, and has even been incorporated into the drug courier profile as applied to the highway. See *infra* note 78 and accompanying text.

43. One agent admitted to not knowing whether the use of small denomination currency—a uniform factor in nearly all drug courier profile cases reported—was part of the profile, but testified he believed that being Hispanic was a profile factor. *Westerbann-Martinez*, 435 F. Supp. at 698. Until 1977, this uncertainty might have been due to the fact that the profile used by the DEA was not written down. This allowed the profile an unjustifiable degree of flexibility. The recording of profiles has interested some courts who are asked to rule upon their validity. See, e.g., *State v. Graciano*, 134 Ariz. 35, 39, 653 P.2d 683, 687 (1982)(auto thief profile struck down as unconstitutional). Even presuming that the DEA's profile is now reduced to writing, the factors composing the profile vary dramatically from case to case.

44. *United States v. Chamblis*, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977)(suspect aroused agent's suspicions by appearing nervous, having little luggage, and making phone call immediately after disembarking).

45. Once the federal agent requests identification, it is debatable whether the suspect feels free to go, or whether there has, in fact, been a seizure of the person. See *infra* note 55 and accompanying text. Agent Paul Markonni once testified: "We never demand, we always ask: 'Excuse me. Do you have some identification we could look at for a second?'" *Elmore*, 595 F.2d at 1042. However, at least one lower court felt that Markonni's conduct, on one occasion, was "clearly more accusatorial than inquisitorial, [and the suspect could] reasonably believe he was detained." *United States v. Williams*, 647 F.2d 588, 590 n.1 (5th Cir. 1981).

46. *Elmore*, 595 F.2d at 1039 n.3. Failure to produce identification was dropped from the skyjacker profile after it was shown to have no correlation to the crime of skyjacking. See *supra* note 21 and accompanying text. There has been no assertion by the DEA that not carrying identification has a direct correlation to drug activity.

47. *Id.*

48. *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978).

49. *Elmore*, 595 F.2d at 1039 n.3.

50. *Id.* at 1039.

tags with others;<sup>51</sup> and increasing nervousness.<sup>52</sup>

This initial contact, during which the agent is motivated to gather evidence sufficient to support probable cause to search, is the most delicate step in the initial encounter between the agent and the suspect.<sup>53</sup> The suspect may not know, but the agent is certainly aware that since the agent does not have reasonable suspicion to detain him, the suspect is free to go on his way.<sup>54</sup> Although the agent must not convey the impression that the suspect is in custody, the agent must be authoritative and intimidating enough to prolong the investigatory detention. Otherwise, the suspect might simply stroll away unimpressed.<sup>55</sup>

A screening system under which entire planeloads of travelers cross the threshold of suspicion, and which calls upon law enforcement to intimidate in order to investigate, presents clear constitutional problems. The suspect's fear and alarm inherent in the initial confrontation serves to alert the DEA agent's "instincts" to the necessity for a search.

### *Searching the Suspect*

One method agents may employ to detain the suspect and heighten his anxiety is to proceed directly to the third step of the procedure. In this third step the agent explains that the purpose of the stop is to search for contraband and requests permission to search the suspect's bag or person.<sup>56</sup> To obtain consent, an agent may assure the person that she will have nothing to fear if she is "clean."<sup>57</sup> The suspect's consent not only permits the agent to search, but may later attenuate the taint of an illegal search, should the procedure come under judicial scrutiny.<sup>58</sup> Surprisingly, suspects often consent

51. *United States v. Thomas*, No. CR 78223A (N.D. Ga. 1978), as described in Kadish, *supra* note 42, at 48.

52. *Id.*

53. One court stated:

The pattern of cases irrefutably demonstrates that a part and parcel of the Drug Courier Profile Program is to detain a suspect long enough to gather evidence which either corroborates or allays earlier suspicion. In this respect, this court can see no difference between what Markonni does and what the officer in *Terry* did.

*Williams*, 647 F.2d at 590 n.1.

54. *Green & Wice*, *supra* note 25, at 273.

55. *Id.* At trial, if a court decides that a suspect reasonably believed she could not leave, it will find that the suspect was seized within the meaning of the fourth amendment. *Mendenhall*, 446 U.S. at 551-57. Absence of probable cause will render the seizure unconstitutional. Conversely, if the suspect was not seized (if she believed she was free to go but did not go, or if she unreasonably believed that she was not free to go), then probable cause, rarely present in these cases, is not needed to justify the agent's actions. *Mendenhall*, 446 U.S. at 551-57.

To date, it appears that most courts have not seriously considered how intimidated the average person feels when pulled aside by a federal drug agent in a strange airport. Courts seem to attribute even to unsophisticated citizens a knowledge of the fourth amendment principle that they are free to walk away from a non-seizure encounter with law enforcement. *See e.g.*, *Mendenhall*, 446 U.S. 544.

56. *Green & Wice*, *supra* note 25, at 273.

57. That is, if she is not carrying contraband. *Green & Wice*, *supra* note 25, at 273. *See also Mendenhall*, 446 U.S. at 549. However, one court has observed that "when Markonni approaches his suspects, they are already the focus of a criminal investigation." *Williams*, 647 F.2d at 590.

58. *Mendenhall*, 446 U.S. at 549. In *Mendenhall*, the suspect was told twice that she had the right to decline to be searched; in *Williams*, 647 F.2d at 590, the court noted that the lower court had held that the suspect's consent after two formal warnings of his right to refuse consent was

to a search.<sup>59</sup>

### CRIMINAL PROFILES ON THE HIGHWAY THAT HAVE OVERCOME CONSTITUTIONAL HURDLES

Use of profiles in the highway setting is not new. In order to distinguish innocent travelers from auto thieves taking cars to Mexico, the Arizona Department of Public Safety devised an auto thief profile tailored to southern Arizona.<sup>60</sup> The profile was based on an analysis of 10,000 Phoenix area auto thefts during 1973.<sup>61</sup> Facts distilled from this research allowed state law enforcement officers to devise a profile which fit only a small number of those persons traveling between Tucson and Nogales.<sup>62</sup> Whether the auto thief profile could supply valid reasonable suspicion to support a vehicle stop was raised in *State v. Ochoa*,<sup>63</sup> in which the Arizona Supreme Court upheld its use. The court approved of the profile's written form, and of the fact that it was narrowly tailored to select only a small number of travelers upon that highway.<sup>64</sup> Ruling that stopping a motorist based exclusively upon such a profile was not a stop "at random on the chance of discovering something illegal,"<sup>65</sup> the *Ochoa* court observed that written statistics detailing the effectiveness of the profile bolstered the profile's credibility.<sup>66</sup>

In 1982, the Arizona Supreme Court was asked to rule upon the validity of another auto thief profile. In *State v. Graciano*,<sup>67</sup> the arresting officer

dispositive of the search's legality, even though there had been no reasonable grounds to support a legal stop. *Williams*, 647 A.2d at 590.

Although DEA agents are not required by law to do so, Agent Markonni devised a printed card similar to a *Miranda* warning, which he could read to the suspect from whom he wished to secure consent to search. It read:

You have the right to allow or refuse to allow a search to be made of your person and the personal property that you have with you. You have the right to consult an attorney before deciding whether you wish to allow or refuse to allow the search. If you consent to the search any illegal objects found can be used against you in court proceedings. Do you understand?

*Williams*, 647 F.2d at 590. At least one consent obtained using this warning was found valid. *Id.*

59. See, e.g., *Mendenhall*, 446 U.S. 544; *State v. Cohen*, 103 N.M. 558, 711 P.2d 3 (1985); *United States v. Miller*, 821 F.2d 546, 547 (11th Cir. 1987) (upon officer's request, the suspect signed a consent to search form immediately upon being stopped for an alleged traffic violation).

60. *State v. Ochoa*, 112 Ariz. 582, 585, 544 P.2d 1097, 1100 (1976).

61. *Id.*

62. *Id.* at 586, 544 P.2d at 1100. The peace officers concluded that the typical auto thief drove a Ford or Chevrolet pick-up or sedan, was 17-27 years old, traveled alone, or occasionally with an adult, had no apparent luggage, and showed Maricopa or Pima County registration. *Id.* at 586, 544 P.2d at 1101.

63. 112 Ariz. 582, 544 P.2d 1097 (1976).

64. *Id.* at 586, 544 P.2d at 1101. This narrowness of selection was also a key factor in the approval of the skyjacker profile. See *supra* note 15 and accompanying text.

65. *Ochoa*, 112 Ariz. at 585, 544 P.2d at 1100. In *Ochoa*, a Department of Public Safety officer stopped the suspect's truck traveling south on U.S. 89 solely on the basis of the suspect fitting the auto thief profile. The court did not enumerate which characteristics were exhibited by the suspect. It also did not address the question of how many characteristics would justify the officer's decision to make a stop. *Id.*

66. *Id.*, at 586, 544 P.2d at 1101. Before implementation of the auto thief profile, the recovery rate for stolen vehicles in the area was less than 16%. That rate increased to 33% with use of the profile. *Id.*

67. 134 Ariz. 35, 635 P.2d 683 (1982). Unlike the suspect in *Ochoa*, the suspect's Hispanic appearance was a profile factor in *Graciano*. The Arizona Supreme Court made it clear that being a non-Caucasian was not a legitimate profile factor. The court distinguished the profile situation from

stopped a suspected auto thief on Interstate 19 in Arizona, claiming to have relied upon profile factors. The court distinguished between the formal written profile in *Ochoa* and the profile in *Graciano* which consisted of the officer's informal discussions with other law enforcement professionals.<sup>68</sup> Concluding that this was not a true profile, the *Graciano* court held that the officer had no reasonable suspicion to stop the motorist.<sup>69</sup>

*Ochoa* and *Graciano* reveal that the use of profiles on the highway does not automatically incur judicial wrath. Nevertheless, the Arizona Supreme Court has made it clear that there must be procedural safeguards to align such profiles with *Terry* principles.<sup>70</sup> If the suspect matches profile factors, the profile must be capable of generating specific and articulable facts from which the officer can make the rational inference that the suspect is a drug courier.<sup>71</sup>

The question, then, is whether the drug courier profile, developed in the airport setting, can convey reasonable suspicion in a manner similar to the auto thief profile in Arizona. An examination of the individual drug courier profile factors shows how they have been taken from the airport context and grafted onto the highway setting.

#### APPLICATION OF THE DRUG COURIER PROFILE CHARACTERISTICS TO THE HIGHWAY SETTING

Like the carrier of illegal narcotics passing through an airport, motorists transporting drugs on the highway are thought to exhibit characteristics which distinguish them from innocent travelers.<sup>72</sup> Among these characteristics are: appearing to be a foreigner,<sup>73</sup> driving a one-way rental car,<sup>74</sup> paying for the rental car with cash,<sup>75</sup> or with someone else's credit card,<sup>76</sup> traveling

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that in which race could be an identifying characteristic of a particular person sought. For example, where police receive information that Mexican nationals plan to cross the border illegally at a certain place and time, it would be justifiable for police to be suspicious of Hispanic people at that place and time. Concerning profiles, the court concluded that "the mere fact that an individual is of a specific race, nationality or ethnic background is not a reasonable ground for founded suspicion which will justify a stop and detention." *Id.* at 39 n.7, 635 P.2d at 687 n.7.

68. *Id.* at 134 Ariz. at 38, 635 P.2d at 636. The officer did not say which profile factors were discussed in his conversations with other officers. When questioned, the officer admitted he could not say for certain to what ethnic group the defendant belonged, but only that he had dark skin. *Id.*

69. *Id.* at 38-39, 635 P.2d at 686-87.

70. *Ochoa*, 112 Ariz. at 585, 544 P.2d at 1100. In fact, the *Terry* principle allowing protective searches makes more sense on the highway than in the airport drug courier stop. The airport DEA agent can be reasonably certain that his suspect, having cleared the security checkpoints, is unarmed. The motorist, on the other hand, may or may not be armed, and can also flee more readily due to the inherent mobility of the automobile. Kadish, *supra* note 42, at 49.

71. *Graciano*, 134 Ariz. at 38, 635 P.2d at 686 (1982).

72. See generally *State v. Johnson*, 516 So. 2d 1015 (Fla. App. 1987)(court upheld motion to suppress evidence seized pursuant to a stop based solely on the drug courier profile, but expressed opinion that profile was reasonable suspicion to initiate a stop); *United States v. Smith*, 799 F.2d 704, 708 n.5 (11th Cir. 1986)(court held that profile characteristics are consistent with innocent behavior).

73. *State v. Cohen*, 103 N.M. 558, 560, 711 P.2d 3, 5 (1985)(New Mexico State Police officer stopped defendants for speeding, and, observing that defendants appeared to be "foreigners," continued to detain them to try to obtain consent to search).

74. *Valcarcel v. State*, 718 S.W.2d 359, 361 (Tex. 1986).

75. *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

76. *Valcarcel*, 718 S.W.2d at 362.

across the country;<sup>77</sup> carrying a small amount of luggage;<sup>78</sup> appearing to be nervous and in a hurry when stopped by police;<sup>79</sup> driving cautiously or below the speed limit;<sup>80</sup> not looking at the police vehicle;<sup>81</sup> traveling on a route known to be used by drug couriers;<sup>82</sup> driving a late model car<sup>83</sup> or large "luxury" car;<sup>84</sup> traveling late at night or early in the morning;<sup>85</sup> and appearing to be a husband and wife team of Spanish descent.<sup>86</sup>

Once the law enforcement officer makes a stop based on a fit between the suspect's appearance and the drug courier profile,<sup>87</sup> the officer may observe other characteristics, such as the use of a deodorizer or talcum powder to shroud drug odor;<sup>88</sup> the passengers or driver exiting the stopped car in an effort to meet police officers away from the suspicious vehicle;<sup>89</sup> use of gray duct tape to seal off the drug odor;<sup>90</sup> and extreme anxiousness to get away from the scene.<sup>91</sup>

As with the airport drug courier profiles, courts are divided as to whether a match between the suspect's appearance and profile factors can be considered reasonable suspicion to detain the suspect.<sup>92</sup> Three kinds of drug

77. *Id.*

78. *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

79. *Id.* at 560, 711 P.2d at 4.

80. *Johnson*, 516 So. 2d at 1018. On the other hand, if the suspect is speeding, the police also have a valid reason to stop. *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

81. Department of Highway Safety and Motor Vehicles v. Coleman, 505 So. 2d 668, 670 (Fla. App. 1987).

82. *Id.*

83. *Id.*

84. State v. Johnson, 516 So. 2d 1015 (Fla. App. 1987). The state trooper involved in this case, Trooper Robert Vogel of the Florida Highway Patrol, has become something of a celebrity in his own right due to his dedication to stopping motorists based upon a drug courier profile of his own design. Trooper Vogel was the subject of a recent "60 Minutes" broadcast in which he described the factors in this profile:

The car will usually be occupied by two persons, usually males. They'd be between the age grouping of 20 to 45. They'd be driving at or less than the speed limit, overly cautious. They would avoid making eye contact. They'd be travelling through Velutia [sic] County [Florida] between the time frame of 6:30 P.M. to 4:30 A.M. with 3:00 A.M. being the peak single hour that more arrests were made than any other time of day. The cars would usually display Florida rental tags or out-of-state rent tags. The cars oftentimes will be equipped with additional equipment such as CB radio or radar detector, especially in a rental car. That would give me additional suspicions.

60 Minutes: "Trooper Vogel" (CBS television broadcast, April 27, 1987, Vol. XIX, no. 32)(transcript on file at University of Arizona College of Law Library).

However, Trooper Vogel denied that a person's race could ever be part of his profile. *Id.* at 7.

85. United States v. Smith, 799 F.2d 704, 706 (11th Cir. 1986).

86. *Valcarcel*, 718 S.W.2d at 362. It is disturbingly common to find racial and ethnic designations in drug courier profiles. See, e.g., *Graciano*, 134 Ariz. 35, 635 P.2d 683 (part of patrolman's auto thief profile was suspect's Hispanic appearance). For further discussion of the racial factor in profiles, see *infra* notes 148-56 and accompanying text.

87. Like the skyjacker and airport drug courier profiles, it is not settled just how many factors will justify a police-citizen confrontation, or whether some factors automatically carry more weight than others. See e.g., *Reid v. Georgia*, 448 U.S. 438, 441 (1980)(one profile characteristic—nervous glancing over the shoulder—was insufficient to detain the suspect); Department of Highway Safety v. Coleman, 505 So. 2d 668, 669 (Fla. App. 1987)(stop of motorist based on eight profile factors held invalid); and *Cohen*, 103 N.M. at 561-63, 711 P.2d at 6-8 (seven characteristics were upheld as reasonable suspicion to detain the suspects).

88. *Valcarcel*, 718 S.W.2d at 362.

89. *Cohen*, 103 N.M. at 559, 711 P.2d at 4.

90. *Valcarcel*, 718 S.W.2d at 362.

91. *Cohen*, 103 N.M. at 559, 711 P.2d at 4.

92. In *United States v. Smith*, the Eleventh Circuit described the profile factors as a "classic

courier profile stops emerge from an analysis of the cases: stops based *solely* upon the profile,<sup>93</sup> stops based upon some unlawful conduct, such as a traffic violation,<sup>94</sup> and the "pretextual" stop.

The pivotal question in the second type of stop is whether observation of drug courier profile characteristics can support reasonable suspicion to continue to detain the suspects in the same manner as when the officer, for example, approaches the car and detects the odor of marijuana. The argument advanced against the use of the profile in this type of stop is that the lawful reason for the stop—for example, a traffic citation—may have been concluded by the time the officer decides to detain.<sup>95</sup>

The third type of stop is "pretextual." This means that although the stop was actually predicated upon the drug courier profile, the officer seeks to justify it in some other manner.<sup>96</sup> Rather than address the question of whether the officer *could* legally have made the stop absent reliance on the drug courier profile, courts have held that the proper inquiry is whether the officer *would* have made the stop, were his judgment not influenced by observation of the profile characteristics.<sup>97</sup> The fact that police officers avoid admitting in court that they relied upon the profile suggests that law enforcement is aware of judicial disfavor of stops in which the profile plays a part.

#### *Detention of Motorists Based Solely Upon the Drug Courier Profile*

In *Department of Highway Safety v. Coleman*,<sup>98</sup> the Florida Supreme Court rejected the notion that a motorist driving lawfully on the highway can be stopped by police solely because he exhibits characteristics associated with someone who might be carrying drugs.<sup>99</sup> The court held that the stop did not fulfill reasonable suspicion requirements under *Terry*, not because profiles are inherently incapable of supporting reasonable suspicion, but because reliance upon them at present is premature.<sup>100</sup> By rejecting this stop, based not upon one or two profile factors, but upon *eight* factors<sup>101</sup> claimed

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example of those 'inarticulate hunches' that are insufficient to justify a seizure under the fourth amendment." 799 F.2d 704, 707 (11th Cir. 1986). But in *Cohen*, the New Mexico Supreme Court held that a match of seven profile characteristics did support reasonable suspicion to detain the suspects after the lawful reason for the initial stop had expired. *Cohen* 103 N.M. at 561, 711 P.2d at 6.

93. See, e.g., *Smith*, 799 F.2d 704.

94. See, e.g., *Cohen*, 103 N.M. 558, 711 P.2d 3.

95. For example, with the issuance of a citation for speeding, which suggests that the reason for the initial stop has concluded. See, e.g., *Cohen*, 103 N.M. 558, 711 P.2d 3 (1985).

96. For example, in *Smith*, 799 F.2d 704, the Eleventh Circuit rejected the trooper's claim that he had stopped the defendant's vehicle because it was "weaving," as a pretext employed to conceal that the stop was based solely upon the trooper's drug courier profile. *Id.* at 707. The court found that the stop was really made because "the appellants matched a few nondistinguishing characteristics contained on a drug courier profile and, additionally, because [Trooper] Vogel was bothered by the way the driver of the car chose not to look at him." *Id.* The court upheld the suppression of evidence seized. *Id.* at 708.

97. *Id.* at 709.

98. 505 So. 2d 668 (Fla. App. 1987).

99. *Id.* at 669-70.

100. *Id.*

101. *Coleman*, 505 So. 2d at 669-70. Profile characteristics relied upon in *Coleman* were: (1) the suspect's vehicle was a late model; (2) the vehicle bore Florida rental car plates; (3) the vehicle

by the trooper to be reliable, the Florida Supreme Court implied that only a long history of successful field application will legitimize the highway use of the drug courier profile.<sup>102</sup> How long law enforcement would have to work with the profile to establish its credibility was not discussed, and this particular court remains among those still troubled by the fact that most of the profile factors are also descriptive of innocent behavior.<sup>103</sup>

At least one Florida appellate court<sup>104</sup> appears impatient for its state supreme court to rule that the drug courier profile has in fact established a record of reliability on the highway. In *State v. Johnson*,<sup>105</sup> the appeals court certified a question to the Florida Supreme Court, asking whether a drug courier profile developed by an experienced law enforcement officer could be relied upon by the officer as reasonable suspicion to justify a brief investigatory traffic stop on highways known to be used for the transport of drugs.<sup>106</sup>

Prior to receiving the supreme court's response, the *Johnson* court affirmed the motion to suppress evidence seized pursuant to a drug courier profile stop,<sup>107</sup> but stressed that it was compelled to do so by precedent.<sup>108</sup> Relying partly upon *State v. Cohen*,<sup>109</sup> a New Mexico Supreme Court decision, the *Johnson* court argued forcefully for legitimization of the profile. It examined the urgency of the public's interest in stopping drug traffic, and the inherent soundness of the profile approach in light of *Terry*.<sup>110</sup> First, it applied a balancing test which weighed the importance of the government's interest in stopping drug traffic against the minimal intrusion into a motorist's privacy caused by a stop and brief detention.<sup>111</sup> Predictably, given the widespread drug traffic in Florida, the *Johnson* court reasoned that a brief

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contained two occupants; (4) the driver was a male; (5) the driver was about 35 years of age; (6) the vehicle was traveling on I-95, a route frequently used by drug couriers; (7) the vehicle was traveling during prime drug courier hours in an extremely cautious manner; and (8) the driver did not look at the trooper as he passed the patrol car. *Id.* at 669.

102. *Id.* at 670.

103. The Eleventh Circuit is also troubled by this fact:

While the factors noted by Trooper Vogel might have some statistical correlation to characteristics of drug couriers, they are also descriptive of numerous legitimate interstate travelers. Whether other factors contained in the profile might sufficiently distinguish drug couriers from other travelers we do not today consider.

*Smith*, 799 F.2d at 708 n.5.

104. Court of Appeals for the Fifth District of Florida.

105. 516 So. 2d 1015 (Fla. App. 1987).

106. *Id.* at 1021.

107. *Id.* at 1015. This was another Trooper Vogel stop. In *Johnson*, the profile factors cited by the trooper as suspicious were: (1) the suspect vehicle was driving at 4:15 A.M.; (2) the defendant was alone; (3) the defendant was about 30 years old; (4) the car had out-of-state tags; (5) the car was a large "luxury" model; (6) the defendant was a male; (7) the defendant was wearing casual clothing; (8) the defendant drove in an "overly cautious" manner; and (9) the defendant was driving on Interstate 95, a known drug courier route. *Id.* at 1018.

Vogel testified that these factors derived from his own personally designed drug courier profile. *Id.* at 1020. He said that he did not rely upon guidelines supplied to a Florida Highway Patrol profile: (1) air shocks; (2) blacked out glass; and (3) heavily loaded vehicles. *Id.* at 1018 n.5.

108. *Smith*, 799 F.2d 704 (investigatory detentions on the highway may not be based solely upon the drug courier profile).

109. 103 N.M. 558, 711 P.2d 3 (1985).

110. *Johnson*, 516 So. 2d at 1016 n.1. The *Johnson* court stated that south Florida is the point of entry for over 80% of the marijuana and cocaine imported into the United States. *Id.*

111. *Id.* at 1018.

investigatory detention is reasonable under the fourth amendment, provided that the drug courier profile is capable of supporting reasonable suspicion.<sup>112</sup>

Second, the *Johnson* court took issue with the tendency it perceived in other courts to elevate reasonable suspicion to a standard very near that of probable cause.<sup>113</sup> The court implied that there could be little point in having a relaxed standard of review for a brief investigatory detention if courts insisted that the officer justify the stop with full-fledged probable cause.<sup>114</sup> Instead, the court urged that it is the totality of the circumstances which adds up to a reasonable suspicion, and those circumstances include the officer's experience and expertise.<sup>115</sup> The court observed that the officer may be able to make inferences and deductions that might well elude an untrained person.<sup>116</sup>

Finally, the *Johnson* court went to the heart of the drug courier profile question by suggesting that the profile factors themselves are capable of raising a particularized suspicion as required by *Terry*.<sup>117</sup> The court reached this conclusion by confronting the often-raised objection to the drug courier profile: that its components also resemble innocent behavior. The court acknowledged that many profile factors were not suspicious when viewed separately, but that enough of them, combined with each other, aroused a legitimate reasonable suspicion in the trained observer.<sup>118</sup> The *Johnson* court did not specify how many factors must be present, but rather suggested that if "enough" factors were present, there was reasonable suspicion to stop the suspect.<sup>119</sup>

Clearly, the *Johnson* court is encouraging the Florida Supreme Court to

112. *Id.* at 1019. "Detainees are released within a few minutes if the trooper's suspicions are not further aroused by the presence of additional factors." *Id.*

113. *Johnson*, 516 So. 2d at 1019.

The difficulty in deciding whether the profile relied upon by Trooper Vogel here is sufficient to satisfy the reasonableness requirement is due, in part, to the indefiniteness and malleability of the "reasonable suspicion" standard, and the apparent willingness of some courts to elevate it to a level which approaches, if it does not in fact reach, the standard of "probable cause."

*Id.*

114. *Id.* at 1019.

115. For example, the *Johnson* court observed that Trooper Vogel possessed 13 1/2 years' experience with the Florida Highway Patrol. Over an 11 month period he made 30 non-drug courier profile stops in which drugs were seized. From these stops, Vogel compiled his drug courier profile. *Id.* at 1017-18.

116. *Id.* at 1021.

The Supreme Court has . . . instructed that . . . courts must always give due weight to the specialized expertise and experience of the law enforcement officer. Thus, while *the standard of reasonableness is never a subjective one*, the courts must view the conduct through the eyes of the police officer, as he would see it.

*Id.* at 1020 (emphasis added).

117. *Id.*

118. *Id.* at 1020.

. . . [I]nherent in the nature of profiles is that no single factor provides a reasonable suspicion of criminal activity, but that the presence of enough of the factors, though each one may be innocent in itself, is sufficient to make a trained observer reasonably suspicious . . . . "[I]nnumerable law enforcement officers, through personal experience, have observed that, while couriers do things that innocent, honest travelers do—such as pay in cash, drug couriers also do things that innocent, honest travellers do not ordinarily do—such as travel under an assumed name."

*Id.* at 1020-21, (quoting *Florida v. Royer*, 460 U.S. 491, 512 (1983)).

119. *Id.* at 1021. "I suggest, instead, that a sufficient (at least undetermined) correlation between

adopt an approach similar to that upheld in *State v. Cohen*.<sup>120</sup> In *Cohen*, the New Mexico Supreme Court ruled that the drug courier profile supports reasonable suspicion for brief investigatory stops of motorists.<sup>121</sup> If the Florida Supreme Court accepts the New Mexico view, Florida will become the first state to respond to its drug traffic crisis by endorsing the proposition that a motorist's exhibition of drug courier profile characteristics, standing alone, is reasonable suspicion to detain motorists.

#### THE UNSUITABILITY OF INDISCRIMINATE APPLICATION OF CRIMINAL PROFILES IN THE HIGHWAY SETTING

The profile method of investigation into criminal activity has not made a smooth transition from the pursuit of skyjackers to the pursuit of drug couriers on the highway. It is still unclear why courts, uniformly willing to uphold the FAA's skyjacker profile,<sup>122</sup> have subjected the drug courier profile to rigid constitutional tests and even judicial scorn.<sup>123</sup> One possible answer lies in the inherent differences between the two profiles.

#### *The Poor Pedigree of the Drug Courier Profile*

The FAA skyjacker profile was the product of months of research by a diverse task force.<sup>124</sup> In contrast, the drug courier profile factors were conceived either by a single DEA agent or by a small group of DEA agents.<sup>125</sup> The FAA based its skyjacking profile upon a study of all the known skyjackers at that time,<sup>126</sup> while the professional expertise of a small group of drug agents formed the basis for the drug courier profile.<sup>127</sup> Standing alone, this reservoir of experience, while arguably quite accurate,<sup>128</sup> has a subjective

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the activities of the traveller and the drug courier profile should be considered reasonable suspicion for a stop and search." *Id.*

120. 103 N.M. 558, 711 P.2d 3 (1985). The *Johnson* court, however, is incorrect in citing *Cohen* to support the proposition that a lawful stop can be made based *solely* on the drug courier profile. In *Cohen*, the highway patrol stopped the suspects for speeding and while issuing a citation observed drug profile characteristics. The patrolman continued to detain the suspects, even though they had cleared the National Crime Computer check by radio, and had been issued their speeding citation. The continuation of this detention, *not the initial stop*, was based upon the drug courier profile. *Id.* By contrast, in *Johnson*, the initial stop was based solely upon the profile. *Johnson*, 516 So. 2d at 1020.

121. *Cohen*, 103 N.M. at 563, 711 P.2d at 8.

122. See *supra* notes 6-25 and accompanying text.

123. Unfavorable comments directed at the drug courier profile by the judiciary include: "The 'drug courier profile' is a rather loosely formulated list of characteristics used by Detroit DEA agents to indicate 'suspicious' persons." *United States v. McCaleb*, 552 F.2d 717, 719 (6th Cir. 1977). "[P]art and parcel of the Drug Courier Profile Program is to detain a suspect long enough to gather evidence . . ." *Williams*, 647 F.2d at 590 n.1. "[T]his court must conclude that either the 'Drug Courier Profile' is too amorphous and unreliable to be of any help, or that there is a tremendous lack of communication within the Drug Enforcement Agency as to the factors in the profile." *Westerbann-Martinez*, 435 F. Supp. at 698. "[A] classic example of . . . 'inarticulate hunches'." *Smith*, 799 F.2d at 707.

124. See *supra* notes 6-25 and accompanying text.

125. *Green & Wice*, *supra* note 25, at 269.

126. *Lopez*, 328 F. Supp. at 1082.

127. *Green & Wice*, *supra* note 25, at 269.

128. The drug courier profile's appeal lies in its supposed accuracy. Unlike the skyjacker profile, or the auto thief profile in Arizona, the DEA has either not kept records or is unwilling to release them. The public is unsure just how many stops actually produce contraband, and in what sort of amounts. The public knows only that the drug courier profile stop seems to impede drug traffic. For

basis, one that does not comport with the test for reasonable suspicion as defined in *Terry*.<sup>129</sup>

### *Exigency of the Surrounding Circumstances*

Drug dealing poses a serious threat to human life that is not immediate in nature. While not enumerated in any published decision to date, it is possible that courts weigh the relative urgency of the situations surrounding the drug courier and skyjacker profiles. Perhaps the threat of immediate death and destruction posed by skyjacking renders the screening procedures implemented by the FAA more palatable to courts.<sup>130</sup> In contrast, the drug courier's cargo is not an imminent threat to the airplane. The drug courier's purpose is not to disrupt or control the flight. Indeed, the drug courier may wish more sincerely than any other passenger for an uneventful flight. Similarly, the highway drug courier, if not ingesting drugs himself, presents no traffic hazard. Even state troopers have observed that the drug courier seems to drive very cautiously.<sup>131</sup> When stopped, drug couriers are generally cooperative with the law enforcement officers.<sup>132</sup>

Thus, at the risk of extensive judicial second-guessing, it is possible that courts weigh the imminent danger to human life posed by drug trafficking and conclude that the drug courier profile as a means to control drugs is not constitutionally palatable. Reading between the lines of opinions, perhaps courts reveal that a compromise of fourth amendment principles is not appropriate because the destruction to human life inherent in illegal substances lies not upon the drug courier route itself, but in the too near future, upon distribution.

### *Drug Courier Profiles as Unconstitutional "Overkill"*

The mechanics of implementing the FAA profile differ from the DEA profile. The skyjacker profile was only one element of skyjacker screening procedures, with several steps<sup>133</sup> interposed by the screener between the profile and the most extreme step, the search.<sup>134</sup> The drug courier profile, by contrast, *is the entire screening procedure*. Once the DEA agent or highway

the lay citizen, the question often turns only upon his own inconvenience and a sense of personal innocence. For example, a citizen interviewed on a recent broadcast of "60 Minutes" said:

I think as long as Trooper Vogel has success with his profile, and is able to confiscate drugs as they move up and down the highway, any minor inconvenience by someone wanting to stop and search me, they're more than welcome to do that, and I think anyone who's a law-abiding, legitimate citizen wouldn't have a problem with a few minutes of detention. They're more than welcome to search anything I've got.

*60 Minutes: "Trooper Vogel"* (CBS television broadcast, April 27, 1987, Vol. XIX, no. 32)(transcript on file at the University of Arizona College of Law Library).

129. The test is set forth *supra* at note 3.

130. One commentator, speculating on the reason for public acquiescence to airport security, said: "It is difficult to imagine a more frightening and dangerous event than armed piracy of a passenger aircraft in flight." Andrews, *supra* note 9, at 693 (quoting the court in *United States v. Epperson*, 454 F.2d 769, 771-72 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972)).

131. *Smith*, 799 F.2d at 706.

132. *Valcarcel*, 718 S.W.2d at 362.

133. See *supra* notes 19-23 and accompanying text.

134. Andrews, *supra* note 9, at 661. In 1968, only those travelers matching the profile, activating the magnetometer, and failing to produce I.D. had their baggage inspected or were frisked. *Id.*

patrol officer selects a suspect for detention based upon the profile, the next step is to request consent to search, or to obtain a warrant to search.<sup>135</sup> Given the successful FAA safeguards, it is questionable whether law enforcement has indeed selected the least intrusive methods of screening drug couriers from innocent highway and air travelers.

Furthermore, the entire FAA screening procedure is a *deterrent* to skyjacking; the primary purpose was to discourage the potential skyjacker with security measures.<sup>136</sup> In contrast, the drug courier profile is a tool to aid law enforcement in identifying a crime actually in progress and seizing the fruits. It is apparently not a deterrent to drug trafficking, as the incidence of those arrested for drug trafficking seems to be on the rise.<sup>137</sup> Because the point of the drug courier profile is to remove, not deter, the trafficker and his cargo from participation in drug commerce, it is questionable whether highway law enforcement and the FAA should employ the same methods to achieve such divergent ends. The DEA and state highway patrols should not point to judicial approval of the skyjacker profile or the auto thief profile and claim that courts have ratified the drug courier profile. Where deterrent of a life-threatening crime is the goal, and arrest of individuals is only a secondary consideration, the constitutional guarantee against unreasonable search and seizure may be better served than where detection and detention are simultaneously the means and ends.

### *Objectivity of Application: Unfettered Police Discretion*

The FAA profile was typically applied by non-law enforcement personnel, who themselves could be screened for personality traits that might cause them to use the profile to harrass a traveler.<sup>138</sup> Sensitized only to the potential crime of skyjacking, the screener's perceptions are receptive only to crime involving weapons; thus there is no subconscious warping of the profile characteristics to allow selection of a non-skyjacking suspect.<sup>139</sup>

On the other hand, only law enforcement personnel apply drug courier profiles.<sup>140</sup> Although the DEA calculates profile characteristics to designate only the drug courier, the law enforcement agent's focus is not so narrowly circumscribed. It is not surprising that the agent, who often has a personal stake in the effectiveness of the profile because it reflects upon his performance as a law enforcement officer, may distort profile characteristics in order to provoke a confrontation with the desired suspect.<sup>141</sup> One example of this is the trait of nervousness, which appears in many drug courier profiles.<sup>142</sup>

Assuming for the sake of argument that the FAA profile also contains a

135. See *supra* notes 45-59 and accompanying text.

136. Andrews, *supra* note 9, at 737. "Most of the effectiveness of the screening process is . . . to keep most persons from ever attempting a hijacking by making them think that insuperable obstacles lie in their path." *Id.*

137. For example, a Florida appeals court noted the fact that "[d]rug trafficking has reached epidemic proportions" in that state. *Johnson*, 516 So. 2d at 1016.

138. Andrews, *supra* note 9, at 728.

139. *Id.*

140. See generally Chardak, *supra* note 5; Green & Wice, *supra* note 25.

141. Andrews, *supra* note 9, at 728.

142. See *supra* note 36 and accompanying text.

nervousness factor,<sup>143</sup> the person doing the screening would have to apply the same factor differently depending upon whether it appeared in the drug courier profile or the skyjacker profile. The FAA screener, normally a non-law enforcement person without any discretion,<sup>144</sup> observes the suspect's nervousness and evaluates its relation only to skyjacking. The screener also knows that a magnetometer will confirm or allay any suspicion. The DEA agent, by contrast, observing nervousness, need not assign a specific criminal motive, but is free to approach his suspect on any basis his law enforcement training suggests. This vests virtually unlimited discretion in police and has been shown to invite abuse.<sup>145</sup>

### *Suspect Classifications: An Integral Part of the Drug Courier Profile*

Due to the secrecy of the FAA profile, there is only the word of various courts and commentators from which to conclude that the skyjacker profile is entirely neutral regarding race, ethnic background, sex and personal appearance.<sup>146</sup> On the rare occasion where race was introduced as a factor into a skyjacker profile, one court refused to uphold the stop.<sup>147</sup> On the other hand, drug courier profiles include racial, ethnic, and personal appearance factors on a regular basis.<sup>148</sup> Other groups targeted by the drug courier profile as suspicious include persons of a certain age<sup>149</sup> or those whose clothing or grooming appear to be unlike that of the other passengers on the plane.<sup>150</sup>

At first glance, it may seem scientifically sound to permit, for example, race and sex as profile factors where experience has shown that people of a certain race or sex commit a certain crime in disproportionately high numbers.<sup>151</sup> Closer analysis reveals this to be statistically as well as constitution-

143. According to an FAA official, it does not contain such a "nervousness" trait. See *infra* note 147 and accompanying text.

144. In fact, where a skyjacker profile expressly called for "an act of individual judgment on the part of airline employees," one court held that the previous "neutrality and objectivity of the approved profile" was destroyed because "[w]hen elements of discretion and prejudice are interjected it becomes constitutionally impermissible." *Lopez*, 328 F. Supp. at 1101.

145. *Andrews, supra*, note 9, at 726. In fact, *Andrews'* criticism of the FAA profile is that it is susceptible to exactly this sort of abuse when applied by law enforcement agents. *Id.* *Andrews* defines application of the skyjacker profile by non-law enforcement agents an "important internal [control]." *Id.* at 728.

146. *Andrews, supra* note 9, at 731. It has also been stressed by Dr. John T. Dailey, Chief FAA Psychologist, that it is not the skyjacking suspect's *appearance* that matches profile characteristics, but his *conduct*. McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 *FORDHAM L. REV.* 293, 302 (1972). This "behavior" is not related to such qualities as "nervousness," but "to the manner in which the traveler approaches the ticket counter or boarding gate." *Andrews, supra* note 9, at 713 n.306.

147. *Lopez*, 328 F. Supp. at 1101 (court rejected as having no scientific basis a "revised" profile which included an ethnic element).

148. See, e.g., *Valcarcel*, 718 S.W.2d 359 (profile factor of husband and wife appearing to be of Spanish descent contributed to police officer's decision to stop); *Cohen*, 103 N.M. 558, 711 P.2d 3 (suspects' "foreign" appearance aroused officer's suspicion of drug activity, since this was a profile factor); *Westerbann-Martinez*, 435 F. Supp. 690 (suspects were approached because they were "casually dressed" Hispanics who scanned the area after leaving the plane).

149. E.g., *Smith*, 799 F.2d at 707 n.3 (trooper selected suspects partly because their apparent age, about 30, was a factor in his drug courier profile).

150. E.g., *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980)(suspect's "unkempt appearance" was unlike that of the other passengers, and triggered agent's suspicion).

151. For example, an analysis of skyjackers showed that out of 212 reported cases, 123 were men

ally unsound. Skyjackers or drug couriers make up such a minute portion of either sex, or of any ethnic group, that it cannot logically follow that race or sex aids in identifying the lawbreaker.<sup>152</sup>

The skyjacker profile adheres to *Terry* principles by targeting particular conduct and behavior of individuals,<sup>153</sup> while the highway drug courier profiles focus to a large degree upon personal appearances of the suspects selected for search.<sup>154</sup> Proponents of the FAA skyjacker profile are on solid scientific and constitutional ground when they exclude factors such as race from consideration. Use of race as a profile factor by law enforcement officials on the highway only serves to discredit the drug courier profile further.

### *The Drug Courier Profile As an Unworkable Clone of the FAA's Skyjacker Profile*

Because the DEA profile emerged from the FAA model, the two bear some resemblance to one another. One striking similarity is the uncertainty as to how many factors each contains. Estimates of the skyjacker profile range from twelve to thirty factors.<sup>155</sup> A composite of the various airport drug courier profiles in use reveals sixteen factors,<sup>156</sup> while a composite of the highway profile contains about eighteen to twenty factors.<sup>157</sup> The reason for the uncertainty as to the skyjacker profile is, of course, its secrecy, but the uncertainty of the drug courier profile arises from its nonuniformity. Moreover, different areas of the country use different profile factors, each containing a few factors from the composite list. Some of the factors are common to many jurisdictions.<sup>158</sup>

The DEA has advanced no justification for the lack of uniformity in the factors and their application. One possible reason could be a perception among law enforcement agencies that drug couriers in different regions of the country manifest different characteristics. However, the DEA has not suggested this in response to criticism from courts.<sup>159</sup> The result is that the FAA has compiled a list of secret factors, the interface of which works to differentiate skyjackers from non-skyjackers.<sup>160</sup> In contrast, the DEA has a

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and 10 were women (sex was not reported in some of the cases). *Andrews, supra* note 9, at 732. This ratio is about five times higher than the general proportion of men to women. But it would be absurd to suggest that, since 123 men skyjacked while millions of other men traveled peacefully, the FAA should scrutinize male travelers more carefully for potential skyjackers.

152. *Andrews, supra* note 9, at 732.

153. *See McGinley & Downs, supra* note 146, at 302, 305.

154. *See supra* note 27 and accompanying text for a list of DEA drug courier profile characteristics, and contrast them with the list of highway drug courier profile characteristics *supra* in notes 73-92 and accompanying text. The DEA profile, modeled directly upon the FAA's conduct-specific skyjacker profile, is more attuned to *conduct* of the suspect than the highway drug courier profile, which focuses primarily upon *appearance* of the suspect.

155. *Andrews, supra* note 9, at 713 n.305.

156. *See supra* notes 28-39 and accompanying text.

157. *See supra* notes 72-91 and accompanying text.

158. For example, having little or no luggage and appearing nervous are two factors listed in nearly every drug courier profile published in the reported opinions. *See, e.g., Elmore*, 595 F.2d at 1039 n.3.

159. *Westerbann-Martinez*, 435 F. Supp. at 698 (court observed that the nonuniformity of the drug courier profile leaves its contents to the officer's complete discretion).

160. *Lopez*, 328 F. Supp. at 1082.

core list containing a few factors, around which law enforcement agents' imaginations and misconceptions revolve.

### CONCLUSION

Profiles used as tools to distinguish those engaged in crime from those who are not, are not *per se* invalid. Courts will, however, scrutinize the scientific basis for any profile, its reliability, its reported effectiveness, whether it is narrowly selective of only a small percentage of travelers, its method of implementation and whether overbroad factors, such as race, are used.

The highway drug courier profile has not fared well in courts to date due to its failure to imitate the safeguards against intrusiveness and arbitrariness which were inherent in its predecessor, the FAA skyjacker profile. The drug courier profiles in use today are not based upon scientific facts, but seem to spring from impressions of individual officers. In addition, particular profiles do not exist long enough to acquire a reputation for reliability. Instead, drug courier profiles have a "chameleon-like" quality that seems to change at the whim of individual officers.<sup>161</sup>

Implementation of the profiles on the highway is ragged and non-uniform, and even law enforcement officers themselves seem unsure or mistaken as to the factors to be applied.<sup>162</sup> This often results in a post-search patchwork application of profile factors to disguise the unconstitutional use of the experienced officer's "gut instinct."

Unless highway law enforcement agencies are willing to establish uniformity in the creation and application of drug courier profiles, the reliability of this potentially accurate tool will not be established to the satisfaction of courts. This may provoke continued judicial disfavor of the drug courier profile. It is possible that even its present limited use will be further circumscribed, allowing even more interstate freedom to the drug courier.

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161. *Westerbann-Martinez*, 435 F. Supp. at 699.

162. *See supra* note 40 and accompanying text.

