Reexamining Fourth Amendment Seizures: A New Starting Point

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NOTES

REEXAMINING FOURTH AMENDMENT SEIZURES: A NEW STARTING POINT

Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons.1

Chief Justice Warren, *Terry v. Ohio*

Traditionally, police officers have been required to show probable cause2 in order to justify either an arrest3 or the functional equivalent of an arrest.4 In *Terry v. Ohio*, decided in 1968, the Supreme Court recognized for the first time that there exists a stage of police-citizen encounter less intrusive than an arrest.5 If an individual is only briefly detained against his or her will,6 or is sim-

1. 392 U.S. 1, 19 n.16 (1968).
2. 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" to believe that a crime has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925); *cf. Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (probable cause is reasonable ground for belief of guilt insofar as arresting officer is concerned). An arrest must always be based on probable cause, see *Ker v. California*, 374 U.S. 23, 34-35 (1963), although warrants are not always required. See note 23 infra.
3. See *Henry v. United States*, 361 U.S. 98, 103 (1959) (whenever a suspect is taken into custody or otherwise deprived of his freedom he is arrested).
ply frisked\(^7\) (the "Terry stop"\(^8\)), then police officers are required to show only reasonable suspicion\(^9\) to justify the action.

As Chief Justice Warren realized\(^10\) in Terry, however, there may be a stage in a police-citizen encounter that exists prior to even a Terry stop. Yet, until the recent decision of United States v. Mendenhall,\(^11\) Chief Justice Warren's assertion had been largely ignored by the Court. Although the Mendenhall decision commands no clear majority,\(^12\) the opinion by Justice Stewart, announcing the judgment of the Court, suggests a new stage\(^13\)—a

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8. Despite the fact that stop and frisk has been a "time-honored police procedure," LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39, 42 (1968), it was not until Terry v. Ohio that the Supreme Court approved, for the first time, the seizure of persons upon less than probable cause. 392 U.S. at 30. Stop and frisk has since often been referred to as a "Terry stop." See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 41, 45 (1979) (Brennan, J., dissenting); United States v. Blum, 614 F.2d 537, 539 (6th Cir. 1979); United States v. Chamberlin, 609 F.2d 1318, 1331-33 (9th Cir. 1979); United States v. Ashcroft, 607 F.2d 1167, 1170 (5th Cir. 1979), cert. denied, 100 S. Ct. 2944 (1980); United States v. Belle, 593 F.2d 487, 496 (3d Cir. 1979); United States v. Short, 570 F.2d 1051, 1055 (D.C. Cir. 1978).

9. Reasonable suspicion exists where the policeman can point to "specific and articulable facts which, taken together with the rational inferences from those facts . . .," 392 U.S. at 21, lead him "reasonably to conclude in light of his experience that criminal activity may be afoot . . . ." Id. at 30. See generally 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.2 (1978).

10. See text accompanying note 1 supra.


12. Justice Stewart announced the judgment of the Court and delivered an opinion in which Justice Rehnquist joined. 100 S. Ct. at 1873-80. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, joined the opinion, id. at 1880 (Powell, J., concurring in part and concurring in the judgment, joined by Burger, C.J., and Blackmun, J.), in all but part II-A, id. at 1875-78, which for the purpose of this Note is the critical part of the opinion.

13. Actually, the stage may not be so new. Arguably, the groundwork commenced with Terry v. Ohio, where the Court first recognized, in an opinion by Chief Justice Warren, that not all encounters between citizens and the police are seizures. See text accompanying note 1 supra. Indeed, as Professor Amsterdam has stated, the Court's "1968 decisions are commonly read as recognizing three categories of street encounters: mere conversation, which an officer may commence without any particularizing cause; 'stops,' which require some reliable indicia of criminal activity not amounting to probable cause; and 'arrests,' which require probable cause." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 376 (1974) (footnotes omitted). The stage is new, however, in the sense that an explicit statement by the Supreme Court of the right of law-enforcement officials to make inquiries and seek citizen cooperation without some level of particularized suspicion has never previously been made. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT 257-58 (Commentary 1975). Indeed, the Court has yet to form a majority opinion as to this specific question. See note 107 infra, dis-
new starting point—in search and seizure analysis. Justice Stewart’s opinion takes Chief Justice Warren’s assertion one step further and proposes that a threshold determination of whether an individual has been seized within the meaning of the fourth amendment be made before consideration of the officer’s justification for any seizure that might—or might not—have occurred.14

Justice Stewart’s opinion breathes new life into Chief Justice Warren’s assertion in recognizing again that not all encounters between policemen and citizens constitute seizures.15 If the action taken by the police does not amount to a seizure, then the officer needs no articulable suspicion in order to take such action.16 Although the fourth amendment applies to all police-citizen encounters, it is not violated despite the lack of articulable suspicion for the simple reason that the citizen has not been seized.17

14. 100 S. Ct. at 1877. For a full discussion of Justice Stewart’s test, see text accompanying notes 88-106 infra. In Terry, the question whether officer McFadden initially seized Terry when he approached him was never fully answered by the Court. Due in part to an inadequate record, the Court assumed that up to the point of the officer’s physical contact with Terry, no seizure had occurred within the meaning of the fourth amendment. 392 U.S. at 19 n.16. The fourth amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

15. 100 S. Ct. at 1877.


17. 100 S. Ct. at 1877. Professor Amsterdam, reflecting upon the Court’s decisions after Terry, observed:

The fourth amendment, then, is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.

Amsterdam, supra note 13, at 388 (emphasis added) (footnotes omitted).

It is important to realize that the question whether a seizure has occurred is one separate and distinct from the issue presented in a Terry stop. If a citizen is seized, albeit briefly, then reasonable suspicion is required to justify the stop. E.g., Brown v. Texas, 443 U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 657 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). But if a citizen is not seized, the
Determining when a seizure occurs therefore becomes crucial. The police often learn critical information in the initial stages of their encounters with citizens. The requisite level of suspicion either exists or does not exist at the moment of any subsequent seizure. The validity of the procedure used to obtain that information is important because any information learned after the seizure cannot be used in retroactive justification.

The purpose of this Note is to assess the importance of Justice Stewart's analysis in United States v. Mendenhall and determine at what point in police-citizen encounters a seizure occurs. By examining the differences between seizures and non-seizures, and the policy values behind the fourth amendment, it will be shown that a "totality of the circumstances test," suggested by Justice Stewart and expanded upon here, should be used to determine when a seizure occurs. Although the test applies to all police-citizen encounters, this Note will limit its focus to Mendenhall-type factual situations by examining the results which follow application of the "totality" test to encounters between law-enforcement officials and citizens in public airports.

SEARCH AND SEIZURE PRIOR TO MENDENHALL

The fourth amendment to the United States Constitution, made applicable to the states through the due process clause of the requirement of reasonable suspicion does not enter the analysis. See 100 S. Ct. at 1877. It is only after a seizure occurs that reasonable suspicion is required. Id. For this reason, the stage suggested by Justice Stewart in Mendenhall must be viewed as an addition to, rather than a change in, search and seizure analysis.


20. See Wong Sun v. United States, 371 U.S. 471, 484-88 (1963). See also Brown v. Illinois, 422 U.S. 590, 600-03 (1975). If the initial seizure is illegal because the requisite level of suspicion does not exist prior to the seizure, then the information learned by the police may be "tainted" and inadmissible as the "fruit of the poisonous tree." See text accompanying notes 156-158 infra.

21. The Supreme Court has in a long line of cases taken short but definite steps in an effort to define when specific constitutional protections attach. See, e.g., Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) ("Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (sixth amendment right to assistance of counsel attaches upon the initiation of formal adversary proceedings). Similarly, Justice Stewart's opinion in Mendenhall reminds us of the need to determine when the protections of the fourth amendment attach.
fouthern amendment, provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

Although some commentators have criticized the Supreme Court for its lack of clarity and consistency with respect to fourth amendment doctrine, the accumulated weight of precedent has established definite rules of law.

Before the landmark decision in Terry v. Ohio, the fourth

22. Mapp v. Ohio, 367 U.S. 643 (1961); see Wolf v. Colorado, 338 U.S. 25 (1949), which was the first case in which the Supreme Court made the fourth amendment applicable to the states. Although the Wolf case failed to make the exclusionary rule applicable to the states, while Mapp subsequently did, it was only this aspect of Wolf which Mapp overruled. 367 U.S. at 654-60.

23. U.S. CONST. amend. IV. (The full text of the fourth amendment is reprinted in note 14 supra.) Although some historians have concluded that the first clause of the fourth amendment was intended only as a "mere premise" for the second clause, which condemns general warrants, see N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937), case law has given the clause its own vitality. See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Boyd v. United States, 116 U.S. 616 (1886). See generally A. BARTH, THE PRICE OF LIBERTY 94-110 (1961).


amendment prohibition against unreasonable seizures of persons was consistently analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause.\textsuperscript{27} Although warrants are not always necessary,\textsuperscript{28} probable cause has always been required for an arrest to be constitutional.\textsuperscript{29} Justice Brennan summarized the development of the requirement: "The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment."\textsuperscript{30}

In \textit{Terry}, the Supreme Court recognized for the first time that not all seizures of persons constitute an arrest and, therefore, not all seizures of persons require probable cause.\textsuperscript{31} At issue in \textit{Terry} was a brief, on-the-street stop and frisk\textsuperscript{32} for weapons, rather than a full-fledged arrest.\textsuperscript{33} The Court distinguished the two situations by focusing on the different levels of intrusiveness presented by each.\textsuperscript{34} Since the stop and frisk was so substantially less intrusive than a full-scale arrest, the Court deemed strict compliance with the probable-cause requirement to be inappropriate. Rather, the

\textsuperscript{27} See generally 3 W. \textsc{LaFave}, supra note 9, §§ 9.2-10.5; see also Dunaway v. New York, 442 U.S. 200, 208-09 (1979).

\textsuperscript{28} Exceptions to the warrant requirement have been clearly delineated for both arrests, see United States v. Watson, 423 U.S. 411 (1976) (felony arrests in public places); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit), and searches, see Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Chimel v. California, 395 U.S. 752 (1969) (search incident to a lawful arrest); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Carroll v. United States, 267 U.S. 132 (1925) (moving vehicle).


\textsuperscript{31} In \textit{Terry}, the Court concluded that a police officer "may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior, even though there is no probable cause to make an arrest." 392 U.S. at 22.

\textsuperscript{32} For a general review of stop and frisk procedures see Schwartz, \textit{Stop and Frisk (A Case Study in Judicial Control of the Police)}, 58 J. Crim. L.C. \\& P.S. 433 (1967).


\textsuperscript{34} 392 U.S. at 17-22. The Court rejected, however, the notion that the fourth amendment applied to arrests but not to stops: "There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action arises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion." Id. at 16 (citations omitted); accord, Brown v. Texas, 443 U.S. 47 (1979). The Court did, however, hold that the warrant requirement of the fourth amendment did not apply to the investigative stop, which need only be tested against the "reasonableness" requirement. 392 U.S. at 20.
Court concluded that a balancing test should be utilized to determine if the stop was "reasonable" under the fourth amendment. Under this balancing test, the government's interest in crime prevention and detection was weighed against the individual's interest in avoiding the intrusion.

In the stop-and-frisk situation presented in Terry, the scales tipped toward the government's interest in crime prevention, thus justifying the stop on less than probable cause. The Court held that when the officer "patted down the outer . . . clothing" of his suspect, he was "warranted in believing petitioner was armed and thus presented a threat to the officer's safety." At the time of the stop and frisk the officer was not arresting the suspect, and thus did not need probable cause to believe that a crime had been or was about to be committed. Rather, since the intrusion on the suspect's personal freedom was limited in comparison to the officer's reasonable belief that Terry was "armed with a weapon that could unexpectedly and fatally be used against him," that is, in comparison to the government's interest in crime prevention, the stop and frisk was reasonable under the fourth amendment.

The majority in Terry limited its decision to the facts. Indeed, the Court specifically declined to address the question of the "constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."

Any confusion over this issue was laid to rest in Adams v.

35. 392 U.S. at 21.
36. Id. at 19-22. Although it is clear that the right of personal security belongs to citizens on the streets, see id. at 9, the Court's concern with the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest," id. at 24, led it to conclude that only "reasonable suspicion" would be required for a stop and frisk. Id. at 30. For a definition of reasonable suspicion, see note 9 supra.

It may be argued that the decision in Terry was a reaction to the high levels of crime at the time and the need to do something about it, rather than a pure interpretation of constitutional law. The Court in several places noted the "easy availability of firearms to potential criminals," id. at 24 n.21, the number of police officers "killed in the line of duty," id., the number of "deaths and injuries inflicted with guns and knives," id. at 24, and the overwhelming governmental interest in preventing crime and saving lives. Id. at 22-24. See generally L. TIFFANY, D. McINTYRE, & D. ROTENBERG, DETECTION OF CRIME 44-57, 87-95 (1967).

37. 392 U.S. at 19.
38. Id. at 28.
39. Id. at 23.
40. Id. at 23-30.
41. Id. at 30.
42. Id. at 19 n.16.
where the Court reaffirmed *Terry* and applied the balancing test to investigative seizures. The Court concluded that

[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest, to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response . . . . A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of facts known to the officer at the time.\(^{44}\)

In the cases which followed *Terry* and *Adams*, the Court continued to apply a balancing test to various types of police-citizen encounters.\(^{45}\) As the test developed, four major factors became relevant: (a) the need for the stop,\(^{46}\) (b) the suspect's interest in avoiding the intrusion,\(^{47}\) (c) the gravity of the intrusion,\(^{48}\) and (d) the likelihood of the suspect's involvement, or potential involvement, in criminal activity.\(^{49}\) These factors thus fur-

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44. *Id.* at 145-46 (citations omitted); cf. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (*Terry* rationale applied to roving border patrol).
46. See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 557-60 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975); Alemida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973); Terry v. Ohio, 392 U.S. at 21. Other factors taken into account in considering the need for the stop include the public interest served, the seriousness of the offense, and the need for prompt action. See United States v. Price, 599 F.2d 494, 500 (2d Cir. 1979).
48. See, e.g., United States v. Brignoni-Ponce, 422 U.S. at 879-80; Terry v. Ohio, 392 U.S. at 21-23. Other factors considered here include the extent to which the defendant is impeded in his actions and the extent to which there is interference with general traffic. See, e.g., Brown v. Texas, 443 U.S. at 50-51; United States v. Martinez-Fuerte, 428 U.S. at 558.
49. See, e.g., Brown v. Texas, 443 U.S. at 50-51; Delaware v. Prouse, 440 U.S.
nished a framework for the Court's consideration of whether a particular seizure was reasonable under the fourth amendment. 50

Of course, a determination of the reasonableness of a seizure cannot determine whether a seizure actually occurred. It is interesting to point out, as Chief Justice Warren did in Terry, that "[s]treet encounters between citizens and police are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men, involving arrests or injuries or loss of life." 51 Given this diversity, the Court noted that there exists a class of encounters between policemen and citizens in which a person is not seized within the meaning of the fourth amendment. 52 Justice White agreed with this conclusion in his concurring opinion, stating that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances [reasonable suspicion], the person approached may not be detained or frisked, but may refuse to cooperate and go on his way." 53

However, the observations of Chief Justice Warren and Justice White seem to have been lost in the wake of Terry's primary holding: that a lesser degree of suspicion is necessary for a stop and frisk than for a formal arrest. Since 1968, the Court has applied the Terry balancing test to police-citizen encounters without addressing the threshold question of when a person has been seized within the meaning of the fourth amendment. 54 The law developed

at 654-55; United States v. Brignoni-Ponce, 422 U.S. at 879-83. Other factors used by courts here include the need for specific and articulable facts, the circumstances viewed as a whole and not singly, and the circumstances as viewed through the eyes of an experienced law-enforcement officer. See United States v. Cortez, 595 F.2d 505, 507-08 (9th Cir. 1979); United States v. Roundtree, 596 F.2d 672, 674 (5th Cir.); cert. denied, 100 S. Ct. 149 (1979); United States v. Smith, 574 F.2d 882, 884-86 (6th Cir. 1978); United States v. Oates, 560 F.2d 45, 59 (2d Cir. 1977).

50. See generally Greenberg, supra note 45.
51. 392 U.S. at 13.
52. Id. at 19 n.16.
53. Id. at 34 (White, J., concurring). Justice Harlan also agreed that a fourth amendment seizure does not occur in all encounters between citizens and police, when he stated in his concurring opinion in Terry that policemen have "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 interrogator and walk away . . . ." Id. at 32-33 (Harlan, J., concurring).
54. In Sibron v. New York, 392 U.S. 40 (1968), a companion case to Terry, the Court was concerned with an issue similar to the one presented in Terry. The facts of Sibron, however, led the Court to an interesting question which it declined to address. Officer Martin was on patrol in Brooklyn in the spring of 1965, when he ob-
by *Terry* and its progeny was never intended to deal with this question. Indeed, the *Terry* Court specifically stated that it had to assume a seizure had not occurred prior to the frisk of the suspect because of an inadequate record. A full articulation by the Supreme Court of when a seizure occurs would have answered the question and would therefore have been an addition to—a starting point for—the *Terry* analysis. Although some circuit courts and some state courts had addressed this issue, by the time certiorari was granted in *Mendenhall* the Supreme Court had yet to consider the assertion, originally made by Chief Justice Warren in *Terry*, that not all encounters between citizens and police constitute seizures.

served Sibron in conversation with six to eight persons known by him to be narcotics addicts. Later that evening, Sibron entered a restaurant and spoke with three more known addicts. While Sibron was eating, Officer Martin approached him and asked him to step outside. Once outside, Officer Martin told Sibron, “You know what I’m after,” whereupon Sibron “mumbled” something and reached in his pocket. Officer Martin simultaneously reached in Sibron’s pocket and discovered glassine envelopes which later turned out to contain heroin. *Id.* at 44-46. In considering the question whether Officer Martin had reasonable suspicion to believe Sibron was armed and dangerous, the Court remarked: “We are not called upon to decide in this case whether there was a ‘seizure’ of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search.” *Id.* at 63. The Court did not consider this issue because the record was “unclear with respect to what transpired between Sibron and the officer inside the restaurant.” *Id.* Ultimately, the Court regarded this deficiency in the record as “immaterial, since Patrolman Martin obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside.” *Id.*

55. 392 U.S. at 19 n.16.


58. Certiorari was granted on October 1, 1979. 444 U.S. 822 (1979). Although it is interesting to note that the government in its petition for certiorari failed to raise the question whether the defendant was initially seized, the government did note, in the course of arguing that the level of suspicion necessary to justify the stop was slight, that it was “arguable that the initial encounter between the DEA agents and the respondent in this case was not even a ‘seizure’ of her person within the meaning of the Fourth Amendment.” Petition for Certiorari at 19, United States v. Mendenhall, 100 S. Ct. 1870 (1980). Moreover, the government devoted seven pages of its brief to the question whether the defendant had been seized. Brief for United States at 19-26, United States v. Mendenhall, 100 S. Ct. 1870 (1980).
Sylvia Mendenhall arrived at the Detroit Metropolitan Airport on a commercial airlight from Los Angeles, California. As she got off the plane, she was observed by agents of the Drug Enforcement Administration (DEA) who were present at the airport for the purpose of detecting illegal narcotics traffic. Because she appeared to possess some characteristics the agents believed were similar to those possessed by persons known to unlawfully carry narcotics, these traits and characteristics, referred to as the "drug courier profile," include seven primary and four secondary characteristics believed by DEA agents to be common among drug couriers. United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979). The primary characteristics are: (1) arrival from a source city, a city from which drugs are shipped to other points for sale or further distribution; (2) carrying little or no baggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for very long airline trips; (4) the use of aliases; (5) carrying unusually large amounts of currency, in the many thousands of dollars, usually on their person; (6) buying an airline ticket with a large amount of small denomination currency; and (7) unusual nervousness. The secondary characteristics include: (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving false or fictitious call-back telephone numbers with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.

For some recent cases considering suppression motions arising out of DEA's program, see United States v. Forero-Rincon, 626 F.2d 218 (2d Cir. 1980); United States v. Buenaventura-Ariza, 615 F.2d 29 (2d Cir. 1980); United States v.
the agents approached Ms. Mendenhall.63

After identifying themselves as federal agents, the agents asked to see the suspect’s airline ticket and some identification.64 Ms. Mendenhall produced her Michigan driver’s license bearing the name Sylvia Mendenhall and an airline ticket which was issued in the name of Annette Ford.65 When asked why the ticket bore a different name, the suspect responded that she “just felt like using that name.”66

At this point the agents asked the defendant how long she had been in California. When the defendant responded that it had been only two days, the agents’ suspicions became aroused because it was a “very short, abbreviated trip to go that distance and return.”67 When one of the agents specifically identified himself as a federal narcotics agent, the suspect “became quite shaken, extremely nervous. She had a hard time speaking.”68 The agent returned the suspect’s ticket and driver’s license and requested that she accompany them to a DEA office in the airport for further questions. The defendant did so, although the record did not indicate verbal agreement or disagreement.69

Roundtree, 596 F.2d 672 (5th Cir.), cert. denied, 100 S. Ct. 149 (1979); United States v. Trautman, 590 F.2d 604 (5th Cir. 1979).

63. According to Agent Anderson, Special Agent with DEA, who observed and approached the defendant, the following characteristics possessed by the defendant drew his attention to her: (a) The defendant was the last person to deplane, which in Agent Anderson’s experience is common of drug couriers who wish to obtain a clear view of the area inside the terminal; (b) The defendant looked nervous as she deplaned, as if she were trying to detect police in the terminal area; (c) The defendant failed to claim any luggage, despite the fact she had taken a long journey; and (d) The defendant changed airlines for the next portion of her journey even though she already had a valid ticket for the same destination. The fourth factor, particularly, aroused Agent Anderson’s suspicions because drug couriers often change airlines to confuse anyone who may be following them. United States v. Mendenhall, Crim. No. 6-80208 (E.D. Mich. Nov. 18, 1976) (Memorandum and Order of the District Court at 2-3), rev’d, 596 F.2d 706 (6th Cir. 1979), rev’d and remanded, 100 S. Ct. 1870 (1980).

64. 100 S. Ct. at 1873. Justice Stewart concluded that the defendant was not “seized” at this point, based on the standards he articulated in his opinion. Id. at 1877; see text accompanying notes 99-100 infra. On the other hand, Justice White and the dissenters “assumed” that the defendant was “seized,” within the meaning of the fourth amendment, when the agents asked to see her identification and airline ticket. 100 S. Ct. at 1885 (White, J., dissenting). The dissenters’ analysis is in accord with the traditional analysis discussed in note 17 supra.

65. 100 S. Ct. at 1873-74.

66. Id. at 1874.


68. Id.

69. 100 S. Ct. at 1874. Although the trial court found that the defendant
At the office, the agents informed the defendant that she had a right to withhold her consent to a search of her handbag and then asked if she would consent to such a search. She responded, "Go ahead," and voluntarily handed the agent her purse. The search of her handbag revealed a receipt for an airline ticket issued to "F. Bush," which the defendant stated she had previously used for her flight from Pittsburgh to California, by way of Chicago.

With their suspicions heightened further, the agents called a female police officer of the Metro Airport Police Department to conduct a search of the defendant. After obtaining the defendant's consent to the search, the officer informed the defendant that she had to remove all of her clothing. The defendant stated that she had a plane to catch, but was assured by the policewoman that she could proceed.

accompany the agents to the DEA office in the "spirit of apparent cooperation," United States v. Mendenhall, Crim. No. 6-80208 (E.D. Mich. Nov. 18, 1976) (Memorandum and Order at 8), and Justice Stewart agreed, 100 S. Ct. at 1878, it is arguable in light of Dunaway v. New York, 442 U.S. 200 (1979), that the defendant was seized at this point. See 100 S. Ct. at 1887-88 (White, J., dissenting). At issue in Dunaway was the legality of custodial questioning on less than probable cause. 442 U.S. at 202. The defendant had been picked up by the police in connection with a murder investigation. He was then driven to police headquarters in a police car and placed in an interrogation room where he was questioned by officers. The defendant eventually made statements that incriminated him in the crime. Id. at 203. The Court held that the detention of the defendant was "indistinguishable" from a traditional arrest and as such required probable cause. Id. at 216.

In light of Dunaway, the request by the agents in Mendenhall that the defendant accompany them to the DEA office easily could have carried with it the implication of an obligation, which unless clearly stated to be voluntary, may have been an awesome experience. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT § 110.1 (1975); id. at 261 (Commentary).

70. 100 S. Ct. at 1874.
71. Id.
72. Id.
73. Officer Beverly Mersier responded to Agent Anderson's request. At the suppression hearing, Agent Anderson testified that the request for a female officer to conduct a strip search of a female suspect is a "regular airport procedure." United States v. Mendenhall, Crim. No. 6-80208 (E.D. Mich. Oct. 18, 1976) (Transcript of Suppression Hearing at 16).
74. 100 S. Ct. at 1874. Officer Mersier asked the DEA agents if the defendant had consented to the search. The agents said that she had, and Officer Mersier then asked the defendant to accompany her to a private search room. At the search room, Officer Mersier again asked the defendant if she consented to the search. Id. A majority of the Supreme Court concluded that the consent was valid. Id. at 1879-80.
75. Because drug couriers often carry illegal narcotics on their person, strip searches are a common occurrence in drug-related investigations. See, e.g., United States v. Aman, 624 F.2d 911 (9th Cir. 1980); United States v. Webb, 623 F.2d 758 (2d Cir. 1980); United States v. Perkins, 606 F.2d 1064 (5th Cir. 1979). See generally 3 W. LaFave, supra note 9, § 10.5(b).
that if she was not carrying narcotics "there would be no problem." As the defendant began to disrobe, she voluntarily removed from her undergarments two small packages, one of which appeared to contain heroin. She handed both packages to the policewoman. The defendant was subsequently placed under arrest and charged with possession of heroin.

Prior to trial, the defendant moved to suppress introduction of the heroin as the fruit of an unlawful search. The district court denied the motion, concluding that the initial approach and request to see her identification and airline ticket was a permissible investigative stop, based on specific and articulable facts, consistent with the Supreme Court decision in Terry. The district court also found that the defendant had accompanied the agents to the DEA office voluntarily and had freely consented to the search in the DEA office.

The defendant's subsequent conviction was at first reversed by the Court of Appeals for the Sixth Circuit in an unreported decision. The court stated only that the case was "indistinguishable from U.S. v. McCaleb, 552 F.2d 717," where DEA agents seized heroin under circumstances considered by the Sixth Circuit to be substantially similar to those in Mendenhall. Subsequently, however, the court vacated its decision, granted a rehearing en banc, and—although reinstating the panel decision—concluded that the defendant had not validly consented to the search of her person in the DEA office. Yet, the court offered no factual analysis to support its conclusion. The United States appealed and the Supreme Court granted certiorari on October 1, 1979.

76. 100 S. Ct. at 1874. Although counsel for the defendant argued that the defendant did not consent to the search, relying principally on the fact the defendant indicated that she had a plane to catch, Brief for Respondent at 50-52, United States v. Mendenhall, 100 S. Ct. 1870 (1980), according to a majority of the Supreme Court "the trial court was entitled to view the statement as simply an expression of concern that the search be conducted quickly." 100 S. Ct. at 1879-80.

77. 100 S. Ct. at 1874.

78. Id.


80. Id. (Memorandum and Order at 8-10).

81. See United States v. Mendenhall, 596 F.2d 706, 707 (6th Cir. 1979) (en banc) (quoting unreported panel decision).

82. See id.

83. Id.

While the government did not focus in its petition for certiorari on whether the defendant was seized when the agents initially approached her, the issue was raised in its brief. Because the issue on appeal had been whether the defendant's consent to the search was voluntary or was the product of an earlier violation of the fourth amendment, Justice Stewart concluded that it was necessary to first determine if there had been an unlawful detention prior to the defendant's oral consent to be searched.

Justice Stewart's Test

Justice Stewart's conclusion that the defendant was not seized within the meaning of the fourth amendment was based on two premises. First, although the fourth amendment protects an individual's right of personal security as he or she walks through a public airport, the fourth amendment is not intended to eliminate all contact between citizens and the police. Rather, the fourth amendment only protects citizens against arbitrary and oppressive
interferences with personal liberty. According to Justice Stewart, "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." In support of this premise, Justice Stewart cited Chief Justice Warren's observation, dormant in the 12 years since Terry, that not all encounters between citizens and the police constitute fourth amendment seizures.

Justice Stewart's second premise was based on a concern that characterizing every street encounter as a seizure, while not enhancing any fourth amendment interest, "would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." He noted that previous Supreme Court decisions have recognized the need to give law-enforcement officers greater investigative flexibility, and quoted the following passage from Schneckloth v. Bustamonte in support: "Without such investigations, those who were innocent might be falsely accused, and those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."

Given the degree of intrusion and the government's interest in law enforcement, Justice Stewart concluded that a person was seized within the meaning of the fourth amendment only if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Consistent with this test, the circumstances that might indicate a seizure had occurred would include "[a] the threatening presence of several officers, [b] the display of a weapon by an officer, [c] some physical touching of the person of the citizen, or [d] the use

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90. 100 S. Ct. at 1877; see United States v. Martinez-Fuerte, 428 U.S. at 554; United States v. Brignoni-Ponce, 422 U.S. at 878; Terry v. Ohio, 392 U.S. at 20-21; Camara v. Municipal Court, 387 U.S. at 536-37.
91. 100 S. Ct. at 1877 (emphasis added).
93. See 100 S. Ct. at 1877. See generally 3 W. LAFAVE, supra note 9, § 9.2(g).
94. 100 S. Ct. at 1877.
97. Id. at 225; see Haynes v. Washington, 373 U.S. 503, 515 (1963).
98. 100 S. Ct. at 1877.
of language or tone of voice indicating that compliance with the officer's request might be compelled." In light of the general test and specific examples quoted, Justice Stewart concluded that the conduct in *Mendenhall*, "without more, did not amount to an intrusion upon any constitutionally protected interest." Thus, no seizure had occurred.

Justice Rehnquist joined Justice Stewart in concluding that no seizure had occurred. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, did not reach the seizure issue because "neither of the courts below considered the question . . ." Accordingly, Justice Powell assumed, as did the courts below, that a seizure had occurred; however, Justice Powell went on to conclude that based on the totality of the evidence the seizure was a permissible one, based on reasonable suspicion in light of *Terry*. In spite of the differing analyses regarding the seizure issue, a majority was easily formed. All five Justices believed themselves bound by the district court's finding that the defendant had voluntarily consented to the search of her person. Since there was a valid consent to the search, and there was no prior unlawful seizure that would taint the defendant's consent, the Supreme Court reversed the court of appeals decision and remanded the case for further proceedings.

**BEYOND MENDENHALL**

Justice Stewart's opinion in *Mendenhall* presents a turning point in the approach to police-citizen encounters. Indeed, since *Mendenhall* a number of federal decisions have relied upon that opinion in analyzing fourth amendment seizure problems. While

99. *Id.*
100. *Id.*
101. *Id.* at 1873.
102. *Id.* at 1880 (Powell, J., concurring in part and concurring in the judgment).
103. *Id.* (Powell, J., concurring in part and concurring in the judgment).
104. *Id.* (opinion of Stewart, J.).
105. That is, the defendant was either not seized (according to Justices Stewart and Rehnquist) or was seized pursuant to the DEA agents' reasonable suspicion (according to Chief Justice Burger and Justices Powell and Blackmun).
106. *Id.* at 1880.
107. See, e.g., United States v. Fry, 622 F.2d 1218, 1221 (5th Cir. 1980); United States v. Robinson, 625 F.2d 1211, 1214-15 (5th Cir. 1980). See also Mc Shan v. Georgia, 155 Ga. App. 518, 271 S.E.2d 659 (1980). The test enunciated by Justice Stewart to determine when a seizure occurs was never specifically rejected by the other members of the Court. Indeed, the concurring Justices stated that they did "not necessarily disagree with the views expressed in Part II-A," of Justice Stewart's
it is well-settled that the amendment protects citizens from unreasonable seizures,\(^\text{108}\) the relevant question for Justice Stewart arises

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100 S. Ct. at 1880 n.1 (Powell, J., concurring in part and concurring in the judgment, joined by Burger, C.J., and Blackmun, J.). While this footnote in the concurring opinion may not mean that Part II-A of Justice Stewart's opinion is now the view of a majority of the Court, it takes on a greater significance in light of the opinions of the Court in Reid v. Georgia, 100 S. Ct. 2752 (1980) (per curiam), decided one month after Mendenhall.

In Reid, the Court was confronted with a fact pattern substantially similar to the one presented in Mendenhall. In both cases the defendant had been observed walking through an airport and was approached by DEA agents who requested some identification. The opinions by the Court in Reid, however, should be separately emphasized for several reasons. First, although the majority in Reid held that the DEA agent did not have reasonable suspicion to stop the defendant when he did, id. at 2754, it failed to consider the question whether the defendant was even seized within the meaning of the fourth amendment in the first place. What is most surprising is that Justice Stewart, who addressed and answered the question in Mendenhall, is part of the majority in Reid. (The opinion of the Court in Reid is per curiam and is supported by Justices Brennan, Marshall, Stevens, White, and Stewart.) Further, the majority in Reid never even cites to Mendenhall, despite the similarity in the cases.

Even more interesting is the opinion by Justice Powell in Reid, joined by Chief Justice Burger and Justice Blackmun. These same Justices concurred in Mendenhall. As noted above, their opinion in Mendenhall did not necessarily disavow Justice Stewart's test for determining when a seizure occurs. In Reid, however, these Justices went further, seemingly endorsing Justice Stewart's approach in Mendenhall. First, Justice Powell stated that Reid is "similar in many respects to United States v. Mendenhall." 100 S. Ct. at 2754 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.). He then indicated that the "threshold question in Mendenhall, as here, was whether the agent's initial stop of the suspect constituted a seizure within the meaning of the Fourth Amendment." Id. (Powell, J., concurring) (emphasis added). This is significant because for the first time, a majority of the Supreme Court has acknowledged that the threshold question in police-citizen encounters is whether the initial contact between a citizen and the police constitutes a seizure within the meaning of the fourth amendment (Justices Stewart and Rehnquist in Mendenhall, and Justice Powell, Chief Justice Burger, and Justice Blackmun in Reid).

This however is not the end of the significance of Reid. Justice Powell next quoted Justice Stewart's test from Mendenhall to determine when a seizure occurs. He went on to remind us that he did not necessarily indicate disagreement with Justice Stewart's views in Mendenhall. After then observing that the threshold seizure question was not considered by the courts below in Reid, Justice Powell stated "that issue remains open for consideration by the state courts in light of the opinions in Mendenhall." Id. at 2755 (Powell, J., concurring).

This is an interesting statement. Does it mean that Justices Powell and Blackmun and Chief Justice Burger have now adopted Justice Stewart's test in Mendenhall? Does it mean, even if they have not, that they realize Justice Stewart's approach may be the correct approach and that lower courts should now consider Justice Stewart's approach when evaluating police-citizen encounters? It is doubtful anyone can yet know with certainty what this statement means, although as noted above, supra, some federal and state courts have followed Justice Stewart's approach.

108. See, e.g., Brown v. Texas, 443 U.S. 47, 50-51 (1979); Delaware v. Prouse,
prior to any determination of the seizure's reasonableness. The question is, "When does a seizure occur"?

If Sylvia Mendenhall had asked whether she was free to leave and the DEA agent told her she was not, then any ambiguity concerning the nature of the encounter would have been clarified—a seizure would have occurred. If the agent upon his approach had advised her that she was free to leave, but she chose to remain, then again the situation would have been clear—no seizure would have occurred. The problem arose, however, because nothing was said by either the agents or the defendant to clarify the situation. The Court was "confronted with a substantially ambiguous set of objective facts from which [it had to] determine whether a seizure of the person [had] indeed occurred."

Mendenhall illustrates the need for an analytical framework within which trial courts can resolve these ambiguities and thus determine whether a seizure occurs within the meaning of the fourth amendment. It does not, however, satisfy that need. As Professor LaFave has pointed out, there are several alternative approaches that can be taken to establish this framework. Among the approaches that can be taken are:

[Whether the officer would permit the suspect to leave?]

Whether the suspect believed he was still free to leave? Whether


109. Although one way to resolve any ambiguity would be to require the officer upon approaching to advise the person that he or she was free to leave and did not have to cooperate, it is unlikely that the Supreme Court would impose such a restriction on the police. Warning requirements are generally not triggered until a person is taken into custody. Custodial interrogation has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added) (footnote omitted). Indeed, the Supreme Court has held that Miranda warnings do not apply to the questioning of suspects who are neither arrested nor detained against their will. Beckwith v. United States, 425 U.S. 341, 344 (1976). Indeed, the Miranda Court placed its own limits on the decision:

Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

384 U.S. at 477-78. See generally W. LaFAVE, supra note 9, § 10(b), at 95-106.

the suspect consented to the interview? Whether by some objective test a restraint had occurred? Or [whether] 'the approach of an officer is the same as the seizure of an individual?"111

The first approach places the trial court in an untenable position because the court is required to determine the state of mind of the officer. This, according to Professor LaFave, is unrealistic because "in most instances the officer will not think ahead to such a possibility . . . because suspects being questioned on the street ordinarily do not attempt to leave."112 Any test with the purpose of identifying street encounters that are not seizures must be expressed in terms which can be easily applied by the officer in the field.113 The second approach is therefore also not satisfactory because the officer is required to determine what the suspect's state of mind is, a skill that " 'would require a prescience neither the police nor anyone else possesses.' "114

The rationale that makes utilization of the first approach inappropriate also makes utilization of the third approach, the consent standard, inappropriate. Most suspects do not attempt to leave or otherwise manifest their lack of consent.115 This is illustrated in one empirical study which concluded that

[i]t is not meaningful in practice to attempt to distinguish between field interrogation with consent and that which takes place without consent. In high-crime areas particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three.116

The fifth standard, which would equate the approach of an officer with the seizure itself, completely ignores the fourth amendment value, the protection of individual freedom, that search and seizure analysis should be responsive to. As long as the individual

111. 3 W. LaFAVE, supra note 9, § 9.2(g), at 48 (emphasis in original) (quoting Comment, "Stop and Frisk" Under the Fourth Amendment: Terry and Sibron, 6 Hous. L. Rev. 333, 337 (1968)).
112. Id. at 52.
113. Id. at 50-51.
114. Id. at 51 (quoting United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969)).
115. Id. at 52; see Pilcher, supra note 5, at 473.
retains his or her freedom to leave, the mere approach of a law-
enforcement officer cannot be said to constitute a seizure.\textsuperscript{117}

Professor LaFave suggested use of the objective standard. This approach has two important advantages over the others. First, courts will not be forced into the "guesswork" required by the more subjective tests. Second, law-enforcement officers will be in a better position to assess what is legally permissible.\textsuperscript{118} The latter advantage is especially important when the officer is required to make split-second decisions in the field.\textsuperscript{119} Having a clearly defined and easily understandable objective approach therefore best serves society's interests in both law enforcement and the perpetuation of constitutional government.

\textit{The Totality of the Circumstances Test}

Any fair and effective test must allow examination of the totality of the circumstances of the encounter to determine whether a seizure has occurred within the meaning of the fourth amendment. However, at least two considerations should be focused upon in detail. First, the trial court needs to examine actions taken by the police during the encounter. Specifically, a determination of whether the police by means of physical force or show of authority have restrained the liberty of an individual is critical.\textsuperscript{120} It is easily stated that the degree to which an individual's liberty may be restrained depends upon an officer's conduct, but it is difficult to arrive at a reasoned conclusion without the assessment of objective factors. Whether the defendant acted voluntarily in a spirit of apparent cooperation—or without consent in submission to a show of authority—depends on an examination of both the overt and subtle actions of the police.\textsuperscript{121} For while not all police-citizen encounters constitute seizures,\textsuperscript{122} any encounter can easily be transformed into a coercive atmosphere.

The second consideration upon which trial courts should focus in assessing whether a seizure has occurred requires expansion upon the general test urged by Justice Stewart in \textit{Mendenhall}. By

\begin{footnotes}
\item 117. See text accompanying notes 88-100 \textit{supra}.
\item 118. 3 W. LAFAVE, \textit{supra} note 9, § 9.2(g), at 52.
\item 119. Compare id. at 56-57 with Schwartz, \textit{supra} note 32, at 448-49.
\item 120. See 392 U.S. at 19.
\item 121. See Sibron v. New York, 392 U.S. 40, 63 (1968); text accompanying note 99 \textit{supra}.
\item 122. See 100 S. Ct. at 1877; 392 U.S. at 19 n.16; People v. De Bour, 40 N.Y.2d 210, 216-17, 352 N.E.2d 562, 567, 386 N.Y.S.2d 375, 380 (1976).
\end{footnotes}
that standard, a seizure occurs if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” That test incorporates an examination of actions taken by the police, an examination advocated above. It fails, however, to provide adequate focus upon the policy values underlying the fourth amendment. The amendment was designed to protect an individual’s privacy. However, the amendment protects only a person’s reasonable expectations of privacy. This is not, however, a subjective test. The objective factor—the location of the encounter—is of critical importance precisely because the reasonableness of an individual’s privacy expectation is dependent upon the environment. One end of the spectrum has historically been defined by an individual’s expectations of privacy in his or her home. As Justice Stevens stated for the Court in *Payton v. New York*, “[t]he Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home . . . .” Thus, the second factor in the totality test advocated requires an evaluation of an individual’s reasonable expectations of privacy in the location of the encounter.

123. 100 S. Ct. at 1877.

124. Id.


The right of privacy has been referred to as the “right to be left alone.” *Olmstead v. United States*, 277 U.S. 438, 471, 478 (1928) (Brandeis, J., dissenting). The roots of the modern concern for privacy may be traced to Justice Brandeis’ seminal article. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).


127. 100 S. Ct. 1371 (1980).

128. Id. at 1381-82; *see United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). However, outside the home, a person has been accorded less fourth amendment protection. For example, the Supreme Court has indicated that in a public place a person may have no reasonable expectation of privacy. *See United States v. Santana*, 427 U.S. 38, 42 (1976) (sustaining an arrest without a warrant in a public place); *cf. Katz v. United States*, 389 U.S. at 351 (1967) (“What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.”). *See also* United States v. Chadwick, 433 U.S. 1 (1977); Cardwell v. Lewis, 417 U.S. 583 (1974), indicating that an individual has a lesser expectation of privacy with respect to his or her car in part due to its mobility.
Taking the two factors together—the actions of the police and the individual’s reasonable expectations of privacy in the location of the encounter—will enable trial courts to arrive at a determination based on objective factors as to whether a seizure has occurred.  

EXPECTATIONS OF PRIVACY IN AN AIRPORT

Airports today are often the scene of congestion and chaos. 130 Air travelers frequently experience traffic delays, cancellations, detours due to weather conditions, and lost baggage, 131 with each passenger having his or her own “favorite horror story.” 132 The increase in the number of airline passengers in the last decade has been staggering, causing many airports to burst at their seams. 133 In 1979, close to 300 million passengers flew on scheduled domestic flights. 134 New York’s LaGuardia airport handled 25,000 passengers each day that year. 135 In 1978, National Airlines traffic at Ft. Lauderdale’s airport reached the levels predicted for 1984. 136 Atlanta’s airport has had so many passengers that the congestion in the corridors leading to the boarding gates on a normal weekday has been described as resembling “the movement in the grandstands of football games between halves.” 137 The minimum conclusion to be drawn from this information is that an individual’s expectation of privacy in an airport is diminished at least by comparison

129. A difficulty with of this type of analysis is that to the extent the determination as to whether a seizure has occurred turns on an individual’s reasonable expectations of privacy, the determination whether a given expectation is reasonable must be made for each location of any encounter between citizens and the police. For example, as the discussion as to airports indicates, see text accompanying notes 130-153 infra, courts must be sensitive to many factors in determining which expectations of privacy society is prepared to recognize as reasonable for any given location. Among these factors are: (1) the level of government regulation or the extent of the government’s presence already in the area; (2) the public or private nature of the location, and; (3) the patterns of interaction in the location. See generally 3 W. LAFAVE, supra note 9, § 9.2, at 53-54.

130. See Airport Congestion, TRAVEL/HOLIDAY, Sept. 1979, at 22.
133. ECONOMIST, June 23, 1979, at 113.
135. Id. at 14.
137. ATLANTIC, Aug. 1979, at 25.
to that expectation in the home. The practical effect of this diminution is illustrated by the legally sanctioned solicitation of contributions in airports by members of certain religious groups.\textsuperscript{138} Certainly, no one would suggest that the law would not allow one to bar similar solicitation in one's living room.

While the factors mentioned above contribute to the diminished expectation of privacy in the airport, perhaps the most important factor is the utilization of antihijacking systems. For unlike the sheer number of passengers, the ubiquitous antihijacking devices relate directly to the law-enforcement function. Since 1973, pursuant to Federal Aviation Administration directives,\textsuperscript{139} all passengers have been required to pass through a metal detector.\textsuperscript{140} At the same time, all carry-on bags are searched either manually or by x-ray weapons detectors.\textsuperscript{141} If the device's indicators are triggered, passengers are required to produce identification, while armed law-enforcement officials stand by.\textsuperscript{142} The expectations of privacy that passengers have as to their person, luggage, and other personal belongings are therefore greatly diminished by the simple fact that they are constantly having such items either searched or inspected.

In addition to having their baggage searched, airline passengers, on both domestic and international flights, are required to show their airline tickets and boarding passes.\textsuperscript{143} Indeed, on international flights, the extent to which luggage is searched and passengers are required to produce identification is even greater.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{138} See Int'l Soc. for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 268-69 (7th Cir. 1979); N.Y. Times, Jan. 28, 1979, at 25, col. 1.
\item \textsuperscript{140} A metal detector or magnometer is designed to detect the presence of metal objects with substantial ferrous content carried by a passenger either on his person or inside his carry-on luggage. See United States v. Lopez, 328 F. Supp. 1077, 1085-86 (E.D.N.Y. 1971).
\item \textsuperscript{141} Id. at 1083-86; see United States v. Davis, 482 F.2d 893, 900-02 (9th Cir. 1973). See generally Note, The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices, 7 U.C.L.A.—ALAS. L. REV. 307 (1978).
\item \textsuperscript{142} See Note, supra note 139, at 131 (citing Department of Transportation Press Release No. 103-72, Dec. 5, 1972).
\item \textsuperscript{143} As part of their duty to screen passengers, see 14 C.F.R. §§ 121.538, 121.584, 121.585 (1980), airlines are required to check passengers' airline tickets and boarding passes. Interview with Eliot Blue, Airport Security Agent, Federal Aviation Administration, John F. Kennedy International Airport, New York, Sept. 29, 1980.
\item \textsuperscript{144} Unlike passengers arriving on domestic flights, passengers arriving on international flights are subject to more extensive, albeit still routine border searches simply by virtue of the fact that they have crossed our national border. See United
\end{itemize}
Furthermore, most airports display signs and announce over public-address systems that all passengers are subject to being searched. While the constitutionality of whether a passenger therefore "impliedly consents" to a search based on these signs and announcements may be doubtful, their existence attests to the fact that an individual would be unreasonable to expect that he or she would not be subject to some method of search in the interest of law enforcement.

To be sure, a person does not divest himself or herself of all constitutional protection simply by venturing into a public airport. Yet, what the foregoing factors illustrate is the unavoidable relationship between individual values and public values. Professor Amsterdam has observed that, if any "particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent


145. United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973). See generally Note, supra note 139, at 149-52.

146. Some courts have concluded that airline searches could be upheld on an "implied consent" theory. See United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973); United States v. Doran, 482 F.2d at 932. Other courts, however, have held that a passenger must be specifically apprised of the right to refuse the search by not boarding the plane and that posted signs do not take the place of express consent. See United States v. Meulener, 351 F. Supp. 1284, 1287-88 (C.D. Cal. 1972); United States v. Lopez, 325 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971). The Supreme Court decision in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), throws doubt upon the validity of the "implied consent" doctrine despite the fact that subsequent to Schneckloth some courts have held that a consent may be made voluntarily, without an express warning of the right to refuse a search. See, e.g., United States v. Edwards, 359 F. Supp. 764, 768 (E.D.N.Y. 1973); People v. Kuhn, 33 N.Y.2d 203, 209, 306 N.E.2d 777,779, 351 N.Y.S.2d 649, 653 (1973). In Schneckloth the search was found to be constitutional when the defendant expressly agreed to it, albeit verbally. 412 U.S. at 233-49. Present airport security systems, however, are unlikely to meet the standard of "express consent," even after Schneckloth, for at no point is the verbal or written assent of the passenger obtained. See Note, supra note 139, at 151. See generally Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 57 (1974).

147. 100 S. Ct. at 1876; see Katz v. United States, 389 U.S. 347, 351-52 (1967) (citations omitted): "[T]he fourth amendment protects people, not places. . . . But what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." See also 1 B. Schwartz, A Commentary on the Constitution of the United States: Rights of Persons, Sanctity, Privacy and Expression 228 (1968).
with the aims of a free and open society." At the same time, however, if constitutional restraints were to be at all times absolute, the values served and protected by law enforcement would be equally diminished. This fact, inherent in Professor Amsterdam's analysis and displayed in a myriad of tangible reminders throughout airports every day, makes it unreasonable to recognize an expectation that no police-citizen interaction will occur in a public airport.

Sylvia Mendenhall may have preferred to be asked questions by an airline agent instead of a government agent. This cannot, however, compel a different result. The choice to respond to questions asked by either an airline agent or government agent was Ms. Mendenhall's. In either case, she had a similar choice to walk away. As long as she remained free to make her own decision, any expectation of privacy she may have held was not infringed upon by the government agents. Thus, since the defendant's freedom

148. Amsterdam, supra note 13, at 403.

149. Another commentator has noted that "if one is to live and thrive in this closely set society, he must agree, either consciously or unconsciously, to abdicate some measure of personal privacy." M. Slough, Privacy, Freedom and Responsibility 6 (1969). Similarly, a third commentator has observed that "[a]s a value privacy does not exist in isolation, but is part and parcel of the system of values that regulates action in society." Simmel, Privacy is Not an Isolated Freedom, 13 Nomos 71 (1971). See also United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (The nature of a particular practice and the likely extent of its impact on the individual's sense of security as measured by the customs and values of the past and present must be balanced against the utility of the conduct as a technique of law enforcement); United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y. 1971) (The court must take into account both the "contemporary norms of social conduct and the imperatives of a viable democratic society."); Gross, The Concept of Privacy, 42 N.Y.U.L. Rev. 34 (1967); Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. Rev. 968, 983 (1968).

150. Furthermore, the police would have been able to obtain the information on her airline ticket from the airline if they had chosen to do so. Even if an individual does have an actual expectation of privacy in his or her airline ticket, this expectation is not one that society is likely prepared to recognize as reasonable. As already noted, see text accompanying notes 125-126 supra, the fourth amendment protects only a person's reasonable expectations of privacy. See Terry v. Ohio, 392 U.S. at 9 (citing Katz v. United States, 389 U.S. 347, 351 (1967)). As the Supreme Court stressed in Katz, what a person knowingly "exposes" to the public is not a subject of fourth amendment protection. 389 U.S. at 351. Indeed, the Supreme Court has consistently held that a person has no reasonable expectation of privacy in information that is conveyed to third parties. See, e.g., Smith v. Maryland, 442 U.S. 735, 744 (1979) (reasonable expectations of privacy in phone numbers dialed forfeited when numbers are conveyed to the phone company to complete the call); United States v. Miller, 425 U.S. 435, 442-44 (1976) (reasonable expectation of privacy in financial information conveyed to bank forfeited because of exposure to bank employees in the ordinary course of business).
was not limited by anything other than her desire to cooperate,\textsuperscript{151} no fourth amendment interest would be served by classifying the encounter in \textit{Mendenhall} as a seizure.

Given the contemporary reality of an individual's experience in a public airport and the resultant diminution in the reasonable expectation of privacy, law-enforcement officials should constitutionally be able to seek a citizen's cooperation in order to prevent and detect criminal activity\textsuperscript{152} without being required to articulate

\textsuperscript{151} See United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1976). In \textit{Wylie}, the defendant had been questioned concerning his identity and activities immediately prior to an encounter that took place in a bank from which he attempted to withdraw money without any identification. In applying a reasonable man test of whether the person was under a "reasonable impression that he was not free to leave," the court held that there was no seizure in the situation where the individual was free to choose whether to continue the encounter, and did choose to do so. \textit{Id.} at 68. See \textit{generally} E. Newman, \textit{Police, The Law and Personal Freedom} 49 (1964); see also United States v. Brunson, 549 F.2d 348, 357 (5th Cir.), cert. denied, 434 U.S. 842 (1977).

\textsuperscript{152} The government's interest in preventing and detecting crime in airports is focused on two areas: the prevention of hijacking and the prevention of narcotics trafficking. The former interest is primarily concerned with the protection of lives and property. See \textit{Note}, \textit{supra} note 141, at 311. Some courts have "judicially noticed" the grave threat that air piracy poses to national air commerce. See, e.g., United States v. Epperson, 454 F.2d 769, 771 (4th Cir.), cert. denied, 406 U.S. 947 (1972). "As a crime, air piracy exceeds all others in terms of the potential for great and immediate harm." United States v. Moreno, 475 F.2d 44, 48 (5th Cir.), cert. denied, 414 U.S. 840 (1973). See \textit{generally} McClintock, \textit{Skyjacking: Its Domestic, Civil and Criminal Ramifications}, 38 J. AIR & COMM. 29, 36 (1973). Courts have consistently recognized this and have held that airport security measures are constitutionally justified as a limited and relatively insignificant invasion of privacy, as balanced against the overwhelming societal interest created by the imminent danger of passenger deaths. E.g., United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Bell, 464 F.2d 667, 675 (2d Cir.), cert. denied, 409 U.S. 991 (1972). The embodiment of this overriding governmental concern is manifested in the federal law against hijacking. Antihijacking Act of 1974, 49 U.S.C. § 1472 (i)-(m) (1976).

In addition to the prevention of hijacking, there is also a strong governmental interest in preventing the distribution of illegal narcotics. The federal government's effort to curtail the illegal use of drugs is carried out by the Drug Enforcement Administration, created in July, 1973, by President Nixon's Reorganization Plan No. 2 of 1973. See \textit{The Nation's War on Drugs is Now under a Unified Command}, \textit{Drug Enforcement}, Fall, 1973, at 2. The public interest in preventing drug trafficking because of its immense societal costs has been embodied in many of the nation's criminal laws. E.g., 21 U.S.C. §§ 841-851 (1980). It has also been duly noted by many
any certain level of suspicion. Only when an individual's freedom to choose his or her response is denied should such an articulation be required. The following two hypothetical situations are offered in illustration of the "totality" test advocated.

**Situation A**

At approximately five o'clock p.m., defendant E deplanes at gate 68 of Atlanta's International Airport from a flight which originated in Detroit, Michigan. Although E is not spotted when she gets off the plane, two plain-clothes DEA agents observe E as she heads toward the main terminal. The DEA agents notice that E is not carrying any baggage. E is then seen walking into and out of gate 66 at a time when no flights are due to arrive there. E then walks to a window, on the opposite side of the corridor, overlooking an airplane parking area. After looking out the window, E walks through gate 65, where a little earlier a flight had nearly finished deplaning.

E resumes walking in the agents' direction, looking back several times. E stops a few feet in front of the agents to examine both an electronic flight monitor located in the hallway and her ticket. At this point, the DEA agents notice that E does not have any baggage claim receipts attached to her ticket.

courts. See, e.g., United States v. Korman, 614 F.2d 541, 547 (6th Cir.), cert. denied, 100 S. Ct. 2918 (1980). United States v. Price, 599 F.2d 494, 500 (2d Cir. 1979). The Sixth Circuit, for example, recently stated that judges "ought not to engage in hypertechnicalities which will hamstring capable and conscientious officers of the law endeavoring to properly perform their duties in protecting the public from harmful drugs. The airports have been used extensively by narcotics dealers to transport huge quantities of dangerous drugs from the seaports to inland cities . . . ." United States v. Korman, 614 F.2d at 547. See generally W. Seymour, Jr., THE YOUNG DIE QUIETLY: THE NARCOTICS PROBLEM IN AMERICA (1972).

153. Consider section 110.1(1) of the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT (1975):

(1) Authority to Request Cooperation. A law enforcement officer may . . . request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request. In making requests pursuant to this Section, no officer shall indicate that a person is legally obliged to furnish information or otherwise to cooperate if no such legal obligation exists. Compliance with a request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such request was made by one known to be a law enforcement officer.

Id. (emphasis added).

154. Situations A and B are fact patterns based on United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 100 S. Ct. 2998 (1980); see note 165 infra.
E then goes to a Delta Airlines counter where she receives information concerning a flight from Atlanta, Georgia to Birmingham, Alabama. Agent C, standing in line behind E, learns that E had previously flown into Atlanta from Detroit. From the Delta Information counter, E proceeds into several small shops. Although E makes no purchases, she is constantly glancing around.

At this point, the DEA agents decide to question E because her movements seem consistent with some of the characteristics commonly associated with drug couriers. DEA agents C and M identify themselves as federal agents and ask E if she would mind showing the agents her airline ticket. E says she does mind and begins to turn away. Agent C places his hand on E's arm and says, "Just a minute! We're federal agents and we want to talk to you. Let me see your airline ticket."

E hands agent C a one-way ticket from Detroit to Birmingham. The ticket is issued to an "E. Gray." Agent C asks, "Mrs. Gray," and E responds affirmatively. Agent C then asks E if she would provide additional identification. E states that her sister-in-law, "E. Gray," had purchased the ticket in advance in Birmingham and E had picked up the ticket in Detroit without any identification. E then hands agent C an Alabama driver's license with her correct name on it.

At this point agent C believes something is wrong. The ticket is not marked pre-paid and according to his knowledge it is contrary to airline policy to give out a pre-paid ticket without first requiring identification. When agent C tells E that he is a federal narcotics agent, E states that there is a case pending against her for the sale of heroin. Agent C then gives E's ticket to agent M, who goes to the Delta ticket counter to learn the history of E's ticket. Subsequently, agent M returns with the information sought.

The day before, E had flown to Detroit under the name "E. Gray," with a one-way ticket purchased with cash in Birmingham, Alabama. She returned less than sixteen hours later, using a one-way ticket which was paid for and picked up in Detroit. Based on this information, the agents decide to search E and advise her of her right to refuse. E consents, and heroin is discovered on her person.

Analysis of Situation A—Applying the totality of the circumstances test to determine whether a seizure occurred within the meaning of the fourth amendment requires two basic steps. First, the actions taken by the police need be examined. After approaching and identifying themselves as federal agents, the agents asked E if she would show them her airline ticket. When E refused,
agent C touched E and restrained her movement. He then said, "Just a minute! We're federal agents and we want to talk to you. Let me see the ticket." This show of authority, combined with the choice of language and tone of voice, conveyed to E that she was compelled to continue the encounter. This was a demand for information, indicating to E that she was expected to cooperate. Once the agent took E's ticket, her freedom was restrained.

The second part of the analysis requires inquiry into the reasonable expectations of privacy a person has in the location where the encounter occurs. Here the location of the encounter is an airport. Although a person's expectations of privacy are low in an airport, a person does not reasonably expect that police officers will demand information and restrain his or her freedom of movement.

The conclusion to be drawn from the fact pattern in situation A is that when viewing the totality of the circumstances surrounding the encounter, a person would not reasonably feel free to leave. E was seized at the moment agent C touched her and demanded to see her airline ticket. If E is seized at this point, then reasonable suspicion must be based on the information the agents have prior to the point of the seizure. The subsequent information learned cannot be used to provide reasonable suspicion, because if there is an illegal seizure, the evidence derived therefrom becomes the "fruit" of it. The statements made by E subsequent to the illegal seizure are deemed to be an "exploitation" of it, unless the government shows that such statements were both voluntary and "sufficiently an act of free will to purge the primary taint."  

E's refusal to cooperate cannot elevate the level of suspicion in and of itself. As indicated above, the requisite level of suspicion either exists or it does not exist at the moment of the seizure. If it does not exist and the suspect refuses to identify himself or herself, or chooses not to cooperate, the level of suspicion is not elevated to the point where a seizure is justified by virtue of this failure to cooperate alone. This point is illustrated by the Supreme Court's

155. See text accompanying notes 130-153 supra.
156. See note 19 supra.
159. See Brown v. Texas, 443 U.S. 47 (1979) (failure to identify oneself fur-
decision in Brown v. Texas.¹⁶⁰

In Brown, the Court was confronted with a situation where the circumstances preceding an officer’s seizure of the defendant failed to engender a reasonable suspicion.¹⁶¹ Although the defendant “looked suspicious,” the officer who made the Terry stop could not point to any specific facts to support that conclusion. When the defendant refused to identify himself, he was arrested for, and later convicted of, violating a Texas statute which made it a crime for any person to refuse to give his or her name and address.¹⁶² A unanimous Supreme Court reversed the defendant’s conviction and held that he could not be punished for refusing to identify himself.¹⁶³ The lack of reasonable suspicion before the seizure was not elevated to reasonable suspicion by virtue of the fact that the defendant refused to cooperate.¹⁶⁴ Hence, in situation A, E’s refusal to cooperate did not provide the reasonable suspicion required for the stop. Her subsequent seizure was therefore a violation of the fourth amendment if her activities up to the point of the seizure did not amount to reasonable suspicion.

Situation B

Consider the same set of facts with the following exception: When the agents initially approach E and identify themselves as federal agents, instead of refusing to show the agents her airline

¹⁶¹ Id. at 51-52.
¹⁶² Id. at 49. TEXAS PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974) provides in relevant part that a “person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.”
¹⁶³ 443 U.S. at 53. Other state statutes that punish an individual for refusing to identify himself or herself, or for refusing to answer questions, have been found to be unconstitutional. See, e.g., People v. DeFillippo, 80 Mich. App. 197, 199-200, 262 N.W.2d 921, 923-24 (1977), rev’d and remanded sub nom., Michigan v. DeFillippo, 443 U.S. 31 (1979) (invalidating Detroit Municipal Code § 39-1-52.3).
¹⁶⁴ 443 U.S. at 53. See generally LaFave, supra note 8, at 106-09. However, the Court has yet to answer the question whether a refusal to cooperate by a suspect after the police have reasonable suspicion with respect to that suspect can elevate the level of suspicion to probable cause. See 443 U.S. at 53 n.3.
ticket, E says, “Sure, here it is,” and hands her ticket to agent C. The same facts are learned and the same statements are made by E following the point at which she hands the ticket to agent C.

Analysis of Situation B—Applying the totality of the circumstances test to situation B first requires an examination of actions taken by the agents. Up to the point at which agent M takes E’s airline ticket to the Delta counter, there is no hint of coercion. There is no physical contact between the agents and E. There is simply conversation. The only arguable show of authority is the agents’ initial introduction as federal agents. They display no weapons and are wearing no uniforms. Their use of language and tone is courteous and respectful. They do not summon E to their presence but rather approach her and request to see her airline ticket. In short, they do not convey the impression that E is not free to leave. In his situation the defendant is cooperating with the agents. She voluntarily provides agent C with her ticket and driver’s license, displaying no objective signs that she wishes to walk away from the encounter. She is acting as if she were talking to anyone in the airport.

The second part of the analysis involves assessing the reasonable expectations of privacy in the location the encounter takes place. As noted earlier, in an airport an individual’s reasonable expectations of privacy are very low. These expectations are not infringed upon when agents simply ask questions or request that a person produce an airline ticket or some other form of identification.

The conclusion to be drawn from situation B is that E was free to leave up until the point where agent M removed her ticket and went to the Delta counter. A reasonable person would not have believed that he or she was seized until that point. Calling situation B a seizure serves no fourth amendment interests.165 E had

165. Situation B is based on United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 100 S. Ct. 2998 (1980). The question presented in Elmore was, “When did the seizure take place?” Id. at 1039. After analyzing the Supreme Court decisions in Terry, 392 U.S. 1 (1968) and Sibron, 392 U.S. 40 (1968), the Fifth Circuit concluded that “certain encounters between law enforcement officers and citizens, even for investigative purposes, are not encompassed by the Fourth Amendment.” 595 F.2d at 1041. The court held that Elmore was not seized until the federal agent carried Elmore’s ticket away to the Delta counter. The initial encounter was not precipitated by force. There was no physical contact. The only show of authority occurred when the agents initially approached Elmore and identified themselves as federal law enforcement officers. Such identification is insufficient to convert an encounter, otherwise
the freedom to walk away at any point she chose to do so. The motivations of a person to cooperate with the police are many.\footnote{166} However, regardless of what they might be, the police should be able to seek this cooperation.\footnote{167} The fourth amendment was not intended to prevent citizens from talking to the police if they choose to do so. There is nothing oppressive or humiliating about two persons conversing in a crowded and congested airport.

Situations A and B demonstrate the differences between seizures and non-seizures within the meaning of the fourth amendment. A seizure takes place only when, in view of the totality of the circumstances, a reasonable person would have believed that he was not free to leave.\footnote{168} Conversely, a person is not seized if he reasonably would have believed that his freedom of movement was not restrained. In \textit{Mendenhall}, the agents approached the defendant, identified themselves as federal agents, and requested to see the defendant’s airline ticket in addition to some other form of identification.\footnote{169} In situation B the agents did the same. A correct analysis of both situations should therefore yield the conclusion that the initial approach and request to see the airline ticket or other form of identification is not a seizure. Rather, if a seizure occurred, it did so at some time in the future.

\textbf{CONCLUSION}

Justice Stewart’s opinion in \textit{United States v. Mendenhall} reaffirms the constitutional principle, enunciated by Chief Justice

\begin{itemize}
\item regarded as outside the purview of the Fourth Amendment, into a \textit{Terry} stop. \footnote{Id. at 1042.}
\item \footnote{166. L. TIFFANY, D. McINTYRE, & D. ROTENBERG, supra note 36, at 17; see Tiffany, \textit{The Fourth Amendment and Police-Citizen Confrontations}, 60 J. CRIM. L.C. \& P.S. 442, 451-54 (1969); \textit{MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT} 259-60 (Commentary 1975). Consider the comment in E. NEWMAN, \textit{supra} note 151, at 49: There is nothing in the law which protects a man against himself. In other words, if a person under suspicion wished to cooperate with the law enforcement officials, and consents, either by his express words or by his actions, to an unreasonable search and seizure, he cannot, at some later date, invoke the protection of the Fourth Amendment.}
\item \footnote{167. Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969) (police have the right to request citizens to cooperate); see Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).}
\item \footnote{168. 100 S. Ct. at 1877; accord, United States v. Wylie, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); United States v. Brunson, 549 F.2d 348, 357 (5th Cir.), cert. denied, 434 U.S. 842 (1977).}
\item \footnote{169. 100 S. Ct. at 1876.}
\end{itemize}
Warren in *Terry v. Ohio*, that not every encounter between a citizen and the police constitutes a seizure subject to fourth amendment restrictions. If a citizen retains his or her freedom to walk away, no fourth amendment interests are served if an otherwise inoffensive contact is transformed into a seizure simply because one party to the conversation is a police officer.

The totality of the circumstances test suggested by Justice Stewart and expanded upon in this Note requires the court to assess in detail both the actions of the police and the reasonable expectations of privacy in the location where the encounter takes place. Because it represents an objective method of balancing competing values and constitutional interests, it should be utilized in assessing police-citizen encounters. A close analysis of the reality of the situation reveals that it makes little sense to speak of the necessary level of suspicion the police must have to make a seizure, if no seizure has occurred within the meaning of the fourth amendment.

Utilizing the totality of the circumstances test advocated may have significant consequences. The police will often have the right to approach citizens, ask questions, and request to see some identification without possessing reasonable suspicion. However, if a suspect refuses to cooperate, the police cannot detain the person against his or her will, absent reasonable suspicion. As the Supreme Court stated in *Davis v. Mississippi*, "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes, they have no right to compel them to answer."\(^1\)

As noted earlier,\(^1\) the police often learn critical information in the early stages of their encounters with citizens. However, the information learned by the police after the seizure cannot be used to justify the seizure. Once there is a seizure, reasonable suspicion either exists or it does not exist. The refusal to cooperate, however, cannot be a factor in elevating the level of suspicion to the point at which the seizure is justified.

*Mendenhall* does not erode the constitutional safeguards established by *Terry* and its progeny. Rather, it adds a new dimension—a new starting point—to the analysis. The *Terry* balancing test remains, but it should be utilized only *after* the court

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171. See text accompanying note 18 supra. See also text accompanying note 44 supra.
makes a threshold determination that the individual has been seized within the meaning of the fourth amendment. Should the court determine that there has been no seizure, then there has been no intrusion upon any constitutionally protected interest.

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