

RETURNING TO REASONABLENESS: THE ARGUMENT  
AGAINST EXPANDING INVESTIGATORY SEARCHES AND  
SEIZURES TO COMPLETED MISDEMEANORS

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*A police officer may initiate a Terry stop and perform a search and seizure when he has a reasonable suspicion that a crime is presently being committed. Courts are currently split over whether a completed misdemeanor can form the reasonable suspicion required for a search and seizure. This Note surveys the history of search and seizure cases leading up to Terry v. Ohio, examines the contemporary Terry stop, and analyzes United States v. Hensley, which expanded Terry to completed felonies. The author examines the three-to-one circuit split with the Eighth, Ninth, and Tenth Circuits applying factual analysis to stops based on completed misdemeanors and the Sixth Circuit opining that these stops are per se unreasonable. If offense designation plays a role in justifying a Terry stop, the classification of crimes into felonies and misdemeanors allows the legislature to play a role in the application of Fourth Amendment rights. This also places significance on the meaning of “unreasonable” searches and seizures, which are prohibited by the Fourth Amendment of the Constitution. Additionally, the expanded authorization of searches and seizures based on less than probable cause can result in an increased risk of police misconduct. Consequently, resolution of this circuit split is necessary for the protection of civil rights.*

*This Note argues that the Supreme Court must address the circuit split by adopting a bright-line rule that searches and seizures for completed misdemeanors with less than probable cause are unreasonable. The author reasons that, based on the meaning of probable cause, expansion of Terry is unnecessary; and furthermore, Terry is meant to be narrowly applied. Thus, this Note calls for a per se rule that Terry stops based on completed misdemeanors are unreasonable within the meaning of the Fourth Amendment.*

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*It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.*<sup>1</sup>

## I. INTRODUCTION

Police officers are afforded substantial discretion in determining when a search or seizure is appropriate. So long as officers initiate action based upon valid justification, their conduct is—at least at the outset—permissible. The difficulty in this process is defining the scope of valid justifications. Can an officer detain a suspect who he or she witnesses shooting a man? Of course; the officer has probable cause.<sup>2</sup> What if, rather than witnessing the crime, the officer hears a gunshot and observes the suspect a few minutes later, covered in blood? Perhaps probable cause does not exist, but few would quarrel over validating seizing the suspect upon reasonable suspicion that a crime had been committed.<sup>3</sup> Changing the facts further, would officers still be justified in stopping a suspect if they were not in hot pursuit, but rather were reasonably suspicious of an individual walking down the street two weeks after the crime?<sup>4</sup> Does the answer change if the underlying crime was not a homicide, but instead was a misdemeanor noise violation?<sup>5</sup> It is easy to ask the questions but, as a brief survey of the past forty years of Fourth Amendment doctrine shows, the answers are far more complicated.

The focus of this Note is the final situation described above. Under what circumstances can a completed misdemeanor be the basis for a search or seizure when an officer has a reasonable suspicion that a crime has been committed, but no probable cause exists? It is well settled that a search or seizure can be based upon less than probable cause—a so-called *Terry*<sup>6</sup> stop—so long as the officer initiating the action had a reasonable and articulable suspicion that a crime was *presently* being committed<sup>7</sup> or that the suspect *previously* completed a felony.<sup>8</sup> The Supreme

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1. *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

2. *See United States v. Watson*, 423 U.S. 411, 423 (1976) (authorizing warrantless public arrests when probable cause exists).

3. A situation such as the one described here may still create probable cause, so long as the officer has reason to believe that a public arrest is based upon probable cause. *See id.* at 423–24.

4. *See United States v. Hensley*, 469 U.S. 221, 223 (1985) (authorizing *Terry* stops based upon completed felony offenses).

5. *See, e.g., United States v. Grigg*, 498 F.3d 1070, 1083 (9th Cir. 2007) (addressing completed misdemeanors as authorization for *Terry* searches and seizures).

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

7. *Id.* at 30. A valid *Terry* search or seizure, at least at the time the decision was published, required a belief that “criminal activity may be afoot” and that the suspects might be “armed and *presently* dangerous.” *Id.* (emphasis added).

8. *Hensley*, 469 U.S. at 227.

Court has not addressed whether a completed misdemeanor can form the reasonable suspicion required for a *Terry* stop, but the question has been presented to several federal circuits.<sup>9</sup> The result has been a circuit split, with disagreement developing regarding whether such searches and seizures are always unreasonable or if a case-by-case test is appropriate.<sup>10</sup>

This Note proposes that the Supreme Court resolve the circuit split by adopting the position that it is per se unreasonable to authorize investigatory stops for completed misdemeanors based on less than probable cause. Part II of this Note briefly surveys the common law of searches and seizures, the origins of the Fourth Amendment, and the two Supreme Court decisions primarily serving as the precursor to the current circuit split: *Terry* and *Hensley*. In Part III, this Note analyzes the circuit split, considers offense classification based on crime severity, outlines the “Reasonableness” Clause of the Fourth Amendment, and concludes by discussing law enforcement misconduct potentially resulting from *Terry* expansion. Finally, Part IV proposes a bright-line rule for completed misdemeanors that both respects the Constitution and explains why *Terry* expansion is not a necessary component of law enforcement efficacy.

## II. BACKGROUND

Fourth Amendment doctrine has developed progressively—arguably beginning before the drafting of the Bill of Rights and continuing for centuries beyond.<sup>11</sup> As American case law developed, nuanced questions began to arise. Of particular interest for the purposes of this Note is the past forty years following the Supreme Court officially sanctioning searches and seizures without probable cause.<sup>12</sup> To help answer contemporary questions stemming from the Fourth Amendment, it is constructive to delve into the principles and concerns debated by the Framers.

### A. Common Law

The drafting of the Fourth Amendment was not the result of mere ingenuity on the part of the Founding Fathers.<sup>13</sup> On the laundry list of

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9. *United States v. Hughes*, 517 F.3d 1013, 1017 (8th Cir. 2008); *United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007); *Grigg*, 498 F.3d at 1077–81; *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004).

10. *See infra* Part III.A.

11. *See generally* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 *MISS. L.J.* 1, 11, 25–28 (2007) (discussing Fourth Amendment history and development into modern doctrine).

12. *See Terry*, 392 U.S. at 30 (authorizing the reasonable suspicion standard rather than requiring probable cause for every search or seizure).

13. *See* Robert Berkley Harper, *Has the Replacement of “Probable Cause” with “Reasonable Suspicion” Resulted in the Creation of the Best of All Possible Worlds?*, 22 *AKRON L. REV.* 13, 16–19 (1988) (describing the influence English common law and practices had upon the adoption of reasona-

motivating factors culminating in the American Revolution, abuses of warrants and Writs of Assistance by the Crown would certainly hold a prominent position. The principles inherent in Fourth Amendment jurisprudence were fairly well established by English common law long before the meeting of the Constitutional Convention, but it was the erosion of these principles that made their enumeration in the Bill of Rights a priority.<sup>14</sup>

The British Crown authorized intrusive searches and seizures both in England and its numerous colonies without requiring probable cause or any related standard of proof.<sup>15</sup> Rather than mandating scrupulous particularity in obtaining a general warrant or a writ authorizing the search of a private residence or the like, English documents were generally left blank—essentially allowing officers of the Crown to detain, search, and arrest with nothing more than mere suspicion.<sup>16</sup> In the American colonies, frustration with the British defiance of standards led the 1774 Continental Congress to lash out against the King, “The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information.”<sup>17</sup> Although English abuse of writs became commonplace in colonial America, one should not assume that the sanctity of privacy rights was not cherished by lawmakers back in England. From the floor of the House of Commons in 1763, William Pitt expressed his frustration with the Crown’s invasion upon private property rights:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.<sup>18</sup>

Growing discontent among colonists began to boil over and would not be forgotten after the Americans won their independence.<sup>19</sup>

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bleness in searches and seizures in colonial America and ultimate inclusion in the Fourth Amendment of the U.S. Constitution).

14. See *id.* at 17 (“The widespread abuse of [the general warrant] process by officers of the Crown has been credited as one of the major catalysts behind the American Revolution that resulted in independence.”).

15. *Id.*

16. *Id.*

17. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 75 (Da Capo Press 1970) (1937) (quoting the petition sent by the Continental Congress to the King on October 26, 1774).

18. See Esther Jeanette Windmueller, *Reasonable Articulate Suspicion—The Demise of Terry v. Ohio and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 545 (1991) (describing abuses of privacy and property rights by the Crown and its officers).

19. See LASSON, *supra* note 17, at 51–78 (detailing British Writs of Assistance in the American colonies).

### B. *The Fourth Amendment*

*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.*<sup>20</sup>

There is no shortage of litigation arguing the meaning, scope, and purpose of the Fourth Amendment.<sup>21</sup> The monumental importance of the amendment, coupled with its myriad possible meanings, has left scholars and the judiciary alike scratching their collective heads. Simply put, “the amendment ‘has the virtue of brevity and the vice of ambiguity.’”<sup>22</sup> As one scholar so eloquently framed the current state of the law, “[F]ourth Amendment cases are a mess.”<sup>23</sup> To help sort through the mess amassed by over two centuries of constitutional litigation, it is helpful to consider the political landscape as it existed at square one.

Starting with a clean slate, the Founders sought to insulate Americans from arbitrary searches conducted at the whim of government officials.<sup>24</sup> Behind the amendment, there exists an overarching belief that the powers of government should be limited, “defined not simply by the functions it may perform, but also in how it is permitted to perform them, with structures in place at the constitutional level ready to enforce those limits.”<sup>25</sup> The Fourth Amendment was established to provide a safeguard against tyrants and to thwart unreasonable invasions into the personal lives of citizens.<sup>26</sup> Although the Founders were concerned about pervasive government intrusion into the privacy of individual homes, warrantless searches were not an issue at the forefront of their agenda.<sup>27</sup> Their lack of concern was not the result of apathy, but rather a consequence of the fact that warrantless searches were rare at the time.<sup>28</sup> It was generally accepted that law enforcement simply could not search or seize absent authorization—even the King’s customs inspectors were, at least in theory, required to have a valid writ to conduct a search, although the

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20. U.S. CONST. amend. IV.

21. See Harper, *supra* note 13, at 19 (“[T]he fourth amendment has resulted in more litigation than any other provision of the Bill of Rights in recent years . . .”).

22. *Id.* at 18 (quoting JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 42 (1966)).

23. Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329, 329 (1973).

24. See Bruce A. Antkowiak, *Saving Probable Cause*, 40 *SUFFOLK U. L. REV.* 569, 579 (2007).

25. *Id.*

26. See *id.* at 581 (comparing the security provided by the Fourth Amendment to the doctrines of double security provided by federalism and the separation of powers).

27. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 43 (1969) (describing the framers as “not at all concerned about searches without warrants”).

28. Harper, *supra* note 13, at 17.

writ process was heavily abused.<sup>29</sup> The Framers' belief that law enforcement officials were not permitted the pervasive right to search and seize is further evidenced by common law liability. Officers were not afforded any greater protection from trespass, assault, and false imprisonment liability than were ordinary citizens if they acted without proper authorization to search or seize.<sup>30</sup>

Regardless of the concerns surrounding warrantless searches of residences, the scope of a reasonable search has certainly changed since the adoption of the Bill of Rights. Notably, the Fourth Amendment does not prevent all searches and seizures—only “unreasonable” actions are prohibited.<sup>31</sup> It is important to consider what the word “unreasonable” may have meant to the Framers and how that definition has necessarily changed over time. In the late eighteenth century, failing to apprehend a criminal as he or she fled the scene of a crime almost always meant permanent escape from capture.<sup>32</sup> With far fewer resources than modern police forces and a lack of the advanced technologies that exist today, a balancing test of the intrusion into personal privacy and the State's interest in the search or seizure may have yielded a substantially different result than it would today.<sup>33</sup> In other words, the governmental interest today may be a slight delay in capture rather than an outright escape from prosecution—a distinction that becomes important when considering exceptions to the Probable Cause and Reasonableness Clauses of the Fourth Amendment.

### C. *Terry v. Ohio: A Limited Exception*

In 1968, the Supreme Court opened the door to what would lead to a complex new tangent in Fourth Amendment exceptions. Prior to the Court's decision in *Terry v. Ohio*,<sup>34</sup> arrests following a search or seizure were technically valid only if they were based upon probable cause—the hallmark of the Fourth Amendment.<sup>35</sup> Although stopping and frisking a suspicious individual on the street certainly was not a new practice, the Court had not previously given express authorization to do so.<sup>36</sup>

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29. *Id.*

30. *Id.*

31. U.S. CONST. amend. IV.

32. Harper, *supra* note 13, at 33; see also Floyd R. Finch, Jr., Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361, 365 (1976) (discussing capturing and arresting criminals at common law).

33. See *infra* notes 52–54 and accompanying text (discussing balancing tests used to determine reasonableness).

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

35. Harper, *supra* note 13, at 23. Many states had already authorized some variation of a “stop and frisk” procedure prior to the adjudication of *Terry* in 1968. See *id.* at 23 n.78 (noting similar statutes in the states of Alabama, Delaware, Illinois, Louisiana, Massachusetts, Nebraska, New Hampshire, New York, Rhode Island, and California).

36. See *id.* at 23 (“Historically, these actions have not been, and as a practical matter could not be, subject to the warrant procedure.”).

John Terry was convicted of carrying a concealed weapon following a “stop and frisk” by an officer.<sup>37</sup> The arresting officer could not specifically describe what initially drew his attention to Terry, but explained that he had developed habits of observation based upon his thirty-nine years of experience that caused him to believe that something with Terry “didn’t look right.”<sup>38</sup> Believing that Terry was planning to hold up an establishment in front of which he had been pacing and without any further evidence, the officer approached him, patted him down, found a .38-caliber revolver, and placed him under arrest.<sup>39</sup>

In affirming Terry’s conviction, the Court carved out a limited exception to the Fourth Amendment requirement of probable cause, allowing law enforcement officers to stop and frisk suspicious persons only when there exists a reasonable belief that the safety of the officer or the public is at risk.<sup>40</sup> The Court was careful to emphasize the limited nature of its holding:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>41</sup>

Even with the limited nature of the ruling announced by the Court, Justice Douglas still felt the need to weigh in with a strong dissenting opinion. Justice Douglas rooted his dissent in the Probable Cause Clause of the Fourth Amendment and expressed his belief that it was a “mystery” how the Court could authorize such a search or seizure without fulfilling the clause.<sup>42</sup> If *Terry* was a mystery, Justice Douglas would likely find the expansion that would follow the decision utterly befuddling.

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37. See *Terry*, 392 U.S. at 4–7.

38. *Id.* at 5.

39. See *id.* at 6–7.

40. See *id.* at 30.

41. *Id.*

42. *Id.* at 35 (Douglas, J., dissenting). Justice Douglas noted that he did not doubt that Terry was both searched and seized under the Fourth Amendment, but stated that the Court should not authorize such actions “unless there was ‘probable cause’ to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.” *Id.* (footnote omitted).

D. *Expanding Terry to Completed Crimes: United States v. Hensley*

Since *Terry*, it is well settled that reasonable, articulable suspicion of a crime presently being committed can justify an investigatory stop.<sup>43</sup> Until the Court heard arguments in *United States v. Hensley*,<sup>44</sup> it was not entirely clear whether *Terry* investigatory stops applied to crimes already committed. The Court answered the question in the affirmative in *Hensley*, at least for police conduct based upon completed felonies.<sup>45</sup>

Thomas Hensley was involved in an armed robbery in Ohio.<sup>46</sup> In connection with the robbery, police released a “wanted flyer” featuring Hensley’s photograph.<sup>47</sup> Without confirming whether a warrant had been issued for Hensley’s arrest, police engaged in a *Terry* stop based upon the flyer.<sup>48</sup> After a search of Hensley’s vehicle revealed he was traveling with a firearm, he was charged and convicted of possession of a firearm by a convicted felon.<sup>49</sup>

On appeal, Hensley argued that a wanted poster was not sufficient to generate a reasonable suspicion that he had committed a crime and that, even if it did, *Terry* was not meant to act as an exception to the Fourth Amendment when there existed no possibility of danger or injury to police officers or the public in general.<sup>50</sup> Because the police did not wait to confirm or deny the existence of a warrant for Hensley’s arrest, they could not be positive that probable cause existed, rather they initiated a *Terry* stop based solely upon their reasonable suspicion that he was wanted in connection with a completed felony.<sup>51</sup>

The Court held that permitting investigatory stops based upon reasonable, articulable suspicion of a completed felony is consistent with the policy underlying the *Terry* decision.<sup>52</sup> Recognizing that the *Terry* factors balancing the government’s interest in investigation against the intrusion of the citizen’s personal privacy could balance differently when considering a completed crime than they do for a presently occurring offense, the Court suggested that exigent circumstances and present danger be consi-

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43. *Id.* at 30 (majority opinion).

44. 469 U.S. 221 (1985).

45. *Id.* at 229 (“[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.”).

46. *Id.* at 223.

47. *Id.*

48. *See id.* at 224.

49. *Id.* at 224–25.

50. *See id.* at 225.

51. *Id.* at 225. The Supreme Court, however, disagreed and specifically noted that relying on a wanted poster was objectively reasonable because the existence of the flyer suggested that the officers who released the flyer had a reasonable suspicion that would have authorized the stop had they observed the suspects themselves. *Id.* at 231–32.

52. *Id.* at 226 (“Although stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer’s reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion.”).

dered in the reasonable suspicion analysis, but that they not be dispositive.<sup>53</sup> The Court was quite clear in its belief that the government's interests outweigh the harm resulting from a momentary privacy intrusion of a *Terry* stop, even when the underlying crime has already been completed.<sup>54</sup> The Court noted that, "where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes . . . ."<sup>55</sup> Although the Court expanded *Terry* to cover investigatory stops based upon completed felonies, it implied that completed misdemeanors were beyond the scope of its decision.<sup>56</sup> "We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted."<sup>57</sup> Reaction to the Court's expansion of *Terry* has not been unanimously positive.<sup>58</sup> As one commentator opined, "the *Hensley* expansion will not necessarily improve police effectiveness; rather, this expansion will permit police to engage in unprofessional conduct and lessen judicial supervision and control by allowing courts to judge officers' conduct with a subjective rather than an objective standard."<sup>59</sup> With *Hensley*'s express reservation of the completed misdemeanor issue and rigorous academic debate on the matter, expansion of this *Terry* exception to non-felonies was primed for judicial battle.

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53. *Id.* at 228 ("The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct . . . . A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law.").

54. *Id.* at 229.

55. *Id.* The Court continued, [r]estraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible.

*Id.*

56. *See id.*

57. *Id.*

58. *See, e.g.,* Windmueller, *supra* note 18, at 556 (noting criticism of the *Hensley* decision by Professor Robert Harper).

59. *Id.* (citing Harper, *supra* note 13, at 35–42). Harper argues that *Hensley* will not necessarily lead to more felony arrests and that the decision undermines goals of fostering professional conduct among police departments because of the ability to rely upon other departments in a way that would be impermissible if the detaining department itself were so acting. *Id.* "The *Hensley* decision seems to grant the investigating department greater authority due to the information received than the authority possessed by the initial department. This new grant of authority may permit unprofessional officers to circumvent constitutional restraints." Harper, *supra* note 13, at 35.

### III. ANALYSIS

The distinction between felonies and misdemeanors, both for purposes of sentencing and as a broader concept, has been a popular topic for commentators surveying a diverse array of legal disciplines.<sup>60</sup> Within the context of the Fourth Amendment, offense classification becomes important for determining when an officer can search and seize without probable cause. To analyze the consequence of the distinction, this Part introduces the circuit split in need of resolution. Next, this Part discusses the inherent differences between felonies and misdemeanors. Third, this Part reviews the Fourth Amendment Reasonableness Clause and specifically focuses on the reasonable purposes behind the *Terry* and *Hensley* decisions. Finally, the analysis concludes by discussing the dangers of expanding *Terry* to completed misdemeanors by considering the perils of pretextual searches and seizures and the potential for law enforcement misconduct.

#### A. *The Circuit Split*

By expressly excepting misdemeanors from the ruling in *Hensley*, the Supreme Court has, at least for the time being, left interpretation of *Terry* expansion for completed non-felonies to the federal circuits to debate. Four federal circuits have weighed in on the issue, creating a three-to-one split favoring permitting completed misdemeanors to form the basis for a reasonable suspicion justifying an investigatory stop, at least in some limited circumstances.<sup>61</sup> Among the courts adopting a fact-specific rule potentially allowing such stops are the Eighth, Ninth, and Tenth Circuits; while the Sixth Circuit has refused to expand *Terry* to completed misdemeanors.<sup>62</sup>

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60. See, e.g., Kenneth W. Gaul, Note, *The Applicability of Miranda Warnings to Non-Felony Offenses: Is the Proper Standard "Custodial Interrogation" or "Severity of the Offense"?*, 17 U. MICH. J.L. REFORM 627, 637–39 (1984) (analyzing offense classification standards for *Miranda* warning requirements); Kirsten Howe, Note, *Criminal Nonsupport and a Proposal for an Effective Felony-Misdemeanor Distinction*, 37 HASTINGS L.J. 1075, 1086–87 (1986) (discussing the felony-misdemeanor distinction within the context of failing to pay child support obligations); Dawn Marie Johnson, Note, *The AEDPA and the IIRIRA: Treating Misdemeanors and Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 478–79 (2001) (surveying the differences between felonies and misdemeanors in immigration law).

61. Compare *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (interpreting the Supreme Court's ruling in *Hensley* as disallowing *Terry* stops based upon completed misdemeanors), with *United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007) (allowing completed non-felonies to form the requisite reasonable suspicion for a *Terry* stop if an appropriate facts and circumstances test is met), and *United States v. Hughes*, 517 F.3d 1013, 1017 (8th Cir. 2008) (same), and *United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007) (same).

62. See *supra* note 61.

1. *Advocating a Fact-Specific Rule: Grigg, Moran, and Hughes*

One solution to the felony-misdemeanor distinction when applied to investigatory stops is simply to extend the *Hensley* balancing test to encompass misdemeanors as well as felonies. The generic totality of the circumstances test balancing the government's interest in law enforcement against the individual citizen's interest in privacy can just as easily be applied to a minor offense as to the most serious of felony violations.<sup>63</sup> The issue then is not one of practicability, but rather whether the lack of danger generally associated with misdemeanor offenses can justify the invasion of privacy associated with an investigatory stop under *Terry*.<sup>64</sup>

The Ninth Circuit was given the opportunity to test the bounds of *Hensley* and determine if it applied to completed misdemeanors in *United States v. Grigg*.<sup>65</sup> Justin Grigg on occasion boomed loud music from his Mercury Cougar.<sup>66</sup> Following a second noise complaint, police trailed Grigg when they observed him driving past the home of a neighbor who was making the complaint.<sup>67</sup> Although Grigg was not playing music when he drove past and police had no specific facts identifying Grigg as the perpetrator of the alleged noise ordinance violation, they initiated a *Terry* stop to attempt to identify Grigg.<sup>68</sup> Apart from suspecting him of violating the noise ordinance, police admitted that they had no valid reason that would justify pulling over the vehicle.<sup>69</sup> After observing an SKS rifle and .38-caliber handgun ammunition in plain view and finding concealed brass knuckles on Grigg's person during a pat down, Grigg was arrested and ultimately convicted of possession of an unregistered automatic rifle.<sup>70</sup>

The Ninth Circuit recognized that the risk of offenders repeating their misdemeanor crime strengthens the case for extending *Terry* and *Hensley* to completed non-felonies.<sup>71</sup> Although the court paid homage to

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63. See *Grigg*, 498 F.3d at 1083 (applying the *Hensley* balancing test to determine the reasonableness of an investigatory stop based upon a completed misdemeanor offense).

64. See *id.* at 1078 ("In state court cases addressing the identical or similar factor, the state courts have split, with the decisive issue being the dangerous nature of the underlying misdemeanor that gave rise to the *Terry* stop.").

65. *Id.* at 1075.

66. *Id.* at 1072.

67. *Id.* at 1072–73.

68. See *id.* Police could have used their in-car computer system to verify Grigg's identity as the individual against whom a noise violation had earlier been made, but they "testified that it would have been time-consuming to attempt to bring up the log on [the] patrol car computer, and that [they] did not want to 'bother' dispatch with a noise complaint, which is 'not that big of a deal.'" *Id.* at 1073.

69. See *id.* at 1072–73. Police also admitted that they had no intention of arresting Grigg for the misdemeanor and, in fact, they were not permitted to place him under arrest because Idaho law prohibited arrests for misdemeanor offenses committed outside of the presence of police. *Id.* at 1073.

70. *Id.* at 1072–73. Note that, although the trial court convicted Grigg and denied his motion to suppress evidence recovered during the *Terry* stop, it pointed out that this case was "a very, very close call." *Id.* at 1074.

71. *Id.* at 1080 ("A practical concern that increases the law enforcement interest under *Hensley* is that an investigating officer might eliminate any ongoing risk that an offending party might repeat

the distinction between felonies and misdemeanors and the varying levels of relative danger inherent in the offenses, it held that the *Hensley* balancing test should nonetheless apply to non-felonies.<sup>72</sup> Rather than adopting a per se rule, the court opined that whether *Terry* reasonable suspicion can be satisfied by a completed misdemeanor depends on the nature of the offense, “with particular attention to the potential for ongoing or repeated danger”<sup>73</sup> and “any risk of escalation”<sup>74</sup> reasonably associated with the crime.<sup>75</sup> After applying its newly adopted test, the court reversed Grigg’s conviction, noting that a completed violation of a noise ordinance posed absolutely no danger to the public or to police.<sup>76</sup>

The Tenth Circuit seconded the reasoning of the *Grigg* court in *United States v. Moran*.<sup>77</sup> Moran trespassed on private property near public hunting ground, a misdemeanor under New Mexico law.<sup>78</sup> After receiving a brief description of Moran and his vehicle, police pulled over his SUV based solely upon their suspicion that he had trespassed on private property.<sup>79</sup> Upon initiating a *Terry* investigatory stop, police observed the butt of a rifle sticking up in the back seat of Moran’s vehicle.<sup>80</sup> Moran was arrested on an unrelated warrant, charged, and convicted of being a felon in possession of a firearm.<sup>81</sup> On appeal, Moran argued that, even if police reasonably suspected that he had completed the misdemeanor of criminal trespass, such justification was insufficient to initiate a *Terry* stop and that *Hensley* should be limited to completed felonies.<sup>82</sup>

In affirming Moran’s conviction, the Tenth Circuit cited the government’s general interest in crime investigation and public safety.<sup>83</sup> The court recognized that completed crimes in general, and completed misdemeanors in particular, do not present the same level of governmental interest as crimes where there are no alternative means of investigation available.<sup>84</sup> Nevertheless, in this situation, “[t]o restrain police ac-

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the completed misdemeanor or that an officer might stem the potential for escalating violence arising from such conduct, both of which enhance public safety.”).

72. *Id.* at 1081.

73. *Id.* The court gave as an example of potential for ongoing danger “drunken and/or reckless driving.” *Id.*

74. *Id.* According to the court, risks of escalation may include “disorderly conduct, assault, [or] domestic violence.” *Id.*

75. *See id.*

76. *Id.* at 1083 (“Under the circumstances here, it was unreasonable for the Nampa police to pull over Grigg on suspicion of having played his music too loudly where they did not duly consider the lack of any threat to public safety . . .”).

77. 503 F.3d 1135, 1141–42 (10th Cir. 2007).

78. *Id.* at 1138 & n.1.

79. *Id.* at 1139.

80. *Id.*

81. *Id.*

82. *Id.* at 1141.

83. *Id.* at 1142 (“The circumstances of the present case implicate a strong governmental interest in solving crime and bringing offenders to justice because the alleged underlying criminal activity posed an ongoing risk to public safety.”). The court noted that criminal trespass is inherently risky because there is always some risk of confrontation involved with the crime. *Id.*

84. *Id.* (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

tion . . . would be to require police to turn their backs on potential criminal activity and to ‘enable the suspect to flee.’”<sup>85</sup> Although it found the investigatory stop based upon Moran’s completed misdemeanor offense of criminal trespass valid, the court was careful to emphasize the “limited and fact-dependent nature of [its] holding.”<sup>86</sup> Like the Ninth Circuit, the *Moran* court did not establish a per se rule, but rather it adopted a circumstance-intensive test, permitting *Terry* stops based upon completed misdemeanors when an objectively reasonable officer could come to the conclusion that the suspect is likely to commit the crime again or when safety is a concern.<sup>87</sup>

The most recent federal circuit to consider completed misdemeanors in the context of *Terry* and *Hensley* was the Eighth Circuit in *United States v. Hughes*.<sup>88</sup> Like the Ninth and Tenth Circuits, the *Hughes* court refused to adopt a per se rule that a completed misdemeanor could not ever justify a *Terry* search or seizure.<sup>89</sup> Unlike *Moran*, however, the Eighth Circuit found that the specific facts surrounding the misdemeanor of criminal trespass were not enough to sustain a reasonable suspicion in the *Hughes* case.<sup>90</sup>

In that case, in August 2005, police were dispatched to investigate “suspicious parties on [apartment complex] property.”<sup>91</sup> The complaint to police indicated that two individuals trespassed on private property and described the suspects as black males, one shirtless and the other wearing a brown shirt and having braided hair.<sup>92</sup> Police spotted Roy Hughes standing at a bus stop across the street with another man who matched the description received from the complainant.<sup>93</sup> Although the suspects were no longer on private property, police initiated a *Terry* stop and frisk based upon what they argued was a reasonable suspicion that the two men had recently engaged in misdemeanor trespass to property.<sup>94</sup> Police recovered live rounds on Hughes, and he was charged and convicted of being a felon in possession of ammunition.<sup>95</sup>

The Eighth Circuit held that merely being present near the scene of a trespass and loosely matching the description of suspects was not

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85. *Id.* (quoting *Hensley*, 469 U.S. at 229).

86. *Id.* at 1143.

87. *See id.*

88. 517 F.3d 1013, 1017 (8th Cir. 2008).

89. *Id.* (“The Supreme Court has ‘consistently eschewed bright-line rules [under the Fourth Amendment], instead emphasizing the fact-specific nature of the reasonableness inquiry.’”) (alteration in original) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). *But see* James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 435–37 (1985) (noting that bright-line rules can also promote judicial efficiency).

90. *See Hughes*, 517 F.3d at 1018.

91. *Id.* at 1015.

92. *Id.*

93. *Id.* There was a third suspect, a female, at the scene who was not mentioned in the initial complaint to police, but who was also stopped and searched. *Id.*

94. *See id.*

95. *Id.*

enough to ground a reasonable suspicion that Hughes had trespassed, but the court adopted the view of the Ninth and Tenth Circuits that an individualized reasonableness inquiry is necessary for *Terry* stops based upon completed misdemeanors.<sup>96</sup> The court held that the balancing test affirmed by the Supreme Court in *Hensley* applies also to completed non-felonies: “To determine whether a stop is constitutional, [the] court must balance the ‘nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.’”<sup>97</sup>

Several state and federal courts have agreed with the Eighth, Ninth, and Tenth Circuits and adopted a fact-specific test to determine if completed misdemeanors can create acceptable reasonable suspicion.<sup>98</sup> The courts that have done so generally acted in response to a perceived danger, or at least a possibility of danger, to the public.<sup>99</sup> Other courts refused to recognize such a risk as legitimate and responded by rejecting case-by-case analysis in favor of a bright-line rule.<sup>100</sup>

## 2. *Advocating a Bright-Line Rule: Gaddis v. Redford Township*

Some courts have refused to accept an attenuated risk of danger to law enforcement and the public resulting from completed misdemeanors as justification for expanding the limited scope of *Terry*. In 2004, the Sixth Circuit was the first federal circuit to consider the issue of *Hensley*'s application to completed non-felonies.<sup>101</sup>

*Gaddis v. Redford Township* is an unusual case, in that it announced a legal conclusion on an issue of first impression for the circuit in a case that did not directly present the issue in question.<sup>102</sup> The facts of the *Gaddis* case itself led to a traffic stop that was relatively uncontroversial,<sup>103</sup> in that the fact pattern is closer to *Terry* than *Hensley*. Officers observed Gaddis weaving while driving and slightly slumped over in his

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96. *See id.* at 1017–18. The court did not prohibit all *Terry* searches and seizures based upon misdemeanor trespasses. Rather, it merely ruled that the indicia of suspicion in *Hughes* were too weak to affirm a conviction, noting that the tip to police in this case was uncorroborated. *See id.* at 1018–19.

97. *Id.* at 1017 (quoting *United States v. Hensley*, 469 U.S. 221, 228 (1985)).

98. *See, e.g., State v. Myers*, 490 So. 2d 700, 704 (La. Ct. App. 1986) (“The safety of the . . . public and the potential . . . to inflict serious damage provides a fairly strong government interest.”); *State v. Burgess*, 776 A.2d 1223, 1225–27 (Me. 2001) (affirming an investigatory stop based on threats to shoot a hole in a vehicle); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 117–18 (Miss. 1999) (ruling that an artificial felony-misdemeanor distinction would be inappropriate); *City of Devils Lake v. Lawrence*, 639 N.W.2d 466, 473 (N.D. 2002) (noting that a potential threat exists arising from a completed misdemeanor and permitting an investigatory stop on that basis).

99. *See, e.g., Myers*, 490 So. 2d at 704; *Lawrence*, 639 N.W.2d at 473.

100. *See, e.g., Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 768–70 (6th Cir. 2004).

101. *See id.* at 769–71.

102. *See id.* at 768–70.

103. When a police officer observes an individual committing a crime, she likely has probable cause and, thus, the completed misdemeanor-investigatory stop debate is irrelevant. Here, police could not be sure that a crime was being committed, but the court found the officer's testimony persuasive that he had, at a minimum, a reasonable suspicion that Gaddis was committing an offense. *Id.* at 771.

seat.<sup>104</sup> Suspecting that Gaddis was intoxicated, police initiated a traffic stop and ultimately arrested him.<sup>105</sup> Because police observed Gaddis's conduct first-hand, the officers had a reasonable suspicion that a crime was ongoing<sup>106</sup> and thus, a completed misdemeanor analysis was not necessary to the disposition of the case. The relevant contribution to the investigatory search and seizure debate resulting from the *Gaddis* case came in dicta summarizing Fourth Amendment jurisprudence in the Sixth Circuit.<sup>107</sup>

The Sixth Circuit held that a completed misdemeanor cannot create the reasonable suspicion needed to initiate a *Terry* stop.<sup>108</sup> *Gaddis* makes clear that police may permissibly perform investigatory stops when a crime is ongoing regardless of the offense classification.<sup>109</sup> While reinforcing that police should respect the Supreme Court's ruling in *Hensley*, the court expressly refused to extend the scope of the case to completed misdemeanors: "Police may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor."<sup>110</sup>

Of particular concern to the *Gaddis* court was the danger of police misconduct in making pretextual stops.<sup>111</sup> According to the court, requiring probable cause to exist concurrently with any improper motivation for a traffic stop is more objectively verifiable than permitting the same with mere reasonable suspicion.<sup>112</sup> The court cited its own precedent in observing that "there is a significant difference between a pretextual stop based on probable cause that a traffic violation has occurred, and a stop that is not based on probable cause *or even reasonable suspicion*."<sup>113</sup>

The Sixth Circuit is not alone in its prohibition of *Terry* stops based upon completed misdemeanors.<sup>114</sup> Some courts have used state statutes listing the lawful arrests of individuals to buttress their argument that offenses falling outside of these arrests cannot reasonably fall within the

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104. *Id.* at 766.

105. *Id.* at 766–67.

106. Ongoing crimes do not fall under the *Hensley* analysis, but rather a search or seizure can be justified in those cases simply based on a *Terry*-like inquiry. *See id.* at 771 n.6.

107. *See id.* at 769–71, 771 n.6.

108. *See id.* at 771 n.6.

109. *Id.*

110. *Id.* (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

111. *See id.* at 769–70. For a more detailed discussion of pretextual searches and seizures and the dangers stemming from investigatory stops based upon completed misdemeanors, *see infra* Part III.D.

112. *See Gaddis*, 364 F.3d at 769–70. This is likely because reasonable suspicion can be justified using the diverse background and experience of the particular officer, a standard by which the officer could fairly easily conjure a fabricated justification for a search or seizure. *See id.* at 771. Probable cause, on the other hand, is a higher standard based upon more concrete, articulable facts. *Id.* at 781 (Clay, J., dissenting).

113. *Id.* at 770 n.5 (majority opinion) (quoting *United States v. Huguenin*, 154 F.3d 547, 557 (6th Cir. 1998)).

114. *See United States v. Jegede*, 294 F. Supp. 2d 704, 708 (D. Md. 2003); *see also United States v. James*, No. 06-20172-JWL, 2007 WL 1098468, at \*3 (D. Kan. Apr. 11, 2007) (noting that a *Terry* stop based solely on a completed misdemeanor would have been invalid, but upholding a traffic stop on other grounds).

*Terry* exception to the Fourth Amendment.<sup>115</sup> Courts have specifically addressed the fact that the government's interest in crime enforcement is diminished when the offense in question is a mere completed misdemeanor:

At the very least, because misdemeanor offenses are considered less serious crimes than felonies and because police cannot arrest for misdemeanors unless the offense is committed in their presence, the public concerns served by seizures to investigate past misdemeanors are less grave than the concerns served by seizures to investigate past felonies and gross misdemeanors.<sup>116</sup>

The court's recognition that the misdemeanor-felony distinction deserves consideration is not at all peculiar. In fact, given the import placed upon offense classification in American jurisprudence,<sup>117</sup> the contrast is quite pertinent.

### B. *Let the Punishment Fit the Crime: Felonies vs. Misdemeanors*

The notion that some crimes are more culpable than others and should thus carry a much more substantial penalty is deeply rooted in the common law.<sup>118</sup> Traditionally, a crime was only classified as a felony if conviction would result in a loss of property, be it land or goods—a punishment that almost always included the possibility of a death sentence also being imposed.<sup>119</sup> Legislatures no longer define felonies only as those crimes for which death is a penalty, but it is still recognized that there is a need to classify offenses by severity of the defendant's conduct.<sup>120</sup>

Although possibly a more difficult task when dealing with the Constitution, specifically the Fourth Amendment, courts have become quite accustomed to differentiating based upon offense severity in both criminal and civil cases.<sup>121</sup> Scholars have espoused the need for punishment to

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115. See, e.g., *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 883–84 (Minn. Ct. App. 1985). The *Blaisdell* court established a per se rule that *Hensley* is not applicable to completed misdemeanors. *Id.* at 884. For examples of representative statutes prohibiting arrests without a warrant based upon past misdemeanors outside of police presence, see FLA. STAT. ANN. § 901.15(1) (West Supp. 2010); MICH. COMP. LAWS ANN. § 764.15(1) (West Supp. 2009); MINN. STAT. ANN. § 629.34(1)(c) (West Supp. 2010).

116. *Blaisdell*, 375 N.W.2d at 883 (referring to Minnesota law in refusing to extend *Hensley*).

117. See *infra* note 121 and accompanying text.

118. See 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 17 (15th ed. 1993).

119. *Id.* § 19.

120. See John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 178–81 (2004) (discussing the development of felonies in the common law and efforts by states to classify felonies using modern statutes).

121. For instance, it is relatively uncontroversial that the use of force, either in self-defense or by police officers attempting to arrest a suspect, is acceptable when a person fears for his or her life or such force is necessary in order to protect the public. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (authorizing police to use deadly force only when “the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm”). But generally it is unacceptable to use such force when attempting to detain an individual for a minor offense. See *id.* The *Garner* court further noted

be rational and fitted carefully to the crime for centuries.<sup>122</sup> That crimes should be divided into various offense classifications based upon severity is relatively uncontroversial.<sup>123</sup> Disagreement arises, however, when scholars and courts debate the degree to which these classifications should impact Fourth Amendment jurisprudence.<sup>124</sup>

Invariably, a mechanism must be designated to interpret the constitutional exception created by *Terry*. The express reservation of the question of completed misdemeanors and their application to investigatory stops by the Supreme Court suggests, at a minimum, that the Court recognized that there is a possible distinction in how *Terry* should apply to statutes of varying severity. By doing so, the Court has left open the possibility that legislatures, in addition to the judiciary, will play a role in constructing the scope of constitutional rights by determining which crimes will fall under categories designated as “reasonable” justifications for *Terry* investigations.<sup>125</sup>

### C. *A Return to Reasonableness*

Before attempting to classify an extension of *Terry* and *Hensley* to completed misdemeanors as reasonable or unreasonable, it is helpful to further understand the Fourth Amendment’s prohibition on unreasonable searches and seizures. Scholars disagree as to what the Framers intended to convey by inserting the word “unreasonable” as a modifier to the search and seizure language in the first clause of the Fourth Amendment.<sup>126</sup>

At least one commentator, Professor Thomas Davies, has suggested that John Adams insisted on including the word following his work on the Massachusetts state constitution, which originally outlawed all searches and seizures without a warrant.<sup>127</sup> Professor Davies contends that Adams and the other Framers feared misuse of general warrants and

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that burglary, while potentially dangerous, is not necessarily serious enough to authorize deadly force because it is merely a property crime, rather than a violent crime. *See id.* at 21. Differentiation based upon culpability and severity of wrongdoing is also common in tort law. *See, e.g.,* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (ruling that courts should consider the severity of the defendant’s wrongdoing when determining the applicability and amount of punitive damages).

122. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 182 (Prometheus Books 1988) (1781).

123. *See* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1957–61 (2004) (noting the difficulty of deciding what impact crime severity should have on constitutional claims).

124. *See id.* at 1961.

125. For further mention of possible legislative circumvention of the judiciary’s Fourth Amendment interpretation *see infra* note 199 and accompanying text.

126. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 560–90 (1999) (detailing conflicting points of view regarding the origins and meaning of the word “reasonable” in the Fourth Amendment and the author’s perceived flaws with their theories before ultimately presenting his own interpretation that the Fourth Amendment was merely meant to prevent general warrants and that the modern interpretation has strayed vastly from the Framers’ intent).

127. *See id.* at 684–87.

writes by the newly formed national government<sup>128</sup> and that the inclusion of the word “unreasonable” was simply meant to suggest implicitly what the Warrant Clause of the Fourth Amendment states explicitly<sup>129</sup>—that warrants must “particularly describ[e] the place to be searched, and the persons or things to be seized.”<sup>130</sup>

The majority view among academics and, indeed, among the judiciary is that the first clause of the Fourth Amendment was not meant as a mere precursor to the Warrant Clause, but rather is its own distinct concept restricting searches and seizures to those that are objectively reasonable.<sup>131</sup> Regardless of the debate over the original intent of the clause, the preamble of the Fourth Amendment is modernly interpreted in the manner expressed by the Supreme Court in *Terry* that “what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”<sup>132</sup> Courts determine reasonableness using a balancing test, weighing “the [government’s] need to search against the invasion which the search entails.”<sup>133</sup> To fit within the modern interpretation of the Fourth Amendment, exceptions to the Warrant Clause and the general prohibition on searches and seizures must have a reasonable purpose that balances in favor of government invasion over the intrusion into personal privacy.

### 1. *Terry’s Reasonable Purpose*

*Terry* is a limited exception and the limited nature was a crucial part of the balancing test considered in authorizing investigatory stops based upon less than probable cause.<sup>134</sup> Recognizing that *Terry* has an extremely limited purpose,<sup>135</sup> the level of intrusion considered as an input to the Fourth Amendment reasonableness balancing test was small—a fact that should be kept in mind, especially in light of modern expansion of *Terry* to numerous investigatory situations.

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128. For a discussion of the Crown’s abuse of general warrants that quite possibly fueled these fears, see *supra* Part II.A.

129. See Davies, *supra* note 126, at 724.

130. U.S. CONST. amend. IV.

131. See TAYLOR, *supra* note 27, at 19–46 (describing the origins of the Fourth Amendment and the meaning of “reasonableness”); see also Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 62–65 (1996) (describing reasonableness and searches in the context of the Warrant Clause of the Fourth Amendment). *But see*, David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 236–38 (2005) (arguing that Professor Amar’s interpretation of the word “reasonable” in the Fourth Amendment is incorrect).

132. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

133. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 536–37 (1967). *But see* *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) (arguing that “warrantless searches are *per se* unreasonable” except in a few limited circumstances).

134. See *supra* note 41 and accompanying text. The word “limited” is repeatedly stressed in the *Terry* opinion—appearing ten times in the relatively short opinion. See *Terry*, 392 U.S. at 15–30.

135. See *supra* Part II.C (discussing the limited purpose of the *Terry* opinion and emphasizing that it is an exception carefully carved out of the rule that is the Fourth Amendment).

To begin the balancing test, one must first consider the governmental interest in the need to search or seize.<sup>136</sup> The *Terry* court began by examining the very important state interest of effective crime prevention and detection.<sup>137</sup> The Court considered this paramount to its analysis, referring to it as the “interest which underlies the recognition 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.”<sup>138</sup> But in *Terry*,<sup>139</sup> and indeed in most investigatory stops that result in constitutional challenges,<sup>140</sup> the officer did more than merely approach the suspect. The governmental interest required to physically restrain a suspect or to place hands upon the individual must, therefore, be something more than a generalized belief that crime prevention is a noble goal of the State. In *Terry*, the Court opined that the governmental interest went beyond mere crime prevention.<sup>141</sup> Perhaps the true governmental interest protected by *Terry*, and in fact the purpose that the Court called the crux of the case, was the desire to allow police officers to ensure that the individual with whom they are interacting is not armed and will not cause injury to the officer or others nearby.<sup>142</sup> Regardless of the relative weight given to each component, the governmental interest in performing a search was rationalized using some combination of a generalized need to promote crime prevention and a desire to protect police officers when performing their routine duties.<sup>143</sup>

The intrusion against which the government’s interest must be balanced is more readily identifiable. Individual rights must, at least minimally, be invaded in an investigatory stop—a fact not glossed over by the Court: “Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”<sup>144</sup> The question, then, becomes whether the interests in safety and crime prevention outweigh this brief, but intrusive, invasion. The Court held that the scales balance in favor of the government, but *Terry*’s ‘reasonable purpose’ is narrow. A police officer may briefly de-

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136. See *Camara*, 387 U.S. at 536–37.

137. *Terry*, 392 U.S. at 22.

138. *Id.*

139. *Id.* at 6–7 (describing how Officer McFadden physically placed his hands on the suspect and conducted a pat down in order to detect weapons).

140. See *Adams v. Williams*, 407 U.S. 143, 144 (1972).

141. See *Terry*, 392 U.S. at 23–24.

142. *Id.* at 23. (“[T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”).

143. See *id.* at 22–23.

144. *Id.* at 24–25. Because investigatory stops can be justified without having probable cause, the Court took the prospect of allowing frisks based merely upon a reasonable suspicion very seriously—even briefly considering an argument by *Terry* that such an intrusion is only justified when it is incident to an otherwise valid arrest. See *id.* at 25–27.

tain and search a person's outer clothing only when she reasonably suspects that the person with whom she is interacting is "presently dangerous."<sup>145</sup> With the door pried open slightly by the *Terry* exception, the next forty years of Fourth Amendment jurisprudence would lead to the Court straying further and further away from *Terry*'s 'reasonable purpose.'

## 2. *Exceptions Run Amuck*

*Terry* began as a very limited and narrowly crafted exception to the requirement of probable cause when police did not themselves witness ongoing criminal activity.<sup>146</sup> Like most constitutional interpretations handed down by the Court, *Terry* litigation experienced growing pains as the judiciary stretched the boundaries of the ruling and attempted to apply the new "reasonable suspicion" standard to cases that were far less clear-cut than *Terry*.<sup>147</sup>

The Court began its slow drift away from the limited nature of *Terry*'s reasonable suspicion exception in 1972 with *Adams v. Williams*.<sup>148</sup> After receiving a tip, police instructed Williams to open his car door. When he instead rolled down his window, police grabbed a firearm that was previously concealed in the defendant's waistband—exactly in the spot where an informant claimed a gun would be found.<sup>149</sup> Although the tip was not sufficiently reliable to meet the legal standard for informants,<sup>150</sup> the Court reached for *Terry* to justify a reasonable suspicion to search Williams because, it argued, the tip aroused an "indicia of reliability" allowing police to meet the requisite standard for investigatory stops.<sup>151</sup> Justice Brennan penned a vigorous dissent warning against expanding *Terry* beyond its original purpose:

There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true. . . .

. . . .

. . . [*Terry*] was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property, not the

145. *Id.* at 30 (emphasis added).

146. *See supra* Part II.C.

147. *See* Windmueller, *supra* note 18, at 549 (describing what the author termed "[d]escending into the [a]byss" following *Terry*—a phrase meant to suggest that trying to "fashion boundaries for [the Court's] new doctrine . . . resulted in the loss of the 'particularized suspicion' requirement").

148. 407 U.S. 143 (1972).

149. *Id.* at 144–45.

150. *Aguilar v. Texas* created a two-pronged test to determine the acceptability of a tip by an informant in 1964. 378 U.S. 108, 114–15 (1964). The test required that an affidavit supporting probable cause describe (1) "some of the underlying circumstances from which the informant concluded that [the tip is accurate]," and (2) "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" *Id.* at 114 (citing *Jones v. United States*, 362 U.S. 257, 267–68 n.2 (1960)).

151. *Adams*, 407 U.S. at 146–47.

conventional ones of possessory offenses. If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows “that criminal activity may be afoot.” I greatly fear that if the [contrary view] should be followed, *Terry* will have opened the sluiceways for serious and unintended erosion of the protection of the Fourth Amendment.<sup>152</sup>

Justice Brennan’s concerns have played out in the last forty years of Fourth Amendment decisions.<sup>153</sup>

The Court’s slow progression of minor alterations to *Terry* may seem insignificant when taken incrementally, but taken as an entire body of law, the leap is startling. What began as an exception to protect the safety of law enforcement personnel when they reasonably believed that criminal wrongdoing was presently afoot has since been stretched to justify protective sweeps of private property incident to an arrest, whether with or without a warrant,<sup>154</sup> investigatory seizures of property,<sup>155</sup> and searches of the passenger compartment of vehicles.<sup>156</sup> These representative cases have gradually accepted a smaller and smaller degree of danger as justifying reasonable suspicion and, thus, authorizing an investigatory search or seizure.<sup>157</sup> Whether the Court has impermissibly broadened the scope of *Terry* is a question that, in and of itself, has been the subject of substantial scholarship.<sup>158</sup> The inquiry of this Note, however, is limited to the inclusion of completed offenses within the realm of *Terry* exceptions. The Court was first faced with expanding Fourth Amendment doctrine to reasonable suspicion based upon completed crimes in *Hensley*—the decision that is the precursor to the specific question posed by this Note.

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152. *Id.* at 151, 153 (Brennan, J., dissenting) (quoting *Williams v. Adams*, 436 F.2d 30, 38–39 (2d Cir. 1971) (Friendly, J., dissenting) (citations omitted)); see also Windmueller, *supra* note 18, at 549–50 (discussing Justice Brennan’s dissenting opinion in *Adams*).

153. See Windmueller, *supra* note 18, at 549–53 (outlining how exceptions to *Terry*’s original purpose have eroded the original limited justification for the probable cause exception).

154. *Maryland v. Buie*, 494 U.S. 325, 331 (1990) (“There are . . . contexts . . . where the public interest is such that neither a warrant nor probable cause is required.”).

155. *United States v. Place*, 462 U.S. 696, 706 (1983) (extending *Terry* to detention of property).

156. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (“[T]he search of the passenger compartment of an automobile . . . is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons.”).

157. See *supra* notes 154–56 and accompanying text.

158. See, e.g., Antkowiak, *supra* note 24, at 582–93 (considering the Court’s slow movement away from probable cause and the history and arguments in favor of safeguarding the original standards of the Fourth Amendment); Harper, *supra* note 13, at 35–37 (discussing the possibility that expansion of *Terry* will lead to increased police misconduct); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 68–72 (1994) (exploring the possible negative implications of further expanding *Terry* to create what the author terms “a ‘new’ Fourth Amendment Doctrine”); Windmueller, *supra* note 18, at 544 (arguing that the erosion of individualized suspicion has perverted the core purposes of the Fourth Amendment).

### 3. Hensley's *Reasonable Purpose*

The 1985 decision by the Court in *Hensley* authorized investigatory searches and seizures based upon a reasonable suspicion by law enforcement that a felony has been completed, regardless of whether the suspected perpetrator is brandishing a high-powered firearm or lounging on the beach at the time of her arrest.<sup>159</sup> In order to expand *Terry* stops to completed offenses, the Court once again used a balancing test to elevate the State's need to search or seize over the privacy interests compromised by the intrusion<sup>160</sup>—a task which it conceded was more difficult when the felony, however dangerous the underlying offense may be, has already been accomplished.<sup>161</sup>

The theoretical interests of the State when investigating a completed crime are no different than those present when in hot pursuit of a suspect following a crime just committed. In practice, however, police have a much greater opportunity to secure a warrant once a crime is no longer ongoing, and the exigent circumstances exception to the Fourth Amendment warrant requirement oftentimes obviates the need for a *Terry*-like analysis when the circumstances are urgent enough so as to make waiting for a warrant a risk to public safety.<sup>162</sup> The Court, however, reasoned that the intrusion upon personal privacy was minimal enough so as to still be overwhelmed by the State's interest in crime prevention and the safety of officers and the public, noting that “[t]he law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.”<sup>163</sup>

The Court's reasoning is controversial.<sup>164</sup> The Fourth Amendment Probable Cause and Reasonableness Clauses are intended to be safeguards against the government to prevent general warrants and sweeping random checks for generalized criminal wrongdoing.<sup>165</sup> Rather than for the protection of citizens, the reasoning in *Hensley* seems to treat probable cause as an inconvenience to law enforcement.

Regardless of its treatment of probable cause, the Court's argument in *Hensley* is colorable. Thus, *Hensley*'s ‘reasonable purpose’ can be

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159. United States v. Hensley, 469 U.S. 221, 229 (1985).

160. See *supra* Part III.C.1 (discussing the balancing test required in order to classify a search or seizure as reasonable and therefore not a violation of the Fourth Amendment).

161. *Hensley*, 469 U.S. at 228 (“The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct. . . . [T]he governmental interests and the nature of the intrusions involved in the two situations may differ.”).

162. See, e.g., *Payton v. New York*, 445 U.S. 573, 586–87 (1980) (discussing situations in which a warrantless arrest may be valid due to exigent circumstances).

163. *Hensley*, 469 U.S. at 229.

164. See, e.g., Harper, *supra* note 13, at 34–42 (outlining various reasons why expanding *Terry* to completed crimes is unnecessary, undesirable, and contrary to the realities of modern law enforcement).

165. See *supra* Parts II.A–B.

stated as the apprehension of individuals reasonably suspected of having committed crimes sufficiently serious so as to be designated as felonies.<sup>166</sup> The Court argued that, because felonies at least theoretically involve some degree of inherent danger, the State has an interest in expeditiously apprehending suspects despite the fact that the underlying offense has been completed.<sup>167</sup> When police are investigating misdemeanors rather than felonies, the Court recognized that the State's interest might not be sufficient to justify even momentary privacy intrusions, although it expressly declined to create binding precedent on the issue.<sup>168</sup> Although the concern is not as great when dealing with felonies, one of the myriad red flags that comes with allowing completed misdemeanors to justify *Terry* searches and seizures is the potential for law enforcement misconduct, for example, racial profiling, that can arise if such a low threshold is accepted in place of probable cause.<sup>169</sup>

*D. The Elephant in the Room: Pretextual Searches and Seizures, Racism, and Reasonableness*

Racial profiling and pretextual searches and seizures have long been the subject of controversy. The Fourth Amendment was designed to provide a safeguard against abuses of discretion by law enforcement.<sup>170</sup> Probable cause exists as a requirement in the Fourth Amendment to prevent State misconduct—originally through general writs and, today, through arbitrary exercises of discretionary authority.<sup>171</sup>

In *Whren v. United States*, the Supreme Court held that a search or seizure is not invalidated when it was initiated hoping to find criminality or based upon any reason other than probable cause or reasonable suspicion, whichever is appropriate, so long as the search or seizure was facially valid for some other reason, regardless of the severity of the crime or infraction.<sup>172</sup> For example, police who have a hunch, but no proof whatsoever, that an individual is selling narcotics may initiate a traffic stop hoping to find drugs, a so-called pretext, so long as they have an other-

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166. See *Hensley*, 469 U.S. at 229.

167. See *id.*

168. See *id.* at 228–29. The Court noted that completed crimes still involve danger to the public “[p]articularly in the context of felonies,” implying that misdemeanors may involve less risk. *Id.* at 229 (emphasis added). Furthermore, the Court indicated that it was not presented with the question of whether all completed crimes could justify investigatory searches or seizures regardless of offense severity, noting that its ruling was limited to completed felony offenses only. *Id.*

169. See David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–61 (1997) (asserting, in the wake of *United States v. Whren*, which made it “possible for the police to stop anyone,” that “pretextual stops will be used against African-Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population”).

170. See Antkowiak, *supra* note 24, at 579.

171. Although the general writs and warrants discussed *supra* Part II.A are not of primary concern today, racial profiling remains a pervasive problem. For a discussion on discriminatory practices in law enforcement, see Harris, *supra* note 169, at 560–73.

172. See *Whren v. United States*, 517 U.S. 806, 813–14, 818–19 (1996).

wise appropriate reason to initiate the stop, for example, failure to use a turn signal.<sup>173</sup>

Although the Court's reasoning in *Whren* was seemingly valid, commentators have alleged that permitting searches and seizures based upon probable cause or reasonable suspicion of a completed felony, when the true purpose for the intrusion is an ulterior motive of the officer, opens the door to police misconduct. More specifically, it enables racial profiling—so long as the officer can allege a colorable infraction, however minor.<sup>174</sup> Further expanding *Terry* and *Hensley* to completed misdemeanors would open a whole new can of worms—allowing a pretextual stop based upon a reasonable suspicion that a suspect previously committed a minor infraction. Under the most cynical, but perhaps not unfounded, scenarios,<sup>175</sup> following the Eighth, Ninth, and Tenth Circuits would allow an unethical officer to initiate a *Terry* stop of someone walking down the street based upon the pretext of finding her slightly suspicious, so long as the officer can justify a “reasonable suspicion” of an offense even as amorphous and generally non-violent as disorderly conduct<sup>176</sup>—a far cry from the reasonableness and probable cause standards of the Fourth Amendment. Such expansion amplifies the racial profiling concerns expressed following *Hensley* to an even greater degree.

Reasonable suspicion is not easily definable, nor should it be, according to the Supreme Court.<sup>177</sup> Legal scholars appreciate the ability to know when conduct is proper and when it is wrongful, but invariably, police activity is sometimes best judged using the experience of those in law enforcement.<sup>178</sup> The Court has expressed that it is not necessarily uncomfortable giving such latitude, stating that “evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”<sup>179</sup> It is true that police must consider the “big picture” in determining whether rea-

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173. Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 155–57 (1996).

174. See Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332–38 (1994) (explaining the racial implications of a *Terry* stop).

175. See *id.*; see also Harris, *supra* note 169, at 560–61.

176. Disorderly conduct is a misdemeanor in most states and offenders can be cited for activity of widely varying levels of severity. See, e.g., GA. CODE ANN. § 16-11-39(a)(4) (West 2007) (making vulgar language in front of a child under the age of fourteen a misdemeanor when it threatens to breach the peace); 720 ILL. COMP. STAT. ANN. 5/26-1(a)(1) (West 2006) (criminalizing unreasonably “disturb[ing] another” if it provokes a breach of the peace); KY. REV. STAT. ANN. § 525.060(1)(b) (Lexis-Nexis 2008) (making “unreasonable noise” constitutes the misdemeanor of disorderly conduct).

177. See *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (articulating why the Court believed it was not troublesome that one cannot easily determine what is or is not suspicious). The Court went on to explain that the proper analysis for determining reasonable suspicion focuses on probabilities rather than certainties. *Id.* at 418. “Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.” *Id.*

178. See *id.* at 417–18.

179. *Id.* at 418.

sonable suspicion exists—no one factor can ever truly be determinative.<sup>180</sup> But with this latitude also comes an inevitable potential for abuse, and officers must not be allowed to turn their own prejudices into factors arousing suspicion.<sup>181</sup>

The judiciary has emphasized that race should generally not play a role in determining whom an officer stops,<sup>182</sup> but it is unquestionable that this ideal is not always the reality.<sup>183</sup> It is especially important to keep this in mind in light of the fact that as *Terry* expands, so too does the scope of *Whren*. As a result, pretextual stops have slowly become more pervasive, originally authorized when independent probable cause was present,<sup>184</sup> then based upon mere reasonable suspicion,<sup>185</sup> expanding to reasonable suspicion of completed felonies,<sup>186</sup> and finally to completed misdemeanors in those federal circuits that have chosen to expand *Terry*.<sup>187</sup>

Even prior to *Hensley*, when pretextual stops were authorized only upon probable cause or upon reasonable suspicion of a presently occurring offense, commentators expressed concern that ulterior motives might be easily concealed by conjuring suspicion where very little existed to justify a stop.<sup>188</sup> Though it may be unclear how an individual can reasonably arouse suspicion that she committed a felony in the past, as was the case in *Hensley*, it is even more baffling to consider how one reasonably gives the appearance that she previously completed a misdemeanor. The problem, according to some scholars, is that *Whren* authorized the method most commonly used to racially profile individuals, namely the

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180. See, e.g., *Brown v. Texas*, 443 U.S. 47, 51 (1979) (describing the process of articulating a particularized suspicion based upon the circumstances as a whole); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (same).

181. For a detailed discussion of how racial prejudice may become dangerous in light of *Terry* and *Whren*, see Harris, *supra* note 169, at 544–47. Harris goes beyond merely suggesting that racism might lead to an increase in traffic stops among African Americans and argues that *Whren* essentially obliterates Fourth Amendment protections for drivers. *Id.* at 545. “*Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police. . . . Simply put, [the Fourth Amendment] no longer applies when a person drives a car.” *Id.* at 545–46.

182. *United States v. Hayden*, 740 F. Supp. 650, 653 (S.D. Iowa 1989) (“[I]t would be fundamentally wrong for an officer to act, even in small part, on the basis of a motorist’s race.”)

183. See, e.g., *United States v. Thomas*, 787 F. Supp. 663, 676 & n.17 (E.D. Tex. 1992) (describing a training video used by the Louisiana State Police Department to look for “Cubans, Colombians, Puerto Ricans or other swarthy outlanders” when trying to pick out drug offenders and further instructing officers “to ask themselves whether the person ‘fits the car,’ a veiled reference to the belief held by some that a person of color in an expensive car is engaged in suspicious activity”). For a more detailed discussion of race as a factor for suspicion, including the *Thomas* case, see Susskind, *supra* note 174, at 334–38.

184. *Whren v. United States*, 517 U.S. 806, 818–19 (1996).

185. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (authorizing the reasonable suspicion standard).

186. See *United States v. Hensley*, 469 U.S. 221, 229 (1985) (extending reasonable suspicion to completed felony offenses).

187. See *supra* note 61.

188. See Matthew J. Saly, *Whren v. United States: Buckle-Up and Hold on Tight Because the Constitution Won’t Protect You*, 28 PAC. L.J. 595, 603–04 (1997) (describing the possibility of inappropriate motives justifying valid pretextual stops).

pretextual stop,<sup>189</sup> and the erosion of *Terry* simply expands an avenue for unethical officers to conceal impermissible motivations with valid, seemingly innocuous justifications.<sup>190</sup>

When pretextual *Terry* stops are permitted upon the mere reasonable suspicion of a completed misdemeanor, the fear of abuse by police becomes even greater than the already perilous standard when a presently occurring reasonable suspicion is required.<sup>191</sup> The problem then becomes one of cultural differences in interactions with law enforcement.<sup>192</sup> One commentator has advocated a “reasonable African-American standard” for determining when an individual is seized, due to the fact that race often changes a police encounter and may change the answer to whether or not a person feels free to leave.<sup>193</sup> Professor Wayne LaFave has outlined how easily a trained officer can turn a seizure into a consensual encounter, even when the detained individual did not truly feel free to walk away:

All the officer has to do to obviate any and all time and scope limitations is to perform in such a manner that courts are likely to treat as manifesting a termination of the seizure even though any person who has been detained for a traffic violation is unlikely to so perceive the situation.<sup>194</sup>

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189. See Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 726–27 (2000). At least one commentator has suggested that an Equal Protection claim might also exist resulting from pretextual racial profiling, in which case strict scrutiny would have to be survived by the alleged wrongdoers. See Susskind, *supra* note 174, at 339–42. This would be notable primarily because an Equal Protection violation would render evidence seized during the pretextual stop inadmissible. *Id.* at 339. Such claims are extremely rare, however, due to the difficulty in proving law enforcement motivations. See *id.* at 340–42. Although these claims are rare, they are not impossible. See *id.* at 340 n.80 (“[T]he officer ‘carried out policies that systematically violated the constitutionally protected rights of Blacks and Hispanics to travel and be free from unreasonable seizures on an equal basis with other persons traveling the highways of this nation.’” (quoting *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990))).

190. Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1902–03 (2004).

191. For a discussion of potential problems with the use of a pure *Terry* standard becoming arbitrary, see *id.* at 1902–03.

192. See Susskind, *supra* note 174, at 344–46 (describing the effect of race on police interaction); see also Kenneth Gavsie, Note, *Making the Best of “Whren”: The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 391–94 (1998) (referring to *Whren* as a “stamp of approval on racial discrimination”). Gavsie continues, “[m]inorities have made accusations of discriminatory practices by law enforcement in the use of traffic stops for a long time. . . . *Whren* is simply responsible for making the situation worse by providing law enforcement with the constitutional foundation for engaging in such discriminatory practices.” Gavsie, *supra*, at 394.

193. See Susskind, *supra* note 174, at 346–48; see also *Laymon*, 730 F. Supp. at 342 (acknowledging that race can affect law enforcement interactions by noting that the fact that the individuals in question were African American may have enhanced their belief that they had no choice but to consent to a search).

194. LaFave, *supra* note 190, at 1898. To illustrate his point, Professor LaFave cites case law demonstrating the ease with which officers often obtain consent to search or seize. See *id.* at 1902 (“The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year . . . indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfacto-

Lowering the threshold for *Terry* stops to include completed misdemeanors makes such manipulation even easier for corrupt officers. This further illustrates how allowing *Terry*'s snowball to grow can lead to an avalanche—what was originally intended to justify a cursory pat down for weapons<sup>195</sup> would be allowed to authorize a seizure based upon suspicion of a noise violation, disorderly conduct, or any number of minor offenses. The judiciary must put a stop to such an impetuous extension of Fourth Amendment doctrine.

#### IV. RESOLUTION AND RECOMMENDATION

To resolve the current disagreement among the circuit courts and protect Fourth Amendment guarantees, the Supreme Court should act. Failing to resolve the circuit split leaves open a dangerous path for police misconduct and allows law enforcement officials to justify their actions using an ambiguous standard with a scanty threshold. If the Court's focus returns to the Fourth Amendment, rather than being distracted by *Terry* and its copious exceptions, expansion of investigatory stops becomes both unnecessary and unreasonable. As such, the Court should adopt a bright-line rule prohibiting investigatory searches and seizures based upon completed misdemeanors. Allowing such police activity is repugnant to the Constitution for two reasons. First, expanding *Terry* to include completed misdemeanor offenses is unnecessarily circumspect when the fluid nature of the probable cause warrant standard is considered and, second, the *Terry* ruling was meant to be one of limited application, the sensitivities of which are best served through a bright-line prohibition of searches and seizures based upon a mere reasonable suspicion of a completed petty offense.

##### A. *Probable Cause Remembered: Why Expansion of Terry Is Unnecessary*

*Terry* and its progeny have progressively moved away from the Probable Cause Clause of the Fourth Amendment and have stretched the Reasonableness Clause beyond what it was arguably originally intended to achieve.<sup>196</sup> Whether the two clauses are read separately or as a whole,<sup>197</sup> avoidable problems arise from using completed misdemeanors

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rily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so." (quoting *Ohio v. Robinette*, 519 U.S. 33, 48 (1996))).

195. *Terry v. Ohio*, 392 U.S. 1, 25–26 (1968).

196. See Frank Rudy Cooper, *The Spirit of 1968: Toward Abolishing Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539, 542–43 (2007). Professor Cooper claims that the *Terry* court "abandon[ed] probable cause" and that the "decision expresses a prioritization of 'law and order' over civil liberties, particularly the civil liberties of racial minorities." *Id.* at 543.

197. Compare Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 392–94 (1988) (explaining the theory that a "reasonable search" is one that is based upon probable cause), with Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U.

to create reasonable suspicion. It is true that the distinction between a felony and a misdemeanor is a “fluid concept,”<sup>198</sup> but this is not cause to ignore the differentiation. It is, after all, the responsibility of the legislature to make value judgments as to the punishment that is appropriate for a given offense and, by classifying a crime as a misdemeanor, the insinuated message conveyed is that the government has a lesser interest in arresting offenders for these crimes than it does for felony offenses.<sup>199</sup> To be sure, probable cause has a “fluid nature,”<sup>200</sup> but this does not mean that the standard adjusts based upon the classification of an offense—in fact, the Court has ruled that the opposite is true, holding that “[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”<sup>201</sup> The differentiation between felonies and misdemeanors is significant,<sup>202</sup> and the importance of classifying offenses by severity should not be lost in the flurry of Fourth Amendment cases decided in the forty years following *Terry*.

States always have at least a minimal interest in arresting and prosecuting those who break its laws,<sup>203</sup> but when the interest is minimal—as is the case with misdemeanors—constitutional guarantees should not be sidestepped in favor of zealous crime prevention. Along the gradient of reasonable invasions justified under the Fourth Amendment, searches and seizures logically become unreasonable upon crossing some threshold—although where that line is to be drawn is not easily defined. Initiating *Terry* stops based upon reasonable suspicion that a suspect is guilty of a completed misdemeanor may well be efficacious law enforcement, but adherence to the Fourth Amendment leads to the conclusion that it is unreasonable—and indeed, unnecessary—to do so.

Refusing to authorize *Terry* stops for completed misdemeanors does not logically lead to the conclusion that more criminals will successfully evade capture and prosecution for their offenses. The Fourth Amendment itself provides the proper mechanism to be used in such situations through the Warrant Clause.<sup>204</sup> In some situations it makes good sense to dispense of the warrant requirement. For example, when police are in

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COLO. L. REV. 693, 698–99 (1998) (explaining the concepts of reasonableness and probable cause as potentially separate determinations).

198. See William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 811–16 (1993).

199. See *id.* at 804.

200. *Id.* at 803.

201. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

202. See Schroeder, *supra* note 198, at 811–16. “The felony/misdemeanor distinction has been said to be “[t]he most important classification of crimes in general use in the United States.” *Id.* at 813 (quoting WAYNE R. LAFAYE & AUSTIN H. SCOTT, JR., CRIMINAL LAW § 1.6 (2d ed. 1986)).

203. See Chalmous G. Reemes, *United States v. Salerno: The Validation of Preventive Detention and the Denial of a Presumed Constitutional Right to Bail*, 41 ARK. L. REV. 697, 713–15 (1988) (discussing the relationship of governmental interests in crime prevention to individual rights invasions).

204. U.S. CONST. amend. IV.

hot pursuit of a felon presently fleeing the scene of a crime,<sup>205</sup> when the imminent destruction of evidence necessitates such action,<sup>206</sup> or when there is an immediate risk of danger to police or the public at large;<sup>207</sup> it would be counterproductive and dangerous to require strict adherence to the Fourth Amendment Warrant Clause. When exigent circumstances are not present, the justification for warrantless searches and seizures is not as evident. Furthermore, when a crime has already been completed, police action is less likely to substantially enhance public safety—especially when the completed offense is minor.<sup>208</sup> The proper action for officers who legitimately have a reasonable suspicion that a misdemeanor has been completed is to develop probable cause and initiate the warrant process. Because misdemeanors are inherently judged to be less dangerous to the public than felonies, and the completion of the crime lowers the risk to the public to even a greater degree, there is minimal harm in delaying capture until a warrant can be obtained. This avoids sloppy law enforcement conducted on a whim, while allowing well-founded suspicions to be further vetted for accuracy, and achieves the same result through a warrant as would have been accomplished with a seizure based upon reasonable suspicion, thus rendering a *Terry* stop in such situations unnecessary.

It is likely that there will be times when an officer with reasonable suspicion that a misdemeanor has been completed will not be able to secure a warrant because he is unable to convert suspicion to the requisite probable cause needed to survive the process. This is perhaps unfortunate, but such situations have been contemplated by the courts and nonetheless deemed unreasonable.<sup>209</sup> Occasionally, adherence to constitutional principles results in some who have committed wrongs evading capture. When law enforcement is not able to muster even the probable cause required to obtain a warrant, however, this is a cost that must be borne by the people in reverence to the Constitution.

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205. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 747–48 (1984).

206. See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

207. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 330–31 (1990).

208. See *United States v. Grigg*, 448 F.3d 1070, 1080–81 (9th Cir. 2007).

209. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”); Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 335–36 (2007) (discussing the Founding Fathers and the Fourth Amendment Reasonableness Clause); see also *Payton v. New York*, 445 U.S. 573, 585–86 (1980).

B. “*Difficult and Troublesome*”:<sup>210</sup> *Remembering the Sensitivities of Terry Through a Bright-Line Rule*

When the Supreme Court announced the reasonable suspicion standard in *Terry*, it appeared to understand the delicate ground upon which it trod.<sup>211</sup> Courts should keep this timidity in mind when expanding Fourth Amendment doctrine. When a search or seizure is unreasonable it is unconstitutional.<sup>212</sup> While there are a number of factors to be considered in determining reasonableness,<sup>213</sup> some searches and seizures simply serve a governmental interest that is too small to justify even brief and minimal intrusion. Completed misdemeanors for which officers do not have probable cause constitute such unreasonable circumstances. As such, the Court should resolve the current circuit split by adopting a bright-line rule that completed misdemeanors cannot give rise to the reasonable suspicion required to initiate a *Terry* stop.

Bright-line, per se rules sometimes frighten away well-intentioned judges who retreat to the safety of case-by-case tests using often empty standards such as “reasonableness” and “the totality of the circumstances.”<sup>214</sup> Benchmarks such as these are oftentimes advisable and, although frequently lacking in judicial guidance, these standards reflect the flexibility routinely required when attempting to apply a static law to elastic realities. But other times, a fixed rule benefits all involved—citizens, law enforcement, and the courts—by providing a reliable measure through which to arrive at a consistent conclusion.<sup>215</sup>

The type of bright-line rule recommended by this Note is within the scope of standards suggested even by scholars who have warned that “the Fourth Amendment’s place in the Bill of Rights strongly suggests that, if bright-line rules are to be adopted, they should protect the constitutional rights of citizens rather than promote police efficiency.”<sup>216</sup> By strictly prohibiting *Terry* stops based upon completed misdemeanors, the Court would protect citizens from potential police misconduct, while also taking the guesswork out of police interactions in which complicated Fourth Amendment jurisprudence is implicated.<sup>217</sup>

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210. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity . . .”).

211. The Court acknowledged that Fourth Amendment guarantees are of great significance and should be approached with great reverence. *Id.* at 9. “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Id.* (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

212. See *Terry*, 392 U.S. at 9.

213. See generally Volokh, *supra* note 123 (discussing reasonableness and crime severity).

214. See Wilson, *supra* note 89, at 436.

215. For a more detailed discussion of bright-line rules and their benefits and drawbacks, especially in the context of constitutional law, see *id.* at 435–37.

216. LaFave, *supra* note 190, at 1904.

217. But see Ryan J. Caststeel, Note, *Constitutional Law—Fourth Amendment and Search and Seizure—Introducing the Supreme Court’s New and Improved Summers Detention: Now Equipped*

## V. CONCLUSION

Although the original intent of the Founding Fathers may never be known with certainty, it seems clear that they were concerned about searches and seizures conducted without particularized justification.<sup>218</sup> That concern should continue today. Although all grants of substantial law enforcement discretion are subject to abuse, allowing investigatory searches and seizures based upon mere reasonable suspicion that a suspect previously committed a misdemeanor offense presents circumstances especially vulnerable to misconduct. In these cases, searches and seizures should be carried out only upon securing a valid warrant, backed by the familiar standard of probable cause.

The Supreme Court should take the opportunity presented by the current circuit split to resolve this issue by granting certiorari. *Terry* stops based upon completed misdemeanors are outside the purview of the Fourth Amendment's Reasonableness Clause. Read together with the Warrant Clause, expansion of investigatory stops becomes unreasonable and unnecessary. Responsible constitutional interpretation calls for a bright-line rule distinguishing misdemeanor cases from the completed felony rule announced in *Hensley*. The Court was justifiably wary in its creation of the reasonable suspicion standard in 1968, but its timorous skepticism has developed into wayward expansion of *Terry* doctrine. It is time to rein in the proliferation of *Terry* exceptions and return to the reasonableness standard that is the hallmark of the Fourth Amendment.

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*with Handcuffing and Questioning!* Muehler v. Mena, 544 U.S. 93 (2005), 29 U. ARK. LITTLE ROCK L. REV. 379, 403–04 (2007). Mr. Caststeel points out that bright-line rules in Fourth Amendment cases can sometimes lead to the unintentional glossing over of situations that the judiciary failed to consider at the time of the creation of the rule. *See id.* Rules dealing with the Fourth Amendment in conjunction with statutory offense classification, however, are less susceptible to this sort of oversight because the legislature maintains the ability to correct many of the problems that may arise simply by reclassifying an offense.

218. *See supra* Part II.A–B.



