Unreasonable Differences: The Dispute Regarding the Application of Terry Stops to Completed Misdemeanor Crimes

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UNREASONABLE DIFFERENCES: THE
DISPUTE REGARDING THE APPLICATION
OF TERRY STOPS TO COMPLETED
MISDEMEANOR CRIMES

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INTRODUCTION

The Founders of our country believed in the equality of all in
the eyes of the law, each person having certain inherent rights
that could not be violated by the government. The rights and
protections granted to the People by the Constitution and its
various Amendments are intended to give effect to those beliefs,
and are intended to apply equally to everyone. In reality,
however, this is not necessarily true. The Supreme Court has
never squarely answered the question of whether a police officer
may seize an individual without probable cause in order to
investigate his or her involvement in a completed misdemeanor
crime. Several circuit courts have addressed this issue, however,
and are sharply divided in their conclusions. In some
jurisdictions, such police action is held to be a per se
constitutional violation. In other jurisdictions, this same police
activity has been held constitutionally permissible. As a result,
the right of the People to be free from unreasonable searches and

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1 “We hold these truths to be self-evident, that all men are created equal, that
they are endowed by their Creator with certain unalienable Rights, that among
these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF
INDEPENDENCE para. 2 (U.S. 1776).

2 The Preamble to the Constitution of the United States unambiguously declares
that justice and the “Blessings of Liberty” are secured for the benefit of the People.
U.S. CONST. pmbl. The Fourteenth Amendment specifically states that all are
entitled to equal protection under the law. U.S. CONST. amend. XIV, § 1.

3 See, e.g., Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763, 771 n.6 (6th Cir.
2004).

4 See, e.g., United States v. Moran, 503 F.3d 1135, 1143 (10th Cir. 2007).
seizures guaranteed by the Fourth Amendment receives varying levels of protection based solely upon jurisdictional lines. This offends the very principles upon which our nation was established.

Born out of a desire to protect the People against unlimited governmental intrusions into their lives, the Fourth Amendment is one of the most important restrictions intended to prevent the government from arbitrarily laying its immense power against the individual. While the goal of protecting the People from arbitrary governmental intrusion is a noble one, the authors of the amendment could not possibly predict every conceivable situation in which the government might unreasonably intrude upon the lives of the People, and thus, the language of the Fourth Amendment is necessarily vague. As a result, the determination of what constitutes an unreasonable search or seizure in a particular situation ultimately rests upon decisions of the Supreme Court.

While the purpose of the Fourth Amendment is to protect the People from arbitrary governmental intrusions into their lives, its practical effect is to regulate the actions of the police. Supreme Court decisions define the circumstances under which a search or seizure is reasonable, effectively setting boundaries for acceptable police procedures. The 1968 ruling in Terry v. Ohio

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

U.S. CONST. amend. IV.

6 See Boyd v. United States, 116 U.S. 616, 624–26 (1886) (discussing the practice during colonial times of revenue officers obtaining "writs of assistance" that allowed them to search anywhere they suspected they may find contraband, effectively placing the liberty of the individual solely at the discretion of the investigating officer).

7 See U.S. CONST. amend. IV; see also Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. PITT. L. REV. 307, 308 (1982) ("The protections of the fourth amendment are exceedingly important to each and every one of us, largely determining, as they do, 'the kind of society in which we live.'").

8 Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV 349, 353–54 (1974) (describing the Fourth Amendment as "that brief, vague, general, unilluminating text written [over] two centuries ago").

9 "The fourth amendment is quintessentially a regulation of the police . . . ." Id. at 371.

10 392 U.S. 1 (1968).
represents one of the most influential decisions the Supreme Court has made with respect to regulation of police conduct. In *Terry*, the Supreme Court ruled that a police officer may, without a warrant or probable cause, seize a person based upon a reasonable belief that "criminal activity may be afoot." Furthermore, the Court stated that police officers may then conduct a cursory search of that person if they have reason to believe the individual "may be armed and presently dangerous." Under *Terry*, the Court stated that the officer does not need to establish probable cause to arrest in order to seize an individual to investigate suspected criminal activity. Instead, the officer must only demonstrate a "reasonable suspicion" of the person's involvement in criminal activity. "Reasonable suspicion" is a lower standard than probable cause, and requires only a "minimal level of objective justification for making the stop," based upon "specific and articulable facts... taken together with rational inferences from those facts." Under traditional Supreme Court Fourth Amendment jurisprudence, a search or seizure performed in the absence of probable cause or a warrant was presumptively unreasonable. Thus, the decision in *Terry* represented a shift away from this traditional view of reasonableness towards a more flexible standard.

To justify its decision in *Terry*, the Supreme Court noted a strong governmental and public interest in allowing the police to take certain actions to prevent crimes from occurring. In

11 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 277-79 (4th ed. 2006) ("In terms of the daily activities of the police, as well as the experiences of persons 'on the street,' there is no Supreme Court Fourth Amendment case... of greater practical impact.").
13 Id.
14 Id. at 21.
16 *Terry*, 392 U.S. at 21.
17 See DRESSLER & MICHAELS, supra note 11 (stating that *Terry* signified "a move by the Supreme Court away from the proposition that warrantless searches are per se unreasonable").
18 Id.
19 *Terry*, 392 U.S. at 21 ("[T]here is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails. " (quoting Camara v. Mun. Court, 387 U.S. 523, 534–35 (1967))).
20 See id. at 22.
United States v. Hensley,\textsuperscript{21} decided in 1985, the Supreme Court expanded the scope of Terry to include completed crimes.\textsuperscript{22} Specifically, the Court held that a police officer may make an investigative Terry stop based upon reasonable suspicion of an individual’s involvement in a completed felony.\textsuperscript{23} By limiting its decision to completed felonies, the Court left open the question of whether conducting a Terry stop for a completed misdemeanor is reasonable within the meaning of the Fourth Amendment.\textsuperscript{24} In the two decades since Hensley was decided, only four circuit courts have addressed this narrow issue, and they disagree as to the conditions under which—or even if—Terry stops may be made for the purpose of investigating a completed misdemeanor without violating the Fourth Amendment.\textsuperscript{25} The Sixth Circuit uses a bright-line rule that police may never conduct a Terry stop to investigate a completed misdemeanor offense.\textsuperscript{26} In contrast, the Eighth, Ninth, and Tenth Circuits employ a “totality of the circumstances” test, which weighs the interest of effective law enforcement against the gravity of the intrusion into the life of the individual.\textsuperscript{27}

This Note addresses the current disagreement surrounding the constitutionality of Terry stops based upon a completed misdemeanor and recommends a solution that is consistent with the reasoning expressed by the Supreme Court in both Terry and Hensley. Part I of this Note discusses the traditional “reasonableness” standard of probable cause and explains the

\textsuperscript{21} 469 U.S. 221 (1985).

\textsuperscript{22} See id. at 229.

\textsuperscript{23} Id. ("[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." (emphasis added)).

\textsuperscript{24} Id. ("We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted.").

\textsuperscript{25} See United States v. Moran, 503 F.3d 1135, 1143 (10th Cir. 2007) (adopting a balancing test to determine the reasonableness of a Terry stop for a completed misdemeanor); United States v. Grigg, 498 F.3d 1070, 1081 (9th Cir. 2007) ("[W]e decline to adopt a per se standard that police may not conduct a Terry stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense."); Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763, 771 n.6 (6th Cir. 2004) ("Police may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor." (citing United States v. Hensley, 469 U.S. 221, 229 (1985)) (emphasis added)).

\textsuperscript{26} See Gaddis, 364 F.3d at 771 n.6.

\textsuperscript{27} See Moran, 503 F.3d at 1141; Grigg, 498 F.3d at 1077.
evolution of the *Terry* Doctrine. Part II discusses the four circuit court cases that specifically addressed this issue and the processes by which each court came to its respective conclusion. Part III analyzes the bright-line and totality of the circumstances approaches to answering this question, and suggests that neither method provides for both effective law enforcement practices and adequate protection of the Fourth Amendment. This Note resolves the current disagreement among the circuit courts by presenting a new rule that strikes an appropriate balance between permissible police actions and protection of constitutional rights of the People. Under the proposed rule, *Terry* stops conducted for the investigation of completed misdemeanors are presumptively unreasonable unless the police officer can point to specific facts that would lead a reasonable officer, in his position, to conclude that failure to take immediate action would result in physical harm, either to himself or to a member of the general public. This rule adopts the reasoning employed in both *Terry* and *Hensley* and can be easily and consistently applied by the police. The proposed rule provides law enforcement officers with the appropriate amount of flexibility to act to prevent imminent physical harm without having to first weigh a myriad of ambiguous factors in the heat of the moment; yet the rule still provides better protection of Fourth Amendment rights than either of the methods currently employed.

I. THE EVOLUTION OF THE *TERRY* DOCTRINE

A. The Traditional Requirement of "Probable Cause"

The concept of "probable cause" comes directly from the language of the Fourth Amendment's Warrant Clause. In terms of traditional Fourth Amendment jurisprudence, probable cause is the "traditional standard" by which the reasonableness of a particular search or seizure is measured. A fundamental concept of probable cause is that a "good-faith" belief by the police officer that a crime has been committed is not enough; rather, it is an objective standard, requiring the officer to have

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28 See supra note 5.
actual knowledge or information that would cause a hypothetical, reasonably prudent police officer to form the same belief, in the same circumstances.\(^{30}\)

Determining whether probable cause exists “turn[es] on the assessment of probabilities in particular factual contexts.”\(^{31}\) The existence of probable cause to arrest means that (i) a crime has \textit{probably} been committed; and (ii) the crime was \textit{probably} committed by the person the police officer seeks to arrest.\(^{32}\) As a general rule, the existence of probable cause to arrest is evinced by the issuance of a warrant by a “neutral and detached magistrate.”\(^{33}\) This general rule supports the traditional Fourth Amendment jurisprudential preference for warrants,\(^{34}\) which is based on the theory that a magistrate is better suited than police officers, who are “engaged in the often competitive enterprise of ferreting out crime,” to provide an unbiased judgment on whether a particular set of facts supports the reasonable belief that a crime has occurred.\(^{35}\) This preference for warrants exists because the Court feared that allowing police officers to make an “on-the-spot” probable cause decision would expose the public to an unacceptable risk of unreasonable governmental intrusion and would effectively nullify the protections of the Fourth Amendment.\(^{36}\) Despite the preference for this check on police power, the Supreme Court’s decision in \textit{Terry}\(^{37}\) created what was

\(^{30}\) \textit{See} Carroll v. United States, 267 U.S. 132, 161–62 (1925) ("Good faith is not enough to constitute probable cause.").


\(^{32}\) \textit{See id.} at 231–32.


\(^{34}\) \textit{See}, e.g., New York v. Belton, 453 U.S. 454, 457 (1981) ("It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so.").

\(^{35}\) \textit{See} \textit{Johnson,} 333 U.S. at 14.

\(^{36}\) \textit{See id.} ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

\(^{37}\) 392 U.S. 1 (1968).
then intended to be a narrow exception to the general rule,\textsuperscript{38} meant to be applied only in those situations in which obtaining a warrant is impracticable.\textsuperscript{39}

B. Terry v. Ohio: Search and Seizure in the Absence of Probable Cause

In *Terry*, the Supreme Court ruled that a police officer may—without probable cause to arrest—stop an individual based upon a reasonable suspicion of that person’s involvement in criminal activity.\textsuperscript{40} If the police officer has reason to believe that the person may be “armed and presently dangerous,” the officer may then conduct a cursory “pat-down” search of the individual for weapons.\textsuperscript{41} In coming to this conclusion, the Court focused heavily upon the facts of the case. In *Terry*, veteran police detective Martin McFadden was conducting a foot patrol of a downtown area of Cleveland, Ohio.\textsuperscript{42} Detective McFadden observed two men repeatedly walk from a street corner to look into the window of a particular store, then return to the street corner to confer with each other.\textsuperscript{43} After several repetitions, a third man approached.\textsuperscript{44} After a brief conference, the third man departed the area, leaving the original two individuals on the street-corner.\textsuperscript{45} Following a few more repetitions of looking through the store window and returning to the street corner, the two men departed the area, heading in the same direction as the third man.\textsuperscript{46} At this point, McFadden believed the three men were “casing” the store for an upcoming robbery and decided to investigate further.\textsuperscript{47} He approached the three men, identified

\textsuperscript{38} *Id.* at 27 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest . . . .”).

\textsuperscript{39} *Id.* at 20 (“[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”).

\textsuperscript{40} *Id.* at 30.

\textsuperscript{41} See *id.*

\textsuperscript{42} *Id.* at 5.

\textsuperscript{43} *Id.* at 5–6.

\textsuperscript{44} *Id.* at 6.

\textsuperscript{45} *Id.*

\textsuperscript{46} *Id.*

\textsuperscript{47} *Id.*
himself as a police officer, and asked them what they were doing. When the men "mumbled something" in response to his inquiries, Detective McFadden conducted a "pat-down" search of the individuals, and discovered that two of the three men were carrying concealed handguns in violation of state law. At trial, the court denied motions to suppress the handguns as evidence and found the two armed men, Terry and Chilton, guilty of a felony. Eventually hearing the case on appeal, the Supreme Court affirmed the convictions.

Because the validity of the convictions turned on whether or not the handguns were properly admitted as evidence at trial, the Supreme Court first addressed the issue of whether a distinction should be made between a "stop and frisk" and a full-blown search and arrest. The State characterized the police practice of "stopping" and "frisking" as something less intrusive than a full search and seizure of a person, and thus not within the realm of the Fourth Amendment. According to the State, because the handguns were discovered as a product of an activity not contemplated by the Fourth Amendment, no violation occurred and the weapons were therefore properly admitted. Furthermore, the State argued that "police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." The State contended that these responses should include both the ability to briefly stop and question an individual to investigate suspected involvement in criminal activity, as well as the ability to frisk the person if the officer suspects that he or she may be armed, without having to first establish probable cause to arrest. The State argued that a "stop and frisk" amounted only to "a mere 'minor inconvenience

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48 Id. at 6–7.
49 Id. at 7.
50 Id.
51 Id. at 7–8.
52 Id. at 8.
53 Id. at 10 (discussing the government’s argument that a distinction should be made between a "stop and frisk" and a full-scale search and arrest).
54 Id.
55 Id. at 10–11; see also Mapp v. Ohio, 367 U.S. 643, 647–48 (1961) (discussing the Exclusionary Rule, in which evidence obtained as a result of a search in violation of the Fourth Amendment is excluded from admission as evidence, as the remedy for Fourth Amendment violations in both federal and state courts).
56 Terry, 392 U.S. at 10.
57 Id. at 10–11.
and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement."58 The Court adamantly rejected this argument, and clarified that, regardless of the term the police chose to use, a "stop and frisk" is a search and seizure within the meaning of the Fourth Amendment.59 Chief Justice Warren clarified that attaching the word "stop" to this police practice does not change the resulting constitutional analysis because "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."60 Furthermore, when a police officer "pats-down" or "frisks" an individual in order to find concealed weapons, this is a search.61 Additionally, Chief Justice Warren emphatically disagreed with the State's characterization of a "stop and frisk" as a "petty indignity," stating that "[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."62 Having established that a "stop and frisk" is a police activity that falls within the boundaries of the Fourth Amendment, the Court proceeded to decide whether or not the search and seizure in this case was reasonable.

In order to determine whether Detective McFadden's actions were reasonable under the circumstances, the Court found it necessary to determine (i) "whether [his] action was justified at its inception,"63 and if so, (ii) whether the resulting search was "reasonably related in scope to the circumstances which justified" the stop.64 Having affirmed the traditional preference for warrants,65 the Court recognized that this situation was different because it involved the need for the police officer to make an on-

58 Id. (citing People v. Rivera, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964)).
59 See id. at 16 ("There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion." (emphasis omitted) (footnote omitted)).
60 Id.
61 Id. ("[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' ").
62 Id. at 17.
63 Id. at 20.
64 Id.
65 Id. ("[P]olice must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . .").
the-spot decision under circumstances in which obtaining a warrant was not possible.\textsuperscript{66} To decide whether the stop was justified, the Court balanced the interests of the government against the rights of the individual.\textsuperscript{67} The Court ultimately determined that the general public interest of “effective crime prevention and detection” justified the initial seizure of Terry.\textsuperscript{68} The subsequent frisk (or search) for weapons was justified by the interest in allowing a police officer to provide for his personal safety while performing his law enforcement duties.\textsuperscript{69} Furthermore, the Court determined that the “frisk” for weapons was appropriately limited in scope because Detective McFadden suspected the men of an impending armed robbery, and the “pat-down” was not a search for general evidence of wrongdoing, but only for concealed weapons that might have been used against him.\textsuperscript{70}

The ruling in \textit{Terry} established that a police officer may briefly seize an individual—without probable cause to arrest—in order to investigate his or her involvement in criminal activity, provided the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion,”\textsuperscript{71} and only in those situations in which obtaining a warrant is impracticable. Additionally, the officer may conduct a cursory search of the person for weapons based upon a reasonable belief that the individual may be armed.\textsuperscript{72} This was a significant departure from traditional Fourth Amendment principles. Under the ruling in \textit{Terry}, police may seize an individual without knowledge sufficient to form probable cause to arrest based upon the types of “reasonable

\textsuperscript{66} \textit{Id.}; see supra note 39.  
\textsuperscript{67} See supra note 19; see also \textit{id.} at 20.  
\textsuperscript{68} \textit{Id.} at 22.  
\textsuperscript{69} \textit{Id.} at 23.  
\textsuperscript{70} \textit{Id.} at 29–30. As the Court noted:  
\begin{quote}
The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns.
\end{quote}  
\textit{Id.}  
\textsuperscript{71} \textit{Id.} at 21.  
\textsuperscript{72} See \textit{id.} at 30.
inferences" traditionally left to judges and magistrates in order to serve the important public purpose of preventing crime from occurring.

C. United States v. Hensley: Extending Terry to the Investigation of Completed Crimes

In United States v. Hensley, the Supreme Court extended application of Terry to allow police officers to investigate completed felonies—a situation not contemplated in the Terry decision. Hensley involved an armed robbery of a tavern in a suburb of Cincinnati, Ohio. Following the robbery, police obtained information implicating Thomas Hensley as the driver of the getaway car, and subsequently circulated a "wanted flyer" to surrounding police precincts. Six days after the initial circulation of the flyer, a police officer in a nearby jurisdiction observed Hensley driving a white Cadillac. After calling in a report to his headquarters, the officer learned "that there might have been an Ohio robbery warrant outstanding on Hensley." Another police officer overheard the call, and drove to a residence Hensley was known to frequent. While the officer waited for his headquarters to determine whether an arrest warrant had actually been issued, he spotted the Cadillac—with Hensley at the wheel—approaching his location and the officer made the decision to stop the car. Approaching the vehicle with his weapon drawn, the police officer ordered Hensley and his passenger out of the car. Shortly thereafter, a second police officer arrived on the scene, and promptly noticed a handgun protruding from underneath the passenger's seat of the vehicle. Following this discovery, the officers searched the interior of the vehicle and discovered two more guns. The officers arrested

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73 See id. at 21.
74 See id. at 22.
75 469 U.S. 221 (1985).
76 Id. at 229.
77 Id. at 223.
78 Id.
79 Id. at 223–24.
80 Id. at 224.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id. at 225.
both Hensley and his passenger.\textsuperscript{86} The state handgun charges against Hensley were dismissed, but he was subsequently charged with being a felon in possession of a firearm in violation of federal law.\textsuperscript{87} Hensley argued that the handguns were obtained by police in violation of his Fourth Amendment rights, as well as the principles stated in \textit{Terry}, and thus should be excluded from evidence.\textsuperscript{88} The Supreme Court disagreed, however, and held that the firearms were properly introduced as evidence.\textsuperscript{89}

Although \textit{Terry} involved crimes that were either ongoing or imminent, the Court determined that \textit{Terry} stops were not strictly limited in that regard\textsuperscript{90} and could be applied to investigation of completed crimes under certain circumstances.\textsuperscript{91} To reach this conclusion, the Court relied upon the two main governmental interests discussed in \textit{Terry}. First, the Court addressed the government's interest in the detection and prevention of crime.\textsuperscript{92} While it conceded that "[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,"\textsuperscript{93} the Court recognized that there is a "strong government interest in solving crimes and bringing offenders to justice."\textsuperscript{94} Although there was no "frisk" of a person in this case as there was in \textit{Terry}, the Court next addressed the government's interest in allowing a police officer to provide for his or her own safety, and that of the public at large.\textsuperscript{95} While it admitted that the threat to the safety of the officer and the public is far less with a completed crime as

\textsuperscript{86} \textit{Id.} at 224–25.
\textsuperscript{87} \textit{Id.} at 225.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.} at 236.
\textsuperscript{90} \textit{Id.} at 227 ("We do not agree with the Court of Appeals that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest.").
\textsuperscript{91} \textit{Id.} ("To the extent previous opinions have addressed the issue at all, they have suggested that some investigative stops based on a reasonable suspicion of past criminal activity could withstand Fourth Amendment scrutiny.").
\textsuperscript{92} \textit{Id.} at 228.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 229.
\textsuperscript{95} \textit{Id.} at 228.
opposed to an ongoing crime, the Court ultimately decided that a \textit{Terry} stop was reasonable under the circumstances because “in the context of felonies or crimes \textit{involving a threat to public safety}, it is in the public interest that the crime be solved and the suspect [be] detained as promptly as possible.”

Although the Court analyzed this case within the framework established in \textit{Terry}, it specifically confined its ruling to completed felonies and left unresolved the question of whether, or under what circumstances, the police may reasonably conduct a \textit{Terry} stop to investigate an individual’s involvement in a completed misdemeanor. As a result, the circuit courts that have addressed this situation have come to two different conclusions in deciding how to resolve this issue.

II. \textit{TERRY STOPS TO INVESTIGATE COMPLETED MISDEMEANORS FOLLOWING HENSLY}

The Supreme Court has yet to settle the question of whether \textit{Terry} stops may be used to investigate completed misdemeanors left open by the \textit{Hensley} decision over two decades ago. In the years following \textit{Hensley}, only four circuit courts have addressed whether a \textit{Terry} stop for the purpose of investigating a completed misdemeanor is reasonable within the meaning of the Fourth Amendment. Unfortunately, these courts apply drastically different tests to resolve this issue. The Sixth Circuit advocates the use of a bright-line rule that prohibits the use of \textit{Terry} stops to investigate completed misdemeanors under

\footnote{Id. ("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.").}

\footnote{Id. at 229 (emphasis added).}

\footnote{Id. In so holding, the Court stated:}

\begin{quote}
We need not and do not decide today whether \textit{Terry} stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if 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 \textit{Terry} stop may be made to investigate that suspicion.
\end{quote}

\textit{Id.}
any circumstance, while the Eighth, Ninth, and Tenth Circuits weigh the “totality of the circumstances” to determine the reasonableness of such a Terry stop.

A. The Bright-Line Approach

The Sixth Circuit offered the first answer to the question of whether police may make an investigative Terry stop based upon reasonable suspicion of a completed misdemeanor in *Gaddis ex rel. Gaddis v. Redford Township*. In *Gaddis*, the court decided a civil rights action brought against the police by Mr. Gaddis, who alleged that the officers “violated his Fourth Amendment rights by stopping his car without justification,” and “us[ed] excessive force” by shooting him several times in the course of a confrontation that ensued during the stop. In addressing the alleged Fourth Amendment violation, the court attempted to provide clear guidance for the police as to when they may conduct Terry stops, stating that “[p]olice may make an investigative stop of a vehicle when they have reasonable suspicion of an ongoing crime, whether it be a felony or misdemeanor.” Citing the relevant facts in this case, the court held that the police had reasonable suspicion to believe Mr. Gaddis was driving his vehicle while intoxicated—an ongoing crime—and thus, the investigative Terry stop was reasonable under the circumstances. However, the court did not stop there, and continued to expound upon its interpretation of Terry and its appropriate limitations, explaining, “[p]olice may also make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.” Although the question of whether a Terry stop may be made to investigate a

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99 See *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004).
100 See *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008); *United States v. Moran*, 503 F.3d 1135, 1140, 1143 (10th Cir. 2007); *United States v. Grigg*, 498 F.3d 1070, 1074, 1077 (9th Cir. 2007).
101 364 F.3d 763.
102 Id. at 765.
103 Id. at 766.
104 Id. at 766–67.
105 Id. at 771 n.6 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)) (emphasis added).
106 Id. at 770–71.
107 Id. at 771 n.6 (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)) (emphasis added).
completed misdemeanor was not specifically an issue in *Gaddis*, the Sixth Circuit unequivocally established a bright-line rule: *Terry* stops may never be conducted upon suspicion of a completed misdemeanor.¹⁰⁸

**B. The “Totality of the Circumstances” Approach**

Three years after *Gaddis*, the Ninth Circuit decided *United States v. Grigg*¹⁰⁹ and directly addressed the issue of whether police may conduct a *Terry* stop founded upon suspicion of a completed misdemeanor. In *Grigg*, the police received a complaint from a citizen who reported that Mr. Grigg drove past his home while playing his car stereo at an excessive volume, a misdemeanor offense in that jurisdiction.¹¹⁰ During the process of questioning the citizen and filling out the requisite complaint, Mr. Grigg again drove past the citizen’s home.¹¹¹ Although neither the police nor the citizen heard any music coming from the car as he passed by, the citizen identified Mr. Grigg and confirmed that he previously drove past his home playing music at an excessive volume while driving that particular car.¹¹² One of the police officers pursued and pulled Mr. Grigg over, even though he was driving lawfully at the time.¹¹³ Upon approaching the vehicle, the police officer observed an assault rifle as well as ammunition for a handgun on the passenger’s seat.¹¹⁴ A subsequent frisk of Mr. Grigg revealed brass knuckles concealed on his person.¹¹⁵ The court ruled that the *Terry* stop was unreasonable in this case, but it did not come to this conclusion solely because the

¹⁰⁸ A limited number of lower courts have applied this same bright-line rule. See, e.g., *State v. Dobsinski*, No. A06-588, 2007 WL 738688, at *3 (Minn. Ct. App. Mar. 13, 2007); *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 884 (Minn. Ct. App. 1985). *But see Blaisdell v. Comm’r of Pub. Safety*, 381 N.W.2d 849, 849 (Minn. 1986) (indicating that it was unnecessary for the Court of Appeals to address the issue of whether a *Terry* stop could be made for a completed misdemeanor). It is interesting to note that, even though the Supreme Court of Minnesota has not ruled upon the issue, the state of Minnesota falls under the jurisdiction of the Eighth Circuit, which currently employs the “totality of the circumstances” test. See infra notes 138–153 and accompanying text.

¹⁰⁹ 498 F.3d 1070 (9th Cir. 2007).

¹¹⁰ *Id.* at 1072.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1073.

¹¹⁴ *Id.*

¹¹⁵ *Id.*
police suspected Mr. Grigg of a past misdemeanor.\textsuperscript{116} In fact, the Ninth Circuit flatly rejected the bright-line rule espoused by the Sixth Circuit.\textsuperscript{117} The court stated that, even though \textit{Hensley} addressed the reasonableness of \textit{Terry} stops for completed felonies, the Supreme Court did not specifically limit the application of its holding to felony offenses.\textsuperscript{118} Thus, the Ninth Circuit was free to decide \textit{Grigg} within the guidelines set by the Court in \textit{Hensley}.\textsuperscript{119} Ultimately, the court announced a rule considerably different from that adopted by the Sixth Circuit. The Ninth Circuit ruled that, in determining the reasonableness of a \textit{Terry} stop for a past misdemeanor, "a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger... and any risk of escalation... An assessment of the 'public safety' factor should be considered within the totality of the circumstances..."\textsuperscript{120}

One month after the Ninth Circuit ruled on \textit{Grigg}, the Tenth Circuit addressed the issue in \textit{United States v. Moran}.\textsuperscript{121} Here, police officers responded to complaints that Mr. Moran was trespassing on private property—a misdemeanor offense.\textsuperscript{122} The officers interviewed the complainant, Mrs. Ferguson, and learned that both she and her neighbors had several previous confrontations with Mr. Moran regarding his trespassing.\textsuperscript{123} Mrs. Ferguson and her neighbor also informed the police that Mr. Moran trespassed on their lands in order to hunt in the national forest behind their properties and that he threatened to "kill all the deer" behind their land if they refused him access.\textsuperscript{124} While

\textsuperscript{116} See id. at 1081.

\textsuperscript{117} See id. ("[W]e decline to adopt a \textit{per se} standard that police may not conduct a \textit{Terry} stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense.").

\textsuperscript{118} See id. at 1077.

\textsuperscript{119} See id. The court stated that
[although the Supreme Court did not expressly limit its holding, the reasoning of \textit{Hensley} suggests that we may properly consider the gravity of the offense in balancing the interest of crime prevention and investigation against the interest in privacy and personal security when a court assesses the reasonableness of a \textit{Terry} stop.]

\textit{Id.}

\textsuperscript{120} Id. at 1081.

\textsuperscript{121} 503 F.3d 1135, 1141 (10th Cir. 2007).

\textsuperscript{122} See id. at 1138, 1140.

\textsuperscript{123} See id. at 1139.

\textsuperscript{124} See id.
the police questioned the complainants, they observed a black SUV depart from a residence located across the street. The police followed, knowing that Mr. Moran drove a similar black SUV and pulled the vehicle over about one-quarter of a mile down the road. After approaching the vehicle, the officers discovered Mr. Moran at the wheel of the SUV; they also discovered a rifle, a bow, and arrows on the back seat. Mr. Moran was convicted of being a felon in possession of a firearm in violation of federal law. Mr. Moran claimed that his Fourth Amendment rights were violated because, under Hensley, police could only stop his vehicle to investigate a past felony, and he was stopped by officers investigating an alleged completed misdemeanor. Like the Ninth Circuit, the Tenth Circuit disagreed with this interpretation of Hensley, and instead reviewed the “totality of the circumstances” to judge the reasonableness of the Terry stop. Specifically, the court looked to the analytical framework employed in Hensley, and balanced “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” The Tenth Circuit focused on the “governmental interest in ‘solving crimes and bringing offenders to justice,’ ” and noted that this governmental interest “is particularly strong when the criminal activity involves a threat to public safety.” Here, the court decided that the governmental interest in bringing Mr. Moran to justice was significant because he posed a threat to public safety due to the confrontational nature of the misdemeanor trespass offense and the fact that he had previous confrontations with Mrs. Ferguson and her neighbor. The court also found that it was reasonable for police to believe that Mr. Moran was armed because his

125 See id. at 1138–39.

126 Id.

127 Id. at 1139.

128 Id. at 1137–38.

129 Id. at 1141.

130 See id. at 1140.

131 Id. at 1141 (quoting United States v. Hensley, 469 U.S. 221, 228 (1985)).

132 Id. at 1142 (quoting Hensley, 469 U.S. at 229).

133 Id.

134 See id. (discussing that criminal trespass inherently involves a risk of danger because of the possibility of confrontation, and, in this case, Mr. Moran had previous altercations with the particular property owners, which only increased the risk of escalation and physical danger).
trespass allegedly arose out of a desire to hunt in the forest adjoining Mrs. Ferguson's property. Finally, the Tenth Circuit held that, because the trespass occurred "just minutes before the officers stopped [Mr. Moran], the governmental interest in solving the crime was strong." Ultimately, the Tenth Circuit found the actions of the police to be reasonable and upheld Mr. Moran's conviction.

Most recently, the Eighth Circuit addressed the issue of whether a Terry stop conducted to investigate a completed misdemeanor may be reasonable in United States v. Hughes. In Hughes, a police officer responded to a call of two suspicious black males trespassing on the property of an apartment building at approximately 9:30 in the morning in a notoriously high-crime area of Kansas City. When the police officer arrived, he noticed two men matching the description given lawfully standing at a nearby bus stop. Although Mr. Hughes and his companion were not committing any crimes when the police arrived, they were suspected of having previously trespassed on private property, a misdemeanor offense under Missouri law. The officer questioned Mr. Hughes as to what he was doing in the area, and then "frisked" him. The police officer found "live rounds of ammunition" in Mr. Hughes' pocket. Mr. Hughes was subsequently convicted of being a felon in possession of ammunition in violation of federal law. In deciding Hughes, the Eighth Circuit refused to apply a bright-line rule prohibiting police officers from conducting Terry stops for completed misdemeanor offenses. Instead, the Eighth Circuit employed the same "totality of the circumstances" test adopted by both the Ninth and Tenth Circuits. In employing this test, the court ultimately determined that the actions of the police officer were

\[\text{References}\]

135 See id.
136 Id.
137 Id. at 1143, 1147.
138 517 F.3d 1013 (8th Cir. 2008).
139 Id. at 1015.
140 Id.
141 See id. at 1016.
142 See id. at 1017.
143 Id.
144 Id.
145 See id.
146 See id.
unreasonable under the circumstances. Like Moran, this case involved a Terry stop conducted to investigate an individual's involvement in a misdemeanor trespass; however, the court ultimately held that the actions of the police officer were unreasonable because there was no threat to public safety. In Moran, the Tenth Circuit found that the threat to public safety justified the police officer's actions. Because Mr. Moran had previous altercations with Mrs. Ferguson and he trespassed for the purpose of hunting, he was most likely armed, and thus, the possibility of violent escalation of the conflict existed. In Hughes, however, the Eighth Circuit found that this threat to public safety did not exist, and therefore, the governmental interest in solving a completed trespass did not outweigh Mr. Hughes' right to be free from unreasonable governmental intrusion. Specifically, the court stated that Mr. Hughes was "not acting suspiciously, and there was no report of any property crime, personal crime, or any weapons." Because of the lack of any indication of danger to either the police officer or the public in general, the Eighth Circuit held that the stop—or seizure—of Mr. Hughes was unjustified at its inception, and thus, the ensuing search of his person was unreasonable.

In addressing whether, or under what circumstances, a Terry stop may be made to investigate a completed misdemeanor crime, the Eighth, Ninth, and Tenth Circuits rejected a bright-line rule prohibiting such stops, in favor of a "totality of the circumstances" test in which each case is decided upon its particular facts. Although not specifically stated by any of these courts, it is apparent that a threat to the public safety is a major—and perhaps even dispositive—factor in determining whether such a Terry stop is reasonable.

147 See id. at 1018 ("On the facts here, the governmental interest in investigating a previous trespass does not outweigh Hughes's personal interest.").
148 See id. at 1019.
149 See United States v. Moran, 503 F.3d 1135, 1142 (10th Cir. 2007).
150 See id.
151 See Hughes, 517 F.3d at 1018.
152 Id.
153 See id. at 1019 (noting that, if the Terry stop itself is unreasonable, a subsequent "frisk" or search of an individual is also unreasonable).
C. Inadequacies of the Current Decisions

The common element between the Terry and Hensley decisions was a threat of imminent physical harm to either the police officer or the general public that justified the need of the officer to intervene—even without probable cause—in order to nullify that threat.\(^{154}\) This exception applies only in those circumstances in which police must take immediate action to prevent the harm, and thus cannot wait to establish probable cause or obtain a warrant before acting.\(^{155}\) In deciding whether a Terry stop is reasonable with respect to a completed misdemeanor, none of the four circuit courts to address this narrow issue have clearly articulated a rule that is consistent with the reasoning employed in Terry and Hensley.

The main flaw in the Sixth Circuit's bright-line rule is that the court failed to consider the analytical framework under which both Terry and Hensley were decided.\(^{156}\) The court relied solely upon one sentence in the Hensley opinion that stated a Terry stop conducted to investigate an individual's involvement in a completed crime was reasonable as long as "police have a reasonable suspicion... that a person they encounter was involved in or is wanted in connection with a completed felony."\(^{157}\) The Sixth Circuit assumed that, because the Supreme Court did not address the application of Terry stops to completed misdemeanors, they must be unreasonable in such situations. Unfortunately, by resting its decision upon the strict language of one small part of the Hensley opinion, the Sixth Circuit ignored the logical path by which the Supreme Court arrived at its decision. In an apparent attempt to provide police with clear guidelines, the court simply stated that police may never conduct a Terry stop for a completed misdemeanor under any

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\(^{154}\) See Terry v. Ohio, 392 U.S. 1, 24 (1968) (stating that a police officer may reasonably make an investigatory stop in the absence of probable cause when he "is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others"); see also United States v. Hensley, 469 U.S. 221, 229 (1985) ("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" (emphasis added)).

\(^{155}\) Terry, 392 U.S. at 20 (discussing the types of police actions that must be made pursuant to "on-the-spot observations" and which thus cannot be subjected to the warrant procedure).

\(^{156}\) See supra text accompanying notes 68–69, 94–97.

\(^{157}\) Hensley, 469 U.S. at 229.
circumstance. However, this is not consistent with the ruling in Hensley for two main reasons. First, the Sixth Circuit never addressed the underlying issue in both Terry and Hensley—the threat of danger to either the police officer or the general public under circumstances that necessitate immediate action. In those cases, the Supreme Court acknowledged that it was reasonable for police to act without probable cause to arrest in order to mitigate the threat. The rule adopted by the Sixth Circuit makes no such provisions. Under the Sixth Circuit's ruling, if the completed crime is a misdemeanor, a Terry stop will always be unreasonable, even if there is a threat of imminent physical harm to the police officer or members of the public.

The second reason the Sixth Circuit’s decision is inconsistent with Hensley is because the Supreme Court specifically declined to address the reasonableness of a Terry stop for investigation of crimes of varying levels of seriousness, and only discussed completed felonies. The Supreme Court’s decision in Hensley did not prohibit the use of Terry stops for the investigation of completed misdemeanor offenses; it simply did not discuss the issue. Thus, the Sixth Circuit’s statement that Terry stops may not be used in such circumstances because the Hensley decision confined its reasoning to completed felonies is inaccurate.

In contrast, the “totality of the circumstances” test adopted by the Eighth, Ninth, and Tenth Circuits did not rely strictly upon the wording of the Hensley opinion, but instead looked to the underlying policies and principles by which the Supreme Court arrived at its decision. The Ninth Circuit was the first of these courts to address the application of a Terry stop to a completed misdemeanor, and it reviewed various state court opinions as guidance. The court found that, while some state courts drew bright lines prohibiting Terry stops for completed misdemeanors, other courts decided the reasonableness of such stops under the “totality of the circumstances.” The Ninth

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158 Id. ("We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted.").
159 See, e.g., United States v. Grigg, 498 F.3d 1070, 1079–80 (9th Cir. 2007).
160 Id. at 1077–79.
161 Some state courts draw bright lines, and prohibit Terry stops for completed misdemeanors. See, e.g., State v. Bennett, 520 So. 2d 635, 636 (Fla. Dist. Ct. App. 1988) (holding Terry stops for investigation of completed misdemeanors to be unreasonable); Blaisdell v. Comm'r of Pub. Safety, 375 N.W.2d 880, 883–84 (Minn. Ct. App. 1986) (holding Terry stop for completed misdemeanors violates the
Circuit ultimately found the "totality of the circumstances" approach to be the superior method, and instructed reviewing courts to "consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger . . . and any risk of escalation," along with "[a]n assessment of the 'public safety' factor . . . within the totality of the circumstances."\footnote{162} Unfortunately, the court did not clearly describe those circumstances under which an "assessment of the public safety factor" would shift the balance in favor of the government so as to make a Terry stop reasonable. The decision of the Tenth Circuit, however, discussed such circumstances and thus provided some additional clarification.\footnote{163} Although the Tenth Circuit did not establish a new rule, the court explained why the facts of the case satisfied the "public safety factor" consideration required under the Ninth Circuit's rule.\footnote{164} First, the court explained that trespassing inherently carries with it the possibility of conflict with the property owner, and thus, the nature of the offense alone creates some threat to public safety.\footnote{165} Next, the court reasoned that because Mr. Moran had previous conflicts with the property owner regarding his trespassing, there was a risk of ongoing or repeated danger.\footnote{166} Furthermore, Mr. Moran allegedly trespassed in order to hunt, and therefore was most likely armed.\footnote{167} Thus, there was a possibility of his ongoing confrontations with the landowner escalating from verbal altercations into physical violence.\footnote{168} The decision of the

\begin{footnotes}
\item 162 Grigg, 498 F.3d at 1081.
\item 163 See United States v. Moran, 503 F.3d 1135, 1142 (10th Cir. 2007).
\item 164 See id.
\item 165 See id.
\item 166 See id.
\item 167 See id.
\item 168 See id.
\end{footnotes}
Eighth Circuit contributed to the discussion of relevant “public safety” considerations, and identified situations that would not satisfy this requirement under the “totality of the circumstances” test.\(^{169}\)

Although the rulings of the Eighth and Tenth Circuits arguably clarify the types of circumstances that satisfy the “public safety” consideration, there is still one major flaw in the “totality of the circumstances” rule. The flaw in this test is that it does not require any showing of *imminent* danger which makes it impracticable to develop probable cause and obtain a warrant. Without requiring a showing of need for immediate action, the “totality of the circumstances” test, as it currently exists, has the potential to severely degrade protection of the individual’s Fourth Amendment rights because the police must only demonstrate some threat to public safety, regardless of how remote that threat is. In both *Terry* and *Hensley*, the Court specifically addressed situations in which police officers were required to make on-the-spot decisions under circumstances that made it impossible for the officer to first develop probable cause and get a warrant. The Eighth, Ninth, and Tenth Circuits, however, only stated that danger to public safety was a factor, without discussing the imminence of that danger. While one may argue that impracticability of obtaining a warrant is assumed to be an inherent part of the rule due to the nature of Terry stops in general, an analysis of the Tenth Circuit’s ruling illustrates that there is, in fact, no such requirement under the current “totality of the circumstances” test. In *Moran*, the police did not witness Mr. Moran’s trespass, and pulled him over as he drove away from the area.\(^{170}\) If the nature of trespassing on one’s land inherently includes some risk of conflict with the landowner, that risk is no longer immediate when the trespasser terminates his actions and leaves the area. According to the record, any history of conflict was limited to Mr. Moran, the landowner, and her immediate neighbors. There is no information to suggest that Mr. Moran had any history of conflict with anyone else in the surrounding

\(^{169}\) A criminal trespass, without more, does not present a public safety risk great enough to outweigh the individual’s interest in personal liberty. See United States v. Hughes, 517 F.3d 1013, 1018 (8th Cir. 2008). Also, an individual’s mere presence in a “high-crime” area does not automatically give rise to reasonable suspicion necessary to justify a Terry stop. See id. at 1016–17 (citing United States v. Bailey, 417 F.3d 873, 877 (8th Cir. 2005)).

\(^{170}\) See Moran, 503 F.3d at 1138.
community. When Mr. Moran drove away in his SUV, there was no longer any immediate threat of conflict or violence between him and the landowner, nor were there any specific facts to support a reasonable belief that Mr. Moran posed any immediate danger to the rest of the general public. To summarize, when the police seized Mr. Moran as he departed the area, they seized him based upon a reasonable suspicion that he previously committed a misdemeanor trespass, but without any threat of immediate danger to either themselves or anyone else. Despite this lack of immediate danger, the Tenth Circuit held that the actions of the officers were reasonable.171 This decision demonstrates that the “totality of the circumstances” test employed by the Eighth, Ninth, and Tenth Circuits is inconsistent with the decisions of Terry and Hensley. Those cases allowed police to act in the absence of probable cause to arrest only in those circumstances in which such need for immediate action outweighed the individual’s right to be free from arbitrary government intrusion.172 By omitting a requirement of immediate danger, the Eight, Ninth, and Tenth Circuits have shifted the balance strongly in favor of the government, at the expense of the protection of the Fourth Amendment rights of the People.

III. ESTABLISHMENT OF A BETTER RULE

The main purpose of the Fourth Amendment is to prevent unreasonable intrusions into the lives of the people.173 In order to prevent such intrusions and to ensure adequate protection of the rights of the People, the circumstances under which a Terry stop may be conducted to investigate a completed misdemeanor offense must be clearly communicated to the police. While bright-line rules provide clear guidance to police, such rules are generally inappropriate to decide issues arising under the Fourth Amendment because such rules cannot possibly account for the various factual circumstances involved in every encounter

171 See id. at 1143.
172 See United States v. Hensley, 469 U.S. 221, 226 (1985) (“[C]onsistent with the Fourth Amendment, police may stop persons in the absence of probable cause under limited circumstances.”); see also Terry v. Ohio, 392 U.S. 1, 20 (1968) (stating that police must obtain a warrant whenever practicable).
173 See Dunaway v. New York, 442 U.S. 200, 214–15 (1979) (“Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . . .” (quoting Davis v. Mississippi, 394 U.S. 721, 726–27 (1969))).
between the police and a suspect.\footnote{174 See United States v. Drayton, 536 U.S. 194, 201 (2002).} The Fourth Amendment does not forbid all governmental intrusions into the lives of the people, but only those that are unreasonable.\footnote{175 See Ohio v. Robinette, 519 U.S. 33, 39 (1996) (discussing reasonableness as the foundation of the Fourth Amendment).} Thus, the question of whether a Terry stop may be conducted for a completed crime should not turn on the classification of that crime as a felony or a misdemeanor, but instead on whether the stop was reasonable. Whether a Terry stop is reasonable in a given situation must necessarily take into account the relevant circumstances.\footnote{176 Id. ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.").} However, it is important to clearly define those relevant circumstances in order to provide the police with clear guidance and to protect the Fourth Amendment rights of the People. Following the reasoning in both Terry and Hensley, the relevant circumstances under which a Terry stop may be made to investigate a completed misdemeanor should be strictly limited to those situations in which police reasonably believe that an imminent threat to either themselves or the general public exists.

A. Bright-Line Rules v. "Totality of the Circumstances"

A "totality of the circumstances" test is the superior approach to determine whether a Terry stop may be conducted to investigate a suspected misdemeanor offense. The decision in Terry itself was a balancing test, in which the Court weighed the governmental interest in law enforcement and personal protection of the officer against the rights of the individual.\footnote{177 See Terry, 392 U.S. at 20–21.} In Hensley, the Supreme Court employed a similar balancing test.\footnote{178 See United States v. Hensley, 469 U.S. 221, 228 (1985). The court noted that [t]he proper way to identify the limits is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test . . . balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Id.} For questions regarding the Fourth Amendment, the Supreme Court traditionally denounces bright-line rules\footnote{179 See Robbins v. California, 453 U.S. 420, 443 (1981) (stating that the "entire [legal] profession is trained to attack 'bright lines' the way hounds attack foxes").} and instead
considers all relevant factors, as the reasonableness of a police officer's actions necessarily depends upon the circumstances under which they were taken. Thus, the use of a "totality of the circumstances" or balancing test is consistent with the Terry and Hensley decisions, as well as traditional Fourth Amendment jurisprudence in general. There is some merit to the argument that "totality of the circumstances" tests do not provide police officers with clear guidance, thus increasing the likelihood of Fourth Amendment violations. Reaching this conclusion does not require deep analytical reasoning. Any rule that tells a police officer that he or she may not do something is obviously clearer than a rule that instructs the police officer to weigh certain factors before making a decision. However, lack of clarity in understanding and employing a "totality of the circumstances" test is only a problem when that test is overly-broad. For example, in Dorman v. United States, the court established a seven-part test for police to use in order to determine whether or not a warrant was required in a given situation. As one commentator noted, "I doubt whether there is a police officer in the country who would bet his lunch money on his ability to apply those seven factors correctly in a particular case." A "totality of the circumstances test" does not need to be drawn so broadly. Terry is a prime example of a narrowly limited "totality of the circumstances" rule. In that case, the Supreme Court created a rule that is by no means "bright-line," yet limited its application to a narrow set of circumstances by requiring a police officer to demonstrate reasonable suspicion of an individual's involvement in crime, supported by specific facts. Thus, a "totality of the circumstances" rule can be constructed narrowly enough to give the police clear guidance.

180 See, e.g., United States v. Drayton, 536 U.S. 194, 207 (2002) (stating that proper resolution of any Fourth Amendment question must consider all of the circumstances); Alabama v. White, 496 U.S. 325, 330 (1990) (holding that the totality of the circumstances must be considered in order to evaluate the existence of reasonable suspicion); United States v. Sharpe, 470 U.S. 675, 685 (1985) (refusing to impose a rigid time limitation on Terry stops, and instead evaluating reasonableness of the police officer's actions under the totality of the circumstances); United States v. Mendenhall, 446 U.S. 544, 557 (1980) (applying a totality of the circumstances test to determine whether consent to search was voluntary).


182 See LaFave, supra note 7, at 321–22 (citing Dorman, 435 F.2d at 392–93).

183 Id. at 322.

184 See Terry v. Ohio, 392 U.S. 1, 21 (1968).
In contrast, a bright-line rule is inadequate to answer the question of whether a Terry stop conducted to investigate a completed misdemeanor is reasonable because it does not provide police with any flexibility to act in order to prevent imminent physical harm to either themselves or members of the general public. In Hensley, the Court recognized that a danger to the public may exist even after a crime is completed, and thus, police officers should be allowed to act in those cases.\footnote{See United States v. Hensley, 469 U.S. 221, 229 (1985) (stating that there is a strong governmental interest when the crime involved includes a threat to public safety).} A danger to the public may exist even if the completed crime is a misdemeanor,\footnote{See, e.g., City of Devils Lake v. Lawrence, 639 N.W.2d 466, 473 (N.D. 2002) (finding actions of police officers reasonable because the completed minor crime was a bar-fight, and upon arrival at the scene, the police officers were notified that one of the participants in the fight continued to linger in the nearby parking lot, and thus, there was a public safety consideration due to the possibility of repeated violence).} but a bright-line rule prohibiting Terry stops for all misdemeanor offenses ignores this possibility and demands that the police do nothing in such a situation. Such a rule contradicts the reasoning employed by the Court in Terry, which stated "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest."\footnote{Terry, 392 U.S. at 24.}

Our society entrusts its police officers with the duty of placing themselves between the criminal and the innocent citizen. In order to uphold this duty, the police officer on the street must have enough flexibility to take appropriate action in order to provide for his or her own safety, and the safety of those he or she has sworn to protect.

**B. The Proposed Rule and its Merits**

Terry stops, performed without a warrant or probable cause, for the purposes of investigating an individual's suspected involvement in a completed misdemeanor should be presumptively unreasonable, unless the police officer can point to specific, articulable facts that lead to the objectively reasonable conclusion that a failure to immediately act would expose either the police officer or the general public to an unnecessary risk of imminent physical danger. The Sixth Circuit's bright-line rule prohibiting Terry stops for all completed misdemeanors is too
restrictive, and the "totality of the circumstances" test used by the Eighth, Ninth, and Tenth Circuits—with its inadequate explanation of relevant circumstances that may be considered—is overly broad. The proposed rule, however, strikes the appropriate balance between these two methods and is the superior method for three main reasons.

First, the rule is consistent with traditional Fourth Amendment jurisprudence. It clearly communicates to police officers that they generally may not seize a person unless they have a warrant supported by probable cause. This warrant preference sets a "default position" from which police may deviate only in extraordinary circumstances. In turn, this "default position" gives police officers clear guidance. When they encounter a situation in which they must decide whether or not to conduct a Terry stop and seize an individual to investigate that person's involvement in a completed misdemeanor, police officers know that they may not take this action unless a relevant exception applies. Under the proposed rule, there is only one relevant exception: a threat of imminent physical danger to either the police officer or the general public which makes it necessary to take immediate action. Consistent with Terry, this assertion of imminent physical danger must be supported by actual facts, not "inarticulate hunches." The narrow "physical harm" exception provides the only relevant consideration necessary to balance law enforcement interests in investigating relatively minor crimes against the individual's right to be free from unreasonable government intrusions, and thus provides better protection to the Fourth Amendment rights of the People.

Second, this rule is consistent with the reasoning employed in both Terry and Hensley. In Terry, the Court essentially decided that a police officer can stop (or "seize") an individual and, based upon a reasonable belief—grounded in specific facts—that the person may be armed, the officer may then "frisk" (or "search") that person for weapons without probable cause for two key reasons: (i) there is a compelling interest in allowing the police to detect and prevent crime, and (ii) the police officer should not be required to take unnecessary risks in the attempt to prevent crime if there is reason to believe the person might be

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188 See id. at 22.
189 See id.
armed and dangerous. In *Hensley*, the Court conceded that the crime prevention interest discussed in *Terry* does not exist when the crime has already been completed, but it argued that the crime solving interest is of equal merit when that completed crime is a felony offense. Additionally, the Court pointed out that the crime in question was an armed robbery, and thus, the criminals posed an imminent risk of physical danger to the general public as long as they remained at-large. In both of these cases, the Court considered the crime-preventing or crime-solving interest along with the threat of imminent physical danger, and weighed these factors against the individual’s right to be free from governmental intrusion in order to determine reasonableness. The decision that *Terry* stops may be conducted to investigate completed felonies was based upon a balancing of interests. Because felonies are relatively “serious” crimes under our legal system, the Court decided that the balance weighs in favor of the police being allowed to conduct *Terry* stops to investigate and solve these crimes. In contrast, misdemeanor offenses are, by nature, less serious than felonies. Logically, it follows that if the crime is less serious, the government’s interest in solving it and bringing the offender to justice is therefore significantly lower. If this crime-solving interest is placed on the same side of the scale as the “public danger” consideration, then the threat of imminent physical harm should logically be required to carry the weight necessary to shift the balance in favor of the government. Simply stated, if the completed crime is less serious, then the governmental interest in solving that crime is lower, and therefore, the threat of imminent physical harm to

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190 See *id.* at 23.
When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

*Id.* at 24.
192 See *id.* at 223, 229.
193 “Misdemeanor” means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.” *N.Y. Penal Law* § 10.00(4) (McKinney 2009). “Felon” means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.” *Id.* § 10.00(5).
either the police officer or the public should be the dispositive consideration. The proposed rule reflects these considerations, as well as the Terry opinion's stated requirement of police officers obtaining a warrant in most cases. The proposed rule presumes that a Terry stop for a misdemeanor offense is unreasonable because the governmental interest in solving a less serious crime will not generally override the individual's Fourth Amendment protections. However, the rule recognizes that the question of whether an individual suspected of a completed criminal offense poses an imminent threat depends upon the facts and circumstances of the particular situation and not strictly upon the technical classification of the crime. This rule provides police officers with the appropriate amount of flexibility to take action to prevent this imminent threat of harm from actually occurring.

Third, the proposed rule serves to prevent Fourth Amendment violations from occurring in the first place, whereas the current "totality of the circumstances" test only assists courts in determining whether a violation has already occurred. When police officers have a general rule to follow with respect to searches and seizures, they do not have to try and guess how a court will view the situation at a later time, and they will conform their actions to the requirements of the Fourth Amendment in most cases. The proposed rule provides the police with the required amount of guidance. The rule tells police officers that, most of the time, they may not conduct a Terry stop to investigate a completed misdemeanor. The officer knows that a reviewing court will hold the Terry stop to be in violation of the Fourth Amendment unless he or she can present actual facts to support the conclusion that action was necessary to prevent immediate physical harm. Furthermore, the rule contains safeguards against abuse because a police officer cannot justify his or her actions by merely making some assertion of an ambiguous "public safety factor," but must present specific facts supporting the existence of an immediate danger. As a result, the proposed rule appropriately limits the discretion of police officers, which ultimately helps them to make the right decision in most cases. Because discretion of the police is strictly limited

194 See Terry, 392 U.S. at 20 ("We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . .").
to those cases in which an imminent threat exists, the proposed rule will result in fewer Fourth Amendment violations than the current "totality of the circumstances" test. In contrast, the "totality of the circumstances" test—which fails to adequately define the appropriate circumstances to be considered—does not give clear guidance to police officers before they act. Rather, it merely provides a limited amount of guidance to assist a court conducting a post-action review to whether the police already violated an individual's Fourth Amendment rights. A police officer investigating a completed misdemeanor will not know whether he or she may take action in a particular case. The officer may simply make the decision to act and let a court later determine whether or not such action violated the rights of the suspect. As a result, the "totality of the circumstances" test does not help to prevent Fourth Amendment violations from occurring. Because of the failure of the "totality of the circumstances" test to give police officers clear guidance before they act, it effectively leaves the protection of an individual's Fourth Amendment rights at the discretion of the acting police officer—a result expressly condemned by the Supreme Court.\textsuperscript{195}

While the proposed rule will not completely eliminate Fourth Amendment violations in connection with the investigation of completed misdemeanors, it will drastically limit these cases and ensure that the police get it right most of the time.\textsuperscript{196}

CONCLUSION

The Framers of the Constitution "feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual."\textsuperscript{197} In order to limit the power of the government, they granted the fundamental right to be free from unreasonable governmental intrusion to the People, and embodied this right in the text of the Fourth Amendment. The "Warrant Clause" of the Fourth Amendment, which requires probable cause before police may seize an individual, is an

\textsuperscript{195} See supra note 36.

\textsuperscript{196} See Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142 (1974) ("security [against unreasonable searches and seizures] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement").

\textsuperscript{197} Amsterdam, supra note 8, at 400.
important procedural safeguard against such arbitrary intrusions. Such a crucial protection of individual rights should not lightly be dispensed with, as "[t]he history of liberty has largely been the history of observance of procedural safeguards,"198 while "the history of the destruction of liberty...has largely been the history of the relaxation of those safeguards."199 By making exceptions to the traditional requirement of establishing probable cause before seizing a person, the Court makes "small hole[s] in the fabric of the [F]ourth [A]mendment which customarily begins the process by which entire tapestries unravel."200 In order to prevent the wholesale deterioration of the "fabric" of the Fourth Amendment, Terry stops conducted to investigate completed misdemeanor crimes should be presumptively unreasonable, except in those situations in which immediate action is necessary in order to prevent imminent physical harm to the police officer or a member of the general public.

198 Id. at 354 (quoting McNabb v. United States, 318 U.S. 322, 347 (1943)).
199 Id.
200 Id. at 374.