

NOTE

DEFINING THE CONTOURS OF *UNITED STATES V. HENSLEY*: LIMITING THE USE OF TERRY STOPS FOR COMPLETED MISDEMEANORS

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INTRODUCTION

In *United States v. Hensley*,¹ a case of first impression, a unanimous Supreme Court announced the rule 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 *Terry* stop may be made to investigate that suspicion.”² By expanding the scope of the doctrine set forth in *Terry v. Ohio*,³ *Hensley* strengthened the power of police officers to make warrantless stops of individuals, with less than probable cause, if they believe that those individuals pose a threat to themselves and/or the public. Prior to *Hensley*, the Court’s decisions merely sanctioned *Terry* stops of individuals who the police suspected were *about* to commit a crime or were committing a crime *at the time of the stop*.⁴ Thus, by authorizing *Terry* stops for already-completed felonies, *Hensley* extended the scope of the *Terry* doctrine, further empowering police officers patrolling the streets.

Although explicitly broadening the boundaries of *Terry* to apply to stops for completed felonies,⁵ the Court in *Hensley* declined to address whether the *Terry* balancing approach similarly applies to stops for completed *misdemeanors*.⁶ Without guidance from the Court, lower

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¹ 469 U.S. 221 (1985).

² *Id.* at 229.

³ “*Terry* doctrine” refers to the rule that the U.S. Supreme Court set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), which I discuss in further detail in Part I.

⁴ See *Hensley*, 469 U.S. at 227 (citing, among other cases, *Adams v. Williams*, 407 U.S. 143 (1972), and *Terry*, 392 U.S. at 1).

⁵ *Hensley*, 469 U.S. at 229.

⁶ *Id.* (“We need not and do not decide today whether *Terry* stops to investigate *all past crimes, however serious*, are permitted.”) (emphasis added).

federal and state courts have attempted to answer this question on their own; in doing so, they have diverged on the issue. I begin this Note by providing a background of the case law discussing this open question, as well as analyzing and evaluating the rationale underlying these federal and state courts' approaches. Following a thorough discussion of the significant decisions on the issue, I then argue that courts should not extend the decision in *Hensley* to apply to completed misdemeanors. Instead, courts should use a modified per se rule prohibiting Terry stops for all completed misdemeanors, with an exception for the most dangerous moving vehicle violations qualifying as misdemeanors.

Part I provides background on the Supreme Court's decisions leading up to *Hensley* and then briefly discusses the facts and holding of *Hensley*. Part II examines the federal circuit court cases that have addressed the issue of *Hensley*'s application to stops for completed misdemeanors. It also briefly discusses the state court decisions that have taken a stance on the question. Part III argues that a per se rule prohibiting Terry stops for completed misdemeanors respects the traditional distinction between misdemeanors and felonies, as well as promotes society's interest in personal security and privacy. Part III also explains why a dangerous-driving exception to the per se rule is necessary and justified.

I

BACKGROUND: SUPREME COURT PRECEDENT

The Fourth Amendment protects individuals against "unreasonable searches and seizures" and requires "probable cause" for the issuance of warrants.⁷ Prior to the U.S. Supreme Court's landmark decision in *Terry v. Ohio*, the Court had continuously held that probable cause was necessary and required for a warrantless search or seizure to pass muster under the Fourth Amendment.⁸ In *Terry*, the Court created an exception to this traditional probable cause requirement when it held that a police officer may "stop-and-frisk" an individual if that officer has a reasonable suspicion that criminal activity is at

⁷ U.S. CONST. amend. IV.

⁸ *Terry*, 392 U.S. at 37 (Douglas, J., dissenting) ("[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their 'seizure' without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that 'probable cause' was indeed present.") (emphasis omitted).

hand.⁹ By creating such an exception, the Court inserted a “reasonableness” standard into its Fourth Amendment jurisprudence.¹⁰

The *Terry* case arose when a police officer patrolling the streets noticed suspicious behavior and decided to investigate the situation.¹¹ Upon doing so, the officer patted down the suspicious individuals and uncovered pistols on two of the three men involved.¹² At trial, the judge denied a motion to suppress the uncovered pistols, and defendant Terry was ultimately convicted.¹³ The Ohio intermediate appellate court affirmed Terry’s conviction,¹⁴ and the Ohio Supreme Court dismissed his appeal.¹⁵ The U.S. Supreme Court then granted Terry’s petition for certiorari.

On review, the Court held that “swift action” based upon “on-the-spot observations of the officer on the beat” is not subject to the Warrant Clause of the Fourth Amendment; rather, the Fourth Amendment’s general proscription against unreasonable searches and seizures governs the situation.¹⁶ Thus, a police officer may seize an individual if the officer has a reasonable suspicion, based on “specific and articulable facts,”¹⁷ that criminal activity is at hand. If, after identifying himself as a police officer and making reasonable inquiries in an attempt to dispel his initial suspicions, the officer continues to believe that the individual is armed and dangerous, “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.”¹⁸

⁹ *Id.* at 20 (distinguishing the conduct in question from conduct involving the Warrant Clause, instead testing the conduct against the Fourth Amendment’s general proscription against unreasonable searches and seizures).

¹⁰ *See id.*; *see also* Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) (“The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order ‘to safeguard the privacy and security of individuals against arbitrary invasions’”) (quoting Marshall v. Barlow’s, Inc., 436 U.S. 307, 312 (1978)); Heather Winter, *Resurrecting the “Dead Hand” of the Common Law Rule of 1789: Why Terry v. Ohio Is in Jeopardy*, 42 CRIM. L. BULL. 564, 567 (2006) (“The Supreme Court eschewed probable cause . . . [and] conclude[d] that police officers only have to demonstrate reasonable suspicion to justify a stop and patdown search (‘stop and frisk’).”).

¹¹ *Terry*, 392 U.S. at 5–6.

¹² *Id.* at 6, 7.

¹³ *Id.* at 7, 8.

¹⁴ State v. Terry, 214 N.E.2d 114, 122 (Ohio App. 1966).

¹⁵ *Terry*, 392 U.S. at 8.

¹⁶ *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.”).

¹⁷ *Id.* at 21.

¹⁸ *Id.* at 30.

In determining whether a stop-and-frisk based on less than probable cause is reasonable under the Fourth Amendment, the Court conducted a balancing test by weighing the government's interest in crime prevention, which stop-and-frisks promote, against individuals' personal privacy interests, which such seizures disregard.¹⁹ In addressing the government's interest, the Court discussed the interest in seizing individuals separately from the governmental interest in frisking those individuals upon detention. Regarding the issue of the initial seizure, the Court recognized the governmental interest in crime prevention and detection.²⁰ "The crux of th[e] case," however, was the propriety of the officer's actions in frisking the individual upon detention.²¹ On this issue, the Court identified the strong governmental interest in allowing police officers to protect themselves against potentially armed individuals; the interest in officer protection is arguably the main rationale for the Court's creation of this exception to the traditional probable cause requirement.²² In fact, the Court emphasized officer safety as a principal rationale for its holding when it stated that it was "concerned with more than the governmental interest in investigating crime[s]."²³ Indeed, "there 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."²⁴ To bolster this justification for its departure from the traditional probable cause requirement, the Court inserted a footnote emphasizing the true danger that armed criminals pose to police officers on the street; the footnote provided statistics regarding the number of officers killed, injured, or assaulted in the line of duty in a recent year.²⁵

In emphasizing the governmental interest in crime prevention and officer safety, however, the Court did not ignore the substantial interference with personal privacy and security that such stops implicate. It recognized that even a limited search constitutes a substantial intrusion on personal liberty and that such a search "must surely be an annoying, frightening, and perhaps humiliating experience."²⁶ Nev-

¹⁹ *Id.* at 20–21.

²⁰ *Id.*

²¹ *Id.* at 23.

²² See *id.* (describing the interest in officer safety as "the more immediate interest"); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1287–88 (1998) ("While the *Terry* Court was aware of the multiple purposes served by aggressive patrol practices, the Court chose to emphasize police safety as the crucial interest to be weighed against the individual's interest in freedom from unreasonable searches and seizures.").

²³ *Terry*, 392 U.S. at 23.

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at 24 n.21.

²⁶ *Id.* at 25.

ertheless, although acknowledging the interference with individual rights, the Court held that the balance ultimately struck in favor of the governmental interest.²⁷ Thus, under the *Terry* doctrine, if a police officer reasonably suspects that an individual is in the process of committing a crime or is about to commit a crime, the officer may briefly detain that individual, try to ascertain whether the individual is armed, and, if the officer believes that the individual is armed, conduct a pat down in areas in which the individual could realistically hide weapons. The Court held that, under the facts in *Terry*, the officer's search did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures: the officer based the search on his reasonable suspicion that the defendant was armed and dangerous, and he confined his search to those areas of the person in which the individual could hide weapons.²⁸

Since its decision in *Terry*, the Court has attempted to shine some light on several of the cryptic phrases the opinion used—most notably, the term “reasonable suspicion.” It has not, however, provided a definitive rule for determining the quantum of evidence necessary for establishing reasonable suspicion.²⁹ Rather, the Court has noted that “the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause”³⁰ and that the idea of reasonable suspicion is not “readily, or even usefully, reduced to a neat set of legal rules.”³¹ Commentators have been highly critical of the Court's failure to adopt a “coherent and practical stop-and-frisk procedure for law enforcement personnel to follow.”³² The lack of guidance has created confusion for both police officers patrolling the streets and for courts reviewing whether an officer had reasonable suspicion to justify a decision to stop-and-frisk an individual.³³

²⁷ *Id.* at 27 (“Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there 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 the individual for a crime.”).

²⁸ *See id.* at 30.

²⁹ *See* Michael Bell, Note, *Caballes, Place, and Economic Rin-tin-tincentives: The Effect of Canine Sniff Jurisprudence on the Demand for and Development of Search Technology*, 72 BROOK. L. REV. 279, 305 (2006).

³⁰ *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citation omitted).

³¹ *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

³² Esther Jeanette Windmueller, *Reasonable Articulate Suspicion—The Demise of Terry v. Ohio and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 543 (1991).

³³ *See, e.g.*, JIM RUIZ & DON HUMMER, HANDBOOK OF POLICE ADMINISTRATION 92 (2008) (“Reasonableness (or the lack thereof) is a moving target that is hard to pin down. It is not a bright line rule, unlike some aspects of the Fourth Amendment jurisprudence. This makes it difficult for police officers and administrators to know the outer limits of what is allowed.”); Bell, *supra* note 29, at 305–06 (“The nebulosity of these principles has resulted in a standard that is so deferential to the judgment of police officers that practically any articulated justification is sufficient to withstand Fourth Amendment scrutiny.”).

In its attempt to provide some guidance, the Court has held that lower courts should conduct a totality-of-the-circumstances test to determine whether a Terry stop is reasonable.³⁴ That is, the court must look to the circumstances under which the officer acted in determining whether to stop a particular individual.³⁵ Relevant considerations may include objective observations by the officer, information obtained from police reports, and the patterns of operation of certain types of criminals.³⁶ If a court concludes that, from this information, it was reasonable for an officer to have a “particularized suspicion”³⁷ that the detained individual was involved in criminal activity, then the officer’s suspicion was reasonable, and the stop was therefore permissible.³⁸

Although the reasonable-suspicion test is an objective one, and asks whether the facts that an officer knew at the time of a stop would “warrant a man of reasonable caution in the belief” that the action taken was appropriate,³⁹ under a totality-of-the-circumstances approach, courts may also take into account the subjective knowledge of the detaining officer when determining whether a stop was permissible.⁴⁰ In fact, in its decision in *United States v. Arvizu*, the Court explicitly held that in determining the reasonableness of a Terry stop, a court may consider subjective characteristics of the detaining officer, and held that police officers may “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.”⁴¹ The subjective component of the reasonable-suspicion test came into play in the Court’s holding in *Terry*, though not explicitly. The Court mentioned the officer’s experience several times throughout its opinion and ultimately determined that his suspicion that the three men were about to engage in criminal activity was reasonable, especially in light of the knowledge and experience that the officer had gained from his thirty years of patrolling the area.⁴²

³⁴ See *United States v. Cortez*, 449 U.S. 411, 417–18 (1981); Bell, *supra* note 29, at 306.

³⁵ *Cortez*, 449 U.S. at 417 (opining that the “whole picture . . . must be taken into account”).

³⁶ *Id.* at 418.

³⁷ *Id.*

³⁸ See *id.*; *Brown v. Texas*, 443 U.S. 47, 51 (1979) (“[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.”) (citations omitted).

³⁹ *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (citations omitted).

⁴⁰ See Bell, *supra* note 29, at 306–07.

⁴¹ 534 U.S. 266, 273 (2002); see also Bell, *supra* note 29, at 306–07.

⁴² See *Terry*, 392 U.S. at 23 (“It would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.”).

In the post-*Terry* years, the Court has also addressed several other questions left open in its decision,⁴³ including when a seizure has actually occurred⁴⁴ and the permissible duration of a Terry stop.⁴⁵ One of the most significant post-*Terry* cases for purposes of this Note is *Adams v. Williams*,⁴⁶ as it represents the Court's trend of stretching and extending the contours of the stop-and-frisk doctrine from its original form.⁴⁷ In *Adams*, the Court addressed the question of whether a police officer must personally observe potentially criminal behavior to make a Terry stop, or whether the officer may instead rely on a tip from a known informant.⁴⁸ Although the Court declined to adopt a per se rule, it did hold that stops based on known informants' tips may sometimes be reasonable; the Court ultimately adopted a case-by-case standard that takes into account the reliability of the particular tip.⁴⁹ In some situations, such as the one in *Adams*, the particular tip may have enough indicia of reliability such that "the subtleties of the hearsay rule should not thwart an appropriate police response."⁵⁰ The Court discussed two particular situations in which a Terry stop based on an informant's tip would be reasonable: first, "when the victim of a street crime seeks immediate police aid and gives a description of his assailant"; and second, "when a credible informant warns of a specific impending crime."⁵¹

Adams is significant because, instead of simply reiterating the *Terry* doctrine, the Court gave greater power to police by allowing them to base their reasonable suspicion on the observations of other

⁴³ See Mark W. Malone, Comment, Florida v. J.L.: *The United States Supreme Court Departs From Its Recent Pattern of Strengthening the Hand of Law Enforcement—A Warning Against Overly Aggressive Law Enforcement*, 27 OKLA. CITY U. L. REV. 475, 479 (2002).

⁴⁴ See Florida v. Bostick, 501 U.S. 429, 434 (1991) (holding that a person is not seized if "a reasonable person would feel free 'to disregard the police and go about his business'") (citation omitted).

⁴⁵ See Florida v. Royer, 460 U.S. 491, 500 (1983) (holding that a Terry stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop").

⁴⁶ 407 U.S. 143 (1972).

⁴⁷ See Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 576–77 (1991) ("[T]he delicate *Terry* compromise was short-lived and began to erode as early as 1972 in the case of *Adams v. Williams*. There, the Court began not only to backtrack on the minimal requirements established for a stop-and-frisk, but also to signal that other factors like time of night, high crime area, and even race could be used to expand the scope of permissible 'stops and frisks' under the *Terry* 'suspicion' standard."); Malone, *supra* note 43, at 479; *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 165, 171 n.59 (1993) ("Since *Terry*, the Court has gradually expanded the circumstances that justify a stop and frisk, see, e.g., *Adams v. Williams* . . .") (internal citation omitted).

⁴⁸ See *Adams*, 407 U.S. at 145, 147.

⁴⁹ *Id.* at 147.

⁵⁰ *Id.*

⁵¹ *Id.*

individuals.⁵² As one observer notes, *Adams* “constitutes the first monster that emerged from Pandora’s box.”⁵³ Indeed, the decision opened the door to a line of cases in which the Court continued to expand the *Terry* doctrine and strengthen the power of police officers,⁵⁴ thereby beginning a trend that ultimately led to the Court’s decision in *United States v. Hensley*.⁵⁵

Hensley, a case of first impression, addressed whether a *Terry* stop based on an officer’s reasonable suspicion that the individual had previously engaged in an *already-completed* crime was permissible under the Fourth Amendment.⁵⁶ Pre-*Hensley* decisions implicating the *Terry* doctrine concerned only situations in which police officers had stopped an individual on suspicion that the individual was about to commit a crime or was committing a crime at the moment of the stop.⁵⁷

The Court’s prior holdings led it to its decision in *Hensley*, in which it disagreed with the Sixth Circuit’s “inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest.”⁵⁸ In *Hensley*, the Court explicitly noted that dicta from several of its past decisions had suggested that stops based on an officer’s reasonable suspicion of past criminal activity were not necessarily per se invalid under the Fourth

⁵² See *id.* at 151 (Douglas, J., dissenting) (“I share with Judge Friendly a concern that the easy extension of *Terry v. Ohio* to ‘possessory offenses’ is a serious intrusion on Fourth Amendment safeguards. ‘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.”’) (internal citations omitted); *id.* at 162 (Marshall, J., dissenting) (arguing against the extension of *Terry* and noting that “[a]s a result of [the *Adams*] decision, the balance struck in *Terry* is now heavily weighted in favor of the government”); Malone, *supra* note 43, at 479.

⁵³ Windmueller, *supra* note 32, at 549.

⁵⁴ See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983) (holding that its decision in *Terry* and its application of *Terry* in various contexts compelled the conclusion that “the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons”); *Pennsylvania v. Mimms*, 434 U.S. 106, 106–07 (1977) (per curiam) (allowing an officer, upon lawfully stopping a vehicle, to order the driver out of the car and, upon observing a bulge in the individual’s pants, pat down the individual to determine whether the bulge was a hidden weapon); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding traffic check-points over a *Terry* challenge); see also *Chimel v. California*, 395 U.S. 752, 763 (1969) (relying on *Terry* in holding that, incident to an arrest, it is reasonable for the arresting officer to search “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence”).

⁵⁵ 469 U.S. 221 (1985).

⁵⁶ See *id.* at 227.

⁵⁷ *Id.*

⁵⁸ *Id.*

Amendment.⁵⁹ The Court ultimately adopted the same reasonableness test that was already in use for stops based on suspicion of imminent or ongoing crimes to govern stops for *completed* crimes.⁶⁰ Under this approach, the Court balanced the “nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.”⁶¹

In conducting this balancing test, the Court contrasted the governmental interests promoted by Terry stops for imminent or ongoing crimes with stops for already-completed criminal activity. In particular, it noted that Terry stops to investigate ongoing or imminent criminal activity promote the strong governmental interest in crime prevention and detection, unlike stops to investigate past crimes.⁶² The exigent circumstances that require police officers to intercept an individual who is about to commit a crime do not exist if the individual has already completed the crime because there is nothing more to prevent; the act has already been completed.⁶³ Moreover, the public’s safety is not as threatened by an individual who has engaged in past criminal activity but who is presently “going about his lawful business [as] it is by a suspect who is currently in the process of violating the law.”⁶⁴ Finally, the Court noted that officers who make a stop to investigate completed crimes may have a greater ability to choose the time, place, and circumstances of the stop.⁶⁵

Although acknowledging the factors that tend to lessen the government’s interest in detaining individuals for having already allegedly completed a crime, the Court also discussed the law enforcement interests that such stops might promote. The ability of police officers to briefly detain an individual who they believe committed a crime and who they have had difficulty locating “promotes the strong government interest in solving crimes and bringing offenders to justice.”⁶⁶ Furthermore, prohibiting police action until probable cause exists allows the individual time to flee, thereby continuing to act as a threat to the public’s safety.⁶⁷ In highlighting the governmental and

⁵⁹ *Id.* *Hensley* cites the second footnote in *United States v. Cortez*, 449 U.S. 411, 417 n.2 (1981), which stated that, “[o]f course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct.” The Court also cites to its decision in *United States v. Place*, 462 U.S. 696 (1983), where it held that a police officer may stop a person “when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.” *Id.* at 702.

⁶⁰ *Hensley*, 469 U.S. at 228.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 228–29.

⁶⁶ *Id.* at 229.

⁶⁷ *See id.*

societal interest in solving crime, the Court noted that this interest was particularly strong “in the context of felonies or crimes involving a threat to public safety.”⁶⁸ The Court ultimately concluded that in situations in which the alleged crime was particularly violent and dangerous and in which the individual sought constituted a continuing threat to public safety, the law enforcement interests outweigh the individual’s interest in being “free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.”⁶⁹

The most relevant part of the Court’s decision is its explicit refusal to decide whether the *Hensley* rule applies to “*Terry* stops to investigate all past crimes, *however serious*.”⁷⁰ By deliberately addressing only the issue of completed felonies and not determining whether the *Terry* balancing test applies to detentions for past misdemeanors, the Court left that question open for lower federal and state courts to address.⁷¹ In the years following *Hensley*, the Court has not answered this question.⁷² As the following Part explains, a variety of approaches have developed.

II

THE LOWER FEDERAL AND STATE COURTS ANSWER *HENSLEY’S OPEN QUESTION*

Thus far, three circuit courts of appeal have addressed the proper boundaries of the *Hensley* decision; in doing so, they have diverged on the issue. The Ninth and Tenth Circuits have both held that the *Hensley* decision should extend to apply to investigative stops of completed misdemeanors, and that such stops may be reasonable and acceptable under the Fourth Amendment if the governmental interests at play outweigh the privacy interests inherently implicated by such stops.⁷³ The Sixth Circuit, on the other hand, noted, albeit in dicta, that

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (emphasis added).

⁷¹ *Id.* (“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 *Terry* stop may be made to investigate that suspicion.”); see also Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 615 (2005) (“Dicta in *United States v. Hensley* suggest that completed crimes less serious than a felony would not permit the use of *Terry* stop-and-frisk powers”); William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries Into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. KAN. L. REV. 439, 442 (1990) (discussing the Court’s decision not to address the issue of misdemeanors).

⁷² See David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1158 (2000).

⁷³ See *United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007); *United States v. Grigg*, 498 F.3d 1070, 1076–77, 1083 (9th Cir. 2007).

“[p]olice may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.”⁷⁴

The completed misdemeanor at issue in the Tenth Circuit case of *United States v. Moran* was trespassing.⁷⁵ There, the court applied the balancing approach from *Hensley* by weighing the intrusion on personal liberty against the governmental interests justifying the intrusion, and concluded that the investigatory stop was reasonable under the Supreme Court’s Fourth Amendment jurisprudence.⁷⁶ In applying the balancing test, the Tenth Circuit noted that the underlying crime “posed an ongoing risk to public safety” and, therefore, implicated the strong governmental interest in “solving crime and bringing offenders to justice.”⁷⁷ The court further justified its decision by mentioning three factors that tended to increase the governmental interest in detaining Moran: first, inherent in a criminal trespass is the risk of confrontation with the owner of the property; second, because Moran was trespassing in order to hunt in the neighboring public lands, a reasonable officer could assume that he was carrying a weapon; third, because the property owners had already made two police reports that Moran was trespassing, the officers could reasonably assume that the illegal activity would recur.⁷⁸

In the same breath, however, the court recognized the factors tending to undercut the strength of the governmental interest. For instance, the officers knew Moran and could have obtained a warrant and located him later that same day at his house.⁷⁹ The court nonetheless held that this fact did not substantially reduce the strength of the governmental interest and that, regardless of the existence of alternative measures, restraining police action in such a situation would “require police to turn their backs on potential criminal activity and to ‘enable the suspect to flee.’”⁸⁰ Furthermore, when the officers

⁷⁴ *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (citations omitted).

⁷⁵ 503 F.3d at 1138–39. The specific facts of *Moran* are as follows: The Fergusons made two reports to the local police department that an individual, Moran, was trespassing on their property, which bordered a national forest. *Id.* at 1138. Licensed individuals were permitted to hunt on these public lands, and it was hunting season at the time. *Id.* Upon arriving at the property, the responding officers observed a parked black SUV that they suspected belonged to Moran. *Id.* While talking to the Fergusons, the black SUV pulled out and began to drive away. *Id.* at 1139. One of the officers then pulled the vehicle over and, upon approaching the SUV, noticed the butt of a rifle stock in the back seat. *Id.* Ultimately, the officers arrested Moran on an unrelated warrant, and he was subsequently indicted for being a felon in possession of a firearm. *Id.*

⁷⁶ *Id.* at 1141–42.

⁷⁷ *Id.* at 1142.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

stopped Moran, he was more representative of an “individual in the process of violating the law or a suspect fleeing from the scene of a crime than ‘a suspect in a past crime who now appears to be going about his lawful business.’”⁸¹

The stop at issue in *Moran* was an investigatory *automobile* stop, which, under the court’s balancing test, did not implicate strong privacy concerns.⁸² The court pointed out that such traffic stops are “‘brief” and “‘non-intrusive,’”⁸³ and, consequently, because the intrusion on personal privacy was minimal, the governmental interest outweighed any privacy concerns.⁸⁴ The balance having struck in favor of the government, the court held that the investigatory stop of Moran was not unreasonable and therefore not violative of the Fourth Amendment.⁸⁵ Hence, under the Tenth Circuit’s approach in *Moran*, the reasonableness of a Terry stop for a completed crime will turn on whether “the alleged underlying criminal activity pose[s] an ongoing risk to public safety”⁸⁶ and the type of stop conducted (i.e., whether it’s an on-the-street stop-and-frisk or a brief investigatory automobile search).⁸⁷ Furthermore, in the Tenth Circuit, whether the police officers had alternative means of locating and investigating the suspect is of minimal consequence.⁸⁸ The fact that obtaining a warrant and locating Moran later in the day would have been a simple task for the police officers was not determinative for the court; rather, the court was concerned more with the ability of the defendant to flee.⁸⁹

The Ninth Circuit, which similarly extended *Hensley* to apply in the case of completed misdemeanors, took an interesting and instructive approach to the question in *United States v. Grigg*.⁹⁰ Rather than blindly applying the traditional Fourth Amendment balancing test, the circuit court explicitly inserted another element into the equation—the nature of the underlying offense at issue.⁹¹ In *Grigg*, the crime occasioning the stop was not dangerous and was entirely nonviolent; the police detained the defendant in his vehicle for playing his

⁸¹ *Id.* at 1143 (quoting *Hensley*, 469 U.S. at 228).

⁸² *See id.* at 1138–39, 1143.

⁸³ *Id.* at 1143 (quoting *United States v. Johnson*, 364 F.3d 1185, 1188 (10th Cir. 2004)).

⁸⁴ *Id.* (“Balanced against the strong governmental interest in solving crime, the relatively limited intrusion on personal security occasioned by an investigatory stop was warranted and the officers’ seizure of Mr. Moran was not unreasonable.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1142.

⁸⁷ *Id.* at 1143.

⁸⁸ *See id.* at 1142 (acknowledging that alternative means of investigating the crime existed, but nevertheless explaining that such alternative methods did not sufficiently detract from the governmental interests promoted by detaining Moran).

⁸⁹ *Id.*

⁹⁰ 498 F.3d 1070 (9th Cir. 2007).

⁹¹ *Id.* at 1081.

car stereo too loudly and thus violating a local noise ordinance.⁹² Specifically, the court adopted the rule that when applying the *Hensley* balancing test to stops to investigate completed misdemeanors, courts “must consider the nature of the misdemeanor offense in question.”⁹³ Clarifying this approach, the Ninth Circuit instructed courts that, in considering the nature of the underlying offense, they should take into account “the potential for ongoing or repeated danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence),” as well as the availability of “alternative means to identify the suspect or achieve the investigative purpose of the stop.”⁹⁴ The court’s concern in adopting this approach was with public safety—the more inherently dangerous the misdemeanor, the greater the threat to public safety implicated by failing to detain the individual.⁹⁵ Under such a scenario, the balance swings in favor of detention, as the interest in maintaining the safety of society outweighs the intrusion on personal liberties that such detentions cause. Thus, in the case at hand, the officer’s detention of Grigg did not promote the government’s interest in keeping the public safe and was therefore unreasonable; even if Grigg had continued to play his loud music, no threat to the public safety would result.⁹⁶

Although noting that some state court decisions had relied on the traditional misdemeanor-felony distinction to limit *Hensley* to stops for completed felonies, the Ninth Circuit’s opinion explicitly declined to adopt such a *per se* rule against the use of Terry stops for all completed misdemeanors.⁹⁷ Its decision not to adopt a *per se* rule was due to its concern with overinclusiveness; such a rule would prohibit stops for completed misdemeanors that police may reasonably consider to be a threat to the public safety, such as reckless driving.⁹⁸

In contrast to the Ninth and Tenth Circuits, the Sixth Circuit, in *Gaddis ex rel. Gaddis v. Redford Township*,⁹⁹ declined to extend the *Hensley* analysis to past misdemeanor situations, at least in the context of vehicle stops. *Gaddis* did not involve a stop for a completed misde-

⁹² *Id.* at 1072.

⁹³ *Id.* at 1081.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1077–81.

⁹⁸ *Id.* at 1081. (“Despite the misdemeanor-felony distinction, and the fact that some courts have relied on this distinction to limit *Hensley*, we 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. We think it depends on the nature of the misdemeanor. Circumstances may arise where the police have reasonable suspicion to believe that a person is wanted in connection with a past misdemeanor that the police may reasonably consider to be a threat to public safety.”).

⁹⁹ 364 F.3d 763 (6th Cir. 2004).

meanor; rather, the misdemeanor at issue was ongoing.¹⁰⁰ It was therefore unnecessary for the Sixth Circuit to delve into a sophisticated and in-depth analysis of the application of *Hensley* to investigative stops for completed misdemeanors. Instead, the court addressed the issue in a footnote that summarized its current Fourth Amendment jurisprudence on vehicle stops.¹⁰¹ In this footnote, the court stated that although police may stop an individual based on a reasonable suspicion that the individual participated in a completed felony, police may not make a stop of an individual that they reasonably suspect had participated in an already-completed misdemeanor.¹⁰²

It is noteworthy that the Sixth Circuit's statement was made in the context of describing its jurisprudence on vehicle stops. As my proposed approach in this Note does distinguish between stops on the street and stops for dangerous-driving misdemeanors, one might wonder whether the court intended to limit its rule to traffic stops; that is, does the Sixth Circuit's jurisprudence prohibit police officers from ever making investigative stops for past misdemeanors or only from doing so for traffic violations amounting to misdemeanors? Although for support the court cited to *Hensley*, which did not limit its decision to stops for traffic offenses,¹⁰³ the analysis of the case centered on investigative stops for traffic offenses; more specifically, stops to investigate suspected drunk driving.¹⁰⁴ All of the cases to which the court cited dealt with questions concerning the appropriate standard for evaluating traffic stops.¹⁰⁵ Moreover, the court explained in the footnote that it was "summariz[ing] the state of [its] Fourth Amendment jurisprudence on vehicle stops."¹⁰⁶ Thus, a strong argument exists that the Sixth Circuit intended for its *per se* rule against the extension of *Hensley* to apply only to vehicle stops for completed misdemeanors. As I will discuss later, due to the inherent differences between investigatory traffic stops and stop-and-frisks on the street, one could sensibly believe that the court intended to treat the two differently.¹⁰⁷

¹⁰⁰ *Id.* at 766–68, 770.

¹⁰¹ *Id.* at 771 n.6.

¹⁰² *Id.* ("Police may make an investigative stop of a vehicle when they have reasonable suspicion of an ongoing crime, whether it be a felony or misdemeanor, including drunk driving in jurisdictions where that is a criminal offense. Police may also make a stop when they have reasonable suspicion of a completed *felony*, though not of a mere completed *misdemeanor*." (emphasis added) (internal citations omitted).

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 768–70 (discussing the legal standard applied in prior Sixth Circuit cases that analyzed the brief stop of a vehicle on suspicion of drunk driving, ultimately holding that the standard of reasonableness governs the stop of Gaddis's vehicle).

¹⁰⁵ *Id.* at 770–71 (citing *United States v. Sanchez-Pena*, 336 F.3d 431 (5th Cir. 2003); *United States v. Colin*, 314 F.3d 439 (9th Cir. 2002); *United States v. Wheat*, 278 F.3d 722 (8th Cir. 2001); *United States v. Roberts*, 986 F.2d 1026 (6th Cir. 1993)).

¹⁰⁶ *Id.*

¹⁰⁷ *See infra* Part III.

In contrast to the small number of federal circuit courts that have decided the question that *Hensley* left open, the number of state court decisions addressing the issue is substantial.¹⁰⁸ In light of the dearth of federal circuit case law, the reasoning and analyses that these state courts have employed is useful in developing a broad rule for all jurisdictions. Furthermore, because the state courts draw on the specific criminal statutes of the states in which they sit, they provide an important tool for determining the landscape of the criminal law across varying jurisdictions. The state courts' approaches generally parallel the approaches of the circuit courts that have addressed the issue; some have declined to extend *Hensley* to stops for completed misdemeanors, while others have permitted such stops upon a finding that they were reasonable under the *Hensley* balancing approach. These decisions turn both on the way in which the court interprets the *Hensley* decision and the way in which the state legislature distinguishes felonies from misdemeanors.¹⁰⁹ The following Part draws specifically from the Minnesota Court of Appeals' decision in *Blaisdell v. Commissioner of Public Safety*,¹¹⁰ in which the court declined to extend *Hensley* and adopted a per se approach against stops for completed misdemeanors.

¹⁰⁸ See, e.g., *State v. Bennett*, 520 So. 2d 635 (Fla. Dist. App. 1988) (per curiam) (affirming trial court's holding that Terry stops to investigate completed misdemeanors are per se unreasonable under Fourth Amendment); *State v. Myers*, 490 So. 2d 700, 703-04 (La. App. 1986) (holding that *Hensley* test, balancing the nature and quality of the intrusion against the governmental interests justifying the intrusion, governs the inquiry of the reasonableness of a stop for completed misdemeanor); *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 884 (Minn. App. 1985) (holding that vehicle stops to investigate past misdemeanors are per se unreasonable and violate the Fourth Amendment); *City of Devils Lake v. Lawrence*, 639 N.W.2d 466, 472-73 (N.D. 2002) (holding that a Terry stop based on an officer's suspicion that an individual had committed a misdemeanor offense of disorderly conduct was reasonable); see also, e.g., *State v. Duncan*, 43 P.3d 513, 517 (Wash. 2002) (holding that Terry stops may not be made for completed noncriminal, nontraffic civil infractions).

¹⁰⁹ See, e.g., *Myers*, 490 So. 2d at 704 (distinguishing the case from *Blaisdell* by noting that, unlike the Minnesota legislature, "[t]he Louisiana legislature has not recognized or made such a distinction" between misdemeanors committed in an officer's presence and misdemeanors committed outside of the officer's presence); *Blaisdell*, 375 N.W.2d at 883 ("We must also acknowledge the disparate legislative treatment accorded felonies and misdemeanors."); *Duncan*, 43 P.3d at 518 ("The Court's focus on preventing crimes, and promoting the interests of justice in arresting felons in *Hensley*, suggests that the interest in preventing civil infractions may not be accorded the same weight.").

¹¹⁰ 375 N.W.2d at 884. In *Blaisdell*, a clerk at the Q-Service Gas Station informed an officer on routine patrol that a car leaving the station may have been involved in a "no-pay" gas theft that had occurred approximately two months earlier. *Id.* at 881. The officer followed the vehicle; he did not notice any driving violations or careless driving before pulling the car over in the parking lot of a nearby restaurant. *Id.* Upon pulling *Blaisdell* over, the officer detected an odor of alcohol on his breath. The officer gave *Blaisdell* a breath test which *Blaisdell* failed. *Id.*

III

ANALYSIS: DEFINING THE CONTOURS OF *HENSLEY*

The opinion in *Blaisdell* is instructive, as it provides thoughtful analysis and strong support for the court's decision to limit the application of *Hensley* and adopt a per se rule prohibiting Terry stops for completed misdemeanors. Similar to *Gaddis*, however, although the Minnesota Court of Appeals' discussion concerning the general distinction between felonies and misdemeanors and how the legislature treats them is relevant to a general discussion about the appropriate application of *Hensley* to all stops for completed misdemeanors, and not just vehicle stops, the court nevertheless appears to limit its holding to investigatory vehicle stops for completed misdemeanors.¹¹¹ Nonetheless, unlike the Sixth Circuit, which did not discuss its per se approach,¹¹² the *Blaisdell* court, after acknowledging that *Hensley* explicitly left the issue open and noting that no Minnesota state court had yet addressed it, engaged in an analysis of the issue.¹¹³

The court began by discussing the inherent differences between the governmental interests implicated by stops to investigate completed crimes and stops to investigate imminent and ongoing crimes.¹¹⁴ In analyzing the propriety of extending *Hensley* to stops for completed misdemeanors, the *Blaisdell* court placed great emphasis on "the disparate legislative treatment accorded felonies and misdemeanors."¹¹⁵ The court noted that, by definition, misdemeanors are punished less harshly than gross misdemeanors or felonies.¹¹⁶ Furthermore, as the court observed, Minnesota law, like that of other states, prohibits a police officer from making a warrantless misdemeanor arrest *unless* the perpetrator committed the offense in the officer's presence.¹¹⁷ This disparate treatment of felonies and misdemeanors by the Minnesota state legislature was a strong factor in the court's decision; indeed, the court noted that the legislature's treatment of misdemeanor arrests is a "legislative recognition that the public concerns served by warrantless misdemeanor arrests are in some degree outweighed by concerns for personal security and lib-

¹¹¹ See *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004); *Blaisdell*, 375 N.W.2d at 884 ("We therefore hold that vehicle stops to investigate completed misdemeanors violate the [F]ourth [A]mendment of the United State Constitution.").

¹¹² See *Gaddis*, 364 F.3d at 771 n.6.

¹¹³ *Blaisdell*, 375 N.W.2d at 882.

¹¹⁴ *Id.* at 882-83.

¹¹⁵ *Id.* at 883.

¹¹⁶ *Id.*

¹¹⁷ *Id.* This Minnesota law, codified at MINN. STAT. ANN. § 629.34(1)(c) (West 2003), provides that a "peace officer or part-time peace officer who is authorized . . . to make an arrest without a warrant may do so under the following circumstances: (1) when a public offense has been committed or attempted in the officer's presence; (2) when the person arrested has committed a felony, although not in the officer's presence."

erty.”¹¹⁸ Thus, because the law punishes misdemeanors less severely than felonies and because, under Minnesota state law, a police officer may not arrest an individual without a warrant for a misdemeanor unless that individual committed the offense in the officer’s 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.”¹¹⁹

The opinion continues by discussing the possible governmental interests advanced by traffic stops to investigate past misdemeanors. According to the court, such investigatory traffic stops do not advance the interest in solving crimes to any great degree.¹²⁰ The court based this conclusion partly on the alternative investigative measures that police may use in order to derive the same information that a stop of an automobile may provide.¹²¹ For example, an officer may record the automobile’s license plate number to determine the car owner’s name.¹²² Because Minnesota state law did not permit the officer to arrest Blaisdell, the court opined, “[I]t is difficult to see what information, other than the name of the driver, the officer expected to obtain as a result of the stop.”¹²³

The court concluded that, although situations may exist in which an automobile stop could potentially advance the public interest in crime solution to a greater degree than the stop at issue, such situations “will [not] arise in a misdemeanor context with sufficient frequency to appreciably advance the public interest in solving past crimes.”¹²⁴ Thus, when considered in the aggregate, the public interest in permitting automobile stops for completed misdemeanors would not be sufficient to “outweigh the intrusion on the ‘motorists’ right to free passage without interruption.”¹²⁵

Although arguably intended to apply only to traffic stops, the Minnesota Court of Appeals’ rationale provides a sound and informa-

118 *Blaisdell*, 375 N.W.2d at 883.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 883–84 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 557–58 (1976)). In evaluating the interference with personal liberty caused by automobile stops, the court

restate[d] the physical and psychological intrusions recognized in *Delaware v. Prouse*. The stop is normally effected ‘by means of a possibly unsettling show of authority[,] interfere[s] with freedom of movement; [is] inconvenient, . . . consume[s] time, [and] may create substantial anxiety.’ Additionally, we cannot overlook the potential of legitimizing a technique for harassment.

Id. at 883 (internal citations omitted).

tive analysis of the permissible contours of the *Hensley* decision. The court focuses on two key factors essential to justify its per se approach and on which I will now elaborate: first, the traditional and historical differences between crimes classified as misdemeanors and crimes classified as felonies, and, second, the state legislature's disparate approach for punishing misdemeanors and felonies, as well as the legislature's disparate treatment of rules governing arrests for both types of crimes. Additionally, the efficiency and guidance that such a per se rule provides is an important consideration that helps justify my proposed rule: balancing tests such as the one that the Court set forth in *Terry* provide little guidance to police on routine patrols, fail to accurately inform individuals of their rights in varying situations, and result in an inefficient system in which courts must conduct case-by-case analyses.¹²⁶

The Supreme Court's treatment of the felony-misdemeanor distinction is rather inconsistent; the Court has accepted the historical distinction in some decisions while dismissing it as arbitrary in others. In *Hensley*, the Court clearly found the categorization of some crimes as felonies important enough to draw the line for permissible Terry stops for completed crimes to those for completed felonies only.¹²⁷ Nevertheless, in *Tennessee v. Garner*, decided only several months after *Hensley*, the Court characterized the distinction as "highly technical" and "often arbitrary."¹²⁸ On the other hand, in *Welsh v. Wisconsin*, decided the year before the *Hensley* decision, the Supreme Court implicitly recognized the historical distinction when it addressed the warrant requirement for arrests in the home.¹²⁹ The crime for which the police made a warrantless home arrest was a "noncriminal, traffic offense"¹³⁰ that Wisconsin law classified as a "civil forfeiture offense for which no imprisonment is possible."¹³¹ The Court ultimately held that, in determining whether an exigency meriting a warrantless entry into the home exists, an important factor that police officers and courts must consider is the "gravity of the underlying offense for

¹²⁶ Cf. *Welsh v. Wisconsin*, 466 U.S. 740, 761-62 (1984) (White, J., dissenting) ("[T]he Court's approach will necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped.").

¹²⁷ See *United States v. Hensley*, 469 U.S. 221, 229 (1985).

¹²⁸ 471 U.S. 1, 14, 20 (1985).

¹²⁹ See *Welsh*, 466 U.S. at 749, 752-53. The Court has recognized that as an underlying principle, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Id.* at 749 (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)). The Court further held in *Payton*, however, that the existence of some exigent circumstances may act as an exception to the warrant requirement and justify a warrantless arrest in the home. *Payton*, 445 U.S. at 583. Thus, warrantless arrests in the home are sharply limited, absent probable cause and exigent circumstances. See *id.* at 602.

¹³⁰ *Welsh*, 466 U.S. at 753.

¹³¹ *Id.* at 754.

which the arrest is being made.”¹³² Thus, because of the strong presumption against warrantless entries and the great intrusion on personal liberty that they implicate, “application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.”¹³³ Although the Court’s holding did not draw the line for permissible warrantless home entries along the felony-misdemeanor distinction, and rather distinguished between *minor* and *grave* crimes, the Court nonetheless referenced the distinction in its discussion of lower courts’ decisions applying the exigent-circumstances exception.¹³⁴ The Court noted that, although several lower courts had allowed warrantless home entries for “major felonies” under certain circumstances, most lower courts “have refused to permit warrantless home arrests for nonfelonious crimes.”¹³⁵ Thus, although the Court did not distinguish between felonies and misdemeanors in its holding, by relying on and acknowledging lower court decisions that did, the Court implicitly recognized that such a distinction was not entirely arbitrary or subjective in applying the exigent-circumstances exception to the rule against warrantless home entries.¹³⁶

The distinction between these two classifications of crimes has its roots in the common law. At common law, most felonies were punishable by death.¹³⁷ Although not all felonies resulted in execution, the link between death and felony was profound enough for Blackstone to write that “‘[t]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them,’” and thus “if a statute makes any new offense [a] felony, the law implies that i[t] shall be punished with death.”¹³⁸

Although most crimes formerly punishable by death no longer are,¹³⁹ the historical distinction based on punishment is important be-

¹³² *Id.* at 753.

¹³³ *Id.*

¹³⁴ *See id.* at 752–53 (citing, among other cases, *State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983) (“The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded.”); *People v. Strelow*, 292 N.W.2d 517, 521–22 (Mich. App. 1980)).

¹³⁵ *Id.* at 752.

¹³⁶ After citing to state court cases distinguishing between warrantless home entries for felonious and nonfelonious crimes, the court stated that “without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.” *Id.* at 753.

¹³⁷ *See Tennessee v. Garner*, 471 U.S. 1, 13–15 (1985).

¹³⁸ *Id.* at 13 n.11 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *98).

¹³⁹ *See id.* at 14.

cause it helps to explain why the majority approach continues to be that the punishment associated with the commission of a crime, rather than the actual punishment imposed, determines whether the law treats the crime as a felony or a misdemeanor. For example, in most states, a misdemeanor offense refers to all offenses for which the statute prescribes a punishment other than death or imprisonment in the state prison.¹⁴⁰ The categorization of an offense as a misdemeanor, therefore, generally means that a violation of the offense will result in the imposition of a fine or imprisonment for a brief term in the local jail.¹⁴¹ Considering the existence of fifty-two different jurisdictions in which criminal statutes are enacted and prosecuted, there can be no one definition of “misdemeanor”; however, it is enough to recognize that all misdemeanors are “‘less than felon[ies].’”¹⁴² Similarly, no universal definition of “felony” exists; however, it is generally accepted that the term includes any offense punishable by death, imprisonment for more than one year, or imprisonment in the state prison.¹⁴³ The California Code, for example, defines a felony as “a crime which is punishable with death or by imprisonment in the state prison,”¹⁴⁴ and the New York Code defines a felony as any offense “for which a sentence to a term of imprisonment in excess of one year may be imposed.”¹⁴⁵

The historical and traditional distinction between the treatment of misdemeanors and felonies led to the “ancient common-law rule that a peace officer was permitted to arrest without a warrant for a

¹⁴⁰ See 22 C.J.S. *Criminal Law* § 15 (2006); WAYNE R. LAFAYE, *CRIMINAL LAW* 34 (4th ed. 2003) (“In the modern codes, it is sometimes provided that a crime punishable by death or imprisonment in the state prison . . . is a felony, and that any other crime (i.e., any crime punishable only by fine or by imprisonment in a local jail or both) is a misdemeanor. The practical effect of that dividing line is usually such that these statutes indirectly state what the statutes in almost all other jurisdictions expressly declare: that any crime punishable by death or imprisonment for more than one year . . . is a felony and that any other crime is a misdemeanor.”); see, e.g., *Eckhardt v. People*, 247 P.2d 673, 677 (Colo. 1952); *State v. Myrick*, 163 S.E. 803, 804 (N.C. 1932) (“A crime not punishable by death or imprisonment in the state’s prison is a misdemeanor . . .”).

¹⁴¹ See *United States v. Meyers*, 143 F. Supp. 1, 4–5 (D. Alaska 1956); *Eckhardt*, 247 P.2d at 677; *State v. Pluth*, 195 N.W. 789, 791 (Minn. 1923) (“The crime charged against defendant is punishable only by a fine and imprisonment in the county jail, and therefore is not a felony . . .”); BLACK’S LAW DICTIONARY 1020 (8th ed. 2004) (defining misdemeanor as a “crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)”); 22 C.J.S., *supra* note 140, § 15; LAFAYE, *supra* note 140, at 34.

¹⁴² 22 C.J.S., *supra* note 140, § 15 (citation omitted); see SEYMOUR F. HARRIS, *PRINCIPLES AND PRACTICE OF THE CRIMINAL LAW* 6 (14th ed. 1926) (“‘*Misdemeanour*’ is to be regarded as a negative expression, being applied to indictable crimes not falling within the class of felonies.”).

¹⁴³ See MODEL PENAL CODE § 1.04(2) (1985); 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 19 (15th ed. 1993).

¹⁴⁴ CAL. PENAL CODE § 17(a) (West 1999).

¹⁴⁵ N.Y. PENAL LAW § 10.00(5) (McKinney 2004).

misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”¹⁴⁶ As indicated in *Blaisdell* and several of the other federal and state courts that have addressed the topic, this common law rule prevails among the states.¹⁴⁷ The categorization of crimes as either felonies or misdemeanors also remains relevant for purposes of the substantive criminal law, as well as for criminal procedure law.¹⁴⁸ In the substantive context, “there are a number of crimes whose elements are defined, or whose punishment is stated, with reference to felonies as distinguished from misdemeanors.”¹⁴⁹ For example, at common law, burglary was defined as breaking and entering another’s home at night with the intent to commit a felony; the intent to commit a misdemeanor therein was not enough for conviction.¹⁵⁰

In the procedural context, the number of peremptory challenges available to the prosecution and defense might depend on the classification of the underlying crime being charged.¹⁵¹ Additionally, a defendant charged with a felony must be present at his trial, whereas an individual charged with the commission of a misdemeanor need not be.¹⁵² Moreover, the statutory period of limitations within which the prosecution must commence a case may depend upon the classification of the crime charged.¹⁵³

¹⁴⁶ *United States v. Watson*, 423 U.S. 411, 418 (1976); see also 1 TORCIA, *supra* note 143, § 21.

¹⁴⁷ See *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 883 (Minn. App. 1985); see also *Watson*, 423 U.S. at 419; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 10.02 (3d ed. 2002); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 327 (12th ed. 2008) (“Some . . . relevant authorities have described the common law warrantless arrest power of police regarding misdemeanors as having two limitations: (i) that the offense have occurred in the officer’s presence; and (ii) that the offense constitute a ‘breach of the peace.’”); Frase, *supra* note 71, at 615–16 (“A similar ends proportionality principle underlies the common law rule, still recognized in some form by most states, forbidding warrantless arrest for misdemeanors not committed within the arresting officer’s presence.” (footnote omitted)); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 777 (1993) (“Most jurisdictions . . . retain the in-the-presence rule in some form.”). Although the Supreme Court has not held that the Fourth Amendment requires the “in the presence” rule for warrantless misdemeanor arrests, it nonetheless continues to be the prevailing rule among the states. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001) (“We need not, and thus do not, speculate whether the Fourth Amendment entails an ‘in the presence’ requirement for purposes of misdemeanor arrests.”); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (“[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states.”) (citation omitted).

¹⁴⁸ See LAFAYE, *supra* note 140, at 35; Schroeder, *supra* note 147, at 812–15.

¹⁴⁹ LAFAYE, *supra* note 140, at 35.

¹⁵⁰ *Id.*

¹⁵¹ 1 TORCIA, *supra* note 143, § 21 (noting that a greater number of peremptory challenges is usually allowed if the crime charged is a felony rather than a misdemeanor).

¹⁵² See *id.*

¹⁵³ See *id.* § 92.

The distinction may have even further implications outside of substantive and procedural criminal law. In some states, for example, conviction of a felony may be grounds for divorce, while in others, felony convictions may subject the individual to the loss of professional licenses and the right to serve on juries.¹⁵⁴ Some jurisdictions prohibit convicted felons from holding public office.¹⁵⁵ Commentators, like Professor William Schroeder, have also continued to appreciate the distinction. As Professor Schroeder wrote:

Despite its flaws, the felony/misdemeanor distinction should be accorded constitutional significance. The distinction has deep roots in the common law and in search and seizure law. It also comports with contemporary norms. The felony/misdemeanor distinction has been said to be “[t]he most important classification of crimes in general use in the United States.”¹⁵⁶

Indeed, the importance of this distinction is what drove the lower court decisions referenced in *Welsh*, as well as several other lower court decisions deciding the issue of the exigent-circumstances exception to the rule against warrantless entries.¹⁵⁷

State legislatures continue to distinguish between felonies and misdemeanors, a distinction that continues to be determined by the severity and longevity of the punishment associated with a conviction of the crime, rather than the actual punishment imposed.¹⁵⁸ The perpetuation of this historical distinction suggests that legislatures are

¹⁵⁴ See LAFAVE, *supra* note 140, at 36; Schroeder, *supra* note 147, at 815 & nn.161, 163.

¹⁵⁵ LAFAVE, *supra* note 140, at 36.

¹⁵⁶ Schroeder, *supra* note 147, at 812–13 (alteration in original) (footnotes omitted).

¹⁵⁷ See, e.g., *State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983) (“The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded.”); *Youtz v. State*, 494 So. 2d 189, 192–93 (Ala. Crim. App. 1986) (suggesting that warrantless entries into homes may only be justified if police have probable cause to believe that a felony was being committed); *People v. Hoffstetter*, 470 N.E.2d 1247, 1251–52 (Ill. App. 1984) (holding that odor of marijuana does not justify warrantless entry into a person’s home because it only suggests that a misdemeanor, and not a felony, is being committed).

¹⁵⁸ See *United States v. Meyers*, 143 F. Supp. 1, 4–5 (D. Alaska 1956) (“[T]he statute itself defines the crime as a felony. Regardless of this classification, however, the majority rule and that which has been applied in this jurisdiction is that where a statute defines an offense as ‘punishable’ by imprisonment in the penitentiary, or which offense may be punished or is liable to be punished by such imprisonment, the offense is a felony, as the accused is subject to such punishment regardless of the penalty actually imposed.”); *People v. Hughes*, 32 N.E. 1105, 1106 (N.Y. 1893) (“It is not the actual sentence, but the possible one, which determines the grade of the offense.”); LAFAVE, *supra* note 140, at 34–35 (“The typical provision . . . uses the word ‘punishable’ or the phrase ‘which may be punished.’ Under a test so worded it is the possible sentence, not the actual sentence imposed, which controls, by the great weight of authority. . . . Thus in the United States most criminal statutes defining specific crimes do not themselves label as felonies or misdemeanors the crimes which they describe, leaving the matter to be determined by reference to the punishment provided (according to the place or to the length of confinement).”).

simply less concerned with punishing those who commit misdemeanors and removing them from society than they are with punishing felony offenders. Although several courts and commentators have noted that the felony-misdemeanor distinction may now be immaterial because of the inconsistency of state legislatures' categorization of crimes,¹⁵⁹ this inconsistency does not change the fact that in designating a crime as a "felony," a legislature is making the determination that the crime is inherently more serious than crimes it does not designate as felonies.¹⁶⁰ Thus, even though a crime categorized as a misdemeanor in one state may be a felony in another, the most serious crimes continue to be categorized as felonies in all states.

According to a 2000 survey of approximately 930,000 state felony convictions, conducted by the Department of Justice's Bureau of Justice Statistics, approximately 3 percent of convictions were for weapon offenses; approximately 35 percent were for drug offenses, including possession and trafficking; approximately thirty percent were for property offenses, including burglary, larceny and fraud; and approximately twenty percent were for violent offenses, including murder, rape, robbery, and aggravated assault.¹⁶¹ This survey indicates that state legislatures continue to understand and appreciate the consequences and stigma that attach to a felony conviction; the most serious crimes to society continue to be designated as felonies. Under the approach I advocate, police officers would continue to be able to make Terry stops based on their reasonable suspicion that an individual had engaged in any one of these serious and, many times, violent felonies.

¹⁵⁹ See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 14 (1985); *Carroll v. United States*, 267 U.S. 132, 158 (1925) ("In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors."); *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974) (rejecting the common law rule prohibiting warrantless arrests for misdemeanors committed outside an officer's presence and noting that "[t]he difference between felonies and misdemeanors is no longer as significant as it was at common law"); Paul R. Rice, *Evolving Evidentiary Needs: A Neglected Responsibility*, 35 HOFSTRA L. REV. 657, 668-69 (2006) (arguing that evidentiary rules involving admissibility of prior convictions should be changed to reflect the idea that "the felony/misdemeanor distinction no longer has the same meaning").

¹⁶⁰ See Henry F. Fradella, *Mixed Signals and Muddied Waters: Making Sense of the Proportionality Principle and the Eighth Amendment*, 42 CRIM. L. BULL. 498, 498 (2006) ("We differentiate what is more severe as compared to what is less severe often using nothing more than common sense. Legislatures do this when they designate offenses as violations, misdemeanors, and felonies.").

¹⁶¹ MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2000, at 6 tbl.1.1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sc0001st.pdf>. The report lumped together the remaining approximately fifteen percent of crimes as "other offenses." *Id.*

A survey of the 2006 arrest rates in California also helps to highlight the distinction between misdemeanor and felony offenses that continues to exist in state codes today. Excluding the arrests for motor vehicle violations, the greatest number of misdemeanor arrests were for assault and battery, petty theft, marijuana and other drug offenses, prostitution, public drunkenness, violations of the liquor laws, disturbing the peace, vandalism, trespassing, and violations of a city or county ordinance.¹⁶² The greatest number of felony arrests, excluding arrests for motor vehicle violations, were for weapons offenses; violent offenses, including homicide, forcible rape, robbery, assault, and kidnapping; property offenses, including burglary, theft, motor vehicle theft, and arson; marijuana, narcotics, and dangerous drug offenses; and sex offenses.¹⁶³ With the exception of assault and battery, none of the most commonly committed misdemeanors involved physical contact or behavior that presents a real threat to the public safety.¹⁶⁴ Furthermore, in California, assault and battery against a police officer, or against any individual if it results in serious bodily injury, may qualify as a felony.¹⁶⁵ Thus, since the 2006 misdemeanor arrests for assault and battery were most likely for offenses that did not result in serious injury to the victim, the classification of offenses in California indicates that the California legislature continues to appreciate the historical distinction between felonies and misdemeanors: the most dangerous and serious crimes, such as homicide and forcible rape, continue to be felonies, and those crimes that do not involve physical contact and do not present a grave threat to society continue to be designated as misdemeanors.

Although I do not intend to undermine notions that the felony-misdemeanor distinction has perhaps lost some of its common law significance,¹⁶⁶ I do argue that the distinction continues to be relevant in the application of *Terry* to stops for completed misdemeanors. I argue that, with the exception of the most dangerous driving violations qualifying as misdemeanors, courts should not extend the *Hensley* decision to warrantless *Terry* stops for completed misdemeanors. By classifying the commission of a crime as a misdemeanor, a legislature is pronouncing its belief that that crime is not terribly serious and that a person who commits that crime does not represent a high threat to society. Thus, that a crime may be a misdemeanor in one

¹⁶² See CALIFORNIA CRIMINAL JUSTICE STATISTICS CENTER, TOTAL MISDEMEANOR ARRESTS, tbl.4A (2006), http://stats.doj.ca.gov/cjsc_stats/prof06/00/4A.htm.

¹⁶³ See CALIFORNIA CRIMINAL JUSTICE STATISTICS CENTER, TOTAL FELONY ARRESTS, tbl.3A (2006), http://stats.doj.ca.gov/cjsc_stats/prof06/00/3A.htm.

¹⁶⁴ See CALIFORNIA CRIMINAL JUSTICE STATISTICS CENTER, *supra* note 162, at tbl.4A (2006), http://stats.doj.ca.gov/cjsc_stats/prof06/00/4A.htm.

¹⁶⁵ CAL. PENAL CODE § 243(a)-(d) (West 2005); see also *id.* § 17.

¹⁶⁶ See sources cited *supra* note 159 and accompanying text.

state but a felony in another does not undermine my proposed approach; *Hensley's* extension of *Terry* was justified by the government's interest in solving crimes and bringing offenders to justice, as well as detaining an individual who, if allowed to flee, would continue to act as a threat to the public safety. These governmental interests that justified the extension of *Terry* to stops for completed felonies do not support a further extension of *Terry* to stops for completed misdemeanors.

By designating a crime as a misdemeanor, the legislature has implicitly determined that violators of the statute do not present a great threat to public safety. In short, the legislature is not terribly concerned with punishing those offenders and isolating them from the rest of society. Therefore, stops for completed misdemeanors would not advance the governmental interests in public safety and bringing offenders to justice to a great enough degree to outweigh the interference with personal liberty and security interests that such stops implicate.¹⁶⁷ Although the strong privacy interests discussed in *Terry* and *Hensley* continue to exist in the context of stops for completed misdemeanors, the strong governmental interests do not, and the rule should not be extended to apply in such situations. Echoing these concerns, the Washington Supreme Court, in its discussion regarding its decision not to extend the *Terry* stop exception to nontraffic civil infractions, stated:

Accepting the presumption that more serious crimes pose a greater risk of harm to society, we place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime.¹⁶⁸

Indeed, as Professor Schroeder noted in an article regarding warrantless misdemeanor arrests, “[m]isdemeanors . . . are relatively less important than felonies. It is therefore appropriate that additional safeguards be imposed and hurdles leaped before an individual can be subjected to the indignity and inconvenience of an arrest for a misdemeanor.”¹⁶⁹ Similarly, safeguards and hurdles should also be in place before police officers impose the “indignity and inconvenience” of a *Terry* stop.¹⁷⁰

Although many of the federal and state court decisions addressing this issue involved investigatory vehicle stops, which the Supreme

¹⁶⁷ Cf. *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 883 (Minn. App. 1985) (opining that disparate treatment of felonies and misdemeanors by the state legislature is a “legislative recognition that the public concerns served by warrantless misdemeanor arrests are in some degree outweighed by concerns for personal security and liberty”).

¹⁶⁸ *State v. Duncan*, 43 P.3d 513, 518–19 (Wash. 2002).

¹⁶⁹ Schroeder, *supra* note 147, at 825.

¹⁷⁰ See *id.*

Court has treated as analogous to Terry stops,¹⁷¹ and which the Court has noted do not generally implicate as severe privacy concerns as on-the-street Terry stops,¹⁷² such stops should nonetheless be prohibited. Initially, it is important to note that most of the lower court decisions involving vehicle stops were in the context of nondriving misdemeanors; thus, although police officers coincidentally made the stops while the defendants were driving their cars, the stops were intended to investigate nondriving-related, already-completed misdemeanors.¹⁷³ It is true that stops of vehicles may not involve any physical contact between the police officer and the driver and may serve only to allow the officer to “ask questions[] or check identification.”¹⁷⁴ Nevertheless, such vehicle stops, with an exception for stops to investigate dangerous driving misdemeanors, should be per se prohibited, as they generally do not pass muster under the Fourth Amendment reasonableness analysis.

One of the Court’s justifications for its holding in *Hensley* was the recognition that restraining police action “might . . . enable the suspect to flee . . . and to remain at large.”¹⁷⁵ In the context of vehicle stops for completed misdemeanors, however, this justification is much less persuasive. Because police officers in most states cannot make a warrantless arrest of an individual upon pulling that individual over for a completed misdemeanor not committed in the officer’s pres-

¹⁷¹ See Moran, *supra* note 72, at 1153–55; see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“The Fourth Amendment prohibits ‘unreasonable searches and seizures’ by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest.”) (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)); Knowles v. Iowa, 525 U.S. 113, 117 (1998) (“A routine traffic stop . . . is a relatively brief encounter and ‘is more analogous to a so-called “Terry stop” . . . than to a formal arrest.’”) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).

¹⁷² See Delaware v. Prouse, 440 U.S. 648, 653 (1979) (explaining that investigatory vehicle stops are “limited [in purpose] and the resulting detention quite brief”); United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976) (holding that, in the context of routine vehicle checkpoint stops, although the stops do “intrude to a limited extent on motorists’ right to ‘free passage without interruption,’ and arguably on their right to personal security,” it involves only “a brief detention of travelers” where “[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search”) (internal citations omitted); United States v. Brignoni-Ponce, 422 U.S. 873, 879–80 (1975) (describing an automobile stop as a “modest” intrusion); see also United States v. Moran, 504 F.3d 1135, 1143 (10th Cir. 2007).

¹⁷³ See, e.g., Moran, 504 F.3d at 1138–39 (criminal trespass); City of Dodge City v. Hadley, 936 P.2d 1347, 1354 (Kan. 1997) (disorderly conduct); Blaisdell v. Comm’r of Pub. Safety, 375 N.W.2d 880, 881 (Minn. App. 1985) (suspicion of gasoline theft from two months earlier); State v. Hayes, 640 A.2d 288, 289–90 (N.H. 1994) (police observed driver “yelling and gesturing” and eyewitness told police defendant “had kicked over a parking sign”); City of Devils Lake v. Lawrence, 639 N.W.2d 466, 567–69 (N.D. 2002) (disorderly conduct).

¹⁷⁴ United States v. Hensley, 469 U.S. 221, 229 (1985).

¹⁷⁵ *Id.*

ence,¹⁷⁶ “the prospect of bringing the suspect to justice is not immediately advanced.”¹⁷⁷ Furthermore, in situations in which the underlying offense does not threaten public safety, no exigency exists that warrants an immediate Terry stop of the individual “at the expense of alternative investigative methods,” including “run[ning] a routine license check,” which “is a standard procedure for gathering information about a suspected violation of the law.”¹⁷⁸ Thus, although vehicle stops to investigate completed misdemeanors might implicate less severe privacy concerns than stop-and-frisks conducted on the street, restraining immediate police action while other alternative investigative measures are employed does not threaten public safety to a degree sufficient to warrant such stops. Furthermore, because in most jurisdictions an officer would not be able to make a warrantless arrest of the detained individual if the misdemeanor was not completed in the officer’s presence, it is difficult to see what information an officer would be able to gather as a result of the stop other than the name of the driver, which can be obtained by recording the license plate numbers.¹⁷⁹

The Supreme Court’s treatment of traffic stops as analogous to Terry stops further justifies the rule against investigative traffic stops for completed misdemeanors. Because of its determination that the *Terry* doctrine governs traffic stops, the Court held in *Pennsylvania v. Mimms* that if a police officer lawfully stops a vehicle, so long as the officer has reason to believe that the driver is armed, that officer may routinely order the driver out of the vehicle and briefly pat the driver down in areas in which weapons may be hidden.¹⁸⁰ Thus, although the Court and commentators have recognized that routine traffic stops may constitute less of a threat to personal liberty than stops on the street, because the *Terry* doctrine governs such stops, a police officer may lawfully order the individual out of the car, thereby forcing him or her to engage in a face-to-face confrontation.¹⁸¹ Moreover, assuming that the officer believes that the individual is armed, the

¹⁷⁶ See sources cited *supra* notes 117–119 and accompanying text.

¹⁷⁷ *Blaisdell*, 375 N.W.2d at 883.

¹⁷⁸ *United States v. Grigg*, 498 F.3d 1070, 1082, 1083 (9th Cir. 2007); see also *State v. Bennett*, 520 So. 2d 635, 636 (Fla. Dist. App. 1988) (Glickstein, J., concurring) (per curiam) (“The police unquestionably could not have arrested their suspect, even if he had confessed. The police were not trying to obtain evidence from a third party witness whom they might not otherwise be able to find. They were trying to obtain information from the suspect himself whom if they wished to charge, would have to find him again [sic].”).

¹⁷⁹ See *Blaisdell*, 375 N.W.2d at 883.

¹⁸⁰ 434 U.S. 106, 110–12 (1977) (per curiam).

¹⁸¹ See *id.* at 110 (“Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements[;] this, in turn, reduces the likelihood that the officer will be the victim of an assault.”).

officer has the right to frisk the driver's outer clothing.¹⁸² Accordingly, under prevailing case law, it is entirely possible that if police officers making traffic stops were permitted to investigate past misdemeanors, these stops could escalate to face-to-face confrontation and physical contact between the officer and the driver.

Under a *per se* approach against all Terry stops for completed misdemeanors, an exception exists for the most dangerous of traffic violations amounting to misdemeanor offenses. Using the California Penal Code as an example, the approach recognizes such an exception due to the continuing harm to public safety that these types of crimes present. Although privacy concerns are implicated by such traffic stops, especially considering the fact that the risk of escalation to face-to-face confrontation and physical contact between the driver and detaining officer still exists, the balance nevertheless weighs in favor of allowing such detentions, as the governmental interest in protecting other drivers and pedestrians from dangerous or reckless driving outweighs the interest in protecting personal security and privacy. An example of a dangerous driving misdemeanor to which this exception would apply is the crime of driving under the influence. Under California law, for example, driving under the influence ("DUI") may classify as a misdemeanor depending upon the circumstances of the offense. The relevant provisions classify a first-time DUI offense as a misdemeanor that may result in a maximum of six months imprisonment in the county jail.¹⁸³ Although a misdemeanor and not punishable by imprisonment in the state prison under California law, driving while under the influence of drugs or alcohol obviously represents a threat to the public. Therefore, under this approach, a police officer may make an investigatory stop of an automobile based on the officer's reasonable suspicion that the already-completed misdemeanor is a dangerous driving offense, such as DUI or reckless driving.

The dangerous-driving exception has limits, however, and in that sense, represents a reasonableness-under-the-circumstances test. If the officer reasonably suspects that a driver committed a DUI offense three days ago, making an investigatory traffic stop of that individual is no longer justified; the amount of time that has passed makes such a

¹⁸² See *id.* at 111–12.

¹⁸³ See CAL. VEH. CODE § 23152 (West 2000) (driving under the influence); *id.* § 23536(a) ("If a person is convicted of a first violation of Section 23152, that person shall be punished by imprisonment in the county jail for not less than 96 hours, at least 48 hours of which shall be continuous, nor more than six months and by a fine of not less than three hundred ninety dollars (\$390), nor more than one thousand dollars (\$1,000)."); see also CAL. PENAL CODE § 17(a) (West 1999) ("A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor"); *id.* § 19 ("[E]very offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.").

stop unreasonable, as those actions of the driver no longer endanger the public and, therefore, the governmental interest in public safety is insufficient to outweigh the costs to personal security. If, however, the officer reasonably suspects that an individual currently operating a moving vehicle had been driving under the influence three hours earlier, an investigatory stop of that individual might be reasonable. Although it will require a case-by-case adjudication of the temporal issue, the dangerous-driving exception to the per se approach that I advocate in this Note is necessary due to the risk to the public that such crimes present. In the aggregate, the governmental interest in public safety that investigatory traffic stops for the most dangerous driving misdemeanors would promote outweighs the privacy interests inherent in such stops.

Returning again to the general per se rule against extending *Hensley* to stops for completed misdemeanors, and considering the fact that the categorization of crimes and the punishments that go along with them vary from jurisdiction to jurisdiction, one might argue that a somewhat modified per se rule prohibiting all stops for completed misdemeanors is either undesirable or unnecessary. The need for a per se rule is strong, however, as it generally avoids “pointless litigation concerning the nature and gradation of various crimes.”¹⁸⁴ Applying the *Hensley* balancing test to situations involving stops for completed misdemeanors would “necessitate a case-by-case evaluation of the seriousness of particular crimes,”¹⁸⁵ as well as “hamper law enforcement [efforts].”¹⁸⁶

In its decision in *Grigg*, the Ninth Circuit applied the *Hensley* balancing test and also inserted the factor of the gravity of the underlying offense in question.¹⁸⁷ Under this approach, if the misdemeanor in question is not particularly dangerous or serious, the stop is unreasonable.¹⁸⁸ Engaging in a case-by-case balancing test, however, in which courts and police officers must consider the gravity of the particular offense at hand “requires [police officers] to engage in an even more sophisticated balancing of imprecise and often conflicting factors at a time when prompt action is, by definition, necessary.”¹⁸⁹ Although I advocate in this Note for an exception to the per se rule for dangerous traffic violations that would allow police to make reasonable stops

¹⁸⁴ *Welsh v. Wisconsin*, 466 U.S. 740, 760–61 (1984) (White, J., dissenting).

¹⁸⁵ *Id.* at 761–62.

¹⁸⁶ *Id.* at 760.

¹⁸⁷ *United States v. Grigg*, 498 F.3d 1070, 1077 (9th Cir. 2007).

¹⁸⁸ *See id.* (“Although the Supreme Court did not expressly limit its holding, the reasoning of *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 *Terry* stop.”).

¹⁸⁹ Schroeder, *supra* note 71, at 491.

to investigate completed dangerous-driving misdemeanors (with reasonability depending on the temporal factor), my proposed general rule nonetheless provides more guidance for officers patrolling the streets than the Ninth Circuit's approach that factors in the gravity of the offense. Although the Ninth Circuit's balancing approach might lead to the same result—stops for completed dangerous driving violations weigh heavily in the balance—my approach nonetheless provides for more guidance to police officers and less balancing by the courts.

Under this Note's rule, police officers would know that they may never make a Terry stop on the street based on their reasonable suspicion that an individual was engaged in a past misdemeanor. Furthermore, officers patrolling the roads similarly would know that they may only make vehicle stops for a limited and predetermined number of dangerous driving violations. Depending on the driving offenses criminalized as misdemeanors in a police officer's jurisdiction, the officer would know ahead of time which driving offenses qualify as dangerous, thereby falling under the exception. Thus, all the police officer would need to do is factor in the amount of time that has elapsed since the individual engaged in the past conduct. Police officers patrolling the roads therefore would have enough guidance to know when an investigatory traffic stop was permissible—considering the temporal proximity of the past crime is a task that police officers are more than equipped to handle.

In addition to providing guidance to police officers on patrol, this approach allows individuals to more easily understand their rights in given circumstances. As the Supreme Court noted in *Oliver v. United States*,¹⁹⁰ "an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances" creates difficulties for courts, police, and citizens.¹⁹¹ Should the Terry balancing approach be further extended to stops for completed misdemeanors, the situations in which individuals are uncertain of their Fourth Amendment rights will only increase. Given the weakness of the governmental interest in stops for completed misdemeanors, an approach under which individuals know their rights ahead of time and can appreciate when a stop by a police officer is unlawful will add further clarity to Fourth Amendment jurisprudence.

CONCLUSION

State legislatures continue to appreciate and apply the historical common law distinction between crimes categorized as felonies and

¹⁹⁰ 466 U.S. 170 (1984).

¹⁹¹ *Id.* at 181.

those categorized as misdemeanors. Although consistency among all fifty-two jurisdictions is lacking, each individual jurisdiction categorizes a crime as either a felony or a misdemeanor based on its own determinations and beliefs about the seriousness and gravity of the offense. Although a misdemeanor in one state may be a felony in another, the designation of a crime as a misdemeanor in a given jurisdiction generally indicates that the legislature in that jurisdiction believes that the perpetrator of such a crime does not present a strong threat to public safety. Indeed, it is this distinction that the Minnesota Court of Appeals relied on to adopt a *per se* rule prohibiting all investigative vehicle stops for past misdemeanor offenses. In so holding, the court reasoned that the aggregate governmental interests that such stops would promote did not outweigh the severe interference with personal liberty that such stops implicate. This court was correct: the governmental interests in solving crimes and bringing offenders to justice that justified the Court's extension of *Terry* in the *Hensley* decision do not support the further extension of *Terry* to stops for completed misdemeanors. Misdemeanors are, by definition, less serious offenses than felonies, and the public interest in bringing such offenders to justice is not high enough to outweigh the strong privacy interests implicated by *Terry* stops.

In the case of dangerous-driving misdemeanors, however, the governmental interest in protecting other drivers on the road and pedestrians on the street outweighs the privacy interests implicated by a vehicle stop. For an already-completed DUI, for example, if the automobile stop is made in a timely fashion, then such a stop is permissible and reasonable under the Fourth Amendment.

The approach I advocate in this Note provides clear guidance to police officers patrolling our communities. It also sufficiently apprises individuals of their Fourth Amendment rights in advance of a *Terry* stop. In the end, a rule prohibiting stops for misdemeanors that have already been completed, with an exception for dangerous-driving misdemeanors, recognizes the inherent status of misdemeanors as less serious and dangerous offenses, as well as promotes judicial efficiency and gives greater guidance to police officers patrolling the streets.

