

NOTES

POLICING THE FOURTH AMENDMENT: THE CONSTITUTIONALITY OF WARRANTLESS INVESTIGATORY STOPS FOR PAST MISDEMEANORS

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In the 1985 case of United States v. Hensley, the Supreme Court ruled that the Fourth Amendment permits police officers to perform warrantless investigatory stops for completed felonies. However, Hensley explicitly declined to address whether the Fourth Amendment allows such stops to investigate suspicion of completed misdemeanors. Since then, courts have ruled inconsistently on this issue, creating uncertainty in this important area of search and seizure law. This Note attempts to settle this uncertainty by examining the Fourth Amendment's text, history, and jurisprudence. It argues that warrantless stops to investigate completed misdemeanors are constitutional when the underlying crime presents an ongoing danger.

INTRODUCTION

Justin Grigg must have been surprised to see flashing police lights in his rear-view mirror on a late September 2004 night.¹ Checking his speedometer would not have explained the pursuit; at the time of his stop, he was not speeding or committing any other traffic violations.² As it turns out, the police stopped Grigg not for something he was *doing* but to investigate a crime he had allegedly *done* earlier in the day. Furthermore, the past crime was so innocuous and prevalent that its illegality might surprise those of us in the MTV generation: Grigg had been “booming” his car stereo too loudly while driving through a residential neighborhood.³ He subsequently brought a suit challenging the constitutionality of the stop under the Fourth Amendment.⁴ *United States v.*

1. *United States v. Grigg*, 498 F.3d 1070, 1072–73 (9th Cir. 2007).

2. *Id.*

3. *Id.* The police found an unregistered machine gun in Grigg’s car during the investigatory stop. *Id.* At trial, Grigg argued that the firearm was inadmissible because it was discovered during an unlawful search, and thus invoked the exclusionary rule, discussed *infra* note 24 and accompanying text.

4. The Fourth Amendment provides in full:

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

*Grigg*⁵ thus sets the stage for this Note's topic: Are warrantless⁶ police stops investigating past misdemeanors constitutional?⁷

This question cuts to the heart of the proper scope of police power under the Fourth Amendment;⁸ yet, courts have answered it differently. Many courts hold that warrantless stops to investigate completed misdemeanors are categorically unconstitutional.⁹ Other courts conclude that such stops can be constitutional if they pass a reasonableness inquiry.¹⁰ Looking to Supreme Court doctrine does not settle the dispute: This widespread disagreement arises because the Court explicitly declined to address the constitutionality of such stops in *United States v. Hensley*.¹¹

This Note argues that warrantless police stops to investigate completed misdemeanors are constitutional only when employed to defuse an ongoing danger.¹² Part I situates investigatory stops within broader

U.S. Const. amend. IV. Investigatory stops are a subset of Fourth Amendment police activity. See *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (holding warrantless stop of defendant on sidewalk a "seizure"). *Terry* and cases arising under it are discussed at length *infra* Part I.

5. 498 F.3d 1070. For an analysis of the Ninth Circuit's reasoning in *Grigg*, see *infra* Part II.E.

6. The right of police to investigate criminal activity specified in a warrant supported by probable cause is well established. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (holding that search warrant supported by probable cause gives police officers authority to search areas specified in warrant); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) ("[A] major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality."); *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (recalling history of Fourth Amendment and asserting validity of police activity supported by warrants issued on probable cause); *Spinelli v. United States*, 393 U.S. 410, 412 (1969) (holding warrant issued without probable cause unconstitutional). Consequently, this Note will limit its exploration to warrantless stops for minor crimes. For further discussion of probable cause and the warrant requirement, see *infra* Part I.A.

7. Another way of phrasing this issue that makes use of the Fourth Amendment text is: Are investigatory stops for completed misdemeanors "reasonable"? See U.S. Const. amend. IV (prohibiting "unreasonable searches and seizures" (emphasis added)). See *infra* Part I for further discussion of the Fourth Amendment's reasonableness requirement.

8. See 4 Wayne LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.1(a) (4th ed. 2004) [hereinafter LaFare, *Search and Seizure*] (exploring centrality of investigatory stops to Fourth Amendment jurisprudence).

9. See *infra* Part II.D.

10. See *infra* Part II.E.

11. 469 U.S. 221, 229 (1985). *Hensley*'s failure to settle this specific issue has been observed in legal literature, although the issue has not been extensively discussed. 4 LaFare, *Search and Seizure*, *supra* note 8, § 9.2(c) (identifying uncertainty surrounding constitutional status of investigatory stops for completed misdemeanors); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 811 n.137 (1993) [hereinafter Schroeder, *Warrantless Arrests*] ("The *Hensley* Court did not decide that *Terry* stops for non-felonies were impermissible. It simply declined to decide whether warrantless '*Terry* stops to investigate all past crimes, however serious, are permitted.'" (quoting *Hensley*, 469 U.S. at 229)). For further discussion, see *infra* Part II.

12. At this point, it is crucial to make an important distinction regarding the way in which this Note reaches its conclusions. This Note essentially treats Supreme Court decisions, state legislation, and historical context as authoritative. This is to say that this Note attempts to draw conclusions regarding the constitutionality of investigatory stops for completed misdemeanors based on a descriptive analysis of Fourth Amendment doctrine.

Fourth Amendment doctrine by discussing *Terry v. Ohio*¹³ and subsequent cases that articulate the legal doctrine of investigatory stops. Part II explores the conflict among lower courts with respect to allowing police stops for investigation of misdemeanors, focusing on *Hensley* and subsequent cases. Part III then evaluates the constitutionality of investigatory stops in light of broader Fourth Amendment doctrine. It argues that while such stops are rarely constitutional, certain past misdemeanors might create an ongoing danger sufficient to justify a warrantless police stop.¹⁴ It then analyzes the felony/misdemeanor distinction in both the Fourth Amendment and other legal contexts, and concludes that on-the-beat warrantless police stops (“*Terry* stops”) for past minor crimes can be “reasonable” under the balancing test enunciated in *Hensley*. Finally, it evaluates investigatory stops for completed misdemeanors in light of the threat of various police abuses, including racial profiling, a concern recognized by the Court in numerous Fourth Amendment contexts. This Note thus bridges a critical gap in the Court’s Fourth Amendment jurisprudence and existing Fourth Amendment literature. By addressing the constitutionality of investigatory stops for completed misdemeanors, this Note explores a previously unexamined realm of criminal procedure that may importantly influence day-to-day interactions between police and civilians.¹⁵

There is a great deal of scholarship concerning what interests the Fourth Amendment *should* protect and how its doctrine should be altered to reflect those interests. See generally Akhil Reed Amar, *The Constitution and Criminal Procedure* 1–36 (1998) (deeming modern Fourth Amendment doctrine “ultimately misguided” and suggesting revisions based on “text, history, and plain old common sense”); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 *Colum. L. Rev.* 1456 (1996) [hereinafter Colb, *Innocence*] (promoting “Targeting” and “Innocence” models of understanding Fourth Amendment protections); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 *Colum. L. Rev.* 1642, 1642, 1706–25 (1998) [hereinafter Colb, *Reasonableness*] (arguing that legitimate Fourth Amendment inquiry should include “substantively balancing the interests served by particular classes of searches and seizures against the costs of such government activity for the individual’s sense of security and privacy, even in cases in which the government must also have probable cause and a warrant before proceeding”); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 *Hastings Const. L.Q.* 47 (2005) (examining original intent of Fourth Amendment in order to glean proper protections). Though such normative analyses are generally beyond the scope of this Note, Part III.D considers normative arguments in the context of racial profiling.

13. 392 U.S. 1 (1968).

14. The topic of this Note fits within existing case law in the following way:

	Felony	Misdemeanor
Ongoing	Constitutional	Constitutional
Completed	Constitutional	This Note’s Topic

15. See *infra* Part III.D and Conclusion for further discussion of practical implications of this Note’s topic.

I. THE FOURTH AMENDMENT AND THE *TERRY* EXCEPTION TO THE WARRANT CLAUSE

This Part examines the line of Supreme Court cases addressing the constitutionality of warrantless police stops. Part I.A first gives a quick overview of the Fourth Amendment, with a specific emphasis on its general requirement that police activity be supported by a warrant. Part I.B then examines *Terry's* holding that warrantless investigatory stops for ongoing felonies are constitutional because they pass a general reasonableness inquiry. In order to establish the full existing framework in this area, Part I.C concludes by examining the degree of certainty required to perform a warrantless investigatory stop.

A. The Basic Structure of the Fourth Amendment: What It Requires and What It Protects

The Fourth Amendment centrally defines the scope of individual rights afforded by the Constitution.¹⁶ It begins by firmly asserting “[t]he right of the people to be secure in their persons, houses, papers, and effects.”¹⁷ Although the precise nature of this right has been characterized in many different ways,¹⁸ it is clearly among the most venerated in our constitutional order. As the Supreme Court has stated, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”¹⁹

The Fourth Amendment contains two parts governing police conduct: a Reasonableness Clause and a Warrant Clause.²⁰ The former

16. See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 *Wm. & Mary L. Rev.* 197, 197 (1993) [hereinafter Maclin, *Central Meaning*] (“Unquestionably, the protections of the Fourth Amendment are fundamental.”). For further discussion of individual rights under the Constitution, see generally Douglas W. Kmiec, *Individual Rights and the American Constitution* 251–406 (2d ed. 2004).

17. U.S. Const. amend. IV.

18. See *infra* note 22 and accompanying text.

19. *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891).

20. This Note borrows the phrases “Reasonableness Clause” and “Warrant Clause” from existing Fourth Amendment literature. See, e.g., Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 *B.U. L. Rev.* 925, 927–28 (1997) [hereinafter Maclin, *Complexity of the Fourth Amendment*] (“Under the first model [developed by the Court], the Reasonableness Clause mandates a universal rule that all searches and seizures be reasonable. If the police obtain a warrant, the Warrant Clause contains certain safeguards to ensure the validity of the warrant.”); Timothy P. O’Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 *U. Colo. L. Rev.* 693, 707–08 (1998) (“In a search and seizure situation, the Court looks first to the Warrant Clause to determine if a warrant was properly issued. If there was no warrant, the Court then looks to the other clause of the Fourth Amendment—the Reasonableness Clause . . .”). For a comprehensive discussion of the jurisprudence surrounding the two clauses and the way in which they relate to one another, see 2 LaFave, *Search and Seizure*, *supra* note 8, § 3.1 (discussing two clauses and

guarantees protection against “unreasonable searches and seizures” by law enforcement.²¹ It thus provides an individual right to freedom²² from “unreasonable” searches or arrests.²³ A criminal procedure doctrine, known as the “exclusionary rule,” protects this individual right by rendering evidence gathered during an “unreasonable” search or arrest inadmissible at trial.²⁴ The Fourth Amendment thus guarantees both a substantive right and procedural protection for criminal defendants.

Court’s interpretation of relation to one another); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 762–63, 801 (1994) [hereinafter Amar, *First Principles*] (arguing that reasonableness is key requirement of Fourth Amendment and that strict warrant requirement conflicts with text and history of Fourth Amendment); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 *S. Cal. L. Rev.* 1, 5–11, 13, 20–21, 24–25 (1994) [hereinafter Maclin, *Cure Worse than Disease*] (contending Fourth Amendment should be read to require warrant for searches and seizures).

21. U.S. Const. amend. IV. Like almost all constitutional guarantees, the Fourth Amendment applies to state action via the Fourteenth Amendment and thus prohibits state police from unreasonable searches and seizures. See U.S. Const. amend. XIV; see also Geoffrey R. Stone et al., *Constitutional Law* 734–40 (5th ed. 2005) (discussing evolution of incorporation doctrine). The Fourth Amendment’s guarantee against unreasonable searches and seizures was held applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

22. The Court and academics construe this right in multiple ways, with two of the most common constructions being a “right of privacy,” see, e.g., Colb, *Innocence*, supra note 12, at 1457 n.1 (using “the phrase ‘right of privacy’ to refer to ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches’” (quoting U.S. Const. amend. IV)), and a “right to security,” see, e.g., *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (referring to right protected by Fourth Amendment as “right to personal security”). For further discussion by the Court, see *Katz v. United States*, 389 U.S. 347, 350 (1967) (“[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, [and] its protections go further”); *Berger v. New York*, 388 U.S. 41, 62 (1967) (“[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement.”); *Ker v. California*, 374 U.S. 23, 32 (1963) (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be ‘as of the very essence of constitutional liberty’” (quoting *Gouled v. United States*, 255 U.S. 298, 304 (1921))).

23. While arrests are not explicitly mentioned in the Fourth Amendment, the Court has long assumed that they were intended to and should fall within the Fourth Amendment’s ambit. See *Steagald v. United States*, 451 U.S. 204, 211–13 (1981) (acknowledging Court has “consistently held that the entry into a home to . . . make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant”); *Payton v. New York*, 445 U.S. 573, 583–86 (1980) (“[T]he warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable”); *United States v. Watson*, 423 U.S. 411, 416–18 (1976) (stating arrest “without a warrant for a misdemeanor of felony committed in [a peace officer’s] presence as well as for a felony not committed in his presence” was allowed “if there was reasonable ground for making the arrest”); *Giordenello v. United States*, 357 U.S. 480, 485–86 (1958) (stating Fourth Amendment “of course applies to arrest as well as search warrants”); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 451–53 (1806) (providing early assumption by Justice Marshall that Fourth Amendment governs arrests).

24. See *Mapp*, 367 U.S. at 644 (establishing exclusionary rule in state cases); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing exclusionary rule in federal cases);

The Warrant Clause assures that no search²⁵ or arrest warrant²⁶ will be issued without “probable cause.”²⁷ While the factual elements establishing probable cause vary by circumstance,²⁸ warrant issuance generally requires evidence that a search or seizure is more likely than not justified from the perspective of a person “‘of reasonable caution.’”²⁹ The Supreme Court, however, has held that warrants are not always a constitutional requirement.³⁰ For instance, “exigent circumstances”³¹ can justify dispensing with the warrant requirement; such circumstances include the need to preserve evidence, preventing harm to self or others, or the “hot pursuit” of a suspect.³²

B. *Investigatory Stops and Terry v. Ohio*

Investigatory stops are another type of Fourth Amendment activity that does not require a warrant.³³ Such stops involve situations where a police officer stops a suspect to investigate suspicious activity without suf-

see also Joshua Dressler & George C. Thomas, *Criminal Procedure: Investigating Crime* 456–504 (3d ed. 2006) [hereinafter Dressler & Thomas, *Criminal Procedure*] (discussing doctrinal nuances of exclusionary rule).

25. See *United States v. Harris*, 403 U.S. 573, 575–84 (1971) (exploring grounds on which search warrant may be issued by magistrate judge); *Spinelli v. United States*, 393 U.S. 410, 412–38 (1969) (same).

26. In fact, the Fourth Amendment does not contain explicit mention of protection against unreasonable arrests. However, such arrests have been deemed “seizures” and thus fall under the Fourth Amendment’s protection. See Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 3.5(a) (3d ed. 2000) (exploring grounds on which arrest warrant may issue and exceptions to arrest warrant requirement); *supra* note 23.

27. U.S. Const. amend. IV. Probable cause is an evidentiary standard regarding the certainty that a suspect is engaged in criminal activity: “A search or seizure that is conducted *in the absence* of probable cause ordinarily is *unreasonable*.” Dressler & Thomas, *Criminal Procedure*, *supra* note 24, at 132. As the Court in *Brinegar v. United States* noted, probable cause to arrest “exists where ‘the facts and circumstances within (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed” by the suspect. 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

28. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (“[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . .”).

29. *Brinegar*, 338 U.S. at 175 (quoting *Carroll*, 267 U.S. at 162).

30. See, e.g., *United States v. Watson*, 423 U.S. 411, 424 (1976) (upholding warrantless public daytime arrest).

31. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (“[I]n most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . .”). While exactly what qualifies as an exigent circumstance changes from case to case (depending on the exigency), courts have generally relied on safety needs or the need to preserve evidence as sufficient exigent circumstances to justify dispensing with the probable cause requirement. See *infra* Part III.

32. See, e.g., Dressler & Thomas, *Criminal Procedure*, *supra* note 24, at 203–53 (discussing situations giving rise to exigent circumstances); 4 LaFave, *Search and Seizure*, *supra* note 8, § 9.5 (same).

33. For discussion of, and cases reflecting, the diminishing role of warrants, see Dressler & Thomas, *Criminal Procedure*, *supra* note 24, at 333–433.

ficient evidence to support the suspect's arrest.³⁴ Police departments have long practiced investigatory stops.³⁵ However, as the Court began to more precisely define the proper limits of police activity under the Fourth Amendment in the 1960s, the uncertain constitutional status of warrantless investigatory stops inevitably came within its view.³⁶

Terry v. Ohio presented the Court with an opportunity to definitively establish the constitutional standing of warrantless investigatory police stops. In *Terry*, a patrolling police officer noticed Terry and two other men suspiciously loitering about a store.³⁷ Through "habits of observation" developed on the job, the officer suspected criminal activity³⁸ and decided to ask them for their names.³⁹ When they mumbled inarticulately under their breath, the officer grabbed Terry, spun him around, and patted him down.⁴⁰ In the process of the frisk, the officer discovered and removed a pistol from Terry's pocket.⁴¹ Charged with carrying a concealed weapon,⁴² Terry brought a motion to suppress the pistol from

34. 4 LaFave, Search and Seizure, supra note 8, § 9.4. The above description is an oversimplification: There is a large amount of case law on what exactly constitutes a "stop" and what activity falls short of such a distinction. See *id.* (drawing line between actions "short of stop" and actions which can be classified as stops).

35. See *id.* § 9.1(a) ("The practice of stop and frisk, of course, is by no means new. It is a time-honored police procedure for officers to stop suspicious persons for questioning . . .").

36. As Professor LaFave describes:

Although it ha[d] long been a matter of routine in every major police department in the country, for some years the police appeared content with the fact that their authority to employ the stop-and-frisk tactic was undefined. Few courts or legislatures had said that the police could stop and frisk; but neither had they said that the practice was improper, and the resulting uncertainty did not strike the police as disadvantageous. But when the Supreme Court imposed a Fourth Amendment exclusionary rule on the states in 1961, and then imposed a Fifth Amendment exclusionary rule to bar admissions obtained without certain warnings in 1966, it became increasingly apparent that the police could not continue to benefit from the law's silence. Notwithstanding the common use of such euphemisms as "stop," "frisk," and "field interrogation," it was clear that sooner or later courts would have to determine whether these practices could be squared with the Constitution.

Id. (internal citations omitted).

37. *Terry v. Ohio*, 392 U.S. 1, 6 (1968) ("[A]fter observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, [the officer] suspected the two men of 'casing a job, a stick-up,' and that he considered it his duty as a police officer to investigate further.").

38. The three men repeatedly peered through the store's window, searched its surroundings, and paced back and forth. *Id.*

39. *Id.* at 6–7.

40. *Id.* at 7.

41. *Id.*

42. *Id.*

evidence at trial,⁴³ but the motion was denied.⁴⁴ Terry was subsequently convicted and sentenced to a jail term of one to three years.⁴⁵

Terry addressed the constitutionality of the officer's actions.⁴⁶ As a threshold matter, the Supreme Court ruled that Terry's detainment, although very brief, sufficiently intruded upon his personal freedom to be deemed a "seizure,"⁴⁷ and accordingly fell under the Fourth Amendment. Furthermore, the pat-down qualified as a "search" in spite of its brief, truncated nature.⁴⁸

Though the *Terry* Court recognized that stop and frisks qualify as Fourth Amendment activity, it nevertheless ruled that they need not be supported by probable cause.⁴⁹ It reasoned that stop and frisks were "an entire rubric" of police conduct involving "necessarily swift action predicated upon on-the-spot observations of the officer on the beat."⁵⁰ Requiring a warrant for stop and frisks would be time-consuming and impractical, as well as unprecedented.⁵¹ While an officer should obtain a warrant "whenever practicable,"⁵² such was clearly not the case in *Terry* given the officer's duty to immediately defuse a developing criminal situation.⁵³

43. *Id.* Terry sought to suppress the evidence on the grounds that it was obtained in a search incident to an unlawful arrest. For further detail regarding search-incident-to-arrest law, see *infra* Part III.C.1.b-c.

44. *Terry*, 392 U.S. at 7-8. More specifically:

The trial court rejected [the prosecutor's] theory, stating that it 'would be stretching the facts beyond reasonable comprehension' to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, 'had reasonable cause to believe that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action.'

Id.

45. *Id.* at 4. Terry was convicted according to "Ohio Rev. Code § 2923.01 (1953), [which] provides in part that '(n)o person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person.'" *Id.* at 4 n.1. An exception was made "for properly authorized law enforcement officers." *Id.*

46. *Id.* at 4. *Terry* thus addressed whether warrantless police stops to investigate suspicion of contemporaneous crimes were "reasonable." See U.S. Const. amend. IV.

47. *Terry*, 392 U.S. at 16.

48. *Id.*

49. *Id.* at 20. For discussion of the probable cause requirement, see *supra* note 27.

50. *Terry*, 392 U.S. at 20.

51. *Id.*

52. *Id.* ("We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . ."). Professor Akhil Amar has criticized *Terry* on this point, arguing that requiring a warrant whenever it is "practicable" to obtain one is inconsistent with the historical foundations of search and seizure law, which contains no such requirement. Akhil Reed Amar, *Terry* and Fourth Amendment First Principles, 72 St. John's L. Rev. 1097, 1099 (1998) [hereinafter Amar, *Terry* First Principles].

53. *Terry*, 392 U.S. at 20.

Having addressed investigatory stops under the Fourth Amendment's warrant requirement, the Court turned to the Reasonableness Clause.⁵⁴

C. *Terry's Application of a Reasonableness Balancing Test to Determine the Constitutionality of Warrantless Investigatory Stops*

In order to address the reasonableness of the investigatory stop, the Court applied a reasonableness balancing test.⁵⁵ This test weighed “the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen” against the “invasion which the search (or seizure) entails.”⁵⁶ Furthermore, the officer must have been able to identify “specific and articulable facts” that reasonably justified the intrusion.⁵⁷ While *Terry* also considered the reasonableness of the officer's frisk,⁵⁸ this Note focuses on the Court's ruling with respect to investigatory stops.

The Court reasoned that any police interference with one's natural right to “liberty and personal security” constitutes a significant invasion of privacy;⁵⁹ investigatory stops, which police can employ at any time for judicially unexamined motives and which inevitably entail police detention, clearly invade one's liberty interests.⁶⁰ Weighed against this privacy interest is the governmental interest in “effective crime prevention and detection”⁶¹—i.e., the need to act quickly to foil imminent criminal activity and defuse the threat to safety posed by an armed robbery. The Court concluded that this need created a compelling governmental interest in

54. *Id.* See *supra* Part I.A for discussion of the Fourth Amendment's warrant and reasonableness requirements and the connection between the two.

55. This balancing test was first developed in *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967) (arguing reasonableness standard must take into account “competing public and private interests . . . at stake”); see also *Brown v. Texas*, 443 U.S. 47, 50–51 (1979) (“Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”).

56. *Terry*, 392 U.S. at 21.

57. *Id.*

58. *Id.* at 24–30. The need to protect officers from physical harm provided sufficient governmental interest to justify the frisk. If an arresting officer has justifiable fears that an assailant threatens her safety, as in *Terry*, she may “take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” *Id.* While even a limited frisk of one's clothing constitutes a “severe, . . . annoying, frightening, and perhaps humiliating” intrusion on physical privacy, actions absolutely necessary to discover and detain dangerous weapons justify the search. *Id.* Such frisks are thus constitutional “regardless of whether [an officer] has probable cause to arrest the individual for a crime.” *Id.*

59. *Id.* at 12, 16–19.

60. See *supra* note 22 and accompanying text for discussion of the nature of rights protected by the Fourth Amendment. While scholars characterize these rights differently, it is clear the Fourth Amendment protects the right of individuals to be free from *over*intervention by the police. The question this Note addresses is whether investigatory stops for completed misdemeanors constitute such an excessive interference.

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

the officer's warrantless stop that outweighed the competing privacy interest.⁶² Accordingly, the cornerstone of *Terry's* finding of reasonableness with respect to investigatory stops was the officer's need to act quickly, both in order to thwart criminal activity and to prevent an imminent danger.⁶³

Subsequent Supreme Court decisions further illuminated the circumstances under which an officer can reasonably employ a *Terry* stop. In *Sibron v. New York*, a police officer observed the defendant conversing with known narcotic addicts many times during an eight hour period.⁶⁴ The policeman approached the defendant with the statement "[y]ou know what I am after"⁶⁵ and frisked him. The Court struck down the officer's stop and frisk, concluding that vague suspicion of minor narcotics dealing did not justify the officer's actions.⁶⁶ Only a safety threat presented a significant enough interest to justify the physical intrusion.⁶⁷ Justice Harlan's concurring opinion framed the inquiry as whether the underlying criminal situation necessitated "immediate action."⁶⁸ As one commentator has suggested, *Sibron* signals the Court's unwillingness to extend police power to *Terry* stops investigating minor, nondangerous crimes not requiring swift action.⁶⁹

D. *The Degree of Certainty Required to Perform an Investigatory Stop*

While probable cause is not required to perform an investigatory stop,⁷⁰ several cases have illuminated the degree of certainty required. In *Brown v. Texas*, the Court held that a suspect could not be stopped merely because he "looked suspicious" and had not been seen in an area before, since such evidence did not amount to "reasonable suspicion, based on

62. The Court noted, "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." *Id.* at 23.

63. In ruling that investigatory stops for ongoing felonies are reasonable, the Court ruled that *all* such stops are reasonable, unless the officer's actions in performing the stop were impermissible. That is, the Court's ruling obviated the need to evaluate every investigatory stop for a felony by the reasonableness balancing test; by virtue of *Terry's* ruling, all ongoing felonies provide reasonable grounds for performing an investigatory stop.

64. 392 U.S. 40, 45 (1968).

65. *Id.* Subsequently, the defendant mumbled under his breath and reached into his pocket. The officer simultaneously reached into the defendant's pocket, grabbing a bag of heroin. *Id.*

66. See *id.* at 62-63.

67. *Id.* at 63-66.

68. *Id.* at 73 (Harlan, J., concurring).

69. See 4 LaFave, *Search and Seizure*, *supra* note 8, § 9.2(c) (noting *Sibron* "suggests the Court has some reluctance about extending *Terry* to such lesser offenses as possession of narcotics").

70. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (requiring only "'some minimal level of objective justification'" to support *Terry* stop (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984))).

objective facts, that the individual [was] involved in criminal activity.”⁷¹ The Court elaborated on this “reasonable suspicion” standard in *United States v. Brignoni-Ponce*,⁷² concluding that the plaintiffs’ Mexican heritage and location near the Mexican border were insufficient to arouse reasonable suspicion that they were illegally in America.⁷³ In *Adams v. Williams*, however, the Court ruled that an informant’s tip could give rise to reasonable suspicion, implying that an officer need not have witnessed the criminal activity.⁷⁴ Each decision arrived at the reasonable suspicion standard as a compromise between promoting individual liberty and accommodating the spontaneous nature of investigatory stops, which demands a lesser standard.⁷⁵

E. *The Existing Framework for Evaluating Investigatory Stops and Its Limitations*

Taken together, these cases create a solid framework for evaluating warrantless investigatory stops. Such stops are generally reasonable only when the need to act promptly necessitates immediate action.⁷⁶ *Terry* stops should be subjected to a reasonableness inquiry that weighs the governmental interests in the stop against the severity and nature of the intrusion. Furthermore, a police officer employing a *Terry* stop must have a reasonable suspicion, based on specific, concrete facts, that the suspect is involved in criminal activity; yet the officer need not have witnessed the criminal activity herself.⁷⁷

The cases discussed above concern investigatory stops for the sake of crime prevention—i.e., defusing a developing criminal situation. Yet, courts have validated the use of *Terry* stops for crime detection. An officer may stop a person if she has reasonable suspicion that the suspect has just committed a crime in the immediate past.⁷⁸ Additionally, a series of cases establish the power to stop suspects near the scene of a recent crime if a “rational belief” exists that they are guilty of criminal activity.⁷⁹ Such detection stops are justified, in part, because the probability of ap-

71. 443 U.S. 47, 47, 51 (1979).

72. 422 U.S. 873 (1975).

73. *Id.* at 878–87.

74. 407 U.S. 143, 147 (1972); see also *Alabama v. White*, 496 U.S. 325, 328–31 (1990) (discussing factors contributing to finding that informant’s tip gave rise to reasonable suspicion).

75. See *Brignoni-Ponce*, 422 U.S. at 878; *Adams*, 407 U.S. at 146; *Sibron v. New York*, 392 U.S. 40, 60 n.20 (1968).

76. See *supra* Part I.C.

77. See *supra* Part I.C.

78. See *United States v. Cortez*, 449 U.S. 411, 417 n.2 (1981) (“[A]n officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct.”).

79. See, e.g., *People v. Harris*, 540 P.2d 632, 634–35 (Cal. 1975).

prehending a criminal that the victim cannot identify significantly decreases if the criminal has fled the vicinity.⁸⁰

While the ability to stop reasonable suspects immediately after a crime is well established, *Terry* does not answer whether such stops are justified for crimes completed a significant time earlier. The Court addressed this question directly in *United States v. Hensley*.⁸¹

II. *HENSLEY* AND CASES ADDRESSING THE CONSTITUTIONALITY OF *TERRY* STOPS FOR COMPLETED MISDEMEANORS

This Part examines *Hensley* and cases interpreting its holding. It presents *Hensley*'s facts and then examines the case's central holding—that police stops can be employed to investigate completed *felonies*. It then explores the split among lower courts over whether *Hensley* deems such stops for completed *misdemeanors* categorically unreasonable.

A. *Facts of Hensley*

On December 4, 1981, two armed men robbed a bar in St. Bernard, Ohio. Six days later, the St. Bernard police issued a “wanted flyer” to surrounding police departments, which stated that the men were suspected of armed robbery, offered details regarding the alleged crime, and requested that other police departments hold them if found.⁸² On December 16, a police officer from a neighboring district observed Hensley in the front seat of a white convertible.⁸³ After having difficulty ascertaining whether a warrant had been issued for Hensley's arrest, the officer ordered Hensley and an adjacent passenger to exit the car on the basis of the flyer.⁸⁴ Hensley subsequently challenged the reasonableness of the stop, arguing that warrantless *Terry* stops should be limited to ongoing crimes or those committed in the immediate past.⁸⁵ While the Eastern District of Kentucky court ruled that the stop was permissible, the Sixth Circuit overturned the district court's decision.⁸⁶ Subsequently, the Supreme Court granted certiorari to hear the case.⁸⁷

80. See *id.*

81. 469 U.S. 221 (1985).

82. *Id.* at 223.

83. *Id.* at 223–24.

84. *Id.* at 224.

85. *Id.* at 225. During a subsequent search of the convertible, officers discovered three handguns hidden in the car. Hensley was indicted under federal law as a felon in possession of firearms. He filed a motion to suppress the guns from evidence under the exclusionary rule, asserting that the police impermissibly stopped him. *Id.*

86. 713 F.2d 220, 225 (6th Cir. 1983). The Sixth Circuit held that *Terry* stops were intended as limited exceptions to the probable cause requirement, and should thus only apply to ongoing crimes. *Id.*

87. 713 F.2d 220, cert. granted, 467 U.S. 1203 (1984).

B. Hensley's *Holding That Investigatory Stops for Completed Felonies Are Reasonable*

United States v. Hensley addressed the constitutionality of warrantless investigatory stops for past felonies.⁸⁸ Justice O'Connor opened the majority opinion by discussing the *Terry*⁸⁹ and *Brignoni-Ponce*⁹⁰ decisions, asserting that *Terry* did not create an "inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest."⁹¹ Rather, *Terry* and *Brignoni-Ponce* together implied that an officer can stop a car without a warrant if she has reasonable suspicion that the passengers are engaged in a crime.⁹²

In fact, other cases suggested the constitutionality of such stops. *United States v. Cortez* stated that "an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct."⁹³ Similarly, dicta from *United States v. Place*,⁹⁴ *Michigan v. Summers*,⁹⁵ and *Florida v. Royer*⁹⁶ suggested that a police officer can stop a suspect to investigate a past crime.

Yet these cases involved stops soon after a crime was committed. The "precise limits" of a *Terry* stop for past, completed crimes were "more difficult to define."⁹⁷ In order to make this determination and define the "limits" of stops for past crimes, Justice O'Connor adopted the *Terry* reasonableness test, in which the governmental interests in an investigatory stop are weighed against the nature and severity of the intrusion.⁹⁸

Echoing *Terry*, the Court in *Hensley* reasoned that investigatory stops inevitably infringe on the Fourth Amendment "right of the people to be secure in their person[],"⁹⁹ if only for a short period of time. However, the stop in *Hensley* differed from the stop in *Terry*: Stops for ongoing and

88. For further discussion of *Hensley*, see Schroeder, Warrantless Arrests, *supra* note 11, at 811; see also 4 LaFave, Search and Seizure, *supra* note 8, § 9.2(c).

89. 392 U.S. 1 (1968); see *supra* Part I.B for further discussion of *Terry*.

90. 422 U.S. 873 (1975).

91. *United States v. Hensley*, 469 U.S. 221, 227 (1985).

92. See *supra* Part I.D for discussion of the reasonable suspicion standard.

93. 449 U.S. 411, 417 n.2 (1981).

94. 462 U.S. 696, 702 (1983) (acknowledging police authority to stop person "when the officer has reasonable, articulable suspicion that the person *has been*, is, or is about to be engaged in criminal activity" (emphasis added)).

95. 452 U.S. 692, 698 n.7 (1981) (noting precedent "that the Fourth Amendment does not prohibit forcible stops when the officer has a reasonable suspicion that a crime *has been* or is being committed" (emphasis added)).

96. 460 U.S. 491, 498 (1983) (recognizing stop as justified "if there is articulable suspicion that a person *has committed* or is about to commit a crime" (emphasis added)).

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

98. See *id.* (applying *Terry* reasonableness test to evaluate investigatory stop for completed felony).

99. *Id.* at 226.

past crimes present different governmental interests.¹⁰⁰ First, stops for past crimes “do[] not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity,”¹⁰¹ because the police cannot prevent an already-committed crime. Second, the circumstances requiring immediate police action—most notably where the safety of the officer and the public at large is at stake—are likely not as dire for completed crimes as for imminent or ongoing crimes.¹⁰² Similarly, officers investigating a completed crime likely have greater opportunity to choose the time and manner of their investigation, and to obtain a warrant.¹⁰³

Nonetheless, the government retains a significant interest in *Terry* stops for completed crimes: “[W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice.”¹⁰⁴ That is, investigatory stops for past felonies can prove instrumental in investigating crimes.

C. *Felony/Misdemeanor Distinction in Hensley*

Under *Hensley*, an investigatory stop based on specific and articulable facts that the suspect has completed a felony is categorically reasonable, as long as the officer’s conduct in performing the stop is reasonable.¹⁰⁵ The Court reached this conclusion by adopting a test weighing the governmental interest in the stop against the nature of the intrusion. While the Court recognized the significant invasion of privacy inevitably presented by investigatory stops,¹⁰⁶ it determined that the governmental interests in effective crime prevention and control trumped. Furthermore, the Court concluded that the St. Bernard police had specific and articulable facts justifying a reasonable suspicion that Hensley was in-

100. *Id.* at 228 (“The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct.”).

101. *Id.*

102. *Id.*

103. *Id.* at 228–29. *Terry* expressed an explicit preference for obtaining a warrant when “practicable.” *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

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

105. As explained *supra* note 63, an officer’s conduct can bear on whether a specific apprehension is reasonable. For instance, the unreasonable use of force to apprehend a suspect could render a stop unconstitutional, even if the grounds for the apprehension were reasonable. See *Tennessee v. Garner*, 471 U.S. 1, 20–22 (1985) (holding use of deadly force to seize fleeing person suspected of robbery unreasonable). However, this Note addresses only the question of whether completed misdemeanors provide reasonable grounds for an investigatory stop.

106. See text accompanying *supra* note 47 (discussing Court’s finding in *Terry* that brief detention was seizure under Fourth Amendment).

volved in an armed robbery.¹⁰⁷ The informant's testimony implicating Hensley aroused reasonable suspicion of Hensley's involvement in the crime; the stop was thus reasonable.¹⁰⁸

While the *Hensley* Court ruled definitively on *Terry* stops for completed felonies, it declined to address such stops for completed misdemeanors.¹⁰⁹ It emphasized the potentially different governmental interests in *Terry* stops for completed felonies and misdemeanors.¹¹⁰ Though the Court held that, “[p]articularly in the context of felonies or crimes involving a threat to public safety,” the need to investigate the crime outweighs the individual's interest in freedom from detention,¹¹¹ it fenced in its holding:

We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.¹¹²

This aspect of Justice O'Connor's opinion possesses important details. While O'Connor spoke definitively on *Terry* stops for completed felonies, she did not explicitly address such stops for completed misdemeanors.¹¹³ However, one might argue that the use of the word “particularly” emphasized in the holding above subtly hinted that certain minor crimes might present a safety threat justifying an investigatory stop.¹¹⁴ The *Hensley* Court, however, did not elaborate on this issue.¹¹⁵

Since *Hensley*, numerous state and federal courts have addressed this issue; these courts, however, have failed to reach a consensus.

107. *Hensley*, 469 U.S. at 233. It is not clear from the opinion whether the dangerousness of the underlying offense of armed robbery played a crucial role. Justice O'Connor mentioned that stops for completed felonies were particularly justified. *Id.* at 229. Given the ambiguity, the safest conclusion is to assume that Justice O'Connor referred primarily to felonies, as this interpretation gives the holding the least breadth.

108. *Id.* at 233–34.

109. See 4 LaFave, Search and Seizure, *supra* note 8, § 9.2(a) (arguing that *Hensley* did not prohibit investigatory stops for completed misdemeanors, but merely failed to address issue); Schroeder, Warrantless Arrests, *supra* note 11, at 818 (same).

110. See *Hensley*, 469 U.S. at 229; see also 4 LaFave, Search and Seizure, *supra* note 8, § 9.2(c) (recognizing question of reasonableness for completed misdemeanor stops left open in *Hensley*); Schroeder, Warrantless Arrests, *supra* note 11, at 818, 820 (discussing *Hensley* and effect of seriousness of offense on reasonableness of seizure).

111. *Hensley*, 469 U.S. at 229 (emphasis added).

112. *Id.*

113. See *supra* note 109.

114. See *infra* Part III.B for further linguistic analysis of Justice O'Connor's statement.

115. For discussion of the specific stop underlying *Hensley*, see *supra* notes 107–108 and accompanying text.

D. *Cases Holding that Terry Stops for Completed Misdemeanors Are Always Unconstitutional*

A number of state and federal cases have held that *Terry* stops for completed misdemeanors are categorically unreasonable. These cases can be divided into (1) those that interpret *Hensley* to explicitly limit *Terry* stops to completed felonies¹¹⁶ and (2) those that do not interpret *Hensley* to explicitly announce such a limitation, but conclude that stops for completed misdemeanors can never pass the reasonableness inquiry announced in *Terry* and *Brown*.¹¹⁷

1. *Cases Interpreting Hensley to Limit Terry Stops to Completed Felonies.* — In a 1992 Sixth Circuit case, *United States v. Halliburton*,¹¹⁸ a woman reported witnessing the defendant engaged in the misdemeanor offense of indecent exposure. Two weeks later, a police officer confronted the defendant in order to question him. When the defendant refused, the officer continued to block the defendant's path and state his intention to question him.¹¹⁹

The Sixth Circuit, in an unpublished table decision—thereby limiting its precedential value—invoked *Hensley* in evaluating whether the stop for the relatively minor, completed crime of indecent exposure was reasonable.¹²⁰ In so doing, the court created a bright-line rule against such stops:

[The] “seizure” of defendant was “unreasonable” within the meaning of the Fourth Amendment. [The officer] lacked grounds for a *Terry* stop of defendant because he lacked a reasonable and articulable suspicion that defendant was committing or was about to commit a crime or that defendant had committed a completed felony.¹²¹

The unpublished *Halliburton* opinion thus interpreted *Hensley*'s language as prohibiting outright searches for suspicion of past, completed misdemeanors.

Two subsequent cases in the Sixth Circuit addressing *Terry* stops for ongoing felonies contain language suggesting that *Hensley* directly prohibits such stops for completed misdemeanors. In *United States v. Roberts*, the Sixth Circuit deemed reasonable an investigatory stop based on suspicion of driving while intoxicated, a felony offense.¹²² However, *Roberts* noted that police can employ an investigatory stop for suspicion of a “completed felony, but not for a completed misdemeanor.”¹²³ The Sixth Circuit

116. See *infra* Part II.D.1.

117. See *infra* Part II.D.2.

118. 966 F.2d 1454, 1992 WL 138433 (6th Cir. 1992) (unpublished table decision).

119. *Id.* at *2.

120. *Id.* at *4.

121. *Id.*

122. See 986 F.2d 1026, 1030 (6th Cir. 1993).

123. *Id.* (citation and internal quotation marks omitted).

reiterated *Roberts's* dicta in *Gaddis ex rel. Gaddis v. Redford Township*.¹²⁴ Although the case again dealt with a present, ongoing crime,¹²⁵ the court asserted that “[p]olice may make an investigative stop of a vehicle when they have reasonable suspicion of an ongoing crime, whether it be a felony or misdemeanor Police may also make a stop when they have reasonable suspicion of a completed felony, *though not of a mere completed misdemeanor*.”¹²⁶ Each of these cases, however, merely reads *Hensley* as prohibiting completed misdemeanor stops rather than relying on legal principles to derive this conclusion, as the next group of cases does.

2. *Cases Holding Investigatory Stops for Completed Misdemeanors Cannot Pass Reasonableness Test.* — Several state courts have held that *Terry* stops for completed minor crimes cannot pass the reasonableness test announced in *Terry* and are thus categorically unconstitutional.¹²⁷ In the Minnesota case *Blaisdell v. Commissioner of Public Safety*, a gas station clerk told a police officer that a car leaving the station had filled up on gas and driven off without paying two months earlier, a misdemeanor in Minnesota.¹²⁸ The officer followed the car, stopped it, and informed the defendant that he was investigating the alleged no-pay theft.¹²⁹

Unlike the courts in *Halliburton*, *Roberts*, and *Gaddis*,¹³⁰ the court in *Blaisdell* adopted the *Terry* reasonableness test to evaluate the stop.¹³¹ The court observed that stops for completed misdemeanors do not promote the governmental interest in effective crime prevention and detection to the same degree as stops for completed felonies.¹³² The court looked to the Minnesota legislature’s “disparate legislative treatment” of felonies and misdemeanors, including greater punishment for the former and a prohibition against warrantless arrests for minor crimes not committed in an officer’s presence.¹³³ Furthermore, vehicular stops for com-

124. 364 F.3d 763 (6th Cir. 2004).

125. The crime in *Gaddis* was driving while intoxicated. *Id.* at 766.

126. *Id.* at 771 n.6 (emphasis added) (citations omitted).

127. See, e.g., *State v. Bennett*, 520 So. 2d 635, 636 (Fla. Dist. Ct. App. 1988) (mem.) (upholding trial court decision that held investigatory stops for completed misdemeanors constitutionally impermissible); *State v. Duncan*, 43 P.3d 513, 515, 518–19 (Wash. 2002) (en banc) (ruling that police cannot stop and detain suspect for civil infraction committed outside of officer’s presence).

128. *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 881 (Minn. Ct. App. 1985). The decision was affirmed on other grounds by the Minnesota Supreme Court, which mentioned, but explicitly declined to address, the lower court’s ruling with respect to the constitutionality of stops for completed misdemeanors. *Blaisdell v. Comm’r of Pub. Safety*, 381 N.W. 2d 849, 850 (Minn. 1986).

129. *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d at 881.

130. See *supra* Part II.D.1 for discussion of these cases.

131. See *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d at 882 (“Since the ‘no-pay’ gas theft is categorized as a misdemeanor, our analysis begins, rather than ends, with *Hensley*.”).

132. *Id.* at 883–84.

133. *Id.*

pleted misdemeanors do not help solve the crime, as an officer can easily write down the license plate number of the vehicle.¹³⁴

The court weighed these considerations against the fact that all investigatory stops constitute a significant, unsettling invasion of privacy.¹³⁵ Accordingly, the Minnesota court announced a bright-line rule: “We conclude that the limited benefits to the public interest resulting from warrantless vehicle stops to investigate past misdemeanors do not outweigh the intrusion on the ‘motorists’ right to free passage without interruption.”¹³⁶

Several courts have thus interpreted *Hensley* to prohibit investigatory stops for completed misdemeanors or have ruled that such stops can never pass the test announced in *Terry*. Other courts, however, have ruled that such stops can be reasonable.

E. *Cases Holding that Terry Stops for Completed Misdemeanors Can Be Constitutional*

Both the Ninth and Tenth Circuits held that investigatory stops for suspicion of completed misdemeanors can be constitutional under the Fourth Amendment if they pass a reasonableness analysis.

In *United States v. Grigg*, a police officer stopped and questioned the defendant in response to a civilian complaint that he had previously on several occasions played his car stereo too loudly, a misdemeanor offense “at most.”¹³⁷ As a threshold matter, the Ninth Circuit held that

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.¹³⁸

The court acknowledged that “it is difficult to imagine a less threatening offense than playing one’s car stereo at an excessive volume.”¹³⁹ Within the context of a reasonableness analysis, an innocuous, nondangerous offense seemingly fails to promote a governmental interest sufficient to outweigh an invasion of physical privacy.¹⁴⁰ The court noted that the Maryland District Court and a number of state cases had echoed this reasoning and held that the dangerousness of the underlying offense

134. *Id.*

135. *Id.*

136. *Id.* at 884.

137. 498 F.3d 1070, 1072, 1076 (9th Cir. 2007). See *supra* text accompanying notes 1–7 for further factual description.

138. *Grigg*, 498 F.3d at 1081.

139. *Id.* at 1077.

140. *Id.*

determined the reasonableness of *Terry* stops for completed misdemeanors.¹⁴¹

The governmental interest served depends largely on the type of misdemeanor underlying the stop.¹⁴² *Grigg* ultimately adopted the following articulation of the *Terry* reasonableness inquiry:

We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to 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). An assessment of the “public safety” factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the efficacy of a *Terry* stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop.¹⁴³

Furthermore, the fact that the completed crime was minor, and the suspect was almost certainly not “on the run,” indicated that police officers might have had other means of investigating the crime.¹⁴⁴ While the Ninth Circuit thus deemed *Grigg*’s stop unreasonable, it made clear that certain minor crimes presenting an ongoing safety threat might justify such a stop.¹⁴⁵

The Tenth Circuit adopted a similar view in *United States v. Moran*.¹⁴⁶ *Moran* involved a stop to investigate suspicion of repeated, past misdemeanor trespasses by the defendant. The court acknowledged the discord in this field of law, stating that “the Sixth [in *Gaddis* and *Roberts*] and Ninth [in *Grigg*] Circuits have split on the issue.”¹⁴⁷ It then sided with the

141. *Id.* at 1077, 1079; see also *United States v. Jegede*, 294 F. Supp. 2d 704, 708 (D. Md. 2003) (holding that dangerous nature of underlying completed misdemeanor was decisive factor in determining whether investigatory stop was reasonable); *State v. Myers*, 490 So. 2d 700, 703–04 (La. Ct. App. 1986) (“The safety of the motoring public and the potential capacity of the automobile to inflict serious damage provides a fairly strong government interest.”); *State v. Burgess*, 776 A.2d 1223, 1227–28 (Me. 2001) (upholding stop without mention of *Hensley* to investigate complaint of previous threat by drunken man to shoot holes in vehicle); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 117 (Miss. 1999) (holding, without citation to *Hensley*, that stop of vehicle reported to have driven recklessly was constitutional and rejecting “felony/misdemeanor distinction . . . [that] would require law enforcement officials to ignore communications of other officials warning of drivers who may be impaired, ill, reckless, or dangerous to the public”); *State v. Blankenship*, 757 S.W.2d 354, 357 (Tenn. Crim. App. 1988) (holding stop constitutional on report that suspect was involved in hit-and-run accident). Although some of these cases do not rely on *Hensley*, the common rationale to justify the investigative stop of an already completed misdemeanor stems from the exigency of preventing or mitigating public safety risks associated with the nature of the offense.

142. *Grigg*, 498 F.3d at 1081.

143. *Id.*

144. See *id.* at 1081–82.

145. *Id.* at 1081.

146. 503 F.3d 1135 (10th Cir. 2007).

147. *Id.* at 1141.

Ninth Circuit in holding that investigatory stops for misdemeanors *can* be constitutional under the Fourth Amendment since *Hensley* declined to establish otherwise.¹⁴⁸ Whether such stops *are* reasonable must be determined “in light of the particular facts and circumstances of this case.”¹⁴⁹

To this end, the court followed *Hensley* in adopting the *Terry* balancing test for evaluating the reasonableness of investigatory stops.¹⁵⁰ It concluded that the stop under discussion “implicate[d] a strong governmental interest in solving crime and bringing offenders to justice because the alleged underlying criminal activity posed an ongoing risk to public safety.”¹⁵¹ Trespass creates a risk of confrontation with the landowner who is the victim of the transgression.¹⁵² In *Moran*, the fact that the trespasser was a hunter, and was thus likely armed, heightened this risk of violence.¹⁵³ Furthermore, given the repeated nature of the trespass, the officers had reason to believe it was likely to recur and thus presented an ongoing risk.¹⁵⁴ Accordingly, the court held that the governmental interests in the investigatory stop outweighed the intrusion of individual freedom.¹⁵⁵

Grigg and *Moran*, along with a number of state cases, suggest that investigatory stops for past, completed misdemeanors can be constitutional if the underlying crime presents a continued threat to safety. In such cases, the governmental interest in protecting its citizens might outweigh the incursion on individual liberty. However, the Sixth Circuit, in *Gaddis*, *Roberts*, and *Halliburton*, has suggested that such stops are categorically unreasonable. Strong disagreement thus results on both the circuit and state level concerning the proper scope of individual liberties under the Fourth Amendment, leaving the ultimate nature of our rights uncertain. Part III will, in part, evaluate the arguments presented by each side

148. *Id.*

149. *Id.*

150. *Id.* The *Terry* reasonableness test balances the severity and nature of the intrusion on the individual against the governmental interests in the stop. See *supra* Part I for discussion of *Terry*.

151. *Moran*, 503 F.3d at 1142.

152. *Id.* The threat of violent self-help is recognized as a legitimate concern in numerous legal contexts. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 530 (1972) (Burger, J., dissenting) (discussing, in First Amendment context, “that type of personal, face-to-face, abusive and insulting language likely to provoke a violent retaliation—self-help”); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stan. L. Rev.* 623, 678–79 (1986) (describing presence of violent self-help to remedy trespass among residents of Shasta County, California in evaluating Coase’s Farmer-Rancher Parable); Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 *UCLA L. Rev.* 759, 777–80 (1993) (discussing self-help in landlord-tenant context).

153. *Moran*, 503 F.3d at 1142.

154. *Id.*

155. *Id.* at 1143. See *supra* note 22 and accompanying text for discussion of the nature of the right protected by the Fourth Amendment and *supra* note 58 for discussion of the nature of the invasion entailed by frisk searches.

in order to glean a proper rule for evaluating *Terry* stops for misdemeanors.

III. ARE *TERRY* STOPS FOR COMPLETED MISDEMEANORS CONSTITUTIONAL?

Warrantless police stops to investigate past misdemeanors present opposing governmental and individual interests, and the courts have adopted inconsistent approaches to the issue.¹⁵⁶ On one hand, individuals enjoy an inalienable Fourth Amendment right to be free from unnecessary governmental intrusion.¹⁵⁷ On the other hand, police officers have a duty to help solve crimes, bring offenders to justice, and thwart safety threats to both themselves and the public at large.¹⁵⁸ Part III.A proposes an approach for courts to evaluate these competing concerns: Warrantless stops to investigate completed misdemeanors are reasonable when the underlying crime presents an ongoing danger.¹⁵⁹ Part III.B supports this approach by arguing that *Hensley* does not explicitly prohibit investigatory stops for completed misdemeanors. Such stops, like all brief police detentions, should be evaluated by the *Terry* reasonableness test. Since *Hensley* ruled that investigatory stops for completed felonies are reasonable,¹⁶⁰ Part III.C considers whether a qualitative distinction

156. Both the Court and scholars often characterize *all* Fourth Amendment jurisprudence as an attempt to carve out a space of individual freedom within the sphere of legitimate law enforcement needs. As the Court in *Boyd v. United States*, 116 U.S. 616, 630 (1886), stated:

[Fourth Amendment] principles . . . affect the very essence of constitutional liberty and security. They . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property

Id.; see also John D. Castiglione, *Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 La. L. Rev. 63, 66 (2007) (discussing recent Supreme Court holdings as privileging “the government’s prerogatives in law enforcement to the detriment of individuals’ legitimate expectations of privacy, dignity, and autonomy”).

157. See *supra* notes 22 and accompanying text for discussion of this right.

158. See *Wilson v. Layne*, 526 U.S. 603, 620 (1999) (Stevens, J., concurring in part, dissenting in part) (“Generally speaking, the Members of the Court have been sensitive to the needs of the law enforcement community.”); *Katz v. United States*, 389 U.S. 347, 355–56 (1967) (recognizing “the legitimate needs of law enforcement” as part of the equation in evaluating police activity under Fourth Amendment); *Lopez v. United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting) (“The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement.”).

159. This proposal essentially mirrors that of *Grigg* and *Moran*. See *supra* Part II.E for discussion of these cases.

160. *United States v. Hensley*, 469 U.S. 221, 229 (1985). *Hensley* created a bright-line rule: Reasonable suspicion of any past felony is a lawful ground on which to perform an investigatory stop. Accordingly, the police officer need not examine the *nature* of the felony involved in terms of the governmental interests it presents in order to justify the stop. The Court often frames such bright-line rules in Fourth Amendment doctrine in

between misdemeanors and felonies renders stops to investigate past misdemeanors categorically unreasonable and concludes that such a distinction does not exist. Part III.D examines whether allowing such stops promotes racial profiling and other abuses of police power, a concern the Court and legal scholarship has considered in different Fourth Amendment contexts.

A. *Terry Stops for Completed Misdemeanors Should Be Limited to Those Presenting an Ongoing Danger*

I propose that investigatory stops for completed misdemeanors can be reasonable only if they meet the following standard:

To be reasonable, and thus constitutional, investigatory stops for completed misdemeanors must be grounded in reasonable suspicion, based on specific and articulable facts, that the defendant's past crime presents an ongoing or imminent danger.

This standard flows naturally from existing Fourth Amendment jurisprudence—which generally requires probable cause for any search or seizure—and recognizes the Court's tendency to favor warrants when "practicable" to obtain one (*Terry*).¹⁶¹ This standard also acknowledges that the need to act quickly justifies dispensing with the warrant requirement for investigatory stops (*Terry*, *Hensley*, and *Sibron*)¹⁶² and that safety is arguably the most relevant factor in considering the need to act quickly

order to avoid confusion among law enforcement officers and magistrate judges who issue warrants. As the Court in *New York v. Belton* stated:

Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

453 U.S. 454, 458 (1981) (quoting Wayne LaFare, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141); see also Erwin Griswold, Search and Seizure: A Dilemma of the Supreme Court 47 (1975) (suggesting the Court "standardize its decision in the field of search and seizure" by "develop[ing] categories or type situations" and then "establish[ing] a rule that will be applied to all cases of that type, regardless of particular factual variations"); Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 417–19 (1974) (supporting administrative rulemaking for warrantless searches because they "generate none of the problems of uncertainty and unintelligibility that are the great vices of a graduated Fourth Amendment"); Roger Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 365–66 (1973) ("The evaluation . . . must be expressed in language directed to the police and clear and precise enough for them to follow."); Wayne LaFare, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U. Pitt. L. Rev. 307, 320–33 (1982) (supporting Court doctrine that "saved police from irresolvable confusion . . . by rejecting entreaties to add further layers of sophistication to existing rules").

161. See *supra* Part I.B.

162. See *supra* notes 49–54 and accompanying text.

(*Sibron*).¹⁶³ Accordingly, warrantless stops that do not present a safety threat are unconstitutional under this proposed approach. There is simply no need to act swiftly to investigate completed misdemeanors unless there is a resulting safety threat; the police have plenty of time to obtain a warrant to investigate the crime. Any other rule risks prying *Terry* away from its foundations as an exception to the probable cause requirement.

This Note's approach also recognizes that any investigatory stop is a significant incursion on individual liberty. Applying the *Terry* reasonableness test to completed misdemeanor stops entails weighing the governmental interest in such stops against the nature and the severity of the intrusion.¹⁶⁴ The weight given to the latter consideration is clear: As the Court has noted, all investigatory stops are "significant intrusions upon the interests protected by the Fourth Amendment."¹⁶⁵ This approach incorporates the weighing element in *Terry* and *Hensley*'s reasonableness analysis¹⁶⁶ by adopting a proxy as in *Brown*, *Brignoni-Ponce*, and *Hensley*:¹⁶⁷ It requires a reasonable suspicion based on specific and articulable facts that the defendant is engaged in, is about to engage in, or has committed a crime. Additionally, by positing ongoing or imminent dangerousness as the only circumstance justifying completed misdemeanor stops, this Note's proposed standard accommodates Court intimations that dangerousness is the most important governmental interest in such stops.¹⁶⁸

One example of a case presenting facts that would pass the above test is *United States v. Moran*.¹⁶⁹ The officer in *Moran* had reasonable suspi-

163. See *supra* notes 63–67.

164. See *supra* Part I.E.

165. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). The Court has ruled that nearly all searches or seizures, however brief, constitute significant intrusions on one's legitimate expectation of privacy. See, e.g., *Thompson v. Louisiana*, 469 U.S. 17, 20–21 (1984) (per curiam) (holding warrant requirement must be applied strictly due to competing interests in autonomy); *United States v. Place*, 462 U.S. 696, 700 (1983) (ruling that ninety minute detention of defendant's luggage was significant intrusion on personal autonomy); *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (holding that murder investigation did not justify warrantless four day search of defendant's apartment); *Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963) (requiring probable cause for home entry due to invasive nature of police activity); *McDonald v. United States*, 335 U.S. 451, 454–55 (1948) (invalidating search because compelling reason for absence of warrant was lacking in face of significant intrusion on personal freedom).

However, the Court has ruled that certain Fourth Amendment activity constitutes only a very limited intrusion on personal freedom. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that use of drug-sniffing dog during routine traffic stop does not unreasonably prolong length of stop and thus does not constitute significant incursion on personal freedom). Yet it is well established that investigatory stops fall under the category of police conduct that intrudes on personal freedom. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

166. See *supra* Part I.C.

167. See *supra* Part II.

168. As discussed at various points in all three Parts, threat to safety animates much of the Court's thinking. See *supra* Parts I.C., II.B, II.E, III.A; *infra* Parts III.B, III.C.

169. 503 F.3d 1135 (10th Cir. 2007).

cion that an armed defendant had repeatedly trespassed onto the landowner's property, and that the landowner was becoming aggravated with the situation. While the trespass itself, once completed, did not present an ongoing danger, the officer had reason to believe that the trespass would occur again, and that a threat of physical confrontation existed between the landowner and the armed defendant.¹⁷⁰ Accordingly, the Tenth Circuit correctly ruled that the officer was justified in stopping the defendant as quickly as possible to defuse a developing potential safety threat.¹⁷¹

B. *Hensley Does Not Directly Prohibit Investigatory Stops for Completed Misdemeanors*

While *Hensley* allows investigatory stops for completed felonies,¹⁷² the case should not be interpreted to exclude such stops for completed misdemeanors, as several courts have done.¹⁷³ *Hensley* did not explicitly draw this line.¹⁷⁴ At most, the Court declined to address the issue by holding that it “need not and do[es] not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted.”¹⁷⁵

Furthermore, *Hensley* stated that governmental interests justify a *Terry* stop “[p]articularly in the context of felonies or crimes involving a threat to public safety.”¹⁷⁶ The inclusion of the phrase “crimes involving a threat to public safety” as a category distinct from “felonies” implies that misdemeanors threatening public safety can justify *Terry* stops.¹⁷⁷ Moreover,

170. *Id.* at 1142. See *supra* Part II.A for further discussion of *Hensley*.

171. *Moran*, 503 F.3d at 1143.

172. See *supra* Part II.B.

173. See, e.g., *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (citing *Hensley* for proposition that police may not make stop if they have reasonable suspicion of completed misdemeanor); *United States v. Roberts*, 986 F.2d 1026, 1030 (6th Cir. 1993) (same); *United States v. Halliburton*, 966 F.2d 1454, 1992 WL 138433, at *4 (6th Cir. 1992) (unpublished table decision) (finding officer's “seizure” unreasonable since it was based only on suspicion of misdemeanor); *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 882 (Minn. Ct. App. 1985) (stating *Hensley* is limited to completed felonies). Part II.D contains a further discussion of each of these cases.

174. See 4 LaFave, *Search and Seizure*, *supra* note 8, § 9.2(c) (recognizing that *Hensley* does not explicitly address investigatory stops for completed misdemeanors); Schroeder, *Warrantless Arrests*, *supra* note 11, at 811 (same). See *supra* Part II.C for further discussion of *Hensley's* failure to address investigatory stops for completed misdemeanors.

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

176. *Id.* (emphasis added).

177. In fact, it seems to imply that even the most minor infraction can justify an investigatory stop if it presents a significant danger. This emphasis on the dangerousness of the crime, rather than its formal classification, coincides with Fourth Amendment doctrine at large. See *Tennessee v. Garner*, 471 U.S. 1, 14, 21 (1985) (eschewing formal crime distinctions in favor of evaluating underlying dangerousness of crime); *Sibron v. New York*, 392 U.S. 40, 64 (1968) (stating officer must demonstrate reasonable inference of dangerousness); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (stating there is no “ready test” for determining reasonableness); Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting*

the use of “particularly” implies that crimes not in the listed categories, i.e., misdemeanors not endangering public safety, can justify *Terry* stops in certain situations.¹⁷⁸

Finally, the methodology *Hensley* relied upon suggests that the decision does not directly prohibit completed misdemeanor stops. The *Hensley* Court reached its holding by adopting the *Terry* reasonableness test.¹⁷⁹ Applying this test, the Court concluded that the governmental interests in non-overly intrusive stops to investigate past felonies outweigh the invasion of individual autonomy.¹⁸⁰ *Hensley*’s application of the reasonableness test establishes that it is the proper method for evaluating investigatory stops for completed felonies. Furthermore, a wealth of cases suggest that the reasonableness balancing test is the Court’s definitive method for evaluating different kinds of warrantless police activity it has not yet examined,¹⁸¹ implying that the reasonableness test appropriately applies to completed misdemeanor stops as well. A court asserting the unconstitutionality of all investigatory stops for completed crimes should thus do so within the context of the *Terry* reasonableness test.

Critics might argue that a bright-line rule, rather than the reasonableness test, can be the basis for holdings regarding investigatory stops for past misdemeanors. As *Hensley* deems investigatory stops for completed

Police Officers, Society, and the Fourth Amendment Right to Personal Security, 22 *Hastings Const. L.Q.* 623, 635 (1995) (“The need to protect police officers and innocent bystanders from danger is one factor courts use when determining the constitutionality of preventive police practices. . . . *Terry v. Ohio* and *Sibron v. New York* established the significance of danger and its justification for intrusive police conduct.”).

178. *Hensley*, 469 U.S. at 229. According to its most radical interpretation, this statement seems to imply that any crime whatsoever may justify an investigatory stop. However, given Fourth Amendment history and jurisprudence, this is most likely not the statement’s intended implication. See *supra* Part II.B for further discussion.

179. This test weighs the governmental interests in the stop against the nature and severity of the intrusion. For further discussion of *Terry* and the reasonableness balancing test, see *supra* Part I.B.

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

181. See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (employing balancing test to evaluate reasonableness of warrantless sobriety checkpoints); *Maryland v. Buie*, 494 U.S. 325, 330–31 (1990) (warrantless sweep incident to arrest); *United States v. Robinson*, 414 U.S. 218, 254 (1973) (Marshall, J., dissenting) (search incident to arrest). However, a body of literature, and even some statements of the Court, criticize the reasonableness test as subjective and ultimately guilty of exacerbating the confusion it aims to remedy. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971) (“[I]t would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony.”); Craig M. Bradley, Two Models of the Fourth Amendment, 83 *Mich. L. Rev.* 1468, 1468–69 (1985) (criticizing Court’s Fourth Amendment reasonableness doctrine as contradictory and muddled); Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*, 72 *Minn. L. Rev.* 383, 386–99 (1988) (describing balancing test as too subjective and untethered from Warrant Clause’s historical, bright-line roots); Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 *U. Chi. L. Rev.* 47, 49–50 (1974) (noting inconsistencies in outcomes generated by balancing test). Despite such internal and external criticism, however, the Court has not abandoned the test.

felonies categorically reasonable,¹⁸² future police stops for completed felonies need not be subjected to a reasonableness test on a case-by-case basis.¹⁸³ One might ask if the reasonableness test is no longer used to evaluate stops to investigate completed felonies, why should the same treatment not apply to completed misdemeanors? Yet, the Court extracted its bright-line rule by first subjecting completed felony stops to the reasonableness test; *Hensley* determined that the governmental interests in such stops outweigh their intrusion on personal liberty.¹⁸⁴ The proper method for determining the constitutionality of completed misdemeanor stops *as a category* of investigatory stops is thus to subject such stops to the *Terry* reasonableness test. As the next section explains, misdemeanors and felonies are not so starkly distinct that *Hensley's* ruling should be limited to completed felonies alone.

C. *The Analysis Should Not Hinge on the Crime's Classification as a Felony or Misdemeanor*

To extract a bright-line rule from the *Terry/Brown* reasonableness test declaring all completed misdemeanor stops unconstitutional,¹⁸⁵ one must posit that misdemeanors are universally qualitatively distinct¹⁸⁶ from felonies such that the governmental interests in preventing or solving them are always comparatively lesser. This Note will now examine the felony/misdemeanor distinction in light of Fourth Amendment doctrine, legislative mandate, and constitutional history. It concludes that the Court does not *universally* distinguish felonies and misdemeanors along any substantive lines.

Part III.C.1 explains that stop and frisk, warrantless arrest, and search-incident-to-arrest case law demonstrate that the Court is willing to grant wide discretion to police searches and seizures for minor crimes. Dangerousness and location provide definite limits on such searches (*Atwater, Robinson, and Welsh*), rather than the crime's classification as a misdemeanor or a felony.¹⁸⁷ Part III.C.2 notes that state legislation, the Model Code of Pre-Arrestment, and framing era common law demonstrate some degree of widespread recognition of a distinction between felonies and misdemeanors, and explains why this reliance does not un-

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

183. This is true for all stops that pass the Court's reasonableness test. See 4 LaFave, Search and Seizure, supra note 8, § 9.1(d) (describing Court's preference for bright-line rules in Fourth Amendment jurisprudence); supra note 63 (emphasizing Court's use of reasonableness test in *Terry* to determine that all investigatory stops for ongoing felonies are reasonable).

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

185. See supra Part II.D for discussion of cases holding investigatory stops for completed misdemeanors categorically unconstitutional.

186. Of course, felonies and misdemeanors are categorically distinct by definition: They are different categories of crimes. This Note questions whether this categorical distinction amounts to a substantive distinction as well.

187. See supra Part II.B–C for background discussion.

dercut this Note's proposed approach. In addition, Part III.C.3 highlights the Supreme Court's classification of the felony/misdemeanor distinction as "arbitrary" for the purpose of creating bright-line Fourth Amendment rules (*Garner*).

1. *Lack of Meaningful Felony/Misdemeanor Distinction in Certain Fourth Amendment Contexts.*

a. *Stop and Frisk Law.* — Stop and frisk law,¹⁸⁸ in which *Terry* stops are situated,¹⁸⁹ does not acknowledge universal qualitative differences between misdemeanors and felonies. A police officer may stop suspects of misdemeanors and felonies committed in the officer's presence or in the immediate past¹⁹⁰ and search them if she has reasonable suspicion to believe that they are armed and dangerous.¹⁹¹

Though Justice Brennan emphasized the "limited scope of the [*Terry*] exception to the probable cause requirement"¹⁹²—potentially im-

188. This Note addresses investigatory *stops* for completed misdemeanors. The law of *frisks* was briefly discussed above, see *supra* note 58 and accompanying text, but it is worth elaborating upon at this point. Frisks are body searches in which a law enforcement officer pats down a suspect (although certain frisks, such as those performed by airport security, need not be directed to one suspected of a crime). See 4 LaFare, Search and Seizure, *supra* note 8, § 9.1(e) (noting that many permissible searches are not "prosecution-oriented"). *Terry* and cases arising under it hold that a police officer must have reasonable suspicion, based on specific and articulable facts, that a suspect is armed and dangerous in order to justify a frisk. See *Sibron v. New York*, 392 U.S. 40, 64 (1968) ("In the case of [a] self-protective search for weapons, [the police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which . . . reasonably warrant the intrusion."). Accordingly, mere suspicion of nondangerous criminal activity does not justify a frisk. Furthermore, the scope of the frisk must be limited to touching or grasping required to ascertain whether the suspect is armed; in other words, the frisk must be carefully circumscribed to its initial impetus. See *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (ruling officer frisking suspect to defuse danger may not manipulate object in suspect's pocket in order to discover identity if immediately apparent it is not armed weapon). However, an officer need not refrain from seizing illegal contraband discovered by plain touch during a frisk. *Id.* at 379. Frisk law thus suggests that the suspect's dangerousness is a critical factor in determining a frisk's reasonableness, and therefore its constitutionality.

189. Of course, *Terry stops* just pertain to the "stop" element of "stop and frisk."

190. See *supra* Part I.B for further discussion.

191. *Terry*, 392 U.S. at 27. See *supra* Part I.C for discussion of investigatory stop doctrine.

192. *Michigan v. Long*, 463 U.S. 1032, 1055 (1983) (Brennan, J., dissenting). Several cases similarly attempt to limit *Terry stops* by construing the doctrine narrowly. See, e.g., *Florida v. J.L.*, 529 U.S. 266, 268 (2000) (holding anonymous tip insufficient to establish reasonable suspicion for investigatory stop); *United States v. Place*, 462 U.S. 696, 698 (1983) (finding ninety minute detention of suspect's luggage exceeded investigatory stops authority); *Florida v. Royer*, 460 U.S. 491, 507–08 (1983) (holding that police exceeded investigatory stop's authority by detaining airline passenger in small room); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (concluding that police violated Fourth Amendment when they seized suspect and transported him to police station without probable cause to arrest).

plying that completed misdemeanors should not justify *Terry* stops—such statements do not specify a universal, substantive distinction between felonies and misdemeanors in the context of stop and frisk law.¹⁹³ Furthermore, *Hensley* does not tacitly imply a qualitative distinction between felonies and misdemeanors. Though the Court explicitly limited its ruling to completed felonies, it did not do so on the basis of a binary felony/misdemeanor categorization. Rather, its distinction hinged on the seriousness of the underlying crime.¹⁹⁴ As it is well-accepted that felonies are *generally* more serious crimes than misdemeanors,¹⁹⁵ the inquiry is not into the strength of the governmental interest in investigatory stops for completed misdemeanors *relative* to that of completed felonies. Rather, the question, which *Hensley* declined to address, is whether completed misdemeanors can be *sufficiently* serious to justify an investigatory stop. To assume that misdemeanors are sufficient in this regard begs the question.

b. *Warrantless Arrests for Misdemeanors*. — The Supreme Court has declined to strike down searches-incident-to-arrests for minor crimes, suggesting that it is willing to extend police search and seizure power to misdemeanor crimes. *Atwater v. City of Lago Vista* considered the constitutionality of a warrantless arrest for a misdemeanor committed in the officer's presence.¹⁹⁶ In *Atwater*, the defendant and her two young

193. This is not to say that such stops must be limited, but that it is not clear they should be limited according to their classification as felony or misdemeanor. Perhaps another factor is the most appropriate limit.

194. See *United States v. Hensley*, 469 U.S. 221, 229 (1985) (“We need not and do not decide today whether *Terry* stops to investigate all past crimes, *however serious*, are permitted.” (emphasis added)).

195. See 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”); Wayne R. LaFare, *Criminal Law* 34 (4th ed. 2003) [hereinafter LaFare, *Criminal Law*] (noting that misdemeanors typically receive less severe punishment than felonies); Dawn Marie Johnson, *The AEDPA and IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. Legis. 477, 478 (2001) [hereinafter Johnson, *AEDPA*] (“As can be inferred from the definition of misdemeanor, felonies are more serious crimes than misdemeanors.”).

196. 532 U.S. 318 (2001). The *Atwater* decision has been highly criticized among legal academics, who tend to view the decision as allowing unreasonable incursions on personal liberty. See, e.g., Gregory S. Fisher, *Cracking Down on Soccer Moms and Other Urban Legends on the Frontier of the Fourth Amendment: Is It Finally Time to Redefine Searches and Seizures?*, 38 *Willamette L. Rev.* 137, 167 (2002) (“*Atwater* unduly tips the scales of the Fourth Amendment's balancing test in favor of the government.”); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *Fordham L. Rev.* 329, 329 (2002) (“*Atwater* thus permits, and indeed encourages, unnecessary and disproportionate arrests, along with the various searches and other hardships that routinely accompany an arrest.”); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 *St. John's L. Rev.* 535, 562–63 (2002) (“[H]owever miniscule[] the number of outrageously improper arrests may have been before *Atwater*, it is sure to rise in the wake of *Atwater*.”); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 *Ind. L.J.* 419, 422 (2002) (arguing *Atwater* “broaden[ed] the inherent power of police to intrude upon citizens' liberty and privacy”).

children were driving without seatbelts, which in Texas was a misdemeanor punishable only by a minor fine.¹⁹⁷ Atwater was stopped by a police officer, handcuffed, taken down to the station, booked, and kept in a jail cell for about an hour before being released on bond.¹⁹⁸ She subsequently filed suit, alleging that an arrest for such a minor crime constituted an unreasonable “seizure” under the Fourth Amendment.¹⁹⁹

Justice Souter’s opinion first noted that English common law and the surrounding historical record were inconclusive on the issue.²⁰⁰ Observing the need to create a bright-line rule in order to offer guidance to police officers,²⁰¹ Souter gleaned existing arrest law and concluded that with respect to crimes committed in the officer’s presence, “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”²⁰² Furthermore, Souter reasoned that it is not reasonable to require a police officer to know “frequently complex penalty schemes” and therefore is impractical to create a rule allowing custodial arrests for jailable offenses only.²⁰³ The Court thus ruled that warrantless arrests for minor crimes are constitutional when supported by probable cause.²⁰⁴

However, *Atwater*’s holding is limited. For example, it likely does not extend to arrests requiring entry into the defendant’s residence. In *Welsh*

197. *Atwater*, 532 U.S. at 323.

198. *Id.* at 324. She pleaded no contest to the charges of driving without a seatbelt and paid the \$50 fine.

199. *Id.* at 325.

200. *Id.* at 327–32. Justice Souter’s approach in *Atwater* is widely shared—ambiguities in the proper scope of the Fourth Amendment have led many commentators to seek the original meaning of the amendment. For critical examinations of the origins of the Fourth Amendment, see generally Akhil Reed Amar, *America’s Constitution 326–27* (2005); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction 64–77* (1998); Amar, *First Principles*, *supra* note 20; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 *Mich. L. Rev.* 547 (1999); Maclin, *Central Meaning*, *supra* note 16; Maclin, *Complexity of the Fourth Amendment*, *supra* note 20; David A. Sklansky, *The Fourth Amendment and Common Law*, 100 *Colum. L. Rev.* 1739 (2000); Bruce P. Smith, *The Fourth Amendment, 1789–1868: A Strange History*, 5 *Ohio St. J. Crim. L.* 663 (2008) (reviewing Andrew E. Tazlitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868* (2006)); George C. Thomas III, *When Constitutional Words Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 *Mich. L. Rev.* 145 (2001) [hereinafter Thomas, *Constitutional Worlds*]; William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished manuscript, on file with the *Columbia Law Review*).

201. *Atwater*, 532 U.S. at 347. See *supra* note 160 for discussion of the Court’s preference for bright-line rules in the Fourth Amendment doctrine.

202. *Atwater*, 532 U.S. at 354.

203. *Id.* at 348 (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984)).

204. The Court suggested that the defendant would almost certainly prevail on the specific facts of her case, given that the arrest appeared motivated by a desire to humiliate her rather than effective crime control. Souter reasoned, however, that the Court should adopt a bright-line rule in this confusing area of law, with “standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second guessing.” *Id.*

v. Wisconsin,²⁰⁵ an officer made a warrantless entry into the defendant's house to investigate suspicion of earlier drunk driving, a nonjailable misdemeanor offense in Wisconsin.²⁰⁶ The Court held the warrantless entry unreasonable. First, the threat of the defendant's blood alcohol level diminishing, thus destroying the only "proof" of the alleged crime, was an inadequate basis to justify an invasion of the sanctity of one's residence.²⁰⁷ Second, the Court noted that since "the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to public safety."²⁰⁸

Atwater and *Welsh*'s greatest value for evaluating past misdemeanor stops might be that they demonstrate the Court's willingness to extend, *in a limited fashion*, police power to investigate and solve minor crimes. It may not be immediately clear that these cases provide guidance for *Terry* stops to investigate completed misdemeanors, as arrests for ongoing misdemeanors and stops for completed misdemeanors involve different gov-

205. 466 U.S. 740 (1984). Similar to *Atwater*, there is a wealth of commentary discussing the *Welsh* decision. See, e.g., Sherry F. Colb, The Qualitative Dimension of Fourth Amendment "Reasonableness," 98 Colum. L. Rev. 1642, 1681-84 (1998) (noting that "[t]here is no real substantive scrutiny" in the case); 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, 445 (1990) (addressing approaches to problem of making distinctions based on nature and seriousness of different offenses); Schroeder, Warrantless Arrests, *supra* note 11 (examining constitutional questions raised by expansion of power to make misdemeanors warrantless arrests); Silas J. Wasserstrom, The Court's Turn Towards a General Reasonableness Interpretation of the Fourth Amendment, 27 Am. Crim. L. Rev. 119, 133 (1989) (noting that "*Welsh* is not a model of judicial craftsmanship").

206. *Welsh*, 466 U.S. at 743, 746.

207. *Id.* at 753-54.

208. *Id.* at 743. The sanctity of the home is well recognized in Fourth Amendment jurisprudence. The Court has posited the home as a threshold for Fourth Amendment interests, which the government must generally always have a warrant in order to cross. As the Court has stated: "At the very core of [the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citations omitted). Justice Scalia recently elaborated on the Fourth Amendment's protection of the home in *Kyllo v. United States*:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of the information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

533 U.S. 27, 37 (2001) (internal citations omitted).

Of course, the law's recognition of the sanctity of the home is neither new nor exclusive to Fourth Amendment doctrine. See, e.g., Cuddihy, *supra* note 200, at 1545-47 (observing that at founding "commentators on the Constitution denounced general warrants and searches not just because they were general but because they abridged the security that houses afforded from unwelcome intrusion. That houses were castles was the most recurrent theme of those commentaries . . .").

ernmental interests and individual intrusions. On one hand, both *Atwater* and *Welsh* addressed ongoing crimes or those completed in the immediate past. The governmental interests in crime prevention and detection²⁰⁹ justifying a stop in these cases might thus be greater than the governmental interests in a stop for a past, completed misdemeanor. However, the incursion on individual liberty is clearly greater in arrests than in stops; arrests are more extensive procedures than stops and generally involve physical detention of a suspect.²¹⁰ Ultimately, then, *Atwater* and *Welsh* weigh in favor of allowing warrantless investigatory stops for completed misdemeanors in some situations.

c. *Search Incident to Arrests for Minor Crimes.* — The Supreme Court has only partially limited warrantless arrests for misdemeanors, which further suggests that it would not shy away from extending police search and seizure power to misdemeanor crimes. A search incident to arrest occurs when a police officer searches a suspect without a warrant after validly arresting her.²¹¹ In *Chimel v. California*,²¹² the case establishing the modern doctrine in this area,²¹³ the Supreme Court concluded that a search of the defendant's three-bedroom house incident to a valid arrest for robbery was unreasonable.²¹⁴ The Court suggested that the only reasonable

209. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (identifying crime prevention and detection as dominant interests in investigatory stops).

210. See *Maryland v. Buie*, 494 U.S. 325, 333 (1990) (noting greater risk of danger in arrest in home compared with a stop); *Illinois v. Lafayette*, 462 U.S. 640, 645–48 (1983) (observing that “practical necessities of routine jail administration” require more extensive “search of the person and personal effects of an arrestee upon reaching a police station”); 4 LaFave, *Search and Seizure*, supra note 8, § 9.1 (noting that stop is “relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion”); John M. Copacino, *Suspicionless Criminal Seizures After Michigan Department of State Police v. Sitz*, 31 Am. Crim. L. Rev. 215, 232 (1994) (“In a resounding endorsement of the centrality and importance of the probable cause standard, the Court emphasized the narrow scope of the *Terry* exception. Only those limited circumstances ‘so substantially less intrusive than arrests’ would allow the Court to jettison the Fourth Amendment’s probable cause requirement.” (quoting *Dunaway v. New York*, 442 U.S. 200 (1979))).

211. For an early case addressing searches-incident-to-arrest, see, e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950); see also Dressler & Thomas, *Criminal Procedure*, supra note 24, at 226–44.

212. 395 U.S. 752 (1969).

213. Several cases have elaborated upon *Chimel*'s search-incident-to-arrest doctrine. These cases generally clarify the various time and distance factors that play into whether a search can be described as incident to the arrest. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 14–15 (1977) (finding search not incident to arrest when conducted “more than an hour after federal agents gained exclusive control of the footlocker and long after respondents were securely in custody”); *United States v. Edwards*, 415 U.S. 800, 810 (1974) (Stewart, J., dissenting) (“[T]he mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographic or temporal scope.”); *Shipley v. California*, 395 U.S. 818, 818–20 (1969) (finding search of petitioner's home “extended without reasonable justification beyond the place in which he was arrested”); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220–22 (1968) (holding search of petitioners' car after they were in custody inside courthouse not incident to arrest).

214. 395 U.S. at 768.

purpose for a search incident to arrest was to prevent the suspect from obtaining a weapon or destroying evidence, and accordingly limited the scope of an allowable search to a suspect and her immediately surrounding area.²¹⁵ The Court's holding thus relied on the immediate necessities of safety and law enforcement.

United States v. Robinson applied the Court's search-incident-to-arrest doctrine to misdemeanor traffic offenses.²¹⁶ After letting Robinson free following a traffic stop days earlier, a police officer discovered that the defendant was driving with a revoked license.²¹⁷ The officer stopped the defendant days later to arrest him for driving with a revoked license, frisked him, and discovered heroin in his pocket.²¹⁸ The Court held the search reasonable, concluding that in full-custody arrests²¹⁹ an officer can search the defendant to remove any weapons she possesses in order to defuse any safety threat.²²⁰ The majority rejected the contention that suspects in minor traffic violations did not present a danger, noting that "approximately [thirty percent] of the shootings of police officers occur when an officer stops a person in an automobile."²²¹

Robinson further demonstrates the Court's willingness to allow police searches and seizures for minor crimes. The Court even suggests searches are reasonable without a confirmed threat to safety.²²² Critics might argue that a concern for officer safety still grounds *Robinson's* central holding.²²³ In contrast, investigatory stops alone do not defuse the threat of officers being shot as they approach a person seated in a car; without an accompanying search, such stops expose officers to an even greater risk of violent attack.²²⁴ Though important contextual differ-

215. *Id.* at 766.

216. 414 U.S. 218 (1973).

217. *Id.* at 220.

218. *Id.* at 220–23.

219. A full-custody arrest occurs when a suspect is taken into custody by the police and transported to the police station or a jail cell. See Dressler & Thomas, *Criminal Procedure*, *supra* note 24, at 224–66.

220. *Robinson*, 414 U.S. at 234–36. The Court's central holding in *Robinson* thus privileges a concern for safety, as does much of the Court's other jurisprudence. Many of the Court's other Fourth Amendment doctrines, such as frisk law, are founded on a concern for officer safety. See the discussion of *Terry* *supra* Part I.

221. *Robinson*, 414 U.S. at 234 n.5 (citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 *J. Crim. L. Criminology & Police Sci.* 93 (1963)).

222. *Id.* at 235. This is to say that even if the suspect does not present a threat to safety in the particular circumstance at hand, the Court in *Robinson* established a bright-line rule that a search may be performed incident to the arrest of any crime, regardless of the crime's seriousness. This coincides with the Court's general trend of creating bright-line rules in Fourth Amendment jurisprudence in order to provide clear guidance to law enforcement officers. See *supra* note 160 and accompanying text.

223. See *supra* notes 220–221 and accompanying text for discussion of safety concern invoked in *Robinson*.

224. In other words, when a person approaches the car of an armed suspect without intending to search for and remove a dangerous weapon, she is actually exposing herself to greater danger than if she had never approached the car in the first place. See *supra* note

ences exist between *Robinson* and *Terry* stops for past misdemeanors, at the very least *Robinson* supplements *Atwater* in demonstrating the Court's willingness to allow police to investigate minor crimes presenting a safety concern.²²⁵ By granting some power to investigate completed misdemeanors, this Note's approach accounts for the Supreme Court trend of allowing police to investigate minor crimes.²²⁶

2. *Evaluating a Potential Distinction Between Felonies and Misdemeanors.* — Though the Supreme Court's analysis in the Fourth Amendment contexts discussed above has not hinged on a crime's classification as a felony or a misdemeanor, certain relevant authorities—state legislation, the Model Code of Pre-Arrestment, and framing era common law—rely on such a distinction. However, this reliance does not undercut this Note's proposed approach.

a. *Search and Seizure Legislation.* — Although federal constitutional law controls, “[s]tate law is often relevant in analyzing the reasonableness of police activities under the [F]ourth [A]mendment.”²²⁷ In search and seizure legislation, states often designate a crime as a felony or misdemeanor, a distinction which plays a crucial role in many statutes concerning warrantless arrests. Most states have passed statutes prohibiting warrantless arrests for minor misdemeanors completed outside of an officer's presence.²²⁸ For instance, section 836 of the California Penal Code states that an officer may perform a warrantless arrest if he has

reasonable cause to believe that [the] person to be arrested has committed [a] public offense in [the officer's] presence, if [the] person arrested has committed [a] felony, though not in the

221 and accompanying text. In fact, the doctrine of stop and frisk supports this conclusion in allowing a full pat down of the subject in order to defuse any reasonable threat of safety. See *supra* Part I.C. This doctrine therefore seems to implicitly recognize the danger inherent in interactions between the police and citizens often not amenable to police intrusion. See David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. Davis L. Rev. 1, 5 & n.18 (1994) (noting that frisking may be automatic practice of police officers in context of *Terry* stops, at least for “certain types of persons and situations”).

225. See Frase, *supra* note 196, at 350 (citing *Robinson* as demonstrating Court's preference for bright-line rules granting broad police power).

226. See *supra* Part III.B (arguing *Hensley* did not prohibit investigatory stops for completed misdemeanors).

227. *Reed v. Hoy*, 909 F.2d 324, 330 & n.5 (9th Cir. 1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 15–16 (1985)). One reason that state law plays a role in analyzing Fourth Amendment doctrine is that almost all police activity occurs at the state level. Accordingly, state law governs much of the Fourth Amendment activity that occurs in day-to-day encounters.

228. For representative statutes, see, e.g., Alaska Stat. § 12.25.030 (2006) (listing grounds for arrest by private person or peace officer without warrant); Ariz. Rev. Stat. Ann. § 13-3883 (2007) (discussing reasonableness and warrantless police activity); Idaho Code Ann. § 19-603 (2007) (describing conditions under which police officer may arrest); Mont. Code Ann. § 46-6-311 (2007) (allowing for warrantless arrest not in presence of officer in event of circumstances involving violence); Wash. Rev. Code Ann. § 10.31.100 (West 2007) (prohibiting, with certain exceptions, arrest without warrant for misdemeanor or gross misdemeanor unless committed in officer's presence).

officer's presence, or [the] officer has reasonable cause to believe that [the] person to be arrested has committed [a] felony, whether or not [a] felony has in fact been committed.²²⁹

These statutes demonstrate that state legislatures rely on the felony/misdemeanor distinction to carve the boundaries of acceptable police activity.

While these statutes generally make no mention of similar arrest powers for completed misdemeanors, there is an exception to this general rule: Many state statutes require or authorize arrest for misdemeanor domestic violence offenses that were not committed in the officer's presence.²³⁰ This widespread exception suggests that states emphasize preventing crimes, regardless of classification as a misdemeanor or felony, that threaten others' safety.

One might argue that arrests generally involve far greater invasions of personal liberty than stops.²³¹ Accordingly, while states might prohibit warrantless completed misdemeanor *arrests*, they would not clearly prohibit all warrantless completed misdemeanor *stops*. Subject to the domestic violence exception, however, states' treatments of warrantless arrests show that they at least partially value the classification of a crime as a "felony" or "misdemeanor." At the same time, the domestic violence exception to misdemeanor warrantless arrests shows that the dangerousness of a crime—rather than its classification as a misdemeanor or felony—plays a critical role in determining the kind of Fourth Amendment activity it justifies.

229. Cal. Penal Code § 836(3) (West 2008).

230. See, e.g., Conn. Gen. Stat. § 46b-38b(a) (2004) (discussing investigation of family violence crime by peace officer); D.C. Code § 16-1031 (2001) (describing instances in which probable cause for arrest will be found in context of domestic violence); Iowa Code § 236.12(2) (2008) (stating that peace officer may, with or without warrant, arrest person on probable cause of domestic abuse); La. Rev. Stat. Ann. § 46:2140(1) (1999) (directing law enforcement officers to use all reasonable means to prevent further abuse if reason to believe past abuse has occurred); Me. Rev. Stat. Ann. tit. 19-A, § 4012 (1998) (describing responsibilities of law enforcement agents in domestic abuse context); N.J. Stat. Ann. § 2C:25-21(a) (West 2005) (describing circumstances under which police should arrest one alleged to have committed domestic violence); Utah Code Ann. § 30-6-8 (2007) (describing statewide domestic violence network, police officers' duties, prevention of abuse in absence of order, and limitation of liability); Wash. Rev. Code § 10.31.100(2)(c) (2002) (describing instances when law officer, under belief that assault occurred, shall arrest person over age of sixteen); W. Va. Code § 48-27-1002 (2004) (describing grounds for arrest in domestic violence matters and conditions).

The domestic violence exception has been discussed extensively in legal literature, and has been widely praised as a desirable tool in combating spousal abuse. As one commentator stated, "One of the most powerful weapons to battle domestic violence is the allowance for warrantless arrests for certain misdemeanors, including domestic violence." Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 *UWLA L. Rev.* 1, 8 (2005).

231. This is to say that arrests involve a greater restriction of freedom since one is generally handcuffed and taken down to the station for a far lengthier amount of time than is entailed in an investigatory stop.

b. *Model Code of Pre-Arrestment*. — The American Law Institute’s Model Code of Pre-Arrestment Procedure also relies upon the felony/misdemeanor distinction. Interestingly, the Code directly addresses *Terry* stops for completed misdemeanors:

First, there are increased potentialities for abuse in allowing stops perhaps long after the event in regard to the large number of misdemeanors outstanding at any time. And second, since this authority is intended to cover cases where an officer—usually on orders from headquarters—is looking for a suspect whose crime has already been reported and probably processed at headquarters, there is no great burden in distinguishing grades of offenses.²³²

The Code thus directly advocates prohibiting *Terry* stops for completed misdemeanors.²³³ Although the Code is not binding authority,²³⁴ it represents the work of Fourth Amendment experts and should thus be given weight in analyzing the topic at hand.²³⁵ At the least, it supports limiting investigatory stops for completed misdemeanors.

As described above, this Note proposes to allow investigatory stops for completed misdemeanors that present an ongoing danger, an approach that differs from the Model Code’s outright ban. While the Model Code presents a strong argument that such stops create a heightened risk of abuse,²³⁶ this Note’s approach nevertheless carries a number of advantages. First, this Note’s approach more accurately reflects the Court’s recent Fourth Amendment jurisprudence, which allows police activity based on minor crimes. Second, it allows the police to defuse danger, a concern that is central to Fourth Amendment law. Third, in limiting investigatory stops for completed misdemeanors to only those that present an ongoing danger, this Note’s approach significantly reduces the opportunity for police abuse.

c. *Framers’ Intent*. — The Supreme Court has recently stated “that in determining whether a challenged police intrusion violates the Fourth Amendment, it will ‘inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment

232. Model Code of Pre-Arrestment Proc. § 110.2 note (1975).

233. The Code, of course, did not have *Hensley* in mind when it came to its decision in this regard, as it was composed ten years prior to the decision. However, it seemingly speaks directly to the question left open by the case.

234. The Code is not binding authority because it is merely a model statute developed by the ALI to provide guidance. It was never enacted by a legislature, although many state legislatures have subsequently relied upon it in creating their own criminal procedure laws.

235. See, e.g., Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1409 (2004) (noting that Model Code “was thought to represent the views of the nation’s most influential law enforcement and conservative legal figures”).

236. See *infra* Part III.D.

was framed.’”²³⁷ Fourth Amendment common law history might thus facilitate better understanding of the constitutionality of *Terry* stops for completed misdemeanors.

English and Early American common law is silent with respect to investigatory stops for completed misdemeanors.²³⁸ Conventional thought suggests that the Framers intended the Fourth Amendment to protect against general warrants that allowed expansive, unlimited police searches of persons and property.²³⁹ One could argue that this implies the Framers would have been opposed to stops to investigate past minor crimes, which would constitute a significant exercise of police power.²⁴⁰ However, Professor Akhil Amar has suggested that early American common law allowed police broad authority to perform “reasonable” warrantless stops and searches.²⁴¹ While his account does not directly explore investigatory stops for completed misdemeanors, its portrait of common law warrantless police power suggests that the Framers might have intended to allow, or at least did not intend to prohibit, such stops in framing the Fourth Amendment.

Furthermore, like the modern state statutes discussed above, the framing-era common law prohibited warrantless arrests for completed misdemeanors.²⁴² As Justice Marshall observed, many crimes designated as misdemeanors at common law would be classified as felonies in the modern era.²⁴³ Yet, even then, police officers possessed broad authority to arrest suspected felons.²⁴⁴

237. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. Rev. 895, 896 (2002) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999)).

238. See generally Cuddihy, *supra* note 200. However, this is not to say that the Fourth Amendment is silent with respect to investigatory stops in general.

239. See Davies, *supra* note 200, at 551 (“[T]he Framers intended to require that all searches and seizures be reasonable and also to forbid use of general warrants.”); Maclin, *Central Meaning*, *supra* note 16, at 212–13 (“Those who framed and ratified the Fourth Amendment undoubtedly opposed the general warrants used in England”); Maclin, *Complexity of the Fourth Amendment*, *supra* note 20, at 972 (arguing Fourth Amendment protection not limited to right against general warrants); Sklansky, *supra* note 200, at 1743 (discussing Justices’ focus on historical condemnation of general warrants); Smith, *supra* note 200, at 666 n.14 (noting Americans’ rejection of general warrants); Thomas, *Constitutional Worlds*, *supra* note 200, at 155 n.32 (finding Davies’s proof that Fourth Amendment was only intended to prevent general warrants “utterly convincing”).

240. See *supra* Part II.D.

241. See, e.g., Amar, *First Principles*, *supra* note 20, at 763–68 (suggesting that brief stops do not require warrant to be completed according to early state and constitutional law, and thus challenging Court’s suggestion that Fourth Amendment imposes strict warrant requirement).

242. See LaFave et al., *Criminal Procedure*, *supra* note 26, § 3.5(a) (discussing changing arrest procedure in United States after *Terry*); Davies, *supra* note 200, at 578 (noting early distrust with discretionary authority).

243. See *United States v. Watson*, 423 U.S. 411, 439–40 (1976) (Marshall, J., dissenting) (“[M]any crimes now classified as felonies under federal or state law were treated as misdemeanors [at common law].”).

244. See Schroeder, *Warrantless Arrests*, *supra* note 11, at 773–89.

Similar to the state statutes discussed above, the framing-era prohibition against warrantless misdemeanor arrests suggests some importance for the felony/misdemeanor distinction.²⁴⁵ Given that stops present a more limited intrusion on personal liberty than arrests, however, the common law prohibition against arrests might not apply to investigatory stops. Yet the framing-era common law, even if limited to the warrantless arrest context, suggests *some* importance to the felony/misdemeanor distinction. This Note's approach provides a significant limitation on police activity, as recommended by the history of the Fourth Amendment, including the Framers' intent to limit expansive and invasive searches.²⁴⁶

3. *The Supreme Court's Unwillingness to Adopt Bright-Line Rules with Respect to the Felony/Misdemeanor Distinction.* — The Supreme Court has rejected a bright-line distinction between felonies and misdemeanors, further dispelling doubt that *Hensley's* ruling can be extended to misdemeanors as well. In *Tennessee v. Garner*, Justice White characterized the felony/misdemeanor distinction as “highly technical,” “minor,” and “arbitrary” in holding that police officers cannot use deadly force in the seizure of a suspect simply because there is probable cause to believe that the suspect has committed a felony.²⁴⁷ As Justice White noted, “Numerous misdemeanors involve conduct more dangerous than many felonies.”²⁴⁸

Justice White likely did not intend to dismiss the felony/misdemeanor distinction as utterly meaningless; this would be an unusual conclusion, as the felony/misdemeanor distinction has been described as “[t]he most important classification of crime in general use in the United States.”²⁴⁹ Rather, he recognized a difficulty in creating bright-line Fourth Amendment rules based solely on the felony/misdemeanor dis-

245. There is a debate, even amongst Supreme Court Justices, on whether the Framers' intent should command modern jurisprudence, and if so, how and to what extent. Compare Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 17–18 (2005) (urging interpretation of Constitution based on purposes of textual provisions and how well anticipated consequences fit those purposes), with Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, *An Essay* 23–29, 37–41 (1997) (promoting textualist understanding of Constitution). However, I do not wish to come down on either side of the argument in this Note. I only suggest that the Supreme Court has expressly stated that framing-era common law is important to modern Fourth Amendment law, and thus worthy of at least limited consideration within a broader analysis of the felony/misdemeanor distinction.

246. See *supra* Part III.B.

247. 471 U.S. 1, 14, 20 (1985).

248. *Id.* at 14.

249. LaFave, *Criminal Law*, *supra* note 195, § 1.6(a). LaFave likely did not intend this to be normative. Rather, he merely suggested that states almost universally rely on the felony/misdemeanor distinction in crafting their laws. See Johnson, *supra* note 195, at 478 (“The distinction between a misdemeanor and a felony is rooted deeply in our common law tradition. At common law, present day misdemeanors were known as transgressions or trespasses and were defined simply as lesser crimes than felonies.”). Justice White thus most likely did not intend his statement as a descriptive critique, i.e., that the felony/misdemeanor distinction has not been important for classificatory purposes.

inction.²⁵⁰ For instance, the categorization of a crime as a “felony” might serve as a valuable proxy for a crime’s dangerousness,²⁵¹ justifying searches and seizures in certain circumstances, but not in all cases.²⁵²

While certain areas of criminal law clearly rely upon the felony/misdemeanor distinction,²⁵³ *Garner*, *Atwater*, and *Robinson* demonstrate the Court’s general unwillingness to create bright-line Fourth Amendment rules based solely on this divide.

D. *Safeguards Against the Possibility of Abuse in Terry Stops for Completed Misdemeanors*

Permitting *Terry* stops for completed misdemeanors might open the door to an abuse of police power. As the Model Code of Pre-Arrestment suggests, “There are increased potentialities for abuse in allowing stops perhaps long after the event in regard to the large number of misdemeanors outstanding at any time.”²⁵⁴ One particularly troubling type of police abuse frequently discussed by the Court and legal academics in Fourth Amendment contexts is racial profiling.²⁵⁵ Racial profiling

250. Schroeder, *Warrantless Arrests*, supra note 11, at 811 (discussing Justice White’s statements on felony/misdemeanor divide).

251. This categorization, of course, is not universally true. Certain felonies, particularly those involving white collar crime, might not present any danger whatsoever. However, many crimes are classified as felonies because of their violent nature. See *Black’s Law Dictionary*, supra note 195, at 651 (presenting arson, rape, and murder, three violent crimes, as archetypal examples of felony crimes).

252. *Garner*, 471 U.S. at 14 (“[N]umerous misdemeanors involve conduct more dangerous than many felonies.”).

253. One obvious realm in which this distinction is important is sentencing guidelines. It is most often the case that felony offenses are punished more severely than misdemeanor offenses. For instance, the death penalty is only imposable for major, felony offenses. See Model Penal Code §§ 1.04, 210.6 (1980) (specifying punishments for different levels of crime and stating that death penalty should be reserved for specific violent felonies); *Black’s Law Dictionary*, supra note 195, at 651 (defining “felony” as “serious crime [usually] punishable by imprisonment for more than one year or by death”).

254. Model Code of Pre-Arrestment Proc. § 110.2 note (1975).

255. See generally David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677–81 (1994) (arguing *Terry* and law enforcement techniques it legitimates are applied disproportionately to African Americans and Hispanic Americans); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 225–37 (1983) (examining misuse of race as element in determining reasonable suspicion to stop and frisk); Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 250–62 (1991) (describing incidents between African American men and police officers and impact on black community); Tracey Maclin, *Terry v. Ohio’s* Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John’s L. Rev. 1271, 1279–81 (1998) (discussing impact of stop and frisk tactics on African American community); Maclin, *Cure Worse than Disease*, supra note 20, at 29–31 (noting some individuals label discriminatory race-based tactics “reasonable,” thereby reducing need for probable cause); George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 Rutgers Race & L. Rev. 39, 53–69 (2000)

is a historical and contemporaneous reality of street encounters,²⁵⁶ and thus must be properly considered when proscribing the proper boundaries of police power. Potential expansions of police power that increase the threat of racial profiling should be heavily scrutinized, if allowed at all. The Court prominently raised this concern in *Terry*: Justice Warren's majority analysis carefully considered "[t]he wholesale harassment by . . . the police community, of which minority groups, particularly [African-Americans], frequently complain."²⁵⁷

Justice O'Connor's dissent in *Atwater*²⁵⁸ echoed this concern about racial profiling in the context of warrantless arrests for fine-only, minor offenses. O'Connor warned that allowing such arrests heightened the risk of harassment, particularly for racial minorities: "[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."²⁵⁹ Although O'Connor's warning occurs in a dissenting opinion, many Justices (*Atwater* was a 5-4 decision) and commentators agree with her analysis and recognize that she raises an important, valid concern of police power abuse.²⁶⁰

Warrantless investigatory stops for completed misdemeanors present an even greater threat of racial profiling than warrantless arrests for ongoing minor crimes: *Atwater* was at least limited by the requirement

(suggesting curbing racial profiling by penalizing police departments rather than utilizing individual remedies); Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 983-91 (1999) (determining racial profiling remains prominent despite Court's decisions which "treat race as a subject that can be antiseptically removed").

One category of racial profiling that has recently been explored in the post-9/11 world is that directed against Middle Easterners. See, e.g., Samuel R. Gross & Debra Livingston, Racial Profiling Under Attack, 102 Colum. L. Rev. 1413, 1417-31 (2002) (discussing prevalence of racial and ethnic profiling in context of DOJ's 2001 program to question people in United States about suspected ties to al Qaida). While not traditionally evaluated, the threat of racial profiling against Middle Easterners should be taken seriously and accordingly given weight in any Fourth Amendment analysis seeking to accommodate a concern for racial discrimination.

256. See 4 LaFave, Search and Seizure, supra note 8, § 9.1(e) ("For many of those who honestly oppose Supreme Court recognition of the power of police to stop and frisk, the central point is that police often have utilized street encounters for improper purposes, such as the wholesale harassment of minority groups and blacks in particular.").

257. *Terry v. Ohio*, 392 U.S. 1, 14 (1968). Professor Amar has praised *Terry* for bringing race into the forefront of Fourth Amendment jurisprudence. See Amar, *Terry* First Principles, supra note 52, at 1097 (describing part of *Terry* opinion that considers racial implications as "good *Terry*").

258. *Atwater v. City of Lago Vista*, 532 U.S. 318, 360-73 (2001) (O'Connor, J., dissenting).

259. *Id.* at 372.

260. See supra note 196 for literature disagreeing with majority's opinion, and agreeing with O'Connor's critique.

that an officer witness the underlying crime.²⁶¹ Allowing *Terry* stops for all completed misdemeanors could allow widespread racial profiling, given that an officer has reasonable suspicion based on specific and articulable facts that the suspect has committed any minor crime in the past. With the prevalence of routine traffic violations and other minor crimes,²⁶² this potential to reach into one's past driving habits to find a reasonable suspicion warranting a stop is unsettling. Consequently, any attempt to formulate a rule regarding *Terry* stops for completed misdemeanors must seriously consider the threat of police abuse.

This Note's standard rule provides a significant limitation against racial profiling. It requires a completed misdemeanor to pose an ongoing safety threat, as opposed to merely being completed in the immediate past, to present a reasonable suspicion of ongoing danger. Very few misdemeanors will do this. An officer cannot justify a stop by looking into one's past and subsequently "investigating" any minor crimes. Single incidents of reckless driving or other traffic violations do not present an ongoing danger, or a reasonable suspicion that the driver will drive recklessly again. Minor alcohol and marijuana violations do not continue to threaten the safety of the officers or the public at large. Noise and other public order violations are similarly innocuous and thus should not be subject to warrantless investigatory stops once completed. The rule will almost certainly require a previous pattern of repeated behavior to justify a completed misdemeanor stop. This seems a sufficient requirement to mitigate widespread police abuse.

* * *

This Note's proposed approach incorporates safeguards against abuse and is in line with the Court's Fourth Amendment jurisprudence. Limiting completed misdemeanor stops to those crimes that are contemporaneously dangerous under this Note's proposed standard ensures that *Terry* remains an exception to the probable cause requirement, rather than an exception that swallows the rule.

CONCLUSION

Western thought has long grappled with the proper balance between individual rights and governmental power.²⁶³ The Fourth Amendment represents the Framers' attempt to define this balance for American de-

261. *Atwater*, 532 U.S. at 354.

262. See Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 376-79 (1998) (describing prevalence of routine traffic stops, particularly disparities among African Americans).

263. See, e.g., Aristotle, *Politics* (Richard Robinson trans., Oxford Univ. Press 1996) (n.d.); Thomas Hobbes, *Leviathan* (Richard E. Flathman & David Johnston eds., W.W. Norton & Co. 1996) (1651); Karl Marx, *The Communist Manifesto*, in *The Marx-Engels Reader* 473-500 (Robert C. Tucker ed., W.W. Norton & Co. 2d ed. 1978) (1848); John Stuart Mill, *On Liberty*, in *'On Liberty' and Other Writings* 1-116 (Stefan Collini ed., Cambridge Univ. Press 1989) (1869).

mocracy in searches and seizures.²⁶⁴ Although the Court has elaborated a sophisticated Fourth Amendment jurisprudence to address the varying interactions between individuals and law enforcement, some areas within the Court's framework remain open for exploration.

This Note addressed one such area: the constitutionality of investigatory stops for completed misdemeanors. To this end, this Note considered the *Terry* doctrine, the *Hensley* doctrine, the felony/misdemeanor distinction, and the threat of police abuse in an attempt to discover whether such stops could pass the *Terry* reasonableness inquiry. Part III concluded that it could, but only for completed misdemeanors that presented an ongoing or imminent threat to public safety. Such stops would likely be based on dangerous misdemeanors that created a reasonable suspicion of being repeated.

Yet the implications of this issue may extend beyond legal semantics to affect individuals' everyday lives. Who has never sped or jaywalked?²⁶⁵ Granting police the power to investigate such everyday crimes committed at any point in one's past could dramatically alter the frequency and nature of police stops, and thus our concept of privacy. This Note's proposed rule, that investigatory stops for completed misdemeanors should be limited to those presenting an ongoing danger, aims to strike the proper balance between individual freedom and law enforcement needs within existing Fourth Amendment doctrine.

264. As the Supreme Court has stated, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891).

265. Depending on one's jurisdiction, these crimes may or may not be classified as misdemeanors. Compare N.Y. Veh. & Traf. Law § 1150 (McKinney 2003), with Ala. Code § 32-5A-210 (2008).