

## COMMENTS

### TO STOP OR NOT TO STOP: THE APPLICATION OR MISAPPLICATION OF *HENSLEY* TO COMPLETED MISDEMEANORS

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#### I. INTRODUCTION

A police officer receives a citizen complaint that an individual has been playing his car stereo at an excessive volume. The next day, the officer sees a person matching the description from the complaint driving down the freeway. Should the officer be allowed to pull this individual over on suspicion of having committed a misdemeanor noise violation? Should there be a bright-line rule against allowing vehicle stops to investigate completed misdemeanors? Or, should the validity of an investigatory stop be determined by a balancing of the individual's and the government's interests on a case by case basis, taking into account the threat to public safety posed by the completed misdemeanor?

"[S]topping an automobile and detaining its occupants constitute[s] a 'seizure' within the meaning of" the Fourth and Fourteenth Amendments, even if "the purpose of the stop is limited and the resulting detention quite brief."<sup>1</sup> However, in *Terry v. Ohio*, the Supreme Court held that some warrantless intrusions upon the constitutionally protected interests of citizens are permissible.<sup>2</sup> The

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1 *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) ("[C]heckpoint stops are 'seizures' within the meaning of the Fourth Amendment."); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.").

2 392 U.S. 1, 27 (1968) ("conclud[ing] that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

standard of permissibility is whether the police officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>3</sup> Thus, *Terry* established the “specific and articulable facts” standard, premised upon the requirement of imminent or ongoing criminal activity, as an exception to the warrant requirement.

In *United States v. Hensley*, the Court decided that the Fourth Amendment allows police officers to conduct *Terry* stops if they “have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter . . . is wanted in connection with a completed felony.”<sup>4</sup> However, the Court in *Hensley* stopped short of deciding whether or not this ruling further extends to completed misdemeanors.<sup>5</sup>

This Comment examines the court decisions that address whether the *Hensley* holding also applies to completed misdemeanors. The Comment argues that the Court’s holding in *Hensley* should extend to these misdemeanors and that the validity of *Terry* stops should be determined on a case by case basis.

In Parts II and III, this Comment examines decisions by federal and state courts that address this issue left unanswered by the Supreme Court in *Hensley*. In Part IV, this Comment argues that there should not be a bright-line rule against allowing *Terry* stops to investigate completed misdemeanors. Instead, the Court’s holding in *Hensley* should extend to past misdemeanors and the validity of *Terry* stops should be determined by a balancing of the individual’s and the government’s interests on a case by case basis. In applying the Fourth Amendment balancing test, the Supreme Court has “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”<sup>6</sup> Rather than using the distinction between completed felonies and completed misdemeanors (both of which can threaten public safety) as the basis for ruling on the legal-

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<sup>3</sup> *Id.* at 21.

<sup>4</sup> 469 U.S. 221, 229 (1985).

<sup>5</sup> *See id.* (“We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted.”); *see also* George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 873–74 (1985) (“In *United States v. Hensley*, the Court carefully reserved the question whether ‘all past crimes, however serious’ permit nonarrest detentions on less than probable cause.” (quoting *Hensley*, 469 U.S. at 229)).

<sup>6</sup> *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *see also* *Green v. State*, 348 So. 2d 428, 429 (Miss. 1977) (“Neither this Court nor the Supreme Court of the United States has ever been able to articulate a concrete rule to determine what circumstances might justify an investigatory stop.”).

ity of investigatory stops, the use of a balancing test would allow courts to determine whether a particular misdemeanor poses a serious risk to public safety.<sup>7</sup> For example, it would be unnecessary to differentiate between a case in which a citizen reports seeing an individual driving erratically and police officers believe the individual is intoxicated from a case in which the police officers themselves see the erratic driving, if the officers believe both situations pose an equal threat to public safety.

Finally, Part V of this Comment argues that stops to investigate completed misdemeanors should only be used as a means to protect the public and not as a tool to solve crimes. Public safety is the only government interest that would warrant the invasive intrusion into an individual's privacy rights resulting from stops to investigate past misdemeanors.

## II. FEDERAL CASE LAW: THE SIXTH, EIGHTH, NINTH, AND TENTH CIRCUITS CONSIDERATION OF THE ISSUE LEFT UNANSWERED IN *HENSLEY*

To date, four circuits have addressed the issue left unanswered in *United States v. Hensley*.<sup>8</sup> In *Hensley*, police officers made an investigative stop of a person named in a "wanted flyer" they had received several days earlier. After opening the car door, the officer observed a revolver protruding from underneath the passenger's seat. The suspect was arrested and subsequently indicted by a federal grand jury for being a convicted felon in possession of firearms.<sup>9</sup> The Supreme Court decided that the Fourth Amendment allows police officers to conduct *Terry* stops if they "have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter [is] involved in or is wanted in connection with a completed felony."<sup>10</sup> The Court held that the proper way to determine the validity of these investigatory stops is to apply the same Fourth Amendment balancing test "already used to identify the proper bounds of intrusions that fur-

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<sup>7</sup> See generally *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 117 (Miss. 1999) ("The question is not whether a driver is suspected of a felony or misdemeanor, but whether a law enforcement officer acts reasonably in stopping a vehicle to investigate a complaint short of arrest."); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 811 (1993) ("[I]n *Tennessee v. Garner*, the Court characterized the felony/misdemeanor distinction as 'highly technical,' 'minor,' and 'arbitrary.' The Court observed that many misdemeanors involve conduct more dangerous than that involved in many felonies." (footnotes omitted)).

<sup>8</sup> 469 U.S. 221 (1985).

<sup>9</sup> *Id.* at 225.

<sup>10</sup> *Id.* at 229.

ther investigations of imminent or ongoing crimes.”<sup>11</sup> This test weighs “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.”<sup>12</sup>

However, the Court in *Hensley* stopped short of deciding whether or not their ruling—that the Fourth Amendment allows police officers to conduct Terry stops if they have a reasonable suspicion, grounded in specific facts, that the person was involved or is wanted in connection with a completed felony—extends to completed misdemeanors.<sup>13</sup> The Court explicitly stated: “We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted.”<sup>14</sup>

The Sixth Circuit was the first circuit to examine this issue.<sup>15</sup> In 2004, in *Gaddis ex rel. Gaddis v. Redford*, the Sixth Circuit created a bright-line prohibition against stops based on the reasonable suspicion of a “mere completed misdemeanor.”<sup>16</sup> In this case, the arrestee was alleged to have been driving erratically and to have been slumping in the car seat. The police officers stated they suspected he was intoxicated, in violation of Michigan law. When they stopped him, the officers testified that the arrestee jumped out of the car with a knife, although the arrestee denied having any knife.<sup>17</sup>

The court summarized the state of Fourth Amendment jurisprudence in the Sixth Circuit and held:

Police may make an investigative stop of a vehicle when they have reasonable suspicion of an ongoing crime, whether it be a felony or misdemeanor, including drunk driving in jurisdictions where that is a criminal offense. Police may also make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.<sup>18</sup>

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11 *Id.* at 228; *see also* *United States v. Place*, 462 U.S. 696, 703 (1983) (“We must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”); *Michigan v. Summers*, 452 U.S. 692, 698 n.7, 698–701 (1981) (reinforcing the idea of a balancing test between intrusions on Fourth Amendment interests and governmental interests).

12 *Hensley*, 469 U.S. at 228.

13 *Id.* at 229; *see also* *Dix*, *supra* note 5, at 873–74.

14 *Hensley*, 469 U.S. at 229; *see also* *Dix*, *supra* note 5, at 873–74 (“In *United States v. Hensley*, the Court carefully reserved the question whether ‘all past crimes, however serious’ permit nonarrest detentions on less than probable cause.” (quoting *Hensley*, 469 U.S. at 229)).

15 *Gaddis ex rel. Gaddis v. Redford*, 364 F.3d 763 (6th Cir. 2004).

16 *Id.* at 771 n.6.

17 *Id.* at 766–67.

18 *Id.* at 771 n.6 (citations omitted).

The Ninth Circuit was the next circuit to consider this issue.<sup>19</sup> In 2007, in *United States v. Grigg*, the Ninth Circuit refused the per se standard adopted by the Sixth Circuit three years prior.<sup>20</sup> In this case, police officers discovered an unregistered firearm while conducting an investigative stop of the defendant pursuant to a citizen's complaint that the defendant had been playing his car stereo at excessive volume earlier in the day.<sup>21</sup> The court in *Grigg* instructed "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 or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence)."<sup>22</sup> It further held:

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.<sup>23</sup>

In the same year, the Tenth Circuit also refused a bright-line prohibition against *Terry* stops to investigate completed misdemeanors.<sup>24</sup> In *United States v. Moran*, the Tenth Circuit followed the same reasoning applied by the Ninth Circuit in *Grigg* and held that, in order to determine the constitutionality of an investigatory stop, courts must balance "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion."<sup>25</sup> In this case, the defendant's car was stopped by

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

20 *Id.* at 1081.

21 *Id.* at 1072–73.

22 *Id.* at 1081.

23 *Id.*; see also Aaron Steinberg, *Terry Stop of a Vehicle to Investigate a Completed Misdemeanor Crime: U.S. v. Grigg, a Case of First Impression in the Ninth Circuit*, 36 W. ST. U. L. REV. 207, 219 (2009) (explaining that "[t]he Ninth Circuit's ruling in *Grigg* emphasized that an individual's Fourth Amendment interest varies according to the circumstances of the stop" and noting that, in this way, the court demonstrated "that there is some obligation on the part of an officer to use less intrusive means of investigating a completed petty offense, rather than merely stopping a suspect for questioning when other means of investigation existed").

24 *United States v. Moran*, 503 F.3d 1135, 1141 (10th Cir. 2007); see also Rachel S. Chase, Case Comment, *Criminal Procedure—Tenth Circuit Authorizes Investigatory Stops Based on Past Misdemeanor Offenses—United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007), 42 SUFFOLK U. L. REV. 259, 266 (2008) ("In *United States v. Moran*, the Tenth Circuit considered the constitutionality of investigatory stops based on reasonable suspicion of a past misdemeanor. The court's decision to apply a fact-specific balancing test comports with the constitutional limits of the Fourth Amendment and remains consistent with the majority of circuit courts that have addressed the issue.").

25 *Moran*, 503 F.3d at 1141 (quoting *United States v. Hensley*, 469 U.S. 221, 228 (1985)).

police officers, who found a loaded shotgun inside, after landowners reported him trespassing in order to reach a public hunting area.<sup>26</sup> The *Moran* court noted that “the governmental interest in crime prevention and detection, necessarily implicated in a stop to investigate ongoing or imminent criminal conduct, may not be present when officers are investigating past criminal conduct,” and determined that the governmental interest in “solving crimes and bringing offenders to justice” is particularly strong when the criminal activity involves a threat to public safety.<sup>27</sup>

Finally, in 2008, the Eighth Circuit weighed in on the issue left unanswered in *Hensley*.<sup>28</sup> In *United States v. Hughes*, the Eighth Circuit followed the examples set by the Ninth and Tenth Circuits and refused a per se standard prohibiting police from conducting *Terry* stops on the basis of a reasonable suspicion, grounded in specific and articulable facts, that a person was involved or is wanted in connection with a completed misdemeanor.<sup>29</sup> In this case, the defendant, who was later charged with being a felon in possession of ammunition, was stopped and searched because he was standing near a bus stop in a high crime area and he matched the description given by the police dispatcher of someone who had recently committed criminal trespass.<sup>30</sup>

In *Hughes*, the court followed the balancing test used in *Hensley* to determine the validity of the investigatory stop at issue and noted that “[u]nder this test, the nature of the misdemeanor and potential threats to citizens’ safety are important factors.”<sup>31</sup> When the Eighth Circuit applied the Fourth Amendment balancing test to the facts at issue in the case, it held that the governmental interest in investigating an earlier trespass did not outweigh the defendant’s individual interest of being free from arbitrary interference by the police.<sup>32</sup>

Thus, only one out of four circuits to address this issue has adopted a bright-line prohibition against *Terry* stops to investigate

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26 *Id.* at 1138–39.

27 *Id.* at 1142 (citing *Hensley*, 469 U.S. at 228–29).

28 *See* *United States v. Hughes*, 517 F.3d 1013, 1017–18 (8th Cir. 2008) (holding that a *Terry* stop may be justified if a police officer has reasonable suspicion that a crime has been committed, but the stop and frisk at issue was not a justified *Terry* stop).

29 *See id.* at 1017 (holding that specific and articulable facts can support and justify reasonable suspicion for a *Terry* stop).

30 *Id.* at 1015–16.

31 *Id.* at 1017; *accord* *United States v. Grigg*, 498 F.3d 1070, 1081 (2007); *Moran*, 503 F.3d at 1141.

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

completed misdemeanors.<sup>33</sup> While the Eighth, Ninth, and Tenth Circuits have all extended the Court's holding in *Hensley* to reach to prior misdemeanors, they have refused a per se rule.<sup>34</sup> These circuits determine the constitutionality of *Terry* stops to investigate completed misdemeanors by balancing the individual's and government's interests on a case by case basis.<sup>35</sup>

### III. STATE CASE LAW: INCONSISTENCY IN STATE COURT DECISIONS REGARDING WHETHER OR NOT TO ALLOW *TERRY* STOPS TO INVESTIGATE COMPLETED MISDEMEANORS

In addition to federal court decisions, state court decisions are important to consider in evaluating whether or not to allow *Terry* stops to investigate completed misdemeanors. State court decisions shed light on the importance of civil rights because states have the option to protect individual liberties above and beyond what federal law allows. In August of 1986, Justice William Brennan praised state court actions in a speech to the ABA's Section of Individual Rights and Responsibilities and stressed the importance of considering state court decisions in the evaluation of American law. Brennan stated:

[The] rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions—spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court—is probably the most important development in constitutional jurisprudence in our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead.<sup>36</sup>

Thus, it is important to consider all cases, both state and federal, in order to make an informed evaluation of the reasonableness of *Terry* stops to investigate completed misdemeanors.

Many state courts have addressed the issue left unanswered in *Hensley* and, like the federal courts of appeals, have come to different conclusions about whether or not to allow *Terry* stops to investigate completed misdemeanors.<sup>37</sup> Both the Court of Appeals of Minnesota and the Court of Appeals of Florida, Fourth District, have adopted a

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<sup>33</sup> See *supra* note 18 and accompanying text.

<sup>34</sup> See *Hughes*, 517 F.3d at 1018; *Moran*, 503 F.3d at 1141; *Griggs*, 498 F.3d at 1081.

<sup>35</sup> See *supra* note 34.

<sup>36</sup> Paul Marcotte, *Federalism and the Rise of State Courts*, 73 A.B.A.J. 60, 64 (1987).

<sup>37</sup> See, generally, *State v. Bennett*, 520 So. 2d 635, (Fla. Dist. Ct. App. 1988); *State v. Burgess*, 776 A.2d 1223 (Me. 2001); *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880 (Minn. Ct. App. 1985); *Floyd v. City of Crystal Springs*, 749 So. 2d 110 (Miss. 1999); *City of Devils Lake v. Lawrence*, 639 N.W.2d 466 (N.D. 2002); *State v. Duncan*, 43 P.3d 513 (Wash. 2002).

bright-line prohibition against allowing police to stop vehicles in order to investigate past misdemeanors.<sup>38</sup>

In 1985, the Court of Appeals of Minnesota concluded in *Blaisdell v. Commissioner of Public Safety* 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.”<sup>39</sup> In this case, a clerk at a service station reported that a car, which was driven by a licensee, had been involved in a “no-pay” theft two months earlier. An officer stopped the licensee’s car and only then noticed that the licensee appeared to be intoxicated. After failing a preliminary breath test, the licensee was arrested for DWI.<sup>40</sup>

The Minnesota court in *Blaisdell* held that all vehicle stops to investigate past misdemeanors violate the Fourth Amendment<sup>41</sup> and emphasized that automobile stops to investigate completed misdemeanors do not advance the governmental interest in solving crimes, since the owner of a car can be easily identified by looking up the license plate numbers of the vehicle.<sup>42</sup> The court concluded by stating: “While we can envision situations where an automobile stop could advance the public interest to a greater degree than the present stop, we do not believe this will arise in a misdemeanor context with sufficient frequency to appreciably advance the public interest in solving past crimes.”<sup>43</sup>

In 1988, the Court of Appeals of Florida, Fourth District, followed the 1985 ruling of the Minnesota Court of Appeals in *Blaisdell* and crafted a per se rule prohibiting police from stopping vehicles to investigate past misdemeanors.<sup>44</sup> Indeed, in *State v. Bennett*, the Florida appellate court affirmed an order of the trial court holding that stops to investigate suspects of completed misdemeanors are not permissible.<sup>45</sup>

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<sup>38</sup> See *Bennett*, 520 So. 2d at 636 (accepting trial court’s findings in favor of a bright-line prohibition); *Blaisdell*, 375 N.W.2d at 883–84 (rejecting “warrantless vehicle stops to investigate past misdemeanors”).

<sup>39</sup> *Blaisdell*, 375 N.W.2d at 883–84 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 557–58 (1976)).

<sup>40</sup> *Id.* at 881.

<sup>41</sup> *Id.* at 884; accord *Martinez-Fuerte*, 428 U.S. at 557–58 (stating that checkpoint stops do intrude to a limited extent on motorists’ rights to “free passage without interruption” (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925))).

<sup>42</sup> *Blaisdell*, 375 N.W.2d at 883.

<sup>43</sup> *Id.*

<sup>44</sup> See *State v. Bennett*, 520 So. 2d 635, 636 (Fla. Dist. Ct. App. 1988) (holding that “stops to investigate suspects of past misdemeanors are not permissible”).

<sup>45</sup> *Id.*

In contrast to the rulings of the appellate courts in Minnesota and Florida, other states have rejected a per se rule prohibiting *Terry* stops to investigate past misdemeanors.<sup>46</sup> In 1986, in *State v. Myers*, the Court of Appeals of Louisiana, Second Circuit, applied the Fourth Amendment balancing test to analyze the constitutionality of a vehicle stop to investigate the suspect of a completed misdemeanor.<sup>47</sup> In this case, the defendant's car was stopped by an officer who had received a teletype message to be on the lookout for a vehicle whose description matched the defendant's. The vehicle in question was distinctive and had been seen running a stop sign earlier in the day. After stopping the defendant, the officer discovered that the defendant had been driving under the influence of alcohol.<sup>48</sup> In *Myers*, the court held that a teletype message notifying officers to be on the lookout for a vehicle whose description matched the defendant's provided the police officer with reasonable cause to stop the defendant for the limited purpose of checking the driver's identification—a purpose which could not be accomplished simply by looking at the license plate.<sup>49</sup> The Louisiana court ruled that the police may stop any person whom an officer reasonably suspects of committing an offense, be it a felony or a misdemeanor, and ask for the person's name, address, and an explanation of his actions.<sup>50</sup>

In *State v. Blankenship*, a victim reported that the defendant's car was involved in an accident with hers, that it left the scene of the accident, and that the driver was intoxicated. Defendant contended that the initial stop of his automobile was unlawful, and therefore the evidence of intoxication should have been suppressed.<sup>51</sup> The Court of Criminal Appeals of Tennessee held that "some intrusions upon the constitutionally protected interests of citizens [are] permissible. The standard of permissibility is whether the police officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'"<sup>52</sup> The court applied the Fourth Amendment balancing test to the case at issue and concluded that the information provided to the police officer met the "specific and articulable facts" standard, and

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46 See generally *State v. Burgess*, 776 A.2d 1223 (Me. 2001); *Floyd v. City of Crystal Springs*, 749 So. 2d 110 (Miss. 1999); *City of Devils Lake v. Lawrence*, 639 N.W.2d. 466 (N.D. 2002); *State v. Duncan*, 43 P.3d 513 (Wash. 2002).

47 *State v. Myers*, 490 So. 2d 700 (La. Ct. App. 1986).

48 *Id.* at 701–02.

49 *Id.* at 703.

50 *Id.* at 703–04.

51 *State v. Blankenship*, 757 S.W.2d 354, 356 (Tenn. Crim. App. 1988).

52 *Id.* at 356 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

thus the officer was justified, based on this information, in stopping the defendant's vehicle to investigate the completed crime.<sup>53</sup>

Many other states have also adopted the Fourth Amendment balancing test to determine the validity of *Terry* stops to investigate completed misdemeanors.<sup>54</sup> In 1999, in *Floyd v. City of Crystal Springs*, a defendant was arrested after an individual reported to the police that the defendant was driving at high speed and in a reckless manner. The defendant argued that, because reckless driving is a misdemeanor and because the officer did not himself observe the defendant driving in a reckless manner, the stop was unlawful.<sup>55</sup> The Supreme Court of Mississippi applied the "specific and articulable facts" standard from *Terry* as a test of reasonableness in holding that a vehicle stop by a police officer was justified.<sup>56</sup> In *State v. Burgess* in 2001, a witness reported having seen the defendant driving while intoxicated. Two days later, the officer returned to the area where the witness had seen the defendant and stopped the defendant's car, which matched the description from the report. The officer observed no evidence of erratic driving, but the defendant failed a sobriety test.<sup>57</sup> The Supreme Judicial Court of Maine held:

An investigatory stop is justified if at the time of the stop the officer has an articulable suspicion that criminal conduct has taken place, is occurring, or imminently will occur, and the officer's assessment of the existence of specific and articulable facts sufficient to warrant the stop is ob-

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53 *Id.*

54 *See State v. Burgess*, 776 A.2d 1223, 1227 (Me. 2001) ("An investigatory stop is justified if at the time of the stop the officer has an articulable suspicion that criminal conduct . . . is . . . or imminently will occur, and the officer's assessment of the existence of specific and articulable facts sufficient to warrant the stop is objectively reasonable in the totality of the circumstances." (quoting *State v. Tarvers*, 709 A.2d 726, 727 (Me. 1998)); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 114 (Miss. 1999) ("In determining whether there exists the requisite 'reasonable suspicion, grounded in specific and articulable facts,' the court must consider whether, taking into account the totality of the circumstances, the detaining officers had a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)); *City of Devils Lake v. Lawrence*, 639 N.W.2d 466, 469-71 (N.D. 2002) (listing factors to consider in determining the reasonableness of stopping a motor vehicle or possible offender); *State v. Duncan*, 43 P.3d 513, 516-18 (Wash. 2002) ("[T]he nature and quality of the intrusion on personal security [should be balanced] against the importance of the governmental interests alleged to justify the intrusion." (quoting *United States v. Hensley*, 469 U.S. 221, 228 (1985))).

55 *See Floyd*, 749 So. 2d at 114 ("Floyd contends that because reckless driving is a misdemeanor and because Officer Palmer did not personally observe Floyd driving in a reckless manner, the stop . . . was unlawful as a violation of the Fourth Amendment's prohibition against unreasonable search and seizure.").

56 *See id.* at 114 (elaborating on the "specific and articulable facts" standard set forth in *Terry*, 392 U.S. at 27).

57 *Burgess*, 776 A.2d at 1226.

jectively reasonable in the totality of the circumstances. Thus, an officer has the authority to make an investigatory stop as a crime prevention or detection function.<sup>58</sup>

And, in 2002, the Supreme Courts of both North Dakota and Washington used a totality of the circumstances approach in evaluating the validity of a *Terry* stop to investigate a past misdemeanor.<sup>59</sup> Finally, Texas, New Hampshire, and Pennsylvania also all use the balancing test adopted in *Hensley* to determine the validity of *Terry* stops to investigate completed misdemeanors, and have thus rejected a *per se* standard against such stops.<sup>60</sup>

#### IV. REJECTION OF A PER SE STANDARD AND ADOPTION OF THE BALANCING TEST APPLIED IN *HENSLEY* TO DETERMINE THE VALIDITY OF *TERRY* STOPS TO INVESTIGATE COMPLETED MISDEMEANORS

The Court in *Hensley* chose not to decide whether it is constitutional under the Fourth Amendment for police officers to conduct investigatory stops if they have reasonable suspicion that the person was involved in a completed misdemeanor.<sup>61</sup> However, in light of the Supreme Court's prior application of the Fourth Amendment balancing test, policy considerations regarding public safety, and the lack of a clear and meaningful distinction in the common law between felonies and misdemeanors, the holding in *Hensley* should apply not only to completed felonies, but also to completed misdemeanors.

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58 *Id.* at 1227 (internal quotation marks and citations omitted) (quoting *Tarvers*, 709 A.2d at 727).

59 *See City of Devils Lake*, 639 N.W.2d. at 469 (“In determining whether an investigative stop is valid, we use an objective standard and look to the totality of the circumstances.”); *Duncan*, 43 P.3d at 518 (describing a balancing test used to determine when law enforcement may stop and detain an individual).

60 *See State v. Melanson*, 665 A.2d 338, 341 (N.H. 1995) (“We cannot say that, based on the totality of the circumstances, the trial court erred in determining that the officer had a reasonable suspicion that the driver was impaired.”); *Commonwealth v. Janiak*, 534 A.2d 833, 835 (Pa. Super. Ct. 1987) (discussing the balancing test in which courts must engage to determine individual rights when an automobile is subjected to search and seizure); *State v. Sailo*, 910 S.W.2d 184, 188 (Tex. App. 1995) (“The reasonableness of an investigative detention turns on the totality of the circumstances in each case.”).

61 *See United States v. Hensley*, 469 U.S. 221, 228 (1985) (“[T]he police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene.”).

A. *The Supreme Court Has Consistently Preferred a Fact-Specific Inquiry to Bright-Line Rules in Applying the Fourth Amendment*

The Supreme Court has consistently favored case by case inquiries over bright-line rules in evaluating constitutionality under the Fourth Amendment. In *Florida v. Jimeno*, the Supreme Court held that “[t]he touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.”<sup>62</sup> “Reasonableness . . . is measured in objective terms by examining the totality of the circumstances.”<sup>63</sup> In applying the reasonableness test, the Supreme Court has “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”<sup>64</sup> Accordingly, it is consistent with the Supreme Court’s Fourth Amendment jurisprudence for courts to reject a bright-line rule prohibiting police from conducting *Terry* stops to investigate completed misdemeanors, and instead to adopt a balancing test to determine the validity of such vehicle stops.

The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest and are grounded in the notion of reasonableness, which, in the context of the Fourth Amendment, has never been articulated by the Supreme Court in concrete terms.<sup>65</sup> As noted by the Supreme Court of Mississippi in *Floyd v. City of Crystal Springs*, “the question [of reasonableness] is approached on a case-by-case basis. The United States Supreme Court

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<sup>62</sup> 500 U.S. 248, 250 (1991) (internal citations omitted).

<sup>63</sup> *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

<sup>64</sup> *Id.*; see also *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (reversing the Florida Supreme Court’s adoption of a per se rule that questioning aboard a bus always constitutes a seizure and emphasizing that the proper inquiry necessitates consideration of “all the circumstances surrounding the encounter”); *Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988) (“Rather than adopting either rule proposed by the parties . . . we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.”); *Florida v. Royer*, 460 U.S. 491, 506–07 (1983) (“Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.”).

<sup>65</sup> See *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 115 (Miss. 1999) (“The test is thus one of reasonableness, and neither this Court nor the United States Supreme Court has articulated a concrete rule to determine what circumstances justify an investigatory stop.”); see also *Whren v. United States*, 517 U.S. 806, 810, 817 (1996) (“[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. . . . [E]very Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors.”).

has stated that, as a general rule, ‘the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.’”<sup>66</sup>

In *Adams v. Williams*, the Court discussed the importance of police discretion:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.<sup>67</sup>

Thus, in order to make decisions about investigatory detentions that are consistent with the Supreme Court’s application of the Fourth Amendment, courts should apply a test balancing “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion”<sup>68</sup> in determining the constitutionality of *Terry* stops to investigate past misdemeanors.

*B. Application of the Balancing Test Would Allow Courts to Uphold Terry Stops to Investigate Completed Misdemeanors in Cases When There Is a Threat to Public Safety*

Extending the Court’s holding in *Hensley* to apply to completed misdemeanors, as well as to completed felonies, would allow courts to differentiate between cases based on whether or not there is a threat to public safety, instead of forcing them to distinguish based on a legal characterization which may or may not have any relevance to whether the safety of the public is at risk. A totality of the circumstances approach would allow courts to balance the government’s and individual’s interests, and reach a conclusion in light of the particular facts and circumstances of each case.<sup>69</sup> The standard of per-

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<sup>66</sup> *Floyd*, 749 So. 2d at 115 (quoting *Whren*, 517 U.S. at 810).

<sup>67</sup> 407 U.S. 143, 145–46 (1972) (internal citation omitted). See also David S. Rudstein, *White on White: Anonymous Tips, Reasonable Suspicion, and the Constitution*, 79 KY. L.J. 661, 666 (1991) (discussing the Court’s holding in *Adams* that “reasonable suspicion can be based upon information supplied by another person, provided that the information carries sufficient ‘indicia of reliability’” (footnote omitted) (quoting *Adams*, 407 U.S. at 147)).

<sup>68</sup> *United States v. Hensley*, 469 U.S. 221, 228 (1985).

<sup>69</sup> Cf. Sameer Bajaj, Note, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 COLUM. L. REV. 309, 310–11 (2009) (arguing that “warrantless police stops to investigate completed misdemeanors are constitutional only when employed to defuse an ongoing danger”); Rachel S. Weiss, Note, *Defining the*

missibility, as articulated in *Terry*, should be whether the police officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.”<sup>70</sup>

In a contrary line of reasoning, the Court of Appeals of Minnesota held that all vehicle stops to investigate past misdemeanors violate the Fourth Amendment.<sup>71</sup> In *Blaisdell v. Commissioner of Public Safety*, the court stated, “[w]hile we can envision situations where an automobile stop could advance the public interest to a greater degree than the present stop, we do not believe this will arise in a misdemeanor context with sufficient frequency to appreciably advance the public interest in solving past crimes.”<sup>72</sup> However, there have been many cases, including *State v. Myers*, in which exactly such a situation occurred.<sup>73</sup> In *Myers*, the court wrote:

We have a scenario apparently involving a driver who left the scene of an accident. Damage was caused, perhaps intentionally, to government property. At the very least, we are dealing with an impaired or non-attentive driver who might have been dangerous to other traffic. The safety of the motoring public and the potential capacity of the automobile to inflict serious damage provides a fairly strong government interest.<sup>74</sup>

*State v. Blankenship* is another case involving a misdemeanor in which the governmental interest in protecting the public significantly outweighed the individual’s interest in personal security. In *Blankenship*, the defendant had left the scene of the accident before the police could arrive. However, the victim provided information which led the police to stop the defendant, at which time the officer determined that the defendant was intoxicated.<sup>75</sup> The Tennessee Court of Criminal Appeals determined that the officer was justified, based on the information provided, in stopping the defendant’s vehicle to investigate a completed misdemeanor, because the intoxicated

*Contours of United States v. Hensley: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 CORNELL L. REV. 1321, 1348–49 (2009) (arguing for a dangerous-driving exception to a per se approach against all *Terry* stops for completed misdemeanors).

<sup>70</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

<sup>71</sup> See *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 884 (Minn. Ct. App. 1985) (“[V]ehicle stops to investigate completed misdemeanors violate the fourth amendment of the United States Constitution.”).

<sup>72</sup> *Id.* at 883.

<sup>73</sup> See *State v. Myers*, 490 So. 2d 700, 704 (La. Ct. App. 1986) (discussing a case involving a traffic stop of a vehicle following a completed misdemeanor and the ways in which the driver could have harmed the public).

<sup>74</sup> *Id.* at 704.

<sup>75</sup> *State v. Blankenship*, 757 S.W.2d 354, 356 (Tenn. Crim. App. 1988).

driver posed a threat to other drivers and pedestrians.<sup>76</sup> Due to the significant threat that a reckless or intoxicated driver can pose to the safety of the public, it is important for officers to be allowed to investigate cases, including completed misdemeanors, in which the safety of the public is at risk as a result of such criminal activity.

It is true that some completed misdemeanors pose no resulting risk to the safety of the public, and it is for just this reason that courts should use a balancing test, instead of a bright-line rule, to evaluate the constitutionality of a *Terry* stop to investigate completed misdemeanors. For example, in *United States v. Hughes*, the Eighth Circuit balanced the “nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion,”<sup>77</sup> including the resulting threat to public safety, and determined that “the governmental interest in investigating a previous trespass [did] not outweigh Hughes’s personal interest.”<sup>78</sup> The United States District Court for the District of Maryland aptly noted in *United States v. Jegede* in 2003:

It is one thing to uphold a stop on suspicion of a misdemeanor, not committed in an officer’s presence, when there is potential for repeated danger, such as weaving or other dangerous driving. It is quite another to uphold a stop for a completed misdemeanor when there is no indication that it will be repeated, or cause danger to others, and particularly when the police have the means to identify the driver.<sup>79</sup>

Thus, instead of distinguishing between completed felonies and completed misdemeanors, courts should distinguish between cases which involve a threat to public safety and those that pose no such threat in determining the validity of *Terry* stops to investigate completed misdemeanors.

*C. There Is an Arbitrary Distinction between Felonies and Misdemeanors in the Context of Terry Stops*

As noted in Part IV.B of this Comment, it is arbitrary to distinguish between completed felonies and completed misdemeanors in the context of *Terry* stops, when both involve a risk to public safety and when the officer acts reasonably in detaining the vehicle. This

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<sup>76</sup> *See id.* (noting that the information provided to Officer Cook met the “specific and articulable facts” standard and “Officer Cook was justified, based on this information, in stopping the defendant’s vehicle to investigate a crime,” especially given that it was “in the context of . . . [a] crime[] involving a threat to public safety”).

<sup>77</sup> 517 F.3d 1013, 1017 (8th Cir. 2008) (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

<sup>78</sup> *Id.* at 1018.

<sup>79</sup> 294 F. Supp. 2d 704, 708 (D. Md. 2003).

issue has been discussed by both state and federal courts. In *Floyd*, the Supreme Court of Mississippi rejected a bright-line rule against *Terry* stops to investigate completed misdemeanors, in part because “applying the felony/misdemeanor distinction in traffic violation cases 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 unless the officer has probable cause to arrest.”<sup>80</sup> The court further noted:

The felony/misdemeanor distinction . . . is not the correct test by which to evaluate whether an investigative stop is reasonable. The question is not whether a driver is suspected of a felony or misdemeanor, but whether a law enforcement officer acts reasonably in stopping a vehicle to investigate a complaint short of arrest.<sup>81</sup>

The Tennessee Court of Criminal Appeals has also recognized the drawbacks of distinguishing between felonies and misdemeanors in the context of investigatory stops. In *State v. Blankenship*, the court held that the “difference between felonies and misdemeanors is a legislative, not a constitutional, distinction. Any fourth amendment or *Terry* analysis should apply to all crimes.”<sup>82</sup> Thus, when a police officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant”<sup>83</sup> the detention of a vehicle, and when the governmental interests, including the threat to public safety, outweigh the nature and quality of the intrusion on personal security, it is arbitrary to prohibit a *Terry* stop to investigate the past criminal activity simply because that activity was a completed misdemeanor.

Several federal courts have also questioned the felony/misdemeanor distinction in the application of the Fourth Amendment. In *Street v. Surdyka*,

the Fourth Circuit held that the Fourth Amendment should not “be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer’s presence.” The court reached this result in significant part because it believed that the felony/misdemeanor distinction “is no longer as significant as it was at common law.”<sup>84</sup>

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80 *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 117 (Miss. 1999).

81 *Id.* at 117.

82 757 S.W.2d 354, 357 (Tenn. Crim. App. 1988); *see also* *State v. Bryant*, 678 S.W.2d 480, 483 (Tenn. Crim. App. 1984) (noting that the State of Tennessee’s “limitation on warrantless arrests for misdemeanors is not constitutionally required”).

83 *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

84 *Schroeder*, *supra* note 7, at 811 (footnote call numbers omitted) (quoting *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1972)).

The Supreme Court has also recognized the difficulty of determining how the difference between felonies and misdemeanors relates to the application of the Fourth Amendment. In *United States v. Hensley*, the Court utilized the felony/misdemeanor distinction in holding that police may only conduct *Terry* stops to investigate completed felonies;<sup>85</sup> however, only months later, in *Tennessee v. Garner*,

the Court characterized the felony/misdemeanor distinction as “highly technical,” “minor,” and “arbitrary.” The Court observed that many misdemeanors involve conduct more dangerous than that involved in many felonies, and rejected the argument that deadly force should be permitted to effect the seizure of any felon because such seizures were permitted at common law.<sup>86</sup>

Additionally, in Justice White’s dissent in *Welsh v. Wisconsin*, the Justice noted that “the category of misdemeanors today includes enough serious offenses to call into question” the legal distinction between felonies and misdemeanors.<sup>87</sup> Thus, it is arbitrary and impractical to limit *Terry* stops by police officers to the investigation of only completed felonies.

#### V. STOPS TO INVESTIGATE COMPLETED MISDEMEANORS SHOULD ONLY BE USED AS A MEANS TO PROTECT THE PUBLIC AND NOT AS A TOOL TO SOLVE CRIMES

This Part examines the importance of considering public safety in Fourth Amendment jurisprudence in both federal and state court decisions. Then, this Part argues that because public safety is such an important aspect of the government interest element of the Fourth Amendment balancing test, and because no other government interest would sufficiently justify the invasive intrusion into personal security that results from *Terry* stops to investigate completed misdemeanors, protecting the public from harm resulting from a past misdemeanor is the only government interest that would warrant such investigatory stops.

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<sup>85</sup> 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. . . . [I]f police have a reasonable suspicion . . . 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.”).

<sup>86</sup> Schroeder, *supra* note 7, at 811 (internal footnotes omitted) (quoting *Tennessee v. Garner*, 471 U.S. 1, 14, 20 (1985)).

<sup>87</sup> *Welsh v. Wisconsin*, 466 U.S. 740, 761 (1984) (White, J., dissenting); *see also* Schroeder, *supra* note 7, at 811 n.144.

A. *The Importance of Public Safety in Examining the Strength of the Government's Interest in the Fourth Amendment Balancing Test*

In applying the Fourth Amendment reasonableness test to *Terry* stops, courts must balance the nature and quality of a detention's impact on "personal security against the importance of the governmental interests alleged to justify the [detention]." <sup>88</sup> When there is a threat to public safety, the government has a strong interest in protecting the public from harm. <sup>89</sup> In *Grigg*, the Ninth Circuit laid out the rule derived from *Hensley* regarding the constitutionality of *Terry* stops. The court stated:

[A] court reviewing the reasonableness of an investigative stop must consider the nature of the offense, with particular attention to any inherent threat to public safety associated with the suspected past violation. A practical concern that increases the law enforcement interest under *Hensley* is that an investigating officer might eliminate any ongoing risk that an offending party might repeat the completed misdemeanor or that an officer might stem the potential for escalating violence arising from such conduct, both of which enhance public safety. Conversely, the absence of a public safety risk reasonably inferred from an innocuous past misdemeanor suggests the primacy of a suspect's Fourth Amendment interest in personal security. <sup>90</sup>

Furthermore, in *Welsh*, the Court observed that the nature and seriousness of an offense is "an important factor to be considered when determining whether any exigency exists" that would justify a warrantless home arrest. <sup>91</sup> The reasoning in *Welsh* was not applied specifically to a vehicle stop, <sup>92</sup> but the Court's interpretation of the Fourth Amendment in this case could be extended to apply to all *Terry* stops. Therefore, it is important to consider the nature of the

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<sup>88</sup> See *Hensley*, 469 U.S. at 228 (describing the reasonableness test).

<sup>89</sup> See *United States v. Grigg*, 498 F.3d 1070, 1080 (9th Cir. 2007) (requiring courts to consider the nature of the offense and the threat to public safety from the past violation when determining reasonableness); see also *State v. Burgess*, 776 A.2d 1223, 1227–28 (Me. 2001) (upholding the constitutionality of a vehicle stop to investigate complaint of previous threat by drunken man to shoot a vehicle); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 117–19 (Miss. 1999) (holding that stop of vehicle reported to have driven recklessly was constitutional); *State v. Blankenship*, 757 S.W.2d 354, 356–57 (Tenn. Crim. App. 1988) (holding stop constitutional on report that suspect was involved in hit-and-run accident).

<sup>90</sup> *Grigg*, 498 F.3d at 1080; see also *Hensley*, 469 U.S. at 229 ("Particularly in the context of felonies or crimes involving a threat to public safety . . . law enforcement interests . . . in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.").

<sup>91</sup> *Welsh*, 466 U.S. at 753; see also Schroeder, *supra* note 7, at 818.

<sup>92</sup> See *Welsh*, 466 U.S. at 753 (noting the extenuating circumstances that qualified it as more than a vehicle stop).

criminal activity at hand in determining the governmental interest and the threat to public safety.

The importance of public safety in examining the strength of the government's interest in a Fourth Amendment balancing test is also evident in state court cases addressing the issue of *Terry* stops in the misdemeanor context.<sup>93</sup> For example, in *City of Devils Lake v. Lawrence*, the North Dakota Supreme Court held that an investigatory stop, based on a call from a police dispatch that a fight was going to begin at a bar and a description by a witness that the defendant was the one involved in the verbal altercation, was constitutional:

A law enforcement officer could reasonably infer and deduce from this dispatch, at the very least, the possibility that someone at the bar had engaged in, or was engaging in, "violent, tumultuous, or threatening behavior" with intent to harass, annoy, or alarm another person within the meaning of [the state statute], to necessitate a call for police assistance.<sup>94</sup>

The North Dakota court did not specifically mention *Hensley*; however, the "court was alert to the potential threat arising from a suspected past misdemeanor of disorderly conduct, which favored permitting the investigatory stop to quell the possibility of escalating violence."<sup>95</sup>

Additionally, the Louisiana appellate decision in *Myers*, that a vehicle stop to investigate the suspected perpetrator of a completed misdemeanor was constitutional, was based in part on the fact that in this case the government's interest in protecting the public from harm outweighed the defendant's interest in personal security.<sup>96</sup> The court stated that "[t]he safety of the motoring public and the potential capacity of the automobile to inflict serious damage provides a fairly strong government interest."<sup>97</sup>

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93 See generally *State v. Myers*, 490 So. 2d 700 (La. Ct. App. 1986); *Burgess*, 776 A.2d 1223; *Floyd*, 749 So. 2d 110; *City of Devils Lake v. Lawrence*, 639 N.W.2d 466 (N.D. 2002); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (discussing different examples of *Terry* stops in state misdemeanor cases).

94 *City of Devils Lake*, 639 N.W.2d at 473.

95 *Grigg*, 498 F.3d at 1079.

96 See *Myers*, 490 So. 2d at 704 (noting how a strong governmental interest exists when the safety of the public is at issue).

97 *Id.*

B. *Protecting the Public from Harm: The Only Government Interest That Warrants an Investigatory Detention in the Context of a Completed Misdemeanor*

Because public safety is such an important aspect of the government interest element of the Fourth Amendment balancing test,<sup>98</sup> and because no other government interest<sup>99</sup> would sufficiently justify the intrusion into personal security that results from *Terry* stops to investigate completed misdemeanors, protecting the public from harm resulting from a past misdemeanor is the only government interest that would warrant an investigatory stop.<sup>100</sup> In such a case, the government's interest in solving the misdemeanor crime is great enough to outweigh the resulting invasion into personal security and to warrant a stop to investigate the completed crime.

Even though the Supreme Court did not extend its holding in *Hensley* to apply to completed misdemeanors, the Court did note the differences between the government's interest in ongoing crimes and its interest in completed crimes.<sup>101</sup> With *Terry* stops to investigate completed crimes, the government has no interest in crime prevention or detection because the criminal activity is not ongoing or imminent, "the exigencies requiring a police officer to step in to prevent [the] crime are not present," and "because the crime has been committed, the police have greater latitude to choose the time and place to talk to the suspect."<sup>102</sup> Furthermore, with less serious of-

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<sup>98</sup> See *Grigg*, 498 F.3d at 1079–80 (stating that any particular threat to public safety is a key part of the analysis).

<sup>99</sup> Cf. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 616 (2005) ("On the 'government interest' side of the balance, the Court examines a wide range of factors, including the seriousness and immediacy of the harm sought to be prevented, the degree of individualized or target-group suspicion, the presence of a warrant, warrant-substitute, or other limits on police discretion, the feasibility of applying individualized suspicion and warrant requirements in this context, the importance of the evidence or other expected fruits of the intrusion, the availability of other means to achieve the government's interest, and the effectiveness of the means chosen.").

<sup>100</sup> Cf. *Bajaj*, *supra* note 69, at 310–311 (arguing that "warrantless police stops to investigate completed misdemeanors are constitutional only when employed to defuse an ongoing danger"); *Weiss*, *supra* note 69, at 1348–49 (arguing for a dangerous-driving exception to a *per se* approach against all *Terry* stops for completed misdemeanors).

<sup>101</sup> See *United States v. Hensley*, 469 U.S. 221, 228 (1985) (noting that, despite the limits, a police officer is not prohibited from stopping a suspect of a past crime); Major Wayne E. Anderson, *Everything You Always Wanted to Know About Terry Stops—But Thought It Was a Violation of the Fourth Amendment to Stop Someone and Ask*, 1988 ARMY LAW. 25, 28 (noting that the government may have a more compelling interest in a completed crime when it was a threat to public safety).

<sup>102</sup> Anderson, *supra* note 101, at 28.

fenses, the government's interest in quickly solving the crime is also weaker. "[T]he less serious the offense under investigation, the greater the limits the Constitution imposes on the kind of actions the government can take to investigate the offense and to seize the offender."<sup>103</sup>

In fact, in many cases involving stops of automobiles, officers do not need to utilize the *Terry* stop to advance the governmental interest of solving crimes. As noted in *Blaisdell*, "[t]he name of the owner of the car can be obtained by recording the license plate numbers of the vehicle,"<sup>104</sup> and does not need to be learned through stopping the vehicle.<sup>105</sup> Thus, utilizing the *Terry* stop to investigate completed misdemeanors in cases in which there is no threat to public safety resulting from the illegal conduct can result in an unnecessary invasion of the driver's personal security.

Even though the government's interest in solving crimes does not outweigh the intrusion into personal security resulting from *Terry* stops, there are cases in which the government has a strong interest in investigating completed misdemeanors. As discussed above, when a completed misdemeanor causes a threat to public safety, the government's interest in investigating the past crime can outweigh the resultant invasion of personal security.<sup>106</sup> For example, in *Floyd*, the Supreme Court of Mississippi held that an investigatory stop, based on a description of a car made by a witness who had seen the car driving at a high rate of speed and in a reckless manner, was constitutional even though the officer had not personally observed the criminal behavior.<sup>107</sup>

The court based its holding on the fact that the officer had a reasonable suspicion, grounded on specific and articulable facts, that the defendant had been driving recklessly.<sup>108</sup> In addition, they noted the strong governmental interest in protecting the public from potential

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<sup>103</sup> Schroeder, *supra* note 7, at 820 & n.193; see also *Hensley*, 469 U.S. at 229; *Tennessee v. Garner*, 471 U.S. 1, 14 (1985); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984); cf. Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 677 (1961) ("[T]he detection of minor crimes might legitimize only minor invasions of privacy.").

<sup>104</sup> *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 883 (Minn. Ct. App. 1985).

<sup>105</sup> See *id.* (noting that the governmental interest is not as great when making a stop that is connected to a past, completed crime).

<sup>106</sup> See *United States v. Grigg*, 498 F.3d 1070, 1079–80 (noting that a continued threat to public safety strengthens the governmental interest).

<sup>107</sup> See *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 116 (Miss. 1999) (stating that an officer can make a stop so long as he has a reasonable suspicion of a criminal activity).

<sup>108</sup> See *id.* at 118 (noting that the officer had a specific description of Floyd's car and there was a complaint of reckless driving).

harm caused by the suspect of the past misdemeanor.<sup>109</sup> The court stated:

The public concern served by the seizure is evident—a reckless driver poses a mortal danger to others. There exists in such a situation an absolute necessity for immediate investigatory activity. . . . To cling to a rule which would prevent a police officer from investigating a reported complaint of reckless driving would thwart a significant public interest in preventing the mortal danger presented by such driving.<sup>110</sup>

Thus, in *Floyd*, the government had a strong interest in investigating the past misdemeanor because of the potential for a resulting threat to public safety.

In *State v. Duncan*, the Washington State Supreme Court held that a *Terry* stop to investigate a person who may have been observed drinking alcohol in public was unconstitutional under the Fourth Amendment.<sup>111</sup> In coming to this conclusion, the court “acknowledged the principle in *Hensley* that the traditional interest in officer safety and crime prevention ‘may not be present when dealing with past crime.’”<sup>112</sup> In this case, unlike some of the above cases involving reckless driving which could result in harm to others even after the witnesses were no longer in sight of the criminal action, there was arguably no threat to the public caused as a result of the public consumption of alcohol; the court therefore ruled the police investigation unconstitutional.<sup>113</sup> Furthermore, because of the lack of severity of the crime, the governmental interest in solving the crime did not outweigh the personal intrusion resulting from the investigation.<sup>114</sup>

Thus, adopting a balancing test, instead of a *per se* standard, in which courts can take into account the threat to public safety caused by the completed misdemeanor, renders the holding in *Blaisdell*<sup>115</sup> irrelevant because the governmental interest in solving crimes is not

<sup>109</sup> See *id.* at 117 (stating that the intrusion to *Floyd* was minimal and the interest served was great).

<sup>110</sup> *Id.*

<sup>111</sup> 43 P.3d 513, 521 (Wash. 2002) (refusing to extend *Terry* stops to past crimes that officers did not witness and that did not involve a traffic infraction).

<sup>112</sup> *United States v. Grigg*, 498 F.3d 1070, 1078 (9th Cir. 2007) (“The . . . focus on preventing crimes, and promoting the interests of justice in arresting felons in *Hensley*, suggests that the interest in preventing civil infractions may not be accorded the same weight.” (quoting *Duncan*, 43 P.3d at 518)).

<sup>113</sup> See *Duncan*, 43 P.3d at 521 (“Possessing or consuming alcohol in public is not a crime . . .”).

<sup>114</sup> See *id.* at 518–19 (noting that, with a lesser crime, a lower level of intrusion will be tolerated).

<sup>115</sup> See *Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 883–84 (Minn. Ct. App. 1985) (stating that the balancing test weighs the benefit to the public against the intrusion upon the motorist’s rights).

considered when weighing the interests. Instead, the only interest that outweighs an individual's privacy rights is the government's interest in protecting the public from harm.

## VI. CONCLUSION

This Comment addresses the issue of whether or not the holding in *Hensley*—that police officers are allowed to conduct *Terry* stops if they have a reasonable suspicion, grounded in specific and articulable facts, that a person is wanted in connection with a completed felony—should extend to completed misdemeanors. The Comment examines the federal and state court decisions that adopt a bright-line prohibition against such stops and the decisions that balance the interests on a case by case basis, and argues that the holdings adopting a balancing test are more persuasive and consistent with the Supreme Court's Fourth Amendment jurisprudence.<sup>116</sup> The constitutionality of *Terry* stops should be determined by a balancing of the individual's and the government's interests on a case by case basis, because the Supreme Court has consistently favored fact-specific reasonableness inquiries over bright-line rules in applying the Fourth Amendment and because a balancing test would allow courts to validate *Terry* stops in cases where there is a threat to public safety associated with the crime.

Finally, this Comment examines the importance of public safety in Fourth Amendment jurisprudence by looking at federal and state court decisions addressing this issue, and argues that public safety is the only government interest that would warrant the invasive intrusion into individual privacy rights associated with stops to investigate past misdemeanors.<sup>117</sup> Because public safety is such an important aspect of the government interest element of the Fourth Amendment balancing test, and because no other government interest would sufficiently justify the invasive intrusion into personal security that results from *Terry* stops to investigate completed misdemeanors, protecting the public from harm posed by certain misdemeanors is the only government interest that would warrant such investigatory stops.

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<sup>116</sup> See *supra* Parts II, III, and IV.

<sup>117</sup> See *supra* Part V.