Why Crime Severity Analysis is Not Reasonable

A Comment on Jeffrey Bellin, Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World

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INTRODUCTION

Jeffrey Bellin's article, *Crime Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, argues that the severity of the crime under investigation ought to be taken into account in assessing both the reasonableness of searches and whether a government action is a search in the first place.[1] In pursuit of this objective, his article provides the best attempt to date at dealing with the difficult issue of separating serious from not-so serious crimes (he ends up with three

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1. Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011).

categories—grave, serious and minor[2]). He then makes the enticing argument that calibrating the degree of Fourth Amendment protection according to crime severity would allow courts to provide more protection for those suspected of minor crimes because courts will no longer fear that such a move will handcuff police investigations of serious crimes.

My concern is that just the opposite will occur. Rather than starting from a baseline of warrants and probable cause for investigations of serious crimes and ratcheting protection upward as the targeted crime becomes less serious, courts are likely to apply the warrant baseline to minor crimes and ratchet protections downward when law enforcement goes after people suspected of being terrorists, murderers, rapists and robbers. The proposition that the state should be barred from investigating minor crimes—which appears to be Professor Bellin's agenda, at least when the investigative technique is perceived as "intrusive"[3]—will be too hard for courts to swallow, because it amounts to judicial crime definition in the substantive due process tradition the courts have rejected. At most, courts will require the full complement of probable cause and a warrant in such situations. At the same time, if reasonableness analysis incorporates a crime severity component as Professor Bellin proposes, courts will inevitably relax those requirements in a wide array of investigations, probably involving intermediate, "serious" crimes as well as "grave" crimes (to use Professor Bellin's categories).

Professor Bellin's worry about government over-reaching during investigations of minor crimes is well-taken, however, especially in an age of expanded technological surveillance capacity. While his proposal is one way of grappling with that problem, more traditional, less risky, methods exist for handling it. In particular, enforcing already-existing search incident and particularity doctrine, limiting consent and pretext as a basis for searches, and explicitly recognizing a narrowly-limited-danger exception would go far toward accomplishing the goal that seems to be the primary motivation behind Professor Bellin's article.

THE ADMINISTRABILITY PROBLEM

Professor Bellin is correct in asserting that the main reason the courts have adhered to a "trans-substantive" Fourth Amendment, the term the late William Stuntz coined to describe current search and seizure law,[4] is the concern that a contrary position would immerse judges in frustrating

2. *Id.* at 27.

3. *See infra* text accompanying notes 25–27.

4. William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002) ("[M]ost constitutional limits on policing are transsubstantive—they apply equally to suspected drug dealers and suspected terrorists.").

litigation over when a crime is severe.[5] Professor Bellin does as good job as possible at laying that concern to rest. He proposes the tripartite organization noted above, with crimes of violence occupying the grave crime category, victimless crimes like jaywalking, vagrancy, simple assault, and drug possession comprising the minor crime category, and everything else constituting serious crime.[6]

Of course, one can question whether these categories can be contained in any meaningful way. For instance, Professor Bellin states that a kick to the shin should be in a lower category than an assault involving a stabbing, but notes a court decision declaring that even a shin-kick is a major crime and does not himself indicate whether he thinks the kick is minor or serious or whether the stabbing is serious or grave.[7] The same research he cites for the proposition that consensus exists as to the ordinal ranking of "core" crimes like homicide and assault also finds that for crimes outside the core—which include, notably, drug crimes, prostitution, and petty theft by a recidivist—there is widespread disagreement as to relative seriousness.[8]

When one adds Professor Bellin's suggestion that the category of crime involved in a particular case depends on what a "reasonable" police officer would believe,[9] the potential for mischief vastly increases, given officers' well-known penchant for shading the facts when necessary to nab a guilty person.[10] This becomes a particular problem in cases like *Whren v. United States*, where the cops suspected a drug crime but only had probable cause for a traffic violation.[11] Professor Bellin's crime severity test, which focuses on "the most serious offense plausibly suggested by the facts known to the officer,"[12] would presumably permit the more serious drug offense to govern a court's analysis in such a case. Professor Bellin might respond that even a drug offense is "minor," so no quandary exists. But on the facts of *Whren* an officer could "plausibly" assert (and back up with relevant "facts") that the

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5. Bellin, *supra* note 1, at 13 ("In the few cases where the Court explicitly rejects calls to consider offense severity, however, its emphasis has been on administrability.").

6. *Id.* at 32–33.

7. *Id.* at 25, 34.

8. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1885 tbl.6 (2007).

9. Bellin, *supra* note 1, at 34 & n.138, 43.

10. *See* Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1041–48 (1996).

11. Whren v. United States, 517 U.S. 806 (1996). The officers saw two individuals in a car in a "high drug area" and when the driver saw them (the police) he looked down into his passenger Whren's lap, remained stationary at a stop sign for an abnormally long time (twenty seconds), and then, when the police executed a U-turn to come behind them, took off at an "unreasonable" rate of speed. *Id.* at 808 (internal quotation marks omitted).

12. Bellin, *supra* note 1, at 24 (internal quotation marks omitted).

defendants were drug traffickers, not just possessors of a few ounces of marijuana.[13]

If crime severity needs to be measured, however, Professor Bellin's three categories are probably the best we can do without complicating matters beyond repair. And since much of the rest of Fourth Amendment law depends upon what a reasonable officer believes,[14] that part of Professor Bellin's test is at least solidly based on precedent. Courts will have a hard time measuring crime severity and developing bright-line rules that provide meaningful guidance for the police, especially if, as Professor Bellin believes, "reasonableness should carry the day" when clarity and reasonableness conflict.[15] But the difficulty here is no greater than the difficulty of developing rules about relative intrusiveness, which are already a significant part of Fourth Amendment jurisprudence.[16]

THE NORMATIVE ARGUMENT AGAINST A CRIME SEVERITY COMPONENT

Let us assume that we can conquer the administrability problem. Professor Bellin rightly notes that "intuition," bolstered by the comments of several justices and (my) empirical research investigating the views of the public, could support a reasonableness analysis that takes into account the seriousness of the crime under investigation.[17] And he is also correct that, outside of the administrability complaint, the Supreme Court has failed to provide an explicit explanation for its contrary, essentially trans-substantive, approach to the Fourth Amendment.[18] But none of this means that such an explanation cannot be advanced.

The normative argument was implicit in *Mincey v. Arizona*, where the Supreme Court refused to adopt a "murder scene exception" that would have allowed warrantless searches of a home in all suspected murder cases,

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13. Indeed, the police found in Whren's lap "two large plastic bags of what appeared to be crack cocaine." *Whren*, 517 U.S. at 809.

14. *See, e.g.*, *id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

15. Bellin, *supra* note 1, at 39.

16. *See* Christopher Slobogin, *Proportionality, Privacy and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1595 (2010) (noting that "intrusiveness" or "invasiveness" is found in over 200 Supreme Court Fourth Amendment opinions (internal quotation marks omitted)).

17. Bellin, *supra* note 1, at 4 ("A key intuitive component of reasonableness is the seriousness of the crime investigated"); *id.* at 18 & n.68 (quoting from Justice Jackson's dissent in Brinegar v. United States, 338 U.S. 160, 183 (1949), the statement that "if we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend [instead] upon the gravity of the offense"); *id.* at 45 & n.183 (noting the results of a survey of laypeople described in Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 767 (1993), and finding that "the privacy expectations that society would deem reasonable fluctuate with crime severity").

18. Bellin, *supra* note 1, at 13.

regardless of whether exigency existed.[19] The Court's main concern in *Mincey* was, as Professor Bellin states, the proverbial slippery slope.[20] But in answer to the state's claim that murder investigations should be relatively unrestricted, Justice Stewart's opinion in *Mincey* also forthrightly stated that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[21] In other words, the government may not dispense with a warrant requirement simply because obtaining a warrant might impede a murder investigation. Otherwise, a person's Fourth Amendment protections will diminish whenever the police believe (however reasonably) a serious crime has been committed.

I have argued elsewhere that the latter result is analogous to lowering the beyond-a-reasonable-doubt proof requirement at trial whenever the alleged crime is serious.[22] Professor Bellin contends that this analogy is "flawed" because the state's heightened interest in obtaining a conviction in such cases is offset by "the innocent defendant's interest in avoiding a more serious conviction."[23] But the individual whose house is invaded by police in the erroneous belief that he is a murderer *also* has much more to lose, in terms of both reputation and emotional stability, than the innocent individual whose home is searched upon suspicion of drug possession.

The most potent normative argument in favor of a trans-substantive amendment, however, is based on the likely outcome of a rule incorporating crime severity into reasonableness analysis. Although Professor Bellin never quite says so, he suggests that arrests in traffic cases like *Atwater v. Lago Vista*[24] (the soccer mom case) and various stops and searches connected with other "minor" crimes would not be permitted in his regime.[25] And he explicitly argues that searches of homes (at least via surreptitious video camera) for evidence of crimes like cable theft or marijuana possession should be prohibited.[26] Finally, he seems comfortable with a grave crime

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19. Mincey v. Arizona, 437 U.S. 385 (1978).

20. *Id.* at 393 ("'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine." (quoting Chimel v. California, 395 U.S. 752, 766 (1969))).

21. *Id.*

22. *See, e.g.*, Slobogin, *supra* note 16, at 1614.

23. Bellin, *supra* note 1, at 15 n.55.

24. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

25. Bellin, *supra* note 1, at 36 ("The alternative approach proposed here would allow the suspect in a case like *Atwater* to invoke an exception to the *per se* rule based on the 'minor' nature of her underlying offense. Her seizure could then be individually analyzed in light of its intrusiveness and the public interest furthered to determine Fourth Amendment reasonableness."); *id.* at 20 ("Currently valid searches and seizures would become unconstitutional due, in part, to the relative insignificance of the targeted offense.").

26. *Id.* at 43 ("[W]here police are targeting 'minor crimes,' video surveillance and other technological techniques "should be deemed *per se* unreasonable and no warrant would issue.").

exception to the warrant requirement akin to that rejected in *Mincey*.[27] All of this could easily lead to disaster, at least for those who want a strong Fourth Amendment.

First, contrary to Professor Bellin's apparent hope, courts are highly unlikely to ban arrests or searches simply because the crime at issue is "minor." Rather, as long as the police action is not extremely intrusive, at most they will require full Fourth Amendment protection in such cases. Even *Welsh v. Wisconsin*, the lone Supreme Court case that directly supports Professor Bellin's approach,[28] only prohibited *warrantless* home entries in cases involving minor crime; the Court would have allowed the search of Welsh's home had the police obtained a warrant[29] (which in these days of telephonic warrants is very possible even in the short time the police had to obtain a sample of Welsh's blood while he was still intoxicated[30]). Fourth Amendment rules that make pursuing minor crimes very difficult would amount to a judicial declaration that criminalizing certain actions is unconstitutional. The Supreme Court has been willing to use the Due Process Clause for this purpose when vague laws allow easy abuse of police discretion.[31] But venturing beyond those cases to, in effect, strike down "minor" laws that are not unconstitutionally vague—for instance, traffic laws that might give police a pretext for consent or search incident searches, or drug laws that might provide police with an excuse to access cell phones, computers, or homes—is not a step courts are likely to take.[32] That move

27. *Id.* at 36–37 ("An analogous approach, favoring law enforcement, could be applied in cases like *Mincey*, where a bright-line rule forbidding certain actions would yield in an investigation of a grave offense.").

28. In *Florence v. Bd. of Chosen Freeholders*, the Court is likely to strike down a policy allowing a strip search of jail inmates charged with minor crimes, but presumably that holding is best conceptualized as a statement that suspicion of weaponry or contraband is required for such strip searches, not as a declaration that all jail inmates charged with minor crimes are exempt from the policy. 621 F.3d 296 (2010), *cert. granted*, 131 S. Ct. 1816 (2011).

29. Welsh v. Wisconsin, 466 U.S. 740 (1984).

30. Bryan D. Lane, *Telephonic Search Warrants Under the Oregon Constitution: A Call for the Limitation of Exigent Circumstances*, 24 WILLAMETTE L. REV. 967, 982 (1988) (reporting that, by one estimate, in San Diego 95% of telephonic warrant requests "were processed in less than forty-five minutes").

31. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 47, 64 (1999) (striking down an ordinance that criminalized "loitering" by or with a gang members after failing to disperse when requested to do so by police).

32. *Cf.* New Jersey v. T.L.O., 469 U.S. 325, 343 n.9 (1985) ("Absent any suggestion that the [school] rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not."). Of course, legislatures can impose crime-related limitations on the police, as has occurred with regulation of electronic surveillance. *See* 18 U.S.C. § 2516(1) (2006) (limiting interception warrants to certain felonies).

would trench too obviously on legislative power and police ability to sniff out more serious crime.[33]

If all but the most intrusive actions designed to get evidence about minor crimes can take place pursuant to a warrant and probable cause, then under Professor Bellin's reasonableness approach searches for evidence of serious and grave crimes will be permissible on something less than that. The Supreme Court has already demonstrated its willingness to make this move in connection with national security investigations, where it has seriously watered down both the warrant and probable cause requirements.[34] Professor Bellin provides another example with his description of *United States v. Comprehensive Drug Testing*.[35] There the Ninth Circuit panel crafted a number of reasonable restrictions designed to prevent the police from using a warrant authorizing a computer search as a license to search through every file in the computer; the panel's goal was to ensure the government only saw, or at least only retained, items for which and files about whom it had ex ante probable cause to search.[36] But the government's subsequent complaints about this holding, based primarily on the assertion that the panel's rules would circumscribe investigations of rapists and terrorists, led to reversal of the decision by the full court.[37] Along the same lines, both judges and scholars have explicitly argued that Fourth Amendment standards should be lowered or not subject to the exclusionary remedy in connection with investigations of serious crime.[38] Once a crime severity exception to "normal" protections is recognized, the government

33. It might also create perverse incentives. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 570–72 (1992) (arguing that if school officials were stymied by strict cause requirements they would exercise other, more intrusive powers—suspensions, hall and bathroom monitors, etc.—to accomplish their goal of enforcing order).

34. United States v. U.S. Dist. Court, 407 U.S. 297, 322–23 (1972) ("Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."). This authority has led to a special warrant process for foreign intelligence investigations that reduces the probable cause showing when national security is a "significant" purpose of the investigation. 50 U.S.C. § 1804(a)(6)(B) (2006).

35. Bellin, *supra* note 1, at 42–43.

36. United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1006 (9th Cir. 2009) ("The process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect."), *revised and superseded by* 621 F.3d 1162 (9th Cir. 2010) (en banc).

37. *Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc).

38. *See, e.g.*, State v. Bolt, 689 P.2d 519, 529–31 (Ariz. 1984) (arguing that the exclusionary rule should apply only when the illegality committed by the police outweighs the gravity of the suspected crime); Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 962–63 (2009) (suggesting that a ten percent chance of finding evidence of crime is sufficient if the crime is serious); William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 849 (2001) ("When investigating murder suspects . . . , the standard should probably be *lower*, not higher.").

can be expected to press it routinely and aggressively and courts, as Professor Bellin notes,[39] will find resistance very difficult.

The message that will eventually percolate down to police in such a regime is that the Fourth Amendment is not meant to impose significant constraints on investigations of serious crimes. As Yale Kamisar wrote in criticizing a proposal to exempt serious crime investigations from application of the exclusionary rule, police will come to believe that "[i]n the big cases the fourth amendment is too great an impediment in the war against crime for law enforcement officials to endure."[40] Research indicates that police already cut corners when serious crime is the target.[41] Even many judges appear to have adopted this attitude, at least in connection with "terrorism" investigations since September 9, 2011.[42] Professor Bellin's regime likely ensures that when the goal is to nab a murderer, armed robber, or rapist, the police will increasingly take liberties, and those responsible for regulating them will increasingly turn a blind eye to their behavior.

THE SPECIAL NEEDS EXCEPTION AND CRIME SEVERITY

As one example of the possible benefits his approach could reap, Professor Bellin points to the Supreme Court's special needs cases, which have relied on reasonableness analysis in abandoning both the warrant and probable cause requirements in a host of administrative search situations.[43] Because these cases usually involve investigation of relatively minor crimes and sometimes of behavior that is not a crime at all (e.g., violation of school anti-smoking rules, drug use by railway workers), Professor Bellin suggests that his approach would counter the Court's penchant for relaxing Fourth Amendment rules in these situations.[44] Although, again, Professor Bellin does not make entirely clear how he would regulate these searches, one gets

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39. Bellin, *supra* note 1, at 46 ("Judges, like all of us, prefer that law enforcement employ all of its resources—where 'reasonable' —to combat the most grave crimes.").

40. Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 22 (1987).

41. *See* Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 927–28 (2009) (describing two studies, one involving wiretaps and the other searches for drugs, indicating that police assertions of probable cause are more likely to be wrong when the target is serious crime).

42. *See, e.g.*, Cassidy v. Chertoff, 471 F.3d 67, 82 (2d Cir. 2006) (upholding, per Judge Sotomayor, suspicionless searches on New York's ferry system because "[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and indeed go well beyond them"). As argued below, *see infra* text accompanying notes 68–76, I agree with this sentiment, if not the precise holding in *Cassidy*, but only because it focuses on prevention rather than gathering evidence of already-committed crime.

43. Bellin, *supra* note 1, at 34–35.

44. *Id.* at 35 ("[A] search to enforce the school dress code is not as important as the same search to investigate a violent crime, and the doctrine should reflect that intuition.").

the sense that he would not permit them when they are "intrusive." As he puts it in the school search context, "[w]hether a school official conducts a strip search of a student or monitors students electronically (intercepting e-mail, videotaping school bathrooms, or via GPS tracking), a court evaluating the constitutionality of that search should weigh its intrusiveness against the public interest."[45] But outside of strip searches (which the Court has already held are only permitted in special needs cases when they would be permitted outside the special needs context[46]), what types of school regulatory searches are so intrusive that they would be banned by his approach? If interception of e-mail is prohibited, will searches of desks and purses, which are arguably just as intrusive, also be banned?[47]

Perhaps the result of Professor Bellin's approach is merely that probable cause should be required in the latter situations. I agree with that result on the straightforward ground that these searches are intrusive enough to require probable cause.[48] Professor Bellin's additional rationale—that greater cause is required because the government's goal is only regulatory—creates another dilemma, however. The Court has strongly implied that the quasi-civil nature of these investigations is actually a reason for *reducing* the justification required to carry them out, on the not unreasonable ground that the consequence of a successful investigation for its target is relatively insignificant.[49] Others have explicitly relied on that rationale in justifying fewer restrictions on special needs searches.[50] Once the trans-substantive orientation is jettisoned, in other words, the fact that

45. *Id.*

46. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2643 (2009) (holding that reasonable suspicion is insufficient grounds for exploring students' undergarments).

47. The Court has upheld searches of employee desks and student purses on less than probable cause. *See* O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987) (employee desks); New Jersey v. T.L.O., 469 U.S. 325, 340–43 (1985) (school student's purse).

48. *See* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 65–68 (1991) (arguing for a probable cause standard in these situations if they are of "comparable intrusiveness" to law-enforcement searches).

49. *See O'Connor*, 480 U.S. at 729 n.* ("[W]e do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related statutory or regulatory standards."); *T.L.O.*, 469 U.S. at 341 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." (citing Picha v. Wielgos, 410 F. Supp. 1214, 1219–21 (N.D. Ill. 1976))); *see also* Michigan v. Clifford, 464 U.S. 287, 294–95 (1984) (holding that search of a burned-down house for evidence of arson requires a warrant but that otherwise such a search only requires notice or an administrative warrant).

50. *See, e.g.*, Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 920 (2010) (calling "perfectly sensible" the suspension of an individualized suspicion requirement in situations where the search is for something other than evidence to be used in a criminal prosecution).

the government's target is minor crime rather than grave crime could well lead courts to a result directly contrary to Professor Bellin's preferences.

TECHNOLOGY AND CRIME SEVERITY MODULATION

A second benefit Professor Bellin believes follows from his approach is the restriction he thinks it would impose on government's ability to use its rapidly expanding technological surveillance capacity in aid of minor crime investigations. But that benefit is likely to be minimal. Most of the minor crimes that Professor Bellin identifies—his entire list consists of jaywalking, riding a bicycle on the sidewalk, traffic and regulatory offenses, truancy, vagrancy, illegal gambling, trespassing, public drunkenness, noise disturbances, drug possession, simple assault, petty theft, and prostitution[51]—do not require or even tempt use of technological surveillance of a home or other protected area in order to get evidence. More importantly, for reasons discussed above, on those few occasions when such surveillance is requested—perhaps in connection with drug possession or illegal gambling—the most likely judicial response is to require a warrant, not ban such surveillance altogether.

Professor Bellin also makes an intriguing observation in connection with technologically enhanced investigative techniques that are currently not considered searches (e.g., public GPS surveillance and data mining) and thus would never require a warrant or any level of individualized suspicion under current law. He suggests that, under his proposal, such techniques could be said to cross the Fourth Amendment threshold when they are directed at solving minor crimes.[52] The problem with this approach is that it would transform a technique that is not a search when used to investigate a serious crime into a search when minor crime is the target. That interpretive manipulation might make sense if one could say that reasonable expectations of privacy—the current test for the Fourth Amendment's threshold[53]—differ depending upon whether one is engaging in drug possession or terrorist activities. But that interpretation conflates the threshold inquiry with the justification inquiry. Put another way, it flows from the perspective of a target who is known to be guilty of a particular crime. Yet, as the Supreme Court has made clear, the correct perspective for evaluating Fourth Amendment interests is that of a target who has done nothing wrong.[54] From that perspective, long-term or intense surveillance is

51. Bellin, *supra* note 1, at 32.

52. *Id.* at 46 ("[A] court grappling with the question of whether an investigative technique constitutes a 'search,' could plausibly consider the severity of the crime under investigation.").

53. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

54. Florida v. Bostick, 501 U.S. 429, 438 (1991) ("[T]he potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in [the target's]

similarly intrusive whether the police say they are seeking drugs or bombs. If anything, as noted above, the government is probably acting more intrusively in the latter situation.

A BETTER APPROACH

None of this is meant to deny two of Professor Bellin's core assertions: First, that the government routinely abuses its power in connection with investigation of minor crimes, and second, that technological advances are likely to exacerbate those abuses unless courts are more attentive to Fourth Amendment reasonableness analysis. My primary contention is simply that adopting a crime severity gloss on that analysis in an effort to handle these problems will backfire. Under Professor Bellin's proposal, unless extreme investigative techniques are at issue courts will not change their regulation of minor crime investigation, yet they will use crime severity as an excuse for minimizing protections in all other situations. A better approach is to encourage judicial adherence to traditional trans-substantive Fourth Amendment principles that can curb government discretion in a more nuanced and less risky fashion.

Professor Bellin's article looks at both traditional and technologically-enhanced investigations. The major source of police harassment in traditional investigations of minor crimes cases is the use of street stops and traffic infractions as a pretext to gain consent to search, find evidence of crime in "plain view," or conduct a search incident to arrest.[55] Prohibiting or discouraging government use of these stop and arrest powers even when they flow from good faith efforts to enforce drug possession, traffic violations, and other low-level prohibitions that are not unconstitutionally vague, which is the effect of Professor Bellin's proposal, is too drastic. Instead, courts should strictly enforce three traditional Fourth Amendment doctrines: (1) the reasonable suspicion and probable cause requirements; (2) the rule that consents be voluntary; and (3) the search incident to arrest rationale of protecting officers and preventing evidence destruction.[56] While the current Court has been less than vigorous in enforcing the first two rules, taken seriously they would impose meaningful limitations on police

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position." (quoting Florida v. Royer, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting)) (internal quotation mark omitted)).

55. *See generally* David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 22–32 (1994) (describing abuse of stop-and-frisk authority); Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425 (2002–03) (describing police discretion during traffic stops).

56. For a discussion of these doctrines, see CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 5.03 (5th ed. 2008) (probable cause); *id.* § 11.03(a) (reasonable suspicion); *id.* § 12.02 (voluntariness of consent); and *id.* § 6.04 (scope of search incident rule).

power in connection with investigating minor crimes.[57] And even the current Court has shown signs of reinvigorating restrictions on search incident to arrest doctrine with its decision in *Arizona v. Gant* forbidding searches of cars when the offense of arrest is a mere traffic violation that is unlikely to involve danger to the officers or evidence.[58] An analogous "frisk incident to stop" doctrine would similarly prevent pretextual or overbroad patdowns.

The primary threat posed by technological surveillance lies in its potential for vastly expanding government capacity to monitor public and private activity more cheaply, thus enabling surveillance for prolonged periods of time and over large segments of the populace. The hope among privacy advocates is that the Supreme Court will ultimately follow the suggestion made by five of its members in its recent decision in *United States v. Jones* and hold that, even when focused solely on public activities, long-term surveillance is a Fourth Amendment search.[59] One disincentive for doing so, as Professor Bellin alertly notes, is the real possibility that such a decision would handcuff police investigations of serious crimes, a disincentive that, he says, would disappear if the Fourth Amendment were not interpreted as trans-substantive.[60] But a trans-substantive solution to this dilemma is also possible. As I have argued elsewhere, an intrusion-centered proportionality approach—in other words, an approach that aligns the justification for a search with its intrusiveness—would reduce the cause

57. *See, e.g.*, Harris, *supra* note 55, at 48–52 (proposing a more restrictive stop-and-frisk authority); Arnold H. Loewy, *Knowing "Consent" Means "Knowing Consent": The Underappreciated Wisdom of Justice Marshall's* Schneckloth v. Bustamonte *Dissent*, 79 MISS. L.J. 97, 106–07 (2009) (proposing a more stringent voluntariness test in consent cases).

58. Arizona v. Gant, 556 U.S. 332, 351 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."); *see also* Knowles v. Iowa, 525 U.S. 113 (1998) (prohibiting searches incident to arrest for "non-custodial" crimes).

59. United States v. Jones, No. 10-1259, 2012 WL 171117, at *9 (Jan. 23, 2012) (Sotomayor, J., concurring) ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."); *id.* at *17 (Alito, J., concurring) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.").

60. Bellin, *supra* note 1, at 46. As indicated *supra* note 59, Justice Alito's opinion in *Jones* does suggest that the Fourth Amendment should not apply to tracking in connection with investigation of "extraordinary" offenses. *Jones*, 2012 WL 171117, at *17. Since he defines that term no further, Justice Alito may have in mind the type of investigation that would be covered by the danger exception described below. But it is also worth noting that Justice Scalia's majority opinion in *Jones* stated that "[t]here is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated." *Id.* at *7 (majority opinion).

necessary to carry out less intrusive searches such as public surveillance.[61] A proportionality regime would go a long way toward eliminating judicial concern about declaring preliminary investigative actions "searches." For instance, tracking, at least tracking that is not prolonged, could be justified on reasonable suspicion, and large-scale data mining could be justified on similar grounds.[62] If the latter approach is adopted (which is not out of the question[63]), courts need not take the additional step of modulating reasonableness analysis through a crime severity framework that renders the Fourth Amendment irrelevant to preliminary investigative steps in serious cases.

The type of technological surveillance that is of most concern, Professor Bellin rightly recognizes, is surveillance of the home using hidden cameras, thermal imagers, magnification devices or other detection devices. Professor Bellin conjures up the possibility that the government will eventually end up planting cameras in people's homes even in low level drug and cable theft investigations.[64] Assuming it wants to divert its resources doing so, such surveillance would of course need to be based on a warrant. Under Title III (and consistent with proportionality reasoning, given the intrusiveness of the search), such a warrant would only issue upon probable cause and a showing that the evidence could not be obtained in some less intrusive manner.[65] Furthermore, the particularity and execution limitations on warrants would not permit prolonged surveillance for such simple crimes.[66] For instance, in the case described by Professor Bellin in which a school tracked down a laptop thief by activating the laptop's camera to scan his home,[67] not only would a warrant be needed (apparently none was obtained) but, once the camera was activated and the culprit identified (which would presumably take place within seconds), the surveillance would have to stop. Professor Bellin would instead prohibit use of technology in this way; the alternative, however, is either to forgo the investigation or to

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61. CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 210–11 (2007).

62. *Id.*

63. *Cf.* United States v. Karo, 468 U.S. 705, 718 n.5 (1984) (refusing to decide whether a court order authorizing beeper tracking of a can of ether inside the home could be based on reasonable suspicion).

64. Bellin, *supra* note 1, at 41.

65. 18 U.S.C. § 2518(3)(c) (2006) (requiring the magistrate issuing a Title III warrant for surveillance to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous").

66. *Id.* § 2518(1)(b)(iii), (4)(c)–(e), (5) (requiring, *inter alia*, that a surveillance warrant describe "the type of communications sought to be intercepted . . . a statement of the particular offense to which it relates [and] . . . the period of time during which such interception is authorized", and also requiring that the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception").

67. Bellin, *supra* note 1, at 3–4, 43.

engage in undercover activity, interrogation, or some other investigative technique that might be at least as intrusive and, if Title III is followed, would be more intrusive or risky *by definition*.

THE DANGER EXCEPTION

In other work, I have argued against the type of crime severity analysis that Professor Bellin proposes.[68] However, I have also argued that one type of crime-specific exception to the normal Fourth Amendment requirements is clearly permissible under both the Court's Fourth Amendment precedents and legal principles established in other settings.[69] When a government search is aimed at *preventing* a significant, imminent, and specific threat then it need not meet the ordinary justification requirements. This "danger exception," as I call it, would alleviate to some extent the pressure courts feel when prosecutors make handcuffing arguments.

The danger exception can be seen at work in the Supreme Court's decision in *Terry v. Ohio*,[70] which permits both stops and frisks on the lesser, reasonable suspicion ground in part because of the need to provide police with a mechanism both for snuffing out crime before it occurs and for protecting themselves and other members of the public. As Chief Justice Warren stated for the Court "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[71] This prevention rationale for relaxing Fourth Amendment standards can be found in a number of other Supreme Court Fourth Amendment opinions.[72] It also underlies the Court's decisions permitting preventive detention on clear and convincing evidence rather than proof beyond a reasonable doubt.[73]

Consistent with *Terry*, the danger exception as I conceive it would apply only when the threat is specific and imminent. Furthermore, I agree with Professor Bellin that intrusive actions designed to prevent danger should be permitted only if the danger is significant. This danger exception would

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68. *See, e.g.*, Slobogin, *supra* note 16, at 1611–14.

69. SLOBOGIN, *supra* note 61, at 26–28.

70. Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

71. *Id.* at 27.

72. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 406 (2006) (permitting warrantless entry into a home when there is an "objectively reasonable basis" to believe an assault is imminent); Maryland v. Buie, 494 U.S. 325, 336–37 (1990) (permitting a protective sweep of premises upon reasonable suspicion that a confederate is on premises). *Contra* United States v. Hensley, 469 U.S. 221, 229 (1985) (upholding stops based on reasonable suspicion of past as well as ongoing and future crime, at least when the crime is serious).

73. *See* Addington v. Texas, 441 U.S. 418 (1979).

permit Justice Jackson's kidnapper roadblock,[74] as well as the Court's oft-cited hypothetical anti-terrorism checkpoint,[75] and the use of deadly force in situations approved by *Tennessee v.* Garner.[76] It would also allow some, but not all, of the government's national security investigations to take place on less than probable cause and perhaps without a warrant as well, depending upon the exigencies. In other words, it would permit a reduction in Fourth Amendment requirements in many of the situations that Professor Bellin identifies as reasons we need the crime severity safety valve. But it would not allow relaxation of the Fourth Amendment in investigations of *past* crime simply because a reasonable officer could label the crime grave or serious.

CONCLUSION

Professor Bellin makes the best possible case for incorporating crime severity into reasonableness analysis. If we could be sure it would operate in the way he suggests—with the baseline requirement consisting of a warrant and probable cause for the investigation of serious crimes—then there would be much to recommend it. But since that guarantee is not possible in a society prone to overreact to crime, it is best left moribund.

74. *See* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting), *noted in* Bellin, *supra* note 1, at 18.

75. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) ("[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.").

76. Tennessee v. Garner, 471 U.S. 1 (1985), *noted in* Bellin, *supra* note 1, at 32.