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Why Crime Severity Analysis is Not Reasonable

Christopher Slobogin

Jeffrey Bellin

Southern Methodist College, Dedman School of Law

et al.

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Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World

Jeffrey Bellin *

ABSTRACT: A growing body of commentary calls for the Supreme Court to recalibrate its Fourth Amendment jurisprudence in response to technological and social changes that threaten the traditional balance between public safety and personal liberty. This Article joins the discussion, highlighting a largely overlooked consideration that should be included in any modernization of Fourth Amendment doctrine—crime severity.

The Supreme Court emphasizes that “reasonableness” is the “touchstone” of Fourth Amendment analysis. Yet, in evaluating contested searches and seizures, current Fourth Amendment doctrine ignores a key determinant of reasonableness, the crime under investigation. As a result, an invasive search of a suspected murderer is, legally speaking, no more or less reasonable than the same search of a suspected jaywalker.

Through the years, the primary objection raised by the Supreme Court and academics to altering this status quo is that a crime-severity variable would be unworkable. While a handful of scholars continue to argue for an increased role for crime severity in Fourth Amendment jurisprudence, this powerful objection remains unanswered. In an effort to fill this void in the debate, and introduce crime severity as a critical component of a revitalized search and seizure jurisprudence, this Article proposes a concrete framework for incorporating crime severity into Fourth Amendment doctrine. The Article then explores specific applications of the framework to highlight the constructive role crime-severity distinctions can play in defining the constitutional parameters of searches and seizures in the modern era.

* Assistant Professor of Law, Southern Methodist University, Dedman School of Law. I would like to thank Orin Kerr, Fred Moss, Paul Ohm, Meghan Ryan, Bill Schroeder, Chris Slobogin, Jenia Turner, and Eugene Volokh, as well as the participants in the SMU Criminal Justice Workshop, for their comments on an earlier draft of this Article. Donna Bowman and Octavio Dominguez contributed valuable research assistance. The Article benefitted as well from the patience and support of Catherine Zoe Garrett, and the financial support of the SMU Dedman School of Law and the Fred E. Tucker Endowment for Faculty Excellence.

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INTRODUCTION

Few people objected when Los Angeles police relied on the controversial practice of familial DNA searches to identify a suspect in the “Grim Sleeper” serial-killer case.¹ For those who might worry about the implications of such searches, the reporting noted that the California Attorney General only permitted familial DNA searches in investigations of “major violent crimes,” such as murder or rape.² Slightly more controversy attended the Governor of New York’s signing of legislation that prohibited New York City police from creating a massive computerized database of persons they stopped, even if those persons were not charged with any crime.³ The police claimed the database helped crack cases, but the Governor explained that he could not condone the practice absent evidence that it stopped “very serious crime, or . . . acts of terrorism.”⁴ Finally, condemnation was nearly universal when a Pennsylvania school district, suspecting the theft of some school-issued laptop computers, activated software in the computers that surreptitiously took pictures of students and their families in their homes.⁵ The technology helped locate the missing

1. See David R. Cameron, *DNA Matching Technique Is a Powerful Tool for Police*, HARTFORD COURANT, July 13, 2010, http://articles.courant.com/2010-07-13/news/hc-op-familial-searching-cameron-071320100713_1_offender-profiles-dna-expert-new-dna-technique (noting that “even critics of aggressive approaches to gathering DNA . . . applauded how familial searching was used in the Grim Sleeper case” and quoting an attorney with the American Civil Liberties Union of Southern California, who commented, “From our perspective, if you are going to use familial DNA searching, this is the kind of case you should use it for” (internal quotation marks omitted)); Elizabeth Joh, *The Grim Sleeper and DNA: There’s Much To Be Concerned About*, L.A. TIMES, July 10, 2010, <http://articles.latimes.com/2010/jul/10/opinion/la-oe-joh-dna-20100710> (cautioning that the “investigative triumph” of the Grim Sleeper case should not “blind us to the dangers of expanding genetic surveillance”); Jennifer Steinhauer, *‘Grim Sleeper’ Arrest Fans Debate on DNA Use*, N.Y. TIMES, July 9, 2010, at A14 (reporting expert consensus that “[t]he arrest in the protracted, gory case could settle the internal debate among lawmakers and the law enforcement agencies across the country” regarding familial DNA searches).

2. Press Release, Cal. Att’y Gen.’s Office, California’s Familial DNA Search Program Identifies Suspected “Grim Sleeper” Serial Killer (July 7, 2010), *available at* <http://ag.ca.gov/newsalerts/release.php?id=1945> (explaining that under internal guidelines, familial DNA searches “are only allowed in major violent crimes when there is a serious risk to public safety and all other investigative leads have been exhausted”); see Editorial, *A Yellow Light to DNA Searches*, N.Y. TIMES, July 13, 2010, at A24; Post-Standard Editorial Board, *DNA Searches: Partial Matches Can Help Solve Crimes—If Used Carefully*, SYRACUSE.COM BLOG (July 15, 2010, 6:15 PM), http://blog.syracuse.com/opinion/2010/07/dna_searches_partial_matches_c.html. For an extensive discussion of familial DNA searches, see Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J.L. & TECH. 309 (2010).

3. Ray Rivera & Al Baker, *Police Cite Help from Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 17, 2010, at A15.

4. *Id.*

5. John P. Martin, *Judge Orders L. Merion To Halt Monitoring*, PHILLY.COM (May 15, 2010), http://articles.philly.com/2010-05-15/news/24960045_1_webcams-laptops-injunction (noting the school district’s acceptance of responsibility and apology to students and their families).

laptops but was derided as “overkill,” saddling the school district with a “coast-to-coast onslaught of negative publicity.”⁶ These examples, all drawn from the last year, highlight the rapid changes unfolding in the landscape of criminal investigation and, simultaneously, expose a flaw in existing Fourth Amendment doctrine’s ability to respond to these changes—its failure to consider a variable that nonjudicial decision-makers routinely rely on in this context, crime severity.

The Fourth Amendment prohibits “unreasonable” searches and seizures.⁷ A key intuitive component of reasonableness is the seriousness of the crime investigated: “some crimes are worse than others” and those crimes (and only those crimes) warrant a more aggressive law enforcement response.⁸ Yet, Fourth Amendment doctrine is “transsubstantive,” meaning that “Fourth Amendment law generally treats all crimes alike.”⁹ Apart from circumstances involving imminent harm,¹⁰ the legal standard for evaluating

6. William Bender, *Spying on L. Merion Students Sparks Probes by FBI, Montco Detectives*, PHILA. DAILY NEWS, Feb. 20, 2010, at 3 (reporting negative publicity along with criminal probes initiated by local and federal law enforcement in wake of school-district surveillance); see also Joseph Tanfani, *How School Web Cam Debacle Evolved*, PHILLY.COM (Mar. 21, 2010), http://articles.philly.com/2010-03-21/news/25215619_1_web-cam-computer-files-school-board-member (noting school officials’ retrieval of most of the missing laptops); *Editorial: Untangling a Legal Web*, PHILLY.COM (July 20, 2010), http://articles.philly.com/2010-07-20/news/24968967_1_webcam-laptops-school-issued (condemning district’s actions, in part, because “[a]s an antitheft strategy, the webcam tracking was overkill”).

7. U.S. CONST. amend IV.

8. William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 875 (2001) (“[T]he worst crimes are the most important ones to solve, the ones worth paying the largest price in intrusions on citizens’ liberty and privacy.”); see also sources cited *infra* notes 28, 30.

9. Stuntz, *supra* note 8, at 869; Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2651 (2009) (Thomas, J., concurring in the judgment and dissenting in part) (highlighting as a “basic principle of the Fourth Amendment” that officers “can enforce with the same vigor all rules and regulations irrespective of the[ir] perceived importance” and noting that the “Fourth Amendment rule for searches is the same: Police officers are entitled to search regardless of the perceived triviality of the underlying law”); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.8(c) n.8 (3d ed. 2007) (“[D]istinction[s] between major and minor crimes are rare in the constitutional regulation of criminal procedure.”); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 940 (2009) (“Currently, the Fourth Amendment is blind to the type of crime underlying the search.”); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1244 (2009) (“For better or for worse, we have a trans-substantive Fourth Amendment.”); William J. Stuntz, *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.”).

10. 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.”); *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000) (“[A] report of a person carrying a bomb need [not] bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.”); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1010–11 (2003) (recognizing that “courts

a search (or seizure) is the same whether a police officer suspects that a person jaywalked or is the Green River Killer.¹¹

Transsubstantive doctrine has real consequences. Perhaps the most significant of these is that by opening a gulf between actual “reasonableness” and doctrinal “reasonableness,” transsubstantive doctrine fosters artificially permissive Fourth Amendment rules.¹² From a judicial perspective, the absence of a crime-severity variable means that in order to ensure that the authorities possess wide latitude to aggressively (and often reasonably) investigate the gravest offenses, courts must permit police to (often unreasonably) apply the same aggressive tactics to the pursuit of less serious offenders—a much broader category of investigations that includes most police–citizen interactions.¹³

This often overlooked facet of Fourth Amendment doctrine will become increasingly significant as new technologies—particularly those that enable searches at opposite extremes of the invasiveness spectrum¹⁴—challenge existing conceptions of what is and is not reasonable. The examples cited at the outset of this Article only hint at the array of powerful surveillance tools now available to law enforcement. New technologies allow the state to investigate its citizens as never before, using satellite imagery, miniature surveillance cameras, facial recognition software, DNA databases, e-mail filters, and so on.¹⁵ The volume of personal data that the

have considered the gravity of the suspected offense” in evaluating “exigent circumstances”). But see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1976 n.67 (arguing that the case law seems to focus primarily on whether there is an exigency unrelated to catching criminals, and “[t]he seriousness of the crime being detected or deterred seems to be less significant (unless perhaps it rises to the level of ‘terrorist attack’)” (citation omitted)).

11. For an example of a search upheld based on probable cause for jaywalking, see *United States v. Battles*, No. 8:07CR337, 2008 WL 2323369, at *1 (D. Neb. June 2, 2008). For background on the investigation of the Green River Killer, see Matthew R. Wilmot, Note, *Sparing Gary Ridgway: The Demise of the Death Penalty in Washington State?*, 41 WILLAMETTE L. REV. 435, 435–36 (2005).

12. See discussion *infra* Part II; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) (“Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974) (stating that “courts often stretch and strain in serious cases to avoid applying the exclusionary rule” and identifying suspicious cases of judicial distortion); Stuntz, *supra* note 9, at 2140 (“Judges and Justices are likely to think about the effect of their decisions on the fight against terrorism even when the underlying cases involve more ordinary sorts of policing.”); Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 198 (2005) (“[I]t is hard to believe that the terror war’s shadow does not fall across all search and seizure questions, for any case arising outside of a combat situation may lay a precedent that will be of future use (or harm) in the war.”).

13. See *infra* note 81.

14. See discussion *infra* Part IV.D.

15. See Ric Simmons, *Why 2007 Is Not Like 1984: A Broader Perspective on Technology’s Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 533–34 (2007)

government's expanding surveillance arsenal can be applied to—much of it voluntarily disclosed to private third parties (e.g., Facebook)—is expanding as well.¹⁶ As courts address the novel, often breathtaking privacy intrusions on the horizon, transsubstantive doctrine deprives them of a key variable for assessing reasonableness. In fact, the courts' inability to consider crime severity may cause judges to resist labeling technological intrusions "searches" altogether to ensure that powerful surveillance tools remain available to authorities investigating the worst crimes.¹⁷

This Article proposes that courts abandon transsubstantive Fourth Amendment doctrine. In particular, it suggests that as judges develop new rules to apply the Fourth Amendment in the modern era, they incorporate the severity of the crime being investigated into determinations of constitutional reasonableness. The introduction of a crime-severity variable into Fourth Amendment jurisprudence would operate on multiple levels. It would grant the government more leeway in investigations of the gravest offenses, while simultaneously enabling concrete limits on investigations of minor crimes. Perhaps most important, explicit consideration of crime severity would minimize doctrinal distortions that inevitably arise (and favor the state) when courts must judge all searches and seizures by the same standard.¹⁸

Long before modern technologies made the issue so compelling, commentators criticized the omission of crime severity from the Fourth

(setting out similar list of "powerful new surveillance technologies used by law enforcement agents" with examples of usage); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 343 (2008) (describing the practice of "data mining" where the government assembles personal data and analyzes it "for particular patterns of behavior deemed to be suspicious"); *infra* Part IV.D.

16. See *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010) (concluding that placing GPS tracking device on the underside of the car of a person suspected of growing marijuana did not constitute a search); *Devega v. State*, 689 S.E.2d 293, 299 (Ga. 2010) (rejecting claim that police violated the Fourth Amendment by having the suspect's "cell phone provider 'ping' his phone" to obtain its location); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1463 (2000) ("[T]he state and the private sector now enjoy unprecedented abilities to collect personal data, and . . . technological developments suggest that costs of data collection and surveillance will decrease, while the quantity and quality of data will increase."); Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1556–57 (2010) (providing examples of how new "intermediated communications technologies empower the police" and warning that "we are all being watched more closely and more often than we ever have been"); Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1265 (2004) (explaining that modern "technology has given the government an unprecedented ability to engage in surveillance"); Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 21, 2010, <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html> (discussing radical changes in the amount of information that people voluntarily place into the public domain).

17. See *infra* Part IV.D.

18. See sources cited *supra* note 16; *infra* note 71 (discussing Kaplan's proposal).

Amendment reasonableness calculus.¹⁹ The Supreme Court, however, has persistently deflected these criticisms, arguing that a jurisprudence that considers crime severity would be unworkable.²⁰ Scholars advocating the incorporation of crime severity into Fourth Amendment doctrine presumably disagree with the Court on this point but have not answered the Court's workability claim. In fact, the existing literature contains little analysis of the difficulties of incorporating crime severity into Fourth Amendment balancing, and even fewer efforts to find plausible solutions to those difficulties.²¹

In light of the increasing importance of transsubstantive doctrine in the modern era, this Article attempts to answer the workability objection and thereby reinvigorate the debate as to the doctrine's merits. In Part I, it explores existing transsubstantive, Fourth Amendment doctrine and recognizes the Court's few deviations from the transsubstantive norm. Part II summarizes the surprisingly sparse commentary on this counterintuitive and inconsistent jurisprudence, and emphasizes that scholars have failed to address the primary justification for transsubstantive doctrine—the impracticability of any alternative. In Part III, the Article acknowledges the significant obstacles to incorporating crime severity into Fourth Amendment doctrine, and proposes a novel framework designed to overcome those obstacles. Finally, Part IV illustrates the potential for crime-severity considerations to improve Fourth Amendment reasonableness assessments and help determine the constitutionality of technologically enhanced searches and seizures.

I. TRANSSUBSTANTIVE FOURTH AMENDMENT DOCTRINE

The Fourth Amendment speaks plainly, prohibiting “unreasonable searches and seizures.”²² Yet Supreme Court doctrine ignores one critical

19. See *infra* Part II.

20. See *infra* Part I.B; *infra* note 48.

21. See Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 420 (2003) (arguing that scholars failed to help the Supreme Court reach a correct result in *Atwater* because “[v]ery few writers emphasized the importance of offense severity in reasonableness balancing analysis”); Volokh, *supra* note 10, at 1961 (highlighting the potential significance of crime severity in constitutional adjudication and noting that “[s]urprisingly, few works have so far discussed this matter broadly and systematically”). Apart from a few roughly sketched proposals to limit the reach of the exclusionary rule, see *infra* Part II, the only attempt to demonstrate how a Fourth Amendment crime-severity variable could work focuses on the narrow doctrinal question of implementing the Supreme Court's vague directive in *Welsh v. Wisconsin*. See William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 *U. KAN. L. REV.* 439 (1990) (discussing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)); *infra* Part I.C (discussing *Welsh*).

22. U.S. CONST. amend. IV. Plain does not necessarily mean clear. The second “warrant” clause of the Amendment creates ambiguity because it can be viewed as either narrowing or expanding the first “reasonableness” clause. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT*:

facet of the reasonableness of a search or seizure—the seriousness of the crime under investigation. This Part summarizes the Supreme Court’s general rejection of crime-severity distinctions in Fourth Amendment case law and the Court’s argument that such distinctions are unworkable.

A. THE SUPREME COURT’S REJECTION OF CRIME-SEVERITY CONSIDERATIONS

At a sufficient level of abstraction, the Supreme Court’s Fourth Amendment jurisprudence appears well-suited to crime-severity considerations. The Court’s opinions emphasize that the “touchstone of the Fourth Amendment is reasonableness”²³ and recognize that even when a search is conducted pursuant to a warrant, “reasonableness” remains “the overriding test of compliance with the Fourth Amendment.”²⁴ To implement this “central requirement” of reasonableness,²⁵ the Court attempts to strike a straightforward “balance between *the public interest* and the individual’s right to personal security.”²⁶

ORIGINS AND ORIGINAL MEANING 770 (2009). This Article proceeds on the assumption, shared by most scholars and the Supreme Court, that the overall command of the Amendment is reasonableness, with the warrant clause delineating a specific subset of that command. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 719, 722–24, 736–38 (2000) (citing James Madison’s original proposed text for the Amendment and historical context to argue that its purpose was solely to prohibit general warrants, while recognizing that other commentators “almost uniformly” accept “that the change [to Madison’s original text] was intended to create a reasonableness standard for warrantless intrusions”); CUDDIHY, *supra*, at 695 (arguing that even the original language proposed by Madison was intended to broadly prohibit unreasonable searches and seizures: Madison’s original “meaning . . . was not that general warrants were forbidden while other violations . . . were tolerable, but that only one of many forbidden violations, the general warrant, had been sufficiently egregious to require mention”); *infra* Part I.A.

23. See, e.g., *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (“[T]he ultimate touchstone of the Fourth Amendment, we have often said, is reasonableness.” (alteration in original) (internal quotation marks omitted)); *Samson v. California*, 547 U.S. 843, 855 n.4 (2006) (same); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (same); *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (“‘[R]easonableness’ . . . is the touchstone of the constitutionality of a governmental search.”); *United States v. Knights*, 534 U.S. 112, 119 (2001) (same); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (stating that the “central requirement” of the Fourth Amendment “is one of reasonableness” (internal quotation marks omitted)); Frase, *supra* note 21, at 375 (“The Court has stated many times that ‘reasonableness in all the circumstances’ is the ‘touchstone’ of Fourth Amendment analysis.”); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 70 (1991) (describing that case law establishes as the “most fundamental guideline . . . in determining whether a search or seizure is ‘reasonable’” that “competing state and individual interests must be balanced”).

24. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559–60 (1978); see *United States v. Torres*, 751 F.2d 875, 882–83 (7th Cir. 1984); see also *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

25. *McArthur*, 531 U.S. at 330.

26. *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (emphasis added) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (“[R]easonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” (quoting

The Court's emphasis on "the public interest" as a key Fourth Amendment variable suggests that crime severity should play an important role in Fourth Amendment analysis. The public's interest in any search or seizure surely depends to some degree on the seriousness of the crime under investigation. Indeed, the close relationship between reasonableness, the public interest, and crime severity can be found in the common-sense judgments of "our daily lives,"²⁷ popular-opinion surveys,²⁸ pronouncements of political actors (including statutes that limit search and seizure authority based on crime severity),²⁹ scholarly commentary,³⁰ and even judicial opinions³¹ with little, if any, dissent. Crime-severity distinctions also conform nicely to the historical antecedents of the Fourth Amendment. The Justices themselves occasionally note the integral role crime-severity distinctions

Wyoming v. Houghton, 526 U.S. 295, 300 (1999)); Tennessee v. Garner, 471 U.S. 1, 8 (1985) ("We have described 'the balancing of competing interests' as 'the key principle of the Fourth Amendment.'" (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981))); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987); Frase, *supra* note 21, at 348–49 (chronicling the development of general reasonableness balancing in Supreme Court case law).

27. Volokh, *supra* note 10, at 1965 ("[I]n our daily lives we judge the reasonableness of a reaction partly based on the harm that it aims to avoid [and i]t seems appealing to have constitutional law do likewise.").

28. See Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1598 (2010) (recognizing that in opinion surveys, "the seriousness of the crime under investigation correlated inversely with intrusiveness ratings," i.e., people more readily accept privacy intrusions that target more serious crimes).

29. See, e.g., 18 U.S.C. § 2516 (2006) (limiting authority of prosecutors to intercept wire or oral communications to investigations of serious crimes); *id.* § 3142 (setting forth considerations for holding suspects on bail based, in part, on crime severity). For pronouncements of political actors, see *supra* Introduction.

30. See Amar, *supra* note 12, at 802 ("It clearly states a global truth that makes intuitive sense to police officials and citizens alike: serious crimes and serious needs can justify more serious searches and seizures."); Volokh, *supra* note 10, at 1965.

31. See New Jersey v. T.L.O., 469 U.S. 325, 380 (1985) (Stevens, J., concurring and dissenting) ("The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument."); United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984); *infra* Part II.

A similar intuition is recognized in many foreign jurisdictions. See Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1041 (1983) (discussing German example where courts require that "the methods used in fighting crime must be proportional to the 'seriousness of the offense and the strength of the suspicion'" (quoting T. KLEINKNECHT, STRAFPROZESSORDNUNG ¶ 19 (33d ed. 1977))); Yves-Marie Morissette, *The Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do*, 29 MCGILL L.J. 521, 528–30, 554 (1984) (discussing consideration of seriousness of offense in related contexts in the courts of Scotland, Australia, New Zealand, Canada, and Germany and noting that a recognition of the salience of weighing the "triviality of the offense investigated" against any contested privacy intrusion "pervades continental European administrative law"); Peter P. Swire, *Proportionality for High-Tech Searches*, 6 OHIO ST. J. CRIM. L. 751, 760 (2009) (suggesting that American jurisprudence would benefit from more "engagement" with the proportionality doctrines applied in other jurisdictions, including Canada, Germany, the European Court of Human Rights, India, Ireland, and South Africa).

played in common-law limits on government seizure authority.³² As Thomas Davies explains, at the time of this nation's founding:

Warrantless-arrest authority was much broader for accusations of felon[ies]... than for accusations of less-serious offenses. The reasons are apparent: It was most important for public safety to catch and punish the potentially dangerous criminals who committed the set of very serious and often violent crimes denoted as felonies³³

Yet, for reasons that are never satisfactorily explained, the Supreme Court's evaluation of the public interest in the Fourth Amendment context does not entail any assessment of crime severity. Instead, the public interest

32. See *Tennessee v. Garner*, 471 U.S. 1, 12–13 (1985) (recognizing as “the common-law rule” and the “prevailing rule at the time of the adoption of the Fourth Amendment” that an officer could “use . . . whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanor”); *Payton v. New York*, 445 U.S. 573, 616 (1980) (White, J., dissenting) (“At common law, absent exigent circumstances, entries to arrest could be made only for felony.”).

33. Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS., Summer 2010, at 1, 12 [hereinafter Davies, *Post-Framing Adoption*]; see also Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1286 (2010) (describing common-law rule that “authorized private homes to be searched for felons on hue and cry, merely upon suspicion”). Although it has not decided the question, the Court suggested in *Atwater* that the common-law in-the-presence requirement for a warrantless misdemeanor arrest is not a constitutional requirement. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001) (stating that it was not deciding the question, while simultaneously citing Justice White’s statement in *Welsh* that the requirement “is not grounded in the Fourth Amendment” (internal quotation mark omitted)); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 383 (2002) (stating that the *Atwater* footnote “strongly suggests that the majority justices are unwilling to treat the committed-in-the-presence-of standard as a constitutional requirement for misdemeanor arrests”).

Davies ascribes the movement toward allowing broad search and seizure authority for misdemeanor offenses in the United States to the necessities of enforcing prohibition laws, which “were often *misdemeanors*.” Davies, *Post-Framing Adoption*, *supra*, at 54. As Davies notes, so much has changed since the founding that it may be impossible to return to the common law’s understanding of governmental search and seizure authority. *Id.* at 67. It may also be unwarranted as a purely interpretive matter. See *Garner*, 471 U.S. at 13 (stating that the Amendment “has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment’s passage” (quoting *Payton*, 445 U.S. at 591 n.33) (internal quotation marks omitted)); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (“[T]he Fourth Amendment, more than many other parts of the Constitution, appears to require a fairly high level of abstraction of purpose; its use of the term ‘reasonable’ (actually, ‘unreasonable’) positively invites constructions that change with changing circumstances.”); cf. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 927 (1997) (criticizing the Court for its inconsistent use of history in interpreting Fourth Amendment reasonableness). For a discussion of common-law felonies, see Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 90–91 (2004) (explaining that the term felony “originally referred simply to vicious acts” but greatly expanded over the eighteenth century).

is measured by the quantum of suspicion that a suspect has committed a crime—*any crime*.³⁴ Under existing doctrine, the public interest is somehow just as compelling when the police are investigating an alleged shoplifting as an alleged murder.

Fourth Amendment doctrine's transsubstantive nature is so deeply engrained that it most commonly operates by omission. In the vast majority of cases, the Supreme Court, and thus lower courts, simply ignore the underlying crime in assessing the reasonableness of a search or seizure. For example, in *Arizona v. Gant*, the Supreme Court recently clarified the Fourth Amendment parameters of a vehicle search.³⁵ Neither the majority nor the dissenting opinions suggested that the seriousness of the underlying offense—in *Gant*, the misdemeanor offense of driving without a license³⁶—should play any role in assessing the reasonableness of such searches.

The various overarching verbal formulations that govern Fourth Amendment doctrine similarly ignore the wide variance in the public interest in solving different crimes. To detain (or arrest) a suspect, a police officer must have a reasonable suspicion (or probable cause) that “*criminal activity* is afoot.”³⁷ A search is permitted if “the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of *a crime* will be found.”³⁸ When a

34. See *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”); *Ohm*, *supra* note 16, at 1555 (“Fourth Amendment search-and-seizure law . . . has always treated probable cause as the principle tool for balancing privacy and security.”); cf. *Torres*, 751 F.2d at 882 (“The usual way in which judges interpreting the Fourth Amendment take account of the fact that searches vary in the degree to which they invade personal privacy is by requiring a higher degree of probable cause (to believe that the search will yield incriminating evidence), and by being more insistent that a warrant be obtained . . .”).

35. *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) (holding that the Fourth Amendment permits “an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest”).

36. *Id.* at 1715 (describing lower court’s ruling “that the police saw Gant commit the crime of driving without a license and . . . that the [disputed vehicle] search was permissible as a search incident to arrest”); see ARIZ. REV. STAT. ANN. § 28-3473(A) (2011) (classifying offense of driving without a license as “a class 1 misdemeanor”).

37. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (emphasis added) (explaining that police may detain an individual based on “a reasonable, articulable suspicion that criminal activity is afoot”); cf. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”); *Garner*, 471 U.S. at 7 (“A police officer may arrest a person if he has probable cause to believe that person committed a crime.”).

38. *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (emphasis added) (describing “reasonable suspicion” as “‘a particularized and objective basis’ for suspecting the person stopped of criminal activity” and “probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found” (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981))).

warrant is required, the standard is the same, but a magistrate must first agree that “given all the circumstances” there is “a fair probability that contraband or evidence of a crime will be found in a particular place.”³⁹

The Court occasionally underlines the general absence of a crime-severity variable from its Fourth Amendment jurisprudence by explicitly rejecting crime severity as a relevant consideration. In *Mincey v. Arizona*, the Justices unanimously upbraided an Arizona state court for permitting warrantless searches of homicide crime scenes.⁴⁰ The Supreme Court explained that, absent exigent circumstances, Fourth Amendment “reasonableness” requires a warrant prior to a home search, and “the seriousness of the offense under investigation” does not “create[] exigent circumstances” that would “justify a warrantless search.”⁴¹ Six years later, when state courts in Louisiana did not appear to get this message, a still-unanimous Court reaffirmed *Mincey*’s holding.⁴²

The Supreme Court applied the principle invoked in *Mincey* to the opposite end of the crime spectrum in the more recent cases of *Whren v. United States*⁴³ and *Atwater v. City of Lago Vista*.⁴⁴ In *Whren*, the Court declined to limit the permissible scope of searches or seizures where the sole legitimate government interest implicated was a minor traffic infraction.⁴⁵ In *Atwater*, the Court upheld, as constitutionally reasonable, a custodial arrest for a nonjailable, seatbelt violation.⁴⁶ The *Atwater* majority squarely rejected the argument that the Fourth Amendment’s reasonableness command dictated a more limited arrest (i.e., seizure) authority for a minor, nonjailable offense.⁴⁷

39. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added); see also FED. R. CRIM. P. 41(d)(1) (“After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.”); *Virginia v. Moore*, 553 U.S. 164, 176–77 (2008) (explaining the rule “that officers may perform searches incident to constitutionally permissible arrests” applies to “any ‘lawful arrest’” (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973))).

40. *Mincey v. Arizona*, 437 U.S. 385 (1978). Justice Rehnquist agreed with the holding discussed here, making that holding unanimous. See *id.* at 406 (Rehnquist, J., concurring and dissenting).

41. *Id.* at 394; cf. LAFAYETTE ET AL., *supra* note 9, § 3.6(e), at 223 (“Some courts for years recognized an exception to the general rule that a search warrant is needed to search premises for evidence, namely, that police could enter without a warrant to conduct an investigation at the scene of a possible homicide.”).

42. *Thompson v. Louisiana*, 469 U.S. 17, 21 (1984) (reversing Louisiana Supreme Court’s holding that detectives could perform warrantless search of home where homicide victim was discovered).

43. *Whren v. United States*, 517 U.S. 806 (1996).

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

45. *Whren*, 517 U.S. at 810.

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

47. *Id.* (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth

In sum, despite its purported focus on the “public interest” served by a given search or seizure, the Court refuses to incorporate a significant determinant of the public interest—offense severity—into Fourth Amendment doctrine. Apart from a few, isolated circumstances, discussed below, the Court’s doctrine parts way with the common understanding of “reasonableness” by neither imposing additional limits on searches or seizures aimed at minor offenses, nor affording greater latitude in investigations of the most serious crimes, such as murder.

B. THE WORKABILITY JUSTIFICATION

The Supreme Court rarely tries to explain the omission of crime severity from the Fourth Amendment reasonableness calculus. For the most part, the Court simply passes over the common-sense intuition that the reasonableness of a search or seizure is connected to the seriousness of the crime being investigated. In the few cases where the Court explicitly rejects calls to consider offense severity, however, its emphasis has been on administrability.⁴⁸

In rejecting the Arizona courts’ limited homicide exception to the warrant requirement in *Mincey*, the Court proclaimed that there was no principled Fourth Amendment distinction between “extremely serious crime[s],” such as murder, and less serious crime.⁴⁹ The Court explained: “If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? ‘No

Amendment, arrest the offender.”); Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1138 n.69 (2003) (stating that, in *Atwater*, “the Court continued its insistence that Fourth Amendment law, i.e., the reasonableness of a given search or seizure, does not depend on the nature or seriousness of the crime being investigated”); Davies, *Post-Framing Adoption*, *supra* note 33, at 64 (arguing that the majority “ran roughshod over the historical limitation of less-than-felony warrantless arrests to ‘breaches of the peace’”); cf. Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O’Connor’s Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. 115, 129 (2010) (noting that “state and lower federal courts condoned warrantless arrests, and searches incident thereto, for myriad minor auto and non-auto related offenses” and listing offenses with citations).

48. Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1660 (1998) (“The Court has chosen to stay out of the area of substance in evaluating most searches and seizures partly because of the subjectivity that seems to be an inevitable component of nonquantitative reasonableness analysis.”); Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 849 n.145 (2004) (stating that the Court’s “concern for the administrability of a rule against warrantless arrests for nonjailable offenses may be of a piece with the more general phenomenon that Professor Stuntz has criticized: the absence of proportionality between investigative methods regulated under the Fourth Amendment and the seriousness of the crime involved”); Kaplan, *supra* note 12, at 1047 (“[T]he Supreme Court has never adopted Justice Jackson’s view, presumably because such a rule would raise grave problems of administrability.”); Stuntz, *supra* note 8, at 870 (“The real reason for transsubstantive law is practicality, the fear that taking substance into account when authorizing searches or subpoenas will be unmanageable.”).

49. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine."⁵⁰ The unanimous *Whren* Court similarly claimed that there was "no principle" that would enable the Court to distinguish serious criminal laws from those that are "so commonly violated" or not "sufficiently important to merit enforcement."⁵¹ The workability justification resurfaced in *Atwater* where the Court noted that "complications arise the moment we begin to think about" potential mechanisms "for drawing a line between minor crimes with limited [Fourth Amendment] arrest authority and others not so restricted."⁵² The Justices' administrability concerns are echoed by commentators, such as Christopher Slobogin, who argue that "basing any search and seizure rule on a severity of crime factor" will be plagued by the "difficulty of discerning which crimes are 'minor' and which are 'serious.'"⁵³ Slobogin adds that "even if a useable definition of crime magnitude is devised, its application may be impossible, given the realities of law enforcement; activity which appears to be a 'minor' crime at one point may well be, or become, 'serious' and vice versa."⁵⁴

While daunting in some respects, the Supreme Court's emphasis on the purported impracticability of incorporating crime severity into Fourth Amendment doctrine has a positive side for those dissatisfied with the status quo. It hints at an implicit recognition of the absence of stronger

50. *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 766 (1969)).

51. *Whren v. United States*, 517 U.S. 806, 818-19 (1996).

52. *Atwater*, 532 U.S. at 348.

53. Slobogin, *supra* note 23, at 32 n.109; see Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 810-11 (2004) (arguing that tailoring Fourth Amendment protections to offense gravity "would be wholly unworkable for police in the field in the first instance and for magistrates issuing warrants and for reviewing courts"); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 786 (2002) (arguing that "[a] sliding scale approach" to Fourth Amendment doctrine "presents a variety of administrative and practical problems" and detailing problems); see also LAFAYETTE ET AL., *supra* note 9, § 3.6(a), at 216 & n.9 (criticizing *Welsh* by stating that the dissent "correctly observed that the Court's approach will necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped" (internal quotation mark omitted)).

54. Slobogin, *supra* note 23, at 32 n.109; Volokh, *supra* note 10, at 1983 (stating that while "[w]e may all agree that there is a difference between murder and littering," it does not necessarily "follow that courts can create administrable lines that distinguish the various cases between the two extremes"). Slobogin fleshes out his critique in a footnote, stating:

At what point does an offense become so serious that police no longer need probable cause to search a house? Should the dividing line be between felonies and misdemeanors, between offenses that are considered 'harmful' and those that are not, or should it vary from case to case, depending more on the nature of the criminal act rather than the technical offense committed? And how does one apply whatever standard is appropriate in cases where it is not known what crime has been committed?

Slobogin, *supra* note 23, at 51 n.173.

objections.⁵⁵ After all, the Fourth Amendment demands reasonableness, and in common parlance (as well as common-law tradition), the reasonableness of a search or seizure depends a great deal on the severity of the offense being investigated.⁵⁶ Indeed, as the next section explains, the force of this intuition is so strong that even the Supreme Court is occasionally unable to resist it.

C. EXCEPTIONS TO TRANSSUBSTANTIVE DOCTRINE

A few exceptions to transsubstantive Fourth Amendment doctrine exist, with the most acute arising from the case of *Welsh v. Wisconsin*.⁵⁷ While

55. See Stuntz, *supra* note 8, at 870 (arguing that “no obvious principle requires transsubstantive Fourth Amendment law”); cf. *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (acknowledging that “[i]n *Atwater*, we acknowledged that nuanced judgments about the need for warrantless arrest were desirable,” but the Court nonetheless declined to permit them). Slobogin raises another objection by analogy to other areas of constitutional criminal procedure where protections do not vary based on crime severity. See Slobogin, *supra* note 23, at 52 (arguing that the transsubstantive nature of criminal-procedure rules generally “supports a common-sense intuition: that differences in individual protections against government intervention should usually flow from differences in the consequences of the intervention, not from the nature of the crime”); see also Luna, *supra* note 53, at 785 (“[T]he fact that a given crime is viewed as serious or harmful does not allow the state to circumvent or even relax other constitutional rights, such as the reasonable doubt standard or the right to trial by jury.”). The analogy is flawed, however, because in most criminal-procedure contexts, any offense-gravity-based increase in the government’s interest in conviction is offset by a countervailing consideration: the innocent defendant’s interest in avoiding a more serious conviction. This mirror image of countervailing interests is largely absent in the Fourth Amendment context. See *Welsh v. Wisconsin*, 466 U.S. 740, 760 (1984) (White, J., dissenting) (“A warrantless home entry to arrest is no more intrusive when the crime is ‘minor’ than when the suspect is sought in connection with a serious felony.”); Volokh, *supra* note 10, at 1964 & n.20. One could argue that a *guilty* defendant’s interest in avoiding detection increases as the severity of the crime investigated increases, but the law (properly) does not consider a desire to conceal guilt as a legitimate privacy interest. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (explaining that “[w]e have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest’” (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1349 (2002). Other objections could be raised, such as that vigorous and intrusive prosecutions of minor crimes may be reasonable for the counterintuitive reason that such prosecutions lead to a decrease in serious crime. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997) (arguing that “[c]racking down on aggressive panhandling, prostitution, open gang activity and other visible signs of disorder may be justifiable” under “social influence conception of deterrence” (internal quotation marks omitted)).

56. See *supra* note 30.

57. *Welsh*, 466 U.S. 740; see also Colb, *supra* note 48, at 1682–83 (“The Court in *Welsh* did something it has usually refused to do: It took note of both the gravity of the offense in question (a ‘minor offense’) and the intrusiveness of the particular search (a person’s home, at night).”); Stuntz, *supra* note 8, at 847 n.16 (noting *Welsh* as one of “a few famous exceptions” to the courts’ ostensible indifference to crime severity, “famous precisely because they are exceptional”).

anomalous, *Welsh* informs the analysis in two ways. First, it undercuts the Court's claim in related Fourth Amendment contexts that offense severity is an unworkable consideration. Second, and relatedly, *Welsh* highlights the Court's failure to grapple with the complex issues involved in crime-severity analysis and thus the importance, even if current case law remains unchanged, of addressing these issues in a comprehensive manner.

In *Welsh*, the Court rejected, as unconstitutional, the entry of a home without a warrant despite the presence of an exigent circumstance (the imminent dissipation of evidence).⁵⁸ It reached this conclusion, in part, because "the underlying offense for which there [wa]s probable cause to arrest"—drunk driving—was "relatively minor."⁵⁹ The *Welsh* majority looked exclusively to the state legislature's classification of the offense—"a noncriminal, civil forfeiture offense for which no imprisonment is possible"—to reach its conclusion that drunk driving is a minor offense.⁶⁰ This approach, it explained, constituted the best way to evaluate offense severity as it "can be easily identified both by the courts and by officers faced with a decision to arrest."⁶¹ Apart from this sentiment, the opinion makes no effort to guide lower courts in ranking the relative severity of more typical (i.e., jailable) crimes, and fails to address any of the other questions inherent in a jurisprudence that depends upon crime-severity distinctions.⁶²

The Supreme Court also recognizes offense-severity distinctions in excessive force, "seizure" cases. In *Tennessee v. Garner*, the Court deemed an officer's use of deadly force to stop a fleeing, unarmed burglar "unreasonable" under the Fourth Amendment.⁶³ The majority explained that a seizure by deadly force is reasonable only in response to a threat of physical harm, or if "there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm."⁶⁴ The Court later confirmed that, under *Garner*,

58. *Welsh*, 466 U.S. at 753-54.

59. *Id.* at 750 (citing *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson, J., concurring)).

60. *Id.* at 754.

61. *Id.*

62. See Schroeder, *supra* note 21, at 558 (advocating more concrete guidance for lower courts attempting to implement the holding of *Welsh*); *infra* Part III.

63. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

64. *Id.* at 11. *Garner's* explicit allowance for the use of deadly force based on past, rather than present, dangerousness, is at odds with other parts of the opinion that stress the importance of present dangerousness. Nevertheless, in a later case, the Court rejected an effort to render this language superfluous, explaining that "[t]he necessity described in *Garner* was, in fact, the need to prevent 'serious physical harm, either to the officer or to others'" and that "*Garner* hypothesized that deadly force may be used 'if necessary to prevent escape' when the suspect is known to have 'committed a crime involving the infliction or threatened infliction of serious physical harm,' so that his mere being at large poses an inherent danger to society."

determining “reasonableness” in this context “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.”⁶⁵ Thus, as in *Welsh*, the *Garner* Court recognized a Fourth Amendment distinction between more and less serious crimes, and held that only in circumstances involving the former category would certain government actions be deemed reasonable. Unlike *Welsh*, however, the *Garner* Court did not look to legislative classifications to determine relative seriousness. Instead, the Court appealed to an intuitive violent–nonviolent distinction.⁶⁶

D. SUMMARY

As the preceding discussion reveals, the case law stands in a state of confusion. The bulk of Fourth Amendment doctrine is transsubstantive, either by virtue of the Supreme Court’s explicit rejection of crime severity as a valid Fourth Amendment consideration, or the Court’s pointed omission of that consideration from its analysis. To the extent the Court provides any justification for this counterintuitive omission, it is that offense-severity distinctions are unworkable in the Fourth Amendment context. This explanation is belied by *Welsh* and *Garner*, where the Court explicitly, but inconsistently and with little analysis, requires police officers and courts to assess Fourth Amendment reasonableness, in part, by evaluating the seriousness of the underlying offense.

Scott v. Harris, 550 U.S. 372, 382 n.9 (2007) (citation omitted) (quoting *Garner*, 471 U.S. at 11).

65. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

66. In at least two other contexts, the Supreme Court hinted, without deciding, that offense severity might factor into Fourth Amendment reasonableness. See *United States v. Banks*, 540 U.S. 31, 37 n.4 (2003) (suggesting, without deciding, that there might be a distinction with respect to reasonableness of no-knock entry “when the reason for the search is a minor offense”); *United States v. Hensley*, 469 U.S. 221, 223–24, 229 (1985) (upholding *Terry* stop of a person suspected of being the getaway driver in a twelve-day-old, armed robbery as reasonable, “[p]articularly in the context of felonies or crimes involving a threat to public safety,” but hedging that: “We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted”). In the wake of *Hensley*, lower courts diverge on the question left open by the high court, with some courts deeming there to be a rough dividing line between serious and minor crimes demarcated by the pertinent jurisdiction’s (sometimes obscure) line between felony and misdemeanor offenses. See Rachel S. Weiss, Note, *Defining the Contours of United States v. Hensley: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 CORNELL L. REV. 1321, 1335 & n.109 (2009). Lower courts also incorporate offense seriousness into the reasonableness calculation in contexts not yet condoned by the Supreme Court. See *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984) (per curiam) (holding that the Fourth Amendment prohibits suspicionless strip searches of prisoners arrested “for minor offenses”), *overruled by Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc); see also *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011) (noting Ninth Circuit’s reversal of *Giles* and the circuit split with respect to reasonableness of suspicionless strip searches of prisoners); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 461 & n.270.

II. CALLS TO ALTER THE TRANSSUBSTANTIVE STATUS QUO

Given the intuitive appeal of incorporating offense gravity into Fourth Amendment “reasonableness,” it is no surprise that there have long been critics of transsubstantive Fourth Amendment doctrine. Justice Jackson initiated this chorus in a 1949 case where the Supreme Court applied the then-evolving “automobile exception”⁶⁷ to the Fourth Amendment’s warrant requirement. Unconvinced that Fourth Amendment protections should hinge on the distinction between automobiles and homes, Justice Jackson opined 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.”⁶⁸ Justice Jackson argued that such distinctions would reflect that judges should “strive hard[er] to sustain” a questionable search for a kidnapped child than a similar search for a suspected “bootlegger.”⁶⁹

Justice Jackson’s dissent foreshadowed a smattering of academic calls for offense-severity-based distinctions in Fourth Amendment doctrine. In one of the earliest, John Kaplan advocated an exception to the application of the Fourth Amendment exclusionary rule “in the most serious cases.”⁷⁰ Under this approach, Fourth Amendment protections remain unchanged, but the remedy of exclusion applies only in prosecutions of less serious crimes.⁷¹ Kaplan’s approach, by sending an indirect signal to police officers, tracks modern suggestions that the courts should allow government agents greater leeway in investigating particularly dangerous offenses, such as

67. See, e.g., *United States v. Burgess*, 576 F.3d 1078, 1087 (10th Cir. 2009) (describing the “automobile exception” to the warrant requirement).

68. *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

69. *Id.*; see also *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring).

70. Kaplan, *supra* note 12, at 1046 (proposing exception to the exclusionary rule “in the most serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups” with the caveat “that evidence would be suppressed if the violation of civil liberties were shocking enough”).

71. Kaplan argues that his proposal would protect the exclusionary rule from popular hostility and allow courts to more “fully and honestly” interpret the Fourth Amendment, “[f]reed of the concern that the fourth amendment [sic] doctrine they announce would later result in the release of people guilty of the most serious crimes.” *Id.* at 1047. Yale Kamisar and others criticize proposals like Kaplan’s on the ground that they lead inevitably to dilution of the already meager Fourth Amendment protections, particularly as any list of “serious crimes” would inevitably grow to include numerous offenses, including those that most frequently occasion unreasonable searches—drug offenses. Yale Kamisar, “*Comparative Reprehensibility*” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 26 (1987) (internal quotation marks omitted); Luna, *supra* note 53, at 782–87 (echoing and supplementing Kamisar’s criticisms of “sliding scale approaches to the Fourth Amendment”); LAFAVE ET AL., *supra* note 9, § 3.1(c), at 132 (criticizing proposals to limit the reach of the exclusionary rule).

terrorism.⁷² In fact, prior to federalization of the exclusionary rule in 1961,⁷³ Maryland enacted an extreme form of the system that Kaplan would later propose—providing that evidence obtained in an illegal search could be admitted in any felony trial.⁷⁴

More recently, commentators, including William Stuntz and Sheryl Colb, advocate incorporating offense gravity directly into Fourth Amendment reasonableness assessments.⁷⁵ Stuntz suggests separating offenses into discrete categories and crafting “more forgiving [Fourth Amendment] rules for more serious crimes and tougher rules for less

72. Frase, *supra* note 21, at 417 (“It seems inevitable that the Court will be presented with one or more cases in which the police request additional investigative authority to deal with terrorism or other threats of catastrophic harm.”); Gould & Stern, *supra* note 53, at 778 (arguing that Fourth Amendment doctrine should be altered to ensure that law enforcement may lawfully conduct a mass search to locate a hidden nuclear bomb); Stuntz, *supra* note 9, at 2141–42, 2188–89 (arguing that “there is nothing new about, and nothing wrong with, the claim that after September 11 law enforcement authority should increase” and proposing as part of a “grand trade” that law enforcement be provided additional constitutional leeway investigating terrorists). Even with exclusion off the table, milder disincentives to unconstitutional searches and seizures would presumably remain, such as civil liability under 28 U.S.C. § 1983. See *Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009).

73. See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 76–77 (1992) (explaining that, although the exclusionary rule was introduced by the Supreme Court in the 1914 decision of *Weeks v. United States*, 232 U.S. 383 (1914), its application was limited to federal prosecutions until the 1961 decision in *Mapp v. Ohio*, 367 U.S. 643 (1961)).

74. See *Delnegro v. State*, 81 A.2d 241, 244 (Md. 1951) (citing Bouse Act, ch. 194, § 1, 1929 Md. Laws 533, 533–34 (repealed 1996)). The Maryland statute was later amended to also preclude application of the exclusionary rule in prosecutions of misdemeanor gambling offenses in certain counties. *Salsburg v. State*, 94 A.2d 280, 281 (Md. 1953), *aff’d*, 346 U.S. 545 (1954).

75. See Colb, *supra* note 48, at 1642; Stuntz, *supra* note 8, at 870 (arguing that the Fourth Amendment’s reasonableness command implies a consideration of the “government need” for certain investigative techniques, and “[a] large factor in government need—perhaps the largest—is the crime the government is investigating”). Other commentators echo these calls for offense-specific Fourth Amendment doctrine. See, e.g., Amar, *supra* note 12, at 802, 804 (arguing that Courts should be “fixed on reasonableness as the polestar of the Fourth Amendment” and noting offense severity as one of the possible factors to be considered in determining reasonableness); Arcila, *supra* note 33, at 1339 (suggesting series of guidelines for Fourth Amendment doctrine that includes “proportionality,” a concept defined, in part, based on “the degree of harm to be avoided or investigated”); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53, 74 (advocating a cost-benefit analysis of searches to determine constitutional reasonableness, enforced exclusively by tort remedies, and noting that a factor in weighing the benefits of a search is the “gravity of the crime”). For example, Wesley Oliver echoes Kaplan’s call for an exception to the exclusionary rule for serious crimes, but calls on the legislature to define the crimes effected, and limits this exception to “good faith” Fourth Amendment violations. Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 241, 246 (2005); see also Schroeder, *supra* note 21, at 557–58 (advocating that a bright-line rule be established barring warrantless home entries in investigations of all misdemeanor—as opposed to felony—offenses, and also suggesting differential Fourth Amendment treatment for “apocalyptic” crimes).

serious crimes.”⁷⁶ Colb advocates, more generally, that courts should engage in comprehensive Fourth Amendment balancing that includes a “weighing of the gravity of the crime or crimes defined in the law being enforced, against the invasiveness of the proposed government intrusion.”⁷⁷

Unlike Kaplan’s approach which, as with any analogous tailoring of the exclusionary rule, alters existing doctrine solely by easing limits on prosecutions of serious crime, the reforms advocated by Colb and Stuntz also enhance constitutional limits on investigations of minor crimes.⁷⁸ Currently valid searches and seizures would become unconstitutional due, in part, to the relative insignificance of the targeted offense.⁷⁹ Given that investigations of minor offenses such as traffic violations and drug possession constitute a substantial portion of police–citizen interactions,⁸⁰ limits on

76. Stuntz, *supra* note 8, at 870.

77. Colb, *supra* note 48, at 1647. Colb’s proposal “would result in a finding that the Court either should or should not apply a substantively more demanding standard (or even, in theory, an absolute prohibition) to such intrusions.” *Id.* Echoing the tenor of Colb’s view, Slobogin proposes a doctrinal framework based upon the idea that “the justification for a government search or seizure ought to be roughly proportionate to the invasiveness of the search or seizure.” Slobogin, *supra* note 28, at 1588. Slobogin focuses only on one side of the reasonableness balance, however, and particularly “an assessment of intrusiveness” of the search, which, he argues, should be determined with reference to public opinion. *Id.* at 1594, 1608 (arguing that “crucial to application of the proportionality principle that I propose . . . is an assessment of intrusiveness;” “the government’s justification for a search or seizure must be roughly proportionate to its intrusiveness, and . . . the justification inquiry focuses on how certain police are about whether the search or seizure will produce the evidence they seek”); *see also* CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 39 (2007) (discussing the government-interest side of the equation with reference to the degree of certainty that a suspect committed a crime).

78. *See* Frase, *supra* note 21, at 417 (emphasizing that offense-specific Fourth Amendment doctrine should not be a “one way street” (quoting *Gooding v. United States*, 416 U.S. 430, 465 (1974) (internal quotation mark omitted)), and if Courts grant police greater authority to investigate serious crimes they “will face increased pressure to impose additional limitations on police powers in very minor cases”). As part of a proposed “grand trade,” Stuntz also advocates a crime-conscious Fourth Amendment doctrine that attempts to limit certain types of secret, invasive searches to “the investigation of violent felonies” by “bar[ring] the use of . . . evidence” obtained in those searches “to prove other, lesser crimes.” Stuntz, *supra* note 9, at 2184. This proposal appears, like Kaplan’s, to focus on the charged crime, rather than the crime under investigation.

79. Colb, *supra* note 48, at 1645 (emphasizing the ability of proposed approach to improve upon current doctrine by “address[ing] the potential for disproportionality between searches otherwise supported by probable cause and a warrant when the crime at issue is relatively minor”); Frase, *supra* note 21, at 394 (“In very minor cases, the proportionality principle can operate as a trump, as it did in *Welsh v. Wisconsin*.”).

80. *See* MATTHEW R. DUROSE ET AL., *BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2005, at 3 tbl.3 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf> (reporting on survey indicating that 40.9% of police–citizen contacts involved a stop of respondent for a traffic infraction, while 2.8% arose because the person was suspected of other wrongdoing by police); U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 2011, at 204, 206 tbls.320 & 324 (2011) (listing arrest offenses in 2008, including 430.4 drug-possession arrests per every 100,000 U.S. inhabitants);

police conduct in such investigations would result in fewer searches and seizures, and many of those spared would be poor or members of racial minorities.⁸¹ These proposals resonate with criticisms of *Atwater* and *Whren* as insensitive both to the constitutional command that searches and seizures be “reasonable,” and to modern concerns about racial profiling, police coercion, and community resentment.⁸²

The most striking aspect of the literature analyzing the omission of crime severity from Fourth Amendment balancing, however, is how little exists.⁸³ Moreover, the few commentators who squarely address the subject sketch in exceedingly broad strokes, ultimately failing to address the Supreme Court’s administrability concern.⁸⁴ And this, after all, is the most challenging aspect of the problem. As Eugene Volokh explains,

Bureau of Justice Statistics, Dep’t of Justice, *Key Facts at a Glance*, OFF. JUST. PROGRAMS, <http://bjs.ojp.usdoj.gov/content/glance/tables/drugtab.cfm> (last visited Sept. 1, 2011) (reporting 1,645,500 drug arrests for adults and 195,700 for juveniles in 2007).

81. See CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS 3–5 (2009), available at http://ccrjustice.org/files/reports/Report_CCR_NYPD_Stop_and_Frisk.pdf (describing disproportionate impact of NYPD stop-and-frisk policy on minorities); DUROSE ET AL., *supra* note 80, at 3 tbl.5 (noting race of individuals stopped for traffic violations); Frase, *supra* note 21, at 333 (arguing that in the wake of decisions like *Atwater*, “the extremely broad arrest and search powers now enjoyed by the police will be applied in a highly selective manner, thus virtually ensuring even more frequent complaints of racial profiling and other forms of disparity”); Stuntz, *supra* note 8, at 854–55, 871–75 (arguing that crime-severity distinctions would reduce the likelihood of discriminatory law enforcement because broad substantive criminal law, such as the traffic code, gives police “probable cause to arrest anyone they want[.]”); Ailsa Chang, *Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests*, WNYC NEWS (Apr. 26, 2011), <http://www.wnyc.org/articles/wnyc-news/2011/apr/26/marijuana-arrests> (reporting on high volume of marijuana possession arrests—140 people a day—in New York City and suggesting that aggressive police enforcement of marijuana possession laws disproportionately result in searches of minorities).

82. *Atwater* and *Whren* have been harshly criticized. See, e.g., Diana Roberto Donahoe, “Could Have,” “Would Have:” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1205 (1997) (noting that given the ubiquity of traffic laws and the Supreme Court’s holding in *Whren*, “[n]o one is free from this abuse of discretion”); Frase, *supra* note 21, at 331 (“The decision in *Atwater* has been widely criticized, even by conservatives, and with good reason.” (footnote omitted)); Logan, *supra* note 66, at 465–66 (arguing that *Atwater* suggests that “reasonableness has been written out of the Fourth Amendment” and ignores the implications for “all Americans, who, in contrast to members of the *Atwater* majority, . . . will suffer the brunt of the Court’s cavalier sentiment”); Timothy P. O’Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 730 (1998) (arguing that “*Whren* is a serious setback for those interested in the civil liberties of Americans”).

83. See Stuntz, *supra* note 8, at 851 (noting that Fourth Amendment doctrine’s transsubstantive nature “is almost never questioned”).

84. See Volokh, *supra* note 10, at 1961 (“Surprisingly, few works have so far discussed this matter broadly and systematically.”). Schroeder’s proposal for coherently applying *Welsh*, *supra* note 21, and Oliver’s argument for a limited good-faith exception to the exclusionary rule in serious cases, *supra* note 75, are notable exceptions, but both focus on narrow aspects of Fourth Amendment doctrine.

The value of constitutional severity distinctions in the abstract should not be the issue. Here the devil is in the details. If courts can't make the severity distinctions work in practice, then the distinctions' merits in principle are of little consequence. And if courts can make the distinctions work in practice, then we might be able to live with the distinctions' theoretical problems.⁸⁵

In the end, the existing literature concerning Fourth Amendment doctrine's treatment of crime severity constitutes a fascinating, but incomplete and unsatisfying, dialogue. Compelling reasons for incorporating crime severity into Fourth Amendment reasonableness coexist with compelling, but unaddressed, objections to that course. Particularly as crime severity may hold the key to the meaningful application of the Fourth Amendment in the modern era, the stagnation of this debate is unfortunate. It is long past time for a robust discussion of the specifics of incorporating crime severity into Fourth Amendment doctrine, or a frank acknowledgement from scholars that no workable mechanism for doing so exists.

III. INCORPORATING CRIME SEVERITY INTO FOURTH AMENDMENT DOCTRINE

For all its intuitive appeal, incorporating crime-severity distinctions into Fourth Amendment doctrine is a challenging endeavor. First, any changes to existing doctrine must be amenable to practical application not only by lower courts, but also by police officers acting quickly in ambiguous and sometimes lethal circumstances. Second, the changes must be supported not simply by normative arguments, but by principles of constitutional interpretation.⁸⁶ Guided by these considerations, this Part suggests a novel

85. Volokh, *supra* note 10, at 1983; *see also* Schroeder, *supra* note 21, at 558 (recognizing "the difficulties inherent in finding a viable methodology for distinguishing among and ranking offenses").

86. On this second point, the Fourth Amendment's text is both a blessing and a curse. The "reasonableness" command openly invites consideration of a crime-severity variable in some form. In addition, the vague constitutional directive provides significant leeway to the Supreme Court to define the variable's contours and should immunize the Court to some degree from criticism—at least on constitutional legitimacy grounds—of the choices made. *See* Steiker, *supra* note 33, at 824 (noting that the Fourth Amendment "appears to require a fairly high level of abstraction of purpose; its use of the term 'reasonable' (actually, 'unreasonable') positively invites constructions that change with changing circumstances"); Volokh, *supra* note 10, at 1977 ("Perhaps so long as there is a constitutional principle that shows the need to draw a line somewhere, courts should feel free to draw such a line even if they can't give a principled reason for the particular place they draw it."); *cf.* *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (noting difficulty of line drawing in separating "petty offenses" from those for which a jury trial must be provided and stating that "in the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts"). At the same time, the absence of a more specific constitutional command creates a danger that no matter what course the Court pursues, it will appear to be acting on its own policy preferences, particularly if its crime-severity characterizations do not mirror those of the legislature. *See* Donald A. Dripps, *The Fourth*

analytical and interpretive approach to crafting a Fourth Amendment crime-severity framework.

A. IDENTIFYING THE RELEVANT CRIME

Any framework that incorporates crime-severity distinctions into Fourth Amendment doctrine requires a threshold mechanism for precisely identifying the crime at issue. While often overlooked in the debate over constitutional crime-severity distinctions, identifying the relevant crime can sometimes be just as difficult as determining its relative severity.

The first question in this analysis is whether to focus on the crime being *investigated* at the time of the stop and search, or the crime ultimately *charged*. The two offenses are often distinct, and the divergence can be extreme.⁸⁷ If the analysis is, as here, driven by the Fourth Amendment's reasonableness command, the answer is clear. An assessment of the reasonableness of an officer's search or seizure depends on the information available to the officer at the time of its initiation.⁸⁸ Thus, it must be the offense suspected or under investigation that informs the Fourth Amendment calculus, not the offense ultimately charged (something that will often be unknown at the initiation of a search or seizure).⁸⁹ This conclusion appears consistent with the Supreme Court's truncated forays

Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules, 74 MISS. L.J. 341, 341 (2004) (highlighting the difficulty the "spacious" language of the Fourth Amendment creates for courts: "courts are not supposed to legislate, and yet in this instance the plain meaning of the text incorporates norms of reasonableness by reference").

87. For example, Oklahoma City bomber Timothy McVeigh and serial killer Ted Bundy were apprehended after being pulled over for traffic violations. See Official Trial Transcript, *United States v. McVeigh*, 1997 WL 203457, at *12 & *32 (D. Colo. 1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 271 n.1.

88. See, e.g., *Rios v. United States*, 364 U.S. 253, 261-62 (1960) (holding that constitutionality of arrest must be determined by what occurred at the time of arrest, and "nothing that happened thereafter could make that arrest lawful, or justify a search as its incident"); *United States v. Di Re*, 332 U.S. 581, 595 (1948) ("We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." (citation omitted)).

89. See Colb, *supra* note 48, at 1645 (advocating that "Supreme Court doctrine recognize that an 'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated"); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 *FORDHAM URB. L.J.* 743, 760 (2010) ("However one resolves the transsubstantive issue, the issue is one of substantive, rather than remedial, law."); Stuntz, *supra* note 8, at 851 ("Fourth Amendment law *can* vary its protection based on the nature of the crime police are investigating."). This is not to say that crime-severity distinctions tethered to the charged crime would be unsupportable. Rather, the point is that an approach that focused on the charged crime is distinct from that proposed here, requiring a different doctrinal grounding (e.g., policy-based modifications to the exclusionary rule) and aimed at a different goal—removing obstacles to prosecutions of serious crimes. The merits of such a proposal would require careful consideration and are beyond the scope of this Article.

into Fourth Amendment crime-severity distinctions in both *Welsh* and *Garner*.⁹⁰

The conclusion that the offense under investigation constitutes the relevant crime does not end the analysis. Uncertainty as to the crime being investigated will often arise from factual ambiguity in the initial report of a crime.⁹¹ In addition, once crime severity matters to the constitutional inquiry, officers could artificially buttress the constitutional reasonableness of their actions by overstating the offense under investigation.⁹² As in other areas of Fourth Amendment doctrine, an objective standard can address the related concerns of ambiguity and manipulation.⁹³ A Fourth Amendment crime-severity variable need not be determined by an officer's subjective state of mind, or influenced by after-the-fact rationalizations. Rather, courts could adopt an objective, yet deferential,⁹⁴ test that focuses on the facts known to law enforcement at the time of a search or seizure, much like the probable-cause standard under existing law.⁹⁵ Such a standard (e.g., "the most serious offense plausibly suggested by the facts known to the officer")⁹⁶ would lend itself to common-sense application, even in ambiguous

90. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (determining that the offense the officer believed the suspect had committed was not sufficiently dangerous to warrant seizure by deadly force); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (deeming "the underlying offense for which there is probable cause to arrest" to be minor); cf. *United States v. Hensley*, 469 U.S. 221, 229 (1985) (noting possible distinction in reasonableness between stops based on officer's belief that suspect was involved in felony as opposed to misdemeanor offense).

91. See *Slobogin*, *supra* note 23, at 31–32 n.109; *Stuntz*, *supra* note 8, at 870 (noting that gradations of protections will create the difficult circumstance where the police and prosecutors must "classify cases by crime before the details of the crime are known").

92. Cf. *Steiker*, *supra* note 33, at 853 (noting that under current law, "once police officers have found incriminating evidence, they have an obvious incentive to perjure themselves in order to justify the initial seizure").

93. See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts, . . . the 'reasonableness' inquiry . . . is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (emphasizing that in assessing Fourth Amendment reasonableness, "it is imperative that the facts be judged against an objective standard").

94. *King*, 131 S. Ct. at 1859; *Graham*, 490 U.S. at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . .").

95. See *LAFAYETTE ET AL.*, *supra* note 9, § 3.3(b), at 166 (explaining that the "probable cause test" is "an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man"). Where appropriate, the "collective knowledge" doctrine imputes the knowledge of other officers to the searching officer. See *United States v. Nafziger*, 974 F.2d 906, 912 (7th Cir. 1992) (discussing collective-knowledge doctrine).

96. Cf. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that deadly force seizures are reasonable where "there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm"); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (holding that a warrantless home entry was unreasonable where "the underlying offense for which there is probable cause to arrest" was minor).

circumstances, and counteracts any incentive to speculate as to the existence of a more serious crime than the facts support.

B. THE CASE AGAINST CASE-SPECIFIC SEVERITY DETERMINATIONS

After identifying the relevant crime, a doctrinal framework that incorporates crime-severity distinctions must confront its next significant challenge—determining the relative seriousness of that crime. The difficulty inherent in crafting a workable crime hierarchy is one of the most commonly cited reasons for rejecting Fourth Amendment crime-severity distinctions.⁹⁷

A tempting response to the difficulty of categorizing offenses is to avoid the enterprise altogether, leaving lower courts to make ad hoc, case-by-case assessments of offense severity. This is essentially the approach adopted by the majority in *Welsh*,⁹⁸ with predictable results. Surveying the post-*Welsh* case law, William Schroeder characterizes the lower courts' crime-severity analysis as "arbitrary, freewheeling, and reflective of little more than the intuitive reactions of individual judges to particular crimes."⁹⁹ The lower courts engage "in a process of characterization rather than classification and have simply characterized particular offenses as 'grave,' 'serious,' or 'minor.'"¹⁰⁰

Examples of the phenomenon Schroeder identifies abound. In *Ingram v. City of Columbus*, the Sixth Circuit characterized as a serious offense a defendant's taking of an undercover narcotics officer's twenty dollars and fleeing into a home.¹⁰¹ In *United States v. Schmidt*, the Eighth Circuit took a similarly dim view of a teenager's actions during an attempted arrest (on the teenager's lawn) for underage drinking.¹⁰² The teenager, insisting that the officer had no right to be on his property, kicked the officer in the knee and fled into his house.¹⁰³ The Court concluded that the officer's "hot pursuit" home entry (the officer followed the suspect and kicked in his locked front door) was reasonable because "[t]he underlying offense here, assault with a dangerous weapon" (the teenager's shoe) "is certainly a serious offense."¹⁰⁴

97. See Schroeder, *supra* note 21, at 498; Slobogin, *supra* note 23, at 31 n.109; Volokh, *supra* note 10, at 1982; *supra* Part I.A (discussing the Supreme Court's rejection of offense-severity distinctions); cf. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 76 (1985) ("Rating crimes is ultimately a matter of making value judgments, on which persons reasonably may differ.").

98. See *supra* Part I.C.

99. Schroeder, *supra* note 21, at 497 (citing cases).

100. *Id.* at 494.

101. *Ingram v. City of Columbus*, 185 F.3d 579, 587–88 (6th Cir. 1999) (ruling that the police had probable cause to believe the suspect was "engaged in a felony warranting imprisonment"—offering to sell cocaine—and, thus, could pursue him into a home without a warrant).

102. *United States v. Schmidt*, 403 F.3d 1009, 1012 (8th Cir. 2005).

103. *Id.*

104. *Id.* at 1013.

The Supreme Court itself engaged in this type of vacuous analysis when confronted with a case that appeared analogous to *Welsh*. In *Illinois v. McArthur*, the Court considered whether the police, suspecting that a man had a small amount of marijuana in his trailer home, reasonably barred his entry while they obtained a search warrant.¹⁰⁵ The Court found no Fourth Amendment violation and dismissed comparison to *Welsh*, in part, on the ground that unlike the “minor” offense in *Welsh*, possession of marijuana (a class C misdemeanor under state law) was “‘jailable,’ not ‘nonjailable.’”¹⁰⁶

The post-*Welsh* jurisprudence summarized above highlights two significant problems with case-by-case offense characterization.¹⁰⁷ First, such ad-hoc characterization is anathema to the principle that Fourth Amendment doctrine must be sufficiently concrete that law-enforcement officers (and citizens) can predict, in advance, whether a given search or seizure is constitutional.¹⁰⁸ Second, when looking only at individual cases, courts can find almost any offense, in isolation, “serious.”¹⁰⁹ This predictable reflex misses the point of offense-severity considerations—*relative* severity. The question is not whether a particular crime is serious. (We are, after all, talking about *criminal* laws.) Rather, the pertinent question is whether certain crimes are more or less serious than others, thus necessitating, under a reasonableness standard, a more or less intrusive police response.

C. CRAFTING A CRIME HIERARCHY

The lower courts’ experience implementing *Welsh* suggests that it is not sufficient to leave offense-severity classification to ad-hoc, case-by-case judicial assessments. Guideposts must be erected to ensure predictability for citizens and police officers, create consistency throughout the lower courts, and decrease the temptation to reflexively label all criminal offenses “serious.” In short, a workable Fourth Amendment framework that incorporates offense severity must categorize offenses.

105. *Illinois v. McArthur*, 531 U.S. 326, 328 (2001).

106. *Id.* at 336. The offense could be punished by up to thirty days in jail. *Id.*

107. See Volokh, *supra* note 10, at 1977–79 (highlighting similar difficulties with a doctrinal framework that evaluates crime severity on a case-by-case basis). The debate summarized above reflects the familiar tensions between rules and standards. See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

108. See *New York v. Belton*, 453 U.S. 454, 458 (1981) (“[T]he protection of the Fourth and Fourteenth Amendments ‘can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.’”), *abrogated on other grounds by Davis v. United States*, 131 S. Ct. 2419 (2011).

109. See VON HIRSCH, *supra* note 97, at 74 (“An explicit seriousness scale helps compel the rulemaker to consider whether its proposed penalties comport with its judgment of the comparative gravity of offenses.”); Kamisar, *supra* note 71, at 26 (emphasizing inevitable pressure on courts to expand any list defining “serious crimes” for which law enforcement was permitted greater leeway in its investigations); Luna, *supra* note 53, at 782–87 (echoing and supplementing Kamisar’s criticisms).

In theory, the greater the number of categories, the more precision that can be obtained in assessing reasonableness. Yet the success of any categorization scheme may depend on resisting this sentiment for three reasons. The first is complexity. As the pertinent categories become increasingly refined, police officers and courts will experience greater difficulty determining where particular offenses fall. Second, more categories means more disagreement as to the placement of particular offenses and greater inconsistency among courts, factors that would jeopardize the critical constitutional connection between crime severity and a socially shared conception of “reasonableness.” Indeed, in the Eighth Amendment context, the Supreme Court, while insisting on its competence to draw crime-severity distinctions “on a broad scale,” acknowledges that this capability quickly becomes strained as distinctions become more precise.¹¹⁰ Third, and perhaps most important, there are only so many Fourth Amendment standards that courts can verbalize and apply. Review of a challenged search is not mathematics, and subtle distinctions between more than, say, three gradations of offenses would require great effort to achieve only illusory precision.¹¹¹ Thus, at least until a need appears for more nuanced categorization, three categories should suffice: “grave,” “serious,” and “minor” crimes.

As for placing crimes in each category, it is critical that courts avoid the temptation to defer to legislative classifications. As discussed below, deferring to the legislature, while quite sensible in many contexts, makes little sense as a means of construing Fourth Amendment reasonableness.

The primary evil that the drafters of the Fourth Amendment sought to eliminate was the general warrant—often a creature of legislation.¹¹² The Supreme Court, thus, recognizes in related contexts the absurdity of

110. See *Solem v. Helm*, 463 U.S. 277, 292–94 (1983) (explaining that “courts are competent to judge the gravity of an offense, at least on a relative scale” because “there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes”).

111. This point distinguishes the related challenge of calculating offense seriousness for purposes of sentencing. See ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 99 (1987) (deeming “sensible” the Minnesota Sentencing Commission’s decision to distinguish ten categories of offense seriousness). As the federal sentencing guidelines demonstrate, sentences can be calculated in precise numerical increments. See generally U.S. SENTENCING COMM’N, *GUIDELINES MANUAL* (2010), available at http://www.ussc.gov/guidelines/2010_guidelines/Manual_PDF/TitlePage_Citation_ToC.pdf.

112. See *Illinois v. Krull*, 480 U.S. 340, 362 (1987) (Marshall, J., dissenting) (“Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment.”); CUDDIHY, *supra* note 22, at 151–61, 469–76 (describing vast body of English legislation that authorized searches pursuant to general warrants); DAVIES, *supra* note 22, at 583, 590 (stating that “[n]o one questions that the Framers despised and sought to ban general warrants” and explaining that “the Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants”).

deeming a search or seizure performed by the executive branch either reasonable or unreasonable by reference to the opinion of the legislative branch. Writing for eight Justices in *Virginia v. Moore*, Justice Scalia noted that there is “no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.”¹¹³ Instead, the Amendment embodies the sentiment that “founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.”¹¹⁴

Further, the Supreme Court often emphasizes the need to avoid “linking Fourth Amendment protections to state law”—the law that would most commonly be called upon, as in *Welsh*, to define offense severity.¹¹⁵ Doing so would result in constitutional rules that “vary from place to place and from time to time.”¹¹⁶ Finally, expanding on this last thought (“time to time”), any offense-severity categorization that depends on legislative classification would be vulnerable to manipulation. Legislatures could alter the relevant classifications to increase police officers’ investigative authority, causing a search or seizure that was unreasonable one day to be reasonable the next.¹¹⁷

As tempting as it may be, then, deferring to legislative classification is not the answer. Instead, for practical reasons and as a matter of constitutional interpretation, crime severity must, like other aspects of Fourth Amendment doctrine, be measured objectively, by a judge channeling the views of a hypothetical reasonable person.¹¹⁸ Canadian

113. *Virginia v. Moore*, 553 U.S. 164, 168 (2008); see also Davies, *Post-Framing Adoption*, *supra* note 33, at 24 & n.96.

114. *Moore*, 553 U.S. at 169.

115. *Id.* at 176.

116. *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)) (internal quotation marks omitted).

117. See Colb, *supra* note 48, at 1683 (criticizing *Welsh* for “disavow[ing] any judicial judgment about the significance of the actual violation” and warning that “[i]f Wisconsin were unhappy with the Court’s decision, it could, therefore, nullify it prospectively by simply changing (legislatively) the status of driving while intoxicated from a civil violation to a criminal offense”); Schroeder, *supra* note 21, at 499 (noting that the Fourth Amendment should “not [be] subject to arbitrary change or manipulation by legislatures or courts”); Volokh, *supra* note 10, at 1974 (recognizing danger of legislative manipulation in this context). A further problem is that legislative assignments of maximum sentences may not be indicative even of the legislature’s view of the seriousness of the crime. See *Welsh v. Wisconsin*, 466 U.S. 740, 763 (1984) (White, J., dissenting) (noting that the legislature may have limited “the penalties imposed on first offenders in order to increase the ease of conviction and the overall deterrent effect”); VON HIRSCH ET AL., *supra* note 111, at 100 (recognizing that statutory penalties may be influenced by “considerations other than seriousness”).

118. Reasonable-person standards are common in Fourth Amendment doctrine. See, e.g., *Brendlin v. California*, 551 U.S. 249, 255 (2007) (“[A] seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave’” (quoting *United States v. Mendenhall*, 446 U.S. 544 (1980))); *Florida v.*

jurisprudence relies on a reasonable-person standard in an analogous circumstance of determining whether evidence obtained in a questionable manner must be excluded at trial to avoid “bring[ing] the administration of justice into disrepute.”¹¹⁹ In this context, Canadian Supreme Court Justice Lamer explains, “[t]he reasonable person is usually the average person in the community, but only when that community’s current mood is reasonable.”¹²⁰ Thus, the reasonable-person standard is “not left to the untrammelled discretion of the judge” or the vagaries of public opinion but is a judicial determination “grounded in community values and, in particular, long term community values.”¹²¹ This exercise of drawing upon community norms to apply an objective reasonableness standard should look familiar. It is, in essence, the same analytical exercise the United States Supreme Court undertakes in determining whether a search has occurred in the first place under the venerable “reasonable expectation of privacy” test.¹²²

Reliance on a reasonable-person standard in the crime-severity context draws strength from the broad societal consensus as to the most serious and

Jimeno, 500 U.S. 248, 251 (1991) (“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”); Terry v. Ohio, 392 U.S. 1, 22 (1968) (identifying as key Fourth Amendment inquiry: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate”).

119. R. v. Collins, [1987] 1 S.C.R. 265, para. 20 (Can.).

120. *Id.* at para. 33; see also Morissette, *supra* note 31, at 538 (elaborating on the benefits of the “reasonable man” standard in Canadian jurisprudence). Canadian jurisprudence has a complicated history with respect to considering crime severity in this analysis. See *Collins*, 1 S.C.R. 265, at para. 35 (recognizing as a pertinent factor: “[I]s the offence serious?”); R. v. Grant, [2009] 2 S.C.R. 353, paras. 62, 66, 84 (Can.) (expressing dissatisfaction with the case law that had evolved under *Collins* and, in the process of providing “clarification” as to multifactored approach, ruling that offense seriousness “cut both ways” and was thus always a neutral factor in the exclusionary calculus).

121. *Collins*, 1 S.C.R. 265, at para. 34. A similar approach could be to view relative crime severity through a Rawlsian “veil of ignorance,” where those who craft a crime hierarchy must do so without knowing its implications for their personal interests. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971). Cf. Robert Weisberg, *IVHS, Legal Privacy, and the Legacy of Dr. Faustus*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 75, 78 (1995) (“[T]o return Fourth Amendment law—or supplementary statute law—to what philosophers call the Rawlsian veil of ignorance—that idealized condition in which we convene to establish the best rules for our society before anyone of us knows whether she personally will turn out to be the beneficiary or the victim of the rules.”).

122. See *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’” (quoting *Rakas v. Illinois*, 439 U.S. 128, 143–44 & n.12 (1978) (emphasis added))); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (explaining that a search occurs when the authorities invade an expectation of privacy that “society is prepared to recognize” as reasonable).

most trivial offenses. While views as to *absolute* severity vary among social groups, social-science literature points to “the existence of wide general agreement and stability across different social sectors and population groups with regard to the relative seriousness of behaviors considered to be criminal.”¹²³ Paul Robinson and Robert Kurzban recently surveyed this literature, remarking on the “extraordinary extent of agreement across a variety of issues and demographics,” with various methodological approaches yielding conclusions that “are all essentially the same, confirming the existence of shared intuitions as to relative seriousness of different variations on wrongdoing.”¹²⁴ The Supreme Court already recognizes the salience of this literature as an aid to assessing relative crime severity in its Eighth Amendment jurisprudence.¹²⁵

In the social-science literature, the crimes engendering “wide general agreement” as among the most severe involve “traditional common law-based criminal acts such as ‘a parent beats his young child to death,’ ‘planned killing of a person for a fee,’ ‘forcible rape of a neighbor,’ and ‘armed robbery of a bank.’”¹²⁶ Analogous crimes identified as most serious in public surveys include aggravated assaults, stranger kidnappings, and other armed robberies.¹²⁷ Absent some reasoned basis to reject the societal

123. Sergio Herzog, *The Relationship Between Public Perceptions of Crime Seriousness and Support for Plea-Bargaining Practices in Israel: A Factorial-Survey Approach*, 94 J. CRIM. L. & CRIMINOLOGY 103, 106–07 (2003) (summarizing literature); see VON HIRSCH, *supra* note 97, at 65 (explaining that, while there is continuing debate on this point, the existing “studies show that people from different walks of life tend to rate the gravity of common criminal acts similarly”); Michael O’Connell & Anthony Whelan, *Taking Wrongs Seriously: Public Perceptions of Crime Seriousness*, 36 BRIT. J. CRIMINOLOGY 299, 301 (1996) (surveying literature and concluding that “[t]here appears to be agreement on consensus” that is “best stated by [P.H.] Rossi and [P.H.] Henry” as follows: “Remarkable degrees of consensus obtain . . . across populations within sub-groups [but the] . . . agreement on the relative ordering of criminal acts is compatible with considerable differences in the absolute level of seriousness attributed to any given act”). Similarly, H.L.A. Hart refers to a “commonsense scale of gravity” in describing the need for a rational criminal justice system to assign proportional punishments for varying offenses. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968).

124. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1855 (2007).

125. See *Solem v. Helm*, 463 U.S. 277, 292–94 (1983) (supporting assertion that “courts are competent to judge the gravity of an offense, at least on a relative scale,” by noting social-science literature that suggests “there are widely shared views as to the relative seriousness of crimes” (citing Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 237 (1974))).

126. Stuart P. Green, *Why It’s a Crime To Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1565 (1997) (discussing MARVIN E. WOLFGANG ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL SURVEY OF CRIME SEVERITY (1985)).

127. See WOLFGANG ET AL., *supra* note 126, at 49–50 (listing kidnapping, intentional shootings, and armed robberies among offenses perceived to be most serious in comprehensive survey of offense severity). The phrase “armed robbery” is intended to avoid inclusion of less dangerous, unarmed robberies. See Franklin E. Zimring & Gordon Hawkins, *Crime Is Not the*

consensus with respect to the severity of these crimes, courts could identify these offenses (and other directly analogous crimes) as forming the core of a category of offenses that a reasonable person would deem most severe. As the social-science literature indicates, people in all strata of American society fear these offenses above all others and, presumably, expect police to respond most aggressively to catch those who would commit them.¹²⁸

Problem: A Reply, 69 U. COLO. L. REV. 1177, 1184 (1998) (“[R]obbery is both itself a violent crime and one leading cause of criminal homicide.”).

128. See Delbert S. Elliott, *Life-Threatening Violence Is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1082 (1998) (noting that when considering life-threatening violent crime, “[t]he most inclusive definition would include all homicides, nonnegligent manslaughters, robberies, and aggravated assaults”). For a discussion of the complexities of developing theoretical grounds for ranking offense severity, see Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 81–83 (Michael Tonry ed., 1992). Elsewhere, von Hirsch suggests a theoretical basis for determining offense severity based on the degree to which offenses “restrict people’s ability to direct the course of their own lives,” a theory that “accounts for our sense of the gravity of violence, for violence restricts victims’ choices so drastically” and explains “why economic crimes can also be serious.” VON HIRSCH ET AL., *supra* note 111, at 101. He also argues, consistent with the discussion in the text, that popular assessments of offense severity alone should not determine offense seriousness, but such judgments “need to be supported by reasons.” *Id.* at 100.

See WOLFGANG ET AL., *supra* note 126, at 47–50 (chart). A team headed by Paul Robinson recently surveyed residents of New Jersey and Pennsylvania to evaluate offense grading. See Paul H. Robinson et al., Report on Offense Grading in New Jersey (Jan. 10, 2011), available at <http://ssrn.com/abstract=1737825> (Univ. of Pa. Law Sch., Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-03); Paul H. Robinson et al., Report on Offense Grading in Pennsylvania (Dec. 16, 2009), available at <http://ssrn.com/abstract=1527149> (Univ. of Pa. Law Sch., Pub. Law & Legal Theory Research Paper Series, Research Paper No. 10-01). The surveys, although not tailored to the Fourth Amendment inquiry, are consistent with the social-science literature described above. In the Pennsylvania survey, the offenses rated above 5.5 on a relative severity scale were murder, arson, keeping an adult slave, threatening a judge at gunpoint in retaliation for a ruling, various sex offenses, selling an infant, rape of a minor, shooting a firearm into a structure for purposes of ethnic intimidation, and threatening a witness at gunpoint in retaliation for testifying. Robinson, Report on Offense Grading in Pennsylvania, *supra*, at 58–62. The offenses rated below 2.0 included various nonviolent offenses, such as failing to disperse, fraud, and trespassing (there do not appear to have been any survey questions evaluating drug possession or traffic offenses). *Id.* In the New Jersey survey, the offenses rated above 5.5 were arson, kidnapping, and other violent crimes, as well as the somewhat esoteric offenses of unlawful importation of radioactive material and the unlawful sale of cows with “mad cow” disease. Robinson, Report on Offense Grading in New Jersey, *supra*, at 44–49. Offenses rated below 2.0 included obscenity offenses and possession or use of marijuana. *Id.* Interpretation is complicated by the understandable use of narratives in place of offense definitions. See *id.* at 16 & n.123; Robinson, Report on Offense Grading in Pennsylvania, *supra*, at 10–11. In some of the narratives, the measured offense is paired with a second offense, and it is likely that survey participants rated the severity of the combined offense. See, e.g., *id.* at 49, 61 (evaluating severity of “unlawful use of body vests” through narrative: “John illegally wears a bullet-proof vest during an attempt to kill his neighbor”).

Canadian authorities undertook another recent effort to determine relative crime severity by reviewing the actual sentences given to offenders in Canadian courts. The results track the surveys described above. See CANADIAN CENTRE FOR JUSTICE STATISTICS, STATISTICS CANADA, MEASURING CRIME IN CANADA: INTRODUCING THE CRIME SEVERITY INDEX AND IMPROVEMENTS TO

This description of crimes a reasonable person would deem most serious neatly parallels *Garner's* holding, delimiting the circumstances when it is constitutionally reasonable to "seize" a fleeing suspect with deadly force. The *Garner* Court states that deadly force (and thus the most intrusive type of seizure) is reasonable if the suspect threatens an officer with a weapon "or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."¹²⁹ *Garner*, thus, provides doctrinal support for the principle at the core of this Article: As a matter of Fourth Amendment reasonableness, crimes involving the threat of serious physical harm warrant more intrusive government responses than crimes that do not.¹³⁰ In fact, *Garner* suggests a workable shorthand for the category of "grave" offenses: *offenses involving the intentional infliction, or threatened infliction, of serious physical harm.*

Viewing relative crime severity through the eyes of a reasonable person can also generate a category of "minor" offenses. These crimes parallel what Margaret Raymond calls "penumbral crime," crimes "defined by a high level of noncompliance with the stated legal standard, an absence of stigma associated with violation of the stated standard, and a low level of law enforcement or public sanction."¹³¹ Examples of crimes fitting this description—essentially, laws that are commonly violated with little lasting harm to anyone but, arguably, the violator—can again be identified with the assistance of crime-perception surveys. The most comprehensive survey lists the following crimes as least serious: truancy, vagrancy, illegal gambling, trespassing, public drunkenness, noise disturbances, drug possession, simple assault, petty theft, and prostitution.¹³² Reasoning by analogy from these offenses reveals other crimes that should be included in the "minor" offense category, such as jaywalking, riding a bicycle on the sidewalk,¹³³ and routine traffic and regulatory offenses. Again, absent some reasoned basis for recategorization, the listed offenses would form the core of the "minor

THE UNIFORM CRIME REPORTING SURVEY (2009), available at <http://www.statcan.gc.ca/pub/85-004-x/85-004-x2009001-eng.pdf>.

129. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

130. See Schroeder, *supra* note 21, at 528–29 (recognizing potential merits of crime-severity distinctions that relate to the presence or absence of violence and recognizing that *Garner* supports such an approach); cf. *United States v. Hensley*, 469 U.S. 221, 229 (1985) (suggesting that *Terry* stops might be more reasonable when conducted as part of investigations of "felonies or crimes involving a threat to public safety"); 18 U.S.C. § 924(e)(2)(B)(i) (2006) (mandating harsher penalties for offenders with prior violent felonies, defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another").

131. Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1395 (2002).

132. See WOLFGANG ET AL., *supra* note 126, at 47 (chart).

133. A surprising number of cases involve police contact based on violations of bicycle ordinances. See, e.g., *United States v. McFadden*, 238 F.3d 198, 204 (2d Cir. 2001) (rejecting a challenge to seizure by police who observed defendant riding a bicycle on the sidewalk, even though pertinent New York statute contained numerous exceptions).

offense” category, with the inclusion of other analogous offenses resulting from a filtering of public sentiment through the prism of objective reasonableness—a judicial exercise that joins reasoned distinctions as to crime severity with widely shared community values.¹³⁴

Crafting a category of the most serious offenses and a category of the least serious crimes results in a *de facto* residual category of crimes of moderate severity, which can be labeled “serious,” but not “grave.” Representative crimes include selling drugs, drunk driving, embezzlement, and money laundering.¹³⁵ In the three-tiered categorization scheme set forth above, this middle category functions as a “demilitarized zone,” providing a buffer between the “grave” and “minor” crimes that will minimize disagreement and confusion as to the proper placement of offenses. Only crimes that are particularly distinguished either as “minor” or “grave” would escape categorization as “serious,” and investigations of crimes falling into this broad “serious” category would be treated as they always have for Fourth Amendment purposes.

It would be folly, at an early stage in the doctrine’s development (i.e., as here, stage zero), to attempt to place every crime in a category. Rather, each of the three categories sketched above should be filled out by judicial decisions until the wide swath of crimes now in existence are categorized. A robust series of examples along with principles that enable broad categorization, as postulated above, would enable courts to categorize by analogy until judicial consensus is reached as to most extant crimes. It is worth emphasizing on this point that while penal codes contain a dazzling number of crimes, most police officers spend the bulk of their time investigating a small subset of these crimes that, due to their ubiquity, would quickly be categorized by judicial decision.¹³⁶

134. See *R. v. Collins*, [1987] 1 S.C.R. 265, para. 33 (Can.). Popular survey data, while informative, should not be dispositive. See VON HIRSCH ET AL., *supra* note 111, at 100 (arguing, in the sentencing context, that popular assessments of offense severity alone should not determine offense seriousness, but such judgments “need to be supported by reasons”).

135. Some crimes will fall into this middle category due to the absence of a societal consensus as to their relative severity. Robinson and Kurzban found less agreement when they tested subjects’ views of the relative seriousness of drug offenses, prostitution, and bestiality. See Robinson & Kurzban, *supra* note 124, at 1890–91. The lack of agreement in the study could be an artifact of its design. See *id.* at 1883 (reporting that subjects were first asked to rank relative severity of twenty-four crimes and then, only upon completion, asked to rank twelve new crimes in relation to existing twenty-four-crime framework; the subjects showed consistency in ranking twenty-four crimes, but exhibited less agreement with respect to relative ranking of twelve new crimes). It may also suggest, as the authors contend, that “the closer conduct is to the core of physical injury of persons or property, takings without consent, and deception in exchanges, the greater will be present-day agreement about its relative blameworthiness.” *Id.* at 1891.

136. See Stuntz, *supra* note 9, at 2174 (“The large majority of Terry stops are based on suspicion of one of a half-dozen offenses.”); U.S. CENSUS BUREAU, *supra* note 80, at 204 tbl.299 (reporting statistical breakdown of United States arrests by crime).

A final consideration is whether to permit differentiation between offenses nominally categorized as identical. Should the teenager's kick in *United States v. Schmidt*¹³⁷ be distinguished from a near fatal stabbing, even though both offenses could be deemed assault with a dangerous weapon? It seems that the overarching inquiry as to "reasonableness" requires an affirmative answer.¹³⁸ Nevertheless, such departures from a general offense categorization should be rare. As discussed in Part III.B, if courts focus myopically on case-specific classification, there is a danger that they will deem all crime "grave" or "serious," rendering the notion of *relative* crime severity meaningless.

IV. APPLYING THE CRIME-SEVERITY FRAMEWORK

The preceding Part sketches the contours of a framework for identifying a crime-severity variable that can be incorporated into assessments of Fourth Amendment reasonableness. This Part explores specific applications of this approach. It begins by distinguishing the application of a crime-severity variable in two doctrinal settings—one where incorporation of crime severity will be relatively easy and, a second, where incorporation is more difficult.

A. INCORPORATING CRIME SEVERITY INTO GENERAL REASONABLENESS ASSESSMENTS

Crime-severity considerations can be most readily incorporated into the pockets of Fourth Amendment doctrine governed solely by freeform reasonableness analysis. In these so-called "special needs" contexts, crime severity would simply become one of the common-sense considerations that courts apply in assessing "reasonableness, under all the circumstances."¹³⁹

For example, school searches fall into the "special needs" category. Consequently, "the legality of a search of a student" depends "simply on the

137. *United States v. Schmidt*, 403 F.3d 1009, 1012 (8th Cir. 2005).

138. See Stuntz, *supra* note 8, at 866 (arguing in context of regulating prosecutor's subpoena authority that crime-severity distinctions should not only be substantive, but "thoroughly case-specific").

139. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (evaluating searches of public-school students). This "inconsistent tangle of case law" is difficult to characterize. For a general discussion, see Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 926 (2010) (concluding that the doctrine consists of "an inconsistent tangle of case law, justified by a broad Fourth Amendment loophole whose premise—that detecting and preventing violent crime is not a law enforcement purpose—borders on the absurd"); see also *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) (explaining that the Court has recognized "'special needs' exceptions to the Fourth Amendment . . . in a patchwork quilt of settings: public school principals' searches of students' belongings, *T.L.O.*; public employers' searches of employees' desks, *O'Connor*, and probation officers' searches of probationers' homes, *Griffin*," where "each time the Court has found that 'special needs' counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided 'reasonableness' balancing inquiry").

reasonableness, under all the circumstances, of the search.”¹⁴⁰ Under existing doctrine, however, one circumstance appears out of bounds. The Supreme Court has emphasized that the legality of a school search is not “dependent upon a judge’s evaluation of the relative importance of various school rules.”¹⁴¹ Justice Stevens’s response to this point in dissent resonates far beyond the school-search context: “[f]or the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.”¹⁴²

Of course, 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. In fact, once a workable framework for evaluating relative seriousness is constructed, crime severity should be a central variable (along with intrusiveness) in assessing the reasonableness of school searches. Whether 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. Public interest, here, should be defined both by the quantum of suspicion that a student violated some rule *and* the seriousness of the rule violated. All things being equal, a search aimed at identifying a student rapist (a “grave” crime) would be on firmer constitutional ground than the same search to determine if students were stealing soda, smoking in the bathroom, or leaving campus for lunch (“minor” offenses).

Due to the unbounded nature of the constitutional analysis in this context, no further rules (apart from those already developed in the preceding Part) are necessary. A crime-severity variable can be factored into the freeform reasonableness calculus just like any other pertinent consideration, causing searches that target minor crimes more likely to be deemed unreasonable, and searches that target grave offenses more likely to be deemed reasonable.

B. CRIME SEVERITY AND BRIGHT-LINE RULES

Fourth Amendment jurisprudence often relies on so-called bright-line rules to separate government actions that are *per se* reasonable from those that are *per se* unreasonable.¹⁴³ While it is easiest to incorporate crime

140. *T.L.O.*, 469 U.S. at 341.

141. *Id.* at 342 n.9. The Supreme Court’s existing school-search jurisprudence provides mixed signals on the propriety of crime-severity considerations, holding that such considerations are irrelevant in determining if a search is reasonable in its inception, but perhaps relevant to determining the permissible scope of that search. *Id.*

142. *Id.* at 377, 380 (Stevens, J., concurring in part and dissenting in part).

143. See LAFAYE ET AL., *supra* note 9, § 2.9(f), at 102–03 (describing the Court’s inconsistent approach to bright-line rules in the Fourth Amendment context).

severity (or any variable) into the freeform reasonableness analysis discussed in the preceding Part, crime severity can also be incorporated into an analysis governed by bright-line rules. Indeed, this is essentially what the Supreme Court did in *Welsh*—creating a “minor crime” exception to an exigent-circumstances rule that otherwise permitted warrantless entry.

The general approach would be fairly straightforward. If a rule would ordinarily render a search or seizure *per se* reasonable, the defendant (in a close case) could invoke an exception when the targeted offense was “minor.” Conversely, if a rule would deem a search or seizure *per se* unreasonable, the government could invoke an exception if the targeted offense was “grave.” Unlike in *Welsh*, however (and more like *Illinois v. McArthur*),¹⁴⁴ the invocation of these exceptions should not determine the issue. Rather, the availability of the exception would free the legal analysis from the confines of the bright-line rule, allowing “totality of the circumstances,” reasonableness balancing, as in the “special needs” context.

The mechanics of the proposed approach can be explored by revisiting *Atwater* and *Mincey*.¹⁴⁵ In *Atwater*, the Court claimed to be hamstrung by the *per se* rule deeming an arrest reasonable whenever an officer had probable cause to suspect a person of a crime. Consequently, a custodial arrest of a parent in a car full of children for a seatbelt violation became *per se* reasonable, as opposed to *actually* reasonable, even though the seatbelt violation was not a jailable offense.¹⁴⁶ 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. While this approach inevitably requires some degree of case-by-case analysis, various categories of arrests for minor offenses would likely become *de facto* reasonable—e.g., arrests necessary to fingerprint a suspect who has no identification, to protect the suspect or others (e.g., public drunkenness), or to prevent ongoing violations. The simple fact of an offense, however, would no longer establish the reasonableness of an arrest.

The advantages of the doctrinal change described above would not accrue solely to suspects. An analogous approach, favoring law enforcement,

144. *Illinois v. McArthur*, 531 U.S. 326 (2001). The Court in *McArthur*, after applying the general exigent-circumstances rule to affirm the constitutionality of the search, noted that the offense at issue—drug possession—was fairly minor and seemed to find it necessary to evaluate the overall reasonableness of the contested search in comparison to the search in *Welsh*. The Court emphasized that the offense was not *as* minor as the one in *Welsh* and the intrusion less severe. *Id.* at 336; see discussion *supra* Part I.C.

145. See discussion of *Atwater* and *Mincey* *supra* Part I.A.

146. See Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 280 (2010) (noting that under any regime with bright-line rules, it is inevitable that some people will have their rights violated and that “[t]hese people are a sort of collateral damage from the bright-line rule”).

could be applied in cases like *Mincey*, where a bright-line rule forbidding certain actions would yield in an investigation of a grave offense. Again, case-by-case analysis would be required, but *de facto* rules would inevitably result. For example, a rule like that once followed by the Arizona courts could permit warrantless searches (with probable cause) of single-family residences whenever police, having lawfully entered, encounter a victim of a “grave” crime.¹⁴⁷

C. OBJECTIONS TO OBSCURING BRIGHT-LINE RULES

A likely objection to the approach sketched in the preceding section is that it will reduce the clarity of Fourth Amendment doctrine, particularly with respect to those areas of search and seizure law governed by bright-line rules. According to the most general form of this objection, introducing any new variable into the calculus complicates the task of police officers and increases the potential for inconsistency and confusion in the lower courts.¹⁴⁸

There are two responses to this objection. First, it overstates the clarity and efficacy of existing Fourth Amendment doctrine. Even the so-called bright-line rules that dot the Fourth Amendment landscape are intersecting, multilayered, highly nuanced, and rarely absolute.¹⁴⁹ As Albert Alschuler explains, these rules often “muddy rather than clarify” and fail to recognize that a critical component of police work is the exercise of overall judgment in line with a broad “rule of reason” (i.e., reasonableness) that ultimately may be preferable as a constitutional standard, “not only from the

147. See *State v. Sample*, 489 P.2d 44, 46 (Ariz. 1971) (allowing police to “mak[e] a warrantless search of the premises in which the victim is found dead”).

148. Orin Kerr provides a practical defense of clear rules governing police-officer conduct, arguing that courts must provide clear guidance to minimize social costs of the exclusionary rule. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 527–28 (2007); cf. Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 143–44 (1991) (explaining that when “the court intends [F]ourth [A]mendment rules to guide and influence police behavior, the court will try to define the rule in terms that a law enforcement officer can hope to understand and apply with some degree of accuracy”). This imperative for clear rules is less compelling here, however, because the proposed divergence from the bright-line rules increases the likelihood of exclusion only when police investigate less serious crimes. (Although, in some instances, evidence of serious offenses would be excluded if obtained during an investigation of a minor offense.) Further, the divergence has the countervailing effect of *decreasing* the likelihood of exclusion when police investigate grave crimes.

149. See *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) (explaining that the rule authorizing vehicle searches incident to arrest, while “touted as providing a ‘bright line’” had, in fact, “generated a great deal of uncertainty”); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 230 (1984) (critiquing argument that bright-line rules are preferable to more generic standards in Fourth Amendment jurisprudence); cf. *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (“[T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life.”).

perspective of the sound administration of public justice, but also from the perspective of the officer himself.”¹⁵⁰ Take, for example, the search of the home—a paradigmatic privacy invasion that courts, after centuries of jurisprudence, regulate with some of the clearest doctrinal rules. The doctrine begins with a “presumpt[ion]” that an officer must have a warrant to enter a home.¹⁵¹ Even with a warrant, though, an officer cannot enter the home if the warrant is facially defective,¹⁵² which means “obviously deficient” (not that it “simply omit[s] a few items from a list of many to be seized, or misdescribe[s] a few of several items. . . [or contains] what fairly could be characterized as a mere technical mistake or typographical error”).¹⁵³ An officer does not need a warrant to enter a home if the officer receives consent from the occupant, or someone else with “apparent authority” (except if a co-occupant, also present, disagrees),¹⁵⁴ or there are “exigent circumstances,” which means “‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”¹⁵⁵ Of course, under *Welsh*, this last “rule” does not apply if the targeted offense is “relatively minor.”¹⁵⁶ In addition, police can only rely on exigent circumstances to justify a warrantless search so long as they did not “violate or threaten to violate the Fourth Amendment prior to the exigency.”¹⁵⁷ To call this thicket a bright-line rule governing the entry of a home is an insult to lines (or brightness). And this is about as clear as it gets.

Akhil Amar exaggerates when he critiques Fourth Amendment doctrine’s pretension to concrete rules as follows: “[w]arrants are not required—unless they are”; “[a]ll searches and seizures must be grounded in probable cause—but not on Tuesdays.”¹⁵⁸ The critique, however, rests on a central truth. It is often Fourth Amendment doctrine’s artificiality, not its lack of clarity, that most complicates the police officer’s task. Thus, while offense-severity distinctions may add an additional variable to search and seizure law, this variable simultaneously conforms that law to the overarching constitutional command of reasonableness, a command that may be easier to follow than many of the bright-line rules intended to give it effect.

150. Alschuler, *supra* note 149, at 231, 234.

151. *Payton v. New York*, 445 U.S. 573, 586 (1980).

152. *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

153. *Id.*

154. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

155. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978)).

156. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

157. *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011).

158. Amar, *supra* note 12, at 757.

A second response to the criticism that crime severity complicates existing doctrine is that if, in fact, clarity and reasonableness conflict, reasonableness should carry the day. It is, after all, reasonableness that the Constitution commands. Consequently, courts cannot lightly deem as “reasonable” an unreasonable search on the grounds of administrative convenience (although that is what occurs in cases like *Atwater*). Such sacrifices may be called for in extreme circumstances of administrative necessity, but as this Article has tried to show, it is far from clear that such circumstances justify transsubstantive doctrine. Indeed, the Supreme Court recognizes that reasonableness trumps clarity in the paradigmatic circumstance where officers need *ex ante* clarity—the use of deadly force. Rather than adopt the bright-line rule urged upon it to allow deadly force to stop any fleeing felon, the Supreme Court requires officers to consider, *inter alia*, offense seriousness in assessing whether deadly force is permitted.¹⁵⁹ While such a rule arguably complicates the officer’s task, the rule must do so if it is to give effect to the Fourth Amendment’s “central requirement” of reasonableness.¹⁶⁰ What is true for deadly force seizures is true for Fourth Amendment law generally.

D. THE IMPORTANCE OF CRIME-SEVERITY DISTINCTIONS IN THE MODERN ERA

The preceding Parts sketch the argument that crime severity should, and can be, incorporated into Fourth Amendment reasonableness assessments. The argument presented so far is timeless in that it applies equally to a search in 1797 or 2097. Indeed, judges may object on this ground: Fourth Amendment doctrine has worked well enough for decades without crime-severity distinctions, why change now? One answer, which will be developed in this Part, is that while Fourth Amendment doctrine may have been able to subsist without crime-severity distinctions in the past, its continued ability to do so is uncertain at best. This is because the distinct types of investigative techniques courts will confront in the coming decades are likely to exacerbate critical weaknesses in existing Fourth Amendment doctrine, leaving a gap that crime-severity analysis (or something like it) must fill.

Traditional Fourth Amendment doctrine performs best when assessing venerable methods of search and seizure—a police officer stops a suspect on a street, pats down his clothes, looks through the suspect’s pockets, and ultimately, searches his home for items specified in a warrant. These types of

159. *Tennessee v. Garner*, 471 U.S. 1, 20 (1985) (recognizing the “practical difficulties” inherent in the Court’s rule but emphasizing that “similarly difficult judgments must be made by the police in equally uncertain circumstances”); cf. Stuntz, *supra* note 9, at 2175 (arguing that “vagueness” is an overrated problem in Fourth Amendment jurisprudence and that the central question in crafting legal rules is “whether police officers can know roughly where the boundaries are in practice”).

160. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

searches generally fall within the broad middle ground of a hypothetical invasiveness spectrum; they unambiguously intrude upon an individual's privacy (or mobility), but do so only partially, leaving much of the individual's privacy intact.

The next wave of controversial searches will differ from those traditionally encountered in two important ways. First, for some intrusions, the degree of privacy invasion will increase exponentially. The partial privacy invasions of a physical search of one's possessions, car, or even a home will appear quaint in comparison to the invasions that can be accomplished with modern technologies. Second, modern technologies will simultaneously enable remarkably unintrusive techniques to gather much of the data that, traditionally, only a more intrusive search would reveal. These opposing facets of technologically enhanced searches will increasingly present difficulties for courts applying traditional doctrine. As discussed below, crime-severity distinctions, while not the entire answer, provide a ready means of alleviating these difficulties.

1. The Importance of Crime-Severity Distinctions for Evaluating Particularly Intrusive Searches

The coming storm in Fourth Amendment doctrine is particularly evident in the doctrine's longstanding struggle to evaluate the reasonableness of unusually intrusive searches. When the Court confronts such searches, it inevitably abandons the otherwise applicable bright-line rules in favor of either case-specific, reasonableness assessments¹⁶¹ or special, new rules that apply only to a particularly intrusive type of search or seizure.¹⁶² Exemplifying the latter practice is the inglorious constitutional standard that governs border searches of a suspect's alimentary canal.¹⁶³

Technological change will exacerbate existing doctrine's difficulties with unusually intrusive searches. Modern technologies enable an increasing array of searches that, while not necessarily *physically* intrusive, have the potential to wholly eviscerate an individual's privacy. For example, courts are just beginning to encounter the panoply of issues created by the proliferation of electronic hard drives (e.g., personal computers, flash drives, Blackberries, and iPhones) that, under existing doctrine, can purportedly be searched without a warrant or probable cause if encountered

161. See, e.g., *Winston v. Lee*, 470 U.S. 753, 766 (1985) (ruling that compelled surgery to obtain a bullet from suspect's body was unreasonable because the surgery was not without risk and the state could probably prove its case without the bullet).

162. See discussion of *Garner supra* Part I.C.

163. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 & n.4 (1985) (crafting special Fourth Amendment rule to permit customs agents to detain a suspect at the border for the purpose of monitoring her bowel movement but emphasizing that the rule does not necessarily apply to "strip, body cavity, or involuntary x-ray searches").

during the course of an arrest, or without a warrant, if found in a car.¹⁶⁴ In theory, such searches can be carried out even for trivial offenses such as the seatbelt violation in *Atwater* or, as the Fourth Circuit recently held, failing to disclose one's name to a police officer.¹⁶⁵

The potential for traditional search and seizure doctrines, if left unaltered, to permit wholly "unreasonable" privacy intrusions is increasing not only because people store unprecedented amounts of private data on readily searchable electronic devices, but also because new technology allows the government to replace traditional surveillance techniques with far more comprehensive means of gathering information. In the coming years, the "stakeout" will be replaced by video surveillance and continuous GPS tracking. As the District of Columbia Circuit recently held, the difference in kind of the intrusiveness of this last form of surveillance from previous iterations renders the answers given by traditional doctrine (that no "search" occurs) obsolete.¹⁶⁶ Video surveillance presents similar concerns, particularly where technology allows police to install miniature devices in private spaces that can capture and transmit video footage for weeks, months, or years at a time. Under existing doctrine, the Fourth Amendment's *strongest* response to the enormous privacy invasions on the horizon is to require a warrant and probable cause that the surveillance will uncover evidence of *a crime*.¹⁶⁷ In other words, nothing but the good graces of law enforcement and limited resources stands between the citizenry and cameras hidden in countless homes, watching for days on end, to ferret out evidence of marijuana possession or cable-television theft.¹⁶⁸

164. See *United States v. Burgess*, 576 F.3d 1078, 1088 (10th Cir.) (considering but declining to decide whether police could conduct a warrantless search of a laptop computer seized during a vehicle stop), *cert. denied*, 130 S. Ct. 1028 (2009); *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007) (holding that officer could search suspect's cell phone without a warrant as search incident to arrest); *People v. Diaz*, 244 P.3d 501, 511 (Cal. 2011) (upholding search of defendant's cell phone incident to arrest); Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 29 (2008) (explaining that authority to search a suspect's iPhone incident to arrest "appears to follow from longstanding U.S. Supreme Court precedent laid down well before handheld technology was even contemplated").

165. *United States v. Murphy*, 552 F.3d 405, 411–12 (4th Cir. 2009) (upholding warrantless search of car passenger's cell phone after arrest for giving a false name).

166. *United States v. Maynard*, 615 F.3d 544, 566 (D.C. Cir.) (disagreeing with other courts that have deemed continuous GPS monitoring not to be a search), *cert. granted sub nom.* *United States v. Jones*, 2011 WL 1456728 (2010).

167. See, e.g., *United States v. Nerber*, 222 F.3d 597, 603 n.4 (9th Cir. 2000) (noting the "lengthy string of state court cases holding that citizens have a reasonable expectation not to be secretly surveilled inside a public bathroom stall" and, thus, that a warrant is required for such surveillance); *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984).

168. Law enforcement's use of this power (i.e., its "good graces") will undoubtedly be shaped by political as well as judicial forces. An optimist might suggest that this means that such invasive searches will be shunned by police to avoid popular resentment, but a pessimist would counter that, at most, these forces will cause such searches to be borne by the least politically powerful such as minorities and the poor. Cf. William J. Stuntz, *The Distribution of Fourth*

The Seventh Circuit case of *United States v. Torres* illustrates the limits of existing Fourth Amendment doctrine with respect to unusually invasive, technologically enhanced searches.¹⁶⁹ *Torres* evaluated surreptitious video surveillance conducted inside a suspected terrorist safe house pursuant to a warrant. In struggling with the case, the court emphasized the inadequacy of the “usual way” judges protect privacy interests (requiring probable cause and mandating warrants).¹⁷⁰ The Seventh Circuit ultimately upheld the search, but at the same time, hinted at the approach advocated in this Article, stating: “[M]aybe in dealing with *so* intrusive a technique as television surveillance, other methods of control as well, such as banning the technique outright from use in the home in connection with minor crimes, will be required, in order to strike a proper balance between public safety and personal privacy.”¹⁷¹

In a more recent case, *United States v. Comprehensive Drug Testing, Inc.*, an en banc Ninth Circuit panel recognized the inadequacy of traditional doctrinal safeguards (warrant requirements and probable cause) where the government seized large volumes of private electronic data (including private data of non-suspects) in an investigation of steroid use by professional athletes.¹⁷² Unable to take comfort, as the Seventh Circuit had, in the severity of the underlying offense, the panel rejected the seizure by deeming the government to have exceeded the scope of the warrants issued by the lower courts.¹⁷³ Interestingly, the Ninth Circuit also sought to curb future excesses by crafting from whole cloth a series of hoops that the government would have to jump through to obtain warrants for electronic data.¹⁷⁴ In the wake of the ruling, prosecutors claimed to be “hobbled” in

Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1272 (1999) (“Privacy, as Fourth Amendment law defines it, is something people tend to have a lot of only when they also have a lot of other things.”).

169. *Torres*, 751 F.2d 875.

170. *Id.* at 882.

171. *Id.* The court did not elaborate on how such a limitation might work, and the “minor crimes” dicta does not appear to have achieved any traction in later case law.

172. *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1004 (9th Cir. 2009) (stating that “electronic files are generally found on media that also contain thousands or millions of other files among which the sought-after data may be stored or concealed” and “[b]y necessity, government efforts to locate particular files will require examining a great many other files to exclude the possibility that the sought-after data are concealed there”), *superseded by* 621 F.3d 1162 (9th Cir. 2010).

173. *Id.* at 1003–04.

174. *Id.* at 1006 (crafting novel set of five rules for magistrates to follow in determining whether to issue warrant “to examine a computer hard drive or electronic storage medium in searching for certain incriminating files, or when a search for evidence could result in the seizure of a computer”); *see also* *United States v. Mann*, 592 F.3d 779, 785 (7th Cir.) (opining that panel’s forward looking requirements were not supported by Supreme Court case law), *cert. denied*, 130 S. Ct. 3525 (2010).

other (more serious) investigations and petitioned for rehearing.¹⁷⁵ The Justice Department's brief in support of its request focused, predictably, not on the need to aggressively investigate professional athletes, but on the public's interest in investigating child rapists, "spies and terrorists."¹⁷⁶ Perhaps bowing to the weight of transsubstantive doctrine, the Ninth Circuit granted rehearing and rescinded the forward looking aspects of its earlier ruling, removing the obstacles that might have stymied the government in its investigations of more serious crimes.¹⁷⁷

As the Seventh and Ninth Circuit rulings indicate, existing Fourth Amendment doctrine must be reshaped to meet the challenges presented by technological change. The precise parameters of the new doctrine will, of course, be worked out over time, but a potential approach suggested by the analysis thus far would be to use crime severity to create distinct categories of review for unusually intrusive surveillance. When law enforcement requests a warrant to conduct sweeping electronic data searches, video surveillance of private spaces, continuous GPS monitoring, and the like, the courts could separate such requests by crime seriousness. In the first category where police are targeting "minor crimes," these searches should be deemed *per se* unreasonable and no warrant would issue. In the second category of "serious crimes," reasonableness may depend on the government's observing certain restrictions, such as those crafted by the Ninth Circuit panel in *Comprehensive Drug Testing* or suggested by commentators anticipating the dilemma presented in that case.¹⁷⁸ In investigations of "grave" crimes, as in *Torres*, warrants would issue with the least or, as at present, no restrictions (assuming, of course, the requisite quantum of individualized suspicion is established). Whatever the precise doctrinal approach, however, where privacy invasions far exceed those involved in traditional searches, it is critical that courts consider all the circumstances, including crime severity, in assessing reasonableness. This will ensure that, when considering the breathtaking privacy intrusions looming on the technological horizon, courts can determine whether these

175. See John Roemer, *Electronic Evidence Rules Now Hobbling Prosecutors*, DAILY J., Aug. 11, 2010.

176. Brief for the United States in Support of Rehearing En Banc by the Full Court at 6–7, 16, *United States v. Comprehensive Drug Testing, Inc.*, Nos. 05-10067, 05-15006, 05-55354 (9th Cir. Nov. 23, 2009). The brief never mentions the word "steroid" but does detail a stalled investigation into the rape of a four-year-old girl and a "complex national security case." *Id.*

177. *Comprehensive Drug Testing*, 621 F.3d at 1177 (calling "for greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures"); see also *id.* at 1178–79 (Kozinski, J., concurring) (reiterating superseded requirements as purported "guidance").

178. Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1006–07 (2010); Ohm, *supra* note 16, at 1558.

searches are *actually* reasonable as opposed to some artificial, and ultimately incomplete, proxy for reasonableness.

2. The Importance of Crime-Severity Distinctions for Applying the “Reasonable Expectation of Privacy” Test to Relatively Uninvasive Searches

While some new technologies enable extremely intrusive searches, others allow the state to gather vast amounts of private information in a manner that, at least as a matter of legal doctrine, is remarkably unintrusive. These latter intrusions fall into roughly two categories: (1) technologies that allow the state to gather private information, often from large groups of people, without decisively intruding on any one individual’s privacy (e.g., e-mail filters, data mining, facial recognition software, familial DNA searches, and satellite imagery); and (2) technologies that allow the state to obtain private data about a suspect from a third party (e.g., searches of data obtained from phone companies, Internet service providers, or website operators, such as Google or Facebook). Current doctrine potentially leaves these types of privacy intrusions unregulated as “nonsearches” under the Fourth Amendment because they do not violate any “reasonable expectation of privacy.”¹⁷⁹ Recognizing the staggering implications of this doctrinal blind spot, academics rightly criticize existing case law as out of touch with modern reality, rendering the Fourth Amendment increasingly irrelevant in a changing world.¹⁸⁰

179. See *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) (finding no Fourth Amendment search where government obtained subscriber information from Internet service provider after chat recipient informed government that defendant showed child pornographic video during Internet chat), *cert denied*, 131 S. Ct. 440 (2010); LAFAVE ET AL., *supra* note 9, § 4.4(c), at 296 (recognizing that “the Fourth Amendment status of e-mail is still unsettled” and asserting that the argument that e-mail is not protected because it is revealed to a third party ISP is “plausible” but “probably not a winning” argument); Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291 (2011); Solove, *supra* note 15, at 356–57 (noting that “companies maintain detailed records of individuals’ personal information,” including “internet service providers, merchants, bookstores, phone companies, [and] cable companies” and when this data is provided to the government, third-party doctrine eliminates Fourth Amendment protections); *infra* note 180.

180. See Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 83 (2004) (arguing that “the allure of electronic surveillance to law enforcement and its threat to privacy requires a comprehensive and workable framework that strictly limits government’s ability to surveil”); Kerr, *supra* note 178, at 1006–07 (recognizing that “the application of the Fourth Amendment to computer networks will require considerable rethinking of preexisting law”); Ohm, *supra* note 16, at 1558 (advocating increased Fourth Amendment protections because “reasonable expectations of privacy and the probable cause standard are not enough to ensure a sound balance between privacy and security in the face of widespread intermediation”); John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 294 (2008) (“[I]t is time to rethink whether the scope of the Fourth Amendment is sufficient to protect individual privacy from intrusion by the state, especially with respect to data initially collected by private parties.”); Simmons, *supra* note 55, at 1306 (arguing that if the Court continues on its current path, its doctrine “will inevitably

One consideration that has not been raised in the important debate regarding the Fourth Amendment parameters of novel technological intrusions is crime severity. At first glance, crime severity does not seem to implicate the threshold Fourth Amendment determination of whether an investigative tactic constitutes a “search.” A crime-severity variable, however, could quite plausibly be incorporated into the “reasonable expectation of privacy” test that the Supreme Court uses to draw the search–nonsearch distinction. This is because a critical component of this famously amorphous test is a “value judgment,”¹⁸¹ described by the Court as: whether a particular privacy interest is one that “society is prepared to recognize as reasonable.”¹⁸²

Surveys that attempt to measure societal perceptions of the relative intrusiveness of police conduct conducted by Christopher Slobogin and Joseph Schumacher suggest that, at least as a descriptive matter, the privacy expectations that society would deem reasonable fluctuate with crime severity.¹⁸³ As Slobogin explains, in the survey results, “the seriousness of the crime under investigation correlated inversely with intrusiveness ratings;

result—indeed, has already resulted—in a gradual weakening of Fourth Amendment protections as investigative technologies become more sophisticated”); Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1470 (“[C]onstitutional doctrine for privacy protection in the United States is overly narrow and outdated, particularly in light of the market and technological developments of the past three decades.”). Other means of limiting privacy intrusions exist (e.g., through statutes), but none can provide as broad or as lasting protection as the Fourth Amendment.

181. SLOBOGIN, *supra* note 77, at 33 (criticizing the Court’s approach to this prong of the reasonable-expectation-of-privacy test); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) (arguing that the question courts should ask is “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society”); Kerr, *supra* note 148, at 505 (critiquing the test as follows: “Is it descriptive? Is it normative? Just what does it measure? The cases are all over the map, and the justices have declined to resolve the confusion”). Justice Harlan, the author of the test, suggested a normative approach dissenting in *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (“This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.”).

182. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (describing reasonable-expectation-of-privacy inquiry as consisting of “two discrete questions”: (1) “whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy,”; (2) “whether the individual’s subjective expectation of privacy is one that society is prepared to recognize as reasonable” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)) (internal quotation marks omitted)).

183. See generally 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). Slobogin’s contention that the Court should incorporate population surveys as to the invasiveness of particular techniques, see generally SLOBOGIN, *supra* note 77, is analogous to the suggestion in Part III.C that the Court should incorporate surveys of crime severity in its assessment of the relative gravity of offenses.

thus, for instance, the scenario involving a pat-down for evidence of terrorism was seen as much less intrusive than the pat-down scenario that did not specify the evidence sought.”¹⁸⁴ Given these findings, which support a fairly unsurprising intuition, a court grappling with the question of whether an investigative technique constitutes a “search,” could plausibly consider the severity of the crime under investigation.¹⁸⁵

Importantly, the Supreme Court’s omission of a crime-severity variable from the reasonable-expectation-of-privacy test,¹⁸⁶ as in other areas of Fourth Amendment doctrine, does not mean that the underlying intuition—that police officers act more reasonably (or less intrusively) when, all things being equal, their investigations target grave crime—disappears. To the contrary, the intuition is simply pushed underground, causing courts to gravitate toward other mechanisms for protecting society. Judges, like all of us, prefer that law enforcement employ all of its resources—where “reasonable”—to combat the most grave crimes. Transsubstantive doctrine, which artificially strips crime severity from the reasonableness calculation, creates a powerful incentive for courts to err on the side of deeming applications of challenged new technologies “nonsearches” for purposes of the Fourth Amendment.¹⁸⁷ This temptation is particularly acute where a

184. See Slobogin, *supra* note 28, at 1598; Slobogin & Schumacher, *supra* note 183, at 767 (discussing variances in intrusiveness ratings for identical investigative tactics and explaining that a “possible explanation . . . is that the subjects allowed their attitudes toward the types of crime being investigated to affect their answers”). Slobogin views crime-severity-based variance in intrusiveness as “noise” that distorts the actual intrusiveness. This conclusion is not, however, the only one to be drawn from the data. See Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. PA. J. CONST. L. 331, 353–54 (2009) (discussing Slobogin and Schumacher’s findings that providing subjects with context regarding, inter alia, the purpose of a search influenced the subjects’ views of intrusiveness and criticizing their conclusion that these findings suggest a flaw in the subjects’ intrusiveness assessments: “Doctrinally, that may not be so; psychologically, it is not clear that there are explicit grounds for making such a choice.” (citation omitted)).

185. Although plausible, this approach would likely be unsatisfactory, not because it distorts the reasonable-expectation-of-privacy test, but because it moves the test far afield from its ostensible purpose—determining whether an investigative technique falls within the definition of the word “search.” As a consequence, incorporating crime severity into assessments of reasonable expectations of privacy could lead to the implosion of the test altogether, perhaps rightly so. See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (criticizing the “notoriously unhelpful” reasonable-expectation-of-privacy test and advocating a return to the “clear text” of the Fourth Amendment “and 4-century-old tradition” of the meaning of the terms utilized there); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511 (2010).

186. The Court generally acknowledges the context dependence of societal expectations of privacy, but not with respect to crime severity. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (“What expectations are legitimate varies, of course, with context, . . . depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.”).

187. Cf. SLOBOGIN, *supra* note 77, at 31 (criticizing Supreme Court’s doctrine as follows: “the only good explanation for the Court’s unwillingness to regulate so many actions that are

technology is generally applied prior to the development of individualized suspicion—e.g., data mining, DNA searches, or facial recognition software—and, thus, deeming its use a “search” and requiring a warrant (based on probable cause) is tantamount to branding its use unconstitutional in all cases. Once applied, the “nonsearch” label leaves applications of the technology completely unregulated by the Fourth Amendment; the technology can then be utilized not just to (reasonably) combat grave crimes, but to (unreasonably) investigate minor ones as well.

The incentive to label applications of cutting edge technologies “nonsearches” so that the technologies are then available to combat grave crime recedes once courts are permitted to consider offense severity in assessing reasonableness. Courts can then deem the use of such technologies “searches” constrained by Fourth Amendment reasonableness, while reserving the authority to uphold those searches as “reasonable” if, and only if, the circumstances, including crime severity, warrant. Thus, by more closely aligning Fourth Amendment reasonableness, with *actual* reasonableness, a doctrine that incorporates crime severity would likely capture more “searches.” This development (or its absence) will become increasingly significant as minimally invasive, but nonetheless disturbingly efficient, investigative techniques become ubiquitous in the modern era.

CONCLUSION

Proponents of the government’s reliance on powerful new investigative technologies commonly (and understandably) invoke the specter of increasingly sophisticated and dangerous criminals.¹⁸⁸ Yet, the omission of crime severity from existing Fourth Amendment doctrine allows the government to use the same technologies (as well as time-honored

clearly searches and seizures is that it has decided that the cost to law enforcement of doing so outweighs the ‘minimal’ intrusions involved”). For a possible demonstration of the courts’ nervousness about labeling the use of new technologies a search, see *Warshak v. United States*, 490 F.3d 455, 473 (6th Cir. 2007) (“[I]ndividuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial ISP.”); *Warshak v. United States*, 532 F.3d 521, 522 (6th Cir. 2008) (en banc) (vacating panel opinion due to lack of standing).

188. See, e.g., *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) (emphasizing dangers posed by terrorism suspects in upholding video surveillance as reasonable); Arcila, *supra* note 33, at 1334 (emphasizing pressure placed on Fourth Amendment doctrine by the 9/11 attacks and potential biological, chemical, and technological attacks in a similar vein); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 579–81 (2009) (defending third party doctrine, in part, as a means to prevent criminals from using new technologies to shield activities that previously would have to be performed in public); Simmons, *supra* note 15, at 562 (discussing how modern criminals can use new technologies to cause great damage: “An anarchist in the nineteenth century might seek to assassinate a president or plant dynamite in an opera house—his twenty-first century counterpart has the ability to destroy cities with a nuclear weapon or poison an entire society with chemical or biological agents” (footnote omitted)).

techniques of varying intrusiveness) to investigate unsophisticated criminals and relatively insignificant crimes.¹⁸⁹ Separating these distinct categories of crimes and criminals would provide a critical update to antiquated Fourth Amendment doctrine.

There is nothing radical about the proposal advanced in this Article. The “touchstone of the Fourth Amendment is reasonableness,”¹⁹⁰ and no common conception of reasonableness is complete without an assessment of the purpose of a particular search or seizure. A citywide dragnet for the Oklahoma City bomber may be reasonable, while the same dragnet targeting a parking ticket scofflaw would be absurd. The fact that Fourth Amendment doctrine recognizes no distinction between these scenarios suggests a serious flaw.¹⁹¹

The proposed framework for incorporating crime severity into Fourth Amendment doctrine is no doubt vulnerable to criticism. Such disagreement is not fatal, however. The proposal is intended to suggest that crime severity can be incorporated into Fourth Amendment doctrine and to ignite a debate as to the proper parameters of this powerful consideration. As the debate unfolds, it is important to recognize that the status quo of largely ignoring crime severity is itself problematic, and likely to become increasingly so with technological change. The real question, then, is not whether a certain scheme for incorporating crime severity is flawed, but whether the scheme is more flawed than one that ignores crime severity altogether.¹⁹²

189. *United States v. Hudson*, 100 F.3d 1409, 1423 (9th Cir. 1996) (Reinhardt, J., dissenting) (criticizing majority for failing to incorporate into the Fourth Amendment reasonableness inquiry the “glaring disproportionality between the intrusiveness of the raid and the four-month-old sale of sixty dollars’ worth of drugs that was offered to justify the raid”); Stuntz, *supra* note 8, at 853 (“Just as in some murder cases the law’s standards seem too high, they seem too low in thousands of cases involving less important offenses.”).

190. *United States v. Knights*, 534 U.S. 112, 118 (2001).

191. The distinction currently available in the case law only applies in exigent circumstances (e.g., where the bomber is about to strike or immediately fleeing the crime). *See Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

192. Stuntz, *supra* note 8, at 843 (highlighting problems with transsubstantive doctrine); Volokh, *supra* note 10, at 1982 (noting difficulties of drawing lines between crimes but emphasizing that “there are problems with treating all crimes alike as well”).