

Proportionality, Privacy and Public Opinion: A Reply to Kerr and Swire

Christopher Slobogin*

In 2007 I published a book entitled *Privacy at Risk: The New Government Surveillance and the Fourth Amendment*.¹ The book was triggered in part by the recent upsurge in government use of technology to monitor behavior, and more particularly by the tremendous increase in government surveillance after 9/11, using techniques such as data mining and public camera systems. But the primary analytical target was more general: Supreme Court caselaw that, read broadly (as most lower courts have done), permits all of this technological surveillance to take place without impinging on any constitutional interests.² In an effort to counter-act this tendency, the book constructs a Fourth Amendment framework meant to apply to every type of government investigative technique, technologically-enhanced or not, that is both more faithful to precedent and more attentive to the empirical reality of how the techniques affect individual interests and meet law enforcement needs.

The principal component of this framework is the idea that the justification for a government search or seizure ought to be roughly proportionate to the invasion the search or seizure entails. This proportionality principle is a simple but powerful concept found throughout American jurisprudence, including in a number of the Supreme Court's Fourth

* Milton Underwood Professor of Law, Vanderbilt University Law School

¹ Christopher Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment* (Univ. Chicago Press, 2007).

² See *infra* text accompanying notes 7-16 (describing cases).

Amendment cases.³ But in contrast to the Court’s specific holdings, which leave a wide array of surveillance techniques unregulated, I argue in *Privacy at Risk* that most types of surveillance are sufficiently intrusive to require justification, albeit not always at the probable cause level.

Two well-known scholars who have reviewed the book are Orin Kerr and Peter Swire. Professor Kerr is much more comfortable with the Court’s current position than I am, and disagrees with my attempt to constitutionalize and empiricize regulation of government surveillance.⁴ Professor Swire is willing to contemplate my proposals, but wishes that I had devoted more attention to national security issues and to transnational law that is consistent with my approach.⁵ This symposium provides an opportunity to respond to these reviews, and in the process tweak some of the arguments made in *Privacy at Risk*. On the latter score, I rely on two different works published since *Privacy at Risk* came out, the first of which helps me emphasize the importance of empirical findings to constitutional adjudication and the second of which bolsters my brief observations in that book about the relevance of political process theory to efforts at justifying surveillance of groups.

The Thesis of *Privacy at Risk*

Professor Kerr calls the proportionality principle that I advance in *Privacy at Risk* “a new approach to the Fourth Amendment” (and uses that phrase in the title to his review).⁶ But

³ Slobogin, *supra* note 1, at 21, 28-30 (describing proportionality reasoning in *Terry v. Ohio* and in various other settings, in connection with standards of proof, equal protection law, and tort law).

⁴ Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 Mich. L. Rev. 951 (2009).

⁵ Peter P. Swire, *Proportionality for High-Tech Searches*, 6 Ohio St. J. Crim. L. 751 (2009).

⁶ See Kerr, *supra* note 4, at 951.

proportionality reasoning in Fourth Amendment cases is not my invention. Much of the Supreme Court’s search and seizure jurisprudence reflects an affinity with the idea that the more privacy-invading or autonomy–limiting a police action is, the more justification the government must show before it may carry it out. Thus most searches of houses and most arrests are only permissible if the police have probable cause.⁷ But for lesser searches, such as a patdown, and for lesser seizures, such as stops, only reasonable suspicion is required,⁸ and for brief seizures at sobriety and illegal immigrant roadblocks virtually no suspicion is required.⁹

Admittedly, in some “special needs” situations, such as drug testing of employees and school children, the Court appears to have departed from the proportionality idea because it allows seemingly serious intrusions on virtually no suspicion.¹⁰ Those situations, usually involving searches of groups rather than individual suspects, require a different mode of analysis, for reasons I’ll develop below. In the main, however, the Court has adhered,

7 See, e.g., *Payton v. New York*, 445 U.S. 573, 588-90 (1980) (holding that non-exigent entry of a home to effect an arrest or search requires a warrant based on probable cause because the Fourth Amendment “unequivocally establishes the proposition that ‘[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”).

8 *Terry v. Ohio*, 392 U.S. 1, 26 (1967) (permitting a frisk for weapons and the predicate stop on less than probable cause because it only “constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person”).

9 See *Mich. Dep’t State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding suspicionless stops at a sobriety checkpoints, given “the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (upholding suspicionless checkpoints to detect illegal immigrants because “the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal”).

10 See, e.g., *Bd. of Education v. Earls*, 536 U.S. 822, 829 (2002) (upholding suspicionless drug testing of students involved in extracurricular activities, stating “It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests [but] in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable ‘when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”).

consciously or not, to the notion expressed back in 1967 in *Terry v. Ohio* that “there is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.’”¹¹

Where I depart from the Court’s post-*Terry* cases is in their willingness to ignore or make blithe assumptions about “invasiveness” that are not grounded in reality and to treat legislative and executive allegations of law enforcement “need” as givens, rather than engaging in the strict scrutiny that the fundamental rights established by the Fourth Amendment deserve when the legislature has failed to act properly. *Privacy at Risk* illustrates this point by focusing on two different types of surveillance, what I call “physical surveillance” (real-time observation of our activities) and “transaction surveillance” (the accessing of information from third-party record-holders).¹² With the help of technology, both types of surveillance have increased tremendously in the past decade, and both can visit serious intrusion on their targets. Yet the Court has construed the Fourth Amendment in a way that leaves these investigative techniques entirely unregulated as a constitutional matter.

It has done so through a very grudging construal of the word “search” in the Fourth Amendment. In *Katz v. United States*¹³ and its progeny the Court has defined a search as a government action that infringes “an expectation of privacy that society is prepared to recognize as reasonable,” usually referred to as the “reasonable expectations of privacy” test.¹⁴

11 392 U.S. at 21 (citing *Camara v. Municipal Ct.*, 387 U.S. 523, 534 (1967)).

12 See Slobogin, *supra* note 1, at 6-13 (defining physical and transaction surveillance).

13 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

14 See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (“We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is

Although this amorphous language is open to any number of interpretations, the Court has chosen a narrow view of privacy expectations. According to the Court, it is not reasonable to expect privacy in connection with any activity, including activity that takes place inside the home, that can be seen from a lawful vantage point with the naked eye or with technology that is in general public use.¹⁵ Even more incredibly, the Court has held that we “assume the risk” that personal information surrendered to third parties such as banks and phone companies will be disclosed to the government upon demand and thus can expect no privacy in that context either.¹⁶

In *Privacy at Risk*, I argue that this series of decisions by the Court is conceptually bankrupt, principally because of its refusal to recognize that expectations of privacy can only be gauged through some real world referent, such as positive law governing ordinary citizens or the considered views of the population. Neither source provides much support for the Court’s holdings. In many jurisdictions, it is often a crime or at least a tort for private citizens to engage in Peeping Tomism of the home.¹⁷ And various federal and state statutes guarantee the confidentiality of records maintained by hospitals, banks, schools, and other institutions and

concerned-unless “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and “society [is] willing to recognize that expectation as reasonable.”).

15 *Id.* at 34 (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”).

16 *United States v. Miller*, 425 U.S. 435, 443 (1976) (“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”); *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

17 See Slobogin, *supra* note 1, at 68-69.

penalize breach of this confidentiality with civil and even criminal penalties.¹⁸ Yet the Court's Fourth Amendment jurisprudence declares that we can expect no privacy vis-à-vis police government voyeurism or perusal of our transactions.

Where legislation governing surveillance by the private sector does not exist or does not provide an indication of *how* private particular types of activities or records are, I argue that surveys of the population should be considered relevant.¹⁹ Over the past 15 years, I have conducted three such surveys, usually relying on jury pools to assure a diverse, randomly selected sample.²⁰ Each sample received a number of scenarios, most taken from Supreme Court cases, depicting various types of government investigative techniques, and was asked to rate the "intrusiveness" of the techniques on a scale of 1 to 100, with 100 being the most intrusive. To very quickly summarize the results regarding surveillance, I found that virtually all forms of transaction surveillance as well as overt public camera surveillance are viewed as more intrusive than a roadblock, and that government efforts to access records from web sites, Internet Service Providers (ISPs), pharmacies and banks are perceived to be at least as intrusive as search of a car.²¹ If these results held up, a proportionality analysis would suggest that establishment of a public camera system requires at least as much justification as roadblocks,

18 Id. at 157-58.

19 Id. at 113-16.

20 The surveys, all of which are discussed in *Privacy at Risk*, first appeared in Christopher Slobogin, Government Datamining and the Fourth Amendment, 75 U.Chi.L.Rev. 317, 335 (2008); Christopher Slobogin, Public Privacy: Public Camera Surveillance and the Right to Anonymity, 72 Miss. L.J. 213, 277 (2002); Christopher Slobogin & Joseph 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, 737 (1993).

21 See Slobogin, *supra* note 1, at 112 (table showing mean intrusiveness rating (hereafter MIR) of 35 for roadblock scenario and of 53 for overt camera scenario in which tapes are destroyed) & 184 (table showing MIRs for scenarios involving obtaining information from websites, ISPs, pharmacies, and banks between 74.4 and 78.0).

and that many types of government attempts to obtain records of our transactions from third parties should require the same level of justification as a frisk (reasonable suspicion), if not a search of a car (probable cause).

The rest of my description of *Privacy at Risk* will be in response to the comments of Professor Kerr and Swire. Most of my discussion will focus on Professor Kerr's comments, because they are the most critical of the book. Following the organization he adopted in his review, the response to the Kerr and Swire critiques will focus on the two sides of the proportionality inquiry: intrusiveness and justification.²²

The Nature of Intrusiveness

As both Professor Kerr and Professor Swire point out, crucial to application of the proportionality principle I propose is an assessment of intrusiveness. Professor Swire finds my proposal that the government's justification for a search or seizure bear a relationship to its intrusiveness "useful"²³ and he "particularly like[d]" the use of empirical surveys as a means of informing the courts about reasonable expectations of privacy.²⁴ Professor Kerr feels quite

22 This focus means that this article (like Professor Kerr's review) neglects several aspects of *Privacy at Risk*. Kerr's review looks only at the discussion of the proportionality principle in chapter 2 and its three chapters (Chapters 4, 5 and 7) describing how that principle would apply to surveillance of public activities and to transaction surveillance. Chapter 2 also develops the "exigency" principle (which requires ex ante review of non-emergency searches and seizures) and critiques other Fourth Amendment theories. Further, Chapter 3 is devoted to technological surveillance of the home, Chapter 6 provides an historical analysis of subpoena law (which is crucial to understanding how we ended up without any constitutional regulation of transaction surveillance), and Chapter 8 is a concluding discussion of how the "liberal" view of the Fourth Amendment—requiring individualized probable cause for all searches and exclusion as a remedy—has inadvertently and ironically resulted in a much smaller Fourth Amendment than we'd have if liberals had been a little less greedy.

23 Swire, supra note , at 757.

24 Id.

differently. He argues that asking people to rate police actions according to their “intrusiveness” doesn’t accurately capture privacy expectations, that even if it did courts would have great difficulty knowing how to use such empirical results, and that even if courts could carry out this role they shouldn’t, because ultimately assessment of societal expectations of privacy is not very important for Fourth Amendment purposes. I’ll address each of these points in turn.

Intrusiveness as the Measure of Fourth Amendment Interests

Professor Kerr believes that “measuring intrusiveness does not actually measure how much a technique infringes on civil liberties,” and thus that my surveys are misleading on that score.²⁵ The word “intrusiveness” undoubtedly does not capture all of privacy’s dimensions. But directly asking laypeople whether they expect “privacy” in a given situation is not a productive means of assessing their views on the interests affected by government actions, for a variety of reasons.²⁶ More importantly, the Supreme Court itself often uses “intrusiveness” or “invasiveness” as a proxy for analyzing the individual interests at stake in Fourth Amendment cases; indeed, well over 200 of the Supreme Court’s Fourth Amendment majority opinions rely

²⁵ Kerr, *supra* note , at 959.

²⁶ One reason, of course, is precisely the fact that the concept of privacy is open to so many interpretations. See generally Daniel J. Solove, *Conceptualizing Privacy*, 90 *Calif. L. Rev.* 1087 (2002) (exploring them multiple meanings of privacy). Additionally, framing the survey in terms of privacy expectations would have signaled the purpose of the survey to those who know Fourth Amendment law, would not have permitted sensible answers to scenarios involving seizures rather than searches, and would have in essence asked the intrusiveness question in any event, with a question sounding something like: “On a scale of 1 to 100, how significant is the privacy invasion in the following scenarios?” An advantage of using the word “intrusion” without reference to privacy is that one might feel intruded upon despite recognizing that the law does not consider the intrusion to be an invasion of privacy.

on one or both phrases for this purpose.²⁷ Thus, for instance, in *Scott v. Harris*, decided two terms ago, the Court stated, “in determining the reasonableness of the manner in which a seizure is effected, we must balance the nature and quality of the intrusion in the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”²⁸ In the Court’s search cases as well, ranging from *Terry* to the more recent string of “special needs” cases, the conclusion that a particular technique is relatively unintrusive is usually crucial in holdings favoring relaxation of Fourth Amendment strictures.²⁹

Nonetheless, Professor Kerr believes use of that word skewed my survey results. To him the word “intrusive” means “interference with the status quo,” so that “police techniques that are uncommon, unexpected, or high-profile will tend to be seen as intrusive.”³⁰ Thus, he argues, my survey participants may have indicated that a surveillance technique such as video cameras arrayed along a public street was relatively intrusive because it is not yet pervasive, not because people feel their civil liberties would be infringed by the practice.³¹

A first response to this observation is that, if unexpectedness were correlated with intrusiveness as Professor Kerr suggests, then in contrast to their actual ratings, my survey participants should have ranked scenarios such as those involving covert video surveillance and

27 See generally chart prepared by Andrew Cunningham, Vanderbilt University Law School, depicting holdings in 227 U.S. Supreme Court Fourth Amendment cases in which “intrusion” or “invasion” or some variant thereof was used in describing the Court’s reasoning (on file with author).

28 550 U.S. 372, 383 (2007).

29 See *supra* notes 7-10. See also *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979) (“The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order “ ‘to safeguard the privacy and security of individuals against arbitrary invasions’”).

30 Kerr, *supra* note , at 958.

31 *Id.*

data mining as very intrusive, because their occurrence is rare, at least as far as the public knows; conversely, searches of cars and patdowns should have been seen as relatively unintrusive, since these are daily and well-understood events. Yet I obtained precisely the opposite (and to me, more sensible) results.³² More fundamentally, if it turned out that unexpectedness did have a high correlation with intrusiveness in some types of cases, it is not clear why that is a problem; after all, the Court's test speaks of "expectations" of privacy. If we discount the public's belief that an investigative technique is intrusive when that technique is new or unusual, we move in the direction of granting Fourth Amendment immunity to the type of innovative technological surveillance that became commonplace in Orwell's society of 1984.³³

This comment leads directly into another criticism that Professor Kerr makes about the intrusiveness construct. He states that the public can't accurately evaluate the invasiveness of physical and transaction surveillance because the media has associated these techniques with Big Brother, apparently, as far as Professor Kerr is concerned, irresponsibly.³⁴ But if the public is reacting to surveillance in a media-driven, knee-jerk fashion, my survey participants presumably would not have ranked covert cameras lower than both searching a junkyard or overt use of cameras, nor would they have ranked data mining of airplane passenger lists

³² See Slobogin, *supra* note 1, at 112 (indicating a MIR rating of 35 for covert video surveillance and a MIR of 68 for a patdown) & at 184 (showing MIRs of 32.4, 34.1 and 38.5 for various types of data mining and an MIR of 74.6 for a car search).

³³ See George Orwell, 1984, 6-7 (describing omnipresent "telescreen").

³⁴ Kerr, *supra* note , at 960 (calling some media depictions of surveillance techniques "comically incorrect").

ranked much lower than patdowns or data mining of phone records.³⁵ The subjects in my surveys appear to be making an earnest effort to rank the various scenarios according to how intrusive they think each is; they are not lumping all the surveillance techniques into one Big Brother category.

A final criticism Professor Kerr makes of the way I asked my survey participants about intrusiveness is that I told them to assume the targets of the police were innocent.³⁶ I did so because the Supreme Court has held that the innocent target is the correct perspective for determining when a seizure has occurred for Fourth Amendment purposes.³⁷ Although Professor Kerr correctly points out that the Court has never said that the same perspective applies to analysis of searches,³⁸ I can think of no good reason for distinguishing the two situations.

But Professor Kerr is apparently making a larger point than a mere quibble over the explicit holdings of the Court. He states, “A technique used exclusively to target the guilty would be much less intrusive than one often used to target the innocent. As a result, any assessment of the civil liberties threat posed by a particular investigative technique must account for the settings in which the police employ the technique.”³⁹ Professor Kerr seems to

35 See Slobogin, *supra* note 1, at 112 (showing a MIR of 42 for covert camera surveillance, of 51 for search of a junkyard and of 53 for overt camera use) & at 184 (showing a MIR of 32.4 for datamining of passenger lists, 71.5 for patdown and 74.1 for data mining of phone records).

36 Kerr, *supra* note , at 959.

37 See *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (“the potential intrusiveness of the officers’ conduct must be judged from the viewpoint of an innocent person in [his] position”) (citing *Florida v. Royer*, 460 U.S. 491, 419 n.4 (1983) (Blackmun, J., dissenting)).

38 Kerr, *supra* note , at 961.

39 *Id.* at 960.

be saying that since my “innocent target” assumption applied to all the scenarios, ranging from those usually aimed at highly suspicious people (such as bedroom searches and requests for bank records) to those targeting primarily innocent people (such as roadblocks and data mining), it somehow tainted the results.

If Professor Kerr is arguing that intrusiveness ratings change depending on the perceived guilt of the target, he is probably right. But results from my first study, which are briefly noted in *Privacy at Risk*,⁴⁰ should allay any concern that this dynamic diminished the value of the survey results. In that study, conducted with Joseph Schumacher, we admittedly did find that subjects’ ratings of intrusiveness usually dropped when we varied the scenarios by including a description of the specific evidence sought (e.g., search of a bedroom v. search of a bedroom for drugs).⁴¹ We also found that the seriousness of the crime under investigation correlated inversely with intrusiveness ratings.⁴² However, we further found that the intrusiveness *hierarchy* stayed relatively consistent regardless of context; in other words, the absolute intrusiveness numbers dropped in these situations but the scenarios maintained pretty much the same ordering.⁴³ Holding the seriousness of the crime or the police’s suspicions constant,

40 Slobogin, *supra* note 1, at 33,

41 Slobogin & Schumacher, *supra* note , at 759. More specifically, we found that when a scenario both described the target as the survey participant (rather than some third party) and described the evidence being sought (as opposed to not mentioning any evidence), the combined mean for all 50 scenarios was 15 points lower (48.93 compared to 63.19). *Id.*

42 *Id.* at 767 (describing “dangerousness theory” of intrusiveness, to the effect that if the subject believes the target of the search is dangerous, the perceived intrusiveness of a police action will be lower).

43 *Id.* at 764, 767-68 (finding consistency between the scenarios at the top and bottom of the rankings, and significant inconsistencies only with respect to 10 scenarios, perhaps explainable by the extent to which subjects viewed the target of the search to be dangerous). See also Jeremy Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. Pa. J. Const. 331, 349-50 (2009) (finding “high correlations between overall intrusiveness ratings of stimuli in samples with and without

frisks are always seen as less intrusive than perusal of bank records, and roadblocks are always seen as less intrusive than technological physical surveillance of private property.

If instead Professor Kerr is arguing that, regardless of how survey participants responded, intrusiveness ratings *should* differ depending upon the potential guilt of the target or the nature of the crime, then he is confusing the intrusiveness inquiry with the justification inquiry. Only after the intrusiveness of a technique is determined should the analysis move to the circumstances under which it may take place. More is said about that issue below.

The Courts' Capacity to Use Empirical Results

Professor Kerr next argues that even if intrusiveness surveys were considered relevant to Fourth Amendment analysis, their use would create nightmares for judges:

Before creating a constitutional rule based on public opinion, the Justices must assure themselves that the known surveys accurately and permanently reflect public opinion. .

. . What if the people Slobogin queried have unrepresentative views? What if public opinion varies by state or region or age or race? Can the Court create a constitutional rule based on survey results without even knowing the actual questions asked? And what if public opinion changes over time--should the courts change the rule when public opinion changes, such as after a terrorist attack or the release of an influential movie about surveillance? How would judges know when public opinion has changed? And how should courts reconcile dueling surveys? If the constitutional result depends on

context"—context meaning description of what the police were looking for—but noting variations upon closer examination of particular contexts).

survey results, can the government simply conduct a new survey, rely on the results, and then insist on new constitutional rules? Slobogin's method requires courts to have answers to all of these questions.⁴⁴

These are all great objections, and worthy of answers. In *Privacy at Risk*, I emphasize that before survey results can be used, they must be replicated (as has already occurred with respect to my first study⁴⁵). Unless and until robust results are achieved, constitutional doctrine should not change. But if, as seems increasingly likely, surveys indicate that most people perceive transaction surveillance of financial, medical and other records to be as intrusive as a search of a car, and systemic public surveillance to be more intrusive than a roadblock, then courts purporting to apply the societal expectation of privacy test should not be able to ignore them simply because evaluating empirical information is difficult. Courts have to deal with survey data in many different contexts. Professor Swire notes, for instance, that consumer surveys are routinely used in trademark cases.⁴⁶ Courts are capable of sorting through data about intrusiveness as well.⁴⁷

44 Kerr, *supra* note , at 964.

45 Professors Blumenthal, Adya and Moogge, using a more sophisticated methodology, conducted a study relying on the same scenarios that I and Joseph Schumacher used in our original study and found [quote] that “Our data are quite consistent with [Slobogin’s and Schumacher’s] findings; each of our samples correlated highly with their overall data.” Blumenthal et al., *supra* note , at 345. However, they also found that context affected their results. See *id.* at 348-51.

46 Swire, *supra* note , at 757.

47 Much of the empirical information could be provided in briefs. See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 496 (1986) (“If the research is more analogous to law than to fact, the parties should present the research to the court in the same manner that they would offer legal precedents, that is, in written briefs rather than by oral testimony.”). Moreover, indeterminate empirical results do not make them irrelevant. As Professor Faigman has noted, “[t]he empirical uncertainties of factual statements are as important as the statements themselves and should be part of the legal calculus.”). David L. Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* 162 (2008).

As to Professor Kerr's important queries about how the courts should deal with changes in public attitudes, several responses are worth making. I suggested in *Privacy at Risk* that society's views about relative intrusiveness are unlikely to budge once the Court sets them as the Fourth Amendment standard, because the Court's pronouncements would not only reinforce those views but also inhibit the introduction of techniques perceived to be intrusive and thus make public inurement to them less likely.⁴⁸ That is not to deny the validity of Professor Kerr's supposition that a terrorist attack might affect public attitudes about intrusiveness; my second and third studies, conducted after 9/11, found reduced intrusiveness ratings compared to those assigned to similar scenarios in the first, pre-9/11 study, probably because survey participants were willing to give up civil liberties in exchange for more security.⁴⁹ But, again, the hierarchy stayed the same; almost all scenarios received lower intrusiveness ratings in the later studies, meaning that the findings most relevant to proportionality analysis remained stable.⁵⁰

None of this should be taken to mean that societal views about relative privacy can never change (the younger generation's flirtation with phone video and Facebook suggests as much). But if they do, an intrusiveness-driven Fourth Amendment should, and should be able

48 Slobogin, *supra* note 1, at 114.

49 For instance, the roadblock scenario received a MIR of 46 and a body cavity search at the border a MIR of 90 in the 1993 study, Slobogin & Schumacher, *supra* note , at 737, compared to a MIR of 35 for the roadblock and a 76 for the body cavity search in the 2002 study. See Slobogin, *supra* note 1, at 112.

50 Compare hierarchy in Slobogin & Schumacher, *supra* note , at 737 to hierarchy in Slobogin, *supra* note 1, at 112 and 184.

to, accommodate them. As I stated in *Privacy at Risk*, if society's views did "change substantially—for instance, if twenty years from now, government-run CCTV is seen as much less intrusive than searching foliage in a public park or much more intrusive than a frisk—the Fourth Amendment analysis should probably change with them. After all, that is what happened when *Katz* declared nontrespassory electronic surveillance a search after forty years of precedent saying otherwise."⁵¹

The Societal Expectation Test

Even if the various methodological and implementation objections to intrusiveness surveys can be dismissed, Professor Kerr doesn't think such surveys should govern Fourth Amendment analysis. He points out that the Supreme Court explicitly relies on the societal expectations of privacy test only in connection with determining when a government action is a search, not when it is establishing the appropriate justification for conduct that has already been denominated a search.⁵² And even in connection with the Fourth Amendment's threshold question, he argues that the analysis should consist of "normative assessments of the costs and benefits of subjecting a legal technique to constitutional regulation," not an assessment of societal expectations of privacy.⁵³

On its face, the latter proposal ignores precedent much more forthrightly than Professor

⁵¹ Slobogin, *supra* note 1, at 114.

⁵² Ker, *supra* note , at 961.

⁵³ *Id.* at 961 n. 14.

Kerr claims that I do.⁵⁴ In any event, privacy cannot be evaluated “normatively” without inquiring into what people think about it. As Robert Post has explained (in a statement I quote in *Privacy at Risk*), the only way we can get a sense of what privacy means is by looking at “social forms of respect that we owe each other as members of a common community”;⁵⁵ thus, Post concludes, “there can ultimately be no other measure of privacy than the social norms that actually exist in our civilization.”⁵⁶ We need to be careful about how we measure those norms, but certainly the people whose beliefs make up these norms are the best people to ask about them.

Professor Kerr might respond that the Court doesn’t mean what it says when it states that the threshold of the Fourth Amendment is determined by “expectations of privacy.” Rather this phrase is code that the Justices use to refer to their own balancing of individual interests against the government’s need for evidence of crime. If that is so, on what basis is the Court determining the scope of individual interests at stake in Fourth Amendment cases?

In other work, Professor Kerr has identified three “models” that he says the Court has used to operationalize the *Katz* test.⁵⁷ The “private facts” model, which “asks whether the

54 At one point, Professor Kerr states that the implications of my approach would require “a substantial revision of existing doctrine” and “it is difficult to justify a major revision of existing law on the ground that some aspect of existing doctrine requires it.” Kerr, *supra* note , at 961. I have to confess I don’t understand this argument. First, by investigating society’s expectations of privacy, I am adhering to the *Katz*’ original formulation. Although I am obviously arguing for a different interpretation of that formulation than subsequent Court opinions have given it, scholars routinely argue that the Court is misconstruing its own doctrine, whether the issue is *Miranda*, equal protection, or prior restraint. I’m not clear why that is a “difficulty.”

55 Robert Post, *Three Concepts of Privacy*, 89 *Geo. L.J.* 2087, 2092 (2001).

56 *Id.* at 2094.

57 Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 *Stanford L. Rev.* 503 (2007). Under a fourth model, what Professor Kerr calls the “policy model,” “[j]udges must consider the consequences of regulating a particular type of government activity, weigh privacy and security interests, and opt for the better

government's conduct reveals particularly private and personal information deserving of protection," is the one that most closely relates to the intrusiveness inquiry that I have been discussing.⁵⁸ The second is a "positive law" model, to which I have also already alluded as a good proxy for assessing societal expectations.⁵⁹ The third is a "probabilistic model" that focuses on the risks of disclosure to others as we go about our daily business.⁶⁰ This model is quite frequently invoked by the Court, in cases in which it has stated or implied that when people walk on the public streets, putter about in their yards, engage in activities near their windows, or conduct transactions through banks, they assume the risk that other people, and thus the government, will take note.⁶¹

Although Professor Kerr treats these as three separate models, they are all focused on the same metric: intrusiveness. Professor Kerr recognizes this point, albeit inadvertently, in his discussion of each of the three models. For instance, in discussing the private facts model he states "[t]he nature of the information obtained by the government is obviously a critical aspect of its invasiveness and need for legal regulation."⁶² Regarding the positive law model he writes, "[t]he selection of the positive law model in physical entry cases makes sense: it provides clear and familiar ex ante guidance for police, and in this context it resonates with our intuitions as to what kind of investigative steps are only modestly invasive and what steps are highly

rule." *Id.* at 519. As noted earlier, this way of looking at the Katz test conflates justification with intrusion and so is not discussed here, but rather is addressed (implicitly) in Part III.

⁵⁸ *Id.* at 506.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *supra* note 16.

⁶² Kerr, *supra* note , at 534.

invasive.”⁶³ And in reference to the probabilistic model he states, “social practice will tend to reflect the invasiveness of a particular technique relatively directly: if an unusual technique leads to the discovery of evidence, it is likely that the technique was also unusually invasive.”⁶⁴

Just as importantly, all three models—not just the private facts model—require resort to empirical reality of the sort obtained through surveys. Positive law is, of course, the result of a survey, albeit one mediated through the democratic process. And the probabilistic model’s assertions about risks of exposure—the risk of our banking transactions being seen by unauthorized persons⁶⁵ or the risk that strangers in airplanes will notice activities in the backyard of a home⁶⁶—are also statements about reality that can be empirically investigated (and, my research shows, coincide with the notion of how invasive an investigative technique is perceived to be⁶⁷).

In short, judgments about the nature of individual interests at stake in Fourth Amendment cases are not “normative,” as Professor Kerr sometimes asserts,⁶⁸ but inevitably based on facts relating to intrusiveness. In his recent book, *Constitutional Fictions: A Unified*

63 *Id.* at 529.

64 *Id.* at 544.

65 Cf. *United States v. Miller*, 425 U.S. 435, 443 (1976) (“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”)

66 Cf. *Ciraolo v. California*, 476 U.S. 207, 223 (1986) (“the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent”) (Powell, J., dissenting)

67 For instance, the fact that my survey participants gave a MIR of 80.3 to the perusal of bank records scenario, Slobogin, *supra* note 1, at 184, and a MIR of 50 to helicopter overflights of backyards, *id.* at 112, can be read to indicate that they do not assume such records are routinely made available to third parties or that such flights are common.

68 See Kerr, *supra* note , at 523 (stating that the private facts model requires “a normative assessment of the ‘privateness’ of the information”).

Theory of Constitutional Facts, Professor David Faigman demonstrates that a wide range of constitutional jurisprudence—in cases involving school desegregation, abortion, preventive detention and search and seizure—is chock full of factual assumptions.⁶⁹ Unfortunately, the courts, like Professor Kerr, don’t always admit or recognize that reality. As Professor Faigman notes, “[f]acts for the Court are a constituent part of the interpretive exercise. They are not so much discovered as created.”⁷⁰

Professor Kerr provides an example of this phenomenon toward the end of his review where he argues that, even if relative intrusiveness is the correct test, there is a much easier way to implement it than through consulting surveys. In support of that view, he describes a series of opinions from the New Jersey Supreme Court holding that bank, phone and ISP address records are protected by a reasonable expectation of privacy under New Jersey’s constitution.⁷¹ Without endorsing those results, he notes that they are similar to those I might reach, but states the way the court reached it—through assumptions about what people regard as private—is preferable to my empirical method, because it “offers a more direct and simple path” than reliance on “public opinion surveys that courts are ill suited to apply and interpret.”⁷²

The New Jersey Supreme Court’s method surely is simpler, but it comes close to being the same method on which the Supreme Court relied in coming to the opposite conclusion—

69 Faigman, *supra* note , at 3 (speaking of the “pervasiveness of factual issues in constitutional cases”).

70 *Id.* at 15.

71 Kerr, *supra* note , at 964-66.

72 *Id.* at 965.

judicial fiat. Other than referring to precedent, the New Jersey court's reasoning in these cases consists of guesses about people's expectations in dealing with banks, ISPs and phone companies and descriptions of the types of information the government can obtain from their records.⁷³ Moreover, the court's conclusion that these records, although protected by New Jersey's search and seizure provision, can be obtained via a grand jury subpoena simply on a showing of relevance⁷⁴ (which in New Jersey means that the documents need merely "bear some possible relationship, however indirect, to the . . . investigation"⁷⁵) would be inconsistent with proportionality analysis if findings like those I have obtained are replicated. Those findings indicate that most people associate bank, phone and ISP records with a high degree of privacy, on a par with intrusions that the Supreme Court has held require reasonable suspicion or probable cause.⁷⁶

To this conclusion Professor Kerr might raise his previously noted objection that the Supreme Court has never applied societal expectation of privacy analysis to police conduct that has already been designated a search. While that is technically correct, in fact the Court routinely modulates the degree of justification required for a search based on relative

⁷³ See, e.g., *State v. Reid*, 945 A.2d 26, 33-34 (N.J. 2008) (noting that users of the Web "have reason to expect that their actions are confidential"); *State v. McAllister*, 875 A.2d 866, 874 (N.J. 2005) ("bank customers voluntarily provide information to their banks, but they do so with the understanding that it will remain confidential"); *State v. Hunt*, 450 A.2d 952, 956 (N.J. 1982) ("From the viewpoint of the customer, all the information which he furnishes with respect to a particular call is private.").

⁷⁴ See *Reid*, 945 A.2d at 35-36.

⁷⁵ See *In re Grand Jury Subpoena*, 401 A.2d 258, 259 (N.J. App. Div. 1979) (per curiam).

⁷⁶ See Slobogin, *supra* note 1, at 184 (indicating a MIR of 80.3 for bank records, 74.1 for phone records, and 57.5 for electricity records compared to a MIR of 71.5 for a patdown and 74.6 for search of a car).

intrusiveness. As mentioned above,⁷⁷ scores of Court decisions have done so since *Katz v. United States* established the reasonable expectation test.

The New Jersey Supreme Court's decisions on transaction surveillance provide one further example of that phenomenon. The plaintiffs in that court's most recent transaction surveillance case, involving subscriber information held by ISPs, argued that because previous caselaw had established that relatively unrevealing utility records could be obtained with an *ex parte* subpoena, something more should be required in order to obtain subscriber information.⁷⁸ The court disagreed, not because it rejected the factual premise that utility and ISP records differ from each other in terms of privacy, but because it had already held that accessing bank records only require a subpoena:

Utility records expose less information about a person's private life than either bank records or subscriber information. But we see no material difference between bank records and ISP subscriber information and decline to treat them differently. They reveal comparably detailed information about one's private affairs and are entitled to comparable protection under our law.⁷⁹

Although I think the court's ultimate holding (allowing ISP information to be obtained via subpoena) is probably wrong, the point here is that proportionality analysis based on intrusiveness pervades judicial analysis not only in determining the Fourth Amendment's

⁷⁷ See *supra* note .

⁷⁸ *State v. Reid*, 945 A.2d 26, 36 (N.J. 2008). See also *State v. Domincz*, 907 A.2d 395 (N.J. 2006) (requiring a subpoena to obtain utility records).

⁷⁹ *Id.* at 404.

threshold but also in determining how much protection the Fourth Amendment should extend in situations where that threshold is reached.

Concluding Thoughts about the Intrusiveness Issue

Honest judging would recognize that empirically-derived privacy expectations are crucial in determining individual interests in Fourth Amendment cases, at both the threshold level and once conduct has been determined to be a search. On the threshold issue, the Court has adopted a test—based on expectations of privacy that *society* is prepared to recognize as reasonable—that cries out for a factual resolution of the issue, and then has decided it doesn't care about facts. On the issue of how much weight should be given to individual interests in situations that are clearly searches, once again facts about intrusiveness perceptions should be important, if not dispositive, yet they often are not.

In fairness to the courts and Professor Kerr, these types of facts are not easy to come by. As the New Jersey Supreme Court example illustrates, it is simpler to be an armchair philosopher than investigate the factual basis of one's assumptions, especially when that investigation requires evaluating scientific evidence; p values and standard deviations are scary to many legally-trained individuals. There is also the fear of change; as already noted, if judicial facts are linked to real-world perceptions, the basis for judicial decisions can be altered. That changeability threatens the stability of the law.

More cynically, real facts will often get in the way of the results one wants to reach. Professor Faigman conjectures that one reason courts create facts rather than find them is a

desire to maintain their power; they believe that allowing empiricists to determine facts would mean surrendering their dominion over the law.⁸⁰ But, in response to this contention, Faigman argues that “fact-finding by fiat” also leads to “the almost certain erosion of the legitimacy of the Court’s pronouncements.”⁸¹ And if, as Professor Kerr seems to prefer, courts make a normative assessment of the costs of a search even when those costs have been investigated scientifically, then they are taking on the role of philosopher kings that Justice Scalia, at least, vehemently believes judges should avoid at all costs.⁸²

Professor Faigman also reminds us that, even in a more empirically-based regime, courts will have plenty of power, because they will still play a crucial role in making normative judgments once the correct facts are found.⁸³ As I stated in *Privacy at Risk*

Research such as that described here only provides information concerning society’s views about *relative* intrusiveness. It does not tell the Court where to position the Fourth Amendment threshold (e.g., at a mean of 15 or 50 on a 100-point intrusiveness scale). The decision as to the level at which privacy expectations are accorded constitutional protection can still be a judicial, normative one that has precedential

80 Faigman, *supra* note , at 16 (“An institution that surrenders its authority to define the empirical world loses a considerable amount of its power”).

81 *Id.* at 18.

82 *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (Scalia, J., stating, in the context of a case involving interpretation of the Eighth Amendment, that “To say, as the dissent says, that ‘it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,’ ” . . . not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think ‘proportionate’ and ‘measurably contributory to acceptable goals of punishment’-to say and mean that, is to replace judges of the law with a committee of philosopher-kings.”).

83 Faigman, *supra* note , at 181 (“Enlightened constitutional practice can be neither solely normative nor exclusively empirical.”).

impact.⁸⁴

That judicial assessment would then set the stage, under the proportionality principle, for determining the type of justification the government must advance.

The Justification Inquiry

Recall that under the proportionality principle advanced in *Privacy at Risk* the government's justification for a search or seizure must be roughly proportionate to its intrusiveness, and that the justification should be measured in terms of how certain police are about whether the search or seizure will produce the evidence they seek. In other words, the benefits of a search or seizure should be analyzed by looking at the extent to which the police action is likely to yield evidence of wrongdoing, measured in terms of certainty levels such as probable cause, reasonable suspicion, and the like. The more intrusive searches and seizures should require probable cause or perhaps even something more, whereas less intrusive actions can be justified on reasonable suspicion or relevance grounds, or if the intrusion is minimal, would not require any justification at all.

Professor Kerr argues that “[t]his approach doesn’t work because the government’s amount of proof that a technique will yield evidence ex ante fails to correlate well with the degree to which the technique furthers government interests,”⁸⁵ in two ways. First, “the government’s degree of certainty ex ante is different from the likelihood of finding evidence ex

⁸⁴ Slobogin, *supra* note 1, at 114.

⁸⁵ Kerr, *supra* note , at 962.

post.”⁸⁶ Second, “the degree of confidence that some evidence will be found sheds little light on how much will be found or how helpful the evidence will be.”⁸⁷ This second criticism is echoed, at least indirectly, by Professor Swire. I will take up these criticisms in turn, and then end with a more general concern evidenced by Professor Kerr, having to do with the familiar question of whether courts or legislatures are better at dealing with the justification issue.

Measuring Certainty

Professor Kerr points out that, outside of the warrant context (where searches result in evidence discovery quite frequently) we have very little statistical evidence about how successful searches and seizures are.⁸⁸ From this observation he somewhat mystically concludes that in most search and seizure situations “we cannot rely on ex ante thresholds.”⁸⁹ This would be news to the courts, which routinely evaluate the validity of a search or seizure from an ex ante perspective, as well as to the average police officer, who on a daily basis decides to stop an individual or search a car based on a belief that he or she has a fair chance of uncovering evidence of crime.⁹⁰ These guesses may not be based on a mathematically

86 Id.

87 Id.

88 Id.

89 Id.

90 See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1967) (“in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”).

sophisticated assessment, but the entire edifice of Fourth Amendment law is based on the assumption that they can, to use Professor Kerr's word, "rely" on such determinations.⁹¹

At the same time, data about possible success rates should always be sought if feasible to do so. In searches or seizures aimed at specific individuals, such data might be hard to produce.⁹² But when the government engages in searches or seizures of groups, as it does with roadblocks, drug testing programs, camera surveillance and data mining, some quantitative estimation of a technique's efficacy will often be possible, based on past experience. In *Privacy at Risk*, I argue that, just as intrusiveness can be studied empirically, the government should be required both (1) to produce more than speculative conclusions about the likely hit rate in these group search situations (what I call "generalized suspicion") and (2) to show that this hit rate is roughly proportionate to the intrusion visited upon the individuals in the group.⁹³ Just as the courts should not be able to rely on gut reactions in making pronouncements about intrusiveness when better information exists, they should not be able to declare, as the Supreme Court has done over and over again in its special needs cases, that there is a significant government problem without even seeking any concrete evidence to back up the assertion.⁹⁴

91 See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) ("Under ordinary circumstances, a search . . . will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the [individual] has violated or is violating . . . the law . . .").

92 But see Max Minzer, *Putting Probability Back Into Probable Cause* (forthcoming) (arguing that success rates of individual officers ought to be factored into the ex ante cause determination).

93 Slobogin, *supra* note , at 39-44.

94 See, e.g., *Bd. of Education v. Earls*, 536 U.S. 822, 836 (2002) ("We reject the Court of Appeals' novel test that 'any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number

I may be misunderstanding Professor Kerr's complaint in this regard, but it seems to be that one reason *ex ante* certainty levels should not be dispositive of the justification inquiry is because they make solving crime more difficult. That stance ignores the well-accepted proposition that protecting privacy and autonomy through cause requirements requires some sacrifice in law enforcement efficiency.⁹⁵ It also opens the door wide to allowing government to justify suspicionless or virtually suspicionless investigative efforts on easily made (and made-up) assertions about crime problems, the need for deterrence, and the difficulty of pursuing its goals in any other way.

Context

It is precisely that sort of assertion that Professor Kerr thinks *should* be the focus of justification analysis under the Fourth Amendment. The correct measure of the benefits that derive from a search or seizure is not, he says, the extent to which evidence of wrongdoing will be obtained, but rather the more capacious inquiry into "how much the technique helps the government catch and successfully prosecute bad guys in light of how much that successful prosecution deters future wrongdoing, incapacitates wrongdoers, and furthers justice."⁹⁶

of those subject to the testing, such that testing that group of students will actually redress its drug problem."); Mich. Dept' Police v. Sitz, 496 U.S., 444, 453-54 (1990) ("the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.").

95 Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [requiring probable cause for most searches and seizures] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.").

96 Kerr, *supra* note , at 962.

Elsewhere he states that the proportionality approach is deficient because it “generally does not factor in how much the surveillance solves crime, the seriousness of the crimes that it solves, how much it succeeds compared to alternatives, and how often it targets guilty suspects instead of innocent ones.”⁹⁷

These are all important factors for authorities to consider in choosing between constitutionally legitimate law enforcement options. But Professor Kerr is in essence arguing that a highly intrusive search should be permitted on less than probable cause if it is a particularly effective method of solving serious crime and doesn’t affect “too many” innocent people. That type of argument is a recipe for government dragnets and general searches, which is precisely what the Fourth Amendment was designed to prevent.⁹⁸

Professor Kerr is particularly concerned about the impact imposition of ex ante certainty levels would have in solving serious crime. For instance, he suggests that the cause required to search a house for evidence of a minor crime should differ from the cause required to search a house for evidence of planned terrorist attacks.⁹⁹ Based on this example, he concludes that “[t]he government's interest cannot be measured solely by the chances that some evidence will be discovered; any measurement must consider the importance of the case and how much the evidence will advance that case in light of the alternatives.”¹⁰⁰

97 *Id.* at 963.

98 See *supra* text accompanying notes 1-3 and note 95.

99 Kerr, *supra* note , at 962-63.

100 *Id.* at 963.

On the precise facts of Professor Kerr’s hypothetical, where government is trying to *prevent* a crime rather than solve one, I agree with him. In *Privacy at Risk*, I explicitly recognized this exception to proportionality analysis (and devote much more attention to it than Professor Kerr suggests in the brief footnote in which he describes it¹⁰¹). More specifically, the danger exception that I proposed would exist when the government is conducting a search to prevent a significant, imminent harm.¹⁰² It is this rationale, along with the lesser intrusion idea discussed earlier, that explains the holding in *Terry*, which allowed stops and frisks on reasonable suspicion as a crime prevention measure.¹⁰³ As I suggest in *Privacy at Risk*, this rationale might also justify some of the government’s more aggressive efforts to protect national security,¹⁰⁴ a discussion Professor Swire seems to have missed in indicating that I slight this type of government program.¹⁰⁵

There is a big distinction, however, between reducing certainty requirements because of an imminent danger that needs to be prevented and reducing them because a serious crime has already been committed. Only in the former situation does a true exigency exist. Professor Kerr appears to believe this distinction is not important, since he repeatedly emphasizes the

101 See Kerr, *supra* note , at 963 n.17. But see Slobogin, *supra* note 1, at 26-28; 194; 293-94 n. 99.

102 *Id.*

103 *Terry*, 392 U.S. at 26-27 (“a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.”).

104 Slobogin, *supra* note 1, at 194 (in context of a discussion of data mining to detect terrorist activity, stating “consistent with the danger exception described in chapter 2, the showing usually required under proportionality analysis could be relaxed when the government can demonstrate that the data mining is necessary to detect a significant imminent threat.”).

105 Swire, *supra* note , at 959 (“Slobogin’s discussion of criminal procedure law does not address the intersection with the growing phenomenon of national security searches and seizures.”).

importance of crime seriousness when determining when a particular search or seizure may take place.¹⁰⁶ Professor Swire may be making the same point with his suggestion that *Privacy at Risk* should have resorted to the vast literature in this country and in Europe looking at how proportionality analysis has played out in other constitutional contexts.¹⁰⁷ This literature can be read to require, in the search and seizure context, some assessment of the magnitude of the government's interest as well as the probability that it will be achieved.¹⁰⁸ Thus, again, the argument is that investigation of a serious crime, outside of the imminent danger context, may allow relaxation of the *ex ante* certainty needed to authorize a search or seizure.

In *Privacy at Risk* I explicitly dismissed this type of reasoning. First, it flies in the face of Fourth Amendment jurisprudence, at least when the search or seizure is of an individual suspect, as distinguished from search and seizure of a group (about which more below). In individual cases, the Supreme Court has roundly rejected the idea that “the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.”¹⁰⁹ Second, this doctrine is very good policy. A police raid of a home is not rendered less intrusive simply because the police are looking for

106 Kerr, *supra* note , at 962-63.

107 Swire, *supra* note , at 760-63 (“When Slobogin omits reference to the large literature on the Proportionality Principle, he foregoes a major persuasive argument for his proposed reworking of the Fourth Amendment.”). The statement in the text is not meant to deny the validity of Swire’s general point that greater attention to proportionality literature would have improved the book.

108 See, e.g., Vicki C. Jackson, Being Proportional About Proportionality, 21 Const. Comment. 803, 807 (2004) (noting that one version of proportionality analysis “turns on an evaluation of the importance of the objective measured against its infringing effects on protected rights”).

109 *Mincey v. Arizona*, 537 U.S. 385, 394 (1978).

evidence of a misdemeanor rather than a felony.¹¹⁰ Professor Kerr’s position (if not Professor Swire’s) is analogous to saying that the government’s burden of proof at trial should be reduced in murder cases because such cases involve serious crime. Only once conviction has occurred should decision makers be able to consider the magnitude of the crime in dealing with the individual.

Legislatures v. Courts

A third point to consider in discussing the justification side of Fourth Amendment analysis is at least obliquely suggested by Professor Kerr in the beginning of his review, when he states that liberal justices might adopt my approach as a way of restoring “what they see as the Court’s rightful place at the center of American privacy law.”¹¹¹ Here he is referring to the idea—one that he has vigorously advocated¹¹²—that legislatures are much better situated than courts to come up with regulation governing investigative techniques, especially when, as is the case with physical and transaction surveillance, complicated technology is involved. I think that, in general, he is right. That is why I state in several places in *Privacy at Risk* that the courts should abstain from mandating the finer regulatory points, but rather stick to general

110 Note, however, that there is some evidence to suggest that where government efforts are viewed as facilitative rather than adversarial, as with health and safety inspections, entries into the home are viewed as less intrusive. See Slobogin & Shumacher, *supra* note , at 768 (describing evidence from the intrusiveness study suggesting that “when the motivation of the searchers seems beneficent, the sense of intrusion is lessened”).

111 Kerr, *supra* note , at 951.

112 Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 806 (2004) (“I contend that the legislative branch rather than the judiciary should create the primary investigative rules when technology is changing.”).

principles.¹¹³

But Professor Kerr makes clear in another recent article that he doesn't think the courts should play even the latter role with respect to transaction surveillance (and thus probably not with respect to public physical surveillance either).¹¹⁴ He believes that subconstitutional protections, like subpoena law, sufficiently curb wanton abuse of the authority that the Supreme Court has granted the executive branch in its cases holding that the Fourth Amendment doesn't apply to government requisition of bank records or of records of phone calls.¹¹⁵ Thus, he is not disturbed by the fact that, under existing law, subpoenas can be issued on a simple finding of relevance (and sometimes even less) or the fact that many types of subpoenas can only be challenged by the third party record-holder, which seldom wants to buck the government's investigative efforts.¹¹⁶

113 Slobogin, *supra* note 1, at 75-78 (discussing a legislative approach to surveillance of the home); 118-19 (discussing "constitutional roadmapping" in which courts lay out basic principles with legislatures filling in the details); 201-03 (discussing Kerr's preference for legislative solutions and concluding that, while the courts must provide guidelines, "more detailed rule-making along the lines suggested here might best be left to Congress").

114 Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 *Mich. L. Rev.* 561 (2009).

115 *Id.* at 596-97 (describing statutory substitutes and declaring it a "good thing" that they provide less protection than a warrant).

116 See Slobogin, *supra* note 1, at 169-80 (describing current subpoena-like mechanisms and the minimal extent to which third parties contest them). Professor Kerr gives three other reasons for his stance in favor of the Court's current third party doctrine. First, he asserts that regulating transaction surveillance would unfairly disadvantage the government, which before the advent of the phone, the Internet, and other technology could relatively easily figure out with whom we conducted our transactions. *Id.* at 573-81. But of course technology has also vastly increased the *government's* ability to acquire transactional information; allowing government to acquire this information without justification would lead to a serious imbalance in the other direction. Second, Professor Kerr argues that we consent to revelation of our transactional information when we give it to institutional third parties. *Id.* at 588-90. That restatement of the Court's "assumption of risk" rationale blinks reality and fails to distinguish between giving information to human third parties (who have an autonomy interest in disclosing information) and institutional third parties, which don't. See Slobogin, *supra* note 1, at 156-60. Third, Professor Kerr argues that any alternative to the Court's third party doctrine would disproportionately harm law enforcement because it will be too onerous or confusing. Kerr, *supra* note , at 581-86. I agree with him to the extent we impose the warrant-probable cause template on such searches. One of the advantages of the

Whether or not one believes this statutory law is sufficiently protective of privacy interests in personal information, it is important to remember that, given the Court's stance that the Fourth Amendment does not apply to transaction surveillance, even these minimal limitations are not *required*. As we've seen with National Security Letters, which permitted FBI agents to obtain records without any judicial or prosecutorial check, even the limitations that Professor Kerr is willing to adopt can disappear at the first moral panic, precisely because they are not constitutionally based.¹¹⁷ Courts and the Fourth Amendment have to provide a legal backstop against these types of eventualities.

In *Privacy at Risk* I did briefly mention one significant caveat to this position, a caveat that might also alleviate some (but certainly not all) of Professor Kerr's concern about basing justification solely on certainty levels. Based on a draft of an article by Richard Worf,¹¹⁸ I noted that, where searches and seizures of *groups* are involved—stops at roadblocks, school-wide drug testing programs, data mining and public camera surveillance—political process theory might cede authority to the legislature even where no *ex ante* hit rate evidence is adduced.¹¹⁹ I suggested that, so long as the affected group has access to the political process (i.e., is not a discreet and insular minority) and the authorizing legislation puts sufficient limitations on executive discretion (e.g., requires a search of everyone in the group), rationality review might

proportionality approach is that it provides more flexibility, because it permits less intrusive searches and seizures, conducted at early stages of an investigation, on a lesser showing. Professor Kerr's statement that "intermediate standards" are "not possible under the Fourth Amendment", *id* at 597, is simply not true.

117 See Slobogin, *supra* note 1, at 177-79 (describing abuses of NSLs).

118 Richard Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *Touro L. Rev.* 93 (2007).

119 Slobogin, *supra* note 1, at 43 .

suffice.¹²⁰

In a forthcoming work entitled *Government Dragnets* I elaborate on this position, again relying heavily on Worf's work, now in published form.¹²¹ I acknowledge that legislation that avoids the process flaws of disparate treatment and over-delegation deserves deference, in part because legislative bodies are better at figuring out the welfare maximization questions that arise in determining the deterrent and detection effects of group searches and seizures and alternative methods of controlling crime.¹²² At the same time, as political process dictates, group searches and seizures that are not authorized by legislation or that are authorized by legislation that is tainted by process flaws should still be subject to strict scrutiny, which I define in proportionality terms rather than in terms of the usual compelling state interest/least intrusive means analysis, precisely because courts are not good at carrying out the latter type of calculus in the criminal context.¹²³

Applying this reasoning to cases the Court has confronted, I conclude in *Government Dragnets* that although some of the group search and seizures it has approved (and one it did not¹²⁴) should have been, many were defective because the programs were either not established by legislation or the enabling legislation did not impose any meaningful limitations

120 Id.

121 Christopher Slobogin, *Government Dragnets in a Technological Age*, J. L. & Contemp. Probs. (2010).

122 Id. at . Note also that the primary method of avoiding over-delegation is to ensure the program applies to all constituents, powerful and disadvantaged alike, which should have an inhibiting effect on casual passage of dragnet programs, as evidenced by the outcry against the Defense Department's Total Information Awareness Program. See Slobogin, *Datamining by the Government*, supra note , at 317-38 (describing the near unanimous congressional vote, only two years after 9/11, scaling back the program).

123 Id. at .

124 *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down Georgia statute which required drug testing of all political candidates).

on law enforcement.¹²⁵ Also subject to strict judicial scrutiny would be data mining programs that allow government sweeps of thousands or millions of records based on vague legislation pronouncements and public camera systems established at the behest of law enforcement rather than municipal government; such investigative techniques should be prohibited, I argue, unless there is a demonstration of the hit rates required by proportionality analysis.¹²⁶ Most importantly for purposes of responding to Professor Kerr’s critique, investigative techniques that are not aimed at promoting searches and seizures of groups with political access but rather merely facilitate investigation of individuals suspected of crimes should always be subject to proportionality analysis. That would mean that the legislation that Professor Kerr endorses permitting law enforcement access to a suspect’s bank or phone records based on a subpoena would not be entitled to rationality review, but rather should be analyzed under the proportionality principle.¹²⁷

Contrary to Professor Kerr’s suggestion, unless political process theory counsels judicial deference, the mere fact that legislatures are relatively competent at collecting information about technological surveillance (or any other investigative technique) should not immunize their products from constitutional scrutiny. Courts may be relatively poor at constructing complicated legal rules and institutionally ill-equipped to decide how much deterrence is

125 See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (drug testing program established by local police); *Mich. Dept. State Police v. Sitz*, 496 U.S. 444 (1990) & *Indianapolis v. Edmond*, 531 U.S. 32 (2000) (roadblock policies promulgated by the local police department); *Skinner v. Railway Labor Exec. Assoc.* 489 U.S. 602 (1989) (drug testing policy promulgated under statute permitting Secretary of Transportation to “prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.”).

126 Slobogin, *supra* note , at .

127 Slobogin, *supra* note , at .

bought with various types of techniques, but they routinely make proportionality assessments in search and seizure contexts. The judiciary is perfectly competent at determining whether the other branches of government have come up with the evidence demanded by the proportionality principle in those situations where it applies.¹²⁸

Conclusion

Professor Kerr implies throughout his review that, because of its insistence that the Fourth Amendment have some impact on surveillance techniques, the approach advocated in *Privacy at Risk* would be much more appealing to a liberal court than a conservative one.¹²⁹ I'm not so sure. Since a proportionality approach would not require probable cause or even reasonable suspicion for minimally intrusive techniques such as brief use of overt public camera surveillance or many types of transaction surveillance, many ACLU types may find much to be upset about in my proposals. At the same time, even Justice Scalia has bemoaned intrusive government techniques like drug testing that are not justified on some concrete basis.¹³⁰ In the original intrusiveness study that I conducted with Joseph Schumacher we asked participants to indicate where they would place themselves on a due process/crime control spectrum and

128 As Professor Faigman notes, “[w]hile the judiciary may not be as well designed institutionally as the legislative branch to gather . . . data, courts are especially well designed to evaluate them.” Faigman, *supra* note , at 133.

129 Kerr, *supra* note , at 951, 964.

130 See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (“The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.”).

found that this designation did not have a significant effect on intrusiveness ratings.¹³¹

Conservatives as well as liberals are bothered by government intrusions into their privacy.

The moderate approach represented by the proportionality principle has several advantages. As I explained in *Privacy at Risk*, the principle “ameliorate[s] the pressure created by the probable-cause-forever stance without sacrificing the core protection of the Fourth Amendment.”¹³² Knowing that declaring a government action a search would no longer require that probable cause be demonstrated, courts would be more willing to broaden the scope of the Fourth Amendment. Instead of resorting to vacuous “assumption of risk” analysis (Professor Kerr’s “probabilistic model”) they would be more receptive to analyzing search and seizure cases in the terms *Katz* has always stood for: expectations of privacy society has recognized as reasonable. Along with political process theory, the proportionality principle would also inhibit suspicionless searches and seizures of groups and thus more effectively counteract pressure, particularly strong since 9/11, to engage in blanket surveillance and other dragnet techniques. But with these caveats, preliminary investigative techniques, including some types of dragnets, could take place in the absence of probable cause, and perhaps even in the absence of reasonable suspicion. To conclude with the same language that ended *Privacy at Risk*: “It is possible to achieve security in our houses, person, papers, and effects from both overweening government official and those how wish to do us harm.”¹³³

131 Slobogin & Schumacher, *supra* note , at 772-774 (“contrary to our hypothesis, perceptions of intrusiveness and crime control attitudes were not significantly related.”).

132 Slobogin, *supra* note 1, at 210.

133 *Id.* at 218.