Michigan Law Review

Volume 42 | Issue 1

1943

SEARCHES AND SEIZURES-THE CRITERION OF REASONABLENESS

J. B. W.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Criminal Procedure Commons, and the Fourth Amendment Commons

Recommended Citation
J. B. W., *SEARCHES AND SEIZURES-THE CRITERION OF REASONABLENESS*, 42 MICH. L. REV. 147 (1943).
Available at: https://repository.law.umich.edu/mlr/vol42/iss1/8

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SEARCHES AND SEIZURES—THE CRITERION OF REASONABLENESS—Epithetical jurisprudence is an easy way out of difficulty. Find some term to the use of which established law has commonly attached a consequence; apply that term to the fact situation at hand; the legal consequence is automatically determined. If it happens that the new fact situation is not quite like those to which the term has previously been applied, the term has unobtrusively acquired a new significance; but the forms of logical decision have been followed. One perennial illustration of that epithetical process is the judicial determination that a particular search or seizure is "reasonable" or "unreasonable"—epithets whose precise meaning in that connection appears never to have been defined.

Prior to 1919 the meaning of the terms, though important, was seldom raised in the courts. One can find a criminal prosecution on the charge that defendant "did make an unreasonable search," which was dismissed on the ground that there was no such crime; [1] an action or two for trespass by unreasonable search; [2] and a few other cases of similar type. The Supreme Court, in 1886, had conceived the doctrine that evidence obtained by means of unreasonable search could not be used in a criminal case over the properly made protests of a defendant whose constitutional immunity from unreasonable search had been violated,[3] and after some vicissitudes the doctrine was repeated in 1914.[4] But until the advent of prohibition no state court had voiced approval of that proposition. Most state courts ignored it; one or two expressly repudiated it; [5] none adopted it. The actual incidence of the rule of exclusion was almost negligible even in the federal courts, and the question of "reasonableness" was therefore rarely litigated.

In 1919 however, the Michigan supreme court was asked to compel the return to an alleged liquor law violator of illicit liquor which had been seized by local enforcement agents for use as evidence against him. The court promptly labeled the seizure "unreasonable," by merely

[1] State v. Leathers, 31 Ark. 44 (1876).

[2] Fennemore v. Armstrong, 29 Del. 35, 96 A. 204 (1915): Gamble v. Keyes, 35 S.D. 644, 153 N.W. 888 (1915); Simpson v. McCaffrey, 13 Ohio 508 (1844).

[3] Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886).

[4] Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914).

[5] E.g., Rosenthal v. Muskegon Circuit Judge, 98 Mich. 208, 57 N.W. 112 (1893); Cluett v. Rosenthal, 100 Mich. 193, 58 N.W. 1009 (1894); People v. Aldorfer, 164 Mich. 676, 130 N.W. 351 (1911).

assuming it to be so without argument or explanation, and then, having so easily affixed the stigmatizing label, filled fourteen pages of opinion with its decision that the unreasonably seized liquor must be returned to its unlawful owner.[6] In the following year the Kentucky court likewise labeled the search of a house for illicit liquor unreasonable, despite the fact that the searching officers possessed a warrant to arrest its owner on a liquor law violation charge, and then declared the evidence so obtained inadmissible at the trial.[7] Thus began the adoption by state courts of the theretofore snubbed federal rule, and thus arose the now dominating importance in law enforcement of the epithet "unreasonable." Whether the exclusion of what was unreasonably seized is a wise rule, or as Judge Cardozo called it, a dangerous one,[8] is not here in question. But assuming the fact of the rule's existence, just what is the criterion by which "unreasonableness" is determined?

Many courts have more or less arbitrarily attached the label to many variations of fact situation. They have not defined the term; they have not explained by what process the propriety of its application to specific fact situations is determined; they have merely said that in certain specific situations it is properly applicable. The Supreme Court affirmed one such cliché in *Agnello v. United States*,[9] saying, "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. . . . The search of a private dwelling without a warrant is in itself unreasonable." As an application of the term—though obviously not as a definition of it—this precedent has been generally accepted. The Michigan court has held, without a word of explanation, that even after an arrest within the house it is unreasonable, though the arrest was on a charge of maintaining a place where liquor was unlawfully kept for sale, to search any part of the premises except perhaps the room in which the arrest was made.[10] The liquor in that case had been found in a carpet-hidden cache in the floor of the second story, but its use as evidence was forbidden because the arrest had been effected on the first floor and the manner of its acquisition was therefore judicially labeled "unreasonable." In that same year the Michigan court, again without explanation, also labeled as unreasonable the search of a house for unlawful liquor despite lawful entry with a warrant to search for stolen beans.[11]

For a while the United States courts did not precisely set forth

[6] People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).
[7] Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920).
[8] People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
[9] 269 U.S. 20 at 32, 46 S. Ct. 4 (1925).
[10] People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).
[11] People v. Preues, 225 Mich. 115, 195 N.W. 684 (1923).

their notions of the bounds of reasonableness of search within a house following an arrest. In *Marron v. United States*[12] the Supreme Court said, "The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose." But in a later case that same Court, again without explanation, agreed with circuit judges Martin Manton and Chase that while things in plain sight might reasonably be picked up, any "exploratory" search of the premises for evidence of the crime was "unreasonable," even following a lawful arrest therein.[13]

Search, even with a warrant, for something which is desired only because it may protect the public by showing who committed a particular crime has been emphatically characterized as unreasonable; again with no explanation as to why the court calls it so.[14] Apparently, such a search is called unreasonable simply because it is; just as Adam named the elephant because it looked like an elephant.

Thus, though "unreasonable" has neither been explained nor defined, it has become to some extent a word of art, attached as a matter of law to certain specific fact situations. That its use in these situations is in truth but a matter of judicial custom—hence of judge-made law—and is not the fitting of particular facts into a definition, is forcefully indicated by the struggles of an occasional court in peculiar conditions to evade what it calls the legal rule. One Oklahoma decision, for example, had followed the "law" in a liquor violation case and had declared that even a lawful arrest, if made in the street outside the house, "does not carry with it the right" to search the house, and that evidence obtained by such a search cannot be used. The opinion consistently spoke, not of the right to make a "reasonable" search anywhere, but of the lack of "right," apparently as a matter of law, to search a residence without a warrant unless the arrest was made therein.[15] Then, just a few months later, the court was faced with a burglary case, in which, also, the defendant had been arrested outside his house and the house thereafter searched without a warrant. Obviously, in the latter case, the court desired to sustain the conviction. But apparently it never occurred to the court to hold that the search was "reasonable" under the peculiar circumstances. Indeed the adjectives "reasonable" or "unreasonable" are not made use of anywhere in the opinion; the whole tone of the discussion is simply, was the particular search one permitted by established law? And the court's asserted but unexplained conclusion was merely that "the arrest of the defendant was so connected with the dwelling

[12] 275 U.S. 192 at 199, 48 S. Ct. 74 (1927).

[13] United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420 (1932).

[14] Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261 (1921); United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420 (1932).

[15] Wallace v. State, 42 Okla. Cr. 143, 275 P. 354 (1929).

house that the right of search existed."[16] So also in a Michigan case it appeared that officers had searched a building, without a warrant and not following an arrest therein, and had found evidence enough to convict the defendant of arson. The court had previously promulgated the rule that search under such circumstances was unreasonable and unlawful. In this case, though obviously desiring to sustain the conviction, the court did not weigh the circumstances and find that the search was in fact reasonable; it merely said that the officers were "rightfully in the store, and, being so there, they made observations; they saw and took materials seemingly provided for a fire; all of which were properly received in evidence, having been had without violating the provision of the Constitution."[17] Even in a federal decision where the court thought it proper for officers to search all the premises wherein the arrest was made, the court said that the search was reasonable not because such was the fact but because "such is the law."[18]

But though it may thus have become "the law" that this and that and the other circumstance of search is "unreasonable," what of circumstances for which the rule of law has not yet been formulated? Where the courts have as yet not labeled a particular fact situation, what is the criterion of its "reasonableness"? As respects the search of a house, the fact that the original entry itself was or was not lawful has clearly become a sort of criterion; indeed the assumed unlawfulness of the entry is obviously the basis on which the rule that certain such searches are ipso facto unlawful was built up. But suppose there were no entry in the physical sense; suppose the search were by window-peeking, by use of a telescope, by some as yet not perfected radio-echo device.[19] By what criterion would the reasonableness of that search be determined? What, in short, is the definition of "reasonable," as an adjective applied to "search"? What does it connote?

Other adjectives in many fields of the law have been given fairly satisfactory general definition. "Deadly" weapon, "dwelling" house,

[16] Patton v. State, 43 Okla. Cr. 436 at 439, 279 P. 694 (1929).

[17] People v. Chimovitz, 237 Mich. 247 at 250, 211 N.W. 650 (1927). The court based the officers' "legal right" to enter the building upon the fact that they did so not to make a search but to put out the fire. Inasmuch as before the officers entered the building they sent for the defendant, waited till he came, then waited again until he went back home and got his keys, one may wonder why they were so slow in their efforts "to put out a fire."

[18] Sayers v. United States, (C.C.A. 9th, 1924) 2 F. (2d) 146.

[19] Cf., e.g. Justice Murphy, dissenting, "Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view." Goldman v. United States, 316 U.S. 129 at 139, 62 S. Ct. 993 (1942). Murder your wife at home and be safe?

even "reckless" driving, have been to considerable extent explained, as well as specifically applied. So, too, in other connections, the adjective "reasonable" has acquired understandable definition. In the field of torts, reasonable care is defined as that which a reasonable man would observe; and a reasonable man is defined as "a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others."[20] Moreover, in respect of torts, criteria have been set up by the courts as tests for the reasonableness of any specified activity.[21] "What is sought [in determining reasonableness of care] is a judgment which, as far as possible, represents the general level of moral judgment of the community. . . . The business of legal science in such cases is to develop formulae as guides to the jury in arriving at its judgment. . . ."[22]

In search and seizure problems, too, it *ought* to be the business of legal science to develop formulae as guides for the assistance of judge or jury in determining what is "reasonable." One might suppose that the reasonableness of a search would be left to the jury, as in other types of case where reasonableness is involved. As a matter of practice it is not so left; on the contrary, since its determination is a preliminary to the admission of evidence, not a factor in determining what the admitted evidence proves or fails to prove, it is consistently treated as a question for the court rather than for the jury, even in criminal cases. But not even for the guidance of the court—and even a court needs the guidance of definition of terms—has a formula of the connotation of reasonableness of search been developed.

In negligence cases, the criterion of the "reasonable man" is vague and difficult of application, but at least it is a criterion which can be stated to the jury and which, at least in a vague way, can be grasped by them. So, too, though judges have never succeeded in clearly defining "reasonable doubt" for the jury's assistance, they have at least tried to set up criteria in one form or another.[23] But neither for use by the jury nor by themselves do courts appear to have set up even the vaguest of criteria—as distinct from precedents—as to what constitutes reasonableness of search. The Supreme Court itself has recognized that the reasonableness of a search *ought* to be regarded as a conclusion of fact, not as the application of some rule of law. In passing upon the reasonableness of a particular search it said explicitly: "There is no formula

[20] 2 TORTS RESTATEMENT, § 283 comment a (1935), and cf. § 298.

[21] Id., §§ 291 ff.

[22] HARPER, TORTS, § 69 (1933).

[23] See 9 WIGMORE, EVIDENCE, 3d ed., §§ 2497 ff. (1940); 28 MICH. L. REV. 934 (1930); 29 MICH. L. REV. 252 (1930); State v. Smith, 65 Conn. 283, 31 A. 206 (1894); Bradley v. State, 31 Ind. 492 (1870).

for the determination of reasonableness. Each case is to be determined on its own facts and circumstances."[24]

No law for the determination of reasonableness; no formula! Then by what test can a court determine it? Certainly courts do not utilize the test of what a reasonable man would think to be reasonable. Consider a particular state of facts:—The police have reason to believe that one Agnello is a peddler of cocaine; they watch him; they observe that on being approached by an addict Agnello goes home and returns with a packet of cocaine which he sells to the addict; they arrest Agnello and secure that evidence—all of which the court considers reasonable. But, also, knowing that news of the arrest will be grapevined to Agnello's associates who will take prompt steps to protect themselves, the police go at once to Agnello's house where they find a cache of cocaine from which the packet was probably taken. Had they waited to obtain a warrant to search the house—even if on the showing of facts then known they could have procured one—the evidence would probably have disappeared. Given the facts, would a reasonable man, the law's average citizen, call that search of the house unreasonable? In *Carroll v. United States*[25] the Court itself declared that search of an automobile without a warrant was reasonable "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." The average man might well suppose the search of a house to be equally reasonable were it likely that the evidence would be quickly moved. The fact that the Supreme Court did not even suggest that possibility in the *Agnello* case[26] suggests that the Court's criterion was not the probable reaction of the reasonable man.

In short, then, though in judicial verbalism the "reasonableness" of a search is a conclusion to be reached from the facts and circumstances of each case, there are no judicially recognized criteria by which that conclusion is to be tested.

Yet there is a logically sound criterion, long accepted in a similar connection, which might well be judicially adopted as the test for reasonableness of search. The Supreme Court itself has said that "unreasonable" as used in the Fourth Amendment should be construed "in a manner which will conserve public interests as well as the interests and rights of individual citizens."[27] Moreover in the same paragraph it indicates its own recognition of a proper balance between the two by saying that search of an automobile without a warrant is reasonable if

[24] Go-Bart Importing Co. v. United States, 282 U.S. 344 at 357, 51 S. Ct. 153 (1931).

[25] 267 U.S. 132 at 153, 45 S. Ct. 280 (1925).

[26] Agnello v. United States, 269 U.S. 208, 46 S. Ct. 4 (1925).

[27] Carroll v. United States, 267 U.S. 132 at 149, 45 S. Ct. 280 (1925).

made "upon a belief, reasonably arising out of circumstances known to the seizing officer, that [the] automobile . . . contains that which by law is subject to seizure."

The interest of the public is that of crime prevention through effective law enforcement. The right of the individual is to be free from unreasonable search. He has also the recognized and equal right to be free from unreasonable arrest. These two rights of the individual are protected by the same constitutional provision. Anything that is recognized as a reasonable intrusion upon the latter right ought surely to be reasonable also as an intrusion upon the other. It is never disputed that an actual seizure of the *person* made upon reasonable ground to believe that the person arrested has committed a felony is reasonable and lawful. Moreover, "The reasonable ground or suspicion which justifies an arrest without a warrant has been declared to be a state of facts which would lead a man of ordinary care and prudence to believe"[28] that the person arrested is guilty. Why then should it not be equally well accepted that the mere search of a *place*, if made upon reasonable ground to believe that evidence of a felony is concealed in that place, is likewise reasonable? The criterion which safely determines the reasonableness of an *arrest* ought logically, with equal safety to the interests of both the individual and the public, determine the reasonableness of a *search*. The right of privacy, like the right to freedom, appertains to innocence, not guilt; if a requirement of "reasonable ground to believe" is enough to protect innocence against invasion of its freedom, the requirement is sufficient to protect it also against invasion of its privacy.[29]

J. B. W.

[28] United States v. Bell, (D.C. Cal. 1943) 48 F. Supp. 986 at 992, quoting Yankwich, "The Lawless Enforcement of the Law," 9 So. CAL. L. REV. 14 at 19 (1925).

[29] Though there is no suggestion of such a test in the judicial opinions, there is indication in two recent decisions that judges may be backing away from the commonly accepted proposition that to be reasonable the search of a house must conform to certain legal absolutes. In United States v. Bell, (D.C. Cal. 1943) 48 F. Supp. 986, the court held the search reasonable despite the fact that it extended to all the rooms and closets and that large quantities of printed matter were seized for later examination—a proceeding difficult to reconcile with what was specifically asserted in United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420 (1932). In State v. McCollum, (Wash. 1943) 136 P. (2d) 165, the court held that search of a house was reasonable, despite the fact that the arrest had occurred outside it, because it was made on the day following the arrest and was therefore "incident to" the arrest—a decision impossible to reconcile with Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4 (1925), of which, however, the Washington courts had never wholly approved.