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# FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE

THOMAS A. FAIRCHILD

THESE is no doubt that the freedom from unreasonable search and seizure is a fundamental and cherished American right. The more specific phraseology of this right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" appears in the Fourth Amendment to the Constitution in Article One, Section Eleven of the Constitution of Wisconsin. Such controversy as exists with reference to this right relates to the two questions:

1. What sanctions shall be employed in the protection of the right? and

2. What are the limits of reasonableness in searches and seizures?

Historically, the exercise of power which was condemned as abuse by the constitutional authors included the issuance by the English Secretary of State of general warrants for searching private houses for the discovery and seizure of books and papers that might be used to convict their owners of the charge of libel,<sup>1</sup> the chief political crime of that date, and the issuance in the colonies of writs of assistance to the revenue officers empowering them in their discretion to search suspected places for smuggled goods.<sup>2</sup>

Relief against the administrative practice of issuing general warrants was afforded by resolutions of the House of Commons condemning them. The judicial remedy for those subjected to such search as exemplified by the celebrated *Wilkes* case and *Entick v. Carrington* was an action of trespass against officials involved.<sup>3</sup> It may be maintained that the purpose of the Fourth Amendment did not extend beyond a prohibition of general writs and warrants and a guarantee of a civil cause of action against the perpetrators of an unreasonable search.

A further protective device has now been embodied in a rule of evidence in the federal and some of the state courts, including Wisconsin.<sup>4</sup> This is the familiar rule that where one sovereign has conducted an unreasonable search or seizure, evidence obtained is inadmissible in a criminal trial in the courts of that sovereign at least if the objection is timely.

It is apparently conceded that the common law rule was otherwise,<sup>5</sup> In 1926, out of 45 states considering the question, 14 had adopted the

<sup>1</sup> *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524, 29 L.Ed. 746 (1886).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1927); *State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924).

<sup>5</sup> J. B. Waite, *Reasonable Search and Research*, 86 U. OF PA. L. REV. 623.

federal rule but 31 had rejected it.<sup>6</sup> The first case which suggests the rule is *Boyd v. United States*, decided in 1885.<sup>7</sup> An opposite conclusion was reached in *Adams v. New York*<sup>8</sup> in 1904. In 1914 the Supreme Court held in *Weeks v. United States*<sup>9</sup> that a defendant by timely motion might force the prosecution to return to him material unlawfully seized. The full blown rule developed during the prohibition era.<sup>9a</sup>

The sanction of this rule does not apply to all unlawful searches and seizures and may therefore be ineffective in discouraging them. Evidence so obtained by a private individual is admissible in any court. In a state court evidence wrongfully obtained by federal officials or officials of sister states is admissible. In the federal court evidence so obtained by state officials is admissible. Apparently evidence obtained by anyone through search and seizure violating the rights of persons other than the defendant may be received.

Judge Cardozo in an opinion rejecting the rule<sup>11</sup> commented as follows upon this point: "The federal rule as it stands is either too strict or too lax. A federal prosecutor may take no benefit from evidence collected through the trespass of a federal officer. The thought is, in appropriating the results, he ratifies the means. He does not have to be so scrupulous about evidence brought to him by others. How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it and police in the service of the states on the other. The nation may keep what the servants of the states supply. We must go farther or not so far. The professed object of the trespass rather than the official character of the trespasser should test the rights of government."

A recent extension of the doctrine into the field of telephone communications commands attention. In *Olmstead v. United States*<sup>12</sup> decided in 1927 the Supreme Court held admissible relevant testimony of conversations overheard by federal officers who had tapped telephone lines, notwithstanding the fact that the wire tapping was done in the state of Washington where a statute made such conduct a misdemeanor. It was held that the Fourth Amendment, while protecting papers and personal effects, did not protect projections of the voice over telephone wires. The decision was 5 to 4.

In 1937 in *Nardone v. United States*<sup>13</sup> the court held that such evidence was inadmissible, explaining the change in opinion by reference

<sup>6</sup> *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>7</sup> 116 U.S. 616, 6 Sup. Ct. 524, 29 L.Ed. 746 (1886).

<sup>8</sup> 192 U.S. 585, 24 Sup. Ct. 372, 48 L.Ed. 484 (1904).

<sup>9</sup> 232 U.S. 383, 34 Sup. Ct. 341, 58 L.Ed. 652 (1913).

<sup>9a</sup> J. B. Waite, *Reasonable Search and Research*, 86 U. OF PA. L. REV. 623.

<sup>10</sup> E. C. Arnold, *Search and Seizure Problems*, 16 TENN. L. REV. 291.

<sup>11</sup> *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>12</sup> 277 U.S. 438, 48 Sup. Ct. 564, 72 L.Ed. 944 (1928).

<sup>13</sup> 302 U.S. 379, 58 Sup. Ct. 275 (1937).

to the Federal Communications Act<sup>14</sup> which provides a penalty for the interception of a telephonic or telegraphic communication or the divulging of its contents, no part of the statute provided that evidence so obtained should be inadmissible. In 1939 in *Weiss v. U. S.* 84 L.Ed. 223, it was held that the rule applied to both interstate and intrastate communications and that the government might not rely upon the testimony of one of the parties to a conversation which testimony was elicited as a result of wire tapping by the government. In *Vardone v. U. S.* 84 L.Ed. 227, it was recognized that evidence resulting from wire tapping not initiated by federal officers would be admissible.

At this point it is of interest to note that Wisconsin has a statute which penalizes the interception of telegraph messages,<sup>15</sup> but apparently none with respect to the telephone. The new constitution of the state of New York contains the traditional provision but adds that the right of the people to be secure in their telephonic and telegraphic communications shall not be violated.<sup>16</sup>

The second branch of controversy upon search and seizure is the question of what is a reasonable search. Traditionally, the rule has been that a search is unlawful unless made pursuant to a proper warrant or made as an incident of or immediately following a lawful arrest.

It is noteworthy that the word "unreasonable" is the one used in the Fourth Amendment and is one which implies that circumstances alter cases. The law upon the question of unreasonable search is probably another field where changing times demand changing rules. A search unreasonable in the days of the adoption of the Constitution because an officer might have obtained a proper warrant, may be reasonable in these days of rapid communication and transportation because the detection of the criminal will otherwise be impossible.

Prof. John B. Waite of Michigan<sup>18</sup> has criticized the failure of the courts to adopt some scientific or statistical procedure for the determination of this question of policy. Without saying what view is necessarily correct, he points out two alternative definitions of reasonable search which the courts might have adopted as follows:

1. A search is reasonable whenever the officer making it has reasonable ground to believe that he will discover evidence of criminality and reasonable ground to believe also that such evidence cannot be obtained by more dilatory or less drastic procedure.

2. A search is reasonable where the search proves the person involved to be guilty of crime.

<sup>14</sup> 47 U.S.C.A. 605.

<sup>15</sup> WIS. STAT. (1939) § 348.37.

<sup>16</sup> N. Y. Constitution, Art. I, § 12.

<sup>17</sup> E. C. Arnold, *Search and Seizure Problems*, 16 TENN. L. REV. 291.

<sup>18</sup> J. B. Waite, *Reasonable Search and Research*, 86 U. OF PA. L. REV. 623.

In the consideration of both of the matters in controversy namely the question of whether the rule excluding from criminal trials evidence obtained by unlawful search is a proper means of enforcement of the right and the question whether the traditional rules of reasonableness are proper today, there is a conflict between two interests. The one interest is the protection of society through the detection of criminals. The traditional rule is criticized by Judge Cardozo expressing this interest as follows: "The criminal is to go free because the constable has blundered."<sup>19</sup> The other interest is that of protecting individuals from the annoyance of governmental interference with their private affairs. In a dissenting opinion in the *Olmstead* case Justice Brandeis made the following interesting speculation: "Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been, but of what may be.' The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advance in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions. 'That places the liberty of every man in the hands of every petty officer,' was said by James Otis of much lesser intrusion than these. To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasion of individual security?"

Justice Holmes expounded this second interest and said that he thought it "a less evil that some criminals should escape than that the government should play an ignoble part."

Commenting upon this statement of Justice Holmes, Professor Waite in the article above referred to said "Passing over the question of distinction between what is ignoble and what is pragmatically wise, did Mr. Holmes know how many criminals do in fact escape because of the narrowness with which courts choose to define reasonableness? Possibly definitions might be broadened if judges knew that. The numbers run into thousands, though how many thousands the writer does not know. In the city of Detroit alone a cursory investigation revealed the fact that during a single year 38 indubitably guilty carriers of concealed weapons, a felony punishable by five years imprisonment, were turned loose on society by the courts—and many more by the police—solely because the courts did not approve as reasonable the manner in which the arrest and subsequent search was made. That was a period when armed robbery, assault, and murder were rife in the city, yet

<sup>19</sup> *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

the investigation indicates that one out of every four gunmen arrested was released by the courts or by the police themselves because the court's idea of reasonableness differed from those of the police."

Referring again to the decisions involving wire tapping it is pertinent to ask whether the tremendous advantages of telephonic communication are by the rule mentioned to be made safe for use in furthering various crimes and conspiracies or whether the rule should not be relaxed and governmental agencies aided in detecting the criminals who perpetrate such crimes.

Our discussion is oriented with respect to the concept of civil liberties and our attitude is certainly in favor of their preservation. Reference to the cases, however, which proclaim the rule of inadmissibility of evidence unlawfully obtained, discloses a long list of gamblers, smugglers, dealers in illicit liquor, gunmen, and thieves who have claimed and received protection from effective prosecution upon the basis of this guarantee. In speaking of civil liberties, we do not refer to freedom to violate criminal laws with impunity. The question is therefore posed whether the rule of the exclusion of evidence unlawfully obtained and the traditionally strict rule as to what is an unreasonable search are protecting what we call civil liberties or are merely protecting those whom most of us have no desire to protect.

It will undoubtedly be argued that this is another field in which we have to take the bitter with the sweet, and that in order to have protection from government spying to convict people of crime for political reasons we must endure the protection of the ordinary criminal.

I have referred to the growth of the rule of exclusion during the prohibition era, an illustration of the use of power by the courts to protect individuals from the strict enforcement of a criminal law, the law being increasingly unpopular and unacceptable.

Assuming in the future the major threat to freedom of thought under a dictatorial regime popularly accepted because of a general disappointment in the inefficiencies of democracy or because of war accompanied by governmental propaganda and laws which we would now consider unconstitutional restricting the freedom of thought, do we suppose that the courts will protect the free thinking minority by strict maintenance of the present rules? The creation of the present rules in order to hinder the enforcement of an unpopular law affords a basis for prophecy that they might be relaxed for the enforcement of a popular law. If such a result should occur, citizens would then regret the protection of the criminal in the present day through the enforcement of the present strict rules.

Vigilantism is frequently more disastrous to the offending individual than criminal prosecution. It is easy to imagine a hysteria akin

to the 5th column scare of the recent spring and summer which would result in mob persecution of persons insisting on freedom of thought if the rules of the courts made legal prosecution difficult. Another question is therefore posed—whether the protection which may be afforded by the present rules upon the subject of unlawful search and seizure in a future time of mass interference with individual rights will be sufficiently valuable to render worthwhile the evils protected by such rules at the present time.