

1989

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Recommended Citation

Bruce G. Berner, *The Supreme Court and the Incredible Shrinking Fourth Amendment*, 2 *The Amicus*, no. 3, 1989, at 14.

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THE SUPREME COURT AND THE INCREDIBLE SHRINKING FOURTH AMENDMENT

by Professor Bruce G. Berner

The following is an abridged version of the Inaugural Lecture delivered by Professor Bruce Berner. An in-depth article, based on the lecture, will be published in volume 24 of the Valparaiso University Law Review.

INTRODUCTION

The fourth amendment to the U.S. Constitution poses two substantive questions about governmental searching. The first, "What is a search?", might be called the amendment's "reach" and could be restated, "What general type of governmental activity is this amendment interested in scrutinizing and regulating?" The second and logically subsequent question--"Which searches are unreasonable?"--might be termed the amendment's "grasp" and could be restated: "From this universe of 'searches', which are permitted and which prohibited?" It is, after all, only "unreasonable" searches that the constitution prohibits.

The fourth-amendment "reach" cases are today in wild disarray and the subject of widespread attack. The thesis of today's lecture is that the disarray, while it is particularly notorious because of recent decisions, springs from the fact that the Supreme Court has *never* formulated a coherent test for "reach." It has, instead, historically confused the "reach" and "grasp" problems. While this confusion *has* generated decisions which are profoundly odd, it has done far worse--it has assured that many potential governmental abuses *cannot*, without starting from scratch on the "reach" formulation, be correctly decided absent legislative intervention. While commentators for the most part agree (and I do too) that the Supreme Court is answering the question wrong, I argue in this lecture that the problem is deeper--the Court is answering the wrong question.

A. The Current Reach Formulation

1. Description

The fourth amendment provides, in pertinent part:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated;

(There is a second clause about warrants and probable cause, but it has nothing to do with "reach" and at the "grasp" level is wholly subservient to the cited clause.) Prior to 1967, this cited language prompted the Court to apply two tests for reach. One focused on *place* and one on *governmental activity*. The Court required that *both* hurdles be jumped before it would address the reasonableness question. The first hurdle--"Does the case involve a *place* the fourth amendment is concerned with?"--is typified by *Hester v. United States*, a case which held that any amount of governmental seeking in an "open field," property of the defendant outside the house's protection, could not be a "search." The second hurdle--"Did the police engage in the type of activity that the amendment means to scrutinize?"--is typified by *Olmstead v. United States*, which held that police eavesdropping from one hotel room to the next with a detectaphone (a device that does not physically penetrate the wall) was not a search because it entailed no physical *trespass*. Thus, until 1967, there was no fourth-amendment debate until the police *trespassed* into a relatively short list of "*protected places*."

In *United States v. Katz* (1967) the polestar "reach" case, defendant was making a phone call from a glass-enclosed public pay telephone. Federal police attached an electronic device to the top of the booth and recorded the conversation which became evidence in Katz's trial under federal gambling laws. The Court rejected both halves of its old "reach" doctrine. First, as to *place*, it rejected "persons, houses, papers and

effects" as being an exclusive list of protected places and treated those words as merely evocative of places where the privacy interest is most keenly felt. It broadened the "place" part of reach to all places where a person has an "actual and reasonable expectation of privacy." The *Katz* expansion of constitutional protection fits nicely with other decisions of the liberal Warren Court, in full sail by 1967. Having formulated this "reasonable-expectation-of-privacy" test, the Court then held it reasonable to expect that private phone conversations, even when made in a public phone booth, are not being surreptitiously recorded. As to the *police activity* side, the Court stated that, given the state of technology, one need not identify a trespass to find a search. What did the Court replace *trespass* with? Nothing. The idea of measuring "reach" by looking at the police and their activities *dropped out of the analysis* for all practical purposes. The whole question regarding "reach" now focuses on *place*. Which places? All places in which a person entertains a "reasonable expectation of privacy." This focus is on the citizen--not on the government. But, as I hope to demonstrate, taking one's eyes off the government when doing fourth-amendment jurisprudence is a dangerous game.

The opportunity the Court missed in *Katz* occurred immediately after it held that "persons, houses, papers and effects" was not an exclusive list of protected places but rather that privacy interests may exist in countless places and contexts. Once it said that, the Court could have noticed that it was now analyzing the Constitutional text as if it read:

The right of the people to be secure against unreasonable searches and seizures shall not be violated;

All that would have remained, therefore, would be to define what "search" meant in terms of *governmental activity*. Instead, the Court, loathe to remove all place limitation, reworked the *place* side with a vaguer but self-consciously

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broader formulation--all places where there is a "reasonable expectation of privacy." But why limit fourth-amendment protection to *any* place, however broadly defined? Why not say that such protection goes with all people to all places at all times?

I must concede that a public street affords less privacy than a home. But privacy *in general* is not the fourth amendment's concern. Its concern is freedom from unreasonable searches and seizures, a freedom which is not sensibly circumscribed by time or place. A policeman can, to be sure, properly observe a great deal about us when we are in a public place. This is not, however, because the fourth amendment should not apply in a public place, but because his observations in public places are much less likely to be unreasonable.

2. Testing

[Editors note: At this point, the formulation is tested against ten fact situations - some are decided cases, some hypotheticals.]

3. Evaluation

The "reasonable expectation of privacy" formulation is, I believe, the wrong question to be asking wholly apart from the matter of whether or not the Court is doing a good job of answering it. (It isn't.) The Court is forced by this formulation into one of two unpleasant postures, and cases demonstrate it has adopted both: *either* it must simply conclude by *tour de force* that given expectations are unreasonable or it must offer logical support. Let us examine some of the justifications the Court has offered.

a. The Analogy to Private Citizens

The Court, as we have seen in the last section, often invokes images of the general public, the "curious passerby," the flying public, or a surrogate for the public (neighbors, for example) to find expectations of privacy unreasonable. It is interesting to note how this analogy comes and goes in the cases. Sometimes we hear about these folks

and sometimes we do not; often the reason we do not is that these folks, should they do what the police have done, would be committing torts or crimes. Of course the curious passerby may glance, even purposefully look, into a house from the sidewalk. But if he begins walking through "open fields," looking in buildings, and digging up the earth, he will need a good lawyer. He could fly over your property, but if he stakes you out with binoculars and startrons, he might be liable in tort for "invasion of privacy" or "outrage" and prosecutable criminally under Peeping-Tom Statutes.

When doing constitutional jurisprudence, references to the legality or illegality of actions of private citizens are usually beside the point. Tort law and criminal law, among others, restrain private action. The Constitution restrains state action. This latter restraint is sometimes more than the former, sometimes less. If a policeman breaks into a house and seizes drugs, this is a search and seizure testable under the fourth amendment. If a private citizen were to do the same thing, he would commit burglary and theft. The fact that a private citizen may or may not lawfully engage in a given action is neither necessary nor sufficient to conclude that a policeman may or may not do that same act for a governmental purpose.

b. The "intimate activities" argument

In its decision in *Riley* (a case in which the police hovered over the defendant's back yard in a helicopter to look into a greenhouse that was not visible from street level, and identified marijuana from a height of 400 feet), the Court notes: "As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed...." The Pennsylvania startron case (in which the police staked out defendant's third-floor apartment from an apartment across the street for nine days, and who, with the aid of binoculars and a startron [an infrared device which enhances capacity to see into low light areas],

witnessed persons other than the defendant engage in sexual activity) indeed seems to turn not on what the policeman did, but on *what he saw*. But with all due respect, how can one sensibly judge whether or not activity is a search by reference to what is observed? If police break into your house and find nothing, have they not been searching? Have you not suffered the intrusion? This kind of retrospective reasoning is like saying that all events which *happen* were perforce "foreseeable." Or even "inevitable." I cannot imagine how a person's right to privacy can, without compromising the very *idea* of privacy, be rationally made to turn on what he does with it. The fourth amendment prohibits unreasonable searches and seizures not because they may yield results but because, regardless of their yield, they are improper intrusions.

c. The Policeman's Location

Because the *Katz* question is framed in terms of the expectations of the homeowner to be free from outside intrusion, the focus of the recent cases is, as we have seen, on where the policeman *is located* rather than on what he sees (or hears, etc.) *into*. Note the irony: the "reasonable expectation" rubric, an approach by which the Warren Court self-consciously selected the "protected-place" rather than the "police-activity" perspective, ends up under the Burger-Rehnquist courts concentrating on where the policeman *is physically located* rather than on what place he *intrudes upon*! To the extent the Court now focuses on where a policeman "has a right to be" and not on what he has a "right to view," something akin to the old trespass requirement is back with a vengeance--the policeman needs only to justify his *location*, which is often outside any protected area. And today, of course, there are considerably more tools to intrude on people's privacy without physically trespassing into "protected areas."

B. A Proposed Reach Formulation

1. Description

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The pre-*Katz* notion that "reach" was a function of two perspectives--place and kind of activity--was attacked head on by Professor Anthony Amsterdam. Referring to *Katz*, he stated:

If the word "intrusion" is used, as "violated" plainly was, to mean only that interests protected have been defeated by the "Government's activities," I have no quarrel with it. The problem with the word lies in its subtle suggestion that a particular kind or sort of government activity, labeled an "intrusion," is necessary to trigger the fourth amendment. But this, in my view, was precisely the approach to fourth amendment coverage that *Katz* decisively rejected.

My argument is that this is precisely the approach that *Katz* decisively missed. Professor Amsterdam continued:

The entire thrust of the opinion is that it is needless to ask successively whether an individual has the kind of interest that the fourth amendment protects and whether that interest is invaded by a kind of governmental activity characterizable by its attributes as a "search." Rather, a "search" is anything that invades interests protected by the amendment.

I agree with Professor Amsterdam that there should be one test for "reach," not two, but I suggest that the Court in *Katz* chose the wrong one. If we follow Professor Amsterdam's suggestion that a search is "anything that invades interests protected by the [fourth] amendment," we must next identify those interests. If we attempt to define them broadly as "privacy, security, liberty," the definition includes many interests protected by other constitutional guarantees, by statutes, by common law, and some interests not protected at all. "Privacy"--what Justice Brandeis

called "the most comprehensive . . . and the most valued by civilized men," the "right to be let alone"--is a constellation of interests protected, in its various forms, by the first amendment provisions dealing with association and religion, the third amendment on troop quartering, the fifth-amendment privilege against self-incrimination, and the ninth amendment retained-rights clause, not to mention those privacy-centered interests, like birth-control information, which have been found "emanating" and/or "penumbrating" from the Constitution's text. By the time we cull out these other aspects of privacy, the "interest" underlying the fourth amendment is to be free from uninvited governmental intrusions. The fourth amendment "interest" is, in short, to be free from *unreasonable searches and seizures*. If we then turn around and define a "search" as "anything which defeats this interest," we could be indicted on suspicion of felonious question-begging.

Rather than define the activity in terms of the interest (a search is anything that intrudes on a reasonable expectation of privacy) or the interest in terms of activity (the fourth amendment protects those places we want free from intrusion), I propose that we define the governmental activity in its own terms--that we take the word "search" to mean what it means. Pretty radical. My test for "reach" is as follows: *to search is physically to seek through any of the senses for a governmental purpose*, including, of course, crime detection.

I anticipate the following general objection to my proposal that "search" be defined as "any physical seeking for a governmental purpose": "That is entirely too broad. Everything a policeman does is searching under this definition." Well, not everything. But, truth is, police do a lot of searching. It is a large part of the job. However, it cannot be persuasively argued that because activity happens routinely, the Constitution ought take no note of it--indeed, it ought to be especially interested in it. And, of course, most of these searches are

reasonable. The fourth amendment will "reach" them, but it will not "grasp" them. When they become unreasonable, however, the fourth amendment will be there to strike them down.

And, at bottom, what has happened, I think, is this. (I trust you will grant me a short, political digression.) Using the *Riley* helicopter case as an example, the Court, from a reading of the entire record, concluded that, under the circumstances (including the anonymous tip), the police acted properly to detect a suspected crime. The Court was, therefore, comfortable affirming *Riley's* conviction. But it took this comfort born of a judgment about the conduct's "reasonableness" and translated it--because the "reach" doctrine is so tractable to this--into a finding that the police were "not searching."

But what of those cases looming out there when the Court *does not* think the police have acted properly? The Court will want the Constitution to "grasp" these cases but its "reach" will be too short.

2. Testing

[Editors note: the proposed formulation is, at this point, applied to the same ten fact situations.]

3. Evaluation

The proposed "reach" formulation produces, I think, demonstrably better, more sensible, results in the tested cases. Its focus is on the police, not the vague "expectations" of the average citizen. It frees the Court to scrutinize all uninvited intrusions under the fourth amendment.

Yet, two categories of objections to the proposed formulation can be anticipated. At the "reach" level, a test turning on governmental motivation rather than location is more difficult to administer. A person's location is often provable through direct evidence; his motivation must usually be proved circumstantially. Once a policeman

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learns that certain motivations place his activity outside the fourth amendment, what prevents him from always claiming the innocent motivation? Aside from the obvious fact that police can attempt to manipulate *any* rule (they can lie now as to *where* they were), most of the police activity involved in these cases permit very unambiguous inferences about motivation. The law, including Constitutional law, is rife with instances in which a court must judge motivation, intent, premeditation, knowledge, purpose, belief, etc. and it accomplishes this task, for the most part, without grave difficulty. In troublesome areas, courts can use well-proven legal techniques to prevent abuse; the burden of proof, for example, can be imposed on the government to *disprove* search motivation under all or specified circumstances. One can, for example, easily imagine a rule which presumes a search, absent strong rebutting evidence, whenever a policeman enters a house.

The second category of objection is that the proposed formulation, because it recognizes so many more "searches," places undue stress on the "grasp" issue--"reasonableness." It must be conceded that reasonableness doctrine will have to be more finely tuned. Consider these observations of Professor Amsterdam:

The problem with the graduated model, of course, is [that] it converts the fourth amendment into one immense Rorschach blot. The complaint is being voiced now that fourth amendment law is too complicated and confused for policemen to understand and obey. Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale.

It is often preferable, however, to adopt a rule which generates doctrinal complexity rather than one which simplifies a problem by ignoring it, especially when ignoring it begs abuse, and, most especially, when that abuse will come from the government.

Moreover, the Supreme Court has in fact, since Professor Amsterdam's cited writing, already gone a very long way toward instituting the graduated model of reasonableness. Current doctrine recognizes all of the following concepts: physical restraint less than a typical arrest (called a "stop") justified by less than the probable cause required for arrest; physical restraint more intrusive than a common arrest (like killing the arrestee, at the extreme) justifiable only under compelling circumstances; and "searches" less intrusive than typical ("frisks," magnetometer scans at airports, administrative searches, etc.) as well as those searches uncommonly intrusive (strip searches, body-cavity searches, surgery to remove evidence, etc.), all of which require respectively less or more justification than usual. The Court seems quite comfortable administering this "sliding-scale" approach to "reasonableness."

I do not believe that the task of fitting all the new "searches" into this existing graduated model would be difficult. For example, the Court could quickly establish that all naked-eye searches from public streets or sidewalks are *per se* reasonable absent bizarre aggravating circumstances; that views into a house from a consenting neighbor's property are justifiable upon a showing of "reasonable suspicion"; that views into houses utilizing advanced technology and/or strategic location require "probable cause" and, perhaps, prior judicial approval. The varieties of police behavior may be innumerable, as Professor Amsterdam suggests, but they do tend to fit into broad, predictable categories. Despite the difficulty of such a task, however, it is preferable to burying the whole problem under the headstone, "No Search."

CONCLUSION

To conclude, fourth-amendment analysis should begin by scrutinizing governmental activity to determine if it is the kind of activity that provision is concerned about. The amendment, insofar as it extends to searches, should be understood to "reach" *any* physical seeking for a governmental purpose. Such an understanding would insure that the Court's function as guardian of constitutional liberties will not be jeopardized by decisions which put the reach too short. Once reach is too short, other branches of government must act to remedy injustices; it is crucial to note that many victims of governmental abuses have historically not had much access to those other institutions.

Under my proposal, which governmental searches are reasonable remains, as before, to be debated in an ongoing judicial discourse. The fourth amendment should not grasp everything it can reach. Indeed, the Constitution's reach must exceed its grasp, or what's a Supreme Court for?



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