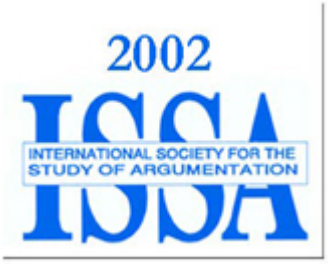
ISSA Proceedings 2002 – Reasonableness Before Rationality: The Case Of Unreasonable Searches And Seizures



I find Perelman's (1979) claim that the rational and the reasonable are distinct, freestanding ideals – that they are not interchangeable terms, but in fact, in certain cases, the rational and the reasonable are in precise opposition – to be his most important political insight. For instance, Perelman argues as applied to the law the "rational corresponds to adherence to an immutable divine standard or to the spirit of the system, to logic and coherence, to conformity with precedents, and to purposefulness; whereas the reasonable, on the other hand, characterizes the decision itself, the fact that it is acceptable or not by public opinion, that its consequences are socially useful or harmful, that it is felt to be equitable or biased (p.121)." The rational corresponds to mathematical reason; the reasonable corresponds to common sense. The rational purports to transcend all particular situations and apply equally to all persons regardless of circumstance; the reasonable is defined in relation to and bound by time, place and situation. However, both the rational and the reasonable strive for universality: the rational through an approximation of divine reason or immutable principle, the reasonable through the construction of a working consensus achieved through open and searching dialogue over the dictates of common sense and the standards of fair cooperation. It is because both the rational and the reasonable strive for universality and more precisely because each standard routinely fails to achieve universality due to the structural indeterminacies of communication as well as the contingencies that mark social life that they stand in a productive dialectical tension. Neither the rational nor the reasonable are sufficient by themselves to ensure either a true or just social order. The rational if left unchecked by the dictates of common sense and fairness would devolve into an inhuman

instrumentality. The reasonable if unchecked by the systematicity of the rational would devolve into ethnocentrism. Hence, for Perelman, it is "the dialectic of the rational and reasonable, the confrontation of logical coherence with the unreasonable character of conclusions, which is the basis for the progress of thought (p. 120)."

Much of the reception of Perelman's work, it seems, abandons this dialectical stance – where each of these distinct standards would be entertained simultaneously, not to reject one in favor of the other, but, to have them constantly modify each other – in favor of the claim that practical reason is exemplary for theoretical reason. Perelman, and even more so his most articulate defenders such as Crosswhite (1996), Maneli (1994) and McKerrow (1982), hold that logical criteria, epistemic principles, and methods of inquiry are the result of a socialized, embodied, practical constellation of reasoning practices and norms of justification. These criteria, principles, and methods (which combine to form a community's understanding of rationality) do not exist as antecedent conditions for discovery and justification, but have emerged over time as the consequences of dominant processes of inquiry. Hence, the criteria of theoretical reason do not govern practical reason: practical rationality is the grounds for and therefore determines, the cogency of technical rationality and sets the limits for it. The relationship between the rational and the reasonable set out in the classic epistemic account is thereby inverted: the reasonable, understood as common sense, is the condition of possibility for the rational. It is this reversal – of the classical ideal of phronesis over the modern norm of instrumental rationality – that allows public judgment to serve as a normative standard for critiquing scientific knowledge that is the hallmark of contemporary rhetorical theory.

In what follows I support the counter-intuitive claim that it is possible to agree wholeheartedly with Perelman and his interlocutors about the nature of rationality and its social-communicative basis yet hold that this treatment of the reasonable as the grounds of rationality may have grave political consequences. That is, I contend that the move from conceptualizing the rational and reasonable as distinct, freestanding ideals to an understanding of reasonableness as a socialized, communicative, and embodied correction to the modern forms of instrumental reasoning sacrifices too much. The reasonable, as I hope to show, is better thought of in purely political, that is non-epistemic, terms as the standard of justification concerned with the legitimacy of the social application of power; a

legitimacy which is cashed out in terms of both democratic participation and preserving the minimum psychic and material conditions of freedom, equality and dignity. It is this full bodied sense of the reasonable, one as Perelman argues is embodied in our common sense, but not understood as a common understanding but the common ethical sensibility called into being through an articulation of a political sense of justice, that is robust enough to serve as the dialectical counterpart to the rational.

But rather than continue this argument in theoretical terms, as I have done on several occasions in the past (1999; 2001), here I pursue this line of argument by working through a case. Specifically, I will look at the career of the reasonable in the U.S. justice system; a career that in one important aspect turns on the question of what constitutes a reasonable search and seizure. For the purposes of this essay I will focus on an important case, *Terry v. Ohio* (1968) and its progeny, a case that deals with the constitutionality of the police practice of "stop and frisks," investigative detentions and searches for weapons on the bodies of criminal suspects on the street.

1.

It was (and in some areas still is) common practice for police officers to patrol minority neighborhoods for anyone they thought looked "dirty," stop their car, jump out and throw their suspect up against the wall and give him or her a "toss" – a thorough search through his or her clothing and belongings, often accompanied by physical and verbal abuse (Harris, 1998). Prior to 1960 any contraband discovered in a toss could be used to arrest and convict, no questions asked. *Mapp v. Ohio* (1960), however, changed the rules for any case in which the Fourth Amendment arose. After *Mapp*, which held that the exclusionary rule applied to the states, police were instructed that all searches had to be based on probable cause. Probable cause, Mapp declared, exists "where the facts and circumstances within the officers knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed (p. 655)." Thus gut instincts or bare hunches were no longer sufficient, the police had to "know based upon the facts present before them" that suspects were committing a crime if any contraband turned up in a search was to be used as the basis for conviction.

For the eight years between *Mapp* and *Terry* probable cause constituted a

reasonable search and seizure. Civil rights activists applauded the court's application of the probable cause standard, arguing that its rigorous epistemic norms helped deter malicious police conduct. Because the probable cause standard, the NAACP argued in it amicus brief in *Terry*, "seeks precisely to objectify, to regularize, the reasoning process by which the judgment of allowability of police intrusions is made" it is the only effective means of diminishing "as much as is institutionally possible the impact of subjective factors" underwriting the conduct of racist police officers (Greenberg, et al., 1968, p. 603). Three epistemic requirements inherent in the probable cause standard were said to help deter discrimination: the use of a reasonable man standard to depersonalize the judgment of the officer's conduct, the removal all questions of value and any normative evaluation of the desirability of police conduct thereby reducing the question to one of objective facts, and the directive that judges remove all traces of professionally motivated intuition in favor of an "independent and autonomous judgment." "In short," the NAACP concluded, "probable cause is a common denominator for police, judicial and citizen judgment. It permits the judge, after hearing the officer's account of his [or her] observations and his [or her] inferences from them, to pass a detached, independent and objective judgment on the rationality of those inferences (605)."

By 1968, there was considerable backlash against the Warren Courts'criminal procedure decisions. Nixon was making campaign promises to reverse the Warren courts liberal jurisprudence and restore respect for law and order. In the wake of race riots in New York, Memphis, Nashville, Minneapolis, Chicago, Washington D.C., police advocates, such as the Americans for Effective Law Enforcement and the National District Attorneys Association, were arguing that the stringent requirements of probable cause should not be held applicable to entire facets of policing such as investigative stops and/or frisks for concealed weapons. It was against this backdrop that the Supreme Court agreed to hear *Terry v. Ohio*, a case challenging the constitutionality of stop and frisks without probable cause.

On October 31, 1963 Detective Martin McFadden, a 39 year veteran of the Cleveland Police force, observed John Terry and Richard Chilton walk down the street and peer into a store window (he was unsure if it was a jewelry store or a United Airlines ticket office) approximately twenty times between the two of them over the course of twenty minutes. During this time Detective McFadden saw a third man approach, speak briefly with Terry and Chilton and then depart. Terry

and Chilton soon left the corner and went down the street where they met the third man and the three of them began conversing. Suspecting that the three men were casing the store for a robbery, McFadden approached them, identified himself and asked for their names. After receiving a "mumbled response" he spun the three men around and patted down the outside of their clothing. He found a gun in both Terry and Chilton's coat pockets and proceeded to charge each of them with carrying a concealed weapon. Terry and Chilton petitioned the Supreme Court to resolve whether the officer had, by frisking them, arrested them without probable cause in violation of the Fourth and Fourteenth amendments.

The court held that the stop and frisk was reasonable although Detective McFadden lacked both a warrant and probable cause. Chief Justice Warren argued that because judges could not approve street stops in advance, hence a stop-and-frisk warrant is impossible, the reasonableness of a stop and frisk is not judged by the presence or absence of probable cause. To determine reasonableness, the Court first had to assess if the governmental interest served by the search is sufficient to justify the level of intrusion on the individuals' privacy and, second, whether the officer had a good enough reason to justify the stop. The Court held that the intrusion presented by a short stop and frisk, while significant, was outweighed by the need to combat crime and that Detective McFadden's field experience and the nature of the facts (though themselves a collection of innocent behaviors) were sufficient to warrant reasonable suspicion. Furthermore, the Court ruled that a frisk is allowed if a reasonably prudent officer would suspect that the person is armed and dangerous. Given Detective McFadden's suspicion that a violent crime was imminent, it would be unreasonable to ask him to attempt to question potentially dangerous criminals without having the power to check them for weapons.

In *Terry v. Ohio* the Supreme Court radically changed the law. Police could now perform investigative stops and bodily searches on citizens as long as they had an "articulable suspicion founded upon reason." And it is this standard of "reasonable suspicion" – more than an inchoate hunch but less than probable cause – that has been the centerpiece of Fourth Amendment jurisprudence since. A stop and frisk is reasonable, the Court claimed, when the officer can articulate the reasons for his or her suspicion that criminal activity was imminent. Reasonable suspicion differs from probable cause by recognizing that facts alone

do not make for the officer's suspicion, but these facts are always interpreted within the total context and in light of the officer's past experience. In the hurried and often volatile context of police work, suspicion is often founded on "common-sense" and "prudence" rather than rational, dispassionate, and autonomous induction. Like professionals in other fields, a trained officer with experience in a community can often sense something wrong even if he or she does not have the tools of legal and social scientific justification to back her or his claims. To satisfy the court, the officer simply must be able to produce a coherent and plausible narrative account of why he or she suspected wrongdoing. In essence, *Terry* worked by mapping a continuum of police-citizen interaction: arrest – stop and frisk – noninterference onto a continuum of epistemic seriousness: probable cause – reasonable suspicion – mere hunch. Each interval down the scale of police interference was met with a corresponding decrease in the degree of epistemic seriousness needed to justify the intrusion. Rhetorically, by placing reasonable suspicion in the middle of the continuum – between a probable cause standard that is founded upon a sterile and impossible account of rationality and the arbitrary relativism of the inchoate hunch, and mapping those epistemic norms onto the account of police conduct poised between the maximally intrusive threat of an arrest and the equally fear inducing image of police so bound by legal technicalities that they are unable to do anything – *Terry* works to render reasonable suspicion as an inherently attractive compromise between the need to fight crime and respecting individual freedom. Reasonable suspicion, in short, sounds eminently reasonable.

2.

The "terry stop" and "terry frisk" have become routine law enforcement practices. And the reasonableness test set out in *Terry* does not just hold for stops and frisks anymore but has become the basis on which most Fourth amendment claims are decided. Instead of carving out a narrow exception to the probable cause standard, what Warren intended, reasonable suspicion is the norm and probable cause the exception – a particular type of inference, one founded on especially strict standards of proof, applicable only in those cases when a warrant is necessary. Thus, in this case, the reasonable has become the grounds of the rational.

This expansion of *Terry* has been a gradual one. While prevalent in the rhetoric of the Rehnquist Court – and one need to look no further than Brennan and

Marshall's consistent stream of dissents (in fact both Justice recanted their decision in *Terry*) to see how pliable the idea of reasonable suspicion has become in the hands of Rehnquist – it is the lower courts that have done most of the dirty work in eviscerating the probable cause standard, requiring less and less evidence for a search and seizure (Harris, 1998). Two doctrinal devices have been key: the acceptance of categorical judgments as the basis for reasonable suspicion and a practice of post-hoc review that rationally reconstructs police accounts so they almost always meet the standard of reasonableness.

The last twenty five years have seen the lower courts steadily move away from *Terry's* insistence on individualized suspicion. "Instead," as David Harris points out, "lower courts have begun to rely on a categorical jurisprudence – that is, an ascertainment of whether the suspect fits into one or more overly broad categories, instead of an examination of facts that would tell both the officer on the street and a court deciding a suppression motion whether or not there was reasonable suspicion to believe that a person was involved in crime and armed (1998:987)." Thus police can stop based on factors such as being in a high crime area, acting evasive, and looking like you do not belong in a certain part of town, regardless of the actual circumstances. Moreover, police officers can perform bodily searches if they believe that the suspect is involved in a "highly dangerous" activity such as narcotics trafficking (the courts have also allowed searches for possession too, even though such cases are much less likely to involve weapons) and burglary. Police also are free to search any and all persons accompanying suspects, including all passengers involved in a traffic stop or, in a decision that came down just this week, all persons who are on the same bus as a suspect. The problem with such categorical judgments, in addition to the obvious fact that they are often merely pretexts for harassing minorities, is that they are very inaccurate indicators of criminal behavior and will inevitably affect many innocent citizens.

If nothing comes of the search, which is often, the officer will never have to articulate the reasons for the stop and there will be no basis by which to challenge any indiscretion or abuse. The stops that an officer has to justify are those resulting in prosecution and in those cases the officer will get considerable help from the prosecutor (and because the facts warranting suspicion are considered objective and their interpretation merely a recollection – which may have to be drawn out, like a doctor making a diagnosis on the basis of reported symptoms – the court condones this practice). Further, since courts prefer to rely

on the "common-sense" of the police officer in the field virtually all stops are affirmed. In determining reasonableness the Court eschews the analysis of probabilities as an example of an unreasonably "Procrustean" application of legal formalism in favor a "practical, non-technical, common-sense" standard of proof. According to Justice Blackmun in *United States v. Cortez* (1981), "the process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact finders are permitted to do the same – and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement (418)." Even a cursory reading of recent cases provides many examples of the Court performing the most charitable of rational reconstructions, filling in the missing premises and supplying the appropriate backing so that officer's common-sense inferences take the shape of rational argument.

If living in a high crime area and acting evasive are reasonable grounds for a stop and frisk, it is obvious that minorities will find themselves subject to a disproportionate number of searches and seizures. African-Americans and Hispanic Americans are likely to find themselves in high crime areas simply because they live and work there. Moreover, they may have very good reasons for wanting to avoid contact with the police given the history of baseless searches being used as a pretense for public humiliation and physical abuse. This results in, as David Harris points out, a vicious cycle. "Police use *Terry* stops aggressively in high crime neighborhoods; as a result, African Americans and Hispanic Americans are subjected to a high number of stop and frisks. Feeling understandably harassed they wish to avoid the police and act accordingly. This evasive behavior in (their own) high crime neighborhoods gives the police that much more power to stop and frisk … [Hence] those communities most in need of police protection may come to regard the police as a racist, occupying force; … an American form of apartheid, in which racially segregated areas are patrolled by police agents … imbued with special powers because of the dangerous nature of the areas they control (1994: 681)." The erosion of *Terry* in the name of reasonableness makes abundantly clear, as Gregory Williams concludes, "that the recent line of *Terry* cases … is this Court's version of *Plessy v. Ferguson*." These decisions "clearly permit the establishment of separate and unequal societies … If society has to live with results of these decisions, then the Supreme Court must

face the fact that instead of contributing to the development of an equal and just society, it is contributing to racial polarization by its refusal to explicitly discuss the racial implications of it decisions (1991:586)."

Plessy's insistence that the constitution is "color-blind" was incorporated into the Court's understanding of the Fourth Amendment in *Whren v. United States* (1996). Writing for a unanimous court, Justice Scalia unequivocally stated that the officer's subjective intentions, even if racist, are irrelevant to the determination of the unreasonableness of a search or seizure (though the court in *Brigoni-Ponce* (1975), a case concerning border searches, claimed that the race of the suspect can be a positive factor in assessing whether an officer has reasonable grounds for a search). Scalia argued that if the Constitution prohibits discriminatory law enforcement practices, the remedy should be found in the Equal Protection Clause rather than the Fourth Amendment. This is an empty promise. An equal protection violation is almost impossible to prove: A defendant must show, by a preponderance of evidence, that the officer who stops him or her treats African Americans (for instance) differently, as a whole and with conscious intent, than Whites. But since police reports and judicial opinions often leave out the suspects race, and the police force and justice department is under no obligation to provide statistics on stops this claim can not be substantiated (and here it should be pointed out that Warren wrote Terry in race neutral language, even though Terry and Chilton were African American and Detective McFadden could not articulate any other reason than he "did not like the way they looked" for watching Terry and Chilton for twenty minutes).

I think there is clear and convincing case to be made that the Rehnquist Court has reversed the promise of the Fourth Amendment. Rather than securing the citizenry from "unreasonable" governmental intrusions and protecting the conditions of possibility for personal dignity for all, the current interpretation of the Fourth Amendment is now part of a strategy, with reasonableness as it primary analytical weapon, for expanding police power.

Many constitutional commentators echo the NAACP's sentiment that that the only way to halt this evisceration is to return to a pre-*Terry* formulation of probable cause: "Indeed the, the mission of stop and frisk theory to establish some third state of police powers, midway between those that can be exercised wholly arbitrarily and those available only upon probable cause, has the allure of sweet reasonableness and compromise. The rub is simply that, in the real world, there is

no third state; the reasonableness of theory is paper-thin; there can be no compromise. Probable cause is the objective, solid and efficacious method of reasoning – itself highly approximate and adaptable, but withal tenacious in its insistence that common judgment and detached, autonomous scrutiny fix the limits of police power … Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim (Greenberg, et. al., 1968:56-57)"

As comforting as the ideal of a dispassionate and objective norm of rationalitysounds when confronted with the alternative of arbitrary or worse, malicious power – and what the NAACP really fears that malicious cops will be able to harass minorities unfettered by the law (but how can a standard of proof really deter violent police conduct if police typically do not arrest those they harass) – a return to a pre-*Terry* probable cause standard is neither feasible or desirable. First, the doctrinal framework simply does not exist to overturn *Terry* without the Court simply admitting it was wrong (think of all the convictions that would be challenged), let alone the political climate certainly weighs against such a return. Second, if the court were to return to the probable cause standard they most certainly would react by substantially narrowing the range of police conduct accountable to the Fourth Amendment (remember the most common argument of police advocates at the time of *Terry* was that a stop and frisk did not constitute a search or seizure at all. Furthermore police misconduct was rampant before *Terry*). Finally, as Ahkil Amar (1998) argues, the court may very well continue down its current path by simply watering down the probable cause requirement altogether (which in many ways it already has). "If that happens we will have betrayed the textual command of the second clause of the Fourth Amendment: We would be allowing *warrants* on something other than true probable cause. In other words we would be authorizing general warrants [warrants that give unlimited power to search, survey and seize anything that is held to contravene the State's objectives, something like section 218 of the USA Patriot act]-precisely the evil the Framers meant to reject in the second clause (1116)."

But, most importantly, simply calling for a return to the probable cause standard neither answers the initial questions posed to the *Terry* Court – what degree of certainty can be realistically expected of police officers in the midst of investigating a crime and what sorts of preventive measure can they take to

protect themselves–and thus cannot explain the shift to reasonable suspicion, nor does it alleviate the real fears of malicious police conduct.

To address the first issue is to ask for what sorts of reasons should police be able to stop and frisk a suspect. Warren's answer, which I think a good one, was if the officer had good reasons to think that a crime was about to take place. Warren understood that having a good reason did not mean certitude or even a mathematically precise sense of probability. He also understood that in the midst of the situation police have to rely on less evidence and react in less time than most of us would ever be willing to; that is, he understood that there was such a thing as a valid hunch. Police work is inherently subjective. But, because it is so, officers have a special responsibility to constantly review their conduct and assess the reasons for their acts. And the purpose of the magistrate is to review those especially problematic cases, cases where mistakes may have been made. The contextually sensitive, temporally responsive and biographically informed practice of reasoning that Warren tried to describe in *Terry* does not fit the bill of probable cause, if by that term we mean an impartial, universal and objective standard of proof. But it certainly is not arbitrary either; our inferences and justifications do not have to be formally valid to be rational and thus worthy of assent. I take the central teaching of (to borrow a phrase from Warren) argumentation theory to be just that. I am sure that Warren would be appalled at the direction the Rehnquist Court has taken *Terry*, as were Brennan and Marshall. I am sure that he would find the authorization of mindless categorical judgments (really no more than stereotypes) and the practice of *de novo* review (really just a rubber stamp for police conduct) to have so cheapened his account of reasonable suspicion that he too may have wanted to recant *Terry*. The important question is why did his account of reasonable suspicion turn out so badly. As I have been suggesting throughout this essay, I think the problem began by positing probable cause as this unattainable – and I would argue never really followed – ideal of rationality that was always juxtaposed to the relativism of the baseless hunch, so that the middle ground of reasonableness was left wide open. As long the Court held to the requirement that the officer have a reason justifying the search and seizure – for Rehnquist it seems this can be almost any reason at all – its decisions fall into the middle ground of "sweet reasonableness" and efficacious compromise, promised by *Terry*. The ambiguity offered by the ideal of reasonableness, defined as a sort of epistemic middle ground, has thus, masked the real questions posed in *Terry*: What are the standards of rational inference that we, as a political

community founded on the ideals of freedom, equality and truth, believe to be necessary to justify police conduct in particular situations and how should we evaluate those inferences? That is, *Terry* should have been taken as the first step in formulating of justification hierarchy, a hierarchy that could be used as a guide to determine the sorts of reasons, the types of evidence, and the relevance of particular inferences necessary to justify some application of police power (Slobogin, 1998). These are questions of rationality.

To address the second issue – the problem of malicious police conduct – we have to move beyond rationality and turn to a political conception of reasonableness. No matter how good the reasons that police have for conducting a search or seizure some forms of police conduct are simply unreasonable: for instance, the humiliation of being forced to take off your shoes and pull down your pants in public under the pretense of being searched for narcotics, being held for twenty-seven hours without being charged of a crime and being told that your detention will continue until you defecate into a bucket in a room full of police officers and other airport personal, or to being forced out of your vehicle and thrown against the hood of your car hands down, legs spread for sitting too long at a stoplight, to use some recent examples of court approved stop and frisks (Saleem, 1997). What the proponents of a return to the probable cause standard miss is that the quality of the reasons driving the officers investigation, that is the question of why he or she is conducting the search, should not determine the level of dignity, security or liberty afforded to the suspect. For once we let the answer to question of why search – the rational justification underwriting the officers conduct – determine the question of how he or she should search we lose much of our ability to secure persons from malicious police conduct. The question of whether a stop or frisk is reasonable does not, then, turn on epistemic grounds (unfortunately proponents of racial profiling and coercive police tactics are not always inarticulate and irrational). Rather, to determine reasonableness the court must answer two questions: Does the police conduct involved in the search and seizure contravene the psychic and material conditions necessary for freedom, equality, and dignity – in short the requirements of full citizenship? And, secondly, is the officer's conduct proportionate to the gravity of the offense. In other words, has the officer used the least intrusive means available, or at a minimum the least intrusive means reasonably available, to conduct the stop and frisk in a manner needed to both effectively investigate the possibility of criminal activity and to protect her or his safety? In Terry, Warren treated both of these questions carefully; recognizing

that the bodily integrity and dignity of Terry and Chilton had indeed been compromised, he argued that the brief detention and surface level search of their outer clothing for weapons was indeed the least intrusive response reasonably available to Detective McFadden. Unfortunately, Warren used the term reasonable to refer to both the test for proportionality and the test of the veracity of McFadden's suspicion in deciding to stop Chilton and Terry. In doing this he sacrificed the opportunity to flesh out a standard of reasonableness robust enough to be used as the basis for challenging malicious police conduct, perhaps through administrative actions, injunctions and civil suits for discrimination. I hope that the arguments I have given here are sufficient to convince you that this mistake is much more than an issue of semantics, or at the very least this semantic and conceptual confusion has resulted in some rather grave consequences.

While many commentators have cursed the framers of the constitution for being too vague in their formulation of the Fourth Amendment, I think their solution was brilliant. By writing two grammatically freestanding clauses – a reasonableness clause that defines the parameters for the coercive power of the state from within the right of all persons to be secure from violations of the conditions necessary for personal freedom and dignity (which I understand as the essential meaning of being secure) and a warrant clause that requires that all searches and seizures would be justified by reasons that are "manifestly rational" (Johnson, 2000) – and conjoining them rather than separating them by a period, the framers set out in beautiful detail the proper relationship between the rational and the reasonable. They are freestanding ideals, distinct in nature and each demanding its own unique form of justification; yet complementary, each providing an essential check for the other.

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