

7-1973

The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations

Steven H. Shiffrin

Cornell Law School, shs6@cornell.edu

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Shiffrin, Steven H., "The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations" (1973). *Cornell Law Faculty Publications*. Paper 1177.

<http://scholarship.law.cornell.edu/facpub/1177>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE SEARCH AND SEIZURE OF PRIVATE PAPERS: FOURTH AND FIFTH AMENDMENT CONSIDERATIONS

There is a recognizable factual distinction between the search and seizure of private papers and the search and seizure of non-documentary items.¹ It is difficult, however, to decide when such a distinction should assume constitutional dimensions. Specifically, are there circumstances under which private papers should be immune from search and seizure? In a 1967 landmark case, *Warden v. Hayden*,² the United States Supreme Court raised doubts concerning the continued validity of decades of settled law³ on this important issue. *Warden's* reopening of this problem aroused the curiosity of commentators,⁴ spurred new policy arguments in the American Law Institute,⁵ divided the lower federal courts,⁶ and raised fundamental questions concerning the central meaning⁷ of the Fourth and Fifth Amendments. This Comment will

1. "Papers are the owner's goods and chattels; they are his dearest property." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765). "There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect [P]rivate papers are almost inseparable from the privacy and security of the individual." *State v. Bisaccia*, 213 A.2d 185, 191 (N.J. 1965).

2. 387 U.S. 294 (1967).

3. The general categories were settled; their application, however, was a constant source of confusion and criticism. See text accompanying notes 43-48 *infra*.

4. See, e.g., T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 93-95, 101-03 (1969); 20 ALA. L. REV. 149 (1967); 32 ALBANY L. REV. 229 (1967); 17 AM. U.L. REV. 119 (1967); 20 BAYLOR L. REV. 122 (1968); 34 BROOKLYN L. REV. 309 (1968); 17 BUFFALO L. REV. 213 (1967); 6 DUQUESNE U.L. REV. 60 (1967); *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 110, 112-17 (1967); 42 ST. JOHN'S L. REV. 425 (1968); 46 TUL. L. REV. 545 (1972).

5. Compare ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 210.3, Note and Comment (Proposed Official Draft No. 1, 1972) with ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 1.03(2), Note and Comment (Tent. Draft No. 4, 1971) and ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 1.03(2), Note and Comment (Tent. Draft No. 3, 1970). See also 48 ALI PROCEEDINGS 426, 429-31 (1971); 47 ALI PROCEEDINGS 59, 61-62, 74, 77-80, 82 (1970).

6. Compare *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), with *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971), and *United States v. Blank*, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972). Most of the other cases dealing with the issue since *Warden* are collected in note 112 *infra*.

7. Cf. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191 (1964).

explore the background leading to the present state of legal confusion, assess recent trends in decisional law, discuss the relevant policy arguments, and suggest a new approach regarding the search and seizure of private papers.

I. THE BACKGROUND

An analysis of search and seizure involving private papers can profitably begin with the "great case"⁸ of *Boyd v. United States*.⁹ In *Boyd* the District Attorney of the United States for the Southern District of New York procured an order from a district judge demanding that defendant Boyd produce an invoice for twenty-nine cases of plate glass previously imported into the country.¹⁰ Boyd produced the invoice but subsequently questioned the constitutionality of the order, claiming the invoice was to be offered in evidence against him at trial.¹¹ Justice Bradley, speaking for the Court, upheld Boyd's contention on both Fourth and Fifth Amendment grounds:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.¹²

Justice Bradley reasoned:

[T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's

8. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). *Carroll v. United States*, 267 U.S. 132, 147 (1925), referred to *Boyd* as "the leading case on the subject of search and seizure." See also W. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 3.01 (1972) (describing *Boyd* as "the first case of any importance involving the Fourth Amendment.").

9. 116 U.S. 616 (1886).

10. *Id.* at 617-18.

11. *Id.* at 618. The invoice was subsequently used in evidence to establish the quantity and value of plate glass contained in thirty-five other cases which the government had seized. The government believed that Boyd, with intent to defraud the government of revenue, had attempted to import the glass by fraudulent means.

12. *Id.* at 634-35.

private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.¹³

The Court recognized that the taking of papers by subpoena avoided "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers"¹⁴ Nevertheless, the use of a subpoena for such purposes was held to be prohibited by the Fourth Amendment to the Constitution "in all cases in which a search and seizure would be; because it . . . effects the sole object and purpose of search and seizure."¹⁵

Boyd thus stood for the proposition that papers in the possession of an individual could not be the subject of a lawful search if the *exclusive* justification for the search was the evidentiary value of such materials. The Court's resolution of the case reflected society's judgment that the personal liberty of an individual was so important that it outweighed the interests of law enforcement in securing evidence. Indeed, *Boyd* approvingly cited the language of the great¹⁶ English landmark *Entick v. Carrington*.¹⁷

[T]here are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too the innocent would be confounded with the guilty.¹⁸

13. *Id.* at 633.

14. *Id.* at 622.

15. *Id.*

16. See R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 35 (2d ed. 1964) (noting that *Entick* is "the case to take to a desert island."). As might be expected, the power of English authorities to search has been significantly broadened since *Entick*. See generally R. ARGUILE, *CRIMINAL PROCEDURE* 38-40 (1969); D. FELLMAN, *THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW* 52-59 (1966); E. WADE & A. BRADLEY, *CONSTITUTIONAL LAW* 485-87, 528-29 (8th ed. 1970); A. WILSHERE, *CRIMINAL PROCEDURE* 30-32 (H.A. Palmer and H. Palmer 4th ed. 1961).

17. 19 How. St. Tr. 1029 (1765).

18. 116 U.S. at 629, quoting 19 How. St. Tr. 1029, 1073 (1765). Some have interpreted this language in *Entick* to mean that a paper search violates principles forbidding self-incrimination. D. FELLMAN, *THE DEFENDANT'S RIGHTS UNDER ENGLISH*

Perhaps the Earl of Chatam, speaking on the floor of the House of Commons, most eloquently stressed the extreme character of the English ideal:

The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter it; but the *King of England can not enter it!* All his power dares not cross the threshold of that ruined tenement!¹⁹

Justice Bradley, in *Boyd*, did not go as far as the Earl since he was able to perceive some circumstances under which the seizure of private books and papers would be substantially different from compelling an accused to be a witness against himself.²⁰ Books required by law to be kept for inspection by revenue officers, for example, "are necessarily excepted out of the category of unreasonable searches and seizures."²¹

So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. . . . In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment²²

Boyd, therefore, allowed the government to recover contraband²³ property or property not belonging to the accused, but prohibited the

LAW 53 (1966); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 393 (1968). On the other hand, Wigmore has argued that it should be read as saying only that a search for evidence, like self-incrimination, should not be permitted because it is cruel and unjust for the innocent to be confounded with the guilty. 8 J. WIGMORE, EVIDENCE § 2264, at 381 n.4 (McNaughton rev. ed. 1961). See also T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 53 (1969).

19. C. GOODRICH, SELECT BRITISH ELOQUENCE 65 (B. Aly ed. 1963).

20. Cf. text accompanying note 13 *supra*.

21. 116 U.S. at 623-24. The concept of "required records" raises issues which will be excluded from the scope of this Comment. See *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Shapiro v. United States*, 335 U.S. 1 (1948); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966); Lipton, *Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323, 324-25 (1968); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951).

22. 116 U.S. at 624.

23. Contraband is material the possession of which is made illegal because "it is

seizure of *private papers*, *i.e.*, papers belonging to the individual, even when such seizure was considered critical to the interests of law enforcement. When the papers are in the possession of the individual, but are not legally owned by him (stolen property) or cannot be legally owned (contraband), they are not his private papers and therefore they may be seized without violating the Fourth and Fifth Amendments. *Boyd* thus created a "zone of privacy that [could] not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants."²⁴ An individual's private papers were absolutely protected from governmental seizure²⁵ based on the substantial privacy interest involved. Indeed, this principle was recognized to involve the "very essence of constitutional liberty and security,"²⁶ since "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property"²⁷

Thirty-five years later the emphasis shifted in *Gouled v. United States*.²⁸ While *Boyd* had stressed that "[p]apers are the owner's . . . dearest property,"²⁹ *Gouled* maintained that "[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized"³⁰ Whereas *Boyd* would absolutely prohibit the seizure of *private papers*, viewing such seizure as compulsory self-incrimination, *Gouled* refused to place papers in a special category, holding rather that seizure of any of an individual's property *merely*

(or is very likely to be) a step toward the doing of harm." W. LAFAYE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 425 (1972). Typically no property interest inheres in the unlawful possession. For example, in *Carroll v. United States*, 267 U.S. 132 (1925), the Court recognized that "no property rights" existed in the contraband liquor seized in the case. *Id.* at 143.

24. *Warden v. Hayden*, 387 U.S. 294, 313 (1967) (Douglas J., dissenting).

25. The papers of an individual might be subject to *search* in rare situations when the police were entitled to enter. For example, police might look for a stolen paper and search through the person's papers to see if the object of the search was present. But papers known to belong to an individual could not be the lawful subject of *seizure*.

26. 116 U.S. at 630.

27. *Id.*

28. 255 U.S. 298 (1921).

29. 116 U.S. at 627-28, quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765).

30. 255 U.S. at 309.

for *evidentiary purposes* was constitutionally prohibited.³¹ Such seizure would violate the Fourth Amendment³² and the introduction of the seized property into evidence would violate the Fifth Amendment.³³ *Gouled's* shift in emphasis provided a simple and logically appealing

31. *Id.* at 309-11.

32. *Gouled* held that the seizure of "mere evidence" violated the Fourth Amendment even when the government proceeded by search warrant. 255 U.S. at 309-11. It is unclear, however, which provision of the Fourth Amendment was believed to have been transgressed. The Fourth Amendment contains two provisions. One guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and the other insures that "no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." U.S. CONST. amend. IV. Since the *Gouled* opinion contended, *inter alia*, that "as a result of *Boyd*" search warrants could not be used for the purpose of securing evidence, perhaps the Court meant that the searches in *Gouled*, like those in *Boyd*, were "unreasonable" under the Fourth Amendment. Such an interpretation is certainly linguistically permissible. The Fourth Amendment clearly does not say that warrants must issue if the probable cause and particularity requirements are met. It merely directs that warrants shall not issue in the absence of such elements. Nothing in the Fourth Amendment suggests that a warrant is *per se* reasonable merely because there is probable cause and a sufficient description of the object to be seized. Indeed, it has been suggested that the first clause of the Fourth Amendment was designed "to cover shortcomings in warrants other than those specified in the second clause" T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1969).

A serious objection to this interpretation of *Gouled* can be raised based on that part of the opinion which states that "[t]he wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted, and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized', searches and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the amendment." 255 U.S. at 308. It is possible, of course, that *Gouled* considered the "mere evidence" rule to be an exception to this statement.

There is yet another way in which *Gouled* can be read. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the majority opinion maintained that "[i]n cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." 387 U.S. at 534. According to *Camara*, reasonableness is determined "by balancing the need to search against the invasion which the search entails." *Id.* at 537. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. Thus, it was emphasized that the probable cause requirement is defined by "the controlling standard of reasonableness." *Id.* at 539. Read in this light, *Gouled* must be interpreted as saying that, if probable cause is found, the search is necessarily reasonable because probable cause is ultimately determined by the constitutional mandate of reasonableness.

33. 255 U.S. at 311. *But cf.* *Adams v. New York*, 192 U.S. 585, 598 (1904). For the modern approach see *Couch v. United States*, 409 U.S. 322 (1973) (For a discussion of *Couch* see text accompanying notes 94-111 *infra*).

basis for *Boyd's* list of permissible search situations, since searches and seizures would be permitted when they were conducted for purposes other than the mere seizure of evidence, that is, "when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken."³⁴

Although the emphasis on the importance of "papers" changed, *Gouled* maintained *Boyd's* central proposition: the private liberty of an individual is so important that it outweighs the claimed necessities of law enforcement in seizing papers or other property for the sole purpose of using them in evidence against him. *Boyd* and *Gouled* thus guaranteed a zone of privacy which the government could not breach to discover items of mere evidentiary value.³⁵

The absolutism of *Boyd* and *Gouled* did not survive the 1920's. In 1927 *Marron v. United States*³⁶ announced an exception which eventually swallowed the rule. In *Marron* the Court permitted a ledger and certain bills to be seized on the theory that they were "part of the outfit or equipment actually used to commit the offense [the illegal sale of intoxicating liquor]."³⁷ Such a theory went far beyond the

34. 255 U.S. at 309, citing *Boyd v. United States*, 116 U.S. 616, 623-24 (1886).

35. Although the *Gouled* Court spoke in terms of "mere evidence" rather than papers, the only materials involved in the case were papers. The "mere evidence" language could thus be dismissed as dicta. This point is strengthened by the fact that in no case after *Gouled* did the Supreme Court suppress non-documentary evidence on "mere evidence" grounds, although the Court still found it necessary to consider the *Gouled* rule when discussing the seizure of non-documentary materials. See *Abel v. United States*, 362 U.S. 217 (1960). However, the lower federal courts did suppress non-documentary materials on "mere evidence" grounds. See, e.g., *Morrison v. United States*, 262 F.2d 449, 450-51 (D.C. Cir. 1958) (handkerchief bearing tangible evidence of a "perverted" act); *United States v. Lerner*, 100 F. Supp. 765, 768-69 (N.D. Cal. 1951).

Chief Justice Traynor contended in *People v. Thayer*, 63 Cal. 2d 635, 639, 408 P.2d 108, 110, 47 Cal. Rptr. 780, 782 (1965), cert. denied, 384 U.S. 908 (1966), that *Gouled* was not constitutionally based. He argued that the Court did not rely on any specific constitutional language, although he did admit that the Court rested its holding on the Fourth and Fifth Amendments. Noting that the federal statutes did not authorize the seizure of purely evidentiary materials, he suggested that "[p]erhaps [the Court] meant no more than that the seizure was unconstitutional because seizures that exceed statutory authority are always unreasonable." *Id.* at 640, 408 P.2d at 111, 47 Cal. Rptr. at 783. If this is what the Court meant it picked a strange way to say it. The failure of the *Gouled* Court to mention the statute is difficult to reconcile with Chief Justice Traynor's position.

36. 275 U.S. 192 (1927).

37. *Id.* at 199.

narrow confines of *Boyd* and *Gouled*, which had permitted police to enter premises and seize property not belonging to the accused or property which it was illegal to possess. *Marron* permitted the search and seizure of non-contraband materials which did belong to an accused, provided that they were utilized in the commission of a crime.

The seizure sanctioned in *Marron* might have been rationalized on the ground that the government had a right to prevent the possession of materials which could be expected to be used in future crimes. *Gouled* seemingly paved the way for such a contention by suggesting that the government would have a valid interest in preventing further frauds by seizing an executed written contract, which was illegally obtained and which was being utilized to perpetrate frauds upon the Government.³⁸ This suggestion was actually akin to classifying such contracts, along with counterfeit coins or lottery tickets, as contraband.³⁹ The ledger and bills in *Marron*, however, could not be so classified. They were not contraband; they were "means and instrumentalities" of a crime already committed—the sale of intoxicating liquors during Prohibition.⁴⁰ As such, they were seized not to prevent the commission of future crimes but solely to exploit their value as evidence.

Another justification for the search which the *Marron* Court might have adopted is that an individual has an absolute right to the protection of property which has never been used in the commission of a crime until probable cause exists to believe that such material has been so used, at which point the value of public order would outweigh the right of privacy. This justification could have been defended as a realistic weighing of the values of order and liberty in a twentieth century context.

Justice Butler did not adopt, or even discuss, either of the above arguments. Instead, he merely asserted that materials which were "part of the outfit or equipment actually used to commit the offense" could be lawfully seized, citing language in three prior cases,⁴¹ only one of

38. 255 U.S. at 310.

39. This raises the possibility that the contraband category could be used as a Pandora's box. However, courts faithful to the principles of *Boyd* could provide limits based on privacy or property. See *Stanley v. Georgia*, 394 U.S. 557 (1969). Although *Stanley* did not cite *Boyd*, it contained language which furthers *Boyd's* values, particularly the language approving of the appellant's asserted "right to be free from state inquiry into the contents of his library." *Id.* at 565.

40. Compare *Marron v. United States*, 275 U.S. 192 (1927), with *United States v. Lefkowitz*, 285 U.S. 452 (1932).

41. 275 U.S. at 199, citing *Agnello v. United States*, 269 U.S. 20, 30 (1925);

which offered even minimal support for his statement.⁴² *Marron* thus sanctioned a significant exception to the rules established by *Boyd* and *Gouled* and shifted the protections of the Fourth and Fifth Amendments by denying to individuals an unqualified protection from the seizure of their private papers and property.

By 1947 the Court could accurately summarize the status of the rule by stating that:

This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of a crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.⁴³

As a matter of law, then, the "mere evidence" rule was retained. In fact, however, its substance was lost. Courts soon began to find that virtually any item could be a means and instrumentality of a crime.⁴⁴

Carroll v. United States, 267 U.S. 132, 158 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

42. In *Agnello v. United States*, 269 U.S. 20 (1925), the Court dealt with the question of whether or not a seizure of cocaine was made in violation of the Fourth Amendment. The Court noted "[t]he right . . . to search . . . to find and seize things connected with the crime as its fruits, or as the *means by which it was committed*, as well as weapons and other things to effect an escape from custody is not to be doubted." 269 U.S. at 30 (emphasis added), *citing* *Carroll v. United States*, 267 U.S. 132 (1925); *Weeks v. United States*, 232 U.S. 383 (1914). Since the search in *Agnello* was determined to be in violation of the warrant requirement of the Fourth Amendment (269 U.S. at 33), and since the cocaine would have been seizable under the already existing contraband category (269 U.S. at 31), such language was dictum.

43. *Harris v. United States*, 331 U.S. 145, 154 (1947). The last case in which the Court actually suppressed materials on "mere evidence" grounds was *United States v. Lefkowitz*, 285 U.S. 452, 464-65 (1932), but the rule was regularly considered in determining whether suppression should be required. *See, e.g.*, *Abel v. United States*, 362 U.S. 217, 234-35 (1960); *United States v. Rabinowitz*, 339 U.S. 56 (1950). *But cf. Zap v. United States*, 328 U.S. 624 (1946).

44. As Yale Kamisar noted:

[T]he courts, to put it kindly, just don't take the rule very seriously.

While "a search for an object of purely evidentiary significance" may be taboo, objects have been and will continue to be found to possess a bit more than "purely evidentiary significance" just about whenever a resourceful judge wants to so find. Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 915, 917 (1960).

See also Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 COL. L. REV. 355, 369 (1966) (discussing application of the "mere evidence" rule to "seizures" of conversations via eavesdropping).

One court even suggested that the shoes of a burglar were means and instrumentalities since the criminal could not have gone barefoot.⁴⁵ Another court permitted the seizure of a camera in a statutory rape case, implying that it was a means of enticement.⁴⁶ A rule subject to such frivolity was hardly a powerful limit on searches and seizures.⁴⁷ It rather became a flexible instrument in the hands of cynical courts. The fact that the rule survived as a matter of law until 1968 was an indication of its weakness rather than its strength.⁴⁸

The Supreme Court insured a reexamination of the "mere evidence" rule when it held that the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's ban on self-incrimination are applicable to the states by virtue of the Fourteenth Amendment Due Process Clause and that the constitutional standards governing these protections are identical for the federal government and the states.⁴⁹ The prospect of applying the shadowy

45. *United States v. Guido*, 251 F.2d 1, 3-4 (7th Cir. 1958). *But see* *Hayden v. Warden*, 363 F.2d 647, 652, 655 (4th Cir. 1966), *rev'd. on other grounds*, 387 U.S. 294 (1967). *See also* *State v. Bisaccia*, 213 A.2d 185, 192-93 (N.J. 1965).

46. *State v. Chinn*, 373 P.2d 392, 401 (Ore. 1962). The *Chinn* court noted that "[t]he arts of seduction are so variant and insidious, especially when applied to different individuals, that it is impossible as a matter of law to lay down any rule on the subject of what will or will not invariably tend to produce delinquency in all minors." 373 P.2d at 401, *quoting* *State v. Stone*, 226 P. 430 (Ore. 1924). In *State v. Iverson*, 187 N.W.2d 1 (N.D. 1971), the North Dakota Supreme Court found not only that the clothing worn by the defendant was an instrumentality, but also that a towel he used to wipe off blood was admissible on the same principle. Perhaps the court in *United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972), put it best when it noted that courts had "torture[d] the English language to make the things the Government seeks 'instrumentalities of the crime.'" *Id.* at 1044.

47. "The 'mere evidence' rule has been used only to allow the courts an additional method of articulating the difference between what is and what is not 'unreasonable.'" Comment, *The Fourth and Fifth Amendments—Dimensions Of An "Intimate Relationship"*, 13 U.C.L.A.L. REV. 857, 861 n.22 (1966). It has been further suggested that "[b]y broadly defining 'instrumentality,' courts can admit evidence despite any formal requirements of the doctrine, while at the same time can leave open the door to the protection of privacy." *Id.* at 861.

48. *Warden v. Hayden*, 387 U.S. 294 (1967), suggested that Congress had helped to perpetuate the rule by negative implication since it had not specifically authorized the issuance of search warrants for the seizure of "mere evidence." *Id.* at 308. State courts faced the absence of direct legislative authorization in different ways. *Compare* *State v. Angel*, 177 S.E.2d 562, 570 (W. Va. 1970) (a statute which authorized search warrants for certain specific categories of property was held not to prohibit or eliminate search warrants for other evidence of the commission of a crime), *with* *Ferguson v. State*, 458 S.W.2d 383, 389 (Ark. 1970) (concurring opinion) (no statutory or common law authority for the seizure of "mere evidence" exists in Arkansas, and *Warden* did not authorize the seizure of "mere evidence" but merely held that there were no constitutional objections to such a seizure).

49. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (holding that the exclusionary rule

"mere evidence" rule to fifty additional jurisdictions⁵⁰ called for a thorough reappraisal of the fundamental requirements of the Fourth and Fifth Amendments as soon as the appropriate case should reach the Court.

II. THE DEMISE OF THE MERE EVIDENCE RULE

The appropriate case turned out to be *Warden v. Hayden*.⁵¹ In 1966 Maryland police officers, in the course of a lawful search, seized clothing allegedly worn by the defendant in an armed robbery.⁵² The

is an essential ingredient of the Fourth Amendment and that the rule is thus binding on the states by virtue of the Due Process Clause of the Fourteenth Amendment); *Ker v. California*, 374 U.S. 23, 33 (1963) (announcing that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments); *Malloy v. Hogan*, 378 U.S. 1, 3, 6-7 (1964) (holding that the Fifth Amendment's privilege against self-incrimination is applicable to the states through the Fourteenth Amendment, and that the federal standards justifying an application of the privilege also applied to the states).

50. A number of commentators concluded that *Mapp*, *Ker* and *Malloy* made the "mere evidence" rule applicable to the states, noting that prior to these decisions "state forums could avoid the application of the *Gouled* rule on the theory that the rule was founded upon the fifth amendment of the United States Constitution and hence was not controlling in state prosecutions. This alternative is now foreclosed, and the distinction between mere evidence and instrumentalities will confront state judges as it has their federal colleagues since 1921." Shellow, *The Continuing Vitality of the Gouled Rule: The Search For And Seizure Of Evidence*, 48 MARQ. L. REV. 172, 180 (1964); accord, Comment, *A Legislative Approach to the Fourth Amendment*, 45 NEB. L. REV. 148, 154 (1966); Comment, *Search and Seizure of "Mere Evidence"—Amendment to Or. Rev. Stat. Sec. 141.010—Effect on Prior Law and Constitutionality*, 43 ORE. L. REV. 333 (1964).

State court judges, however, did not agree. See *People v. Thayer*, 63 Cal. 2d 635, 638-39, 408 P.2d 108, 110, 47 Cal. Rptr. 780, 782 (1965), cert. denied, 384 U.S. 908 (1966) (discussed in note 35 *supra*). See also *People v. Grossman*, 276 N.Y.S.2d 168 (App. Div. 1966), and cases cited therein. But cf. *State v. Bisaccia*, 213 A.2d 185 (N.J. 1965) (contending that the seizure of mere evidence was constitutionally prohibited, but that the only materials included in the category of mere evidence were private papers). For a post-*Warden* contrast to *Bisaccia* see *State v. Smith*, 273 A.2d 68 (N.J. Super. 1971), wherein the court noted that "[w]e consequently are confident that notwithstanding what was said in *Bisaccia* any general prohibition against seizure of papers or documents merely because they may evidence the owner's complicity in crime is no longer viable." *Id.* at 76.

One commentator has suggested that twenty-three states followed the *Gouled* rule even prior to *Mapp*. Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 616-17 & n.149 (1966) [hereinafter cited as *Evidentiary Searches*], quoted in Hudak, *The "Mere Evidence" Rule: Need for Re-evaluation*, 20 CLEV. ST. L. REV. 361, 373 & n.70 (1971), and cited in 20 ALA. L. REV. 149, 154 n.32 (1967). However, the twenty-three states are those which followed the *exclusionary* rule before *Mapp*, not the *Gouled* rule. *Elkins v. United States*, 364 U.S. 206, 224-25 (1959).

51. 387 U.S. 294 (1967).

52. *Hayden v. Warden*, 363 F.2d 647, 649 (4th Cir. 1966).

defendant claimed the clothing was mere evidence and was therefore not subject to seizure. A divided panel in the Fourth Circuit criticized the "mere evidence" rule,⁵³ but felt constrained by precedent and suppressed the evidence.⁵⁴ Even the majority opinion, however, invited reversal,⁵⁵ and in *Warden*, Justice Brennan, speaking for six justices, accepted the invitation.⁵⁶

Justice Brennan rejected the "mere evidence" rule for several reasons. He noted that courts⁵⁷ and commentators⁵⁸ had criticized it, that the language of the Fourth Amendment did not support it,⁵⁹ that it did not protect privacy,⁶⁰ and that it elevated fictional property concepts to a central role in the Fourth Amendment.⁶¹ He suggested that the government's right to seize an item rested not on a superior property right in the item, but on the right to apprehend and convict criminals.⁶² Instead of focusing on a property basis for the Fourth Amendment, he suggested that the "principal object of the Fourth Amendment is the protection of privacy."⁶³ Searches which intruded on that privacy could be sanctioned "after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate . . .,'"⁶⁴ and

53. *Id.* at 655.

54. *Id.*

55. *Id.*

56. 387 U.S. at 310.

57. *Id.* at 300, citing *People v. Thayer*, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965) (discussed in note 35 *supra*).

58. 387 U.S. at 300, citing Chaffee, *The Progress of the Law*, 1919-1922, 35 HARV. L. REV. 673 (1922); Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914-18 (1960); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 478 (1961) [hereinafter cited as Kaplan]; Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355 (1966); Comment, *Limitations On Seizure of "Evidentiary" Objects: A Rule In Search Of A Reason*, 20 U. CHI. L. REV. 319 (1953); Comment, *Search, Seizure, and the Fourth and Fifth Amendments*, 31 YALE L.J. 518 (1922). For some useful post-*Warden* commentary see note 4 *supra*.

59. 387 U.S. at 301.

60. *Id.* at 301-02.

61. *Id.* at 304.

62. *Id.* at 306.

63. *Id.* at 304. *But cf.* *Katz v. United States*, 389 U.S. 347, 350 (1967), wherein it was stated that Fourth Amendment protections "often have nothing to do with privacy at all." If a policeman seizes an automobile in broad daylight without probable cause of any kind, the car owner's *privacy* would not be disturbed, but presumably the Fourth Amendment would still protect the property rights involved. In fact, the Fourth Amendment protects both privacy and property. General slogans about their relative ranking may achieve force as slogans, but they offer little service in legal analysis.

64. 387 U.S. at 309-10, quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948).

property subject to search could be seized if it would aid in a particular apprehension or conviction.⁶⁵ There had to be "a nexus . . . between the item to be seized and criminal behavior."⁶⁶

Thus, the attack on the *Gouled* "mere evidence" rule which began in *Marron* finally became a rout. *Marron* created the means and instrumentalities exception without explaining why and the *Warden* Court simply assumed that the exception was based on the unsupportable theory that the state somehow gained a property interest in means and instrumentalities but not in mere evidence.⁶⁷ Such a theory was easy to topple and certainly posed no problem for the *Warden* Court. In the Court's view the question then became whether *Gouled's* requirement of a governmental property interest in the item to be seized represented a correct interpretation of the Fourth Amendment. Placing great emphasis on the development of privacy as the primary interest being protected by that amendment, the Court rejected "fictional and procedural barriers rested on property concepts" and overruled *Gouled*.⁶⁸

The difficulty with the analysis in *Warden*, however, becomes clear upon a reexamination of *Gouled*. *Gouled* did not seek to protect property only, but sought to protect privacy as well.⁶⁹ In fact, *Gouled* arguably offers more protection for privacy than *Warden*. Faithful application of the *Gouled* categories would have sharply limited the opportunities for state intrusions into privacy.⁷⁰ The means and instrumentalities exception of *Marron* multiplied the opportunities for police searches⁷¹ and *Warden's* elimination of the "mere evidence" rule created even more.

65. *Id.* at 307.

66. *Id.*

67. *Id.* at 302.

68. *Id.* at 303-06, 310.

69. 255 U.S. at 303-06.

70. See Wool, *Lawful Objects of Search and Seizure*, 5 WM. & MARY L. REV. 101, 124-26 (1964). See also note 44 *supra*. This is not to suggest that the *Gouled* rule should have been retained, but rather to say that its idealistic weighing of privacy and order deserved "a more respectful burial." Cf. *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Harlan, J., concurring) (using the phrase in discussing the reversal of *Betts v. Brady*, 316 U.S. 455 (1942)).

71. See *Evidentiary Searches*, *supra* note 50, at 610: "Under [the *Marron*] criteria, there was very little that would not be subject to seizure." Indeed, *Marron* expanded seizable objects to the point that it could rightly be contended that the rule no longer effectively protected privacy. As noted by Kaplan, *supra* note 58, "[t]he privacy of the individual, however, would be just as well served by a restriction on the search to the even-numbered days of the month. Presumably this would have an equal restrictive effect." *Id.* at 478-79.

The actual holding of *Warden* was that a man's non-documentary effects could be seized during a lawful search to be used as evidence.⁷² *Warden* raised but did not resolve the issue of whether there are circumstances under which private papers should be immune from search and seizure.⁷³ *Warden* noted only that:

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.⁷⁴

72. 387 U.S. at 300-01, 302-03. One court, however, has held to a slender thread by declaring a search for evidence of motive to be illegal despite *Warden*, noting that "[n]o decision has been found upholding a seizure of evidence during a search solely for evidence, as here." *United States v. Zive*, 299 F. Supp. 1273, 1278 (S.D.N.Y. 1969). *Zive* interpreted *Warden* as authorizing the use of "mere evidence" only when seized in a search for contraband, instrumentalities or other seizable items.

73. See 387 U.S. at 303.

74. *Id.* at 302-03, citing *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the defendant was convicted of driving an automobile while under the influence of intoxicating liquor. 384 U.S. at 758. At the direction of a policeman and without defendant's consent, a physician withdrew blood from Schmerber's body. A report of the chemical analysis was later admitted at the trial despite objection. *Id.* at 758-59. The Supreme Court held that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." *Id.* at 761 (footnote omitted). Nor did this intrusion into the human body violate the Fourth Amendment guarantees. *Id.* at 772. The *Warden* Court cited *Schmerber* to support the idea that "[t]his court has approved the seizure and introduction of items having only evidential value . . ." 387 U.S. at 301 n.8. This led the majority to conclude that the "mere evidence" rule was "based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (footnote omitted).

But *Schmerber* was entirely consistent with the "mere evidence" rule; the courts had consistently held that the rule did not apply to searches of the person. The language most frequently cited for this position is contained in *Weeks v. United States*, 232 U.S. 383 (1914), which discussed the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Id.* at 392 (emphasis added). Indeed, *Schmerber* cites the *Weeks* language, noting that the rights may be "unrestricted." 384 U.S. at 769. As Learned Hand observed in *United States v. Kirchenblatt*, 16 F.2d 202, 203 (2d Cir. 1926), "[i]t is true that the law has never distinguished between documents and other property found upon the person of one arrested. All may be used in the trial, so far as relevant."

On the other hand, *Preston v. United States*, 376 U.S. 364, 367 (1964), used language which suggested that the lower courts' interpretation of the *Weeks* dictum might have been erroneous: "[W]hen a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of

The first sentence of the quotation says that the seizure of non-testimonial items would not violate the Fifth Amendment; it does *not* say that the seizure of testimonial items would be prohibited.⁷⁵ The second sentence of the quotation expressly leaves that issue open. *Warden* offered no advice in this area and subsequent decisions of the Court have produced only occasional hints.

III. POST WARDEN: THE SUPREME COURT

Barely two weeks after *Warden* was decided, Justice Clark presented the opinion of the Court in *Berger v. New York*,⁷⁶ wherein a New York eavesdropping statute was struck down on a number of Fourth and Fourteenth Amendment grounds.⁷⁷ One Fourth Amendment objection was not accepted, however. The defendant in *Berger* had argued that the use of evidence obtained through eavesdropping violated the "mere evidence" rule.⁷⁸ The claim had force despite the ruling in *Warden* because the things seized in *Berger* were words of the defendant⁷⁹ and as such were testimonial in character. Nevertheless, the majority in *Berger* dismissed the claim in an abrupt footnote which stated that "[t]his contention is disposed of in *Warden* . . . adversely to petitioner's assertion here."⁸⁰

Some writers⁸¹ have interpreted this cryptic comment to mean that the "mere evidence" rule no longer protects testimonial items.⁸² If

the accused for weapons or for the fruits of or implements used to commit the crime." The inference to be drawn from *Preston* is that the phrase "evidences of crime" as used in *Weeks* does not mean "mere evidence" but is limited to the other traditional categories. *Preston's* language and *Warden's* treatment of *Schmerber* suggest that materials can be seized during a search of the person only if they could also be seized during a search of the premises.

75. Nevertheless, some writers have concluded from this statement that the seizure of testimonial objects would violate the Fifth Amendment. 20 BAYLOR L. REV. 122, 127-28 (1967); 6 DUQUESNE U.L. REV. 60, 63-64 (1967).

76. 388 U.S. 41 (1967).

77. *Id.* at 44.

78. *Id.* at 43-44.

79. *Id.* at 45. The *Berger* case was briefed and argued before *Warden* was decided.

80. *Id.* at 44 n.2.

81. *E.g.*, 32 ALBANY L. REV. 229, 236 n.42 (1967); Hudak, *The "Mere Evidence" Rule: Need for Re-evaluation*, 20 CLEV. ST. L. REV. 361, 377 (1971) [hereinafter cited as Hudak].

82. Congress has apparently accepted this interpretation. It amended the United States Code to permit federal officers to seize "any property that constitutes evidence of a criminal offense in violation of the laws of the United States." 18 U.S.C. § 3103(a) (1970) (emphasis added); see *Hill v. Philpott*, 445 F.2d 144, 148 n.4 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

these writers are correct, *Boyd* has also been overruled since it held that an individual's testimonial items could not be seized.⁸³ Such an interpretation, however, assumes that *Boyd* was overruled *sub silentio* in a cavalier footnote, that a majority which was careful in *Warden* to confine its holding to non-testimonial items would extend that holding without discussion two weeks later, and that Chief Justice Warren and Justice Fortas, who in *Warden* had criticized the majority's abolition of the "mere evidence" rule, would be willing to extend the *Warden* reasoning without discussion. These considerations suggest there might be another way to read the controversial footnote in *Berger*. Since the Court decided the case on Fourth Amendment grounds and did not reach the petitioner's Fifth Amendment claim,⁸⁴ the *Berger* footnote can be read as having stated that (1) the Court would not strike down the seizure of the item solely because it was "mere evidence" and (2) the Fifth Amendment claim that testimonial materials cannot be seized not having been reached, there was no reason to decide whether the seizure of such materials would violate the Fourth and Fifth Amendments taken together.⁸⁵ Interpreted in this fashion, *Berger* restates but does not extend *Warden*.

Other writers have suggested that the *Warden* principle was extended to testimonial utterances in *Katz v. United States*.⁸⁶ In *Katz* the government introduced evidence of the petitioner's part of a telephone conversation to prove that he had transmitted wagering information by telephone in violation of federal law.⁸⁷ The Court, while finding the particular search to be invalid since it was not authorized by a warrant,⁸⁸ stated:

[I]t is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very

83. 116 U.S. at 622.

84. 388 U.S. at 43-44.

85. Cf. 116 U.S. at 630: "[A]ny forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

86. 389 U.S. 347 (1967). The confusion surrounding the interpretation of *Katz* is profound. Compare 46 TUL. L. REV. 545, 550 (1972) (contending that *Katz* makes any evidence, testimonial or otherwise, subject to seizure), with Hudak, *supra* note 81, at 377 (contending *Katz* ruled that "testimonial" evidence cannot be seized).

87. 389 U.S. at 348. The statute allegedly violated was 18 U.S.C. § 1084(a) (1970).

88. 389 U.S. at 359.

limited search and seizure that the Government asserts in fact took place.⁸⁹

Thus, *Katz* indicated that under carefully controlled circumstances the police could engage in the electronic surveillance of telephonic communications.⁹⁰ This could be interpreted to mean that *Warden* has been extended to items of a testimonial or communicative nature. This interpretation loses support, however, when the actual evidence in *Katz* is analyzed. The utterances at issue in *Katz* were wagering information⁹¹ and thus would be classified as means and instrumentalities of a crime rather than as mere evidence.⁹² Furthermore, *Katz* did not deal with private papers and thus offers little assistance in determining whether there are circumstances in which private papers should be immune from search and seizure.⁹³

More helpful is the Court's recent opinion in *Couch v. United States*,⁹⁴ which reaffirms the continuing validity of *Boyd* by attempting to distinguish it.⁹⁵ In *Couch* the defendant objected to an Internal Revenue summons directing her accountant to produce business records which she had given to him over a period of fourteen years for use in preparing her income tax returns.⁹⁶ The accountant did not object to the summons, but the defendant asserted that the summons violated her Fifth Amendment rights.⁹⁷ She contended that, although the records con-

89. *Id.* at 354 (emphasis added).

90. *Id.*

91. *Id.* at 354 n.14.

92. See 18 U.S.C. § 1084(a) (1970). Such "material" could have been seized even under the "mere evidence" rule.

93. The seizure of some types of papers could constitute a more serious intrusion into privacy than the seizure of telephonic communications. See note 163 *infra* and text accompanying notes 154-64 *infra*.

In addition, the Fifth Amendment's concern with compulsion could be important when contrasting the seizure of private papers with the seizure of telephonic communications. Effective wiretapping would preclude the possibility of compulsion because compulsion involves prior notice. More traditional searches and seizures, on the other hand, proceed under the threat of legally authorized force. Compulsion is ordinarily inherent in such searches and seizures. Whether this distinction should lead to different treatment is a matter which *Katz* did not and could not decide.

Of course, in some circumstances, searches involve no personal compulsion of the defendant. If the materials are in the possession of another or if the defendant is not home when the officers search, no personal compulsion is employed. Note that even if the defendant is home he is not compelled to say anything or do anything. He is merely compelled not to interfere. See text accompanying notes 185-95 *infra*.

94. 409 U.S. 322 (1973).

95. *Id.* at 330-31; see *id.* at 345 (Marshall, J., dissenting).

96. *Id.* at 324-25.

97. *Id.*

cededly were in the possession of the accountant, the government nevertheless sought the type of forcible extortion of her testimony which *Boyd* had condemned.⁹⁸

Justice Powell, writing for the majority, distinguished *Boyd* by noting that:

That case did not, however, address or contemplate the divergence of ownership and possession, and petitioner concedes that court decisions applying *Boyd* have largely been in instances where possession and ownership conjoined. In *Boyd*, the production order was directed against the owner of the property who, by responding, would have been forced "to produce and authenticate any personal documents or effects that might incriminate him." But we reiterate that in the instant case *there was no enforced communication of any kind from any accused or potential accused.*⁹⁹

Taken alone, this language would suggest that *Boyd* has been limited to situations involving enforced communication by the accused in a summons or subpoena context. If the government proceeded by search and seizure against the accused and seized papers in his possession *Boyd* would apparently not be violated because the accused would not be compelled "to produce and authenticate any personal documents or effects that might incriminate him." This result is consistent with a narrow reading of *Boyd* since *Boyd* involved a demand that the *defendant produce* a document that might incriminate him, but it ignores the reasoning of the majority in *Boyd* which emphasized that the constitutionally offensive aspect of the case was not that the defendant was asked to authenticate the document, but that the document, private in nature and obtained through the use of governmental force, was to be introduced in evidence against the owner.¹⁰⁰ As the *Boyd* Court stated:

[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.¹⁰¹

[A] compulsory production of the private books and papers of the owner . . . is the equivalent of a search and seizure¹⁰²

If the *Boyd* reasoning regarding searches and seizures is not followed, all that will remain of *Boyd* is its factual holding. The question, there-

98. *Id.* at 330; *see Boyd v. United States*, 116 U.S. 616, 630 (1886).

99. 409 U.S. at 330-31 (footnotes and citations omitted and emphasis added).

100. 116 U.S. at 630.

101. *Id.* at 633.

102. *Id.* at 634-35.

fore, is whether this was the result sought by the Court in *Couch*. If the language of Justice Powell referring to authentication is read in isolation such a conclusion seems inescapable. There are, however, several other portions of Justice Powell's opinion which indicate a different result. For instance, at one point he listed two recent cases to exemplify the fact that *Boyd's* application has largely been confined to situations where ownership and possession merged.¹⁰³ The first case involved a *search and seizure* of records in the possession of the defendant.¹⁰⁴ At another place in the opinion, he explicitly left open the question of what result would obtain if a case were presented in which a defendant asserted Fifth Amendment rights when a mere custodian of the defendant's records was forced to produce them.¹⁰⁵ Justice Powell distinguished such a situation from the facts being considered in *Couch*:

Here there was no mere fleeting divestment of possession: the records had been given to this accountant regularly since 1955 and remained in his continuous possession until the summer of 1968 when the summons was issued. Moreover, the accountant himself worked neither in petitioner's office nor as his employee. The length of his possession of petitioner's records and his independent status confirm the belief that petitioner's divestment of possession was of such a character as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion.¹⁰⁶

Thus, Justice Powell conceded that there may be circumstances in which the Fifth Amendment privilege applies even though the defendant is not personally compelled to produce or authenticate anything. He refused to recognize such a privilege in *Couch* simply because there is

little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. . . . Accordingly, petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.¹⁰⁷

The obvious implication is that if a significant privacy intrusion were involved the result might be different on Fourth or Fifth Amendment

103. 409 U.S. at 330.

104. *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (discussed at text accompanying notes 112-27 *infra*).

105. 409 U.S. at 333-34.

106. *Id.* at 334-35 (footnotes omitted).

107. *Id.* at 335-36 (footnotes omitted).

grounds. Also significant in this connection are Justice Powell's conclusion that the petitioner's Fourth Amendment argument "does not appear to be independent of her Fifth Amendment argument"¹⁰⁸ and his statement that "[w]e do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids."¹⁰⁹

Thus, although not serving as a model of clarity, the *Couch* opinion can sensibly be read as holding that the Fifth Amendment bars the compelled production by subpoena of property within the possession of the accused. If the material is not within the possession of the accused, however, or if the government proceeds by search and seizure, the validity of the state action will be evaluated by Fourth and Fifth Amendment concerns for privacy.¹¹⁰ Such an interpretation of the Fourth and Fifth Amendments appears to properly place the emphasis of the inquiry regarding the search and seizure of papers on the privacy interests involved as opposed to their incriminatory nature.¹¹¹ *Couch* could serve as a general starting point for determining the circumstances in which private papers can be seized. *Couch*, however, does not focus on search and seizure and certainly does not attempt to develop any standards for guidance. Thus, from *Warden* to *Couch*, the lower federal courts have been left to deal with the issue of search and seizure of private papers without the benefit of any definitive standards. Predictably, the lower courts have analyzed this problem in different ways.

IV. POST WARDEN: THE LOWER FEDERAL COURTS

Since *Warden* the lower federal courts have encountered many cases involving the search and seizure of private papers. While courts have regularly admitted documentary evidence without much discussion,¹¹²

108. *Id.* at 325-26 n.6.

109. *Id.* at 336 n.20.

110. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein Justice Douglas noted that "[t]he Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy . . ." *Id.* at 484.

111. *See* text accompanying notes 185-95 *infra*.

112. The absence of discussion in most cases may well be related to the lack of a serious privacy interest involved. Post-*Warden* cases admitting documentary evidence in addition to *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971) (discussed at text accompanying notes 128-40 *infra*), and *United States v. Blank*, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) (discussed at text accompanying notes 141-53 *infra*), include: *Romanelli v. Commissioner*, 466 F.2d 872, 877 (7th Cir. 1972) (gambling records); *United States v. Mahler*, 442 F.2d 1172 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971) (extortion case in which

the Seventh Circuit Court of Appeals recently held in *Hill v. Philpott*¹¹³ that some items cannot be the object of a lawful search and seizure.¹¹⁴

In *Hill*, the district court judge had authorized search warrants for

sexually revealing photographs of a girl, as well as envelopes and cards bearing the names and addresses of those to whom photographs were to be sent, were seized); *United States v. Fuller*, 441 F.2d 775 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971) (bookmaking records, wagering paraphernalia and tape recording of defendants giving line information and accepting wagers); *United States v. Cozzetti*, 441 F.2d 344 (9th Cir. 1971) (business records seized in prostitution case); *United States v. Hanon*, 428 F.2d 101 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971) (gambling paraphernalia); *United States v. Munroe*, 421 F.2d 644 (5th Cir.), *cert. denied*, 400 U.S. 851 (1970) (forgery case permitting the seizure of papers as handwriting exemplars); *United States v. Teller*, 412 F.2d 374 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971) (index cards with license plate numbers of narcotic agents); *Pinelli v. United States*, 403 F.2d 998 (10th Cir. 1968) (did not reach the issue but recognized that *Warden* left the issue open); *Taylor v. Minnesota*, 342 F. Supp. 911 (D. Minn. 1972) (memorandum giving instructions to the defendant's wife regarding preparation of prostitutes); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972) (gambling paraphernalia); *United States v. McNally*, 338 F. Supp. 341 (E.D. Pa. 1972) (gambling paraphernalia); *Vanderhae v. Howland*, 27 Am. Fed. Tax R.2d 71-1176, 1181-82 (N.D. Cal. 1971), *rev'd*, 13 CRIM. L. REP. 1019 (9th Cir. March 26, 1973) (tax records); *United States v. Main*, 312 F. Supp. 736 (D. Del. 1970) (gambling records); *Application of Paperboard Sales, Inc.*, 291 F. Supp. 1018 (S.D.N.Y. 1968) (papers used in and pertaining to transactions and property interests of defendant taken from business office); *United States v. Zovluc*, 274 F. Supp. 385 (S.D.N.Y. 1967) (medical records); *A.H. Alexander*, 56 P-H Tax Ct. Rep. 491 (1971) (gambling records); *LaBryer v. State*, 222 So. 2d 361 (Ct. App. Ala. 1969) (paper written by defendant to alleged victim of sodomous attack); *People v. Crosslin*, 251 Cal. App. 2d 968, 60 Cal. Rptr. 309 (1967), *cert. denied*, 390 U.S. 1006 (1968) (identification card, temporary driver's license, and marriage certificate); *People v. Rehman*, 253 Cal. App. 2d 119, 61 Cal. Rptr. 65 (1967) (papers comprising part of business files); *People v. Piwtorak*, 484 P.2d 1227 (Colo. 1971) (letters, name tags, and dog tags); *Scott v. State*, 176 S.E.2d 481 (Ga. Ct. App. 1970) (false license to practice medicine, diploma, books and telephone directories); *People v. Pickett*, 233 N.E.2d 560 (Ill. 1968) (policy gambling tickets); *People v. Jones*, 231 N.E.2d 580 (Ill. 1967) (auto registration); *Crawford v. State*, 267 A.2d 317 (Md. Ct. Spec. App. 1970) (pawn tickets); *State v. Glenn*, 431 S.W.2d 200 (Mo. 1968) (forged notes); *State v. Charest*, 247 A.2d 515 (N.H. 1968) (slips of paper bearing names of individuals removed from person of accused); *State v. Campbell*, 250 A.2d 1 (N.J. 1969) (lottery papers); *State v. Smith*, 273 A.2d 68 (N.J. Super. 1971) (letter to defendant from a friend in Vietnam which incriminated the defendant); *People v. Givens*, 237 N.E.2d 80 (N.Y. 1968) (loan sharking records); *State v. Garrett*, 489 P.2d 994 (Ore. Ct. App. 1971) (letters and birth certificate used to tie defendant to a residence); *Haynes v. State*, 475 S.W.2d 739 (Tex. Crim. App. 1971) (envelope admitted to show letter was addressed to defendant at apartment); *State v. Bullock*, 431 P.2d 195 (Wash. 1967) (letter written by defendant which incriminated him); *Morales v. State*, 170 N.W.2d 684 (Wisc. 1969) (documents connecting defendant to a residence, including telephone bills, special delivery mail notice, and a receipt for a registered letter).

113. 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

114. *Id.* at 149.

“fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice and other sources”¹¹⁵ Dr. Hill then moved for the return of his “private” books and records but the court denied his request.¹¹⁶ On appeal the Seventh Circuit held that the seizure of the books and papers violated the Fifth Amendment’s privilege against self-incrimination.¹¹⁷ Initially, the court of appeals recognized that the “distinction between obtaining papers from a defendant by search and seizure rather than by force of process is more shadow than substance.”¹¹⁸ The Seventh Circuit thus agreed with *Gouled* that:

In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.¹¹⁹

Hill decided that the combination of *Boyd* and *Gouled* required that the records of Dr. Hill be immune from seizure.¹²⁰ The Seventh Circuit was not deterred from this conclusion by the holding in *Warden* because:

In overruling *Gouled* as to its *Fourth Amendment* teachings, we do not believe that the Court intended to in any way diminish the *Fifth Amendment* characteristics which might attach to certain items of property such as personal books and records.¹²¹

The *Hill* court noted that, in the term prior to *Warden*, the Supreme Court in *Schmerber v. California*¹²² had

clearly intimated that in any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step in considering a motion to suppress is to determine whether the introduc-

115. *United States v. Premises*, 801 North Seventh Street, 310 F. Supp. 1316, 1318 (S.D. Ill. 1970).

116. *Id.* at 1321.

117. 445 F.2d at 149.

118. *Id.* The court noticed that if the government had proceeded by subpoena or summons “many if not all of the records seized” would have been privileged from disclosure. *Id.* at 149; accord, *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967); *United States v. Re*, 313 F. Supp. 442 (S.D.N.Y. 1970); *United States v. Kleckner*, 273 F. Supp. 251 (S.D. Ohio), *appeal dismissed*, 382 F.2d 1022 (6th Cir. 1967).

119. 445 F.2d at 149, quoting *Gouled v. United States*, 255 U.S. 298, 306 (1921).

120. *Id.* at 147-49.

121. *Id.* at 418 (emphasis added).

122. 384 U.S. 757 (1966) (discussed in note 74 *supra*).

tion into evidence of the material seized would violate the Fifth Amendment. This is to be determined by inquiry as to whether the evidence "relates to some communicative act or writing." If it does, the search is barred under both Amendments.¹²³

It is possible that the *Hill* court was able to suppress the papers because of *Warden* rather than in spite of it, since *Warden* eliminated any distinction between mere evidence and instrumentalities. The district court judge in *Hill* had noted that the "affidavits for search warrants . . . established that the papers, books, records, and documents sought to be seized were the instrumentalities by which the crimes of willfully attempted tax evasion had been and were then being committed. . . . As instrumentalities . . . they were subject to seizure."¹²⁴ The court of appeals, on the other hand, made no attempt to classify the papers since it read *Warden* as making such classifications meaningless.¹²⁵ Thus, the *Hill* court interpreted the opinion in *Warden* to mean that some items which could be seized prior to *Warden* may not be seizable after *Warden*. It is unclear how far the Seventh Circuit meant to go in *Hill*. If it meant to hold that testimonial or communicative items can never be seized, it went very far indeed. The Supreme Court, presented with an opportunity to clarify the scope of *Warden*, instead denied certiorari and let the Seventh Circuit's decision stand.¹²⁶

Quite recently the Ninth Circuit adopted the *Hill* approach in *Vanderahe v. Howland*.¹²⁷ However, the other circuits have not been

123. 445 F.2d at 148.

124. 310 F. Supp. at 1320.

125. 445 F.2d at 148.

126. Of course, a denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *United States v. Carver*, 260 U.S. 482, 490 (1923). "A denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with . . . any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." *Brown v. Allen*, 344 U.S. 443, 492 (1953). However, the *Hill* decision was apparently approved by the Court in *Couch v. United States*, 409 U.S. 322 (1973). See text accompanying notes 103-04 *supra*.

127. 13 CRIM. L. REP. 1019 (9th Cir. March 26, 1973). *Hill* has received a chilly reception in some quarters. In addition to *United States v. Blank*, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) (discussed at text accompanying notes 141-53 *infra*), see A.H. Alexander, 56 P-H Tax Ct. Rep. 491, 495 (1971) (permitting the seizure of gambling records); *Taylor v. Minnesota*, 342 F. Supp. 911, 917 (D. Minn. 1972) (upholding the seizure of a memorandum giving instructions to the defendant's wife regarding preparation of prostitutes). The Seventh Circuit itself has recently distinguished the *Hill* analysis as it applies to "wagering slips and the like." *Romanelli v. Commissioner*, 466 F.2d 872, 877-78 n.9 (7th Cir. 1972). The Second Circuit has distinguished *Hill* on the ground

prepared to go as far as the Seventh and Ninth Circuits. The leading decision upholding the search and seizure of private papers is *United States v. Bennett*,¹²⁸ which was decided by the Second Circuit. In *Bennett*, federal agents conducted a search incidental to a valid arrest for participation in a conspiracy to import and distribute narcotics. The agents found two address books containing the telephone numbers of one "Jessup," the business card of an "Austin Burke," and a letter from "Egan" to "Farris or Joyce."¹²⁹ The court held that the address book and business card would have qualified as instrumentalities under pre-*Warden* standards and were therefore seizable,¹³⁰ but found that the Egan letter would not have so qualified and announced, without discussion, that the *Warden* caveat demanded discussion only of the Egan letter.¹³¹ The Fourth and Fifth Amendments were distinguished on the ground that "the Fourth Amendment does not protect broadly against the seizure of things whose compulsory production would be forbidden by the Fifth."¹³² The court reasoned that:

The Fifth Amendment would have prohibited a subpoena requiring [the production of] the address books and Egan's business card, on the basis that by responding he would be giving testimony that "the articles produced are the ones demanded," yet no one could have seriously asserted, even before *Hayden*, that the Fourth Amendment protected such papers against seizure pursuant to a search warrant or a reasonable search incident to a lawful arrest.¹³³

Bennett had to dispose of *Boyd* because in *Boyd* seven Justices did in fact seriously assert such a proposition.¹³⁴ The court thus stated that "Mr. Justice Bradley's dicta" had been largely repudiated by *Warden*.¹³⁵

Bennett suggested "with deference" that an "approach geared to the

that records which are part of a regulatory scheme with public purposes are not protected by the Fifth Amendment and are specifically excluded from the holding in *Hill*. *United States v. Warren*, 453 F.2d 738, 742 (2d Cir. 1972). The Second Circuit had rejected the principles of *Hill* even before they were announced. *United States v. Bennett*, 459 F.2d 888 (2d Cir. 1969) (discussed at text accompanying notes 128-40 *infra*). For a comparative discussion of *Hill* and the district court's decision in *Vanderah* (subsequently reversed), see Note, *The Constitutionality of the Use of Search Warrants to Obtain Tax Records*, 6 GA. L. REV. 399 (1972).

128. 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971).

129. *Id.* at 895.

130. *Id.* at 896.

131. *Id.*

132. *Id.*

133. *Id.* at 896-97 (citation omitted).

134. See text accompanying note 13 *supra*.

135. 409 F.2d at 896.

objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized,"¹³⁶ and maintained that the post-*Warden* task was to guard against unlimited searches,¹³⁷ noting:

The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a "diary" whose cover page bore the title "Robberies I Have Performed." Similarly the abhorrence generally felt with respect to "rummaging" through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.¹³⁸

Thus, in contrast to *Boyd*, which was concerned with the object of the search, *Bennett's* concern was with the method. The *Bennett* court therefore had no difficulty admitting the Egan letter, which it termed "mere evidence":¹³⁹

Having found the letter in the course of a lawful search, the agents would have been entitled, even under pre-*Hayden* law, to read it to see whether it was an "instrumentality" for effecting the conspiracy The clear import of *Hayden* is to abolish any distinction because the letter turned out to be "mere evidence" of a conspiracy rather than a proposal to continue it. To hold that seizure of Egan's letter was impermissible would elevate the caveat . . . above the holding.¹⁴⁰

136. *Id.*

137. *Id.* at 897.

138. *Id.*

139. *Id.* at 896, 897.

140. *Id.* at 897 (footnote omitted). The letter from Egan to "Farris or Joyce" was found in a woman's pocketbook in the bedroom closet. *Id.* at 895. Although the arrest was made prior to the Court's decision in *Chimel v. California*, 395 U.S. 752 (1969), which limited searches incidental to arrest to the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" (*Id.* at 763), Judge Friendly, the author of the *Bennett* decision, contended at the 47th annual meeting of the American Law Institute that the seizure of the purse, the opening of the purse, and the subsequent reading of the letter would be "proper even under *Chimel*." 47 ALI PROCEEDINGS 79 (1971).

The idea that agents have the right to read a letter merely because it is in plain view is a dangerous extension of the plain view doctrine and a dangerous inroad on the particularity requirement of the Fourth Amendment. *Cf. Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring). In *Stanley*, Justice Stewart noted that since the warrant did not authorize the seizure of films, and since the content of the films seized could not be determined by mere inspection, the officers had no right to view them. This analogy appears equally applicable to certain papers which must be more than merely "inspected," but must be read in detail.

Bennett appears to support the proposition that there are not any items whose very nature precludes them from being the object of a reasonable search and seizure. Rather, any evidence which would aid in a particular apprehension or conviction can be seized, provided that it can be obtained without unreasonable rummaging through non-incriminating materials. When contrasted with the conclusion of *Hill* that no testimonial evidence can ever be seized, it is clear that the Second and Seventh Circuits "follow" *Warden* down two separate paths.

A third route has been taken by the Sixth Circuit in *United States v. Blank*.¹⁴¹ In *Blank* a search warrant had been issued for the seizure of bookmaking records and wagering paraphernalia.¹⁴² The materials were found and seized by F.B.I. agents, and the defendant filed a motion to suppress on the ground that such materials were testimonial, potentially self-incriminating, and thus not subject to search and seizure.¹⁴³ The district court ordered the material suppressed,¹⁴⁴ citing the decision in *Hill*.¹⁴⁵ On appeal a unanimous court reversed and held that the items were admissible.¹⁴⁶ In so ruling the court partially followed *Bennett*:

[T]here is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant.¹⁴⁷

Blank thus concluded that "the valid search warrant does not 'compel' the defendant to do anything in Fifth Amendment terms."¹⁴⁸ Unlike *Bennett*, however, *Blank* contended that in the absence of such compulsion the "[a]ppellee's ultimate reliance . . . must be upon the right of privacy as described by the Supreme Court in Fifth Amendment terms in *Warden v. Hayden* and *Schmerber v. California* and in Fourteenth Amendment terms in *Griswold v. Connecticut*."¹⁴⁹ Applying this standard, the Sixth Circuit found that the subjects of the seizure were not "personal communications at all but rather business accounts rendered extra-

141. 459 F.2d 383 (6th Cir.), cert. denied, 409 U.S. 887 (1972).

142. *Id.* at 384.

143. *Id.*

144. *United States v. Blank*, 330 F. Supp. 783, 784-86 (N.D. Ohio 1971).

145. 459 F.2d at 384.

146. *Id.* at 387.

147. *Id.* at 385.

148. *Id.* at 386.

149. *Id.* (citations omitted).

ordinary only by the fact that the business is itself illegal."¹⁵⁰ The court thought it important to point out that "[t]hese are not privately recorded and privately held thoughts or descriptions of events, as in the case of a closely held diary, but rather business records of which other persons must have knowledge."¹⁵¹ Indeed, the court even concluded that the papers were not "communicative in nature."¹⁵² As an alternative rationale the court noted that the papers were instrumentalities of a crime and were therefore subject to seizure on that ground.¹⁵³

Blank thus struck a middle ground between *Hill* and *Bennett*. *Hill* ruled that testimonial evidence is inherently unseizable while *Bennett* ruled that no item of evidence is inherently unseizable. *Blank* suggested that certain personal and private types of communication are not subject to seizure, provided that they are not instrumentalities of a crime. It is obvious that such differences in approach to a fundamental question must ultimately be resolved. The relevant policy arguments must be considered and a generally applicable standard must be adopted by the Supreme Court to govern the search and seizure of private papers.

V. THE RELEVANT POLICY ARGUMENTS

It is proposed that any judgment as to whether private papers should be permissible objects of a search and seizure should be guided by a balancing of four factors: (1) the extent of the intrusion into the suspect's privacy, (2) the gravity of the offense, (3) the extent to which the papers are utilized in the criminal act, and (4) the extent to which the general enforcement of the particular law depends upon the seizure of private papers.

A. *The Extent of the Intrusion into the Suspect's Privacy*

"Papers" is a broad concept. It is defined not merely by the physi-

150. *Id.*

151. *Id.* at 386-87 (footnote omitted).

152. *Id.* at 387. This argument seems particularly questionable. The materials were seized *because* they were communicative. As one court put it, "[w]hat is 'testimonial' is more seemingly meaningful than it turns out to be on analysis, for the most impersonal of things have their own condemnatory eloquence." *United States v. Quick*, 336 F. Supp. 744, 745 (E.D.N.Y. 1972). If the theory is that records are not communicative because they are intra-personal rather than interpersonal in character, absurd results would follow. For instance, letters would not be subject to seizure but personal diaries would be. Courts which believe that some communicative materials ought to be subject to seizure should make their reasoning explicit. It is not surprising that *Blank* did not attempt to define "communicative" since other courts employing similar arguments have also failed to do so. *See United States v. Main*, 312 F. Supp. 736, 740-42 (D. Del. 1970).

153. 459 F.2d at 387.

cal or chemical properties of an item, but rather by the presence of symbolic communication, whether verbal or non-verbal.¹⁵⁴ In this sense "papers" includes items as diverse as diaries, letters, address books, business cards, betting slips, cancelled checks, insurance policies, drivers' licenses, draft cards and drawings. Any attempt to classify such materials into categories could never provide an exact index of privacy concerns since individuals single out very different aspects of their lives as uniquely their own.¹⁵⁵ While some people's politics or religious tenets are well guarded aspects of anonymity, others publicly advertise their deepest beliefs. Some people zealously safeguard details of their economic life, educational background, military record, age or physical health; others publish books about their lives of crime or their sexual experiences. The mere fact that some citizens consider their personal beliefs and activities to be the appropriate subject of public debate in no way suggests that the government has the right to gather similar information from the reticent majority. However, although many citizens desire the broadest scope of privacy, the powers accorded to the Census Bureau¹⁵⁶ and the Internal Revenue Service,¹⁵⁷ the compulsory process of courts¹⁵⁸ and legislatures,¹⁵⁹ and the wide latitude afforded the mass media¹⁶⁰ demonstrate that privacy is not an absolute in twentieth century America.

Without attempting to set up categories of papers which may or may not be subject to seizure, it is nevertheless possible to discuss certain types of papers in terms of general privacy interests. For example, there are some testimonial items the seizure of which affords no serious privacy objection. Included here are papers created by the state for identification purposes such as draft cards,¹⁶¹ automobile registration certificates and drivers' licenses. Similarly, governmental seizure

154. For an example of non-verbal testimonial papers see *Hubert v. State*, 234 A.2d 264 (Md. Ct. Spec. App. 1967), wherein the defendant was accused in part of tying up a woman preparatory to a sexual assault. *Id.* at 267. The papers involved were tracings made by the defendant of pictures of bound and gagged women. *Id.* at 273-74. The evidence was suppressed because it was too prejudicial. *Id.* at 274.

The definition of non-verbal testimonial papers would not include most photographs since they usually do not involve symbolic representations. There would appear, however, to be no reason why the principles discussed in this Comment should not apply equally to photographs.

155. *Cf. Time, Inc. v. Hill*, 385 U.S. 374, 412-15 (1967) (Fortas, J., dissenting).

156. U.S. CONST. art. I, § 2, cl. 3.

157. *See, e.g., Couch v. United States*, 409 U.S. 322 (1973).

158. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665 (1972).

159. *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959).

160. *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

161. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968).

of business records is difficult to attack on grounds of privacy. While corporate secrets must admittedly be protected, the seizure of business records discloses little of an individual's private life.

More difficult to assess are the privacy interests involved in the seizure of non-business economic records of an individual. To permit the seizure of all cancelled checks and credit card receipts of an individual would permit a rather thorough analysis of his total life style.¹⁶² On the other hand, the seizure of a single credit card receipt to establish that an individual ate dinner in a particular section of a city would involve a relatively insignificant intrusion on that individual's privacy.

The confiscation of personal letters involves a potentially serious invasion of privacy. People often reveal aspects of their lives to close friends, relatives, ministers, doctors and others that they would not want revealed to anyone else.¹⁶³ Letters sent to an individual could in-

162. Similarly, checking the return addresses of all mail sent to an individual, or all telephone numbers dialed by an individual, could reveal much about his personal relationships. The confiscation of several envelopes or registered mail receipts, to establish merely that an individual resided at a particular address, would involve a relatively insignificant privacy intrusion. Note that cases before *Katz* had concluded that checking mail covers did not constitute a search. *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir.), *cert. denied*, 390 U.S. 951 (1968); *Canaday v. United States*, 354 F.2d 849 (8th Cir. 1966).

163. The fact that the law permits informers to reveal personal confidences does not necessarily justify the seizure of letters. If A tells B a secret, A is taking the risk that B will violate the confidence. If B reveals the confidence, then A has lost a gamble. It is one thing to accept the testimony of B or to use papers written by A to B which are voluntarily provided by B; it is quite another to seize papers sent by A to B without the permission of B. In one case, A has misplaced a confidence; in the other, the state has deliberately intruded into a confidential relationship.

Indeed, it is arguable that the seizure of private letters is a more serious privacy intrusion than the seizure of telephonic communications. The fear of wiretapping in America is widespread. Even before police wiretapping was officially sanctioned, free speech on the telephone was restricted—not by governmental fiat but by private fears. It is therefore conceivable that the American people are more willing to express their private thoughts in letters than on telephones.

This is not to suggest that because people "expect" or "fear" tapping a dragnet invasion of privacy is justifiable. *Katz v. United States*, 389 U.S. 347, 351 (1967), contended that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection." This remark, however, appears subject to qualification. If the government announced that all future conversations of every citizen would be tapped, the fact that no one could entertain a "reasonable expectation of privacy" when he or she spoke on the telephone would not prevent the conclusion that the Fourth Amendment had been recklessly ignored. The question is not merely what expectations of privacy are reasonable, but also what expectations of privacy should be assured. To threaten seizure of private communications is to encourage a society of guarded speech, despite our "profound national commitment to the principle that debate on public issues should be unin-

volve discussions of such matters as easily as those sent *by* an individual. Indeed, few items contain the privacy interests inherent in personal letters.

The seizure of private diaries should be even more carefully scrutinized. Private diaries often contain the innermost thoughts of an individual, reflecting aspects of his personality which he is unwilling to communicate to anyone, even his closest friends and relatives. Indeed, often no one but the person keeping the diary ever sees its contents. The seizure of such an item would be a serious invasion of privacy.

Thus, the term "papers" should not be a talisman in judging the privacy consequences of any particular search and seizure. Nor can the concern for the protection of privacy be limited to the nature of the object seized. The search for the object may itself intrude unduly into private matters. If a search for an invoice involves a search of all of a person's papers, the person's privacy is significantly compromised. Unfortunately, the application of the "plain view" doctrine to private papers tends to encourage such exploratory searches. In *State v. Hawkins*,¹⁶⁴ for example, police obtained a warrant to seize instruments and drugs used in performing abortions.¹⁶⁵ They opened a diary, purportedly to see if it was hollowed out to contain drugs.¹⁶⁶ The diary "happened" to open to a page which contained the statement "Doctor Jack

hibited, robust and wide-open" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Note, however, that First Amendment analysis in this area normally has little utility. For instance, the application of First Amendment principles could lead to the absurd conclusion that diaries could be seized while letters could not, because of the "chilling effect" the seizure of letters would have on communication between individuals. Nevertheless, the First Amendment is implicated in the seizure of some types of papers. For example, when obscene literature is the object of a search and seizure the Court requires "higher standards of particularity in the warrant than are necessary in ordinary contraband cases, in order 'to avoid suppression of constitutionally protected publications.'" T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATIONS* 66 (1969), quoting *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Taylor further argues that the First Amendment should "apply even more strongly to personal 'speaking documents' of the victim of the search." It is unclear, however, why this should be the case. If the "speaking documents" were intended for publication, such an argument might be acceptable. Most private papers, though, are intended to remain private and are not designed for publication. Thus, privacy concerns appear more germane to test the seizure of such papers than any peripheral First Amendment interests. Ordinarily, therefore, only the Fourth Amendment will be involved.

164. 463 P.2d 858 (Ore. 1970).

165. *Id.* at 859.

166. *Id.*

(and I help) gave Dawn an AB at my hse.”¹⁶⁷ The seizure was upheld on the principle that evidence discovered in plain view is seizable.¹⁶⁸ Another example is *People v. Sirhan*,¹⁶⁹ in which a policeman, while throwing away a piece of paper at Sirhan’s residence, “inadvertently” discovered an incriminating paper at the top of the trash bin.¹⁷⁰ Once again plain view principles reigned.¹⁷¹ Although it is possible that the officers’ stories in these cases were true, it is also demonstrable that imaginative stories are often told in court following exploratory rummaging through an accused’s private effects. Whatever the deficiencies of the plain view doctrine as applied to non-documentary items, its application to papers would appear to encourage continued exploratory searches through private papers.¹⁷² One means of guaranteeing that private papers will remain private is to limit the incentive for such searches by denying admittance to papers found in plain view.¹⁷³ Such a limitation would not seriously hamper honest law enforcement since, even though a paper may be in “plain view,” its contents ordinarily cannot be ascertained without close scrutiny.¹⁷⁴

B. *The Gravity of the Offense*

Privacy is not an absolute and in certain circumstances the objectives of law enforcement may outweigh privacy interests. The balance must depend in part upon the seriousness of the societal interest involved. Surely there is a valid distinction between society’s interest in obtaining evidence relating to a conspiracy to assassinate the President of

167. *Id.*

168. *Id.* The court did suppress evidence garnered by reading of a second diary.

169. 7 Cal. 3d 369, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

170. *Id.* at 400, 497 P.2d at 1142, 102 Cal. Rptr. at 406.

171. *Id.* at 400-03, 497 P.2d at 1142-44, 102 Cal. Rptr. at 406-08. The defense neglected to raise the argument concerning the testimonial character of the paper and the court explicitly did not consider the issue. *Id.* at 403, 497 P.2d at 1144, 102 Cal. Rptr. at 408.

172. “Every lawyer practicing in the criminal courts knows that police perjury is commonplace.” Younger, *The Perjury Routine*, THE NATION 596-97 (May 8, 1967); see Chevigny, *Police Abuses in Connection With the Law of Search and Seizure*, 5 CRIM. L. BULL. 3, 8-11 (1969).

173. *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930). As the Court of Appeals of New York observed in *People v. Baker*, 244 N.E.2d 232, 238 (N.Y. 1968), “[n]ow that the seizure of ‘mere evidence’ is authorized, courts will have to be more diligent in assuring that an authorized search for a particular item is not used as a device to gain access for general exploratory searches for evidence, thereby destroying the people’s security in their persons, houses, papers, and effects, guaranteed by the Fourth Amendment.”

174. See notes 140 *supra* and 196 *infra*.

the United States¹⁷⁵ and its interest in obtaining evidence concerning a simple trespass.¹⁷⁶ The more serious the nature of the offense, the more extensive the invasion of privacy which ought to be permitted.

Just as it is possible to evaluate the extent of intrusion into privacy caused by the seizure of various papers, it is possible to make judgments concerning the relative gravity of various offenses. In *Dorman v. United States*,¹⁷⁷ for example, the Court of Appeals for the District of Columbia Circuit, when discussing the exigent circumstances which would justify warrantless searches, noted that such searches normally will be allowed more frequently where "a grave offense is involved, particularly one that is a crime of violence. . . . Contrariwise the restrictive requirement for a warrant is more likely to be retained . . . when the offense is what has been sometimes referred to as one of the 'complacent' crimes, like gambling."¹⁷⁸ Further, the gravity of the offense is taken into consideration whenever a defendant is sentenced for a crime.¹⁷⁹ Any decision regarding seizure of private papers which fails to take the gravity of the offense into account¹⁸⁰ will either give too much or too little weight to the values of privacy and order.

C. The Extent to which the Papers are Utilized in the Criminal Act

Some criminal offenses intimately involve the use of papers. Bank robbers, for example, often use notes to communicate with the

175. If the assassination actually occurs, it would seem that the need to read a diary to locate possible co-conspirators would present a stronger claim for seizure than a desire to read a diary merely to obtain evidence of premeditation. Cf. *People v. Carter*, 26 Cal. App. 3d 862, 872, 103 Cal. Rptr. 327, 333-34 (1972) (officers in "hot pursuit" could seize notebook which might lead to suspect). It might also be argued that the diary could be seized to prevent serious bodily injury but not for use in evidence.

176. One would have to entertain an unusual lack of concern for privacy to permit a seizure of a personal diary to demonstrate that an accused did in fact trespass by walking across the grass on state property.

177. 435 F.2d 385 (D.C. Cir. 1970).

178. *Id.* at 392 (citations and footnote omitted).

179. W. LAFAYE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 25 (1972).

180. Of course, such an analysis does not require a uniquely calibrated measuring device for determining the seriousness of a criminal offense. As LaFave puts it, "[t]here is one case-by-case variable—the seriousness of the offense—which cannot be ignored by police and courts. Taking into account the seriousness of the offense does not require the use of some fine-spun theory whereby each offense in the criminal code has its own probable-cause standard; rather, it involves only the common-sense notion that murder, rape, armed robbery, and the like call for a somewhat different police response than, say, gambling, prostitution, or possession of narcotics." LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 *MICH. L. REV.* 40, 57 (1968) (footnote omitted).

teller in order to avoid conversation. Fraud is often committed through the use of written materials. Agreements in criminal conspiracies are sometimes achieved entirely through exchanges of letters. It would be peculiar indeed to allow an accused to claim that a paper which was a substantial tool in the commission of a crime could not be seized. A better view would be to hold that an accused who uses a paper as a substantial means in the commission of a criminal offense exposes himself to potentially serious intrusions on his privacy.

It might be objected that considering the degree of involvement of the papers in the offense is a return to the means and instrumentalities classification.¹⁸¹ Two major distinctions, however, should be noted. First, unlike the means and instrumentalities exception, the suggested analysis does not render such papers automatically seizable. Rather, it assumes that the extent of utilization of the papers is merely one factor to be weighed in making a final determination regarding seizure. Second, this analysis would not use classifications such as mere evidence or means and instrumentalities. Such arbitrary categories transform differences of degree into differences of kind and impede the formulation of logical policy standards. The suggested analysis merely recognizes that the greater the utilization of the materials in a criminal act, the stronger the case for seizure.

D. The Extent to Which the General Enforcement of the Particular Law Depends Upon the Seizure of Private Papers

Warden required that there exist "a nexus . . . between the items to be seized and criminal behavior."¹⁸² That link could be merely evidentiary and the materials need not have been substantially involved in the commission of the crime.¹⁸³ Some criminal statutes would be almost impossible to enforce if papers of evidentiary value were not subject to seizure. For example, it has been argued that the successful enforcement of tax laws depends upon the ability of the government to seize the economic records of private individuals,¹⁸⁴ even though such records could not realistically be viewed as a substantial means of committing the offense of tax evasion. Similarly, if certain types of fraud, conspiracy, or gambling can be achieved solely through the use of written communications, a prohibition against the seizure of such com-

181. See text accompanying notes 35-48 *supra*.

182. 387 U.S. at 307.

183. See text accompanying notes 51-75 *supra*.

184. Note, *The Constitutionality of the Use of Search Warrants to Obtain Tax Records*, 6 GA. L. REV. 399 (1972). *But cf.* Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966).

munications would be a long step toward condoning such conduct. On the other hand, there appears to be no crime which as a general rule requires the admission of a diary in order to achieve a successful prosecution. It is thus clear that if exclusion of a class of materials could significantly hamper the enforcement of an individual crime, the case for allowing seizure would become quite compelling. A finding to the contrary would overrule substantive laws through rules of evidence, and such constructions are hardly favored, unless absolutely required by the Constitution.

VI. COMPULSORY SELF-INCRIMINATION: AN IRRELEVANT POLICY ARGUMENT

There are those who suggest that self-incrimination should be identified as an important if not decisive factor in the formulation of standards relating to the seizure of private papers.¹⁸⁵ To the contrary, however, self-incrimination is not a decisive or independent factor in this analysis, and, in fact, it appears to be an irrelevant policy consideration that only confuses the real issue.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, *papers*, and effects, against unreasonable searches and seizures shall not be violated"¹⁸⁶ It does not say that the seizure of papers is inherently unreasonable, and the unmistakable implication is that some papers can be the subject of a lawful search and seizure. This is true notwithstanding Justice Bradley's reasoning in *Boyd* suggesting that the search and seizure of an invoice not written by the accused would violate the Fourth Amendment because of the policies of the Fifth Amendment.¹⁸⁷ It is difficult to understand why such an invoice should be considered more self-incriminating than any other object, and certainly the privacy interests involved in such an invoice are insubstantial. It would require a considerable stretching of the Fifth Amendment to hold that *no* paper can ever be the subject of a search and seizure, contrary to the clear implication in the Fourth Amendment. Rather, the two amendments must be harmonized.

The Fifth Amendment appears to be centrally concerned with the production of compelled testimony. It guarantees to each individual the right to refuse to personally produce any evidence which might in-

185. See text accompanying note 13 *supra*.

186. U.S. CONST. amend. IV (emphasis added).

187. See text accompanying note 13 *supra*.

criminate him.¹⁸⁸ When a search is made for self-incriminatory articles, however, the compulsion is not to produce testimony, but to permit a search for evidence already available. A search to find self-incriminating articles does not command the accused to produce anything; it compels him to stand aside while the police gather evidence. There is an important difference between compelling an accused to permit the police to search his house to find a blackmail note, and compelling an accused to tell where it is. This is why the actual holding of *Boyd* is still thoroughly defensible.¹⁸⁹ The Fifth Amendment simply guarantees that no one can be compelled to produce any evidence which might incriminate him; it matters little whether the evidence is an invoice, a knife, a radio or a diary.

If the police seized lottery tickets written in the handwriting of the accused or identification forged by the accused, few would seriously argue that the Fifth Amendment prohibited such seizure.¹⁹⁰ This is true despite the fact that the accused created the items himself. When a diary is seized, however, one is tempted to speak of self-incrimination.¹⁹¹ The diary is not different in kind from the lottery tickets; the difference is simply one of degree. Both items are writings created by

188. Cf. *United States v. Dionisio*, 410 U.S. 1, 7 n.6 (1973) (holding that the compulsion of voice exemplars presented "no hint of testimonial compulsion," since the defendant was merely displaying generally observable physical characteristics for identification purposes).

189. See text accompanying notes 8-27 *supra*.

190. And yet notice that such tickets would be testimonial. Unlike blood samples (*Schmerber v. California*, 384 U.S. 757 (1966)), handwriting exemplars (*Gilbert v. California*, 388 U.S. 263 (1967)), or voice exemplars (*United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973)), lottery tickets are seized precisely for their "communicative content." The chemical and/or physical properties of the lottery ticket are utterly irrelevant to their value as evidence. They are valuable precisely because the "content" of the papers demonstrates that the accused was involved in crime. The Court faces three choices: (1) it may deny that the Fifth Amendment is related to search and seizure situations; (2) it may deny that the material is testimonial; or (3) it may emphasize the privacy aspects of the Fifth Amendment in search and seizure situations. It should be clear that the Court is moving to create a Fifth Amendment right to privacy. See text accompanying notes 94-111 *supra*. Such an approach appears to be superfluous since the Fourth Amendment's ban against "unreasonable" searches and its concern for privacy (see text accompanying note 63 *supra*) is all that is necessary. Furthermore, if protection against the seizure of private communications is thought to depend upon principles of self-incrimination, the papers of concededly innocent third parties would receive less constitutional protection than the papers of a suspect. Surely the diaries of the innocent deserve as much constitutional protection as the diaries of the accused.

191. See, e.g., *People v. Sirhan*, 7 Cal. 3d 369, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

the accused; the crucial difference is found in the privacy interests involved. At the very best, then, the protections afforded by the Fifth Amendment are relevant only to the extent that they create privacy rights. This is the reason the Sixth Circuit spoke of the *Fifth Amendment right of privacy*¹⁹² and the Second Circuit suggested that "an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized."¹⁹³ This is the approach taken most recently by the Supreme Court in *Couch v. United States*,¹⁹⁴ wherein the Court noted that the petitioner's Fourth Amendment claim did "not appear to be independent of her Fifth Amendment argument."¹⁹⁵

CONCLUSION

The law surrounding the search and seizure of private papers is in a state of flux. Currently the Supreme Court is permitting the lower courts to resolve the problems on a case by case basis. Perhaps the only settled point which has emerged out of this confusion is that papers which are totally unrelated to an offense may not be seized. It is apparent that a generally applicable standard must be developed regarding this important issue. It is therefore proposed that the search and seizure of private papers should be regulated by privacy considerations rather than by any self-incrimination concepts. The constitutional bases for such privacy concerns are found in the particularity¹⁹⁶

192. 459 F.2d at 386.

193. 409 F.2d at 896. For similar discussions of the scope of Fifth Amendment protection, see 8 J. WIGMORE, EVIDENCE § 2264 (McNaughton rev. ed. 1961); Comment, *The Fourth and Fifth Amendments—Dimensions of an Intimate Relationship*, 13 U.C.L.A.L. REV. 857 (1966); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 59-63 (1969). Taylor presents a vigorous argument which demonstrates clearly that Fifth Amendment protections are not violated by the seizure of "mere evidence" (*id.*), but curiously concludes that, although compelling testimony is not exactly the same as seizing letters and diaries (which papers he terms "self-identifying"), it comes "perilously close" and thus Fifth Amendment values should be given "primary consideration." *Id.* at 66. One is thus reminded "of Julia who, according to Byron's reports, 'whispering "I will ne'er consent"—consented.'" *Everson v. Board of Education*, 330 U.S. 1, 19 (1946) (Jackson, J., dissenting).

194. 409 U.S. 322 (1973).

195. *Id.* at 325-26 n.6. *Boyd* analyzed the amendments as running together in their concern for self-incrimination. *Couch* analyzes them as running together in their concern for privacy.

196. The particularity requirement alone could be used to preserve the privacy of papers. If a court believed that diaries should not be subject to seizure, it could require that the police describe in the most particular detail the content and language contained in the diary. If the police were able to do so, the seizure of the diary would involve no serious intrusion of privacy since its contents would already be known.

and probable cause¹⁹⁷ requirements of the Fourth Amendment, the prohibition against unreasonable searches and seizures contained in the Fourth Amendment, and the Fifth Amendment right of privacy.¹⁹⁸ It is further suggested that particular decisions regarding the search and seizure of private papers should be reached by balancing four factors: (1) the extent of the intrusion into the suspect's privacy, (2) the gravity of the offense, (3) the extent to which the papers are utilized in the criminal act, and (4) the extent to which the general enforcement of the particular law depends upon the seizure of private papers.

While individuals might balance these factors differently, a few illustrations as to how they could be applied should be instructive. Diaries, for instance, give rise to important privacy interests, are not a substantial means of committing any offense, and need not be seized for the general enforcement of any particular law. Their seizure in whole or part should not be countenanced unless the contents sought to be seized can be described with such particularity that it is clear that privacy interests have already been compromised. Perhaps diaries should also be seizable when a showing can be made that seizure would offer a real potential of preventing serious bodily injury or death.

Private letters also involve significant privacy interests and should not be subject to seizure except in situations where they are a substantial means of committing the offense or are necessary for the general enforcement of a particular law, such as conspiracy. The seizure of gambling records, on the other hand, compromises no significant privacy values. Although gambling offenses are not ordinarily considered to be serious crimes, gambling records are heavily involved in the commission of the offense and prohibiting the seizure of such records would seriously undermine the enforcement of existing law.

The considerations involved in the seizure of private papers for tax prosecutions are more complex. The seizure of all of an individual's economic records would involve a substantial intrusion, the particular offense might or might not be a serious violation of the tax laws, and the records might or might not have been used to prepare the tax forms. Since the Internal Revenue Service was able to effectively enforce the law prior to *Warden* without seizing tax records,¹⁹⁹ presumably the

The decision as to how much detail should be provided should be guided by the factors discussed in this Comment.

197. See note 32 *supra*.

198. See note 110 *supra*.

199. See Note, *The Constitutionality of the Use of Search Warrants to Obtain Tax Records*, 6 GA. L. REV. 399 (1972).

search and seizure of tax records is not necessary for the general enforcement of tax laws and therefore should not ordinarily be permitted.

Even if the balancing of the relevant four factors should suggest that certain papers could be considered constitutionally permissible objects of seizure, it would still be necessary to determine if the search for the material would require an impermissibly broad search through other papers. In short, courts would still have to decide if the particularity requirement of the Fourth Amendment had been satisfied.

Whether the courts are trying to determine the permissibility of a seizure or the allowable scope of a search, they should begin to approach these questions with the recognition that each one of the four factors must be considered before an appropriate balance can be struck in Fourth Amendment law.

Steven H. Shiffrin