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Constitutional Protection for Private Papers

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CONSTITUTIONAL PROTECTION FOR PRIVATE PAPERS

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Introduction

Until 1967 the mere evidence rule limited the objects of searches and seizures to "fruits and instrumentalities" of a crime. This rule provided special, if illogical and arbitrary, constitutional protection to private papers, as they were rarely fruits or instrumentalities of crime.[1] But in 1967, in *Warden v. Hayden,*[2] the Supreme Court decided that the fourth amendment permitted searches for "mere evidence." This holding, although it was based on sound logic, diminished both the number and type of searches prohibited by the fourth amendment.[3]

In the decade after *Hayden* this diminution continued as the Court further expanded the government's ability to gather evidence.[4]

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[1] In addition, because of their testimonial nature, the production of private papers was barred by the self-incrimination clause of the fifth amendment. *See* Boyd v. United States, 116 U.S. 616, 632 (1886) (statute providing for the compulsory production, in a civil case brought by the government, of the defendant's books, invoices, or papers relevant to the proceeding violates self-incrimination clause). In recent years the Court has interpreted this holding of *Boyd* very narrowly. *See* text accompanying notes 49–55 *infra.*

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

[3] *See id.* at 310 (Fortas, J., concurring); *id.* at 312 (Douglas, J., dissenting); text accompanying notes 44–48 *infra.*

[4] *See, e.g.,* Couch v. United States, 409 U.S. 322 (1973) (fifth amendment does not bar summons directing petitioner's accountant to turn over tax records held by the accountant because the amendment is a "personal privilege" which cannot be asserted by the accountant); Fisher v. United States, 425 U.S. 391 (1976) (neither fourth nor fifth amendment bars summons to attorney to produce work papers of his client's accountant turned over to the attorney by the client); Andresen v. Maryland, 427 U.S. 463 (1976) (neither fourth nor fifth amendment prohibits search of an individual's office for, and seizure of, business papers prepared by the individual)

This trend culminated in *Zurcher v. Stanford Daily*,[5] in which the Court upheld the issuance of a warrant to search the office of a student newspaper for photographs that were evidence of a crime, even though there was no claim that either the photographer or the newspaper was involved in any criminal activity.

Zurcher and the other post-*Hayden* cases[6] have broadened the scope of both who can be searched and what can be searched for, thus raising serious questions about whether private papers, particularly those of non-culpable individuals, are entitled to any constitutional protection beyond the usual fourth amendment requirement of a search warrant issued upon a showing of probable cause. The thrust of the Court's opinions from *Warden* through *Zurcher* is that *any* evidence, even the most private of papers, held by *any* individual, even one totally uninvolved in crime, is subject to search and seizure upon a proper showing of probable cause and specificity. Nonetheless, the Court has explicitly stopped short of such a holding. In *Zurcher* the Court recognized that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to a different type of material."[7] And in *Fisher v. United States*,[8] in which the Court upheld an IRS summons for the tax records of petitioners' accountants, it noted that "[s]pecial problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here."[9] Thus, on the one hand the Court seems to have done away with any special protections that private papers may have enjoyed in the past. On the other, it has been unwilling to concede that there may not be certain types of papers which should be accorded special protection.

In *Fisher* the Court stated that "the prohibition against forcing production of private papers has long been a rule searching for a

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[5] 436 U.S. 547 (1978).

[6] *See* note 4 *supra*.

[7] 436 U.S. at 564, *quoting* Roaden v. Kentucky, 413 U.S. 496, 501 (1973). This qualification refers to seizures of specific types of papers, as the Court's discussion of *Roaden* and Stanford v. Texas, 378 U.S. 476 (1965), makes clear. 436 U.S. at 564.

[8] 425 U.S. 391 (1976).

[9] 425 U.S. at 401 n.7. *See also* United States v. Miller, 425 U.S. 435, 440–43, 444 n.6 (1976) and Hill v. California, 401 U.S. 797, 805 (1971), in which the Court avoided the question of the propriety of seizing private papers.

rationale . . . ."[10] It is the purpose of this Article to offer such a rationale and to suggest the rule of law which should be followed when the government desires to search for and seize diaries, datebooks, tape recorded notes, and other purely private communicative materials. This discussion, which involves a consideration of the diminution of the fourth and fifth amendment protections for such materials, concludes that certain private communications, because they are the physical embodiment of the mental process, should be entitled to special protection under the fourth amendment.

I. The Decline of Constitutional Protections

A. Fourth Amendment Protections: The Mere Evidence Rule

To understand the diminution of the fourth amendment's protection for private papers it is first necessary to realize how extensive that protection once was. Protection of private papers from governmental search and seizure is a principle that was recognized in England well before our Constitution was framed. The most eloquent statement of the principle is found in the British case of *Entick v. Carrington*,[11] which the Supreme Court has cited as the source of the framers' understanding of the term "unreasonable searches and seizures."[12] In *Entick* the Secretary of State issued a warrant authorizing a search of the house of John Entick, allegedly the author of certain seditious

[10] 425 U.S. at 409.

[11] 19 Howell's St. Tr. 1029 (1765). An abbreviated report of the case appears at 95 Eng. Rep. 807 (1765). For a discussion of the significance of *Entick* in American constitutional law, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 29, 53-55, 59-60 (1966).

[12] In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court declared:

> As every American statesmen [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this [case] and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of [the framers] and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id. at 626-27.

papers. Entick was arrested and all of his papers were seized, including many which bore no relation to the charge. Entick sued the agents of the Secretary of State for trespass and won before a jury. The King's Bench upheld the verdict. The Court, in an opinion by Lord Camden, reasoned that "every invasion of private property . . . is a trespass" and it was therefore "incumbent upon the defendants to shew the law, by which this seizure is warranted."[13] Because "private papers are the owner's goods and chattels"[14] no trespass could be justified, for such a search would violate the supremacy of the owner's property rights.[15] Searches for stolen goods, on the other hand, were permissible since such goods were not the property of the subject of the search.

Thus "privacy" in *Entick* was simply an offshoot of the right to private property: no one had a right to trespass on another's land and seize the landowner's property, regardless of what sort of warrant he or she might possess. Papers, as chattels, were protected along with other personal property. The reasoning of *Entick* was adopted by the United States Supreme Court in *Boyd v. United States.*[17] In *Boyd* the lower court had ordered that certain business records of the appellants be produced in connection with an ongoing forfeiture litigation with the government. The appellants complied with the order under protest and sought review of the resulting forfeiture judgment. The Supreme Court held that the order to produce the papers violated both the fourth and fifth amendments.[18]

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[13] 19 Howell's St. Tr. at 1066.

[14] *Id.*

[15] *Id.*

[16] Stolen goods were considered the property of the owner from whom they were stolen. *See id.* at 1067.

[17] 116 U.S. 616 (1886).

[18] *Id.* at 634–35. To find a violation of the fourth amendment, it was necessary for the Court to conclude that the order constituted a search or seizure. The Court concluded that it did because it "effect[ed] the sole object and purpose of a search and seizure." *Id.* at 622. This reasoning is highly questionable because a subpoena is less intrusive than a search. It may be that the Court found it necessary to rely on both the fourth and fifth amendments because the papers at issue had not been prepared by appellants but by the firm that had shipped the glass which was the subject of the forfeiture proceeding. *Id.* at 619. The papers were only self-incriminatory in the sense that it would be necessary for appellants to authenticate them in court. Thus, arguably, neither a search nor self-incrimination was present in *Boyd.*

The observation by Justice Marshall, dissenting in Couch v. United States, 409

The Supreme Court later described the *Boyd* holding thus:

> [W]arrants "may be resorted to only 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] the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say . . . that the Government had any interest" in the papers involved "other than as evidence against the accused . . . ," "to permit them to be used in evidence would be, in effect, . . . to compel the defendant to be a witness against himself."[19]

Thus, the papers in *Boyd* were held immune from seizure for two reasons: first, as the private property of the appellants, they were protected by the fourth amendment; second, since they were testimonial in nature, they were protected by the fifth amendment. The Court stated that "in this regard the fourth and fifth amendments run almost into each other."[20]

Boyd established in the American constitutional lexicon the "mere evidence rule" based upon the right to private property that was recognized in *Entick*. Only contraband or fruits and instrumentalities of a crime were subject to seizure.[21] If an individual's private property

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U.S. 322, 348 (1973), that "*Boyd* emphasized that the invoice there was a private paper written by the defendants" is incorrect. While *Boyd* emphasized that the invoices were appellants' private papers, the opinion states that the invoice in question was "'from the Union Plate Glass Company . . . .'" 116 U.S. at 619.

[19] Warden v. Hayden, 387 U.S. 294, 302 (1967), *quoting* Gouled v. United States, 255 U.S. 298, 309, 311 (1921).

[20] 116 U.S. at 630. For an interesting discussion of the *Boyd* opinion and its subsequent abandonment by the Supreme Court, see Gerstein, *The Demise of* Boyd: *Self Incrimination and Private Papers in the Burger Court,* 27 U.C.L.A. L. REV. 343 (1979). That Article, focusing as it does on the "moral autonomy" aspects of the fifth amendment, covers substantially different ground than does this Article.

[21] Instrumentalities differ from contraband in that the defendant clearly has a property interest in the former. The reason that instrumentalities were seizable was explained in an article which was later relied on heavily by the Supreme Court in overturning the mere evidence rule. *See* Warden v. Hayden, 387 U.S. 294, 303, 309 (1967). The article stated:

were merely evidence of a crime it could not be seized, however relevant it might be to an ongoing criminal investigation. The right to privacy was thus assured by the Constitution's protection of property.[22]

Yet the rule, although a comfortable reaffirmation of the principle that "every man's home is his castle,"[23] led to irrational results by

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> The requirement that the object seized be an instrumentality of crime owes its existence to the principle that such articles are forfeit to the government, which in turn seems to be derived from the deodand of the early common law. In the 13th century a metaphysical fault was imputed to an inanimate object such as a wagon or sword which had caused an injury. This fault made the object a deodand which could be seized, condemned, and after purification sold by the Crown.

Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474, 478 (1961).

[22] The early decisions were clearly based on property rights and hence equally applicable whether papers or articles of clothing were involved. Still, they seem to have been influenced by a special regard for private papers. Thus in *Entick* the Court declared:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

19 Howell's St. Tr. at 1066. In *Boyd* the communicative nature of the items seized provided the fifth amendment basis for the decision. And in Weeks v. United States, 232 U.S. 383 (1914), the case which originated the exclusionary rule, the Court stated:

> The case . . . involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house (without a warrant) . . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense the protection of the 4th amendment . . . might as well be stricken from the Constitution.

232 U.S. at 393.

[23] "'The maxim that "every man's house is his castle," is made part of our constitutional law in the clauses prohibiting unreasonable searches and seizures . . . .'" Weeks vs. United States, 232 U.S. at 390, *quoting* T. COOLEY, CONSTITUTIONAL LIMITATIONS 425-26 (1874).

forcing the courts to exclude relevant evidence of crime which had been seized pursuant to otherwise lawful searches.[24] For example, in *United States v. Richmond,*[25] clothing which supported an on-the-scene identification of the defendant was supppressed[26] because the defendant's clothing was his property and not a fruit or instrumentality of a crime. Similarly, in *Morrison v. United States,*[27] a handkerchief "which allegedly bore some tangible evidence of [a sex] offense" was suppressed.[28] Other courts struggled to find that objects were an instrumentality of a crime in order to establish their admissibility. For example, in *United States v. Guido*[29] the court found that a bank robber's shoes were admissible as an instrumentality of the crime because they "would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing barefooted from the scene of a hold-up."[30]

In addition to excluding relevant evidence of crime, the mere evidence rule failed to satisfactorily protect privacy. In *Olmstead v. United States*[31] the Court held that the warrantless wiretapping of exte-

[24] The rule was widely criticized. *See* articles cited in Warden v. Hayden, 387 U.S. at 300 n.7. But the issue was not totally one-sided. *See* United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (L. Hand, J.):

> [T]he real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him . . . . [L]imitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime.

[25] 57 F. Supp. 903 (S.D. W. Va. 1944).

[26] *Id.* at 907.

[27] 262 F.2d 449 (D.C. Cir. 1958).

[28] *Id.* at 450–51. "The handkerchief was merely evidentiary material. It clearly was not the instrument or means by which the crime was committed, the fruits of a crime, a weapon by which escape might be effected, or property the possession of which is a crime." *Id. See also* United States v. Lerner, 100 F. Supp. 765, 768 (N.D. Cal. 1951).

[29] 251 F.2d 1 (7th Cir.), *cert. denied,* 356 U.S. 958 (1958).

[30] *Id.* at 3–4. *See also* Morton v. United States, 147 F.2d 28 (D.C. Cir.), *cert. denied,* 324 U.S. 875 (1945) (blood-stained clothing of a murder suspect held admissible without discussing the mere evidence rule).

[31] 277 U.S. 438 (1928).

rior phone lines by federal agents, "without any trespass on the property of the defendants,"[32] did not violate the fourth amendment.[33] Increasingly sophisticated technology had made it possible to intrude upon even the most private sanctuaries without physical trespass, leaving the subject without legal recourse. It became apparent that the mere evidence rule did not realistically balance the needs of law enforcement and the privacy rights of the individual. The rule, therefore, had to be abandoned. This finally occurred in *Warden v. Hayden.*[34]

In *Hayden* the police, acting upon information that an armed robber "wearing a light cap and a dark jacket"[35] had entered a certain house, followed him inside in "hot pursuit."[36] The officers spread out

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[32] *Id.* at 457.

[33] *Id.* at 466. This decision gave rise to the famous dissent of Justice Brandeis in which he deplored the limitations of fourth amendment protections to physical property:

> [O]nly a part of the pain, pleasure and satisfactions of life are to be found in material things. [The framers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478 (Brandeis, J., dissenting).

[34] 387 U.S. 294 (1967). For an insightful discussion of how the developing philosophy of legal realism led to the abandonment of the mere evidence rule, see Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 944 (1977). The Note, in proposing that "all private testimonial evidence" should be absolutely immune from seizure, essentially adopts the solution offered by Justice Marshall's dissent in Couch v. United States, 409 U.S. 322, 344 (1973). For criticism of this proposal, see notes 116–17 *infra.*

[35] 387 U.S. at 297.

[36] Curiously, the Court's opinion in *Hayden,* frequently cited by the Court as originating the "hot pursuit" exception to the warrant requirement, *see, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971), never used that term; it appears only in Justice Fortas' concurring opinion. 387 U.S. at 310–12. Nevertheless, the "hot pursuit" element of *Hayden* was deemed controlling by the Court even though the state court had upheld the search because the owner of the home had given the police permission to enter. 387 U.S. at 297–98 n.4.

through the house and found Hayden in an upstairs bedroom, feigning sleep. He was arrested when another police officer reported finding no other man in the house. Meanwhile one officer, attracted to the bathroom by the sound of running water, found a shotgun and a pistol in the flush tank. Another officer who "was searching the cellar for a man or the money"[37] found a jacket and trousers in a washing machine which matched the clothing description given by a witness to the crime. Ammunition for the gun was found in Hayden's bedroom. All these items were introduced against Hayden at trial.[38]

The court of appeals considered itself bound by the mere evidence rule to suppress this evidence and reversed the conviction by a 2-1 vote.[39] The Supreme Court reversed, Justice Brennan overturning the mere evidence rule on the ground that "the principal object of the Fourth Amendment is the protection of privacy rather than property."[40] Because the search was proper, it followed that the seizure of any evidence, whether fruit, instrumentality, or mere evidence, would not create any greater intrusion upon the suspect's privacy,[41] and consequently was permissible.

The Court was careful to distinguish this case from the seizure of private papers:

> 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

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[37] 387 U.S. at 298.

[38] *Id.*

[39] Hayden v. Warden, 363 F.2d 647 (4th Cir. 1966), *rev'd,* 387 U.S. 294 (1967). Judge Bryan, dissenting, argued that the clothing would have been seizable if Hayden were still wearing it. Consequently, the dissent would not have allowed Hayden's disrobement to immunize his clothing from seizure. Neither the majority nor the dissent seemed enamored of the mere evidence rule.

[40] 387 U.S. at 304.

[41] Judge Learned Hand had expressed his awareness of this proposition years before, *see* note 24 *supra,* but had nevertheless supported the mere evidence rule for the pragmatic reason that "limitations on the fruit to be gathered tend to limit the quest itself." United States v. Poller, 43 F.2d at 914. Justice Brennan rejected this rationale in *Hayden,* pointing out that "privacy 'would be just as well served by a

> items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.[42]

While the Court thus reserved the question of whether papers were seizable, it nevertheless removed one of the two constitutional bulwarks that had protected private papers from seizure.[43] Henceforward, papers which were more likely to be "mere evidence" than fruits or instrumentalities of a crime could receive special protection only under the fifth amendment, if at all. This appeared to open the courthouse door to all papers which had not been prepared by the defendant, because production of such papers does not involve self-incrimination.

While *Hayden* was based upon sound logic, three Justices were disturbed by the holding, apparently recognizing, as had Judge Hand nearly forty years before,[44] that however illogical the mere evidence rule was, it served to limit the scope of searches. Justice Fortas, joined by the Chief Justice, concurring, suggested that the mere evidence rule should be maintained, but avoided in this case, by arguing that

> use of identifying clothing worn in the commission of a crime and seized during "hot pursuit" is within the spirit and intendment of the "hot pursuit" exception to the search-warrant requirement. That is because the clothing is pertinent to identification of the person hotly pursued as being, in fact, the person whose pursuit was justified by connection with the crime.[45]

This argument was no more satisfactory than the Seventh Circuit's claim in *Guido*[46] that a bank robber's shoes were an instrumentality of

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restriction on search to the even-numbered days of the month.' " 387 U.S. at 309, *quoting* Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474, 479 (1961). Given that the basis of the fourth amendment was now to be privacy and not private property, this analysis was certainly correct.

[42] 387 U.S. at 302–03 (citation omitted).

[43] Later, in Fisher v. United States, 425 U.S. 391 (1976), the Court recognized that the abolition of the mere evidence rule "washed away" the foundations of the traditional fourth amendment protection for private papers. *Id.* at 409.

[44] *See* notes 24 & 41 *supra.*

[45] 387 U.S. at 312.

[46] 251 F.2d 1 (7th Cir. 1958).

the crime because he could not run away without them. Since mere evidence would not have been seizable under a warrant, it would be nonsensical to permit its seizure under an *exception* to the warrant requirement.

Justice Fortas was straining to find a way to preserve the mere evidence rule because he recognized that despite its problems it had the effect of protecting privacy by prohibiting general searches. He argued that "in gratuitously striking down the 'mere evidence' rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today needlessly destroys, root and branch, a basic part of liberty's heritage."[47] Similarly, Justice Douglas, dissenting, declared that the fourth amendment, which had been undermined by the majority, "creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants."[48] The fears of the minority, that the Court's decision would tend to limit the protection of the fourth amendment and allow any evidence, including private papers, to be seized pursuant to a valid warrant or one of the recognized exceptions to the warrant requirement, were reinforced as the Court began to chip away at the other bulwark which had protected papers, the fifth amendment.

B. The Fifth Amendment Protections

Six years after *Hayden,* the Court, in *Couch v. United States,*[49] held that a taxpayer who had given her tax records to her accountant could not invoke the fifth amendment against a summons directing the accountant to turn over the records to the IRS because the self-incrimination privilege "is a *personal* privilege."[50] Because the summons was directed only to the accountant, it followed that there was no compulsory self-incrimination of the taxpayer. *Boyd* was distinguished because in that case the privilege was asserted by the person in possession of the papers.[51]

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[47] 387 U.S. at 312.

[48] *Id.* at 313.

[49] 409 U.S. 322 (1973).

[50] *Id.* at 328 (emphasis in original).

[51] *Id.* at 330.

Three years later, in *Andresen v. Maryland,*[52] the Court removed the final barrier to seizure of private papers. In *Andresen* government agents obtained a warrant to search the petitioner's office for documents pertaining to a real estate fraud. Papers found in the search were used against the petitioner at trial. The conviction was affirmed on appeal and the Supreme Court granted certiorari, in part to resolve a conflict in the circuits over "whether documentary evidence not obtainable by means of a subpoena or a summons may be obtained by means of a search warrant."[53]

While conceding that under *Boyd* the petitioner could have invoked the fifth amendment to resist a subpoena for the documents in question, the Court found that fact irrelevant. The vice of such a summons, that "the very act of production may constitute a compulsory authentication of incriminating information," was not present in the execution of a search warrant where the petitioner was not required to do or say anything.[54] The broad statement of *Boyd* that the "seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself" was dismissed as dictum.[55]

In summary, the Court in *Andresen* conceded that there was compulsion, because the search involved a forcible entry onto petitioner's property, and that there was self-incrimination, because the documents prepared by petitioner incriminated him. Nevertheless, the Court concluded that there was no compulsory self-incrimination because the petitioner was not compelled to prepare, produce, or authenticate the documents.[56]

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[52] 427 U.S. 463 (1976).

[53] *Id.* at 470 n.5.

[54] *Id.* at 474.

[55] *Id.* at 471. Because *Boyd,* unlike *Andresen,* involved a summons, this observation was correct.

[56] The Court, quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), discussed the "policies undergirding the privilege:"

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our willingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; . . . our respect for the inviolability of

Thus the traditional constitutional protections for private papers were swept away. As a result the fourth amendment appears to provide protection only insofar as a warrant must be obtained or a valid exception to the warrant requirement found. Papers are subject to search and seizure regardless of whether they are fruits and instrumentalities of a crime or "mere evidence." The fifth amendment provides protection only against compulsory preparation or production of one's own papers. This protection, however, because it can be avoided by use of a search warrant, is largely meaningless.[57] The constitutional protections having been withdrawn, private papers are no more likely to be excluded from evidence than any other item.

Or are they? A lingering doubt persists. *Andresen* repeatedly adverted to the fact that the documents in question were "business records"[58] and limited the holding to such records.[59] Furthermore, in *Fisher v. United States,*[60] despite the fact that the Court upheld under the authority of *Couch*[61] an IRS summons directing an attorney to

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> the human personality and the right of each individual "to a private enclave where he may lead a private life" . . . ; . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

427 U.S. at 476 n.8. The Court then pointed out that seizure of a pre-existing written statement endangers none of the values which the fifth amendment was designed to protect. *Id.* at 476–77.

In Fisher v. United States, 425 U.S. 391 (1976), the Court considered the question of whether a taxpayer's accountant's workpapers could be subpoenaed from the taxpayer's attorney. It conceded that the subpoena constituted compulsion and that the papers might be incriminating. However, the Court concluded that the mere act of handing over papers prepared by someone else did not constitute compulsory self-incrimination. *Id.* at 411–13.

[57] But not entirely. Because a search may only be conducted upon probable cause, whereas a subpoena may issue with no showing of cause, the refusal of the Court to sanction subpoenas of one's private papers does provide limited protection in cases where the government lacks probable cause to believe that the papers in question are in one's possession or probable cause to believe that they are evidence of a crime.

[58] *E.g.,* "This case presents the issue whether the introduction into evidence of a person's *business records,* seized during a search of his offices, violates the Fifth [Amendment] . . . ." 427 U.S. at 465 (emphasis added).

[59] *Id.* at 477.

[60] 425 U.S. 391 (1976).

[61] 409 U.S. at 322.

produce documents prepared by his client's accountant and delivered to him by his client,[62] the Court was careful to note that "[s]pecial problems of privacy which might be presented by subpoena of a personal diary, *United States v. Bennett,* . . . are not involved here."[63]

In *Bennett,*[64] Judge Friendly had harked back to Judge Hand's statement in *United States v. Poller:*[65]

> Judge Hand's . . . statements afford the best clue to the formulation of any new limitation that we have been able to conceive. As he observed, the vice lies in the unlimited search. 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.[66]

While Judge Friendly offered no solutions, he brought to light the problem which has been lurking at the back of the Court's collective

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[62] 425 U.S. at 396–98. *Fisher* held that simply passing the documents to the attorney did not increase the client's protection under the fifth amendment; *i.e.,* that the attorney-client privilege does not provide protection for pre-existing documents in addition to that provided by the fifth amendment. The Court also decided that even if the petitioner had possessed the papers himself he could not have resisted the subpoena. *Id.* at 409–11.

[63] 425 U.S. at 401 n.7, *citing* United States v. Bennett, 409 F.2d 888 (2d Cir. 1969). At the conclusion of the opinion the Court again observed that "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' *see* Boyd v. United States, 116 U.S. at 634–35." 425 U.S. at 414.

Nevertheless, Justice Brennan, concurring in the result, found the decision "another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd* . . . ." Justice Brennan argued that the above statement by the Court implied that the privilege might not apply to private papers and was therefore "contrary to settled constitutional jurisprudence." *Id.* at 414–15.

[64] 409 F.2d 888 (2d Cir. 1969).

[65] 43 F.2d 911 (2d Cir. 1930). For Judge Hand's statement, see note 24 *supra.*

[66] 409 F.2d at 897.

consciousness for decades. Given that "mere evidence" logically should be the proper subject of a search and admissible at trial, as *Hayden* has held, is there something special about private papers which nevertheless protects them from seizure and renders them inadmissible? A search for private papers seems no more intrusive than the search of Andresen's office for his business records or the search of the bureau drawer in Hayden's house, yet the Court seems to indicate that there might be something about such papers, although it cannot or will not say what distinguishes them from Hayden's clothes or Andresen's "business records."

The key distinction does not seem to come from the fifth amendment. Despite the reservations expressed in *Fisher* and *Andresen,* the thrust of those opinions is that diaries, datebooks, letters, and other papers of the most private nature are not protected any more than were Andresen's business records. Certainly it is no more self-incriminating to record evidence of a crime in a diary than in a business record. And a search for such a diary involves no more compulsion than does a search for business records.

C. Third-Party Searches

Before a solution to the question of what protects private papers from searches can be presented, a recent development which further endangered the privacy of personal papers must be discussed. So long as mere evidence could not be seized, the question of *who* could be the subject of a search was a relatively easy one. Anyone in possession of contraband or fruits or instrumentalities of a crime presumably had a sufficient nexus with that crime, and the government had a sufficient interest in the property, that no serious objection could be raised to a reasonable search for such objects, even if the person to be searched was not directly implicated in the crime.[67]

But what if an innocent third party had mere evidence of a crime which was his or her own property? Prior to *Hayden,* the government had no superior property interest in the evidence and it could not have been seized. After the Court abandoned the mere evidence rule and the

[67] *See* Zurcher v. Stanford Daily, 436 U.S. 547, 577–83 (1978) (Stevens, J., dissenting).

"ancient, fictitious forfeiture theory,"[68] the question arose whether a person could be subject to search and seizure for evidence of a crime in which that person was not involved. In *Zurcher* the Court allowed such a search.

Zurcher arose when Palo Alto police obtained a warrant to search the offices of the Stanford Daily, the Stanford University student newspaper. The newspaper had published a story with photographs of a student demonstration in which nine policemen had been assaulted. The warrant was issued on the finding that there was probable cause to believe that other photographs taken by the newspaper photographer might reveal the identity of the perpetrators of the assaults. The search, which the Supreme Court assumed *arguendo* was within the scope of the warrant, uncovered no such photographs and nothing was seized.[69]

The newspaper, alleging an infringement of first, fourth, and fourteenth amendment rights, filed a civil action against the police and other officials in federal district court seeking declaratory and injunctive relief. The district court[70] denied the request for an injunction but granted declaratory relief on the ground that the Constitution requires that "law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum would be impracticable."[71] The Court of Appeals affirmed per curiam.[72]

The Supreme Court formulated the issue as "how the fourth amendment is to be construed . . . where state authorities have probable cause to believe that fruits, instrumentalities or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime . . . ."[73] Because it would normally be impossi-

[68] Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967).

[69] 436 U.S. at 550–52.

[70] Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd per curiam,* 550 F.2d 464 (9th Cir. 1977), *rev'd,* 436 U.S. 547 (1978).

[71] *Id.* at 132. The Supreme Court interpreted this to mean that it must be shown that the possessor of the materials sought would disregard a court order not to remove or destroy them. 436 U.S. at 552.

[72] Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), *rev'd,* 436 U.S. 547 (1978).

[73] 436 U.S. at 553.

ble for the state to meet the "severe burden" of showing the impracticality of a subpoena, the Court reasoned, "the effect of the [District Court's] rule is that fruits, instrumentalities and evidence of a crime may be recovered from third parties only by subpoena, not by search warrant."[74]

The Court swiftly disposed of the issue:

> Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found. Nothing on the face of the [Fourth] Amendment suggests that a third-party search warrant should not normally issue. The Warrant Clause speaks of search warrants issued on "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." In situations where the State does not seek to seize "persons" but only those "things" which there is probable cause to believe are located on the place to be searched, there is no apparent basis in the language of the Amendment for also imposing the requirements for a valid arrest—probable cause to believe that the third party is implicated in the crime.[75]

Not only may "*any* property" be searched but *anything* which "constitutes evidence of the commission of a criminal offense" may be searched for.[76] Consequently, anyone who possesses such evidence may be the subject of a search. This new development, the susceptibility of innocent third parties to searches and seizures, and hence to

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[74] *Id.* The Court later added that requiring the government to proceed by means of a subpoena would also raise fifth amendment issues of the sort which were avoided by the use of the search warrant in *Andresen.* That is, the party subpoenaed might, in some cases, be able to resist the subpoena on the ground that production and authentication of the documents subpoenaed would be self-incriminatory, a claim not available in the case of a search, as *Andresen* had held. 436 U.S. at 561-62.

[75] *Id.* at 554 (emphasis in original).

[76] *Id.* at 558, *quoting* FED. R. CRIM. P. 42. The Court concluded that absent some showing of abuse, the mere fact that the warrant was for a newspaper office did not violate respondent's first amendment rights. *Id.* at 563-67.

searches and seizures of their private papers, has made the need for special protection of such papers even more acute.

The *Zurcher* Court seemed to separate the two clauses of the fourth amendment.[77] Because, according to the Court's analysis, any place can be searched for anything, one might conclude that any search authorized by a valid warrant is now approved; that is, no search pursuant to a warrant valid under the second clause can be ruled "unreasonable" under the first. Under this logic the *subject matter* of the search, provided only that it be evidence of a crime, will never render the search unreasonable.

Yet, as in *Fisher* and *Andresen,* the Court explicitly stopped short of the result compelled by the decisions' own logic:

> This is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized.[78]

That is, certain searches may still be "unreasonable" even though they conform to the procedural requirements of the second clause of the fourth amendment.

What are those searches? And what is the meaning of the emphasis on business papers in *Andresen* and the reservation of diaries in *Fisher?* It is doubtful that the Court had a clear notion of why a diary, for instance, should not be subject to the same logic which rendered the business papers in *Andresen* and the photographs in *Zurcher* subject to seizure. The Court was wrestling with the angel of privacy. The Justices had not forgotten Lord Camden's admonition from two cen-

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[77] The first clause secures the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . . ." The second clause provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." For the argument that the framers clearly intended that the two clauses be independent, see Justice Douglas' dissent in Warden v. Hayden, 387 U.S. 297, 312 (1967).

[78] Zurcher v. Stanford Daily, 436 U.S. 547, 559-60 (1978).

turies before that "'papers are the owner's . . . dearest property.'"[79] Indeed, in *Zurcher* Justice White, writing for the majority, observed that "the net gain to privacy interests by the District Court's new rule would [not] be worth the candle,"[80] implying that a rule which did significantly advance privacy interests might be met with more acceptance. It is the purpose of the rest of this Article to frame such a rule, one that is consistent with *Andresen* and *Zurcher,* but which nevertheless provides a constitutional foundation for protecting that which we hold most private.

II. Constitutional Protection for Private Papers

In order to formulate a rule for the protection of private papers under the fourth amendment, it is necessary to consider exactly what should fall within the rule. As discussed earlier, some papers seem more worthy of special protection than others. A diary entitled "Robberies I Have Performed," for instance, seems a more suitable candidate for search and seizure than does the diary of Anne Frank.[81]

The Supreme Court's determination that the framers incorporated a balancing mechanism into the fourth amendment provides the means for determining which papers deserve special protection. In *Zurcher,* the Court emphasized that "[t]he fourth amendment has . . . struck the balance between privacy and public need . . . ."[82] Moreover, the Court explained that the public's interest in enforcing laws and recovering evidence is the same regardless of the identity or culpability of the person searched.[83] Assuming that the public interest is a constant, the only variable remaining in the fourth amendment calculus is the individual's interest. An attempt must therefore be made to iden-

[79] *Id.* at 577 n.1 (Stevens, J., dissenting), *quoting* Entick v. Carrington, 19 Howell's St. Tr. 1029, 1066 (1765).

[80] 436 U.S. at 562.

[81] *See* text accompanying note 66 *supra.*

[82] 436 U.S. at 559. *See also* Michigan v. Tyler, 436 U.S. 499, 509 (1978), and cases cited therein.

[83] 436 U.S. at 555. The Court has never taken the position that the seriousness of the crime under investigation or the importance of the evidence sought should have any impact on fourth amendment rights, although there is no inherent reason why these factors could not be included in the calculus.

tify those papers in which the individual has the greatest privacy interest.

Although communications to others, such as letters and phone calls, are undoubtedly a vital part of functioning successfully in society,[84] they are not completely private because at least one other person is involved. Once an individual mails out a letter or transmits a phone call, his or her expectation of privacy in the thoughts expressed has been abandoned; the communication has become the property of another. The recipient may choose to show a letter to a friend, use it against the author in a lawsuit, or give it to the police. Similarly, the recipient of a phone call can record it or allow another to listen in. Knowledge that the communication may be so used has already caused the originator to limit his or her freedom of expression. Consequently, the Supreme Court has had no difficulty, when other requisites of the fourth amendment were met, admitting letters obtained with the permission of the recipient,[85] and phone calls obtained by wire-tapping pursuant to a proper warrant,[86] into evidence against their originators.

The most private matters are one's own thoughts and the physical embodiment of those thoughts in the form of communications solely to oneself. These would include a diary, a reporter's notes of an interview or of a news event, and a doctor's tape recording of his or her

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[84] It is for this reason that Professor Tribe argues that the "right to privacy" must include "freedom to have impact on others." L. TRIBE, AMERICAN CONSTITUTIONAL LAW §15-1 (1978). For the purposes of this Article, a much narrower aspect of privacy, the "right of the individual to be free in his private affairs from government surveillance and intrusion," is considered. Whalen v. Roe, 429 U.S. 589, 599 n. 24 (1977), *quoting* Kurland, *The Private I,* U. CHI. MAGAZINE 7, 8 (Autumn 1976). *See* dissenting opinion of Brandeis, J., in Olmstead v. United States, 277 U.S. 438, 469 (1928).

[85] *See, e.g.,* United States v. White, 401 U.S. 745 (1971). In *White* the Court conceded that the maker of a phone call may have an expectation of privacy as to his conversation but held that that expectation of privacy may be frustrated if the recipient has allowed the police to listen to the other end of the conversation. Obviously, any rule which attempted to protect the expectation of privacy of one party to a letter or telephone conversation would be difficult to enforce and might unconstitutionally restrict the other party's freedom.

Communications to others may, in certain circumstances, be protected by the first amendment. Any such protection is based upon the content of the communications, a subject beyond the scope of this Article.

[86] *See* Omnibus Crime Control and Safe Streets Act of 1968, tit. III, 18 U.S.C. §§ 2510-2520 (1976); Berger v. New York, 388 U.S. 41 (1967).

thoughts and diagnoses following examination of a patient. Such matters, as long as they are not passed to another to read or transcribe,[87] are nothing less than the record of one's own thinking and should be considered as private as the thoughts themselves. Whether they are kept for personal or business reasons is irrelevant. It is the individual's expectation of privacy which is at issue, not a judgment as to the nature of the thoughts.

Having defined "communications to oneself" as the most private of private papers,[88] the *sanctum sanctorum* of the personality, the question then is to what constitutional protection these papers are entitled. Although other constitutional amendments protect privacy in various ways,[89] the fourth amendment must provide any special protection for private papers[90] for the concern here is with a limitation upon the power of the state to search for, seize, or subpoena private papers. The question which must therefore be resolved is how to balance the privacy needs of the individual against the law enforcement needs of society, the issue the fourth amendment has always presented.[91]

Lord Camden's announcement in *Entick v. Carrington*[92] that "papers are the owner's . . . dearest property"[93] seems to indicate that

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[87] A greater degree of privacy protection for thoughts which are *not* passed on to others may be analogized to the attorney-client privilege. Communications between attorney and client are privileged only so long as the client does not disclose them or put them in issue in court. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 91 (2d ed. 1972).

[88] The term "private papers" in this Article encompasses all recorded communications to oneself in any medium, including, for example, tape recordings and videotapes.

[89] *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[90] Fisher v. United States, 425 U.S. 391 (1976), is not to the contrary. The Court in *Fisher,* in holding that an attorney may be required to release tax records transferred to him or her by clients, *see* notes 59–63 and accompanying text *supra,* explained that "there 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." 425 U.S. at 407, *quoting* Gouled v. United States, 255 U.S. 298, 309 (1921). Yet the Court recognized that different types of papers may deserve different degrees of protection. 425 U.S. at 401 n.7.

[91] *See* text accompanying notes 82–83 *supra.*

[92] 19 Howell's St. Tr. 1029 (1765).

[93] *Id.* at 1066.

private papers occupied a preferred position, compared to other "mere evidence," in the law of search and seizure. This tradition was continued in *Boyd,*[94] where the Court, in striking down a summons for the appellant's business records, revealed that the basis for protecting papers is not strictly a property interest, but also a privacy interest. The Court held:

> It is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property [which offends the Constitution]. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime [violates the Constitution].[95]

Yet as discussed at the beginning of this Article, the fourth and fifth amendment bases of *Boyd* have both been undercut in recent years.[96] Consequently, the most that seemed to be left of *Boyd* was a prohibition against a *subpoena* to an individual to produce his or her *own* papers.[97] But *Boyd* stands for more than this. Still viable is the Court's holding that a search for private papers is an "invasion of the indefeasible right of personal security,"[98] as to which the breaking and entering are merely "circumstances of aggravation." Although such a search may not involve testimonial compulsion, as the Court now

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[94] 116 U.S. 616 (1886).

[95] *Id.* at 630. This passage or part of it is quoted in Weeks v. United States, 232 U.S. 383, 391 (1914), and Mapp v. Ohio, 367 U.S. 643, 646–67 (1961).

[96] *See* text accompanying notes 3–10 & 49–66 *supra.*

[97] *See id.* at 414. The Supreme Court has conceded that the fourth amendment is applicable to subpoenas to a limited degree. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). But, as the Court recognized in *Fisher,* a subpoena to an individual to produce his or her *own* records might be barred by the fifth amendment even though a search for those papers would have been permissible. 425 U.S. at 409–10. *See* Zurcher v. Stanford Daily, 436 U.S. at 561 n.8. *See also* Couch v. United States, 409 U.S. 322, 330 (1973).

[98] 116 U.S. at 630.

views the fifth amendment, it is clear under *Boyd* that a search for private papers may be an unreasonable invasion of the right to privacy, notwithstanding the fact that other "mere evidence" can now be searched for pursuant to a proper warrant.

In *Katz v. United States,*[99] the Court held:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[100]

The private papers discussed in this Article are more deserving of special protection than the telephone conversation discussed in *Katz* because the individual in *Katz* already freely disclosed his thoughts to at least one other party.[101] But the principle of *Katz,* that the fourth amendment is a key source of protection for private communications and that it offers protection for matters as to which an individual has a reasonable expectation of privacy, is equally applicable to the argument advanced in this Article. Indeed, because the expectation of privacy in private papers is greater than in living rooms or phone booths, the fourth amendment should reflect these expectations by offering greater protection for communications to ourselves.

A search for private papers may be no more *physically* intrusive than a search for a gun, but the *psychological* intrusion is far greater, because the searcher is invading not only the subject's house but his or her thoughts as well. The impact of a search and seizure of private papers is analogous to that experienced by the individual who is arrested and jailed. What happens, in effect, in a seizure of private papers, is that the individual's *thoughts are arrested:*[102] the thoughts,

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[99] 389 U.S. 347 (1967).

[100] *Id.* at 351–52 (citations omitted). *See also* Warden v. Hayden, 387 U.S. at 301 (the fourth amendment "was intended to protect against invasions of 'the sanctities of a man's home and the privacies of life,' Boyd v. United States, 116 U.S. 616, 630, from searches under indiscriminate, general authority").

[101] *See* text accompanying notes 84–87 *supra.*

[102] That is, the seizure and examination of the papers has an impact on the individual which continues after the search is over. When a gun is seized, the individual's

like an arrested person's body, are in the possession of the authorities. If the seizure of papers is viewed in this manner, the solution suggests itself immediately: if the authorities desire to seize private papers, they must be able to make a *double* showing of probable cause. That is, not only the usual probable cause required for a search, that the subject matter of the search is evidence of a crime, but also the probable cause necessary to effect an arrest, that the individual subjected to the search is involved in the crime in question.[103] Only then can such a serious intrusion be justified.[104]

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privacy is not further intruded upon by its seizure. But when papers are seized, the private thoughts recorded on them can be read by the authorities and introduced into evidence, and may even be published.

[103] The Court in *Zurcher* made it clear that probable cause to arrest is not normally a necessary concommitant of a valid search. 436 U.S. at 558. But the Court was speaking in general terms and was not addressing itself to the question of what additional showing might be required to justify a search for private papers, when, in essence, a seizure of the person's thoughts is involved.

Justice Stevens, dissenting in *Zurcher,* distinguished between the protections which should be afforded to the culpable as distinguished from the non-culpable subject of a search:

> Of greatest importance, however, is the question whether the offensive intrusion on the privacy of the ordinary citizen is justified by the law enforcement interest it is intended to vindicate. Possession of contraband or the proceeds or tools of crime gives rise to two inferences: that the custodian is involved in the criminal activity, and that, if given notice of an intended search, he will conceal or destroy what is being sought. The probability of criminal culpability justifies the invasion of his privacy; the need to accomplish the law enforcement purpose of the search justifies acting without advance notice and by force, if necessary. By satisfying the probable cause standard appropriate for weapons or plunder, the police effectively demonstrate that no less intrusive method of investigation will succeed. Mere possession of documentary evidence, however, is much less likely to demonstrate that the custodian is guilty of any wrongdoing . . . .

436 U.S. at 581. Judge Friendly seems to favor different protection for the papers of culpable and non-culpable individuals. *See* text accompanying note 65 *supra.*

[104] *But see* McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment,* 53 INDIANA L.J. 55, 72 (1977), in which the author argues that "a higher standard of protection [for private papers] can be obtained through a more stringent application of the fourth amendment's procedural requirements." Although the term "private papers" is not defined in that article, it appears that the notion of private papers in that article is broader than "communications to oneself." *See id.* at 55 n.1.

A rule allowing the police, upon a double showing of probable cause, to search for and seize private papers would be consistent with the balance already struck by the fourth amendment in relation to arrests. Currently, once the police have probable cause that an individual has committed a crime, the individual's privacy rights become subject to serious limitation. Upon such a showing the suspect can be arrested, searched incident to that arrest, fingerprinted, booked, jailed, indicted, and tried. It is commensurate with these limitations also to allow the "arrest" of the suspect's thoughts in the form of seizure of his or her private papers. On the other hand, the private papers of the person as to whom the police cannot demonstrate probable cause of culpability should be immune from seizure or subpoena under all circumstances.[105]

The Court has on at least one occasion since *Boyd* recognized the special position of private papers. In *Sinclair v. United States,*[106] in the context of a consideration of the limitations upon congressional investigations, the Court observed:

> Of all the rights of the citizen, few are of greater importance or more essential to his peace or happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.[107]

The leading case supporting a right of mental or psychological privacy, which is the basis of the double-probable-cause rule, is *Stanley*

[105] Under the proposed rule newspaper reporters and doctors, provided they are not accused of crime, could not be the subject of a search or subpoena for their private communications to themselves. But the rule would allow the police to seize the calendar/diary of a foreign agent showing payoffs to congressmen or the diary of a murderer which indicated where he or she planned to strike next, upon a showing of probable cause to arrest that person in addition to the usual probable cause to search.

[106] 279 U.S. 263 (1929).

[107] *Id.* at 292–93, *quoting In re* Pacific Ry. Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887). *See also* Stanford v. Texas, 379 U.S. 476, 484–85 (1965), where the Court relied on *Entick* to posit a special constitutional protection for books and impliedly papers "when the basis for their seizure is the ideas which they contain."

v. Georgia.[108] In *Stanley* federal and state agents entered appellant's home, pursuant to a search warrant, to search for evidence of bookmaking activity. Although they found little such evidence, they did find obscene films, and appellant was ultimately convicted for possession of those films. In reversing the conviction, the Supreme Court held that the combination of the intrusion into the privacy of the home and the violation of the "right to receive information and ideas"[109] led to the conclusion that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[110] Of course, *Stanley* did not involve any direct attempt on the part of the government to control minds. The state of Georgia merely wanted to seize obscene materials in Stanley's home. But it was the Court's recognition that these materials constituted the *input* for one's mental processes which led to the conclusion that the government's power to intrude must be restrained. And just as *Stanley* protected mental input, mental output must also be protected if the mind is to function freely. Both the input and output unite to form the complete physical manifestation of the thinking process, a sphere of privacy into which governmental intrusion must be carefully circumscribed.

The narrow holding of *Stanley,* however, was limited to seizures of private literature in the home and was motivated as much by a special concern for the privacy of the home as it was by the right to receive information. That is, this right to mental input depended upon fourth as well as first amendment values, and mental input was protected only in the privacy of one's own home.[111]

The importance of the government's invasion of the home to the Court's holding in *Stanley* was underscored by *Paris Adult Theaters I v. Slaton.*[112] In that case the Court limited *Stanley* by holding that, although the government cannot control thoughts or arrest people for mere possession of obscene material in their homes, it can control peo-

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[108] 394 U.S. 557 (1969).

[109] *Id.* at 564.

[110] *Id.* at 565.

[111] The Court invalidated the conviction by striking down the Georgia statute which forbade knowing possession of obscene materials. But the Court said, "If the First Amendment means anything, it means that a State has no business telling a man, *sitting alone in his own house,* what books he may read or what films he may watch." *Id.* (emphasis added).

[112] 413 U.S. 49 (1973).

ple's access to obscene movies and books.[113] Because such control of input obviously has an effect on thinking, *Stanley* became primarily a limitation on the power to seize materials, not the power to control access to information.[114] Similarly, "private" writings which are intended to be seen by others or which are kept in a place not personal to the author, such as an office accessible to other workers or in the hands of a third party, do not have sufficient trappings of expression of one's innermost personal thoughts to be subject to any special constitutional protections. Only communications to oneself kept in a special sphere of privacy should be so protected.

How will this sphere of privacy be protected by the proposed rule? Suppose a search warrant directs the search for and seizure of "all records" relating to a certain, allegedly fraudulent, real estate transaction.[115] Several closed file drawers containing numerous papers, some prepared by the suspect, some by his secretary, some by his employees, and some by his business associates are in the suspect's office. The double-probable-cause rule proposed here would protect from seizure only those papers prepared personally by the defendant and kept for his or her private use, such as tape recorded notes or a calendar/diary.

Although the rule is simple, its application is not. An appointment calendar may or may not have been used solely by the defendant. A typewritten paper in a file marked "personal" may have been prepared by the defendant, a secretary, or an employee. But the proposed rule, without attempting to distinguish between personal and business papers,[116] preserves the value it is designed to protect, the individual's

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[113] *Id.* at 67.

[114] *See also* Roaden v. Kentucky, 413 U.S. 496 (1973), where the seizure of materials which were "arguably" protected by the first amendment created a higher standard of "reasonableness" under the fourth amendment. *Id.* at 504.

[115] This example is similar to the warrant approved by the Supreme Court in Andresen v. Maryland, 427 U.S. 463 (1976).

[116] Any rule of law, such as that suggested by Justice Brennan concurring in Fisher v. United States, 425 U.S. at 414, 426–27, and Justice Marshall dissenting in Couch v. United States, 409 U.S. at 350, which extends greater constitutional protection to papers which are "personal" than to those of a "business" nature is doomed to failure. In order for the authorities to determine whether a given paper is of a personal or business nature they would have to read it, thus breaching the privacy which the rule was designed to protect. Furthermore, some of the papers most wor-

freedom from government intrusion. The rule bases the distinction between seizable and protected papers on two factors which may be determined without perusal of the papers involved: the way in which the materials are stored[117] and the culpability of the subject to the search.

When a subject is culpable, the police, upon a double showing of probable cause, can search for anything. When a subject is not culpable, the formula is more complicated. If the materials are stored in an area which appears to be a private enclave of the subject, such as a desk drawer or a file marked "personal" or "private," there must be a presumption that any papers contained therein are "communications to oneself" by the subject.[118] Before such items, belonging to a non-culpable individual, may be seized, the warrant must reflect probable cause[119] that the material in such a file is not a private "communi-

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thy of protection, such as reporters' and doctors' notes, are clearly "business" papers and would not be protected.

[117] Any rule based solely on the *place* in which private papers are stored, rather than on the individual's *intention* to keep them private, would permit criminal suspects to thwart searches by keeping all incriminating papers in files marked "private."

[118] The physical areas which would be protected by the rule formulated in this article are much narrower than all the areas in which one might have a reasonable expectation of privacy under the fourth amendment. The standard in Katz v. United States, 389 U.S. 347 (1967), for example, may protect an expectation of privacy in hotel rooms, offices, and other semi-private areas. However, the expectation of privacy under *Katz* is the ability to admit only whom one chooses. Conversely, the expectation of privacy under the rule proposed in this article is grounded on the owner's intention that *no one* have access to the area. The protection of this proposed rule would be limited to areas which are for the most part completely private, and which are not used by anyone other than the person in question. This rule would protect a closed desk or file cabinet used by one person but located in an otherwise public office.

[119] This probable cause requirement is simply a corollary of the rule that a warrant must reflect probable cause to search the area in fact searched; areas not named in a valid warrant remain protected. The double probable cause rule proposed here elevates private papers to the status of a separate area in which an individual has a separate legitimate expectation of privacy. In United States v. Chadwick, 433 U.S. 1, 13 (1977), and Arkansas v. Sanders, 442 U.S. 753, 762 (1979), the Supreme Court held that a warrant was required to search luggage found in automobiles because luggage is where personal effects are stored. Because private papers are where an individual's most private *thoughts* are stored, an area which appears to contain private papers, like an object which appears to contain personal effects, should remain pro-

cation to oneself," but is instead a communication to which others have access.[120] This is admittedly a standard which police will frequently be unable to meet.

In many cases, non-culpable subjects, such as reporters, will be able to avoid police intrusion by storing everything in files marked "personal." But this tactic will not always be successful. For example, in *Zurcher* the police were seeking photographs.[121] These would be seizable regardless of where they were filed. And even if they were stored in a personal file, the police could have obtained the photographs without reading any of the private papers which may have also been in the file. Similarly, if the warrant calls for seizure of a letter, the police can look in a file drawer marked "personal" in order to determine the nature of the papers therein while not actually reading them and seize the file folders containing correspondence.[122] Furthermore,

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tected by a separate requirement of probable cause even when located in an area where a valid search is taking place.

[120] Thus for the police to be able to search the files of a non-culpable individual which appear to be private, they would have to demonstrate in advance that the papers in such files were not the subject's communications to oneself. In the case of such matters as letters, contracts, and blueprint files such a showing would be relatively easy to make. A search of a personal memo file, on the other hand, would be impermissible. In the case of private and non-private papers mixed together, the police would have to demonstrate that the search could be made without reading the private papers.

[121] Admittedly, not to apply the double-probable-cause rule to photographs is to give somewhat short shrift to the artistic content of a photograph which is arguably as much a product of the photographer's mind as would be a writer's description of the same scene. But the written word is always an expression of thoughts, while a photograph is always a mechanical reproduction of a scene to which others, presumably, have or have had access. Similarly, a reporter's tape recording of an interview is a mechanical reproduction of a conversation to which another person was privy. However, when the reporter goes back and dictates his or her *impressions* of the interview or even his or her attempt at verbatim reconstruction, human and not mechanical reproduction is involved, and such a tape recording would be a communication to oneself. An impressionist painting would pose a difficult case indeed. Fortunately these are rarely the object of a search where the artist is the subject of the search, and are almost always meant to be seen by others.

[122] While such a scheme may be subject to abuse by police it is not without precedent. Currently, under wiretapping warrants police are required to minimize the extent to which they monitor non-pertinent calls. 18 U.S.C. §2517(5) (1976). *But see* Scott v. United States, 436 U.S. 128 (1978), in which some overhearing of personal

the individual who has supplied the police the necessary information as to the location of the papers will frequently be able to attest to their non-private nature. No doubt cases will arise where valuable evidence must be foregone, but the gain to the privacy interests of people not themselves involved in crimes will be substantial.[123]

Of course, like any comprehensive formulation, the rule advanced in this Article is fraught with potential problems and unanswered questions. For example, consider the case of a reporter who has shown his or her notes only to an editor. Such notes would no longer be considered purely private. This is not to say that the reporter cannot discuss the substance of the notes with an editor or that the notes might not in some way be protected by the first amendment or the Privacy Protection Act,[124] but they can no longer be said to be merely communications to oneself. Incorporation of the notes in a story would not, however, render the notes themselves any less private.[125]

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calls was found not to render the wiretap unreasonable under the fourth amendment. In a wiretap case it is impossible for the subject to know if the police have adhered to their mandate unless they admit a breach. But in a search, if the subject of the search or his or her agent is present he or she can observe whether the police merely take a cursory glance at the papers in the "personal" file or stop to read them. The problem is no greater than the possibility that the police will exceed the scope of a warrant in the usual search.

[123] One can conceive of a situation where the culpable individual might attempt to thwart law enforcement efforts by transferring his records to a non-culpable individual for storage in files marked personal. This expedient would not work because once the files were transferred their personal privacy characteristics would be gone. Furthermore, if the materials were seized from another, the transferor might be unable to protest the seizure under Rawlings v. Kentucky, 448 U.S. 98 (1980).

[124] Pub. L. No. 96-440, 94 Stat. 1978 (1980) (codified in 42 U.S.C. § 2000aa). *See* text accompanying notes 128–39 *infra.*

[125] What if a reporter's notes are improperly seized and used against a defendant who gave the reporter information? Under current standing law the defendant's inability to assert a privacy interest in the reporter's notes would cause his exclusionary claim to be disallowed. In United States v. Payner, 447 U.S. 727 (1980), certain documents were illegally seized by federal agents from one Wolstencroft and introduced into evidence at the criminal trial of respondent Payner. The Court held that Payner had no standing to assert the unconstitutional seizure of the documents and the courts could not exercise their supervisory powers to exclude them. The appropriate remedy would be to allow the party whose privacy has been violated to

Practical problems will arise in distinguishing these protected papers from those that are seizable, and the police may be required to make some fine distinctions on the scene. However, the proposed rule should not be prohibitively difficult to administer because in this regard it is consistent with current law.[126] It should be no more difficult to determine whether private papers were illegally seized than to determine whether other materials are fruits of an unreasonable search, and illegally seized private papers, like other fruits of unreasonable searches, could not be used in evidence or as leads.[127]

Finally, it should be noted that protection for private papers must be constitutional rather than statutory. In response to *Zurcher,* Con-

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enjoin the use of the notes and seek their return by writ of mandamus. If he or she chose not to do so then the defendant would be without a remedy.

The Supreme Court has not confronted the issue of whether evidence, illegally seized from X, can be used against Y even in the face of a successful or pending civil action by X for the return of the evidence. However, *Payner,* which found no standing for a defendant to protest the seizure of another person's papers, suggests that Y could not protest if X were subpoenaed to Y's trial, ordered to bring the documents, and compelled to authenticate them under a grant of immunity.

But *Payner* does not confront the problem discussed in this Article: X's privacy interest in his papers and X's (rather than Y's) standing to challenge use of the papers in any trial. Because that interest would be defeated by the use of the papers in the public trial of Y, it follows that X has standing to prevent their use at such a trial or, for that matter, any other use or exposure of his papers by the authorities, including calling X to testify as to the contents of such papers or subpoenaing the papers themselves. Any other result would completely defeat the ability of a reporter or doctor to protect the privacy of his notes since they would usually be sought not as evidence against the subject of the search but as evidence against a third party.

[126] If the police do not conform to the requirements of the double probable cause rule the evidence must be excluded. Thus, if the police execute a search warrant for a private diary without the requisite showing of double probable cause, the diary may not be used in evidence, even if probable cause existed at the time the warrant was issued but was simply not included in the warrant.

If a communication to oneself is accidentally seized in connection with a legitimate search or found in plain view it must be returned, and not used in evidence. However, the plain view must not be such as to dispel the individual's expectations of exclusive privacy. Thus a diary lying on the public sidewalk could be read by any passerby and is no longer protected by the double probable cause rule. On the other hand, a diary sitting on a night table, discovered by police while executing a search warrant, would be protected.

[127] *See* Wong Sun v. United States, 371 U.S. 471 (1963).

gress enacted the Privacy Protection Act of 1980.[128] The stated purpose of the Act is to "limit governmental search and seizure of documentary materials possessed by persons . . . ." Title I of the Act provides in part that it shall be unlawful for any "government officer or employee to search for or seize any work product materials [or documentary materials] possessed by a person" involved in a first amendment activity.[129] Title II of the Act directs the Attorney General to issue guidelines to be followed by federal employees when seeking to obtain documentary materials from a person not a suspect in a crime.[130] The guidelines[131] provide that a search warrant should not be used unless less intrusive alternative means "would substantially jeopardize the availability or usefulness of the materials sought."[132]

Although on its face the Act protects "all materials on which information is recorded,"[133] its protection may prove to be much less. The Act seeks to protect the materials of persons involved in first amendment activities from search and seizure by state and local, as well as federal, government officials,[134] with Congress asserting juris-

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[128] Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified in 42 U.S.C. § 2000aa).

[129] *Id.* § 101(a). "Work product materials" are defined in section 107(b). They are more clearly described in the House Conference Report as "those documentary materials whose very creation arises out of the purpose of conveying information to the public and which involve some measure of original contribution on the part of the person whose intent is that the materials be disseminated to the public." H.R. CONF. REP. No. 96-1411, 96th Cong., 2d Sess. 8, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 3972, 3973. "Documentary materials" are all materials on which information is recorded, but do not include contraband or fruits or instrumentalities of a crime. Pub. L. No. 96-440, § 107(a), 94 Stat. 1879.

[130] *Id.* § 201(a).

[131] Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 46 Fed. Reg. 22,362 (1981) (to be codified in 28 C.F.R. § 59).

[132] *Id.* at 22,365.

[133] Pub. L. No. 96-440, § 107(a), 94 Stat. 1879. The Act would thus extend to many materials, for example, the photographs in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), whose evidentiary value would outweigh the interference with the first amendment activity. *See id.* at 563-67.

[134] Although the Act never defines "government officer or employee," it is clear that state and local officials are included within its provisions. Section 101(a) provides protection from searches by "a government officer or employee." Section 106(a) grants a federal cause of action for damages to persons aggrieved by a violation of the Act "against the United States, against a State . . . , or against any other governmental unit, . . . and against an officer or employee of a State . . . ."

diction over state and local officials under the commerce clause.[135] For this reason the Act may be unconstitutional under *National League of Cities v. Usery*,[136] in which the Supreme Court held that Congress has no power under the commerce clause to "directly displace the States' freedom to structure integral operations in areas of traditional government functions."[137] If *National League of Cities* applies, the protection afforded by any federal statute is severely limited because most searches are undertaken by state and local, rather than federal, authorities.

Even if the Act is constitutional, the protection it affords private papers is limited. Although Title I protects private papers possessed by persons involved in first amendment activities, it offers no protection to private papers held by anyone else, including other professionals, such as doctors and lawyers. The guidelines promulgated under Title II do grant special consideration to materials pertaining to professional, confidential relationships,[138] but Title II applies only to federal officials, and even that protection is far from absolute. The materials covered by Title II can be the object of a subpoena, and may even be searched for and seized, if the requirements of the guidelines are met.[139]

Conclusion

In the years since the mere evidence rule was abolished, the Supreme Court has methodically diminished the constitutional protections applicable to private papers, holding that a search for and seizure

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[135] *See id.* § 101(a).

[136] 426 U.S. 833 (1976).

[137] *Id.* at 852. The area of "police protection" was specifically mentioned by the Court as such a function. *Id.* at 851. Strictly construed, of course, *National League of Cities* was concerned with Congressional intrusion on the states' employer-employee relationships only. But the principle behind the decision, that Congress' power under the commerce clause does not reach functions traditionally performed by state governments, remains for further application by the Court.

[138] 46 Fed. Reg. 22,365.

[139] *Id.* These materials are obtainable by search warrant if "[i]t appears" that less intrusive means "would substantially jeopardize the availability or usefulness of the materials sought," access to the materials "appears to be of substantial importance to the investigation," and the search warrant is approved by a Deputy Assistant Attorney General. *Id.*

of certain papers does not violate the self-incrimination prohibition of the fifth amendment,[140] that certain papers may be subpoenaed from one's attorney,[141] and that a non-culpable third party who possesses evidentiary material may be the subject of a search and seizure.[142] Yet the Court has consistently and explicitly refrained from holding that these lessened protections would be applicable to the most private of papers such as a diary.[143] The Court's restraint is undoubtedly motivated by an awareness that private papers occupy a special position in the spectrum of social values.

To date, the government lacks the capacity to read or record our thoughts. But given the limitations of the human brain, many thoughts, often fleeting and impermanent, are of little import unless they are recorded. In *Stanley v. Georgia,*[144] the Supreme Court established the right of the individual to read whatever he or she likes, i.e., to have mental input, in the privacy of the home. This Article seeks a completion of the sphere of privacy begun by *Stanley.* Just as mental input is protected in *Stanley,* so should mental output be protected. The individual who is not involved in criminal activity should be able to record his or her private thoughts with the assurance that they will never become the subject of legal process. Only if one voluntarily discloses one's thoughts to another, thus destroying their purely private nature, or opens oneself up to the significant intrusions upon privacy to which involvement in criminal activity gives rise, should one's communications to oneself be subject to seizure.

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[140] Andresen v. Maryland, 427 U.S. 465 (1976).

[141] Fisher v. United States, 425 U.S. 391 (1976).

[142] Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[143] *See* text accompanying notes 7–8, 57–62, & 77 *supra.*

[144] 394 U.S. 557 (1969).