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## Whence and Whither the Mere Evidence Rule?

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## COMMENT

### WHENCE AND WHITHER THE MERE EVIDENCE RULE?

The Supreme Court of the United States has stated that the government may not seize a person's property if its sole interest in that property is its use as evidence.<sup>1</sup> Generally only fruits or instrumentalities of a crime, weapons which an arrestee might use to escape, and property the possession of which is a crime may be seized.<sup>2</sup> This restriction on the power of the government to seize is known as the "mere evidence" rule. The Court has held that seizure of mere evidence is a violation of the fourth amendment, and its admission is a violation of the fifth.<sup>3</sup> It has also indicated that the fifth amendment's prohibition against forced self-incrimination forbids the seizure itself, if the things seized are private papers, and that the fifth amendment is a guide to what is meant by the fourth amendment's prohibition against unreasonable searches and seizures.<sup>4</sup>

Whether the mere evidence rule is based upon the fifth amendment, the fourth amendment, or both, it may now be binding on the states,<sup>5</sup> for both amendments apply to them. Applicability of the rule to the states is of particular interest in Louisiana, where the prohibition against seizing mere evidence has not been recognized. The new Code of Criminal Procedure provides:

"A Judge may issue a warrant authorizing the search for and seizure of anything within the territorial jurisdiction of

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1. *Gouled v. United States*, 255 U.S. 298 (1921). It appears to this writer that application of this rule may be limited to cases in which the search in the course of which the seizure was made was without a warrant, incidental to an arrest, or under a warrant not describing the thing which was seized. For scholarly examinations of the questions concerning the Supreme Court's statement of the mere evidence rule see LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 133-36 (1937); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 378-87 (1921); Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964); Comment, *Limitations on Seizure of "Evidentiary" Objects — A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953); Note, *Evidentiary Searches: The Rule and The Reason*, 54 GEO. L.J. 593 (1966).

2. See *Harris v. United States*, 331 U.S. 145, 154 (1947). There may be other interests which the state may assert in order to seize the thing, since the list given by the court does not purport to be exclusive, but what these interests would be is as yet unknown.

3. *Gouled v. United States*, 255 U.S. 298 (1921).

4. *Boyd v. United States*, 116 U.S. 616 (1886).

5. *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment).

the court which:

“ . . .

“(3) May constitute evidence tending to prove the commission of an offense.”<sup>6</sup>

and

“A peace officer making an arrest shall take from the person arrested all weapons and incriminating articles which he may have about his person.”<sup>7</sup>

To determine the possible effect of the mere evidence rule on the administration of criminal justice by the states, this Comment will examine the origin of the rule, the types of searches and seizures to which it applies, the rationale behind the rule, and its constitutional basis.

#### *Development of the Rule*

Drawing upon English history and the fifth amendment to interpret the fourth amendment requirement that searches and seizures be reasonably executed, the Supreme Court evolved the mere evidence rule. Observance of the rule's restriction upon what may be seized became necessary as a result of the Supreme Court's reading *Entick v. Carrington*,<sup>8</sup> an English case, into the Constitution.

In 1765 the British Secretary of State, Lord Halifax, issued a warrant for the arrest of an English clerk, John Entick, who was suspected of writing seditious pamphlets. The warrant also commanded a general search of all of the clerk's papers. Entick brought an action for trespass against the messengers of the Crown who executed the warrants and seized his books and papers. The messengers raised the authority of the warrant in defense. Lord Camden of the Court of Common Pleas found that no statute authorized the type of search and seizure Entick suffered, and that at common law all searches and seizures were trespasses, except those conducted to find stolen property. He noted that even a search for stolen property was a trespass unless the stolen goods were actually found, and denied that seizing a man's private papers was analogous to seizing stolen goods. He refuted the argument that a general search of a man's

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6. LA. CODE OF CRIMINAL PROCEDURE art. 161 (1966).

7. *Id.* art. 255.

8. 19 How. St. Tr. 1029 (1765).

papers ought to be allowed in the case before him because it would be useful by pointing out that no law authorized search for evidence of offenses much more secret than libelling.<sup>9</sup> In dictum Lord Camden did draw an analogy between the prohibition of searches for evidence and the privilege against self-incrimination.<sup>10</sup> Lord Camden traced the practice of issuing general warrants to the ill-famed court of Star Chamber.<sup>11</sup> Hostility of English-speaking peoples to searches and seizures dates back to the early seventeenth century. The right to issue general warrants was claimed as part of the king's "absolute prerogative,"<sup>12</sup> which the common lawyers in Stuart times were determined to render less than absolute.<sup>13</sup>

In *Wilkes v. Wood*, decided by the King's Bench in 1765, Lord Mansfield held illegal a general warrant not specifying the person to be seized.<sup>14</sup> *Wilkes* and *Entick* appear to have inspired the fourth amendment's requirement that a warrant specify the *persons* or *things* to be seized.<sup>15</sup> General warrants, called writs of assistance, commanding officers of the Crown to search any *place* for smuggled goods were frequently issued in the American colonies.<sup>16</sup> The writs were used to aid enforcement of oppressive trade laws implementing Britain's economic policy of mercantilism, which "protected" the British West Indies at the expense of the North American colonies.<sup>17</sup> In 1761 a group of

9. *Id.* at 1074: "If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all other ought to be excepted, as wanting a discovery less than any other."

10. *Id.* at 1073: "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 should seem that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

11. See *Entick v. Carrington*, 19 How. St. Tr. 1029, 1069 (1765).

12. See 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND 254-62 (1863).

13. See BOWEN, *THE LION AND THE THRONE*, (1957) for an excellent account of the conflict between the common lawyers and the early Stuart kings with regard to the prerogative.

14. 19 How. St. Tr. 1075 (1765).

15. See discussion in *Boyd v. United States*, 116 U.S. 616 (1886).

16. See LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT* 51-78 (1937).

17. *Id.* at 51-52. See also SMITH, *THE WEALTH OF NATIONS* 558-59 (Modern Library ed.): "The exclusive trade of the mother countries tends to diminish, or at least, to keep down below what they would otherwise rise to, both the enjoyment and industry of all those nations in general and of the American colonies in particular. It is a dead weight upon the action of one of the great springs which puts in motion a great part of the business of mankind. By rendering the colony produce dearer in all other countries, it lessens its consumptions, and thereby cramps the industry of the colonies, and both the enjoyments and the industry of all other countries, which both enjoy less when they pay more for what they produce. By rendering the produce of all other countries dearer in

merchants obtained a hearing before the Superior Court of Massachusetts on the legality of the writs of assistance.<sup>18</sup> The court eventually found the writs legal,<sup>19</sup> but not before James Otis, attorney for the merchants, aroused a revolutionary fervor against the warrants.<sup>20</sup> Otis contended general warrants were not authorized by statute, but if they were, the statute was unconstitutional. He called writs of assistance "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law that ever was found in an English law book."<sup>21</sup> Thus hostility to general searches in America antedates the American Constitution. Resentment against the writs led to the fourth amendment's requirement that the *place* to be searched be specified in the warrant.<sup>22</sup>

In 1886 the Supreme Court decided *Boyd v. United States*,<sup>23</sup> which read *Entick v. Carrington*<sup>24</sup> into the Constitution. The case arose out of an action to have property declared forfeit to the government for nonpayment of duties. The statute establishing the forfeiture proceeding permitted the court to require the defendant to produce any business book, invoice, or paper belonging to him or under his control. Defendants complied with such an order under protest that obtaining evidence by that means was unconstitutional. The jury found for the United States, and the goods were declared forfeit. The Supreme Court reversed. Finding the proceeding quasi-criminal, it applied the fourth and fifth amendments, stating that the issue was whether "a search and seizure, or what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him . . . is . . . an 'unreasonable search and seizure' with-

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the colonies, it cramps, in the same manner, the industry of all other countries, and both the enjoyments and the industry of the colonies. It is a clog which, for the supposed benefit of some particular countries, embarrasses the pleasures, and encumbers the industry of all other countries; but of the colonies more than of any other."

18. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT* 57 (1937).

19. *Id.* at 62.

20. See *id.* at 59, where the author quotes John Adams on the latter's reaction to Otis's oratory: "I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.'"

21. *Ibid.*

22. See *Boyd v. United States*, 116 U.S. 616 (1886).

23. 116 U.S. 616 (1886).

24. 19 How. St. Tr. 1029 (1765).

in the meaning of the Fourth Amendment of the Constitution?"<sup>25</sup> The Court held, "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 . . . an unreasonable search and seizure . . . within the meaning of the Fourth Amendment."<sup>26</sup>

Justice Bradley's reasoning in the *Boyd* opinion draws heavily upon *Entick v. Carrington*, as being deemed by the drafters of the fourth and fifth amendments "the true and ultimate expression of constitutional law."<sup>27</sup> The Court stated: "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 or to forfeit his goods, is within the condemnation of that judgment."<sup>28</sup> Although no actual search of Boyd's property was made, the principles of *Entick v. Carrington*<sup>29</sup> "affecting the very essence of constitutional liberty and security" were deemed applicable. These principles "reach farther than the concrete form of the case then before the court . . .; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It 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, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."<sup>30</sup> "Breaking into a house and opening boxes and drawers are circumstances of aggravation,"<sup>31</sup> but the principles of *Entick* forbid much more.

Justice Bradley's opinion incorporates the principles of *Entick* into the fourth and fifth amendments. In effect *Boyd* establishes that these amendments elevate the common-law rule against a paper-search to the level of a constitutional imperative. Whereas in *Entick* the seizure was illegal because unauthorized

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25. *Boyd v. United States*, 116 U.S. 616, 622 (1886).

26. *Id.* at 634-35.

27. *Id.* at 622.

28. *Id.* at 630. (Emphasis added.)

29. 19 How. St. Tr. 1029 (1765).

30. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

31. *Ibid.*

by statute, in *Boyd* the statute authorizing the seizure was invalid because it contravened a principle of the higher law.

*Boyd v. United States* enunciated no fixed rule that all mere evidence is immune from seizure. It held only that the government could not seize a man's private papers; "even the act under which the obnoxious writs of assistance were issued did not go so far as this."<sup>32</sup> Nor did the Court hold that the only reasonable seizures were those allowed at common law. It implicitly recognized that the Constitution permitted some statutory expansion of the class of things subject to seizure.<sup>33</sup>

Not until 1921, in *Gouled v. United States*,<sup>34</sup> did the Supreme Court hold that mere evidence *per se* is immune from seizure. *Gouled* was a prosecution for conspiracy to defraud the United States. Warrants were issued authorizing seizure of certain contracts used to bribe an officer of the United States and some papers used to commit the felony of conspiring to defraud the United States.<sup>35</sup> In the course of the searches, three documents not used to commit crimes were seized — an unexecuted contract with Lavinsky,<sup>36</sup> an executed contract with Steinhil,<sup>37</sup> and

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32. *Id.* at 623.

33. See *id.* at 623-24, where the Court gives examples of things other than stolen goods that may be seized. Although the seizure of smuggled goods was not authorized by common law, the Court said such a seizure could be reasonable.

34. 255 U.S. 298 (1921).

35. *Id.* at 307: "Of these papers, the first was seized in defendant's office under a search warrant, dated June 17, and the other two under a like warrant dated July 22, 1918, each of which was issued by a United States Commissioner on the affidavit of an agent of the Department of Justice. It is certified that it was averred in the first affidavit that there were in Gouled's office 'certain property, to wit: certain contracts of the said Felix Gouled with S. Lavinsky [which] were used as a means of committing a felony, to wit: . . . as means for the bribery of a certain officer of the United States.' It is also certified that the second affidavit declared that Gouled had at his office 'certain letters, papers, documents and writings which . . . relate to, concern and have been used in the commission of a felony, to wit: a conspiracy to defraud the United States.' Neither the affidavits nor warrants are given in full in the certificate, but no exception was taken to the sufficiency of either."

The warrants evidently simply referred to the description of the things to be seized in the affidavits. See *Gouled v. United States*, 264 Fed. 839, 840 (2d Cir. 1920). The things seized were not included within the descriptions, because they were not used to commit felonies.

36. *Id.* at 310. Of that document the Court said: "The government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful."

37. *Ibid.* Of the Steinhil contract the Court said it could easily imagine how such a paper could have been used in committing a crime, "so that it [the government] would have a legitimate and important interest in seizing such a paper in order to prevent further frauds." However, since the facts did not show that it was used as an instrumentality in committing the crime, and since the question certified to the Supreme Court stated that the document was "of evidential value only" the Court held the seizure of the executed contract also illegal.

a bill for legal services.<sup>38</sup> The court found seizure of all three documents illegal.

The Court answered the question of whether the seizures violated the fourth amendment in the affirmative.<sup>39</sup> It held that search warrants:

“may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they 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 a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.”<sup>40</sup>

The Court held the introduction of the papers in evidence would violate the fifth amendment: “[T]o permit them to be used in evidence would be, in effect, as ruled in the *Boyd* Case, to compel the defendant to become a witness against himself.”<sup>41</sup> *Gouled* gave little reasoning to support the Court’s conclusion that the seizure violated the fourth amendment. In *Boyd* the Court held the seizure of the papers was unreasonable because it would, in effect, force Boyd to testify against himself in contravention of the fifth amendment. The Court in *Gouled* relied on the fifth amendment merely to proscribe the introduction in evidence of things which it had already determined were seized in violation of the fourth.

*Gouled* extended the mere evidence rule beyond *Boyd* to proscribe the seizure of things other than papers.<sup>42</sup> Since objects other than papers generally do not communicate the thoughts

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38. *Ibid.* Of the bill for legal services the Court said the public could be interested in it “only to the extent that it might be used as evidence,” hence the seizure of it was also illegal.

39. *Id.* at 311. The question was: “Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215 of the United States Criminal Code, when taken under search warrants issued pursuant to the Act of June 15, 1917, from the house or office of the person suspected — seized and taken in violation of the Fourth Amendment?” *Id.* at 309-10.

40. *Id.* at 309.

41. *Id.* at 310.

42. *Id.* at 309: “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.”



of one accused, the fifth amendment, which is designed to protect such communications,<sup>43</sup> cannot serve as a rationale for a mere evidence rule extended to protect more than papers. However, the Court formulated no rationale in *Gouled* to buttress the weakened self-incrimination justification.

In *United States v. Kirschenblatt*<sup>44</sup> the Second Circuit Court of Appeals invoked the mere evidence rule to bar seizure of mere evidence during a search of premises under the control of an arrestee, where the search was made incidental to a lawful arrest. Although the searchers had a valid search warrant, it did not specify the papers they seized. The United States claimed the seizure was nonetheless valid because it occurred in the course of a search incidental to arrest. The Court recognized that it is legal to search an arrestee's person and seize any relevant evidence that may be found, and that one may search the immediate premises where a person is arrested and seize contraband found there.<sup>45</sup> However, it ruled that one may not properly seize mere evidence found on the premises.

Judge Learned Hand stated: "While we agree that strict consistency might give to a search of the premises incidental to arrest, the same scope as to a search of the person, it seems to us that result would admit exactly the evils against which the Fourth Amendment is directed."<sup>46</sup> The court cited *Entick v. Carrington* as directed against "a practice which English-speaking peoples have thought intolerable for over a century and a half — the general search warrants."<sup>47</sup>

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43. See *Schmerber v. California*, 86 Sup. Ct. 1826, 1830 (1966): "We hold 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."

44. 16 F.2d 202 (2d Cir. 1926).

45. *Id.* at 203: "It 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. . . . While the point was not involved, the language in *Weeks v. U.S.* was broad enough to cover it. Furthermore, the Supreme Court has very recently held that, upon an arrest, the immediate premises may be searched for contraband, . . . just as a vehicle may be searched, . . . and as officers, once in under a search warrant, are not confined to the contraband specified in it."

46. *Ibid.*: "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent."

47. *Ibid.*: "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate."

Judge Hand indicated that the reason for the mere evidence rule lies more in history than in policy: "Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past."<sup>48</sup> However, he hinted that the rule may be important in protecting political liberty, for although it might appear fair to search for mere evidence against a bootlegger, such a search "may take on a very different face" if used by the government against political opponents.<sup>49</sup>

In *Marron v. United States*, which arose a year after *Kirschblatt*, the Supreme Court implicitly recognized that the mere evidence rule was applicable to seizures during searches incidental to arrest.<sup>50</sup> However, the Court construed the class of things seizable broadly to favor the government, ruling that bills for gas, electricity, telephone, and water were "so closely related to the business, it is not unreasonable to consider them as used to carry it on,"<sup>51</sup> and therefore they were not mere evidence.

In 1932 the Supreme Court applied the mere evidence rule to hold illegal the seizure of papers only slightly different from the papers in *Marron*. In *United States v. Lefkowitz*<sup>52</sup> the court found that the papers seized were "unoffending" and not subject to seizure, whereas the similar things seized in *Marron* had been used "to carry on the criminal enterprise."<sup>53</sup> Attempting to distinguish the case before it from *Marron*, the Court looked to indicia of a general search present in *Lefkowitz*, but absent in *Marron*. The Court pointed out that the ledgers and bills seized in *Marron* were not found during a general search, but were in plain sight of the officers making the arrest, whereas in *Lefkowitz* "the searches were exploratory and general and made solely to find evidence of respondents' guilt."<sup>54</sup> *Lefkowitz* focuses attention upon the intent of the searchers as well as the nature

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48. *Ibid.*

49. *Ibid.*

50. 275 U.S. 192, 199 (1927): "They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."

51. *Ibid.*

52. 285 U.S. 452 (1932).

53. *Id.* at 465.

54. *Ibid.*

of the thing seized: "The decisions of this court distinguish searches . . . merely to get evidence to convict . . . from searches such as those made to find stolen goods."<sup>55</sup> The interpretation given the mere evidence rule in *Lefkowitz* tends to make the fact that the thing seized is mere evidence just one variable to be weighed in determining whether the seizure is reasonable. The Court cited *Go-Bart Co. v. United States* as controlling, where it was said: "There is no formula for the determination of reasonableness. Each case is to be determined on its own facts and circumstances."<sup>56</sup>

One lower federal court has interpreted *Lefkowitz* so as to merge the mere evidence rule with the general, more flexible, requirement of reasonableness. "The line between fruit of the crime itself and mere evidence thereof may be narrow;" said the court, "perhaps this turns more on the good faith of the search than the actual distinction between matters turned up."<sup>57</sup> However, in *Harris v. United States* the Supreme Court stated the mere evidence rule in a fashion which makes it clear that one looks to the nature of the thing seized rather than to the intent of the searchers:

"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 be validly seized including the instrumentalities and means by which a crime is committed, the fruits of 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."<sup>58</sup>

The search in *Harris* was incidental to an arrest under a warrant charging defendant with forgery. Agents arresting Harris conducted a search of his apartment for checks used as instrumentalities of the crime. They found several draft cards, and the defendant was convicted of the unlawful possession, concealment, and alteration of these. The court held that possession of the cards was a continuing crime, and therefore seizure of them was not illegal.

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55. *Ibid.*

56. 282 U.S. 344, 357 (1931).

57. *Matthews v. Correa*, 135 F.2d 534, 537 (2d Cir. 1943).

58. 331 U.S. 145, 154 (1947).

*Application of the Rule*

Determining whether something seized is mere evidence necessarily involves a decision as to a thing's relation to the crime charged.<sup>59</sup> Since the facts of cases vary infinitely, it is to be expected that decisions as to whether particular kinds of property are mere evidence will also vary.

In *Abel v. United States* the Supreme Court, finding the cases construing the mere evidence rule apparently impossible to reconcile, decided to follow the more recent ones favorable to the government.<sup>60</sup> The narrow construction given the rule is well illustrated by the recent case of *Schmerber v. California*<sup>61</sup> in which the Supreme Court established that the mere evidence rule does not protect an individual against a compulsory blood test, on the ground that the rule protects only property.<sup>62</sup> In general, the courts have given the rule a narrow application by broadly construing the categories of things subject to seizure.

Fruits of a crime, instrumentalities used in committing it and contraband are property in which the state has historically been deemed to have a sufficient interest to justify seizure.<sup>63</sup> The state probably has sufficient interest in the prevention of crime to seize something intended for use in committing a crime. There may be other interests which the state might assert in a

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59. For example, a typewriter used to write an extortion note would be a means by which a crime was committed, and thus subject to seizure. However, if a defendant were charged with tax evasion, a \$10,000 IBM typewriter might be merely evidence that the defendant spent more than he reported, and thus not subject to seizure.

60. 263 U.S. 217, 235 (1960).

61. 86 Sup. Ct. 1826, 1834 (1966).

62. *Id.* at 1834: "Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant, as distinct from the procedures for search and the permissible scope of search are not instructive in this context."

63. See *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926): "It is likely that the admitted power to seize the fruits, or the tools, or crime, itself rests upon a very ancient basis. . . . At any rate, it is very carefully circumscribed in the Search Warrant Act . . . itself. . . . The pursuit of a thief on hue and cry was a civil as well as criminal remedy, and the captors retook the booty and in early times themselves did execution; the tool or other object which killed a man was deodand and forfeit; a burglar's kit or a counterfeiter's plate have never been property in the ordinary sense, any more than liquor since the enactment of section 25. Ruder times had ruder remedies, but the power to seize such chattels probably descends from notions which have long since lost their rational foundation, and, while the method has changed, the substance remains."

thing in order to seize it,<sup>64</sup> for the language in *Gouled v. United States*<sup>65</sup> is broad enough to allow this possibility. What these interests may be has yet to be determined.

The class of contraband, or things the possession of which is a crime, is self-explanatory.<sup>66</sup> The mere evidence rule itself appears not to limit the kinds of things which the government might render seizable by banning, if the statute making possession of the thing illegal were otherwise constitutional. Fruits of a crime are physical objects that the criminal obtains by committing the offense. It has been noted that where the criminal does not seek to obtain a physical thing by committing the crime, there would be no fruits of it.<sup>67</sup>

The class of instrumentalities obviously includes weapons used to commit murder, a car used to escape, or a note ordering a teller to surrender cash. However, the courts have extended this class so far that few things possessed by the defendant when committing a crime would be excluded from the class and yet

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64. See *Gouled v. United States*, 255 U.S. 298, 310 (1920): "While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that under the principles of law stated it would have the right to take it into its possession to prevent injury to the public from its use . . ." (emphasis added).

"It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality in the bribing of a public servant and in perpetrating frauds upon the Government so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds." (Emphasis added.)

See also FED. R. CRIM. P. rule 41(b), which allows issuing warrants to search for and seize things "designed or intended for use . . . as the means of committing a criminal offense."

65. It condemns only the seizure of things in which the government's sole interest is its use in evidence, implying that if there were any other interest which it might assert, the seizure would be valid.

66. The following things have been held to fall within the category of contraband: illegal drugs (*Draper v. United States*, 358 U.S. 307 (1959)); illegal liquor (*Marron v. United States*, 275 U.S. 192 (1927)); altered draft cards (*Harris v. United States*, 331 U.S. 145 (1947)); altered stamps (*United States v. Rabinowitz*, 339 U.S. 56 (1950)); illegally-possessed ration coupons (*Davis v. United States*, 328 U.S. 582 (1946)).

67. See Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966). The concept has been extended to allow seizure of a bankbook recording the deposit of illegally obtained funds in *United States v. Howard*, 138 F. Supp. 376 (D. Md. 1956), and of things purchased with stolen money, *United States v. Moore*, 107 F. Supp. 393 (S.D.N.Y. 1952). The fruit of a crime is often money, see *United States v. Dornblut*, 261 F.2d 949 (2d Cir. 1958). In *United States v. Rees*, 193 F. Supp. 849 (D. Md. 1961) the court did not extend the concept of fruits to an account of a particularly brutal murder written by the defendant who was charged with interstate transportation of kidnapped persons. In *Mathews v. Correa*, 135 F.2d 537 (2d Cir. 1943), the court ruled that an address book containing evidence of a bankrupt's concealment of valuable assets was a fruit, since federal law makes it illegal for anyone to conceal any property belonging to a bankrupt, and the book itself was such property.

be relevant evidence.<sup>68</sup> For example, in *United States v. Guido*,<sup>69</sup> the defendant in the course of a robbery left a distinctive heel print, and a federal appellate court ruled that the shoes worn during the robbery were a means of committing the crime.

"If, during a robbery, a robber had a gun in his hand and wore a mask and gloves, the latter to prevent finger prints, defendant, apparently, would concede that such articles could be seized in a search incidental to a lawful arrest. However, defendant insists that shoes worn during a robbery do not come within that category.

"It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely the latter would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing bare-footed from the scene of the hold-up."<sup>70</sup>

Clothing worn by a defendant is frequently seized when it has been stained with blood of a victim. The reasoning in *Guido*

68. In *Abel v. United States*, 362 U.S. 217 (1960) false birth certificates were held instrumentalities of the crime of espionage, since they could help the defendant pass as an American citizen. Lower federal courts have held the following to be instrumentalities: records of the earnings of prostitutes (*United States v. Boyette*, 299 F.2d 92 (4th Cir. 1962)); bills, records, and a check book used in carrying on illegal gambling (*United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960)); money found in a gambling establishment (*United States v. Joseph*, 174 F. Supp. 539 (E.D. Pa. 1959)); material promoting the sale of obscene literature (*United States v. Klaw*, 227 F. Supp. 12 (S.D.N.Y. 1964), see *contra United States v. Loft on Sixth Floor of Bldg.*, 182 F. Supp. 322 (S.D.N.Y. 1960)); papers with notes on the cost of living used in preparing a fraudulent tax form (*United States v. Stern*, 255 F. Supp. 187 (S.D.N.Y. 1964)); *Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961)); machines used to prepare records of illegal business (*Foley v. United States*, 64 F.2d 1 (5th Cir. 1933)); a list of smuggled goods necessary to the commission of the crime of smuggling (*Landon v. United States Attorney*, 82 F.2d 285 (2d Cir. 1936)).

The following have been held not to be instrumentalities: an address book where the crime charged was harboring a fugitive (*United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1961)); a handkerchief bearing "tangible evidence of a perverted act" (*Morrison v. United States*, 262 F.2d 449 (D.C. 1958)); a letter soliciting purchasers of obscene literature (*United States v. Loft on Sixth Floor of Bldg.*, 182 F. Supp. 322 (S.D.N.Y. 1960); see *contra, United States v. Klaw*, 227 F. Supp. 12 (S.D.N.Y. 1964)); notes on cost of living used in preparing fraudulent tax forms (*Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961), reversed on other grounds, 370 U.S. 650; *United States v. Stern*, 255 F. Supp. 187 (S.D.N.Y. 1964)); a diary and notes of phone numbers and of meetings in prosecution for tax evasion (*United States v. Stern*, 225 F. Supp. 187 (S.D.N.Y. 1964)).

69. 251 F.2d 1 (7th Cir. 1958), *cert. denied*.

70. *Id.* at 3-4.

would permit seizure of any clothing the perpetrator of the crime wore during its commission as an instrumentality. However, not *Guido*, but *Morton v. United States*<sup>71</sup> is cited for the proposition that such blood-stained garments are seizable.<sup>72</sup> But in *Morton* the Court did not consider the applicability of the mere evidence rule to the seizure, the defendant conceded that his clothes could be seized from his closet by an officer making a lawful arrest, but denied that an arrest had been made at the time of the search.<sup>73</sup>

Rarely, if ever, has the mere evidence rule been applied to bar the seizure of intangible evidence. In *On Lee v. United States* the Supreme Court indicated that the fourth amendment and *Gouled* applied only to tangible evidence.<sup>74</sup> Despite *On Lee* one appellate court has implied that the mere evidence rule might bar the seizure of intangible evidence.<sup>75</sup> Also, in *Wong Sun v. United States*, the Supreme Court held that the fourth amendment protected intangible verbal evidence as well as tangible physical evidence against unreasonable searches and seizures.<sup>76</sup> *Wong Sun* might serve as the basis for reconsidering *Olmstead v. United States*<sup>77</sup> in which the Court held that wire-tapping was not contrary to the fourth amendment, because the

71. 147 F.2d 28 (D.C. Cir. 1945).

72. See *State v. Bisaccia*, 45 N.J. 504, 203 A.2d 185 (1965).

73. 147 F.2d 28, 30 (D.C. Cir. 1945): "Appellant properly conceded that an officer making a lawful arrest on a criminal charge may take such articles as may reasonably be used as evidence; but here, he says there was no arrest on a criminal charge at the time the articles were taken."

74. 343 U.S. 747, 753 (1952): "Petitioner relies on cases relating to the more common and clearly distinguishable problems raised where tangible property is unlawfully seized. Such unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force, *United States v. Jeffers*, 342 U.S. 48; *Gouled v. United States*, 255 U.S. 298 (the authority of the latter case is sharply limited by *Olmstead v. United States*, 277 U.S. 438, 463). But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods."

75. *Williams v. United States*, 263 F.2d 487, 488-89 (D.C. Cir. 1959).

76. 371 U.S. 471, 485 (1963): "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'"

77. 277 U.S. 438, 464 (1928): "The Amendment itself shows that the search is to be of material things — the person, the house, his papers of his effects. The description in the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

"The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only."

fourth only protected against searches and seizures of material things.<sup>78</sup> Statements overheard by electronic eavesdropping would usually be communicative mere evidence, except when made in furtherance of a crime, in which case they would be instrumentalities. Application of the mere evidence rule would mean that seizure of such statements would be unconstitutional.

### *The Policies Underlying the Mere Evidence Rule*

As noted before, the mere evidence rule has its constitutional roots in both the fifth and fourth amendments. An examination of the policies underlying these amendments reveals that the mere evidence rule is not one rule, but two. One must distinguish between the rule in *Gouled* condemning the seizure of all mere evidence on the basis of the fourth amendment, and the rule in *Boyd* condemning the seizure of a man's papers on the basis of the fifth amendment as well as the fourth.

In *Schmerber v. California*<sup>79</sup> the Supreme Court held that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."<sup>80</sup> The Court stated:

"It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. . . . (*Boyd* cited) . . . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a sus-

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78. In *Olmstead v. United States* the Court objected to extending the protection of the fourth amendment to telephone communications on the ground that there was no search, as well as no seizure. One might point out that in *Boyd v. United States* there was no search, strictly speaking, and yet the seizure was condemned by the Fourth Amendment, even without a trespass on the premises of the defendant.

79. 86 Sup. Ct. 1826, 1830 (1966).

80. *Ibid.*



pect or accused the source of real or physical evidence does not violate it."<sup>81</sup>

If one considers the papers which a man has written as themselves communicative, the fifth amendment's privilege against self-incrimination bars the seizure of such papers; but it does not prevent the seizure of other types of mere evidence. A rule restricting seizure of mere evidence other than papers must rest upon the fourth amendment alone. *Gouled v. United States* invokes the fifth amendment only as a basis for the exclusionary rule; the court condemns the actual seizure on the basis of the fourth amendment itself.

The rationale for the rule against seizure of papers is thus separable from that underlying the rule against seizure of other types of mere evidence. Both the fourth and the fifth amendments may be said to protect the individual's right to privacy, but not in the same way. The fifth amendment protects the individual in the privacy of his thoughts, the fourth amendment protects him in the privacy of his home or office. When an individual's thoughts have been committed to paper, both amendments join to prevent the seizure of that paper.

In *Schmerber*, after finding that a blood test did not violate the fifth amendment, the Court stated that once the fifth was found inapplicable it assumed that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."<sup>82</sup> If the Court's reasoning applies generally, then the *Gouled* rule should not bar the seizure of non-communicative mere evidence in all circumstances.

The Supreme Court has stated that the policy underlying the fourth amendment is protection of the individual's right to privacy from undue police interference.<sup>83</sup> In *Boyd v. United States* the Court determined that the drafters of the amend-

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81. *Id.* at 1832.

82. *Id.* at 1834.

83. See *Wolf v. Colorado*, 338 U.S. 25, 27 (1949): "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society."; and also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961): "Since the Fourth Amendment's right of privacy has been declared enforceable against the State, through the Due Process Clause of the Fourteenth it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

ment intended to proscribe general searches.<sup>84</sup> Where a warrant has been issued, the constitutional requirement that the thing to be seized be specified, together with the requirement that warrants be issued only upon probable cause, suffices to prevent general exploratory searches. Where no search warrant has been issued, or the thing to be seized is not described in the warrant, the mere evidence rule takes the place of the specificity requirement in narrowing the scope of the search. It narrows the scope by removing the motive for a general search, since the police cannot seize the mere evidence they find, there is little reason to search for it.

The mere evidence rule has been criticized as based on notions of protecting property irrelevant to the modern era. It is true that the rule operates to protect an individual's property; *Boyd v. United States*<sup>85</sup> and *Entick v. Carrington*<sup>86</sup> both reflect a deep-seated belief in the sanctity of private property. But it does not follow that the mere evidence rule is no longer viable. To the extent that it is based on the fourth amendment, it has roots in a constitutional recognition of the right to private property. That amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ." "Houses, papers, and effects" are property and will be protected by the fourth amendment unless it is repealed, whatever the ideological fashions of the day may be.

#### *Searches Under Warrant Specifying the Mere Evidence To Be Seized*

The fifth amendment, together with the fourth, prohibits issuing a warrant to seize private papers written by a suspect. However, the fifth amendment itself does not proscribe warrants

84. 116 U.S. 616, 625 (1886).

85. 116 U.S. 616, 630 (1886), where the Court speaks of the individuals "indefeasible right of . . . private property," as being violated by a paper search.

86. 19 How. St. Tr. 1029, 1066 (1765): "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property is a trespass . . ."

"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 considerable damages in that respect."

for other mere evidence. The mere evidence rule need not be invoked to prevent general searches if the warrant specifies the evidence to be seized; the suspect in such cases would have full benefit of the specificity requirement to protect him. Therefore the mere evidence rule should not prevent the issuing of warrants to seize anything, other than private papers, that would be relevant evidence.

Permitting warrants for specific mere evidence can be reconciled with *Gouled*, if that case be properly limited. The warrants in that case specified something other than the things seized. Hence *Gouled* was not a case where a warrant was issued for specified mere evidence. If *Gouled* is so construed, there is no case deciding whether warrants for specific mere evidence are constitutional. None has arisen between *Gouled v. United States* and *Mapp v. Ohio*,<sup>87</sup> because federal statutes have not authorized such warrants.<sup>88</sup> One must admit that the language used in *Gouled* is broad enough to condemn issuing such warrants. However, the broad language was not necessary to the decision and *Gouled* should be limited to cases where the thing seized was not specified in a warrant. The statement in *Gouled* that "there is no special sanctity in papers . . . to render them immune from search and seizure if only they fall within the scope of the cases in which other property may be seized"<sup>89</sup> should be construed as limiting the *Boyd* rule to allow seizure of papers used as a means of committing a crime, a limitation implicit in *Boyd*.

### *Searches Under Warrant Not Specifying the Mere Evidence Seized*

When the entry is under a lawful search warrant, but the mere evidence seized is not specified in that warrant, two theories support finding the seizure illegal. One can hold the seizure invalid on the ground that the specificity clause of the fourth

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87. 367 U.S. 643 (1961). *Mapp* held the fourth amendment applicable to the states.

88. The first federal statute on the subject was 40 Stat. 228 (1917). It is little different from present FED. R. CRIM. P. rule 41(b) which provides:

"A warrant may be issued under this rule to search for and seize any property.

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957."

89. See *Gouled v. United States*, 255 U.S. 298, 309 (1921).

amendment prohibits any "seizure of one thing under a warrant describing another." This seems to be the position taken by the Supreme Court in *Marron v. United States*.<sup>90</sup> If that approach is taken, there is, of course, no need for the mere evidence rule. However, another Supreme Court case<sup>91</sup> has been read to mean that an officer who enters under a lawful search warrant may seize other things that he happens upon in the normal course of his search.<sup>92</sup> Recently the Supreme Court expressly reserved decision on the question whether contraband may be seized in the course of a search under a warrant not specifying it.<sup>93</sup> Several appellate courts have held that there are circumstances in which things not specified in the warrant may be seized.<sup>94</sup> One of these cases quoted the statement of the mere evidence rule in *Harris v. United States* as controlling.<sup>95</sup>

If seizure of something not specified in the search warrant is allowed, the fourth amendment and *Gouled* should limit the kinds of things seizable. *Gouled* itself applied the mere evidence rule in those circumstances. Some limitation is necessary to prevent a special search from changing into a general one; not applying the *Gouled* rule would greatly weaken the specificity requirement.

### *Warrantless Searches*

Policy underlying the fourth amendment requires that the *Gouled* rule bar the seizure of all mere evidence where the search is incidental to an arrest, or otherwise without a search warrant, unless the mere evidence is found on the arrestee's person. The specificity requirement of the fourth amendment cannot protect the individual's privacy from intrusion by the police where there is no warrant to contain the specification. Searches without a warrant should not give the police any greater power than searches with a warrant. Without the mere evidence rule to sub-

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90. 275 U.S. 192 (1927).

91. *Steele v. United States*, 267 U.S. 498 (1925).

92. In *Steele* a warrant was issued authorizing the seizure of whiskey, and other intoxicating liquors were seized, and the Court upheld the seizure. Judge Learned Hand, in *United States v. Kirschenblatt* interpreted *Steele* to mean that "officers, once in under a search warrant, are not confined to the contraband specified in it." 16 F.2d 202, 203 (1926).

93. *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

94. *Porter v. United States*, 335 F.2d 620 (9th Cir. 1964); *United States v. Eisner*, 297 F.2d 595 (6th Cir. 1962).

95. *United States v. Eisner*, 297 F.2d 595, 597 (6th Cir. 1962).

stitute for the specificity requirement, the police would have greater power to search and seize without a warrant than with one.<sup>96</sup>

If the seizure of mere evidence in a warrantless search were allowed, police officers would be encouraged to by-pass the procedural difficulties of obtaining a search warrant by arresting the accused on the premises which they wish to search. Application to such searches of the rule barring the seizure of all mere evidence would encourage the police to obtain warrants. The individual's privacy would be better protected if the practice of obtaining search warrants was thus encouraged.

#### *Applicability of the Mere Evidence Rule to the States*

Although cases applying the mere evidence rule have spoken in terms of the fourth and fifth amendments, courts in two states have rejected the proposition that the rule is binding upon them. A New York trial court held the rule inapplicable to the states on the ground that it was no longer applied.<sup>97</sup> The California Supreme Court reached the same conclusion in *People v. Thayer*.<sup>98</sup> Chief Justice Traynor found that the mere evidence rule's claim to constitutional status rests solely upon *Gouled v. United States*, whose authority is questionable on several grounds. The Court noted that under *Ker v. California*<sup>99</sup> the states may still give their own interpretation to the reasonableness requirement of the fourth amendment to some extent. The Court expressed doubt that "such a dubious technical requirement will be imposed on the states."<sup>100</sup>

Several states have indicated acceptance of the mere evidence rule in dicta.<sup>101</sup> The New Jersey Supreme Court has adopted it,

96. In *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932), the Court stated: "[T]he authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained."

97. *People v. Carroll*, 38 Misc.2d 630, 238 N.Y.S.2d 640 (1963).

98. 63 Cal.2d 635, 408 P.2d 108 (1965), cert. denied, 86 Sup. Ct. 1342 (1966).

99. 374 U.S. 23 (1963).

100. *People v. Thayer*, 63 Cal.2d 635, 642, 408 P.2d 108, 112 (1965).

101. See *Commonwealth v. Czajkowski*, 198 Pa. Super. 511, 182 S.E.2d 298 (1962); *Hernandez v. State*, 153 Colo. 316, 385 P.2d 996 (1963); *State v. Chinn*, 231 Ore. 259, 373 P.2d 392 (1962). Virginia has amended the statute allowing the issuance of search warrants to conform with the *Gouled* rule. VA. CODE ANN. § 19.1-84 (Supp. 1964). Florida adopted the rule well before *Mapp*. See *Church v. State*, 151 Fla. 24, 9 So.2d 164 (1942).

but limited to private papers. In *State v. Bisaccia*, Justice Weintraub wrote:

"There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect. As we have said, private papers are almost inseparable from the privacy and security of the individual. To browse among them in search of anything inculpatory involves an exploratory search indistinguishable from the search under the general warrant which the Fourth Amendment intended to outlaw. . . . Indeed even a search for a specific, identified paper may involve the same rude intrusion if . . . it leads to an examination of all of a man's private papers. Hence it is understandable that some adjustment may be needed, and presumably it is to that end that a search may not be made among a man's papers for a document which has evidential value alone."<sup>102</sup>

In *Ker v. California*<sup>103</sup> the Court distinguished between cases in which it held evidence inadmissible on the basis of the fourth amendment and those in which it exercised its supervisory power over the lower federal courts. States are bound by the former, but not by the latter. The Court recognized that states could develop their own rules concerning searches and seizures; however, it stated that determinations by state courts that searches and seizures were reasonable would be "respected only insofar as consistent with federal constitutional guarantees," as determined by the "'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment."<sup>104</sup> In *Malloy v. Hogan*<sup>105</sup> the Supreme Court held that the federal fifth amendment standards are binding upon the states, and enforceable by exclusionary rule. It is submitted that an examination of the language used by the Supreme Court in *Boyd v. United States* and *Gouled v. United States* indicates these decisions are based upon the Constitution, and not upon the court's supervisory power. The merits of the decisions may be doubtful, one may view the mere evidence rule as a hypertechnicality; but the language used by the Supreme Court leaves little doubt that the rule is a constitutional one.

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102. 45 N.J. 504, 515, 213 A.2d 185, 191 (1965).

103. 374 U.S. 23 (1963).

104. *Id.* at 33.

105. 378 U.S. 1 (1964).

The Court has frequently cited *Boyd* in its decisions interpreting the Constitution.<sup>106</sup> The authority of the holding of *Boyd* that the privilege against self-incrimination forbids compulsory production of an individual's private papers, and that the fourth amendment likewise renders such a seizure unreasonable has never been impeached. *Boyd* should render any statute purporting to give the police authority to seize a man's private papers void. In order to hold such a seizure valid, the Supreme Court would need to overrule *Boyd*. It is unlikely that it will do so.

To hold valid the seizure of non-communicative mere evidence in the course of a search beyond or without a search warrant, the Supreme Court would need to overrule *Gouled*. It is more likely to overrule *Gouled* than *Boyd*, for it has not employed *Gouled* to hold a seizure unconstitutional since 1932,<sup>107</sup> and has avoided applying the *Gouled* rule by construing it quite narrowly.<sup>108</sup>

#### *Application to Louisiana*

If *Boyd* were held binding upon the states, application of article 161 of the new Code of Criminal Procedure to issue a warrant for the seizure of a man's private papers would be unconstitutional. Consistently with *Boyd*, however, one could issue warrants to seize non-communicative mere evidence, such as a bloody shirt. There would be little adverse effect upon the practical administration of criminal justice since "it is seldom that one finds a document containing evidence of a crime which was not at one time used in its commission."<sup>109</sup> However the *Boyd* rule would strengthen the security of Louisianians in the privacy of their purely personal papers.

If *Gouled* were held applicable to the states, it would not adversely affect the practical administration of criminal justice, if confined to its proper sphere and applied only in searches beyond or without a warrant. The provisions of the Code of Criminal Procedure allowing issuance of warrants for specified mere evidence would be unaffected by *Gouled*.<sup>110</sup> The article

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106. For example, see *Griswold v. Connecticut*, 381 U.S. 479 (1965).

107. In *United States v. Lefkowitz*, 285 U.S. 452 (1932).

108. See *Harris v. United States*, 331 U.S. 145, 155 (1947) and *Davis v. United States*, 328 U.S. 582, 594 (1946) (Justice Frankfurter dissenting in both).

109. *United States v. Kirschenblatt*, 16 F.2d 202, 204 (2d Cir. 1926).

110. LA. CODE OF CRIMINAL PROCEDURE arts. 161, 162 (1966).

imposing upon police officers the duty to seize all incriminating evidence *about* the person arrested<sup>111</sup> would be valid only insofar as the seizure incidental to arrest was *from* the person. To seize other non-communicative mere evidence within the control of an arrestee an officer would need a search warrant.

It is submitted that applying the *Gouled* rule to bar issuance of warrants for non-communicative mere evidence would be undesirable. Such an application would afford the individual little protection against unreasonable searches, but it could well hamper effective enforcement of the law.

*W. Thomas Tête*

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111. *Id.* art. 225.