The Mere Evidence Rule: Need for Re-Evaluation

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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. (Italics ours.)¹

No person . . . shall be compelled in any criminal case to be a witness against himself. (Italics ours.)²

Safeguards similar to these are provided in the constitutions or laws of every state in the Union.

In an address delivered to the Duke University Law School, Justice Traynor of the California Supreme Court admitted:

Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall, the question of admissibility remains a haunting one. The evidence may be of the greatest relevance. If its admission serves to condone lawless law enforcement, however, it opens the way to government intrusion on the privacy of law-abiding people.³

If Perry Mason, in one of his television episodes, moved the trial court to suppress relevant certain evidence seized as an incident to a lawful arrest and search, on grounds that it was merely evidence that the defendant had committed the crime he was being charged with, and if the judge sustained the motion, the reaction of the average layman, and, indeed, of many an attorney unfamiliar with criminal law, would understandably be that the script writers had this time unequivocally abused their literary license. However, such a rule—that during a search and seizure, certain items may not be taken from the accused merely to be used against him as evidence of the alleged crime—is well established in the law of evidence.⁴

Within recent years the areas of search and seizure and self-incrimination have undergone close scrutiny in American courts. Construction of constitutional rights in favor of the accused have evoked denunciations of "coddling criminals" to "communism" from conserv-

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¹ U.S. Const. amend. IV.
² Id. amend. V.

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atives; and, plaudits from liberals and libertarians. In the wake of each major decision issues a flood of periodical literature with detailed analyses, both pro and con.

This article is limited to the "mere evidence rule" as enunciated in *Gouled v. United States;* a brief historical sketch of the genesis of the search warrant; the two landmark decisions leading to *Gouled;* and, an overview of its impact upon American law, with reference to major landmark decisions. A thorough study of the rule and its application and interpretation in the various courts of the United States is book-length in proportion, as the numerous case entries under *Gouled* in the several editions of *Shepard's United States Citations* clearly illustrate. Wigmore provides a fairly comprehensive listing of decisions on illegal searches and seizures.\(^6\)

**Birth of the Search Warrant**\(^7\)

At early common law, the search warrant was unknown. *Any* unconsented entry upon the property of another was trespass *quaere clausum fregit,* punishable in (what is now called) tort, with damages recoverable in proportion to the severity of the wrong.\(^8\)

The Magna Carta was forced from King John by embattled English barons at Runnymede on June 15, 1215. It represented a summarization of traditional liberties enjoyed by the English people, with express reference to such liberties as had been trammeled and violated during the Norman Conquest and thereafter. A decided blow for liberty was struck when John finally pledged: "No free man shall be taken or imprisoned or disseised, or outlawed, or exiled, or any ways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

The words "nor will we go upon him . . . or by the law of the land," are generally deemed the wellspring of the search warrant. This writ developed as a matter of necessity, to provide a means of lawful entry for retrieval of stolen goods. With time, its scope was gradually extended to include any property it was illegal for a free man to possess. On the theory that such chattels as contraband and instrumentalities of a crime were inherently evil, the Crown would seize them for the pur-

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6 8 Wigmore, Evidence, § 2183, 2184b, 2264 (McNaughton ed., 1961).
7 Creditable discussions of the origin of search warrants and events leading up to the incorporation of the Fourth and Fifth Amendments into the Bill of Rights of the United States Constitution are given in Dickerson, Writs of Assistance as a Cause of the Revolution (1939); Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Andrews, Historical Survey of the Law of Search and Seizures, 34 Law Notes 42 (1930); and Fraenkel, Concerning Searches and Seizures, 44 Harv. L. R. 361 (1920).
8 47 Am. Jur. Searches and Seizures § 2 at 503; 79 C.J.S. Searches and Seizures § 2 at 776.
pose of “purification”. Once “purified”, the items would be sold, thus supplying the government with another comfortable source of revenue. Considerable publicity would have been given these items, in advance of sale, since they were freely used against the possessor as evidence to incriminate him at his trial before the entire populace.

During the era of the notorious Star Chamber—a former court of inquisitorial and criminal jurisdiction which emerged in the 15th century under the Tudors and was noted for its arbitrary methods and severe punishments—the warrant became a blanket license for the king’s men to enter private premises and search for and seize anything they might deem “evidence of crime.” At this stage in its development, the search warrant—general in scope—listed neither name of the alleged possessor to be searched nor specific chattels to be confiscated.

Unwittingly the invention of printing from movable type by Johann Gutenberg, c. 1450, in Mainz, Germany, was destined to play a leading role in the developing law of search and seizure. The typographical art was brought from the Continent to England by William Caxton, c. 1468. Recognizing the might of the printed word, the Crown lost no time in attempting to control the ambit of its activity. The Stationers’ Company chartered in 1557 (but allegedly formed as early as 1403), under the aegis of the Star Chamber, limited the number of licensed printers and type founders, as well as locales in which printing was legally sanctioned. Nothing could be printed without an official imprimatur, following rigid scrutiny and censorship of the matter to be printed. In an effort to suppress alleged “seditious” publications by underground presses, calculated to arouse vox populi and incite the rabble to rebellion, unannounced searches of booksellers’ shops and private homes were authorized by the Star Chamber. Those apprehended with unauthorized publications were punished by mutilation, death, whipping at the pillory, and/or imprisonment.

The Petition of Right granted by Charles I in 1628, reaffirmed the liberties enunciated in the Magna Carta, including every free man’s right to be safe against illegal search and seizure. Though the Star Chamber was abolished in 1641 by Parliament, it was replaced by a new scourge—the Licensing Act of 1662—which restricted printing in a similar manner and provided for continuation of the flagrant and shocking abuses by “messengers” of the government through the medium of the general warrant. Private premises were broken into and entered; unlicensed presses and their products seized; and authors and printers apprehended and severely punished.

Though the House of Commons repealed the Licensing Act in 1695, restraint on the press continued to be exercised, this time by means of a stamp duty and the law of libel, the latter encompassing all manner of writings deemed odious and “seditious” to those in political power. Dur-
ing the reign of George III, the populace, having found itself without representation in a corrupt House of Commons, reverted to the columns of its newspapers for expression. Issue No. 45 of the *North Briton* succeeded in extirpating Lord Bute, the premier, from office. A general warrant was put out for the discovery and apprehension of its authors and printers, 49 of whom were subsequently arrested on suspicion. John Wilkes (1727-1797), the author, was convicted by the King's Bench of libel.\(^9\) Securing his release from prison on grounds of privilege as a member of Parliament, Wilkes sued the undersecretary of state in trespass and was awarded damages of £1000.\(^10\) Several days later printer Dryden Leach, also arrested on suspicion, won a jury verdict of £400 in damages against the government messengers. Lord Mansfield joined by the other three judges pronounced the illegality of the general warrant and declared that "no degree of antiquity could give sanction to an usage bad in itself".\(^11\)

**Keynotes to the Fourth and Fifth Amendments of the Constitution of the United States\(^12\)**

Climatically in 1765, John Entick—author of the *Monitor*, or *British Freeholder*, another muckraking newspaper—sued Lord Halifax, the secretary of state, and his three government messengers of trespass. Under a general warrant, they had entered his home and seized all his books and private papers, on grounds of suspicion of seditious libel. Lord Camden, Chief Justice of the Common Pleas Court, in a decision hailed by historians as a "landmark of English liberty", reviewing the annals of the general warrant, declared:

> I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of the opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.\(^13\)

> The great end for which men entered into society was to *secure their property* . . . 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 . . . The law obligeth no man to accuse himself because the necessary means of compelling *self-accusation* falling on the innocent as well as the guilty would be cruel and unjust. And it would seem that a search for evidence is disallowed on the same principles . . . (Italics ours.)\(^14\)

\(^12\) See the works by Dickerson, Lasson, Andrews and Fraenkel, *supra* n. 7.
\(^13\) Entick v. Carrington, 19 How. St. Tr. 1029 at 1066 (1765).
\(^14\) *Id.* at 1029-30.
Lord Camden's opinion is considered the font of the Fourth and Fifth Amendments of the United States Constitution.

Concurrently, during the 18th century, in the American Colonies, a species of general warrant known as a "writ of assistance" was used to raise revenue to finance the French and Indian War. John Fiske, in his work American Revolution, described the origin of these writs:

...in 1767, it was decided to enforce the Navigation Act, and one of the revenue officers at Boston applied to the superior court for a "writ of assistance", or general search warrant, to enable him to enter private houses and search for smuggled goods, but without specifying either house or goods... But James Otis showed the court that the issue of ... such universal writs ... was, "a kind of power, the exercise of which cost one king of England his head and another his throne"; ... and "placed the liberty of every man in the hands of every petty officer." ... Chief Justice Hutchinson granted the writs ..., but Otis' ... eloquence made so great an impression upon the people that this scene in the court room has been since remembered ... as the opening scene of the American Revolution.\(^{15}\)

Such was the milieu from which the Constitution of the United States and the Bill of Rights emerged.

Prelude to Gouled: Boyd v. U. S. and Weeks v. U. S.

The Fourth Amendment prohibits only unreasonable searches and seizures. Unfortunately no clear-cut formula or rule exists for determining whether or not a search is reasonable. Each case must be decided upon its own circumstances and merits. The mills of the courts like those of the gods grind exceedingly slow. The interpretation of unreasonable in regard to searches and seizures did not reach the United States Supreme Court until 1886—121 years after Entick.\(^{16}\)

In Boyd v. United States,\(^{17}\) the federal government sought to compel Boyd and his company to forfeit 35 cases of plate glass he had allegedly smuggled into the country without paying the customs duty. At issue was the validity of a subpoena directing him to produce in court an invoice for these goods, pursuant to customs and revenue laws, which compelled examination of books and records pertaining to the alleged offense by a judicial officer. Non-compliance with the subpoena was tantamount to confession. Defendant complied. Though no actual search and seizure had taken place, the Supreme Court reviewing Entick, in an unanimous opinion written by Justice Bradley, equated a compulsory production of an individual's private papers with an unreasonable search and seizure within the meaning of the Fourth Amendment:

\(^{15}\) As quoted by Andrews, supra n. 7 at 45.

\(^{16}\) Supra n. 13.

\(^{17}\) 116 U.S. 616, 6 S. Ct. 695, 29 L. Ed. 763 (1886).
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 [Entick] judgment. In this regard the Fourth and Fifth Amendments run almost into each other...18

And any compulsory discovery by...compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government...19

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

Though it used a search and seizure approach, the Court in Boyd clearly recognized an individual's constitutional right to protection against self-incrimination. It is from this holding that the rule against seizure of merely evidentiary materials has evolved, i.e. when property seized is of such a nature that introduction of it into evidence is a denial of its owner's right against self-incrimination, the seizure is unreasonable and the material must be excluded.

Weeks v. United States21 reaffirmed the holding of Boyd. The defendant had been convicted of using the mails to transport lottery coupons. Introduced into evidence were items seized by the state officers in one search and by state officers and the federal marshal in another search of Weeks' premises, without warrant, during his absence. Justice Day give the opinion of the Supreme Court:

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..., is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution...22

We therefore reach the conclusion that the letters in question were taken from the house of the accused...in direct violation of the constitutional rights of the defendant;...In holding them and permitting their use at trial, we think prejudicial error was committed....23

Silverthorne Lumber Co. v. United States24 which enunciated the fruit of the poisoned tree doctrine also resulted in the exclusion of illegally seized private documents and books. Although the mere evidence rule per se had not yet been expressly articulated, material which was clearly only evidentiary was being isolated and identified.

18 Id. at 630.
19 Id. at 632.
20 Id. at 633; Davis, supra n. 4 at 103.
22 Id. at 393.
23 Id. at 398.
24 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1914).
Gouled vs. U. S.

In Gouled v. United States\textsuperscript{25} our supreme tribunal met head-on the issue of personal property being seized for its \textit{merely evidentiary} value. Gouled, along with an army officer named Vaughan, and Gouled's attorney Podell were suspected in January, 1918, of conspiring to defraud the United States government, through contracts for clothing and equipment, and of using the mails to promote their scheme. Cohen, who was an army private attached to the intelligence division and a business acquaintance of Gouled's, acting under orders of his superior officers, feigned a friendly call upon Gouled. Gaining admission to the latter's office in his absence, without any warrant, Cohen seized and carried away a number of documents. One of these being of "evidential value only", was subsequently delivered to a United States attorney who introduced it into evidence over Gouled's objection. Gouled did not know that Cohen had carried away any of his papers until the latter appeared on the witness stand.\textsuperscript{26} Charles Evans Hughes argued in behalf of Gouled on appeal. Six questions were certified by the Court of Appeals\textsuperscript{27} to the Supreme Court. The first two pertained to the above stated facts:

[1] Is the secret taking or abstraction, without force, by a representative of any branch or subdivision of the Government of the United States, of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th Amendment? (Italics ours.)\textsuperscript{28}

In reply, Justice Clarke stated:

\ldots whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative.

[2] Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th Amendment?

To which Justice Clarke answered:

Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to the one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private

\textsuperscript{25} \textit{Supra} n. 5.
\textsuperscript{26} Id. at 304-5.
\textsuperscript{27} 264 F. 839 (2d Cir. 1920).
\textsuperscript{28} \textit{Supra} n. 25 at 305.
papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.29

As noted in the opinion, the other four questions concerned three documents which had been admitted into evidence at the trial over the same constitutional objections as were interposed to the admission of the first paper. One was an unexecuted contract between Gouled and one Lavinsky; another was a written contract signed by Gouled and one Steinthal; the third was a bill for Podell's legal services to Gouled. The first of these was seized in Gouled's office under a search warrant dated June 17, 1918; the others, under a warrant dated July 22, 1918. Both warrants had been issued by a United States Commissioner on the affidavit of an agent of the Department of Justice, under authorization of the Espionage Act of June 15, 1917. After the seizure of the papers a joint indictment was returned against Gouled, Vaughan, and Podell.30

These four questions, likewise answered in the affirmative, were:

[3] ... Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted ... when taken under search warrants ... from the house or office of the person so suspected—seized and taken in violation of the 4th Amendment?31

[4] ... If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant—is such admission in evidence a violation of the 5th Amendment?

[5] ... If ... the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon,—can such property so seized be introduced in evidence against said party when on trial for a different offense?32

[6] ... If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?33

The rule of Gouled was formulated in the ensuing quoted paragraph which defined the categories of property that might be seized in execution of a search warrant:

... it is clear that, ... as a result of the Boyd and Weeks Cases, ... they [search warrants] may not be used as a means of gaining

29 Id. at 306.
30 Id. at 306-7.
31 Id. at 309-10.
32 Id. at 311.
33 Id. at 312.
access to a man's house or office and papers solely for the purpose of making a 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. (Italics ours.)

Legal writers generally agree that Gouled was based on theories of property interests vested in the accused, because of its reference to primary right, even though the Fourth Amendment infers a right of freedom from government intrusion, or a right of privacy, which is personal in nature.

Gouled provided the basis for Rule 41 (b) of the Federal Rules of Criminal Procedure, which states that valid search warrants may be issued to search for and seize the following types of property: (1) instrumentalities of crime (2) fruits of crime (3) weapons used in the commission of crime, and (4) contraband. In the words of one legal writer:

The . . . Rules . . . provide for these objects alone. In a sense, each of the permissible objectives of a search is a category of chattels in which either the possessor has no property right or his right has been forfeited. The thief has no property right in stolen goods; the possessor has no property right in contraband; and perhaps the instrumentalities of the crime and the weapons used in its commission are deodands, which, as in the case of contraband are subject to immediate forfeiture.

The rule of Gouled basically is that objects of evidentiary value only may not be seized by federal officers in the execution of a search warrant; and that when such objects are seized, they must be suppressed. The rule also applies to the suppression of similar items seized incidental to an arrest. The United States Supreme Court has never revised this original formulation. While the statement of the rule is clear, problems arose in its subsequent application. Gouled represented the "zenith" of the mere evidence rule. Cases which followed became enmeshed in exceptions to it, as a result of the rule's inherent "residual" nature, as noted in the preceding paragraph, i.e., anything which is

34 Id. at 309.
36 (Lat. Deo dandum, a thing to be given to God). In English law any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses and distributed in alms by the high almoner. Black's Law Dictionary 523 (4th ed., 1951).
neither contraband, nor instrumentality, nor fruit, nor weapon of a crime.\textsuperscript{38}

Impact of Gouled on American Law

A. Exceptions to the Mere Evidence Rule

1. Instrumentalities of a Crime\textsuperscript{39}

The reason most often cited by courts for seizing and admitting merely evidentiary material is that it is also the instrumentality of a crime. There is, as admitted in \textit{United States v. Brengle},\textsuperscript{40} difficulty in drawing the fine line of distinction as to whether personal papers and other articles belong to the former or latter category.

The period of Prohibition in American history provided the courts with many opportunities to test the issue of mere evidence v. instrumentality. Bootleg liquor dealers kept detailed records of their enterprises which, if admitted into evidence, often proved incriminating.\textsuperscript{41} \textit{United States v. Kirschenblatt}\textsuperscript{42} was a significant example promulgating the Gouled rule. The defendant was arrested for alleged "moonshining". His premises were searched, and his papers and books were seized. Judge Learned Hand ruled that the "sum of a man's documentary property" was as inviolate upon his arrest "as upon a search warrant", and that because a document may once have been concerned with a criminal operation, it was not "a seizable item per se".\textsuperscript{43} In \textit{Marron v. United States},\textsuperscript{44} the defendant tried to suppress ledgers and utility bills relating to an illegal liquor operation, which were seized under a search warrant, incidental to an arrest. The Supreme Court denied the motion, holding that these items were actually used to commit the offense in the presence of federal officers and thus were instrumentalities subject to seizure.\textsuperscript{45} \textit{Go-Bart Importing Co. v. United States}\textsuperscript{46} involved seizure of a liquor wholesaler's papers and records at the time of an invalid arrest. The Supreme Court sustained a motion to suppress, distinguishing the case from \textit{Marron}, on grounds that the search had been a general exploratory one, unreasonable \textit{ab initio}. The Go-Bart rationale was applied in \textit{United

\textsuperscript{38} Comment, The Mere Evidence Rule: Limitations on Seizure under the 4th Amendment, 54 Calif. L. R. 2099, 2106 (1966).

\textsuperscript{39} Categories 1 through 5 of this section are those used by Davis \textit{supra} n. 4 at 109-117.

\textsuperscript{40} 29 F. Supp. 190, 191 (W.D. Va. 1939) as cited by Davis, \textit{supra} n. 4 at 109-110.

\textsuperscript{41} Id. at 110.

\textsuperscript{42} 16 F. 2d 202 (2d Cir. 1926).

\textsuperscript{43} Id. at 204; see also Davis, \textit{supra} n. 4, at 110.

\textsuperscript{44} 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927).

\textsuperscript{45} Id. at 198-9; see also Davis, \textit{supra} n. 4, at 107, 108, 111.

\textsuperscript{46} 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); see also Davis, \textit{supra} n. 4 at 107, 111.
Lefkowitz and his co-defendant were also charged with a conspiracy to violate the Volstead Act, by operating a wholesale liquor business. Federal agents, acting pursuant to an arrest warrant, apprehended Lefkowitz in his office, which they then proceeded to search, seizing a large quantity of books, papers, and other items—among them business records, unmailed correspondence, completed order slips, and light bills. The Court labeled these mere evidence which "could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." 49

Zap v. United States50 involved the seizure of a cancelled check during a governmental audit of defendant's books. The Supreme Court held the check to be an instrumentality in scheming to defraud the government, and its seizure lawful. Abel v. United States51 declared the seizure of a bank book in an assumed name, false birth certificates and other personality, valid, as an incident to an Immigration Department administrative arrest, since these were "instrumentalities for the commission of espionage, admissible as an exception to the mere evidence rule." 52

Thus, as previously noted, while the courts used the instrumentality exception most frequently for approving seizures of merely evidentiary material, whether or not an item is applicable to the category, continues to be governed by the merits of each individual case.53

The United States Supreme Court has never applied the rule in a case which did not involve personal papers.

The same can generally be said of lower federal decisions, except for the period between 1958 and 1966, when the trend reversed itself. In Morrison v. United States54 police arrested the defendant in his home for committing a perverted act on a ten-year old boy who directed them to a bedroom where they found a handkerchief allegedly bearing tangible evidence of the offense. The court suppressed the handkerchief as mere evidentiary material "not the instrument or means by which the crime was committed." 55 In Williams v. United States,56 the observances of a

47 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); see also Davis, supra n. 4 at 107-109.
48 United States v. Lefkowitz, supra n. 47, at 458-60.
49 Id. at 464-5.
50 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946); see also Davis, supra n. 4 at 108.
52 See Davis, supra n. 4, at 109.
53 Id. at 113; see n. 43 therein for a list of cases holding both pro and con.
54 262 F. 2d 449 (D.C. Cir. 1958).
55 Id. at 450. But see State v. Chinn, 231 Or. 259, 373 P. 2d 392, 401 (1962), in which a camera, empty beer bottles, and a bedsheet seized pursuant to an arrest for statutory rape, but without a search warrant, were held to be "property used as the means of committing a felony."
56 263 F. 2d 487 (D.C. Cir. 1959).
searching officer were ruled inadmissible on the rationale that visual evidence is excluded under *Gouled*. In *United States v. Linsy*—another Volstead Act Violation—the United States District Court cited *Gouled* in suppressing keys which allegedly implicated the defendant with a convicted co-defendant. This lower court federal trend reversed itself radically in *Golliher v. United States*, which illustrates the present devitalized status of the *Gouled* rule. *Golliher* established the "relevant-evidence" rule. Police seized the defendant's clothing after arresting him for bank robbery. The court labeled the mere evidence rule a refuge for courts to hide behind instead of facing squarely the difficult problem of search and seizure evidence. The decisive issue was the seizure, the court reasoned, since the accused was already subject to a search; and the question was not whether or not he could be searched, but what could be taken. Presumably, under *Golliher*, any evidence, except private-personal documents, relevant to a crime are subjects of reasonable seizure and thus legally admissible.

2. Fruits of a Crime

While stolen goods can quite comprehensibly fall into this excepted category, it has on occasion been applied rather subtly. In *Matthews v. Correa*, pursuant to defendant's arrest for concealing certain assets from his trustee in bankruptcy, officers seized some address books and a business ledger. The court rejected a claim of mere evidence of crime and held that these were "fruits of [a] related crime of withholding from the trustee documents pertaining to the bankrupt's property and affairs."

3. Contraband

Placed in this category, in addition to the commonplace items, are narcotics, counterfeit money, gambling paraphernalia, and numbers' slips. In *United States v. McDaniel*, a towel involved in an unexplained manner in a murder was held reasonably seized as "contraband." Presumably Judge Holzhoff confused contraband and instrumentality.

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57 Criminal No. 63-CR-135 (E.D. Wis. 1964).
58 362 F. 2d 594 (8th Cir. 1966).
59 Id. at 600.
60 Id. at 601.
61 Id. at 601-2.
62 135 F. 2d 534 (2d Cir. 1943).
63 Id. at 535; see also Davis, *supra* n. 4 at 114.
64 Id.
66 Id. at 2; see also Davis, *supra*, n. 4 at 114-5.
4. Business Records

Books and records required by law to be kept represent another well-known exception to the mere evidence rule. These are held properly seizable on grounds that they are "quasi-public" and not within the meaning of the Fourth Amendment. 67

5. Items Seized from the Person

It is a generally accepted conclusion that any items seized from the person upon his arrest and appearing relevant to the alleged crime are admissible, although neither Gouled nor Boyd provides a basis for such a broad exception to the mere evidence rule. Usually such evidence is admitted under a label of instrumentality, contraband, or fruit of a crime. One writer has noted that the United States Supreme Court has never made an attempt to distinguish the difference between authority to search an accused incident to an arrest, which is reasonable, and authority to seize items of purely evidentiary value found during the search, which is not. 68

B. The States and the Mere Evidence Rule

The application of Gouled by state courts has been ably summarized:

State courts have in general paid little attention to the Gouled rule. Those which have acknowledged it have not created meaningful guidelines as to what distinguishes an instrumentality from mere evidence. 69

This lack of guidelines is found even in those states which followed the Gouled rules before Mapp. 70 The leading pre-Mapp cases in these states often discuss various bases for the rule and adopt it for a variety of reasons, but few of them concern themselves with the nature of the distinction. 71

Florida appears to be the only state which dealt directly with the Gouled rule before Mapp . . . 72

Most of the other state courts have either ignored the rule or seem to have mentioned it by accident . . . 73

67 Shapiro v. United States, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 908 (1966); People v. Thayer, 47 Calif. Rep. 780, 408 P. 2d 108 (1965), see also Davis, supra n. 4 at 115.
68 Id. at 115-6.
70 Id. at 616, n. 149 therein, i.e. Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming.
71 Id. at 616-7.
72 Id. at 617.
73 Id. at 617-8.
The United States Supreme Court has never decided whether or not the mere evidence rule applies to the states. Mapp v. Ohio\(^{74}\) held that all evidence obtained by seizures in violation of constitutional standards is inadmissible in a state court. Ker v. California\(^ {75}\) made the standard of reasonableness under the Fourth Amendment nationally uniform, but this reasonableness is a substantial determination to be made by the trial court "from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Amendment and in the opinions of this court in applying the Amendment."\(^ {76}\) Malloy v. Hogan\(^ {77}\) applied the Fifth Amendment to the states. These three cases put the Fourth, Fifth, and Fourteenth Amendments on an equal basis in regard to the reasonableness of searches and seizures.

Although there has been much discussion of the exclusionary rule since Mapp, there does not seem to have been much discussion of the Gouled rule.

Nevada . . . Michigan . . . Kansas, Georgia, Vermont, Nebraska, Maryland, and New York . . . have refused to follow the Gouled rule after Mapp.\(^ {78}\)

California has rejected the mere evidence rule by statute.\(^ {79}\)

There have been, however, several post-Mapp state cases which have adopted and applied the rule [in] . . . Virginia, Pennsylvania . . . Colorado . . . Oregon . . . and . . . New Jersey.\(^ {80}\)

Whether or not the states apply the mere evidence rule depends on whether they interpret it as having a constitutional basis or a rule-making basis. If the former, they must apply the rule because of the Fourteenth Amendment. If the latter, then the rule does not apply to state courts.\(^ {81}\)

Two fairly recent decisions, widely commented upon, show that the states seem to favor the second alternative. State v. Bisaccia\(^ {82}\) rejected the Gouled rule in part,\(^ {83}\) specifically, the primary-right theory enunciated therein. Pursuant to a valid search warrant, a pair of shoes "with a half moon heel" was seized. Probable cause for the warrant was several plaster casts of footprints in muddy soil at the scene of an armed robbery. The opinion distinguished between an individual's private

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\(^{74}\) 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

\(^{75}\) 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963).

\(^{76}\) Id. at 31-5.

\(^{77}\) 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

\(^{78}\) Supra, n. 69 at 618.

\(^{79}\) Calif. Penal Code §1524, subd. 4, p. 110.

\(^{80}\) Supra, n. 69 at 619–21.

\(^{81}\) Davis, supra n. 4 at 119.

\(^{82}\) 45 N.J. 504, 213 A. 2d 185 (1965).

\(^{83}\) It had been applied the year before in State v. Naturile, 83 N.J. Super. 563, 200 A. 2d 617 (1964).
papers to which it limited the mere evidence rule, and other personal property; and it permitted "tangible articles" to "be seized for their inculpatory value alone", if the search comports with the procedural requirements of that amendment. In its rationale the court attempted to strike a balance between the individual's right to privacy and the fair administration of criminal justice. In People v. Thayer, the defendant physician and his office assistant were convicted of submitting false and fraudulent medical care claims to the California Bureau of Public Assistance. Under a valid search warrant the doctor's medical records were seized. Clearly they fell within the "instrumentality" and "business records" exceptions to the Gouled rule. Chief Justice Traynor, in writing the opinion of the Supreme Court of California, declared the real issues to be the conflicting interests of individual privacy and law enforcement. As in Bisaccia, the latter controlled. The search and seizure of Thayer's records was deemed reasonable, because it was conducted pursuant to a valid search warrant specifically describing the items to be seized and because there was probable cause to justify its issuance. These requirements having been met, Justice Traynor found "it impossible to understand why the admissibility of seized items should depend upon whether they are merely evidentiary or evidentiary plus something else." Traynor discussed the United States Supreme Court's tendency not to treat the Gouled rule as a fundamental constitutional standard and the severe limitations imposed upon it, particularly by the instrumentality exception. California left no doubt that it deems the mere evidence rule unsanctionable in its present form.

C. Ohio and the Mere Evidence Rule

Up to the Mapp decision, no evidence was to be excluded in Ohio because the search or seizure was illegal. The court did not have to consider the collateral issue of how the evidence was obtained. Thus evidence that was "legally" obtained could not be excluded because it was merely evidentiary.

The situation in Ohio since Mapp was summarized in a law review comment which points out that until Mapp v. Ohio there were comparatively few Ohio cases involving search and seizure; that in many cases decided since then, the Ohio courts have been, for the most part, successful in applying the federal standards of probable cause and reasonableness; that because search and seizure warrants are governed in Ohio

84 Supra, n. 86 at 519.
86 Id. at 109.
87 Id. at 109-113.
88 Supra, n. 79.
89 15 Ohio Jur. 2d, Criminal Law § 368.
by statute, the arrest procedure does not require a judge or magistrate to decide probable cause, as is demanded by the Fourth Amendment. Hence, the Ohio procedure should be revised to conform to the constitutional standards. 90

The comment concluded that Ohio Lawyers should be careful to raise all issues concerning illegal searches by a pre-trial motion to suppress the evidence. The rules regarding standing to object and burden of proof to establish probable cause are not well defined in Ohio. The federal cases have been given considerable weight. In areas where there are no cases in Ohio, it is likely that the courts will look in the future to the federal law. 91

D. Devitalization of Gouled

Upholding the construction that the Gouled rule should be strictly limited to personal and private documents was Schmerber v. California. 92 Here the defendant was compelled to submit to a blood test to determine whether or not he had been driving while intoxicated. He alleged the blood test to be an unreasonable search and seizure, in violation of his right to privacy. In an opinion written by Justice Brennan, the United States Supreme Court held that the Fourth Amendment protection of personal privacy and dignity against unwarranted intrusions by the state did not imply that the human body is in all circumstances inviolate against such forays. 93 By analogy, if an intrusion into the body does not violate the right to privacy, there is no justification for condemning a valid seizure of any relevant non-documentary evidence to establish the commission of a particular crime. The Supreme Court held further that the blood test did not violate the Fifth Amendment which, it emphasized, protects an accused from being compelled to provide the state with evidence of a "testimonial" or "communicative" nature; and the extraction of blood did not constitute such an enforcement upon the accused; on the contrary, his testimonial capacities were nowise implicated, and his participation was irrelevant to the results of the test. 94 Thus, Schmerber allows the admission into evidence of any "real" or "physical" evidence, even if it be taken by force.

Consistent with this holding was Warden, Maryland Penitentiary v. Hayden, 95 which devitalized the rule further by also limiting non-seizable items to those which are testimonial or communicative in nature.

90 Comment, Search and Seizure in Ohio, 27 Ohio St. L. J. 523 (1966).
91 Id. at 523-4.
93 Id. at 770.
94 Id. at 765.
95 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).
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and thus clearly self-incriminating. Two cab drivers followed a man fleeing the scene of a robbery. Police alerted by them, were admitted into the suspect's home by Mrs. Hayden, who did not object to their search without a warrant. Hayden was in a bedroom pretending to be asleep. A cap was found under his mattress, and a jacket and trousers matching the cab driver's description, in a washing machine. Hayden exhausted his state proceedings and then sought habeas corpus relief in federal courts. A divided Fourth Circuit Court of Appeals finally held that the clothing had been improperly admitted into evidence. The United States Supreme Court granted certiorari. Justice Brennan also delivered this opinion, with reference to his earlier opinion in Schmerber:

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Schmerber v. California, 384 U.S. 757 . . . This case does not require that we consider whether these are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. (Italics ours.)

In view of the care with which Justice Brennan characterized the Hayden evidence as not being "testimonial" or "communicative" in nature, the implication appeared to be that such evidence is excludable under the Fifth Amendment and thus not lawfully seizable under the Fourth Amendment. Indeed, the Court so held a short time later, by implication, if not expressly, in Berger v. State of New York,97 which invalidated New York's wiretapping-eavesdrop statute; and, in Katz v. United States,98 which declared the F.B.I.'s activities in electronically intercepting, without a warrant, the defendant's telephone transmittals of wagering information, from a public phone booth, to be an "unreasonable search and seizure".

Conclusion

What is lacking in the area of search and seizure is a comprehensible and comprehensive re-evaluation, interpretation, and construction of the fundamental concept of liberty embodied in the Fourth Amendment. As this paper has attempted to show, the courts of the various jurisdictions of the United States have followed no consistent pattern in this area in arriving at their decisions and in formulating their rules. Small wonder that "the ordinary prudent man" is distrustful of our judicial process. As the courts continue to engage in games of legal fiction, the system

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96 Id. at 302-3.
97 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967).
loses effectiveness. Reason somehow must conform with law, in arriving at workable, just rules, resulting in a minimum of conflict.99

Legal scholars and writers themselves disagree as to whether or not the mere evidence rule is dead. Though the original rationale may have been grounded in a concept of property rights, within the basic context of the Fourth Amendment, an analysis of cases in which it has been brought into issue shows that in implementation its basic purpose is the protection of personal rights, as evidenced by the frequency with which courts rely upon the Fifth Amendment in applying the mere evidence rule. Since the Fifth Amendment’s protection against self-incrimination played a dominant role in the formulation of the rule, as a foregone conclusion, any re-evaluation and re-formulation of the rule would be bottomed upon it. To preclude further decades of mass confusion in our courts in interpreting and construing such a rule of search and seizure will necessitate an unequivocal holding by the United States Supreme Court that the new rule is constitutionally based and hereafter applicable as a rule of procedure in all federal and state fora without exception.

99 Davis, supra n. 4 at 125.