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Constitutional Law--Search and Seizure--"Mere Evidence" Rule Discarded and Held Inapplicable to Exclude Evidence Lawfully Seized (Warden v. Hayden, 387 U.S. 294 (1967))

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RECENT DECISION

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—"MERE EVIDENCE" RULE DISCARDED AND HELD INAPPLICABLE TO EXCLUDE EVIDENCE LAWFULLY SEIZED.—Moments after a robbery, the police conducted a warrantless search of the house the respondent was seen entering and seized articles of clothing which two witnesses said he had worn at the time of the crime. He was arrested when it became apparent that no other man was inside the house and was subsequently convicted of armed robbery in a Maryland court. By writ of habeas corpus, the respondent successfully contended that the search and seizure of the clothing was unreasonable and in violation of the fourth amendment. On certiorari, the Supreme Court of the United States reversed the decision of the Court of Appeals for the Fourth Circuit and *held* that the seizure of the clothing resulted from a lawful search and that such items might be introduced despite the fact that they were of evidentiary value only, thereby rejecting the longstanding "mere evidence" rule. *Warden v. Hayden*, 387 U.S. 294 (1967).

In an effort to implement the constitutional protections against unreasonable search and seizure, the Supreme Court of the United States developed the "mere evidence" rule, formally enunciated in the case of *Gouled v. United States*.[1] The defendant was charged with conspiring to defraud the United States and with using the mails to defraud.[2] On two separate occasions, certain papers were removed from the defendant's office under the authority of a search warrant, and were later introduced at the trial as evidence against him.[3] Reversing the conviction, the Supreme Court ruled that the seizure of the defendant's property, although predicated upon valid-

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[1] 255 U.S. 298 (1921). It has been argued that the formulation of the rule was unnecessary to the *Gouled* holding since the case involved a statute limiting the objects of the search and this statute had not been complied with. Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 TEXAS L. REV. 526, 531 (1967).

[2] 255 U.S. at 302-03.

[3] The papers procured by authority of the warrant consisted of an unexecuted contract, a written contract signed by Gouled and a bill from his attorney. In addition to the papers seized under the search warrants, one paper was seized without a warrant and without the knowledge of the defendant. Concerning this, the Court ruled that such a search, although executed by cunning rather than by force or coercion, nonetheless fell within the scope of the fourth amendment prohibition against unreasonable search and seizure. Furthermore, because Gouled was the unwilling source of the evidence, admission of it would contravene the fifth amendment's privilege against self-incrimination. *Id.* at 306-07.

ly issued search warrants, constituted an unreasonable search and seizure as prohibited by the fourth amendment, and introduction of that evidence against the defendant was held to violate the fifth amendment privilege against self-incrimination.[4] The Court reasoned that the great weight of common-law precedents precluded any attempt to employ search warrants as a means of gaining access to a man's house or office merely to secure evidence that might be used against him in a criminal proceeding.[5] Search warrants might 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.[6]

This primary or property right theory represents the controlling rationale in the development of the "mere evidence" rule and it is largely responsible for the appearance of so-called "exceptions" to the rule's proscription.[7] These exceptions include: (1) fruits of the crime, (2) instrumentalities of the crime, (3) contraband, and (4) weapons or any other means of escape.[8] Fruits of the crime and contraband could be seized because of a superior property interest enjoyed by someone other than the defendant;[9] weapons and instrumentalities might be seized under the primary interest of protecting the public welfare through the valid exercise of the police power.[10] Under the *Gouled* interpretation of the fourth

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[4] *Id.* at 310-11.

[5] *Id.* at 309, *citing* Boyd v. United States, 116 U.S. 616 (1886) and Weeks v. United States, 232 U.S. 383 (1914). The latter case applied the exclusionary rule to the federal courts without considering the applicability of the fifth amendment.

[6] 255 U.S. at 309 (emphasis added).

[7] *See* Boyd v. United States, 116 U.S. 616 (1886); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 133-34 (1937); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

[8] For cases involving these "exceptions," see Draper v. United States, 358 U.S. 307 (1959) (contraband); Marron v. United States, 275 U.S. 192 (1927) (instrumentalities); United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958) (fruits of the crime).

[9] Gouled v. United States, 255 U.S. 298, 309 (1921), *citing* Boyd v. United States, 116 U.S. 616, 623-24 (1886).

[10] Gouled v. United States, 255 U.S. 298, 309 (1921). Seizure of weapons and instrumentalities is supported by the common-law theory that items used in crime were forfeited to the state. The use of this theory allowed for seizure of weapons and instrumentalities, yet preserved the property rationale intact. *See* Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 475 (1961).

amendment, seizure of any item not falling within these categories was unreasonable per se without regard to the manner in which it was seized, *i.e.*, the nature and extent of the search.

The *Gouled* Court traced the historical premise of the property theory to *Entick v. Carrington*[11] where Lord Camden espoused the concept that the "great end, for which men entered into society, was to secure their property."[12] Acting under the authority of a general search warrant which enabled them to make arbitrary searches of private homes and papers for defamatory material, the King's messengers entered the plaintiff's dwelling house, broke open his desk and rummaged through his personal papers and effects. A successful cause of action for trespass was pursued by Entick, the court holding the warrants illegal for lack of particularity and probable cause.[13] The rationale employed by Lord Camden in curtailing the abuses of the general exploratory warrants was the same property theory with which the *Gouled* Court condemned a restricted search for specific evidence.

In *Gouled*, not only was seizure of evidentiary materials deemed unreasonable, but, because the defendant would be the unwilling source of such information, either actively or passively, introduction of such findings as evidence against him was seen as compelling him to incriminate himself in violation of the mandate of the fifth amendment.[14] The Court relied on *Boyd v. United States*[15] which recognized a delicate interplay between the fourth and fifth amendments. Like *Gouled*, the *Boyd* rationale employed the property theory and geared it to a consideration of unreasonable search and seizure. Yet the facts in *Boyd* present a rather unorthodox situation for the consideration of search and seizure questions.[16] The government sought forfeiture of goods unlawfully imported by the defendant. A subpoena duces tecum was issued compelling the defendant to produce his private books and papers. The Court held

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[11] 19 How. St. Tr. 1029 (K.B. 1765).

[12] *Id.* at 1066.

[13] "[I]f suspicion at large should be a ground of search, especially in the case of libels, whose house would be safe?" *Id.* at 1073-74; Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355, 365 (1966).

[14] 255 U.S. at 311.

[15] 116 U.S. 616 (1886). "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." *Id.* at 635.

[16] Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355, 362 (1966); *see generally* 8 J. WIGMORE, EVIDENCE §§ 2263, 2264 (J. McNaughton rev. ed. 1961).

that this compulsion to produce private books constituted an unreasonable search and seizure, despite the absence of the usual aggravating circumstances of forceful entry and exploratory search.[17] The *Boyd* Court applied the fifth amendment privilege as its sole criterion as to what would be considered unreasonable under the fourth amendment. The concurring opinion argued, however, that the facts presented no issue of search and seizure, but rather that the case should have been decided solely on fifth amendment grounds.[18]

The application of the rule in subsequent cases created some confusion. The "instrumentalities" exception was particularly vulnerable to conflicting interpretations since the Supreme Court had failed to enunciate any standards to determine how closely connected with the crime evidence must be before it could be termed an "instrumentality." [19] In *Marron v. United States*,[20] prohibition agents secured a warrant to search the defendant's premises for liquors and articles for their manufacture. Upon discovering these materials, the agents arrested the defendant for violation of the Volstead Act. Contemporaneous with the arrest, the officers seized a ledger and some utility bills. Affording the instrumentalities exception a broad construction, the Court declared the ledger to be part of the outfit or equipment used to commit the offense and the bills were "convenient," if not necessary, for the keeping of the accounts which were closely related to the illegal "business."[21] Five years later, however, in *United States v. Lefkowitz*,[22] the Court favored a considerably narrower construction. On facts similar to those of *Marron*, the Court chose to treat books, papers, business records and utility bills as "mere evidence" which could not be seized *with or without a warrant*.[23]

The *Lefkowitz* Court attempted to distinguish *Marron*, claiming the search in *Lefkowitz* to be more general or exploratory, while no real search was apparent in *Marron* because the items seized were in plain view.[24] But, the distinction sought to be drawn by the *Lefkowitz* Court in terms of the type of search involved was irrelevant to the application of the "mere evidence"

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[17] 116 U.S. at 622.

[18] 116 U.S. at 638; *but see* Silverthorne v. United States, 251 U.S. 385 (1920) which holds that the exclusionary rule is based solely on the fourth amendment. The defendant's corporate status precluded any attempt to rely on the fifth amendment privilege to exclude evidence.

[19] Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 609-14 (1966).

[20] 275 U.S. 192 (1927).

[21] *Id.* at 199.

[22] 285 U.S. 452 (1932).

[23] *Id.* at 464-65.

[24] 285 U.S. at 465.

rule since, in both *Lefkowitz* and *Marron,* the same *kind* of property was seized. The two cases, therefore, cannot be reconciled.[25]

The failure of the Supreme Court to establish workable standards created even more confusion in the lower courts. For example, in *Foley v. United States,*[26] the court was confronted with the same factual situation present in the *Marron* and *Lefkowitz* cases. Emphasizing the strict adherence to the warrant, the court followed the *Marron* approach and held the items seized under the warrant not to be mere evidence.[27] The instrumentality exception received an even broader application in *United States v. Boyette,*[28] where the court held that a prostitute's receipts, on which she recorded amounts received, were instrumentalities of a Mann Act violation. In *United States v. Guido,*[29] shoes worn in a bank robbery were held to be instrumentalities of the crime.[30] Here the court subtly set forth the only standard applied by the federal courts since the *Gouled* mandate first appeared. "'The line between fruit of the crime itself and mere evidence thereof may be narrow and perhaps turn more on the good faith of the search than the actual distinction between fruits and evidence.' "[31] Despite all the inconsistencies apparent from these federal court decisions, this pattern remains intact. A close observation of the cases indicates that wherever the item seized was considered mere evidence and thereby excluded, the search preceding that seizure was general and exploratory in nature. However, when the evidence seized was admitted under one of the exceptions, the search was more specific and limited.

In *United States v. Poller,*[32] Judge Learned Hand provided some needed defense for the rule: "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. . . . [L]imitations upon the fruit to be gathered tend to limit the quest itself. . . ."[33] Critics of the rule, however, argued that the limitation on the fruit does not in practice protect privacy.[34] During a lawful search for permissible items, the police would naturally include the

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[25] *See* N. LASSON, *supra* note 7, at 135-36; Comment, 45 N.C.L. REV. 512, 514 (1967).

[26] 64 F.2d 1 (5th Cir. 1933).

[27] *Id.* at 4.

[28] 299 F.2d 92 (4th Cir. 1962).

[29] 251 F.2d 1 (7th Cir. 1958).

[30] "Surely, the latter [shoes] would facilitate a robber's getting away and would not attract as much public attention as a robber fleeing barefoot." *Id.* at 3-4.

[31] *Id.* at 4.

[32] 43 F.2d 911 (2d Cir. 1930).

[33] *Id.* at 914.

[34] Kaplan, *supra* note 10, at 477.

suspect's personal papers and effects, and, as one commentator suggests, if the police find the evidence under a lawful search, they should be able to use it.[35]

Originally, the *Gouled* rule presented no particular difficulty to the state courts since many states featured statutes expressly allowing for seizure of "mere evidence."[36] It was not until *Mapp v. Ohio*[37] and *Malloy v. Hogan*[38] made the fourth and fifth amendments applicable to the states that the rule began to affect state court decisions. The issue quickly developed: Did the "mere evidence" rule fall under the power of the Supreme Court to supervise federal courts or did it establish a constitutional standard to be applied by both state and federal courts? Those states adopting the constitutional approach were faced with the same problem which the federal courts experienced, that of applying the rule and its exceptions. With the problem of applying the rule came the temptation to distort the exceptions to meet the facts of a particular case.[39] Those states refusing to recognize the rule as a constitutional standard continued to apply their own state statutes.[40]

Faced with these confusing inconsistencies, the Court in the instant case rejected the "mere evidence" rule as a standard of reasonableness under the fourth amendment.[41] Before considering the validity of the rule itself, the Court first turned its attention to the question of the legality of the search. The police arrived at the suspect's house just five minutes after he had been seen entering it and, without procuring a warrant, commenced their search. The Court reasoned that "the exigencies of the situation made that course imperative."[42] The police had acted reasonably by not delaying their search for the suspected felon whose description they had, and who could reasonably be expected to have in his possession weapons which could be used against them to effect an escape.[43]

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[35] *See* Comment, *supra* note 25, at 516. *Compare* United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951), where an address book was held to be mere evidence, *with* Matthews v. Correa, 135 F.2d 534 (2d Cir. 1943), where a similar address book was held to be an instrumentality.

[36] 16 DE PAUL L. REV. 215, 219 & n.29 (1966).

[37] 367 U.S. 643 (1961).

[38] 378 U.S. 1 (1964).

[39] In State v. Raymond, 142 N.W.2d 444 (Iowa 1966), the court indicated that it could if it chose to apply the rule, consider the clothing as an instrumentality, but the court believed that "such efforts to stay within the rule have correctly been termed frivolous. . . ." *Id.* at 450.

[40] People v. Thayer, 63 Cal. 2d 625, 408 P.2d 108, 4 Cal. Rptr. 780 (1965), *cert. denied*, 384 U.S. 908 (1966); State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965); People v. Martin, 49 Misc. 2d 268, 267 N.Y.S.2d 404 (Sup. Ct. 1966).

[41] Warden v. Hayden, 387 U.S. 294 (1967).

[42] *Id.* at 298, *citing* McDonald v. United States, 335 U.S. 451, 456 (1948).

[43] 387 U.S. at 298-99.

"The permissible scope of search must . . . be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."[44]

Establishing a valid search, the Court next turned its attention to the question of the admissibility of the evidence seized, *i.e.*, the "mere evidence" rule. In rejecting the rule, the Court concluded that the distinction between instrumentalities, fruits, and mere evidence has no foundation in the principles of the fourth amendment. The purpose of the amendment is to secure the privacy of individuals, to protect them from general or indiscriminate searches by the government.

> Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact.[45]

The requirement of specificity would, of course, deal only with warranted searches. But the requirement of probable cause must be fulfilled if the search is to be lawful. Although probable cause is automatically proved when instrumentalities are secured, with mere evidence probable cause that the item sought will aid in a particular apprehension or conviction must be shown.[46]

The Court rejected the property rationale that gave birth to the rule. The requirement that the government assert a superior proprietary interest in items it seizes "obscur[es] the reality that government has an interest in solving crime."[47] In answer to the fifth amendment argument expounded by the respondent, the Court merely concluded that the defendant's clothing seized in this case was not "testimonial" or "communicative" in nature and introduction of that evidence did not compel the respondent to become a witness against himself.[48]

In a separate opinion, Mr. Justice Fortas concurred with the majority's conclusion, but warned against a totally unnecessary repudiation of the "mere evidence" rule. Instead, he chose expansion of the exceptions to the rule and concluded that the clothing seized should be introduced as being within the spirit of the "hot pursuit" exception to the warrant requirement of the fourth amendment "because the clothing is pertinent to identification of the person hotly pursued as being, in fact, the person whose pursuit was justified by connection with the crime."[49]

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[44] *Id.* at 299.
[45] *Id.* at 301-02.
[46] *Id.* at 307.
[47] *Id.* at 306.
[48] *Id.* at 302-03.
[49] *Id.* at 312 (concurring opinion).

In a dissenting opinion, Mr. Justice Douglas argued for absolute retention of the "mere evidence" rule as being basic to the purpose of the fourth amendment. Unlike the majority, he applied the principles of the fifth amendment to implement his argument for retention of the rule. Citing the *Gouled* decision, he could see no distinction between compelling one to produce evidence against himself and obtaining the same evidence by means of an illegal search and seizure.[50] He reasoned that in both instances the accused would be the unwilling source of the evidence and that the evidence is by its very nature testimonial since it is sought to aid in the conviction and will necessarily be used at trial to that end. Seizure of any mere evidence, or, more precisely, its admission, violates an accused's privilege against self-incrimination.

With the rejection of the mere evidence rule and the substitution of the traditional guidelines of reasonableness and probable cause as search and seizure criteria, the fifth amendment will operate as the sole basis for excluding evidence otherwise legally obtained. Accordingly, the ultimate significance of the *Hayden* decision will be determined by the extent to which the amendment's privilege is applied to exclude otherwise admissable evidence.

Although the majority in the instant case detected no fifth amendment problem resulting from the seizure of the suspect's clothing, their reluctance to consider "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure"[51] presents the significant question posed by the decision.

To answer the question of what items will be granted fifth amendment immunity, it is necessary to examine the theories by which this privilege is extended to protect the various types of evidence seized. *Schmerber v. California*[52] offers a relatively recent assessment of the Court's thinking on the application of the fifth amendment privilege. The Court held that the privilege protects the accused from being compelled to testify against himself, or otherwise provide the state with evidence of a "testimonial" or "communicative" nature and that the involuntary withdrawal of blood did not come within the scope of that description.[53]

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[50] *Id.* at 319-20.

[51] *Id.* at 303.

[52] 384 U.S. 757 (1966).

[53] *Id.* at 761. A popular theory construes "testimonial" evidence as that extracted "from the person's own lips." 8 J. WIGMORE, EVIDENCE § 2263 (J. McNaughton rev. ed. 1961), adopted by California in People v. Trujillo, 32 Cal. 2d 105, 194 P.2d 681 (1948). Obviously, if this theory were adopted as the controlling rule for the application of the fifth amendment privilege, the question of the application of the fifth amendment to seized evidence would be resolved.

One conclusion that must immediately be drawn from *Schmerber* is that the element of compulsion is not the sole criterion determining fifth amendment applicability. Despite the obviously compulsive nature of the extraction, performed over the defendant's objection, the Court declined to apply the fifth amendment privilege to exclude the evidence. Attempting an efficient definition of "testimonial" or "communicative" evidence, the Court distinguished between evidence procured when the suspect or his body is the source, and evidence based on communications and responses of the suspect.[54] Accordingly, although the defendant was compelled to submit to the blood test in *Schmerber*, this compulsion in no way affected or implicated his communicative or testimonial faculties. Apart from his role as donor, his participation was irrelevant to the results of the test which were based on chemical analysis alone.[55]

By applying this standard devised by the *Schmerber* Court to various other forms of evidence, one is able to predict the extent to which the fifth amendment privilege will exclude evidence otherwise lawfully seized. Immediately, those items which constituted the exceptions to the ill-fated mere evidence rule can be excluded from the privilege. Weapons, stolen property, contraband, and most instrumentalities in no way involve the communicative faculties and do not reveal the "contents of the mind" of the suspect. But, certain papers, documents and records which presented a problem under the "mere evidence" rule will continue to be troublesome under a fifth amendment standard. Such papers, records, and documents are simply physical representations of thoughts and communications and it would seem that the *Schmerber* rationale was geared specifically so as to include such papers within the protection of the fifth amendment.

The next question must be the propriety of affording these papers blanket coverage. One approach would answer in the affirmative. "Writing is essentially speech; both are the intellectual product of man. For purposes of self-incrimination, it matters little whether the idea is expressed orally or through the medium of paper. The essential element is the turning a man's thought into the vehicle of self-accusation."[56] This broad protection fails to consider the purpose of the fourth and fifth amendments, *i.e.*, to protect individual liberty. It does not analyze the nature of the

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[54] 384 U.S. at 764. In Holt v. United States, 218 U.S. 245 (1910), Mr. Justice Holmes, speaking for the Court, said: "[T]he prohibition of compelling a man in the criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 218 U.S. at 252-53.

[55] 384 U.S. at 765.

[56] 41 NOTRE DAME LAW. 1017, 1027 (1966).

paper, its importance, its purpose, whose ideas it represents and its availability to others.[57]

A more sophisticated approach contemplates the above factors and distinguishes between private papers and quasi-public documents or required records.[58] The public character of these latter papers exhibits an impersonal quality which excludes them from the protection of the fifth amendment. This public character may develop because of the availability of papers and records to a number of people or because they are required by law and accordingly are not held in a personal capacity.[59]

It is at this precise point that the practical impact of the *Hayden* decision reaches its limit. The only limitation leveled on a valid search and seizure by the fifth amendment will be in the area of private papers. It is submitted that if the Court continues to emphasize the true purpose of the fourth amendment, as they did in rejecting the *Gouled* rule, these distinctions will rightfully survive.

The decision of the Court in the instant case is indicative of the considerable controversy and debate evident throughout the entire area of criminal procedure in recent years. At the root of this controversy lies the traditional balance sought to be struck between individual rights and effective law enforcement. "[T]he trend of decisions strikingly has been towards strengthening the rights of accused persons and limiting the powers of law enforcement. It is a trend which has accelerated rapidly at a time when the nation is deeply concerned with its apparent inability to deal successfully with the problem of crime."[60]

The decision in *Miranda v. Arizona*[61] represents unparalleled concern by our highest Court for the individual rights of the accused. Indeed, it has been contended that, when given practical application, it will deprive law enforcement officials of a vital form of evidence.[62] The Court's recent decision in *Berger v. New York*[63] is another instance in which the balance was struck in favor of individual rights. In that case, a New York statute authorizing ex parte eavesdropping by law enforcement officials was held to be

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[57] Comment, *The Mere Evidence Rule: Doctrine or Dogma?*, 45 TEXAS L. REV. 526, 556 (1967).

[58] Shapiro v. United States, 335 U.S. 1 (1957); Meltzer, *Required Records, the McCarren Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951).

[59] *Supra* note 57, at 554-56.

[60] THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 304 (1967).

[61] 384 U.S. 436 (1966).

[62] *Supra* note 60, at 306.

[63] 388 U.S. 41 (1967).

unconstitutional because it failed to interpose sufficient judicial restraints between the police and the accused, resulting in a trespassory intrusion into a constitutionally protected area in violation of the defendant's fourth amendment rights.

Some recent developments, however, seem to indicate a new trend in Court rulings favoring the efforts of enforcement officials. Decided earlier this year, *McCray v. Illinois*[64] seems to support this theory. Here the Court upheld a most vital concept in effective law enforcement, the informer's privilege, by holding that, in a pretrial proceeding examining only the presence of probable cause for arrest or search, the informer's identity need not be disclosed, assuming the judge is convinced the information was received in good faith and from a reliable informant. The decision of the Court in the instant case to extend search and seizure to any evidentiary object which does not violate the fifth amendment further indicates a change of direction by the Court.

Yet, if this change of direction or new trend does exist, it is submitted that it is not without method or rationale.

By comparison to such cases as *Miranda* and *Berger,* the rationale behind these new-trend cases can be identified. In the instant case, for example, once the requirements of a lawful search are satisfied, absent a usually weak fifth amendment argument, the individual's person is not affected other than by the fact that he is present. In *McCray,* neither the individual defendant nor any object connected with him was determinative of the issue involved in the proceeding. And certainly, the basic rationale in *Schmerber* centered on the fact that apart from his role as donor, the suspect's presence was irrelevant to the results of the test. By comparison, the accused in *Miranda* were exposed to the pressures of the interrogation room where their personal involvement had a direct bearing on the determination of their guilt or innocence. The eavesdropping statute struck down in *Berger* depended for its effectiveness on the use of the defendant's own words, electronically obtained without the defendant's knowledge. To distinguish between these cases is to present the basic factor that could very well control the Court's decisions in this area—the degree of the defendant's *personal* involvement. The greater the involvement, the finer the judicial filter and the greater the protection.

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[64] 386 U.S. 300 (1967).