amount of competent evidence which bears on the preliminary question. Thereafter a short supplemental voir dire hearing might be sufficient to insure that the exclusionary rules were being applied in the light of the pertinent facts. Such a solution would, of course, require trial courts to be alert both to the existence of a coincidence between preliminary fact and ultimate issue, and the underlying question posed by such a coincidence. The cases unfortunately suggest that the problem is often ignored, and sometimes misunderstood, by the courts.

LIMITATIONS ON SEIZURE OF "EVIDENTIARY" OBJECTS

A RULE IN SEARCH OF A REASON

"Significant but confusing" appropriately describes the rule first enunciated in 1921 in *Gouled v. United States*[1] that objects of "evidentiary value only" can never be seized even though an otherwise valid search warrant has been issued for the objects and a properly conducted search has taken place.[2] In the *Gouled* case some bills for legal services, an executed contract and an unexecuted contract were seized under a valid search warrant by federal agents while investigating alleged use of the mails to defraud the United States. The Supreme Court held, on the evidence presented, that these objects were of "evidential value"[3] only and accordingly immune from seizure; their seizure violated the Fourth Amendment and the use of them in evidence violated the Fifth Amendment.[4]

I

For several reasons the *Gouled* rule is significant. First, the rule, originating in the Supreme Court, has retained its vitality by frequent application in the lower federal courts.[5] Even a few state courts have utilized the rule, although

[1] 255 U.S. 298 (1921).

[2] Of course, it is possible to conduct a valid search incident to arrest without a search warrant. The cases indicate that the scope of seizure incident to arrest may vary somewhat from the scope under a search warrant. See, e.g., Sayers v. United States, 2 F. 2d 146 (C.A. 9th, 1924).

[3] Gouled v. United States, 255 U.S. 298, 310 (1921). [4] Ibid.

[5] Cases in which the court suppressed the evidence: United States v. Lerner, 100 F. Supp. 765 (N.D. Cal., 1951) (Gouled cited); Freeman v. United States, 160 F. 2d 72 (C.A. 9th, 1947) (Gouled not cited); United States v. Chodak, 68 F. Supp. 455 (D. Md., 1946) (Gouled not cited); In re Ginsburg, 147 F. 2d 749 (C.A. 2d, 1945) (Gouled cited); United States v. Richmond, 57 F. Supp. 903 (S.D. W.Va., 1944) (Gouled cited); Takahashi v. United States, 143 F. 2d 118 (C.A. 9th, 1944) (Gouled cited); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y., 1943) (Gouled not cited); United States v. Thomson, 113 F. 2d 643 (C.A. 7th, 1940) (Gouled cited); United States v. Genello, 10 F. Supp. 751 (M.D. Pa., 1935) (Gouled cited); Bushouse v. United States, 67 F. 2d 843 (C.A. 6th, 1933) (Gouled cited); United States v. Poller, 43 F. 2d 911 (C.A. 2d, 1930) (Gouled not cited); United States v. Kirschenblatt, 16 F. 2d 202 (C.A. 2d, 1926) (Gouled cited); United States v. Snow, 9 F. 2d 978 (D. Mass., 1925) (in setting the case for further hearing, court distinguished between evidentiary and nonevidentiary materials and expressed view that evidentiary materials cannot be seized; Gouled cited); In re No. 191 Front Street, 5 F. 2d 282 (C.A. 2d, 1924) (Gouled cited);

by far the greater majority of states are silent on the question.[6] Second, the federal doctrine that evidence taken in violation of the Fourth and Fifth Amendments must be suppressed requires the exclusion of this "evidentiary only" material.[7] Such exclusion may mean the difference between the successful prosecution of a defendant and the complete collapse of the prosecution's case. The exclusion of the bills and contracts in the *Gouled* case, for example, caused the prosecution's case against Gouled to fail. Third, the rule purports to provide some guide to government agents as to what can and cannot be seized. Fourth, there is a bare possibility that the *Gouled* rule is essential to a scheme of "ordered liberty," thus making it a part of the due process clause of the Fourteenth Amendment and binding upon all the states. The Supreme Court has not yet tested this proposition, although it held in *Wolf v. Colorado*[8] that the federal exclusionary rule is not essential to due process.

There is uncertainty, however, both as to what objects are "evidentiary only" and as to the underlying rationale for the rule itself. An address book was termed a "fruit" of a crime in *Matthews v. Correa*[9] whereas in *United States v. Lerner*[10] the court classified a similar book as being "merely evidentiary." In both cases the search was incident to arrest. The defendant in the *Lerner* case was charged with harboring a fugitive while the defendant in the *Matthews* case

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Honeycutt v. United States, 277 Fed. 939 (C.A. 4th, 1921) (Gouled cited). Cases in which the court admitted the evidence: United States v. Best, 76 F. Supp. 857 (D. Mass., 1948) (Gouled cited); United States v. Lindenfield, 142 F. 2d 829 (C.A. 2d, 1944) (Gouled cited); Matthews v. Correa, 135 F. 2d 534 (C.A. 2d, 1943) (Gouled not cited); United States v. Bell, 48 F. Supp. 986 (S.D. Cal., 1943) (Gouled cited); Landau v. United States Att'y for So. Dist., 82 F. 2d 285 (C.A. 2d, 1926) (Gouled cited); Foley v. United States, 64 F. 2d 1 (C.A. 5th, 1933) (Gouled cited); Sayers v. United States, 2 F. 2d 146 (C.A. 9th, 1924) (Gouled cited).

Although most of these cases differed somewhat from Gouled in their fact situations, the Gouled rule has been used to distinguish between objects that can and cannot be seized. Several of the cases cited involved searches incident to arrest and in some both the seizure and the manner of search were unreasonable. See, e.g., United States v. Lerner, 100 F. Supp. 765 (N.D. Cal., 1951), where bills, statements, photographs, a telephone list and several additional objects were taken. Not only were the objects "merely evidentiary" but the search was exploratory. Although a case precisely like Gouled has not been before the Supreme Court since the Gouled case, the Gouled rule has influenced the Supreme Court in their decisions as to the limits to seizure. See Marron v. United States, 275 U.S. 192 (1927); United States v. Lefkowitz, 285 U.S. 452 (1932); Zap v. United States, 328 U.S. 624 (1946).

[6] State v. Willard, 54 So. 2d 179 (Fla. Sup. Ct., 1951). Here a search warrant authorized a county officer to seize private books and records "for use as evidence before the . . . Grand Jury and in any prosecutions following." The defendant's books were seized and an indictment returned against him. The court held the seizure was objectionable on grounds of self-incrimination. See also statement in Church v. State, 151 Fla. 24, 9 So. 2d 164 (1942), favorable to the Gouled rule; State v. George, 32 Wyo. 223, 231 P. 683 (1924).

[7] See Weeks v. United States, 232 U.S. 383 (1913); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Under the Silverthorne doctrine, if it is objectionable to obtain the objects by warrant, the government is further prohibited from using these objects to obtain other incriminating evidence against the defendant.

[8] 338 U.S. 25 (1949).

[9] 135 F. 2d 534 (C.A. 2d, 1943).

[10] 100 F. Supp. 765 (N.D. Cal., 1951).

was charged with concealing money, merchandise and other property from her trustee in bankruptcy. The *Matthews* court, in its explanation of the character of the address book, made a statement that clarifies little: "The line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up."[11] An exemplification of further confusion attending the application of the rule is *Zap v. United States*.[12] Here a cancelled check that had been used to defraud the government was seized during an inspection of the defendant's books by federal agents. According to the majority opinion, the check was the means by which the crime was committed and therefore subject to seizure.[13] The opinion of the dissenting judges indicates their belief that the check was merely evidentiary,[14] and thus, under the authority of the *Gouled* case, immune from seizure. But, the dissenting opinion seems to agree with the majority that a valid warrant could have been issued for the cancelled check, a statement wholly inconsistent with the *Gouled* rule.[15]

The difficulty of drawing a consistent line between those objects that are "evidentiary only" and those that may be seized is further indicated by a comparison of *Marron v. United States*,[16] *Gouled v. United States*[17] and *United States v. Lefkowitz*.[18] In the *Marron* case, government agents discovered the defendant in the act of soliciting illegal liquor business. An arrest followed. Under a warrant authorizing a search for "intoxicating liquors and articles for their manufacture," ledgers and bills were seized by the arresting officers. The court held that the ledgers were "part of the outfit . . . actually used to commit the offense" and the bills "were so closely related to the business [that they could be

[11] 135 F. 2d 534, 537 (C.A. 2d, 1943). In the Matthews case, the court held that the search was not too intense, even though a thorough search of drawers and other parts of the house was conducted. It is interesting to conjecture that the size of the objects searched for may have importance in deciding whether an intensive search is necessary. For example, an intensive search may be essential to discover small objects like money in the Matthews case while a similar search for a still in open view as in Trupiano v. United States, 334 U.S. 699 (1948) may be objectionable. For additional analysis of this point see Ramsey, Acquisition of Evidence By Search and Seizure, 47 Mich. L. Rev. 1137, 1153 (1947). The officers in the Matthews case searched for money and merchandise and were allowed to seize an address book and an account book. The Supreme Court has developed a number of categories of seizable objects as distinguished from evidentiary materials. These categories include instruments of a crime, fruits of a crime, weapons used to commit a crime, contraband and stolen goods. See Harris v. United States, 331 U.S. 145 (1946).

[12] 328 U.S. 624 (1946).

[13] Ibid., at 629 n. 7.

[14] Ibid., at 632–33. Frankfurter states, "But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of a different color."

[15] Ibid. See Reynard, Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?, 25 Indiana L.J. 259, 283 (1950), where the author takes the position that the Zap case should have followed Gouled v. United States.

[16] 275 U.S. 192 (1927).

[17] 255 U.S. 298 (1921). [18] 285 U.S. 452 (1932).

considered] as used to carry it on."[19] Any difference between the bills for legal services seized in the *Gouled* case and the bills seized in *Marron* is slight. A reasonable conclusion to draw is that the two cases are inconsistent insofar as the limitations upon the objects seized are concerned.[20] In *United States v. Lefkowitz*, federal agents conducted a search incident to an arrest for conspiracy to sell and possess intoxicating liquors in violation of the Prohibition Act. A number of papers, books, glasses, liquor and other articles were picked up by the searching officers. The Court described the search as "exploratory" and called the objects "unoffending" and immune from seizure. Some of these objects do not seem to differ to any significant extent from the bills seized in the *Marron* case.

Thus the *Gouled* rule as interpreted by the courts leaves no hard and fast test upon which federal agents can rely.

II

What rationale, if any, have the courts employed to determine the limits to seizure, i.e., the reason for the *Gouled* rule? In most instances, the courts have accepted the *Gouled* rule upon faith or have neglected to make explicit the reasons for applying the rule. The *Gouled* court, itself, did not elaborate on the reasons for creating such a distinction. At first glance, it seems surprising that, in cases where there has been a lawfully conducted search and the evidence

[19] Marron v. United States, 275 U.S. 192, 199 (1927).

[20] Lasson points out the inconsistency between the Gouled, Lefkowitz and Marron cases. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 135–36 (1937). Many cases can be cited demonstrating the fuzzy line between evidentiary and other objects. Landau v. United States Att'y for So. Dist., 82 F. 2d 285 (C.A. 2d, 1936), involved a memorandum containing a list of watches the defendant was planning to smuggle in from Switzerland. The court held the memorandum to be not merely evidentiary but an instrument of the crime. The court declared, "If papers can ever be an instrumentality of crime, when not constituting the essence of the crime itself, they are such here." In Bushouse v. United States, 67 F. 2d 843 (C.A. 6th, 1933) notebooks, receipts, correspondence, records and other items were seized under a warrant for "liquors, materials and ingredients designed and intended for use in the manufacture of intoxicating liquor, and books and memoranda disclosing sales of and miscellaneous dealings in such liquors." The court held that the books, etc. were seized merely as evidence of the defendant's complicity in a violation of the Prohibition Act. A case decided a little earlier held under practically similar circumstances that such books, records and ledgers were the things actually used to commit the crime of conspiracy to violate the Prohibition Act. Foley v. United States, 64 F. 2d 1 (C.A. 5th, 1933). United States v. Poller, 43 F. 2d 911 (C.A. 2d, 1930) is another example of the court's classification of certain books containing entries of transactions as evidentiary in a case involving prohibition violations. For additional authority as to the uncertainty regarding what constitutes evidentiary materials, consult In re Ginsburg, 147 F. 2d 749 (C.A. 2d, 1945) (securities and cash seized where charge was accepting a bribe; held evidentiary); Bozel v. Hudspeth, 126 F. 2d 585 (C.A. 10th, 1942) (papers, circulars, advertising matter seized incident to arrest where charge was mail fraud; held fruits); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D. N.Y., 1943) (books, papers and records seized where charge was making defective hand grenades; held evidentiary); Sayers v. United States, 2 F. 2d 146 (C.A. 9th, 1924) (liquor, meat bill, light bill, record of savings and of beer purchases seized in search incident to arrest on charge of prohibition violation; seizure held reasonable).

secured is relevant to the crime charged, the courts have applied an additional limitation as to objects that can and cannot be seized.[21]

It is arguable that the invalidation of a seizure of evidentiary objects turns on the stake or "title" the possessor has in the objects. The operation of this "title" notion is more clearly evident when the courts decide that other categories of objects can be seized. Stolen property has long been recognized as subject to seizure.[22] In an early case, the seizure of stolen property was justified on the ground that the thief has no property rights in the goods.[23] Lord Camden declared in *Entick v. Carrington*,[24] the most famous English case of seizure: "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." As for contraband[25] and public papers,[26] both of which the courts agree can be seized, title to neither is in the possessor. It should be noted here that the "stake" the individual must have in the object before he can protest the seizure is somewhat greater than is required to enable him to bring an action of trespass to chattels, in which case mere possession may be sufficient.

The title rationale, however, is insufficient to explain the seizure of weapons used to commit a crime[27] and of required records. Not only does the individual have possession of the weapons, but title as well, which according to the "title" rationale should permit him to protest the seizure. Similarly, while required

[21] There is no express language in the Fourth Amendment to support such a limitation. It can be argued, however, that some distinction between objects that can and cannot be seized was intended by the drafters since they included the phrase "unreasonable searches *and seizures*" in the Amendment. (Emphasis added.) It is doubtful that a conclusive decision as to the validity of the limitation can be made on the basis of an interpretation of the language of the Amendment. In any event, it is significant that none of the cases have attempted to justify the Gouled rule on this ground.

[22] Rule 41(b) Fed. Rules Crim. Proc., 18 U.S.C.A. (1951), authorized the seizure of stolen property. In the historical development of the Fourth Amendment, Coke in England maintained that even stolen property could not be seized. Coke, Fourth Institute 176 (1797). But in Entick v. Carrington, 19 Howell's State Trials 1029 (1765), the court mentioned that by common practice stolen property had become subject to seizure. See also, United States v. Boyd, 116 U.S. 616, 623 (1886), and Harris v. United States, 331 U.S. 145, 154 (1947), and the cases cited, at 154 n. 7 for approval of this formulation.

[23] Statement to this effect can be found in Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1765).

[24] Ibid.

[25] For a complete list of federal statutes authorizing a seizure of contraband consult the Appendix to Davis v. United States, 328 U.S. 582, 618 (1946). A few examples will serve to illustrate what contraband can be seized. Trupiano v. United States, 334 U.S. 699 (1948) (still); United States v. Hotchkiss, 60 F. Supp. 405 (D.C. Md., 1945) (still); Symons v. United States, 178 F. 2d 615 (C.A. 9th, 1949) (dope); McGuire v. United States, 273 U.S. 95 (1927) (liquor).

[26] The Supreme Court upheld the seizure of ration coupons in Davis v. United States, 328 U.S. 582, 588 (1946), and of draft classification cards in Harris v. United States, 331 U.S. 145, 154 (1946), on the ground that these items were "government property" subject to inspection and recall at any time.

[27] Rule 41(b) Fed. Rules Crim. Proc., 18 U.S.C.A. (1951), authorizes the seizure of weapons used to commit a crime.

records can be seized,[28] title nevertheless remains in the defendant. Furthermore, there are no convincing arguments in favor of treating the "title" rationale with such high regard. Making such a notion decisive where the entrance upon the premises is already authorized under the warrant is a somewhat unexpected bit of caution.[29] In addition, this doctrine would supply no reliable guide to searching officers in deciding, for example, whether a piece of paper is evidentiary only or a means used to commit a crime.

Courts frequently hold that the Fifth Amendment's clause forbidding compulsory self-incrimination is violated by a seizure of evidentiary objects.[30] This self-incrimination hypothesis had its inception in *Boyd v. United States*.[31] and received confirmation in the *Gouled* case. In the *Boyd* case, a court order, in compliance with a federal statute, directed the defendant to produce an invoice. The order stipulated that if he failed to produce the invoice the allegations pertaining to it would be treated as admitted.[32] It was held that the order was both an invasion of privacy in violation of the Fourth Amendment and the equivalent of self-incrimination in violation of the Fifth.[33] The Fifth Amendment violation lay in the compulsion which this particular statute imposed upon the defendant to produce the object. The defendant was confronted with the difficult choice of either producing the invoice or having the allegations pertaining to it admitted. The discussion in the *Boyd* case has given rise to a doctrine requiring symmetry between the Fourth and Fifth Amendments which has re-

[28] United States v. Kempe, 59 F. Supp. 905 (N.D. Iowa, 1945), held that the Fourth Amendment is not applicable to records kept by a person under the requirement of law. The court called the records quasi-public since they are open to inspection at all times. However, incident to arrest a stock record book was held not subject to seizure because it did not constitute an instrumentality of the crime. Freeman v. United States, 160 F. 2d 72 (C.A. 9th, 1947). The court admitted the quasi-public nature of the documents but maintained that they were mere evidence of the crime. The court nevertheless declared that such documents could have been picked up under a search warrant or subpoena. The Supreme Court has not yet passed upon the seizability of required records.

[29] Furthermore, courts applying the Gouled rule do not speak in terms of "title" or "trespass." However, the Gouled court may have had some title-trespass notions in mind when it declared that warrants must be limited to cases where "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." (Emphasis added.) Gouled v. United States, 255 U.S. 298, 309 (1921).

[30] Gouled v. United States, 255 U.S. 298 (1921); United States v. Lefkowitz, 285 U.S. 452 (1932).

[31] 116 U.S. 616 (1886).

[32] Ibid., at 620.

[33] Ibid., at 635. Thus by judicial interpretation, the Fifth Amendment's protection against self-incrimination was engrafted on the Fourth Amendment to the point where evidence taken in violation of the Fifth also violates the unreasonable seizure clause of the Fourth Amendment. Wigmore argues that the histories of the two amendments have been distinct and that different considerations should govern the interpretation of each. 8 Wigmore, Evidence § 2264(2b) (3d ed., 1940).

sulted in comment that the effective protection of the individual from self-incrimination is responsible for the *Gouled* rule.[34]

To test this hypothesis, first the categories of objects to which the privilege applies must be examined. The privilege against self-incrimination is primarily a protection against testimonial compulsion,[35] but the privilege has been extended to the category of pre-existing documents.[36] A completely acceptable justification for this extension has not been offered, the best suggestion being that an individual should not be forced to choose between perjury and destruction of the papers.[37] This difficult choice is absent in the seizure field when stolen goods and contraband are involved, since the thief or possessor need not vouch for the genuineness of the goods. The rightful owner is the logical party to make such authentication and therefore no violation of the privilege is apparent. Furthermore, the possession of such objects is tainted with illegality from the beginning.[38]

Where weapons used to commit a crime are seized,[39] none of the usual justifications for applying the self-incrimination privilege are present: there is no testimonial compulsion, and there is no "impossible" choice for the possessor to make. Thus the courts are in accord that the seizure of such weapons is valid, although the question of whether the Fifth Amendment is violated has never been explicitly decided in relation to these objects.[40]

Public papers and required records appear to be treated like corporate papers insofar as the protection of the Fifth Amendment's privilege against self-incrimination is relevant. The privilege is denied the possessor of such papers.[41]

Apparently objects of evidentiary value only are similar to the pre-existing document category that enjoys immunity from production. But the justification for allowing the privilege to pre-existing documents does not hold when a seizure

[34] In his dissent in Davis v. United States, 328 U.S. 582, 595 (1946), Justice Frankfurter declared, "Private papers of an accused cannot be seized even through legal process because their use would violate the prohibition of the Fifth Amendment against self-incrimination." Also see Machen, The Law of Search and Seizure 42 (1950); United States v. Richmond, 57 F. Supp. 903, 907 (S.D. W.Va., 1944).

[35] Haywood v. United States, 268 Fed. 795 (C.A. 7th, 1920). See Meltzer, Privilege Against Self-Incrimination, 18 Univ. Chi. L. Rev. 687, 700 (1951).

[36] Ibid., at 699.

[37] Ibid., at 692.

[38] Ibid., at 707 n. 100.

[39] For a well-known declaration to the effect that weapons can be seized, see Harris v. United States, 331 U.S. 145, 154 (1947).

[40] If a subpoena for such objects were issued, however, the possessor would be faced with the "impossible" choice of either producing an object that might incriminate him or destroying it in disobedience to subpoena. In this event, the courts would be faced with the necessity of making an express ruling on the applicability of the Fifth Amendment. However, as a practical matter, it seems doubtful that a case in which such weapons are subpoenaed will ever occur.

[41] Consult Meltzer, Privilege Against Self-Incrimination, 18 Univ. Chi. L. Rev. 687, 701 (1951).

occurs because there is no opportunity for the possessor to destroy the objects, and consequently, no "impossible" choice for him to make. One might argue that the "lazy prosecutor" notion, sometimes used to explain the privilege against self-incrimination, would supply a clue as to the reason for the immunity of evidentiary objects from seizure. But it seems an overextension of this notion to compel the prosecutor to exercise more ingenuity in discovering other kinds of proof when he has already taken the time to procure a search warrant and to conduct a search. Thus there seems no convincing reason for treating the seizure of evidentiary objects as a violation of the Fifth Amendment.

If Fifth Amendment notions control whenever the *Gouled* rule applies, it should be the case that corporations cannot claim the benefit of the *Gouled* rule. Broad powers of subpoena are allowed with respect to corporations.[42] In *Oklahoma Press Publishing Co. v. Walling*,[43] the Court placed few restrictions on the subpoena of corporation papers by a government administrative agency: "[T]he Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."[44] The Court stated in *United States v. Morton Salt Co.*[45] that a request for reports and other information by a regulatory commission is valid even though the investigation has no particular charge in mind and is conducted merely to satisfy "official curiosity."[46] This type of investigation is hardly distinguishable from a search for "evidence." Although the Supreme Court has not explicitly asserted that corporations are denied the benefit of the *Gouled* rule, the cases in result substantiate this position.[47] The above discussion indicates that it is possible to line

[42] Most cases agree that as long as the subpoena does not call for all the corporation's books and the documents are relevant to the investigation, the subpoena will usually be upheld. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946); Hale v. Henkel, 201 U.S. 43, 72–73 (1906); McGarry v. SEC, 147 F. 2d 389 (C.A. 10th, 1945); Fleming v. Montgomery Ward & Co., 114 F. 2d 384 (C.A. 7th, 1940).

[43] 327 U.S. 186 (1946).

[44] Ibid., at 208.

[45] 338 U.S. 632 (1950).

[46] Ibid., at 652.

[47] Essgee Co. v. United States, 262 U.S. 151 (1923), was a case in which the corporations were subpoenaed to produce certain books and records. The records were produced and subsequently two individuals in the corporation were arrested on the grounds of carrying on illegal importations. The corporation brought a writ of error to review the action of the District Court in denying the corporation the return of the papers. It was contended that the Boyd and Gouled cases required the return, but the court held: "Those cases [Boyd and Gouled] were all unreasonable searches of documents and records belonging to individuals. The distinction between the cases before us and those cases lies in the more limited application of the Amendments to the compulsory production of corporate papers and documents." Ibid., at 158. Reynard seems to think that the corporation cases are consistent with the Gouled rule because the records could be used to commit further crimes. Reynard, Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?, 25 Indiana L.J. 259, 288 (1950). But when no charge is made against the defendant prior to the subpoena, why isn't a search found to be for "evidence" in the Gouled sense when the documents are called for?

up most of the seizure cases on a Fifth Amendment rationale.[48] However, as we have seen, the rationale is tenuous when applied to the seizure of evidentiary objects.

A privacy rationale may provide a better explanation of the *Gouled* rule. Privacy is already protected to an extent through Supreme Court interpretation of the unreasonable search clause of the Constitution.[49] But the safeguards of a reasonable search apply mainly to the original entry. It is arguable that the drafters of the Constitution intended to further protect a man's privacy by immunizing from seizure certain of his personal property. The Constitution explicitly distinguishes between houses, papers and effects.[50] A good statement of the privacy rationale is found in *United States v. Poller*.[51] "[T]he real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. . . . Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself."[52]

The protection of privacy provides a fairly good justification for the distinction between objects that can and cannot be seized. In the case of stolen goods and contraband which can be seized, the individual's right to privacy does not appear worthy of protection because (1) the individual does not own the property, and (2) his acquisition or possession of it is illegal. There is no need to protect privacy where public papers and required records are concerned, since both categories of objects are by definition open to inspection at all times. One might maintain that where privacy notions prevail weapons could not be seized. But, as to these items, there is another equally if not more important policy to consider. The courts have concluded, and rightly so, that it is better to inconvenience an individual somewhat by the seizure of his weapons than to allow the individual the use of these dangerous instruments to harm the public and to perpetrate further crimes.

Seizure in sedition cases raises problems that a privacy rationale for the *Gouled* rule may help in solving. It can be said with some positiveness that the "evidentiary only" rule originated in *Entick v. Carrington*,[53] where so-called

[48] This self-incrimination notion cannot explain the seizure of the cancelled check in Zap v. United States, 328 U.S. 624 (1946). Is not the check a pre-existing document?

[49] See, e.g., Weeks v. United States, 232 U.S. 383 (1913); Byars v. United States, 273 U.S. 28 (1926).

[50] "[T]he rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. 4.

[51] 43 F. 2d 911 (C.A. 2d, 1930).

[52] Ibid., at 914. The court in United States v. Kirschenblatt, 16 F. 2d 202 (C.A. 2d, 1926), explained the Gouled rule on a privacy basis. It was said that unless a limitation is placed on objects that can be seized, one could search at random. Dax, Arrest, Search and Seizure 144 (1946), cites Kirschenblatt as authority on the matter. Other sources also indicate that the privacy notion is dominant. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 623–24 (8th ed., 1927); U.S. v. Rabinowitz, 339 U.S. 56, 64 (1950).

[53] 19 Howell's State Trials 1029 (1765).

"seditious" papers were seized. Concern was expressed in the *Entick* case because a warrant had been issued authorizing the seizure of seditious materials. The court argued that if an officer were allowed to procure such a warrant, there was imminent danger that he would search and seize objects indiscriminately.[54] Search for evidence to convict the defendant was held to be repugnant to the ideals of personal security and privacy. The Fourth Amendment was probably designed to remedy such indiscriminate seizure.[55] Even though it is far from clear what materials are seditious (and it would be asking a great deal for federal agents to be proficient in sifting seditious materials from harmless objects) nevertheless, to protect one's security, it is essential that some limit be placed on the scope of seizure. The District Court decision in *United States v. Bell*[56] points up the importance of this issue. Following a lawful search incident to arrest, the defendant was indicted for conspiring to violate the Espionage Act. Large quantities of letters, printed literature, documents, pamphlets and other papers were seized. Many of the articles were not directly related to the commission of the crime charged; yet the court upheld the seizure on the grounds that the crime was of a complicated nature and that incident to arrest there may be seized "articles, books, and papers which are the instruments, fruits or evidence of the crime or connected with its commission or which supply proof relating to the transaction out of which it arose."[57] It seems distressing that in time of national hysteria, seizures of "seditious" materials might be permitted that would effectively obliterate the concept of unreasonable seizures. Were privacy notions dominant under the *Gouled* rule, one would expect to find the rule applied most rigorously in cases involving sedition. However, the fact that the Smith Act permits warrants to be issued for material advocating violent overthrow of the government[58] indicates that privacy notions have been subordinated in an effort to preserve national security. If the Communist Manifesto or a pamphlet describing the merits of the communal farm system is seditious matter which can be picked up with a warrant under the Smith Act, then one can argue that few objects are safe from seizure.

Another difficulty with the privacy notion as an explanation of the seizure cases is the fact that, in instances where privacy needs protection most, the

[54] The Star Chamber and Privy Council in 1596 allowed searches for all books and papers that affect the state. Lasson, The History and Development of the Fourth Amendment of the United States Constitution 26 n. 50 (1937). An example of the consequences of such seizures is related ibid., at 31. The Privy Council authorized a search of Edward Coke's home for "seditious and dangerous papers." All his books, jewelry, money and even a will were seized.

[55] See Lasson, op. cit. supra note 54.

[56] 48 F. Supp. 986 (S.D. Cal., 1943). [57] Ibid., at 995.

[58] 54 Stat. 670, 671 (1940), as amended, 18 U.S.C.A. § 2385 (1951). The statute declares that it is "unlawful for any person . . . to print, publish . . . circulate . . . or publicly display any written or printed matter advocating, advising or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."

Supreme Court has failed to give the essential help. Securing evidence by wiretapping and other modern hearing devices has been held not to violate the Fourth Amendment.[59] While deciding that evidence procured through the employment of a hearing device cleverly concealed in the clothing of a federal agent's accomplice did not violate either the Fourth or Fifth Amendment, the Court in *On Lee v. United States*[60] postulated that the rule granting immunity from seizure to materials of "evidentiary value only" applies only to a seizure of "tangible" objects.[61] In other words, a taking of conversations, words or thoughts is not really a "seizure" within the meaning of the Fourth Amendment. This rule seems to run contrary to the dictum of a District Court in *Reeve v. Howe*[62] that intangible objects such as communications as well as tangible objects are "effects" within the meaning of the Fourth Amendment. The Supreme Court appears to have conveniently forgotten that one's security can be disturbed equally as much by a seizure of "words" as by a seizure of "documents." Furthermore, it is peculiar that the Supreme Court did not hold, assuming that there had been a seizure, that wiretapping and the acquisition of evidence through other modern hearing devices is a seizure of materials of "evidentiary value only" and consequently invalid. For, in the usual instance, there is probably nothing more purely evidentiary than an intercepted conversation. If privacy protection were the most important consideration in any application of the *Gouled* rule, it should be found that the rule at least covers the wiretapping situations.[63]

Some cases apply a rule to the seizure problem under which all evidence that is relevant to the crime charged is admitted.[64] Such a rule, of course, would eliminate the *Gouled* doctrine. Under this relevancy rule the searching officer can determine the limits to a valid seizure more easily than he can under the *Gouled* rule. When the *Gouled* rule is in effect, an officer may never know what the court will regard as "evidentiary only." However, despite the simplicity and

[59] Olmstead v. United States, 277 U.S. 438 (1928) (wiretapping); Goldman v. United States, 316 U.S. 129 (1942) (detectaphone).

[60] 343 U.S. 747 (1952).

[61] Ibid., at 753. [62] 33 F. Supp. 619 (E.D. Pa., 1940).

[63] Another suggested rationale for the Gouled rule is that the rule is necessary to prevent prosecutions from being based on opinion evidence, i.e., letters and diaries. Fraenkel, Recent Developments in the Federal Law of Searches and Seizures, 33 Iowa L. Rev. 472, 488 (1948). This rationale is predicated on the rather weak assumptions that (1) prosecutors will prosecute in cases in which they have little substantial evidence, and (2) judges are incapable of discerning between opinion evidence and non-opinion evidence. None of the reported cases indicate that this rationale is the moving force behind the rule.

[64] See In re Ginsburg, 147 F. 2d 749 (C.A. 2d, 1945), where the test was relevancy. See also United States v. Mounday, 208 Fed. 186 (D. Kans., 1913). A law review note writer, discussing the Gouled rule, asks: "Is it a wholly irrational interpretation of the language of the court to say that the public has a very real interest in the discovery, seizure and use of everything which may tend to establish guilt of crime?" 20 Mich. L. Rev. 93, 95 (1921). Wisconsin allows the seizure of evidence of a crime. Wisc. Stat. § 363.02 (10) (1951).

easy comprehensibility of the relevancy doctrine, there remains a conscious feeling that additional safeguards to one's privacy are requisite.

Perhaps the extension of the *Gouled* rule into the field of wiretapping and other secretive hearing devices would be desirable. It is in this field that safeguards to the search are lacking, there being no necessity for obtaining search warrants. A more rigorous application of the rule in the sedition area may also be advisable. But shortcomings to this rule may render any application ineffective, because the rule leaves officers in the dark as far as knowledge of the precise limits to seizure is concerned. There exists the additional question of whether such a judicial rule would have any real deterrent effect upon law enforcement officers. In addition to these two practical objections to the extension of the rule into other areas, there is the further objection that the *Gouled* rule lacks an acceptable rationale. But this objection is not necessarily decisive. As Justice Learned Hand has said, "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."[65]

COMMUNISTS AND THE RIGHT TO BAIL

The usually tranquil law of bail has been recently disturbed by a surprising number of cases illustrating the sharp test put to civil liberties conceptions by the Communist problem. Proceedings against subversives under the Smith Act[1] and the Internal Security Act of 1950[2] have brought variations in previously routine and unquestioned bail procedures. Within the bail framework, constitutional values and practical possibilities of martyrdom compete with concern for the security of the nation. The haven offered by sympathetic foreign governments and the nature of the international Communist conspiracy seem to promote escape.[3] The government's challenge of the traditional rules of bail has raised difficult problems of policy and justice.

It is the purpose of this comment to examine the response of the federal courts to these considerations in four situations regarding bail: (1) prior to conviction; (2) pending appeal; (3) in deportation proceedings; and (4) in examining the qualifications of a proffered surety.[4]

[65] United States v. Kirschenblatt, 16 F. 2d 202, 203 (C.A. 2d, 1926).

[1] 54 Stat. 670 (1940), as amended, 62 Stat. 808 (1948), 18 U.S.C.A. 2385 (1951).

[2] 64 Stat. 987 (1950) (Subversives Activities Control Act of 1950; the McCarran Act).

[3] Gerhardt Eisler jumped bail and was, until his recent removal from office, an important official in the East German government. As stated in Stack v. Boyle, 342 U.S. 1, 5 (1951), "The government asks the courts to depart from the norm by assuming, without introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction." But compare the reception of the same argument when advanced in a deportation proceeding.

[4] In relating the cases, it may be helpful to keep in mind the following sequence of events which have seemed to tighten the government's case: outbreak of Korean hostilities, June 25,