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THE CONTINUING VITALITY OF THE *GOULED* RULE: THE SEARCH FOR AND SEIZURE OF EVIDENCE

JAMES M. SHELLOW*

The *Gouled* rule emerged from the opinion of the United States Supreme Court in the case of *Gouled v. United States*.[1] The rule states that objects of only evidentiary value may not be seized by federal officers in the execution of a search, and that when such objects are seized, they must be suppressed. The rule has been applied to the suppression of evidence seized pursuant to the mandate of a search warrant, as well as to the suppression of evidence seized incidental to an arrest.

The *Gouled* rule has been founded on the fourth and fifth amendments to the United States Constitution and therefore, until recently, could be assumed to circumscribe only federal searches. It is now established that federal standards must be applied by state courts in determining the reasonableness of searches and seizures[2] and in determining the sufficiency of the affidavit upon which a search warrant is issued.[3] Similarly, the fifth amendment's prohibition of compelled self-incrimination has been recently held to control state criminal procedures.[4]

Thus, the question of whether the *Gouled* rule arises under the sanctions of the fourth amendment or the fifth amendment no longer determines its applicability to state criminal trials; and to the extent that the rule defines the permissible ambit of a federal seizure, it will be binding upon the states as well. The *Gouled* rule presupposes the lawfulness of the search; such lawfulness will be determined by federal standards. The rule sets forth the federal standards as to what categories of objects may be seized thereby.

The origin of the *Gouled* rule was probably in the case of *Entick v. Carrington*,[5] where a search warrant was issued for the seizure of seditious papers and the court, in the opinion of Lord Camden, held that the private papers of the accused were his personal property and, as such, were immune from seizure.

The opinion and reasoning of Lord Camden was followed in the

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

[2] Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963).

[3] Aguilar v. Texas, 84 Sup. Ct. 1509 (1964).

[4] Malloy v. Hogan, 84 Sup. Ct. 1489 (1964); Murphy v. Waterfront Comm'n, 84 Sup. Ct. 1594 (1964).

[5] 19 Howell St. Tr. 1029 (1765).

American case of *Boyd v. United States*,[6] in which the Court held that the fourth and fifth amendments prohibited the seizure or the compelled production of private papers in which the accused had a property interest:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[7]

Thus, *Entick* and *Boyd* develop the proposition that it is the property right of the accused which inheres in the private papers sought which renders them immune from seizure; and the *Gouled* rule extends this immunity to other chattels in which the accused has a property interest. The case of *Jones v. United States*[8] extended the concept of those who have standing to object to unlawfully seized evidence, particularly in the case of contraband the possession of which is itself a crime, and modified the requisite that some provable interest in the property is necessary in order to request that the evidence be suppressed.

The Federal Rules of Criminal Procedure[9] recognize this distinction between objects in which no property interests inhere and hence are subject to search and seizure, and those chattels in which a vested property right of the accused exists and which may neither be searched for nor seized. These rules provide that a search warrant may be issued for the fruits of a crime, for the instrumentalities of its commission, for weapons, and for contraband; and they 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 this right has been forfeited. The thief has no property right in stolen goods;[10] the possessor has no property right in contraband;[11] 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.

> It is likely that the admitted power to seize the fruits, or the tools, of crime, itself rests upon a very ancient basis. . . . The pursuit of a thief on hue and cry was a civil as well as a criminal remedy, and the captors retook the booty and in early times

[6] 116 U.S. 616 (1885).
[7] *Id.* at 630.
[8] 362 U.S. 257 (1960).
[9] FED. R. CR. P. 41(b).
[10] Entick v. Carrington, *supra* note 5, at 1066.
[11] Davis v. United States, 328 U.S. 582 (1946).

> themselves did execution; the tool or other object which killed a man was deodand and forfeit; a burglar's kit or a counterfeiter's plate have never been property in the ordinary sense, any more than liquor since the enactment of section 25. Ruder times had ruder remedies, but the power to seize such chattels probably descends from notions which have long since lost their rational foundation, and, while the method has changed, the substance remains.
>
> While the point has never been decided, the language of the Supreme Court accords with our belief that it is only such things that may be seized as an incident to an arrest.[12]

Similarly, required records and public documents, because they do not possess the character of private chattels, have been held not to be subject to the exclusions of the *Gouled* rule.[13]

Although the origins of the rule which protected private property from inspection, search, and seizure may have been the common law appreciation of the sanctity of property interests, more recent Supreme Court cases indicate that a federal right of privacy underlies these protections. Speaking of the fourth amendment in a dissenting opinion, Mr. Justice Brennan stated:

> But the first clause embodies a more encompassing principle. It is, in light of the *Entick* decision, that government ought not to have the untrammeled right to extract evidence from people. Thus viewed, the Fourth Amendment is complementary to the Fifth. . . . The informing principle of both Amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion.
>
> . . . .
>
> The authority of the *Boyd* decision has never been impeached. Its basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved in the decisions of this Court. . . . So also, the Court's insistence that the Fourth Amendment is to be liberally construed, . . . that searches for and seizures of mere evidence as opposed to the fruits or instrumentalities of crime are impermissible under any circumstances, . . . and that the Fourth Amendment is violated whether the search or seizure is accomplished by force, by subterfuge, . . . by an invalid subpoena, . . . or otherwise, . . . is confirmation that the purpose of the Amendment is to protect individual liberty in the broadest sense from governmental intrusion.[14] (Footnotes omitted.)

As the rationale of the *Gouled* rule is obscured in the interaction of the mandates of the fourth and fifth amendments, the application

[12] United States v. Kirschenblatt, 16 F. 2d 202, 203 (2d Cir. 1926).

[13] "Of course there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects." Davis v. United States, *supra* note 11, at 602.

[14] Lopez v. United States, 373 U.S. 427, 454-57 (1963); *accord,* Davis v. United States, *supra* note 11, at 587.

of the rule in the federal courts assumes the coloration of the amendment upon which the particular court believes the rule to be founded.

At the outset, the rule would seem to contravene common sense. It appears, particularly to those authors whose philosophical orientation favors the prosecution, that it is absurd to deny to searching officers the right to seize evidence of the very crime for which they have established probable cause.[15] Even to those authors whose perspective ordinarily is that of defense counsel, the *Gouled* rule appears an unwarranted extension of constitutional sanctions and a serious threat to effective law enforcement.[16] The *Gouled* rule, unlike most of the constitutional sanctions, was formulated in and by the Supreme Court; and the Court has neither retreated from its original formulation nor limited the application of the rule. As peculiar as the rule may appear to some authors, authorities are pretty much agreed that the *Gouled* rule is the law.[17] While the statement of the rule is clear, the problems arise in its application. Perhaps the most vexing of these, and the one with which most courts have been concerned, is the problem of what chattels are mere evidence of crime and what chattels are instrumentalities of crime.

In *Gouled v. United States*,[18] the defendant was charged with being a party to a conspiracy to defraud the United States and was charged in a second count with mail fraud. The defendant sought to suppress certain contracts which had been seized under the authority of a search warrant. The grounds relied on by the defendant were that these contracts constituted mere evidence of the offense and hence were immune from seizure. The Court in suppressing these contracts relied on its opinion in *Boyd v. United States*[19] and held:

> Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases*, . . . they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid

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[15] Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 87 (1962).
[16] Kamisar, *Public Safety v. Individual Liberties*, 53 J. CRIM. L., C. & P.S. 171, 177 (1962).
[17] *E.g.*, MAGUIRE, EVIDENCE OF GUILT 183 (1959); 8 WIGMORE, EVIDENCE §2184a, at 45 (McNaughton rev. 1961); Annot., 129 A.L.R. 1296, 1300-01 (1940).
[18] 255 U.S. 298 (1921).
[19] 116 U.S. 616 (1885).

> exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[20]

This paragraph was the formulation of the *Gouled* rule: only certain categories of property may be seized in the execution of a search warrant. Later cases have formulated the rule to impose the same limitations on a search incidental to an arrest. Although the original formulation of the rule has a disarming simplicity, the meaning of the rule can only be understood by an analysis of the opinions of the courts which have applied it and by an attempt to infer from these opinions a common thread.

Six years after its opinion in the *Gouled* case, the United States Supreme Court decided *Marron v. United States.*[21] In that case the defendant sought to suppress certain ledgers and bills which related to the operation of an unlawful liquor business. The Court, in denying the motion to suppress, held that the ledgers and bills were "part of the outfit . . . actually used to commit the offense"[22] and, as such, were instrumentalities properly subject to seizure. A similar line of reasoning was employed in *Foley v. United States*[23] with the same result that ledgers and records of an illicit liquor operation were not suppressed. In almost precisely the same circumstances, the Second Circuit in *United States v. Poller*[24] held these records to be purely evidentiary and suppressed them. A similar result was reached by the Sixth Circuit in *Bushouse v. United States.*[25] Subsequent to the *Marron* case, the Supreme Court again considered a search involving prohibition violations in *United States v. Lefkowitz.*[26] In that case the search was incident to an arrest, and the defendant was successful in suppressing the results. The Court held that the objects seized were "unoffending," and ruled that the search was exploratory and the seizure unlawful.[27]

Thus, the *Gouled* case established the proposition that mere evidence of the commission of crime could not be reached by a federal search warrant, and the *Lefkowitz* case extended the prohibition to searches incidental to arrests. In the decade between these two opinions, search and seizure questions primarily arose out of prosecutions for violations of prohibition laws; and the federal cases, typified by the *Marron* opinion, threshed out questions as to what books and records were mere evidence and which books and records were instrumentalities. The *Gouled* rule and its underlying justification were dis-

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[20] 255 U.S. at 309.
[21] 275 U.S. 192 (1927).
[22] *Id.* at 199.
[23] 64 F. 2d 1 (5th Cir. 1933).
[24] 43 F. 2d 911 (2d Cir. 1930).
[25] 67 F. 2d 843 (6th Cir. 1933).
[26] 285 U.S. 452 (1932).
[27] Further examples of the application of the *Gouled* rule by the federal courts are cited in Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule in Search of a Reason,* 20 U. CHI. L. REV. 319 (1952-1953).

cused at length by Judge Learned Hand in *United States v. Kirschenblatt.*[28] The case involved an alleged prohibition violation, and the officers were armed with a search warrant and arrested the defendant. The court stated:

> The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant.[29]

The court thus declared the seizure of the particular papers to be improper and directed their return. Five years after *Kirschenblatt,* the Court of Appeals for the Second Circuit was confronted with a similar motion to suppress in *United States v. Gowen.*[30] The court, relying upon its approach in *Kirschenblatt,* directed that the papers there sought to be introduced were properly seized; the case was reversed on other grounds[31] and the *Gouled* rule remained as stated in *Kirschenblatt.* The Second Circuit again considered the seizure of evidence in the case of *Landau v. United States Attorney*[32] and there concluded that a memorandum taken from the defendant was an instrumentality of the crime of smuggling:

> The right to retain the paper here may be placed on its classification as an instrumentality of crime. . . .
>
> The memorandum seized here constituted an exact tabulation of the smuggled merchandise. Some such list was a necessity in this type of smuggling to be sure that the actual carrier turned over all the goods. If papers can ever be instrumentality of crime, when not constituting the essence of the crime itself, they are such here.[33]

In the years following the *Kirschenblatt* case, the *Gouled* rule was applied by the federal courts in a variety of criminal prosecutions. In another smuggling case, the Court of Appeals for the Ninth Circuit suppressed papers taken from the briefcase of the defendant and stated:

> It may be laid down as a general principle that a reasonable seizure can only be made of instrumentalities of the crime itself and not of private papers which are mere evidence or indicia of the commission of a crime.
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> . . . [T]he letters and other papers taken from the persons of the

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[28] 16 F. 2d 202 (2d Cir. 1926).
[29] *Id.* at 204.
[30] 40 F. 2d 593 (2d Cir. 1930).
[31] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
[32] 82 F. 2d 285 (2d Cir. 1936).
[33] *Id.* at 287.

> defendants are likewise mere evidences of the intention upon the part of the defendants to commit a crime.[34]

The Court of Appeals for the Seventh Circuit adopted the *Gouled* rule in its opinion in *United States v. Thompson.*[35] The defendants were accused of mail fraud and sought to suppress papers which they claimed were mere evidence of the crime. The court stated:

> A valid search may result in the seizure of papers as well as other kinds of property. The test is not for the nature of the property seized (papers or liquor for instance), but whether such property was by the accused used in perpetrating a crime.[36]

In perhaps its clearest statement of the *Gouled* rule, the Supreme Court in *Harris v. United States*[37] reiterated those categories of objects which may be lawfully seized:

> This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which the escape of the person arrested might be effected, and property the possession of which is a crime.[38] (Footnote omitted.)

The Court held in this case that the possession of altered draft cards constituted a continuing offense and that these cards were properly admissible as contraband. The Supreme Court again addressed itself to this subject in a footnote in *United States v. Rabinowitz,*[39] in which the defendant was charged with selling and possessing forged postage stamps:

> There is no dispute that the objects searched for and seized here, having been utilized in perpetrating a crime for which arrest was made, were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody.[40]

Again in *Abel v. United States,*[41] the Supreme Court concluded that the papers seized were the instrumentalities of the crime itself and denied a motion to suppress:

> Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to

[34] Takahashi v. United States, 143 F. 2d 118, 123 (9th Cir. 1944).
[35] 113 F. 2d 643 (7th Cir. 1940).
[36] *Id.* at 645.
[37] 331 U.S. 145 (1947).
[38] *Id.* at 154.
[39] 339 U.S. 56 (1950).
[40] *Id.* at 64.
[41] 362 U.S. 217 (1960).

> them, it was at these searches which the Fourth Amendment was primarily directed.[42]

And in *Preston v. United States,*[43] the Supreme Court again stated:

> Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime.[44]

This, then, is the extent of the mandate. The Supreme Court has specifically held that mere evidence of crime may not be seized. In each case since *United States v. Lefkowitz*[45] in which the problem has arisen, the Court has held that the *Gouled* rule should not be applied, on the grounds that the evidence sought to be suppressed constituted instrumentalities of the offense. Further, each of the cases heretofore considered involved the suppression of documents; and while the Supreme Court has specifically held that "there is no special sanctity in papers,"[46] the Court has never applied the *Gouled* rule in a case in which papers were not involved.

The same thread runs through the majority of the opinions of the lower federal courts. While the courts speak in broad terms of evidentiary materials being immune from seizure, the rule is applied only to private documents. Typical of these opinions is that of the Fourth Circuit in the case of *United States v. Boyette,*[47] in which the defendants sought to suppress the earnings records of prostitutes. The court denied the motion, held that these records were instrumentalities of the crime, and stated:

> Though the search be reasonable, every article discovered is not subject to seizure. The Supreme Court has frequently adverted to the distinction between seizures of contraband, fruits of crime and the instrumentalities for its accomplishment, weapons and similar articles on the one hand, and the seizure of purely evidentiary materials on the other. Perhaps the influence of the Fifth Amendment is felt here.[48]

Thus, while the lower federal courts pay lip service to the sweeping mandates of *Boyd, Gouled, Lefkowitz,* and *Harris,* ingenious arguments are developed to avoid their application.

Several recent federal cases indicate that the trend is changing. In the case of *Morrison v. United States,*[49] the defendant was charged with committing a perverted act on a young boy, and the prosecution

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[42] *Id.* at 237.
[43] 84 Sup. Ct. 881 (1964).
[44] *Id.* at 883.
[45] 285 U.S. 452 (1932).
[46] Gouled v. United States, *supra* note 1, at 309.
[47] 299 F. 2d 92 (4th Cir. 1962).
[48] *Id.* at 94-95.
[49] 262 F. 2d 449 (D.C. Cir. 1958).

sought to introduce a handkerchief which allegedly bore some tangible evidence of the offense. The court suppressed this evidence and held:

> The handkerchief was merely evidentiary material. It clearly was not the instrument or means by which the crime was committed, the fruits of a crime, a weapon by which escape might be effected, or property the possession of which is a crime. . . .
> This distinction was established in United States v. Lefkowitz and in Gouled v. United States.[50] (Footnotes omitted.)

The following year in *Williams v. United States*,[51] the court suppressed the observations of a searching officer on the theory that visual evidence, as well as material evidence, is excluded under the *Gouled* rule.

In a recent prosecution for moonshining, the United States District Court for the Eastern District of Wisconsin applied the *Gouled* rule and suppressed certain keys which allegedly connected the defendant to a convicted co-defendant.[52] The court stated:

> Evidence which is neither contraband, tools, or fruits of a crime but which consist of private documents or other chattels of the defendant wanted by the government solely for the evidential value have been held to be not subject to seizure incidental to arrest.

Prior to the opinions in *Malloy v. Hogan*[53] and *Murphy v. Waterfront Comm'n*,[54] state forums could avoid the application of the *Gouled* rule on the theory that the rule was founded upon the fifth amendment of the United States Constitution and hence was not controlling in state prosecutions. This alternative is now foreclosed, and the distinction between mere evidence and instrumentalities will confront state judges as it has their federal colleagues since 1921.[55]

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[50] *Id.* at 450-51.
[51] 263 F. 2d 487 (D.C. Cir. 1959).
[52] United States v. Linsy, Criminal No. 63-CR-135, E.D. Wis., 1964. See also Alioto v. United States, 216 F. Supp. 48, 51 (E.D. Wis. 1963).
[53] 84 Sup. Ct. 1489 (1964).
[54] 84 Sup. Ct. 1594 (1964).
[55] *E.g.*, "A search, either with or without a warrant, is also unreasonable when made merely for evidentiary material. . . ." State v. Manske, Criminal No. 2-16025, Milwaukee County Ct., Sept. 25, 1964. "We reject the state's contention that any search of the person of one lawfully arrested is a valid search. Such search to be reasonable must be limited to weapons, or the fruits, or instrumentalities of the crime for which the defendant was arrested." Barnes v. State, No. 35, Oct. 6, 1964.