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SEIZING PRIVATE PAPERS: GREATER PROTECTIONS FOR A DIGITAL AGE

*Stanley A. Goldman**

Before I comment on an area of Professor Shiffrin's scholarship, I want to mention just a few things I found most memorable about having been one of his law school classmates. First, it was all but impossible for anyone else to get the highest grade in any class you took with him. I do not believe that I ever did as well in any course in my life as I did in Evidence. It was taught by a wonderful visiting professor from the University of California at Davis named Jim Hogan. I remember devouring the subject like a young Hasid discovering the Ba'al Shem Tov. When I learned our final exam was a multiple choice test, I realized I had a chance of doing something I'd never done; I had a chance of getting all the answers right on a test. I spent nights studying for the exam. Sure enough, when the grades were posted I had done it. I had gotten 100 percent right, and Steven got the Am Jur. Somehow, even my 100 was not as good as his 100.

The single most memorable thing about Steven, however, was oddly enough not his academic prowess, but rather his mode of transportation. I remember the first time I got into Steven's auto. I turned and said to him, "This is the *worst* car I have *ever* been in." It was a convertible, but I was not entirely convinced it had begun life that way. There were no floor mats, there were no carpets on the floors, your feet rested on metal. You had to sit carefully to avoid the springs coming out of the torn seats. "You're a night student; your day job is as a tenured professor at a state college; you can't tell me you couldn't afford something just a little better than this," I chided him. I have never forgotten his response: "I could get a more expensive vehicle, but why would I want to? This is the best possible car I could own because everything that can go wrong with

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this car has already gone wrong. How much worse could it ever get? I can feel confident that when I take it out for a drive around town, there will be no unpleasant surprises.” Although at the time it reminded me of something out of *Candide*,¹ it turned out to be a philosophy so fungible to many of life’s pursuits that I may even find it necessary to return to it before I will be able to complete my comments.

I think that is probably enough about my remembrances of things past and my bitterness over lost Am Jur awards. I will spend the remainder of this comment on a bit of Steven’s lesser known Fourth Amendment scholarship; I’d like to discuss a Steven Shiffrin student article, published when he was a staff member on the *Loyola of Los Angeles Law Review*, titled: *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*.² In this work the younger Steven argued that the search and seizure of private papers is in fact prohibited by a right of privacy to be found in the combination of the Fourth Amendment’s particularity and probable cause requirements and in a Fifth Amendment privacy right.³

In 1886 the United States Supreme Court had declared, in the great case of *Boyd v. United States*,⁴ that private papers could not be seized by the Government, not only because doing so would constitute an unreasonable search and seizure under the Court’s interpretation of the Fourth Amendment, but also because it would require the author of the papers to be a witness against himself in violation of the Fifth Amendment prohibition. “[W]e have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself,” wrote the *Boyd* majority.⁵

Thirty-five years later, in *Gouled v. United States*,⁶ the Supreme Court expanded this prohibition on the seizing of evidence to include not only the subjects’ private papers, but also any property seized for

1. VOLTAIRE, *CANDIDE* (John Butt trans., Penguin Books 1947) (1759).

2. Steven H. Shiffrin, Note, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 *LOY. L.A. L. REV.* 274 (1973).

3. *Id.* at 309–10.

4. 116 U.S. 616 (1886).

5. *Id.* at 633.

6. 255 U.S. 298 (1921).

mere evidentiary purposes. This became known as the “mere evidence rule,” a “rule” which allowed searches or warrants for searches to be issued only when the subject matter sought to be seized fell into the categories of contraband, fruits of the crimes being investigated, or instrumentalities of those crimes. The *Gouled* majority felt that the *Boyd* case had attempted to articulate as its central principle the idea that privacy interests outweigh any claimed law enforcement need for, not only the seizing of private papers, but any property sought solely for the purpose of using it as evidence against the subject of the search.⁷ Both *Boyd* and *Gouled* therefore created “a zone of privacy which the government could not breach to discover items of mere evidentiary value.”⁸

In 1967, however, the United States Supreme Court, in *Warden, Maryland Penitentiary v. Hayden*,⁹ began its dismantling of these broad privacy guarantees. Justice Brennan, speaking for the majority, overturned the “mere evidence rule.”¹⁰ From this point forward, warrants could be issued and warrantless searches conducted for even “mere evidence” of the commission of a crime. This greatly expanded the opportunities for government intrusion into individual privacy by broadening the scope of searchable items. In spite of this, Justice Brennan’s assertion that the “principal object of the Fourth Amendment is the protection of privacy”¹¹ is consistent with Professor Shiffrin’s theory that the search and seizure of *private papers* be regulated by privacy considerations rather than by self-incrimination concepts.¹²

Unfortunately, Steven’s article appeared in the *Loyola of Los Angeles Law Review* three years *before* the case of *Andresen v. Maryland*.¹³ There, the Supreme Court, consistent with Steven’s thesis, clearly concluded that since a search compels neither an act of creation nor production, no Fifth Amendment rights are implicated.¹⁴ Contrary to Steven’s theory, however, the Court repudiated the idea

7. *Id.* at 309–10.

8. Shiffrin, *supra* note 2, at 280.

9. 387 U.S. 294 (1967).

10. *Id.* at 310.

11. *Id.* at 304.

12. Shiffrin, *supra* note 2, at 309–10.

13. 427 U.S. 463 (1976).

14. *Id.* at 477.

that Fourth Amendment privacy interests protected private papers to any greater degree than it did any other form of seizable evidence.¹⁵

In the generation since *Andresen*, a digital revolution has provided even greater potential governmental access, with or without warrants, to our writings and ideas. Perhaps it is time to resurrect at least a modest reconsideration of whether the seizing of private documents, electronic communications, and recordings should be given greater protection than provided by *Andresen*.

As part of his 1973 proposal, Steven argued for a sliding scale of protection, depending on the nature of the writings sought by the Government.¹⁶ He saw no great privacy interests violated, for example, in the seizure of gambling records. On the other hand, with respect to items such as diaries, he concluded that not only does their seizure give rise to significant privacy concerns, but they typically need not be seized in order to effectuate the general enforcement of any particular law. Their seizure, in whole or in part, should not normally be countenanced. Even here, however, Steven was prepared to accept such searches and seizures if the content sought to be seized could be described in the affidavit to the warrant with such particularity that it is clear that privacy interests would not be compromised.

In some respects, this latter suggestion foreshadows the constitutional requirements under the Fifth Amendment with respect to the subpoenaing of documents. In *Fisher v. United States*¹⁷ and *United States v. Doe*,¹⁸ the Supreme Court informed us that while the Fourth Amendment protects privacy, the Fifth Amendment does not. Since, as the Court had held with respect to seizing documents, a subpoena does not compel creation of the writing, no privilege-against-self-incrimination claim can be asserted with respect to its contents. However, the subpoena will not be valid unless the government knows as a foregone conclusion that such documents exist and are in the possession of the subject of the subpoena.¹⁹

15. *Id.* at 480.

16. Shiffren, *supra* note 2, at 309–11.

17. 425 U.S. 391 (1976).

18. 465 U.S. 605 (1984).

19. *See United States v. Hubbell*, 530 U.S. 27, 45 (2000) (holding that a subpoena for the production of documents violated the Fifth Amendment because the government had failed to establish that it had had “any prior knowledge of either the existence or the whereabouts” of the requested records).

Though founded upon a Fifth Amendment concern that the actual turning over of documents for which there is no foregone conclusion would be forcing the targets of the subpoena to incriminate themselves by admitting the existence and/or possession of the sought documents, there is no reason why the same restriction could not be seen as a legitimate prophylactic against the invasion of Fourth Amendment privacy interests.

I would argue that it is time Professor Shiffrin returned to the question of the search and seizure of private papers because we need him. We need eminent scholars of his stature to return to this moribund area that the Supreme Court has so long ignored.

Of course, the question could be legitimately posed as to why anyone would voluntarily write in an area in which it would seem they are so unlikely to stimulate real change, certainly for years to come. The answer to this question goes to the very essence of the philosophy of life that Steven so earnestly related to me all those years ago in his dilapidated automobile: This is the best possible cause to espouse because everything that can go wrong with it has already gone wrong. How much worse could it possibly get? He can feel assured that when he takes this theory out for a drive around town, there will be no unpleasant surprises.

