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Private Papers Now Subject to Reasonable Search and Seizure - Andresen v. Maryland

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PRIVATE PAPERS NOW SUBJECT TO REASONABLE SEARCH AND SEIZURE—*ANDRESEN V. MARYLAND*

Since 1967, federal courts have been in conflict over the question whether a defendant's private papers are, by their very nature, within the scope of the protection afforded by the Fifth Amendment.[1] A recent Supreme Court decision purportedly answers this question.[2] In *Andresen v. Maryland*,[3] the Court held that the seizure of a person's business records, pursuant to a valid search warrant, and their subsequent introduction at trial did not violate the Fifth Amendment's privilege against self-incrimination.[4] The Court deemed the privilege inapplicable because testimony is not compelled in the case of a seizure of papers pursuant to a valid search warrant. By indicating that this was the constitutionally significant distinction between this case and earlier Supreme Court cases involving subpoenas of "private papers,"[5] the Court apparently decided that all items of evidence, whatever their nature, may be seized pursuant to a valid search warrant.

Andresen, an attorney specializing in real estate settlements, came under scrutiny during an investigation of real estate settlement activities in the Washington, D.C., area.[6] Search warrants were obtained

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1. In Warden v. Hayden, 387 U.S. 294, 303 (1967), the question was stated to be: "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." Although the question seems to imply primarily a Fourth Amendment problem, it has been applied in the Fifth Amendment context. *See* Andresen v. Maryland, 427 U.S. 463, 471 (1976); Schaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975), *cert. denied*, 427 U.S. 912 (1977); VonderAhe v. Howland, 508 F.2d 364 (6th Cir. 1975); United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972); Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). The problem posed in *Warden* is actually a product of the interplay between the Fourth and Fifth Amendments. *See* note 21 *infra*. What *Warden* asked is whether there is any item which the Fifth Amendment would forbid from being introduced at trial against its owner; if there is, then a seizure of the item would be unreasonable.

2. Andresen v. Maryland, 427 U.S. 463 (1976). Although the Court specifically alluded to Warden v. Hayden, 387 U.S. 294 (1967), and the question reserved therein, the decision may only be applicable to the business records which were involved in the factual situation before it. *See* United States v. Miller, 425 U.S. 435, 441 n.3 (1976).

3. 427 U.S. 463 (1976).

4. U.S. CONST. amend. V. The privilege is contained in the words: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

5. 427 U.S. at 473-74. The Court cited Fisher v. United States, 425 U.S. 391 (1976), and Couch v. United States, 409 U.S. 322 (1973), as providing the basis for this distinction.

6. An examination by the investigators indicated that Andresen, acting as settlement attorney in a purchase of Lot 13T in the Potomac Woods subdivision of Montgomery County, had defrauded the purchaser into believing that 13T was free of liens when in fact it was not. 427 U.S. at 465.

permitting a search of Andresen's law office and the office of the Mt. Vernon Development Corporation.[7] Many of Andresen's business papers and records were seized.[8] Several[9] were subsequently introduced into evidence at trial over his Fourth and Fifth Amendment objections that the items seized were the fruits of an unreasonable search and that their introduction into evidence compelled him to testify against himself. Andresen was convicted for false pretenses and fraudulent misappropriation by a fiduciary,[10] and he later appealed. The Court of Special Appeals of Maryland affirmed the trial court's decision, rejecting Andresen's Fourth and Fifth Amendment claims.[11] The Supreme Court granted certiorari[12] and, in a 7-2 decision,[13] affirmed the lower court.[14]

This Note will analyze the Court's treatment of the claim involving the Fifth Amendment's privilege against self-incrimination.[15] The focus will be on the Court's failure to discuss adequately the nature of the seized business records, and the impact of this decision on the zone of

7. The offices of the Mount Vernon Development Corporation were searched because Andresen was its incorporator, sole shareholder, resident agent, and director. 427 U.S. at 466.

8. Although the Court accepted the estimate that the seizure amounted to between 2% and 3% of the files in Andresen's law office and less than 5% of the corporation's files, 427 U.S. at 466-67, the percentages did not indicate the immensity of the seizures. In Petitioner's Brief at 5, Andresen v. Maryland, 427 U.S. 463 (1976), it was noted that literally thousands of petitioner's private papers, documents, and handwritten notes were seized.

9. After suppression and return of some of the papers, three documents from the "Potomac Woods General" file of the Mount Vernon Development Corporation were admitted into evidence and five items seized from Andresen's law office were admitted into evidence. 427 U.S. at 468.

10. Prior to the issuance of the search warrants, three groups of homeowners had complained that Andresen had misappropriated money which they had given him "to procure titles to their properties free and clear of all encumbrances." 427 U.S. at 466 n.1.

11. 24 Md. App. 128, 331 A.2d 78 (1975). Four of the false pretenses counts were reversed because the indictment had failed to allege intent to defraud.

12. 423 U.S. 822 (1975).

13. Justice Blackmun presented the opinion of the Court. Justices Brennan and Marshall dissented. 427 U.S. at 484 (Brennan, J., dissenting). *Id.* at 493 (Marshall, J., dissenting).

14. 427 U.S. 463 (1976).

15. The Court also was faced with a Fourth Amendment issue in this case concerning the validity of the search warrant used to seize the business records and papers. The issue arose over whether the language of the warrant was too "general" to be constitutionally permissible. After a lengthy listing of all items to be seized, each warrant contained the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 427 U.S. at 479. The Court held that when this phrase was properly read with reference to the whole sentence, it did not constitute language which would be too "general" so as to render the subsequent search and seizure "constitutionally unreasonable." *Id.* at 480-81.

privacy concept, which had been considered a "fundamental value" of the privilege.[16]

BACKGROUND

The Fifth Amendment's privilege against self-incrimination is contained in the provision that [n]o person . . . shall be compelled in any criminal case to be a witness against himself." It was originally aimed at preventing the use of torture to force incriminating testimony from the lips of the accused.[17] Through the years, however, the privilege has been interpreted liberally[18] and it has been held to include protection against the compelled production of private papers.[19]

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16. In Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), the Court stated:

> [T]he privilege against self-incrimination reflects many of our fundamental values and most noble aspirations . . . [including] our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' "

17. 427 U.S. at 470. The Fifth Amendment privilege against self-incrimination had its historical roots in the general abhorrence for the practices of the Star Chamber and the ecclesiastical courts. Various methods of torture, including application of the rack, were used to force incriminating testimony from the lips of the accused. The accused became his own prosecutor, and the Fifth Amendment privilege against self-incrimination represented an attempt to protect against such compulsion. *See generally,* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); E. GRISWOLD, THE FIFTH AMENDMENT TODAY 1-20 (1955).

18. In Murphy v. Waterfront Comm'n, 378 U.S. 52(1964), Justice Goldberg listed the following as being the concerns of the Fifth Amendment:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load [citation omitted]; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" [citation omitted]; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." [citation omitted]

Id. at 55. *See also* J. WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961), where 12 separate arguments are listed in support of the privilege.

The multitude of interests protected by the privilege is in keeping with the repeated remark that the Fifth Amendment should be interpreted liberally. In Counselman v. Hitchcock, 142 U.S. 547 (1897), for example, it was stated that the privilege "is as broad as the mischief against which it seeks to guard." *Id.* at 562. *See* Ullman v. United States, 350 U.S. 422, 426 (1956); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616, 635 (1886); McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193, 193-96 (1967).

19. Bellis v. United States, 417 U.S. 85, 89-90 (1974); Couch v. United States, 409 U.S.

The first case recognizing the Fifth Amendment's protection of private papers was the landmark decision of *Boyd v. United States* in 1886.[20] In *Boyd,* the Court held that a court order for the production of petitioner's "private" paper and its subsequent introduction into evidence violated both the Fourth and Fifth Amendments.[21] The Court stated that the essence of the violation was the invasion into the individual's zone of privacy.[22] Seeing no constitutionally significant distinction

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322, 335-36 (1973); Warden v. Hayden, 387 U.S. 294, 303 (1967); Schmerber v. California, 384 U.S. 757, 761 (1966); Davis v. United States, 328 U.S. 582, 595 (1945) (Frankfurter, J., dissenting); Feldman v. United States, 322 U.S. 487, 490 (1944); Gouled v. United States, 255 U.S. 298, 306 (1921); Wilson v. United States, 221 U.S. 361, 380 (1911); Hale v. Henkel, 201 U.S. 43, 76 (1906); Boyd v. United States, 116 U.S. 616, 633 (1886). *See also* Hudak, *The "Mere Evidence" Rule: Need for Re-evaluation,* 20 CLEV. ST. L. REV. 361, 377 (1971); Note, *The Fifth Amendment and the Protection of Records: Are Ownership and Possession Always Necessary?,* 9 GA. L. REV. 658, 659 (1975); Note, 42 FORDHAM L. REV. 202 (1973). *Contra,* Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?,* 59 IOWA L. REV. 1336, 1343 (1974).

20. 116 U.S. 616 (1886). In *Boyd,* petitioner had contracted with the government to provide certain foreign plate glass for a government building which was being constructed. Part of the agreement was that if petitioner filled the order out of his then existing duty-paid stock of foreign plate glass, the government would allow the petitioner to replace what was used with duty-free glass. The plate glass provided came from petitioner's duty-paid stock and was replaced. Afterwards, however, petitioner imported 35 cases more of plate glass and claimed that it should be duty-free. The invoice sought to be introduced by the government was the one for the original replacement.

21. 116 U.S. at 634-35. In *Boyd,* this mutual concern of the Fourth and Fifth Amendments is called "the intimate relationship." The Court pointed out:

> They throw great light on each other. 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 633. The problem posed by Warden v. Hayden, 387 U.S. 294 (1967), is actually a product of this interplay. *See* note 1 *supra. See also* Couch v. United States, 409 U.S. 322, 349 (1973) (Marshall, J., dissenting), where Justice Marshall noted that both amendments involve "aspects of a person's right to develop for himself a sphere of personal privacy." *Id.* at 349; Mapp v. Ohio, 367 U.S. 643, 656-57 (1961); Davis v. United States, 328 U.S. 582 (1946); Weeks v. United States, 232 U.S. 383, 391-95 (1914). *But see* Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship,"* 13 U.C.L.A. L. REV. 857 (1966).

22. 116 U.S. at 630, where the Court stated:

> They [the principles behind the Fourth and Fifth Amendments] apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited.

between the invasion which occurred when one's papers were seized and when one's testimony was compelled,[23] the Court reasoned that the Fifth Amendment privilege extended to private papers.[24]

The scope of the protection accorded private papers by the Fifth Amendment was delineated in cases following *Boyd*. Courts held that papers would be protected from production in response to a subpoena if the papers were compulsorily seized,[25] personal,[26] incriminating,[27] testimonial in nature,[28] and in the possession of the one claiming the protec-

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The idea that the privilege protects privacy had its roots in the Boyd v. United States, 116 U.S. 616 (1886), decision in which it was said that the "essence of the offence . . . is the invasion of his indefeasible right of personal security, personal liberty, and private property." *Id.* at 630. Since that time, courts have been constant in their recognition of this interest. In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), the Court recognized a "right of each individual to a private enclave where he may lead a private life" [citation omitted] *Id.* at 55. In Couch v. United States, 409 U.S. 322 (1973), the Court recognized a "private inner sanctum of individual feeling and thought . . . ." *Id.* at 327. In Bellis v. United States, 417 U.S. 85, 91 (1974), the Court noted that the interest in privacy is interrelated with the Fifth Amendment. *See also* Fisher v. United States, 425 U.S. 391, 399 (1976); Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Schmerber v. California, 384 U.S. 757, 760-61 (1966); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); McKay, *supra* note 18. *But see* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

23. 116 U.S. at 633. The Court stated that "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

24. Although the privilege is generally viewed as being applicable to private papers, records, or books because of the requirement that the item seized be both testimonial and communicative in nature, it has been noted, at least on one occasion, that the privilege may extend to other items of evidence. In Schmerber v. California, 384 U.S. 757, 764 (1966), the Court noted that "[s]ome tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial."

25. *See* note 17 *supra*.

26. A number of cases have held that the papers and records of independent entities, *i.e.*, labor unions, partnerships, corporations, committees, are not the personal or private papers of their representatives. *See* Bellis v. United States, 417 U.S. 85 (1974), in which it was held that the Fifth Amendment privilege "applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life," *id.* at 87-88, but that it did not apply to partnership records held by an individual partner. *See also* Curcio v. United States, 354 U.S. 118 (1957) (records of a labor union not protected); Rogers v. United States, 340 U.S. 367 (1951) (records of the Communist Party of Denver not protected); United States v. Fleischman, 339 U.S. 349 (1950) (records of the Joint Anti-Fascist Refugee Committee not protected); United States v. White, 322 U.S. 694 (1944) (records of labor union not protected); Wilson v. United States, 221 U.S. 361 (1911) (corporate records not protected).

27. *See* McKay, *supra* note 18.

28. Limitations have been placed on the items of evidence to which the Fifth Amend-

tion.[29] If the papers did not fulfill all of these requirements, they would not be protected. If, however, they did fulfill all of these requirements, they would be protected from production by the Fifth Amendment.[30]

THE DECISION

In *Andresen v. Maryland,* the Court established a different standard for determining whether private papers are protected.[31] Noting that the Fifth Amendment protected against the introduction of compelled testi-

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ment applies. *See* Andresen v. Maryland, 427 U.S. 463, 487 n.2 (Brennan, J., dissenting). Courts have recognized a difference between testimonial evidence or evidence used in a testimonial manner and real evidence. Thus, even though evidence may be compelled or may be incriminating, if the evidence does not involve oral communications or written matter used in a testimonial manner, it may be introduced at trial against the individual who provided the evidence. *See, e.g.,* United States v. Dionisio, 410 U.S. 1 (1973) (voice samples permitted); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars permitted); United States v. Wade, 388 U.S. 218 (1967) (lineup identifications permitted); Schmerber v. California, 384 U.S. 757 (1966) (evidentiary use of blood samples permitted).

29. The Supreme Court in Couch v. United States, 409 U.S. 322 (1973) stated: "[w]e do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth . . . forbids." *Id.* at 336 n.20. *See also* Johnson v. United States, 228 U.S. 457, 459 (1913); Note, *The Fifth Amendment and the Protection of Records: Are Ownership and Possession Always Necessary?,* 9 GA. L. REV. 658, 659-60 (1975). However, the Court in *Couch* did note that there may be "constructive possession" situations in which divestiture of possession is so fleeting that the Fifth Amendment privilege may still apply. 409 U.S. at 333. *See also id.* at 337 (Brennan, J., concurring); Fisher v. United States, 425 U.S. 391, 398 (1976); Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations,* 6 LOYOLA (L.A.) L. REV. 274 (1973).

30. 427 U.S. 463 (1976). Justice Brennan stated that:

> [T]he Fifth Amendment protects an individual citizen against the *compelled production of testimonial matter* that *might tend to incriminate* him, provided it is a matter *that comes* within the *zone of privacy* recognized by the Amendment to secure to the individual "a private inner sanctum" of individual feeling and thought.

Id. at 485 (Brennan, J., dissenting) (emphasis added). Quoted portion of passage is from Couch v. United States, 409 U.S. 322, 327 (1973).

31. The Supreme Court's shift in its analysis of the Fifth Amendment privilege actually began with Fisher v. United States, 425 U.S. 391 (1976), which was decided earlier in the year. In *Fisher,* the Court held that an accountant's workpapers concerning a taxpayer's tax liability, could be obtained from the taxpayer pursuant to an IRS summons without violating the taxpayer's Fifth Amendment privilege. Although noting that the papers were not the taxpayer's "private papers," which was enough to resolve the case, the Court went on to state that absent any physical compulsion of the taxpayer, no Fifth Amendment privilege issue was present. *Id.* at 405-14. By shifting its focus from the nonprivate nature of the documents seized to the physical acts which accompanied the production of the documents, the Court, in effect, laid the foundation for the *Andresen* decision.

mony, the Court held that private papers would be protected if their production was "compelled" in a very narrow sense of the word. What was required was some act which either explicitly or implicitly compelled an individual to make or produce an incriminating communication. Without it, the Fifth Amendment would not protect against the production of private papers. This, the Court stated, was the lesson of history[32] and of case law,[33] including cases involving the production of an accused's papers.[34]

The Court distinguished earlier cases involving subpoenas from cases involving searches and seizures. The Court stated that in the former cases an implied act of compelled testimony could make the privilege applicable.[35] By responding to the subpoena, an individual implicitly authenticates the documents.[36] The production is tantamount to a statement that the records are in fact those which are requested. Since a failure to satisfactorily respond to the subpoena would be subject to contempt, the Court stated that such a situation might amount to compelled testimony for the purposes of the Fifth Amendment.[37] The Court

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32. 427 U.S. at 470.

33. *See* 427 U.S. at 477.

34. In Gouled v. United States, 255 U.S. 298, 309 (1921), the Court stated:

> [t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant.

This, the *Andresen* Court stated, was supported by Marron v. United States, 275 U.S. 192 (1927), and by Abel v. United States, 362 U.S. 217 (1960). 427 U.S. at 474. In *Marron*, the Court held that the introduction of an accused's business ledger at trial did not violate his Fifth Amendment rights. In *Abel*, the Court held that the introduction of the accused's false identity papers and certain written evidence of espionage did not violate his Fifth Amendment rights. In both cases, the evidence was secured through no help of the accused and the searches were conducted pursuant to valid warrants.

35. 427 U.S. at 473-74.

36. *Id.* Support for this proposition comes from dicta in a number of the Court's prior decisions. For example, in Fisher v. United States, 425 U.S. 391, 410 (1976), the Court noted that "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer." *See also* Bellis v. United States, 417 U.S. 85, 88 (1974), *quoting from* United States v. White, 322 U.S. 694, 698 (1944); Couch v. United States, 409 U.S. 322, 330, 346-48 (Marshall, J., dissenting); 8 J. WIGMORE, EVIDENCE §2264, at 380 (McNaughton rev. 1961).

37. 427 U.S. at 473-74. The uncertainty of this argument is underscored by the Court's recent half-hearted support for it. In Fisher v. United States, 425 U.S. 391, 410 (1976), the Court stated:

> [t]he elements of compulsion are clearly present [in a subpoena situation], but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical

saw a difference, however, in the case of a search and seizure. Provided that the search and seizure are legal,[38] there are no constitutional problems when one's documents are seized[39] and introduced into evidence. The government discovers, produces, and authenticates the documents on its own.[40] The defendant is not forced to say or to do anything which might amount to compelled testimony; he merely stands by while the production of his documents is "independently secured through skillful investigation."[41]

Recognizing this distinction between subpoena and search and seizure cases, the *Andresen* Court set forth certain guidelines for determining whether a defendant's private documents may be seized and introduced into evidence against him at trial. The presence of any one of three factors in a factual situation would be enough to prevent introduction of the seized items at trial. One factor to be considered by the court is whether the search was illegal.[42] If illegal, then the very illegality of the search would make the evidence "compelled," and the introduction into evidence of inculpatory items would constitute a violation of the Fifth Amendment.[43] A second factor to consider is whether the communication in the private documents was made under coercion. If the individual was forced to commit his thoughts to writing, then the type of compelled testimony which is explicitly protected against by the privilege against self-incrimination would be present.[44] The third factor is

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answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

See also id. at 414.

38. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971) for a discussion of the requirements of a valid search. In general, warrantless searches are "per se" unreasonable, except in certain narrowly defined circumstances.

39. U.S. CONST. amend. IV provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." The *Andresen* Court noted that it was the presence of a Fourth Amendment violation in earlier Supreme Court cases which was the "legal predicate" for the Fifth Amendment violation (also known as the "convergence theory"). 427 U.S. at 472 n.6 (1976). *See* Boyd v. United States, 116 U.S. 616, 633 (1886); Hale v. Henkel, 201 U.S. 43 (1906). Reasoning that absent a Fourth Amendment violation, there would be no Fifth Amendment violation, the Court stated that a Fourth Amendment violation constituted compulsion for Fifth Amendment purposes. *See generally* Abel v. United States, 362 U.S. 217 (1960) and Marron v. United States, 275 U.S. 192 (1927) in which no Fifth Amendment violation was present in situations where items had been seized pursuant to lawful searches.

40. 427 U.S. at 474.

41. *Id.* at 477, *quoting from* Watts v. Indiana, 338 U.S. 49, 54 (1949).

42. *See* note 38 *supra.*

43. 427 U.S.at 472.

44. 427 U.S. at 475. In support of its reasoning the Court analogizes the situation of a

whether the defendant was forced to authenticate the seized items at trial.[45] If he was, then his statements might constitute compelled testimony which is forbidden by the privilege.[46] Absent one of these factors, there could be no grounds for an assertion of the self-incrimination privilege.[47]

The *Andresen* Court found none of the factors to be present in the factual situation before it. The investigative unit had proceeded under authority of a valid search warrant which had been issued by an impartial magistrate.[48] The records were in existence prior to the search and the petitioner was not forced to commit his thoughts to the records when they were made. Further, at trial the state authenticated the records by means of a handwriting expert. At no time during the search and seizure or introduction of the seized items at trial was the petitioner forced to say or do anything. In the absence of any of one of the aforementioned factors, the *Andresen* Court held that the Fifth Amendment privilege was inapplicable to the seized business records.[49]

Criticism Based Upon Prior Case Law

In establishing its standard, the *Andresen* Court failed to discuss adequately the nature of the item seized. The Court chose to take a narrow look at only one of the requirements, compulsion, which are necessary before the Fifth Amendment will protect against the production of private papers.[50] With its special definition of compelled testimony, the Court apparently is signalling a return to the historic roots of the privilege. The message of *Andresen* is that the Fifth Amendment privilege only protects against compelled, implicit or explicit, oral or

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seizure of forced writing to the seizure of compelled "oral communications." If an individual is forced to communicate his thoughts to another, he is compelled for purposes of the Fifth Amendment. If, however, he freely communicates with another, his conversations may be seized and introduced at trial against him. *See* Hoffa v. United States, 385 U.S. 293 (1966), in which the accused voluntarily communicated with a government informant concerning a jury tampering scheme. In like manner, if one is forced to commit his thoughts to writing, he is being "compelled" to communicate.

45. Although specifically referring to a subpoena situation, one may also be forced to authenticate within the same sense if during a legal search he is asked to produce or discover certain documents. By producing and discovering in response to a search warrant, one certainly communicates as much as if he were responding to a subpoena.

46. *See* text accompanying notes 36-37 *supra.*

47. *See* 427 U.S. at 473, 477.

48. *See generally* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971), for the importance of the fact that the warrant be issued by an impartial and detached magistrate.

49. 427 U.S. at 476-77.

50. *See* text accompanying notes 25-30 *supra.*

written testimony. It does not protect against the production of "private" papers, unless either their creation or production is compelled.[51] In dismissing *Boyd v. United States*[52] as the creation of the since-rejected "mere evidence" rule,[53] the Court refused to countenance any privacy interest in papers beyond the wording of the privilege.

The *Andresen* decision rests upon a very narrow distinction which has been criticized by courts and commentators alike.[54] The Court stated that the Fifth Amendment protects against a subpoena of private papers because of the presence of some implicit compelled testimony, while it does not protect against the seizure of private papers pursuant to search warrant because the compelled testimony is lacking. This distinction misapprehends the real interest which courts have stated as being protected by the Fifth Amendment.

The heart of the Fifth Amendment privilege is that it protects against the introducton of the testimony of an accused if it is seized against his will.[55] Whether an accused is "physically forced" to say or do anything

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51. As the Court noted in Johnson v. United States, 228 U.S. 457, 458 (1913): "A party is privileged from producing the evidence but not from its production." *See also* Couch v. United States, 409 U.S. 322, 328 (1973), which stated that the Fifth Amendment privilege against self-incrimination "adheres basically to the person, not to information that may incriminate him."

52. 116 U.S. 616 (1886).

53. 427 U.S. at 472 n.6. The "mere evidence" rule was stated in Gouled v. United States, 255 U.S. 298 (1920), a case decided 34 years after the *Boyd* decision. The essence of the rule was that search warrants could not be issued for mere exploratory searches through an individual's house or effects. Warrants could only issue if the government or some complaining party had a property interest in the items desired to be seized. Without such a property interest, a "reasonable" search could not be made. The "mere evidence" rule was rejected by the court in Warden v. Hayden, 387 U.S. 294 (1967).

54. *See* 427 U.S. at 486 (1976), in which Justice Brennan stated:

> A privilege protecting against the compelled production of testimonial material is a hollow guarantee where production of that material may be secured through the expedient of search and seizure.

See also Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S 991 (1971), in which the court stated: "[the] distinction between obtaining papers from a defendant by search and seizure rather than by force of process is more shadow than substance." *Id.* at 149; C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §665 n.88 (1969), which stated:

> It is much less clear that such a distinction [between the compulsion produced by a subpoena and that produced by a search warrant] would be sound, or fully consistent with the interests protected by the privilege against self-incrimination.

See generally Lipton, *Search Warrant in Tax Fraud Investigations*, 56 A.B.A.J. 941 (1970).

55. That this is the meaning of the compulsion which is prohibited by the Fifth Amendment was made clear in Gouled v. United States, 255 U.S. 298 (1921), where it was stated:

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an

either before or during a seizure of this testimony may have nothing whatsoever to do with whether the testimony is taken against his will. Compulsion to do or to say something may be present even without a show of "physical force."[56] There is no "physical force" in the case of a subpoena for the production of one's papers. An order is issued and service made. Yet, lurking behind the service is the implied threat that failure to comply will be treated as contempt.[57] Likewise, there is no physical force in the case of a search warrant for the seizure of an accused's papers. The *Andresen* Court was correct in stating that the accused is not forced to aid in the discovery, production, or authentication of the documents. Yet, once again, lurking in the background is the threat that if the accused does not comply, he will be forced to do so. A refusal to allow entry would result in the law enforcement officers' employing various self-help methods which in another context would be labelled "breaking and entering."[58] The Fifth Amendment protects against this sort of implied compulsion as well as the implied threat of contempt that is present in a subpoena order.

Furthermore, the subpoena cases prior to *Andresen* did not turn upon the Court's suggested narrow reading of the "compulsion" requirement of the Fifth Amendment. In these cases, the reason the Fifth Amendment was held to be applicable or inapplicable was the presence or absence of a privacy interest. Contrary to the Court's understanding,

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> illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

Papers seized pursuant to a valid search warrant are as much seized against an accused's will as are papers seized pursuant to an illegal search. In both cases, the accused has no opportunity to refuse seizure. *Id.* at 306. *See* Hill v. Philpott, 445 F.2d 144, 149 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); United States v. Lefkowitz, 285 U.S. 452, 466-67 (1932); Hale v. Henkel, 201 U.S. 43, 76 (1906); Boyd v. United States, 116 U.S. 616 (1886).

56. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966), in which blood was extracted from the defendant's body. Although the defendant was not "forced" to say or do anything during the extraction, the Court still found compulsion present. *See also* Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars taken from the defendant held to be "compelled").

57. FED. R. CRIM. P. 17.

58. *See* D.C. CODE ENCYL. §23-301, 18 U.S.C. §3109 (1970). *See also* VonderAhe v. Howland, 508 F.2d 364 (6th Cir. 1975), in which Circuit Judge Ely pointed out this fact:

> One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be broken down, he would be placed under arrest, and the desired material would be seized. How the imminence of such force can be considered as anything other than compulsion escapes us.

Id. at 373 (Ely, J., concurring in part, dissenting in part).

Boyd v. United States, was not concerned primarily with the "mere evidence" rule.[59] The *Boyd* case was concerned mainly with privacy.[60] Its holding[61] was based upon the belief that the Fifth Amendment was framed with the protection of privacy in mind.[62] The constitutional offense occurred in *Boyd* because the accused's private realm of thought and feeling had been invaded when the private papers were requested, not because the request was for "mere evidence." The petitioner was being asked to create the government's case by providing his own private testimonial paper. *Boyd* stated that this was constitutionally impermissible because the order to produce private papers forced the accused to be a witness against himself.[63]

The *Andresen* Court's reading of cases following *Boyd* is similarly defective. Because they did not deal with private papers, those cases do not detract from the concern for the private nature of the papers at issue. For example, in *Wilson v. United States,*[64] the Court held that a representative of a corporation may not assert his Fifth Amendment privilege against the subpoena of corporate records that are in his custody. Corporate records, although possibly incriminating, are not the representative's private records. They are the records of the corporate entity which he represents and are essentially public in nature.[65] The Fifth Amendment privilege does not apply to them because of their public nature.[66]

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59. Although the "mere evidence" rule is traditionally viewed as a rule of evidence concerned with property interests, it is to be noted that the reason it was overruled in Warden v. Hayden, 387 U.S. 294, 301-02 (1967), was that privacy was no more disturbed by a seizure of "mere evidence" than it was by a seizure of the instrumentalities of a crime. The "mere evidence" rule represented an unsuccessful attempt at protecting privacy interests. Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis,* 69 NW. U. L. REV. 626, 633 (1974). An interpretation along these lines would appear to be more consistent with the reasoning of Boyd v. United States, and the specific question that was reserved in *Warden.*

60. *Id.* at 630.

61. 116 U.S. at 634-35.

62. *See* note 22 *supra.*

63. 116 U.S. at 633.

64. Wilson v. United States, 221 U.S. 361 (1911).

65. Records also are public in nature if they are so-called "required records." Shapiro v. United States, 335 U.S. 1 (1948). If one is required to maintain records by authority of law, he may not raise his Fifth Amendment privilege to defeat an order for their production. This is because the Fifth Amendment was meant to protect the individual from governmental compulsion which forces an individual to "divulge information in which the government's only legitimate interest arises from the incriminating nature of the information." Note, *The Fifth Amendment and the Protection of Records: Are Ownership and Possession Always Necessary?,* 9 GA. L. REV. 658, 661 (1975).

66. If, however, the records were those of the representative kept in a purely personal

Similarly, in *Couch v. United States*,[67] the Court held that a subpoena requiring the production of the defendant's papers by her accountant did not violate the Fifth Amendment. The *Andresen* Court maintains that the foundation for the decision in *Couch* was the absence of compulsion against the accused.[68] Thus, the *Andresen* Court suggests that the holding in *Couch* was based upon the recognition " . . . that the protection afforded by the . . . Fifth Amendment 'adheres basically to the person, not to information which may incriminate him.' "[69] However, this represents an incorrect reading of *Couch* which, in fact, stands for the proposition that papers that are no longer private may be subpoenaed and introduced into evidence at trial. By voluntarily transferring possession of her private papers to her accountant, the defendant gave up her expectation of privacy.[70] The papers lost the protection of the Fifth Amendment not because the privilege attaches to the party only, but rather because the papers were no longer private.[71] *Couch* says nothing to defeat the idea that the Fifth Amendment protects against the compelled production of private papers.[72]

Finally, *Andresen* cites *Marron v. United States*[73] and *Abel v. United States*,[74] cases in which papers which arguably were private were seized and introduced into evidence over Fifth Amendment objections. However, this fact does not necessarily detract from the idea that the privilege is concerned with the private nature of the papers seized; in addition to the requirement that a paper be private, the Supreme Court has held that it must be testimonial and used in a testimonial manner.[75]

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capacity, the privilege would be applicable. *See* Bellis v. United States, 417 U.S. 85, 89-90 (1974); United States v. White, 322 U.S. 694, 699-700 (1944); Wilson v. United States, 221 U.S. 361, 380 (1911).

67. 409 U.S. 322 (1973).

68. 427 U.S. at 472-73.

69. *Id.* at 473, *quoting* Couch v. United States, 409 U.S. 322, 328 (1973).

70. Couch v. United States, 409 U.S. 322, 335-36 (1973).

71. Thus, in Hoffa v. United States, 385 U.S. 293 (1966), when the accused communicated with the government informant, he lost his Fifth Amendment protection because he gave up his reasonable expectation of privacy by making the communication to the informant, rather than because the communication was not compelled.

72. *See also* Perlman v. United States, 247 U.S. 7 (1918), and Johnson v. United States, 228 U.S. 457 (1913). In these cases, as in *Couch*, materials requested by subpoena were held to be not privileged because they had been transferred from the defendant to a third party.

73. 275 U.S. 192 (1927).

74. 362 U.S. 217 (1960).

75. *See* note 30 *supra*. Thus, in Marron v. United States, 275 U.S. 192 (1927), the business ledger was allowed into evidence over Fourth and Fifth Amendment objections, not because it was legally seized, but rather because it was offered as part of the "equipment . . . used to commit the offense," *id.* at 199, and not as testimonial evidence.

Items of evidence may be private in nature, their production may be compelled, and their introduction may be incriminating, but absent a characterization as "testimonial," they are not protected from production by the Fifth Amendment.[76] The holdings in both *Marron* and *Abel* were based upon the non-testimonial nature of the evidence at issue;[77] they do not represent a retreat from the historic concern for privacy.[78]

IMPACT

The impact of the Andresen decision in the area of criminal procedure may well be substantial. Although the Court was only confronted with a situation involving a seizure of private business records pursuant to a search warrant, the broad scope of its reasoning leaves room for its applicability to other factual patterns. By emphasizing form over substance in its reasoning, the Court has impliedly stated that any item of evidence may be properly seized and introduced into evidence at trial. All that is required is that the search be legal and that there be no "forced" testimonial communication during the various stages of the search, seizure, and subsequent introduction of the item into evidence at trial. The nature of the item will receive no attention in the Court's analysis. Thus, it would appear that the most intimate of items, a diary, for example, can now be the subject of a reasonable search and seizure as long as the technical requirements of the Fourth and Fifth Amendments are met. After *Andresen,* it would appear that only private items which have been subpoenaed would remain within the protective scope of the Fifth Amendment.[79] Yet, even this is not absolutely certain.[80]

The end result of *Andresen* is not simply that private papers are no longer protected from seizure by the privilege, but, additionally, that the extent to which privacy is protected by the Fifth Amendment has been restricted solely to the words of the individual. The privilege still protects one from making or producing incriminating statements under

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Likewise, in Abel v. United States, 362 U.S. 217 (1960), the papers and evidence of espionage were admitted because they were offered as either corroborative evidence or "as useful means for one engaged in espionage." *Id.* at 220.

76. *See* Andresen v. Maryland, 427 U.S. 463, 490 n.5 (Brennan, J., dissenting).

77. *Id.*

78. *Id.*

79. This is because of the implied oral communication present when one produces in response to a subpoena, not because of any sanctity involved in the nature of the items requested. *See* text accompanying notes 35-36 *supra.*

80. In *Andresen,* the Court states only that "[t]he Fifth Amendment *may* protect an individual from complying with a subpoena for the production of his personal records in his possession." 427 U.S. at 473-74.

duress. However, the zone of privacy, that private "inner sanctum of thought and feeling," which has been wistfully referred to in a number of the Court's opinions,[81] has been eliminated from the scope of the Fifth Amendment.

Harry Lee

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81. Perhaps the strongest statement of the scope of the Fifth Amendment's protection of privacy was made by Justice Douglas in Warden v. Hayden, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting). He stated:

> Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. . . . Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.