
POSTSCRIPT

ARNOLD, DIGITAL MEDIA, AND THE RESURRECTION OF *BOYD*

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In the fall of 2006, United States District Judge Dean D. Pregerson handed down *United States v. Arnold*, which held that U.S. Customs agents violated the Fourth Amendment when they searched a laptop computer belonging to an inbound international traveler at Los Angeles International Airport without any particularized suspicion.¹ The Ninth Circuit recently overturned the district court’s ruling,² but the district court’s analytical approach remains of vital interest. That is because the decision was the first in the nation to find that the “border exception” to the Fourth Amendment—which permits law enforcement to conduct suspicionless, routine searches of personal items crossing the international border or its functional equivalent³—did not apply to laptop computers.⁴ Given its novelty and potential implications for *all* digital media, it is hardly

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1. *United States v. Arnold*, 454 F. Supp. 2d 999, 1003–04 (C.D. Cal. 2006), *rev’d*, No. 06-50581, 2008 WL 1776525 (9th Cir. Apr. 21, 2008).

2. *United States v. Arnold*, No. 06-50581, 2008 WL 1776525 (9th Cir. Apr. 21, 2008).

3. *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

4. Several other courts had sidestepped the issue, finding no need to decide the applicability of the border exception rule because other Fourth Amendment doctrines upheld the search of the digital media at the border. *See, e.g.*, *United States v. Romm*, 455 F.3d 990, 997 n.11 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1024 (2007); *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006); *United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005); *United States v. Furukawa*, No. 06-145, 2006 WL 3330726, at *5 (D. Minn. Nov. 16, 2006).

surprising that the district court's ruling in *Arnold* has grabbed the attention of the press,⁵ law student commentators,⁶ civil liberties lawyers,⁷ and, most notably, other judges.⁸

Curiously enough, the district court in *Arnold* rested its holding on the Supreme Court's recent decision in *United States v. Flores-Montano*.⁹ There, the Court held that border agents looking for illegal drugs could dismantle the gas tank of a car crossing the border without any need to demonstrate suspicion because "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—*dignity and privacy interests of the person being searched*—simply do not carry over to vehicles."¹⁰ Prior to *Arnold*, the lower courts had taken a cue from the Supreme Court's prior decisions and had defined "intrusiveness"—and the attendant affronts to dignity and privacy—solely in terms of *physical* intrusiveness, finding that physically intrusive strip searches or body cavity searches, or searches which destroyed objects, were "nonroutine" and thus had to be justified by "reasonable suspicion" that the international traveler was engaged in illegal conduct; all other border searches, however, were deemed "routine" (or

5. See, e.g., Ryan Singel, *What's in a Laptop? Court Ponders Legality of Border Searches*, WIRE, (June 20, 2007), at <http://www.wired.com/politics/law/news/2007/06/laptopsearches>; E. Michael Power, Jonathan Gilhen & Roland L. Trope, *Setting Boundaries at Borders: Reconciling Laptop Searches and Privacy*, IEEE SECURITY & PRIVACY, Mar.–Apr. 2007, at 72, available at http://www.computer.org/portal/site/security/menuitem.6f7b2414551cb84651286b108bcd45f3/index.jsp?&pName=security_level1_article&TheCat=1001&path=security/2007/n2&file=pri.xml; Adam Liptak, *If Your Hard Drive Could Testify . . .*, N.Y. TIMES, Jan. 7, 2008, at A12, available at http://www.nytimes.com/2008/01/07/us/07bar.html?_r=1&sq=.

6. See Rasha Alzahabi, Note, *Should You Leave Your Laptop at Home when Traveling Abroad?: The Fourth Amendment and Border Searches of Laptop Computers*, 41 IND. L. REV. 161 (2008); Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971 (2007); Kelly A. Gilmore, Note, *Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border*, 72 BROOK. L. REV. 759 (2007); John W. Nelson, Note, *Border Confidential: Why Searches of Laptop Computers at the Border Should Require Reasonable Suspicion*, 31 AM. J. TRIAL ADVOC. 137 (2007).

7. Earlier this year, several groups sued the government to compel disclosure of its policies and rules regarding border searches and seizures of electronic devices. See, e.g., Anita Ramasastry, *Searching Laptops at the Border and in Airports: A Disturbing Practice that Imperils Fourth and First Amendment Rights*, FINDLAW, Feb. 20, 2008, at <http://writ.news.findlaw.com/ramasastry/20080220.html>.

8. See, e.g., *United States v. Seljan*, 497 F.3d 1035, 1048 (9th Cir. 2007) (Pregerson, J., dissenting), *reh'g en banc granted*, 512 F.3d 1203 (9th Cir. 2008); *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007); *United States v. Hampe*, No. 07-3-B-W, 2007 WL 1192365 at *4 (D. Me. Apr. 18, 2007), *aff'd*, No. CR-07-3-B-W, 2007 WL 1806671 (D. Me. June 19, 2007); *Furukawa*, 2006 WL 3330726.

9. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

10. *Id.* at 152 (emphasis added).

were simply not labeled at all) and could be conducted without any suspicion at all.¹¹ Indeed, the Ninth Circuit in *Arnold* ultimately adopted that reasoning.¹² The district court's decision, however, had seized on the Supreme Court's reference to "dignity and privacy interests"¹³ and took a more expansive view of intrusiveness, reasoning that "the search of one's private and valuable personal information stored on a hard drive or other electronic storage device can be just as much, if not more, of an intrusion into the dignity and privacy interests of a person" than physically intrusive searches.¹⁴

On its face, the district court's opinion in *Arnold* marked a shift in the *type* of intrusiveness that would trigger the need for greater government justification of a search at the border. Broadening the focus from physical intrusiveness to the "mental intrusiveness" entailed in the search of digital media simultaneously shifted the focus of the intrusiveness inquiry from an inquiry into what law enforcement *does* to what law enforcement *could learn*. Although the Ninth Circuit has reversed the district court in *Arnold*,¹⁵ and at least one other district court has disagreed with it,¹⁶ the district court's opinion in *Arnold* remains significant because it calls attention to a much broader and more fundamental issue that the courts and legal academy are just beginning to address: should digital media be accorded greater protection under the Fourth Amendment than more traditional items? In this essay, I raise the next logical questions: What is the *rationale* for granting digital media greater Fourth Amendment scrutiny? What are its implications? And most pressingly, what is the *basis* for this rationale?

In recent years, courts and commentators have started treating information stored digitally—on media from hard drives to cell phones to iPods to thumb drives—differently than information stored "the old

11. See, e.g., *id.* at 154 & n.2; *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n.4 (1985) ("[W]e suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches."); see also *Seljan*, 497 F.3d at 1042; *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006); *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995); *United States v. Asbury*, 586 F.2d 973, 975–76 (2d Cir. 1978); *United States v. Roberts*, 86 F. Supp. 2d 678, 688 (S.D. Tex. 2000), *aff'd*, 274 F.3d 1007 (5th Cir. 2001).

12. *United States v. Arnold*, No. 06-50581, 2008 WL 1776525, at *3–*4 (9th Cir. Apr. 21, 2008).

13. *United States v. Arnold*, 454 F. Supp. 2d 999, 1002, 1003 (C.D. Cal. 2006) (citing *Flores-Montano*, 541 U.S. at 152), *rev'd*, No. 06-50581, 2008 WL 1776525 (9th Cir. Apr. 21, 2008).

14. *Id.* at 1000. *Accord* Alzahabi, *supra* note 6, at 178–79.

15. *Arnold*, 2008 WL 1776525.

16. *United States v. Hampe*, No. 07-3-B-W, 2007 WL 1192365 at *4 (D. Me. Apr. 18, 2007), *aff'd*, No. CR-07-3-B-W, 2007 WL 1806671 (D. Me. June 19, 2007).

fashioned way”—that is, in hardcopy form on paper. Contrary to the commonly voiced concern that technology will *narrow* the zone of constitutionally protected privacy,¹⁷ these authorities have viewed advances in technology as cause to *expand* the Fourth Amendment.

Three recent examples illustrate the point. First, the district court’s decision in *Arnold* held that laptop computers—unlike other objects transported across international borders—could be searched only upon a showing of “reasonable suspicion” rather than no suspicion.¹⁸ Second, two federal courts (the Fifth Circuit and a district court in northern California) have held that a cell phone—unlike a wallet—is to be “considered a ‘possession within an arrestee’s immediate control’ rather than as an element of the person,” such that a warrantless search of a cell phone incident to arrest must be nearly contemporaneous with the arrest, whereas a wallet could be searched at any time after arrest without any additional Fourth Amendment showing.¹⁹ Third, Orin Kerr has argued that the plain view doctrine, which authorizes the use of evidence in plain view of law enforcement agents, may need to be curtailed or eliminated entirely when applied to searches of digital media, though retained for nondigital evidence.²⁰

Although the specific context of these three examples varies, they share critical commonalities. In each situation, the net effect of the differential treatment of digital media is to place greater limits on the permissible *scope* of the search, which is now to be governed either by the “reasonable suspicion” standard (which requires the search to be “reasonably related in scope to the circumstances which justified the interference in the first place”)²¹ or by a warrant (which limits the scope of the search to the warrant’s terms). More critically, in each situation, the *rationale* for treating computers and digital media devices differently from

17. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (expressing concern about “police technology . . . erod[ing] the privacy guaranteed by the Fourth Amendment”).

18. *Arnold*, 454 F. Supp. 2d at 1007.

19. *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at *1 (N.D. Cal. May 23, 2007). *Accord* *United States v. Finley*, 477 F.3d 250, 259–60 & n.7 (5th Cir. 2007) (upholding “substantially contemporaneous” search of cell phone as an item in arrestee’s possession), *cert. denied*, 127 S. Ct. 2065 (2007).

20. Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 568–71 (2005). The Ninth Circuit has yet to confront the issue directly. *See* *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1112 n.48 (9th Cir. 2008).

21. *Illinois v. Caballes*, 543 U.S. 405, 418 (2005) (Ginsburg, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968)); *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987) (plurality opinion) (same); *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (same); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (same).

other so-called “closed containers”²² is the same: (1) digital media stores a much larger volume of information than traditional objects,²³ and (2) the information stored on these devices is typically more personal in nature.²⁴ Due to the “quantity and quality”²⁵ of the information stored digitally, a search without any limitations would expose a large amount of potentially intimate information to the eyes of law enforcement; *that*, according to these authorities, is what justifies greater Fourth Amendment protection.

But where do these twin rationales—quantity and quality—come from? I submit that they come as much from the constitutional policies underlying the Fifth Amendment’s privilege against self-incrimination as from the Fourth Amendment.

The Fourth Amendment does not seem to lend much support to the proposition that the government’s authority to conduct lawful searches should hinge on the volume of information or its personal nature. Since the Supreme Court’s landmark decision in *Katz v. United States*,²⁶ the Fourth Amendment has functioned as a means of protecting an individual’s legitimate expectations of privacy by balancing those expectations against the government’s interests.²⁷ Under this paradigm, the volume of

22. Numerous courts and commentators have treated computers or electronic devices and closed containers equally. *See, e.g.*, *United States v. Arnold*, No. 06-50581, 2008 WL 1776525, at *3 (9th Cir. Apr. 21, 2008); *United States v. Roberts*, 86 F. Supp. 2d 678, 688 (S.D. Tex. 2000) (analogizing “an individual’s computer files and computer hard drive to the protection given an individual’s closed containers and closed personal effects”), *aff’d*, 274 F.3d 1007 (5th Cir. 2001); *United States v. Barth*, 26 F. Supp. 2d 929, 936–37 (W.D. Tex. 1998) (making the same analogy); *United States v. O’Razvi*, No. 97 CR. 1250(DLC), 1998 WL 405048, at *6 (S.D.N.Y. July 17, 1998) (same), *aff’d*, 173 F.3d 847 (2d Cir. 1999); *United States v. David*, 756 F. Supp. 1385, 1390 (D. Nev. 1991) (same); *United States v. Blas*, No. 90-CR-162, 1990 WL 265179, at *21 (E.D. Wis. Dec. 4, 1990) (same); Kerr, *supra* note 20, at 533, 549 (same); Alzahabi, *supra* note 6, at 181.

23. *Park*, 2007 WL 1521573, at *8 (“[M]odern cellular phones have the capacity for storing immense amounts of private information.”); *Arnold*, 454 F. Supp. 2d at 1000 (“[T]echnological advances permit individuals and businesses to store vast amounts of private, personal and valuable information within a myriad of portable electronic storage devices including laptop computers, personal organizers, CDs, and cellular telephones.”); Kerr, *supra* note 20, at 533 (“Computers are like . . . vast warehouses in an informational sense.”); Coletta, *supra* note 6, at 999–1000 (noting that laptops “store massive amounts of data”); Gilmore, *supra* note 6, at 781 (“[T]he storage capacity of these machines presents issues not previously encountered in the border search context.”).

24. *Park*, 2007 WL 1521573, at *8–*9 (noting the “quality of information that can be stored on a cellular phone”); *Arnold*, 454 F. Supp. 2d at 1003–04 (“People keep all types of personal information on computers, including . . . [,] confidential client information . . . [,] confidential sources . . . [, and] trade secrets.”); Kerr, *supra* note 20, at 569 (noting the personal nature of information stored on electronic devices); Alzahabi, *supra* note 6, at 181, 183 (same); Coletta, *supra* note 6, at 1000–01 (same); Nelson, *supra* note 6, at 141 (“Laptops are extensions of the self.”).

25. *Park*, 2007 WL 1521573, at *9.

26. *Katz v. United States*, 389 U.S. 347 (1967).

27. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–50 (1990); *Nat’l Treasury Employees*

information is typically of little moment. A police officer with a warrant to search a residence for contraband or evidence may do so whether the residence is a one-room apartment or a mansion. The quantum of suspicion (that is, probable cause) needed to justify the warrant is the same no matter how large the residence and no matter how many rooms that the police may have to search while looking for the object(s) of their search, even though the likelihood of discovering other contraband or evidence in plain view certainly increases with the size of the location searched. Thus, when it comes to Fourth Amendment principles, volume does not usually matter.²⁸

Nor does the nature of the information seized. To be sure, the Court has long treated certain *locations* as sacrosanct, first among them being the private enclave of one's home.²⁹ Our thoughts are even more private, and there is little question that grave Fourth Amendment concerns would arise if law enforcement could somehow "search" the enclave of our minds. Thus far, however, the Fourth Amendment has not granted any special protection to those thoughts we choose to memorialize, no matter how private. For instance, few would question the authority of Customs agents to search an international traveler's diary at the border.³⁰ Consequently, the fact that digital media such as laptops, BlackBerrys, and cell phones may act as extensions of our minds because they often contain information of an intensely personal nature that few people would have written down and carried with them absent these devices³¹ would not, at first blush, appear to warrant any special treatment under the Fourth Amendment.

Of course, information stored on digital media is not analytically

Union v. Von Raab, 489 U.S. 656, 665–66 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989); O'Connor v. Ortega, 480 U.S. 709, 719–20 (1987); United States v. Montoya de Hernandez, 473 U.S. 531, 539–40 (1985). Another way of thinking about it, as Kerr has noted, is that the Fourth Amendment regulates the information flow between individuals and the government. Kerr, *supra* note 20, at 535.

28. The Ninth Circuit, in fact, explicitly rejected the argument that the storage capacity of laptops distinguishes them from other containers crossing the border. *United States v. Arnold*, No. 06-50581, 2008 WL 1776525, at *5 (9th Cir. Apr. 21, 2008).

29. *E.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Illinois v. McArthur*, 531 U.S. 326, 340 n.3 (2001) (Stevens, J., dissenting) ("Principled respect for the sanctity of the home has long animated this Court's Fourth Amendment jurisprudence."); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *Payton v. New York*, 445 U.S. 573, 601 (1980) (discussing the "sanctity of the home"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (same).

30. See *Arnold*, 2008 WL 1776525, at *5 ("Arnold has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers' luggage that the Supreme Court and we have upheld."). *But see infra* notes 53–54 and accompanying text.

31. See, *e.g.*, Coletta, *supra* note 6, at 1106 ("[A] laptop search is more akin to searching inside an individual's diary or brain."); Nelson, *supra* note 6, at 141 ("Laptops are extensions of the self.").

identical to a diary. Most notably, digital media often—though not always—reflects not only one’s thoughts, but also one’s *thought processes*. A laptop often records websites visited, electronically stored documents often contain metadata reflecting the history of changes to the document, and most forms of digital media continue to store data that the user has affirmatively attempted to delete.³² This additional information—which is often digitally recorded without the user’s knowledge³³—provides additional insight into a person’s mind that a diary typically does not. Whether or not this is enough by itself to distinguish a diary from digital media, the nature of the information obtained has yet to play a substantial role in Fourth Amendment doctrine.

There is another provision of the Constitution more directly aimed at ensuring that the government does not have access to our most intimate thoughts: the Fifth Amendment’s privilege against self-incrimination.³⁴ That provision provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”³⁵ In *Murphy v. Waterfront*

32. Another way in which digital media differs from a diary (in addition to its storage capacity) is that digitally stored information may require special equipment, such as forensic tools, to read. The need for additional equipment makes digitally stored information somewhat more like the thermal energy in *Kyllo*, 533 U.S. at 35–36, and the location information transmitted by beeper in *United States v. Karo*, 468 U.S. 705, 714–15 (1984). But it is not identical: Law enforcement in *Kyllo* and *Karo* violated the Fourth Amendment by obtaining information that was otherwise unobtainable because it was inside the home. *Kyllo*, 533 U.S. at 34; *Karo*, 468 U.S. at 716. With digital media, however, the individuals choose to memorialize their thoughts and then carry those memorializations with them, thereby destroying the expectation of privacy that the Court in *Kyllo* and *Karo* sought to protect. Cf. *United States v. Knotts*, 460 U.S. 276 (1983) (finding no Fourth Amendment violation when police used a beeper to follow a suspect’s travels on public roads, where he had no expectation of privacy).

33. Kerr, *supra* note 20, at 542.

34. Some defendants have also sought to bolster the Fourth Amendment by reference to the First Amendment’s protection of expressive material. See, e.g., *United States v. Ickes*, 393 F.3d 501, 506–07 (2005). It is unclear whether and how the First Amendment supports granting greater protection to digital media, however. To begin with, court decisions and commentary have relied upon the quality and quantity of information stored on digital media—not the First Amendment—to justify greater Fourth Amendment scrutiny. See *supra* text accompanying notes 24–29. It is, moreover, difficult to see how one’s intimate thoughts—which are entitled to greater protection due to their personal nature—are at the same time entitled to First Amendment protection because they are *expressive*; expressiveness, at a minimum, seems to entail *communication* of that information. Thus, the conflict “between the Crown and the press” that sometimes requires “scrupulous exactitude” in the application of the Fourth Amendment to expressive material also protected by the First Amendment does not appear to be squarely implicated. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564–65 (1978) (citations and internal quotations omitted). That it not to say, however, that the Court might not grant even material that is not shared with others some level of protection, as it has held that possession of obscene material having *no* First Amendment protection is protected from prosecution if that possession occurs solely in one’s home. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969). A fuller treatment of this issue is beyond the scope of this Comment.

35. U.S. CONST. amend. V.

Commission of New York Harbor,³⁶ the Supreme Court articulated that this guarantee effectuates several constitutional policies, including “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.’”³⁷ The Court has carried these policies into practice in giving content to the privilege as well. The government violates the privilege if it (1) compels (2) incriminating (3) testimonial evidence from an individual.³⁸ The Court’s distinction between “testimonial” evidence—which is protected from compelled disclosure—and “real” or “physical” evidence—which is not—hinges on whether the evidence reveals the contents of one’s mind to law enforcement.³⁹ That is why the police can compel blood,⁴⁰ voice,⁴¹ handwriting⁴² and DNA samples,⁴³ but can not require a person to confess to a crime. Thus, the Fifth Amendment’s privilege against self-incrimination is ostensibly the primary bulwark against government intrusion into our most intimate thoughts.

Of course, the privilege against self-incrimination does not itself stand as a barrier to government border searches of laptops, to postarrest searches of cell phones, or to plain view searches of computer hard drives.⁴⁴ That is because, since the Court’s ruling in *Andresen v. Maryland* in 1976,⁴⁵ it has been settled that the seizure of information that a person voluntarily memorializes does not implicate the privilege because the government never compelled the target to write down the information in the first place.⁴⁶ Compulsion is doubly absent when the person then voluntarily carries that memorialization to a place, such as the border, where no

36. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964).

37. *Id.* at 55 (internal citation omitted).

38. *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 189 (2004) (“To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating and compelled.”); *United States v. Hubbell*, 530 U.S. 27, 34 (2000) (reciting the same rule).

39. *Schmerber v. California*, 384 U.S. 757, 763 (1966) (“[A] long line of authorities . . . have consistently limited [the privilege’s] protection to situations in which the State seeks to . . . obtain[] the evidence against an accused through the cruel, simple expedient of compelling it from his own mouth.”) (internal quotations and citation omitted).

40. *Id.* at 765.

41. *United States v. Dionisio*, 410 U.S. 1 (1973).

42. *Gilbert v. California*, 388 U.S. 263 (1967).

43. *E.g.*, *United States v. Reynard*, 473 F.3d 1008, 1021 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 646 (2007); *United States v. Bean*, 214 F. App’x 568, 571 (6th Cir. 2007); *United States v. Hook*, 471 F.3d 766, 773–74 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2081 (2007).

44. The Fifth Amendment analysis may be different if law enforcement agents compel a traveler to divulge any passwords. *Cf.* *In re Boucher*, No. 2:06-MJ-91, 2007 WL 4246473, at *3–*4 (D. Vt. 2007).

45. *Andresen v. Maryland*, 427 U.S. 463 (1976).

46. *Id.* at 472–77.

legitimate expectation of privacy exists. Indeed, the “act of production” doctrine, which grants immunity only to a document holder’s acts of producing the document, but not to the previously created document itself,⁴⁷ prompted the Justices to debate whether the privilege against self-incrimination protects *any* private papers, including diaries, from compulsory production.⁴⁸

Even though the Fifth Amendment privilege might not, on its own, bar digital media searches, its policy rationales appear to be informing the Fourth Amendment analysis undertaken by those authorities who rely upon the dignity and inviolability of the mind to bolster Fourth Amendment protection.

Reliance on Fifth Amendment principles to reinforce and invigorate the Fourth Amendment is nothing new. Nearly 125 years ago, the Supreme Court in *Boyd v. United States*⁴⁹ observed that it was “unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him [was] substantially different from compelling him to be a witness against himself.”⁵⁰ The Court was “further of opinion that a compulsory production of the private books and papers . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.”⁵¹ “In this regard,” the Court stated, “the Fourth and Fifth amendments run almost into each other.”⁵² Although the Court has largely eroded *Boyd*, and in *Andresen* decoupled violations of the Fourth Amendment from those of the Fifth Amendment’s privilege against self-incrimination, the intersection between the provisions noted by *Boyd* may be an implicit rationale underlying the courts’ and commentators’ special treatment of the especially private information stored on digital media.

47. *Fisher v. United States*, 425 U.S. 391, 401 (1976) (“[T]he Fifth Amendment protects against ‘compelled self-incrimination, not (the disclosure of) private information.’” (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975))).

48. Compare *United States v. Doe (Doe I)*, 465 U.S. 605, 618 (1984) (O’Connor, J., concurring) (“[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.”), with *id.* at 619 (Marshall, J., concurring in part and dissenting in part) (“I continue to believe that under the Fifth Amendment there are certain documents no person ought to be compelled to produce at the Government’s request.”) (internal quotations and citation omitted).

49. *Boyd v. United States*, 116 U.S. 616 (1886).

50. *Id.* at 633.

51. *Id.* at 634–35.

52. *Id.* at 630.

Recognizing this animating rationale has potentially profound ramifications. To begin with, it represents a resurrection of *Boyd's* rationale, though not its holding. More to the point, it makes it far more difficult to rely upon the volume of information stored on digital matter vis-à-vis nondigital media as a limiting principle: if the key consideration is the intimacy of the information potentially obtained, law enforcement should logically be prohibited from obtaining that information from any source, regardless of its storage capacity. Indeed, Ninth Circuit Judge Harry Pregerson noted as much in his dissent in *United States v. Seljan*, where he objected to the majority's refusal to suppress a border search of a FedEx package containing letters soliciting a young girl to have sex:

People send many types of documents through FedEx and other express consignment services: diaries, letters, materials protected by attorney-client and attorney work-product privileges, trade secrets, medical records, and financial records. The mere fact that these items cross an international border does not give customs officials absolute license to read their contents.⁵³

Under this logic, diaries are no different from BlackBerrys or hard drives.⁵⁴

Notwithstanding the Ninth Circuit's ruling in *Arnold* itself, the impact of the reunion of the Fourth Amendment and Fifth Amendment's privilege against self-incrimination effected by the district court's decision in *Arnold* and other decisions regarding digital media under the Fourth Amendment will not go away anytime soon. Whether the return of *Boyd's* rationale will ultimately persist and how that will affect the broader contours of the Fourth Amendment remains to be seen, and warrants serious and measured consideration by the courts and the academy. These institutions must give careful thought to the logic of a return to a rationale that the Court systematically dismantled over the last century, and whether revival of that rationale will have a ripple effect on other Fourth Amendment—and Fifth Amendment—doctrines that fell in the wake of *Boyd's* demise. Then and only then will we be able to draw a line between protecting the public and protecting the individual that is doctrinally sound, theoretically logical, and practically effective.

53. *United States v. Seljan*, 497 F.3d 1035, 1048 (Pregerson, J., dissenting) (internal citation omitted), *reh'g en banc granted*, 512 F.3d 1203 (9th Cir. 2008).

54. Of course, as noted above, the potential of digital media to record one's *thought processes* may be a distinguishing factor. *See supra* text accompanying notes 32–33.