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Intellectual Privacy

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This Article is about intellectual privacy—the protection of records of our intellectual activities—and how legal protection of these records is essential to the First Amendment values of free thought and expression. We often think of privacy rules as being in tension with the First Amendment, but protection of intellectual privacy is different. Intellectual privacy is vital to a robust culture of free expression, as it safeguards the integrity of our intellectual activities by shielding them from the unwanted gaze or interference of others. If we want to have something interesting to say in public, we need to pay attention to the freedom to develop new ideas in private, either alone or with trusted confidants. Free speech thus depends upon a meaningful level of intellectual privacy, one that is threatened by the widespread distribution of electronic records of our intellectual activities.

My argument proceeds in three steps. First, I locate intellectual privacy within First Amendment theory and show how intellectual privacy undergirds each of the traditional understandings of why we protect free speech. Second, I offer a normative theory of intellectual privacy that begins with the freedom of thought and radiates outward to justify protection for spatial privacy, the right to read, and the confidentiality of communications. Third, I examine four recent disputes about intellectual records. I show how a greater appreciation for intellectual privacy can illuminate the latent First Amendment issues in these disputes and can suggest different solutions to them that better respect our tradition of cognitive and intellectual freedom.

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For most of the last century, First Amendment theory has been principally concerned with protecting the act of speaking from interference and censorship.[1] It has paid much less attention, however, to the often private intellectual processes by which speakers generate something interesting to say in the first place. Indeed, when First Amendment thought addresses privacy, it is usually as a hostile value,[2] as illustrated by the line of Supreme Court cases invalidating actions for unlawful disclosure of private facts on free speech grounds.[3]

Reasonable people can certainly agree or disagree about whether the Supreme Court's privacy cases were correctly decided. But the relationship between privacy and the First Amendment is much more nuanced than the case law and the academic literature have recognized. In this Article, I hope to show how and why certain kinds of privacy rules not only advance the project of First Amendment law, but are also essential to it. At the core of the First Amendment is a commitment to the freedom of thought—

1. *E.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50 (2004).

2. *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1161–63 (2005) (collecting examples of First Amendment scholarly critiques of data privacy).

3. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001); Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989); Smith v. Daily Mail Publ'g, 443 U.S. 97, 103–04 (1979); Okla. Publ'g Corp. v. Okla. County Dist. Court, 430 U.S. 308, 311–12 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494–95 (1975); Time, Inc. v. Hill, 385 U.S. 374, 394 (1967) (all relying on the First Amendment to reject privacy-based challenges to the publication of personal information).

recognized for centuries as perhaps the most vital of our liberties.[4] In order to speak, it is necessary to have something to say, and the development of ideas and beliefs often takes place best in solitary contemplation or collaboration with a few trusted confidants. To function effectively, these processes require a measure of what I shall call "intellectual privacy." Intellectual privacy is the ability, whether protected by law or social circumstances, to develop ideas and beliefs away from the unwanted gaze or interference of others. Surveillance or interference can warp the integrity of our freedom of thought and can skew the way we think, with clear repercussions for the content of our subsequent speech or writing. The ability to freely make up our minds and to develop new ideas thus depends upon a substantial measure of intellectual privacy. In this way, intellectual privacy is a cornerstone of meaningful First Amendment liberties.

Yet intellectual privacy has remained underappreciated in First Amendment theory. This has occurred for a number of reasons, but chiefly because it has been difficult—even for those so inclined—to monitor or interfere with the thought processes in people's heads. But in recent years a number of technological and cultural developments have made intellectual surveillance easier. Two of these are particularly salient. First, as we have come to rely on computers and other electronic technologies to live our personal and professional lives, a vast amount of information about our activities is recorded, logged, and made available for access by others. This has become increasingly true as we use these technologies not just to shop, but to think, read, and communicate.[5] The information created by these processes includes not only our preferences in toothpaste, but our tastes in politics, literature, religion, and sex. We are creating, in other words, a record of our intellectual activities—a close proxy for our thoughts—in unprecedented ways and to an unprecedented degree. Second, the records of our electronic activities (intellectual and otherwise) have become increasingly important to the activities of government and industry, which have sought and obtained access to vast amounts of human data as they perform their basic functions.[6] Data-driven decision making—what Ian Ayres has termed the "supercruncher" phenomenon[7]—has fueled a vast market for a wide variety of electronic information about individuals: you, me, and everyone we know.

Legal theory has typically lumped such issues of personal data under the familiar rubric of privacy. When the government seeks "private"

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4. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("[Freedom of thought] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.").

5. *See* Nicholas Carr, *Is Google Making Us Stupid?*, ATLANTIC, July–Aug. 2008, at 56, 57 ("[T]he Net is becoming a universal medium, the conduit for most of the information that flows through [the author's] eyes and ears and into [his] mind.").

6. ROBERT O'HARROW, JR., NO PLACE TO HIDE 214–46 (2005).

7. IAN AYRES, SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART 10 (2007).

information, we typically ask about the government's need for the information and require it to make some showing of relevance or probable cause to an investigation.[8] In such cases, we ask mostly about the government's interest in security and not about the type of information being sought or what values it serves.[9] On the private-sector side, the creation of databases is largely left to the private law of contract, and few legal constraints are placed upon the use of information relating to reading and thinking.[10] Indeed, when it comes to database regulation, many feel that any government regulation of private information flows raises serious First Amendment issues.[11]

Such a model may have utility in ordinary commercial or criminal contexts, but it is a poor model to apply in cases implicating intellectual privacy. Consider in this regard four recent high-profile disputes involving the use of information about private intellectual activities:

- The Justice Department subpoenas the search terms of millions of Internet users from most of the big search engine companies;[12]
- The NSA secretly wiretaps without judicial warrant the telephone calls of Americans speaking to persons overseas;[13]
- Search engines and online bookstores create and use detailed profiles of the reading habits and intellectual interests of Internet users, subject to no meaningful legal constraints;[14] and
- Evidence of the reading habits of defendants is introduced to prove intent in criminal trials.[15]

These cases involve surveillance of intellectual activity or the use of the fruits of such surveillance. In each of these cases, the traditional privacy paradigm was applied, and as a result the special issues of intellectual privacy were largely missed. The failure to appreciate the special nature of

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8. *See* DANIEL J. SOLOVE, THE DIGITAL PERSON 202–03 (2005) (discussing the varying requirements that the government must meet in order to obtain warrants, grand jury subpoenas, and court orders).

9. *See* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1117–19 (2006) (essay) (collecting examples).

10. *See infra* Part III.

11. *E.g.*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000) ("[B]roader information privacy rules are not easily defensible under existing free speech law.").

12. Joseph Menn & Chris Gaither, *U.S. Obtains Internet Users' Search Records*, L.A. TIMES, Jan. 20, 2006, at A1.

13. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

14. Rob Hof, *Google Logs New Data Privacy Policy*, BUSINESSWEEK.COM, Mar. 14, 2007, http://www.businessweek.com/the_thread/techbeat/archives/2007/03/google_logs_new.html; Ellen Nakashima, *AOL Takes Down Site With Users' Search Data*, WASH. POST, Aug. 8, 2006, at D1.

15. United States v. Curtin, 489 F.3d 935, 939–40 (9th Cir. 2007); *see infra* notes 305–316 and accompanying text.

intellectual privacy (even by privacy advocates) resulted in discussions and outcomes that minimized the critical cognitive-liberty issues at stake.

For run-of-the-mill issues of personal information, even embarrassing personal information, the traditional paradigm may be a reasonable way for the law to deal with problems of information collection and use. But when the government is listening to our phone calls or businesses are tracking and analyzing what we read, these activities menace our processes of cognition and our freedoms of thought and speech. If we are interested in a free and robust *public* debate we must safeguard its wellspring of *private* intellectual activity. I will return to these four cases in more detail later.[16] I mention them now to suggest the importance and timeliness of intellectual privacy, and the extent to which our public and scholarly dialogue has failed to appreciate it.

Intellectual privacy is different from other conceptions of privacy, such as those that protect individuals from the emotional harm of information disclosure. It is not concerned with remedying tort injury, but rather with the way our cognitive processes, and ultimately our public discourse, are constituted. I am not arguing that we should understand all privacy issues as implicating intellectual privacy. Nor do I argue that intellectual privacy is a kind of silver bullet for the Information Age. But thinking more about intellectual privacy can help us to better understand a subset of particularly important legal problems—problems that vague notions of privacy fail to capture. Intellectual privacy involves only a fraction of the many issues we might think of as involving "privacy," but this fraction of issues is discrete and worthy of separate treatment.

Issues of intellectual privacy are also some of the most important we face as a society. If we value our freedoms of thought and speech, we must pay attention to the processes through which we exercise them. Our law has protected elements of what I call intellectual privacy in a variety of contexts for some time. But protection of these interests has been piecemeal, accidental, and not according to any broader, principled theory of why we should protect the cognitive processes of belief formation. Similarly, a handful of scholars have addressed elements of intellectual privacy under different names in discrete contexts like libraries or digital-rights-management technologies.[17] But this emerging body of scholarship, though helpful, has

16. *See infra* Part IV.

17. *See, e.g.*, Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 802 (2006) (defending the First Amendment right to receive information and ideas in the context of libraries); Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 575 (2003) [hereinafter Cohen, *DRM and Privacy*] (discussing how digital-rights-management technologies enable greater control over access to digital files while also implicating the privacy interests of users of information goods); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981–82 (1996) [hereinafter Cohen, *Right to Read*] (examining digital monitoring of individual

not yet articulated what intellectual privacy is, what its elements are, and why they matter. This Article seeks to fill that void in the literature—to make the case for what we can gain from thinking more coherently about intellectual privacy in theory and in practice.

My argument proceeds in three steps. In Part I, I attempt to locate intellectual privacy in First Amendment theory. Orthodox First Amendment theory has underappreciated the importance of intellectual privacy to meaningful expressive liberty; its efforts have focused primarily on protecting speakers rather than thinkers. It has privileged the act of freely speaking and neglected the predicate act of freely thinking. To the extent that it has considered privacy at all, traditional First Amendment theory has assumed it to be a conflicting and inferior value that has little place in free speech theory. I argue that a meaningful measure of privacy is critical to the most basic operations of expression, because it gives new ideas the room they need to grow. Our expressive culture thus paradoxically depends upon a measure of intellectual privacy for its vitality and its utility, and I explain the ways in which intellectual privacy is essential to orthodox theories of the First Amendment.

Although intellectual privacy is an essential foundation for our core values of free speech, thought, and inquiry, it has remained overlooked and undertheorized. In Part II, I offer a normative theory of intellectual privacy that explains the importance of legal protection for the activities of thinking, reading, and private discussion. Protection for intellectual privacy has four principal elements—the freedom of thought and belief, spatial privacy, the freedom of intellectual exploration, and the confidentiality of communication. Taken together, these categories provide an overlapping and mutually supporting system of protection for the incubation of new ideas in their formative stages.

In Part III, I suggest some practical applications that could result from an increased focus on intellectual privacy. To illustrate this, I return to the four policy disputes outlined above—government surveillance, private records of intellectual activity, government access of such records, and the introduction of reading habits in criminal trials. I suggest that a greater attention to intellectual privacy could improve our resolution of these disputes in two ways. First, intellectual privacy could inform constitutional doctrine under the First and possibly Fourth Amendments. But constitutional doctrine cannot solve these problems on its own, in part because of the limitations of judge-made rules, and also because constitutional rules cannot regulate threats to intellectual privacy by businesses and other nongovernment actors. Protecting intellectual privacy thus requires a second strategy of building

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reading habits for purposes of "copyright management," and how this cyberspace monitoring affects individuals' freedom to form their thoughts in privacy); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 114–15 (2007) ("Government information gathering . . . can intrude on a significant amount of First Amendment activity.").

structural protections for cognitive and intellectual activities into our nonconstitutional law, institutions, and social practices.

I. Intellectual Privacy and First Amendment Theory

First Amendment theory in the United States is largely a creature of the twentieth century. There is a longstanding Western legal and philosophical literature on the freedoms of thought, belief, and speech,[18] and free speech issues were an element of American legal discourse in the nineteenth century.[19] But discussion of First Amendment issues at the national level was almost nonexistent until a series of Supreme Court cases decided in the aftermath of the First World War.[20] The project of twentieth-century American free speech law drew upon the earlier work of philosophers such as John Milton and John Stuart Mill, and was undertaken initially by judges, including Oliver Wendell Holmes,[21] Louis Brandeis,[22] and Learned Hand,[23] and legal academics such as Zechariah Chafee.[24] First Amendment theory and doctrine evolved in response to what is a familiar story to students of the First Amendment—one whose chief elements include the Espionage Act cases,[25] prior restraints,[26] obscenity prosecutions,[27] and the constitutionalization of defamation law.[28] The core element of this tradition has been the right to speak on public matters without fear of censorship or punishment.[29] It has been, as Justice Brennan famously put it, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[30]

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18. *See generally* J.B. BURY, A HISTORY OF FREEDOM OF THOUGHT (Echo Library 2006) (1913) (providing a theoretical account of the historical development of freedom of thought in the Western tradition).

19. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920, at 2 (1999). *See generally* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" (2001) (providing a detailed account of nineteenth-century free speech debates on issues such as the Sedition Act and slavery).

20. *See, e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 313 (1996) (arguing that the cases interpreting the Espionage Act of 1917 "served to supply First Amendment jurisprudence with its first modern set of theoretical apologetics").

21. *E.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

22. *E.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

23. *E.g.*, Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

24. ZECHARIAH CHAFEE, FREEDOM OF SPEECH (1920).

25. *E.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919).

26. *E.g.*, Near v. Minnesota, 283 U.S. 697, 713 (1931).

27. *E.g.*, Miller v. California, 413 U.S. 15, 23 (1973).

28. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

29. *Id.* at 269.

30. *Id.* at 270.

Legal protections for intellectual privacy can contribute meaningfully to such a vision of free speech. Yet they do so in a way that might be thought paradoxical or curious: all of the processes protected by intellectual privacy occur *before* we are ready to speak. These protections are not so much rights to speak as they are the ways in which our minds develop something novel or interesting to say. Because the core of the First Amendment is the freedom of thought, if we care about speech, we must care about intellectual privacy. In fact, if we neglect the issues that intellectual privacy raises, our entire body of First Amendment law could end up little more than a parchment barrier against encroachments by the state and others upon our intellectual freedom.

This Part locates intellectual privacy within First Amendment theory and tries to imagine what it might mean to make greater room for intellectual privacy within our understandings of expressive liberty. First, I show that traditional theories of the First Amendment have failed to recognize the importance of intellectual privacy to expressive liberty. These theories have been conceptualized in a way that focuses principally on acts of speech rather than on supporting cognitive and intellectual processes. Second, I argue that we should rethink our understandings of why we protect expression to make a greater place for intellectual privacy. I hope to show that, regardless of which traditional theory of the First Amendment we apply, intellectual privacy is essential to that theory because it safeguards the freedom of thought upon which all such theories ultimately rest.

A. Privacy and First Amendment Theory

The relationship between First Amendment theory and doctrine has been an uneasy one.[31] No single theory of the First Amendment adequately explains the doctrine, with a host of utilitarian theories offering competing explanations.[32] Of these, two principal theories of the First Amendment have come to be recognized by courts and scholars—the search-for-truth and democratic self-governance theories.[33] Each of these theories focuses on protecting the expression of existing ideas, and says little about where ideas come from or how they are developed. Moreover, the metaphors conventionally used to operationalize these theories—the marketplace of ideas and the town meeting—leave little place for intellectual privacy.

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31. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995) (positing that the doctrinal confusion surrounding free speech cases stems from mistaken theoretical understandings of the purpose of protecting speech).

32. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) ("Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory.").

33. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2355, 2356 (2000). There is a third theory—autonomy—that is almost as well received and that I take up in the next section.

The leading modern theory of the First Amendment is the search for truth. Relying upon the philosophical work of John Stuart Mill[34] and the judicial writings of Justice Oliver Wendell Holmes,[35] search-for-truth theory justifies heightened protection for First Amendment values because of the belief that public discourse better allows the truth to emerge.[36] This theory is usually operationalized via the "marketplace of ideas" metaphor from *Abrams v. United States*.[37] *Abrams* upheld a conviction under the Espionage Act of 1917 for distributing leaflets with the intent to induce draft resistance.[38] Holmes argued in dissent that the First Amendment invalidated the convictions. In perhaps the single most influential passage in First Amendment law, he argued that:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—*that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out.[39]

Holmes understood the problem of government to be the necessary clash of competing claims to truth that might ultimately be irreconcilable.[40] His solution was to allow free speech in public. Through the public airing of different ideas, he believed, the truth could perhaps emerge via their competition.[41] His theory is avowedly instrumental, justifying speech because it contributes to the higher value of the search for truth. It is agnostic with respect to the ultimate substantive form truth will take (if such a thing is even possible), relying instead on the procedural mechanism of the market-

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34. *E.g.*, JOHN STUART MILL, ON LIBERTY 53 (Stefan Colli ed., Cambridge Univ. Press 1989) (1859) (highlighting the indispensability of "freedom of the expression of opinion" on the ground that "since prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied").

35. *E.g.*, Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

36. *Id.* at 630.

37. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 483 (1988) (O'Connor, J., dissenting) (heralding Holmes's "marketplace of ideas" formulation as "a metaphor that has become almost as familiar as the principle that it sought to justify").

38. *Abrams*, 250 U.S. at 623–24.

39. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

40. *See* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 23 (1990) (explaining Holmes's view that "government cannot be given the authority to regulate in the name of truth" because what is viewed as true will change in a "changing world"). *See generally* Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918).

41. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

place of ideas as "the best test of truth."[42] Holmes's theory has been enormously influential in both free speech theory and jurisprudence.[43]

At first glance, the idea of a marketplace of ideas is not inconsistent with protections for intellectual privacy. Explicit protection for freedom of thought is an important element of both Holmes's and Mill's theories of expressive liberty.[44] And the market metaphor does characterize the competition as one of "thoughts" competing in the market.[45] But a closer examination suggests that the marketplace metaphor directs our attention to problems other than freedom of thought. Holmes's dissent seeks to justify why *speech* should be protected against suppression—in particular, "expressions of opinion and exhortations" to break the law.[46] His theory protects not freedom of thought, but rather the *expression* of those thoughts in public through a mechanism by which true ideas might be "bought" and false ones ignored. The marketplace of ideas directs the public process by which competing ideas of the truth are tested against one another, but it does not speak to the process by which those competing ideas of truth are generated in the first place. To extend the metaphor somewhat, Holmes's mechanism speaks to the marketplace of ideas, but not to the workshops where ideas are crafted.

The second principal theory justifying free speech protections is the democratic self-governance theory usually associated with Louis Brandeis[47] and Alexander Meiklejohn.[48] Brandeis discussed issues of intellectual freedom a number of times in his writings. For example, his famous concurrence in *Whitney v. California*[49] includes free thought as an integral part of the justification for free speech. In that case, involving a conviction under California's criminal syndicalism statute for belonging to a group preaching revolution, Brandeis argued that:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They believed that freedom to think as you will and to speak as you think

42. *Id.*

43. For further discussion of Holmes's influence on both jurisprudence and theory, see RABBAN, *supra* note 19, at 343; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 24–25 (1993); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 135 (1988); Ruth Gavison, *Holmes's Heritage: Living Greatly in the Law*, 78 B.U. L. REV. 843, 846 (1998); and Post, *supra* note 33, at 2356.

44. *See infra* subpart II(A).

45. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

46. *Id.* at 631.

47. *See, e.g.*, RABBAN, *supra* note 19, at 356 ("Brandeis . . . developed a judicial construction of the First Amendment that emphasized the crucial function of free speech in democratic governance.").

48. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 93–94 (1948) ("[T]he principle of the freedom of speech is derived, not from some supposed 'Natural Right,' but from the necessities of self-government by universal suffrage . . . .").

49. 274 U.S. 357 (1927).

> are means indispensable to the discovery and spread of political truth.[50]

Brandeis addressed the importance of freedom of thought in other writings.[51] For example, dissenting from the Court's holding in *Olmstead v. United States*[52] (that warrantless wiretapping does not violate the Fourth Amendment),[53] he argued that the framers of the Fourth Amendment "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations,"[54] thus drawing an explicit link between free thought and privacy.

Brandeis's theory of the First Amendment as promoting American democratic self-governance was refined after the Second World War by philosopher Alexander Meiklejohn.[55] Meiklejohn conceptualized self-governance through the metaphor of the town meeting, which operated to ensure that the body politic received adequate information to debate issues and decide questions of public policy.[56] Moreover, because the town meeting functioned to promote collective deliberation rather than individual speech, it was "essential . . . not that everyone shall speak, but that everything worth saying shall be said."[57] Although it drew heavily upon Brandeis's earlier work,[58] Meiklejohn's self-governance theory revised Brandeis's ideas, placing much less emphasis on freedom of the mind.[59] Meiklejohn's theory, in particular his metaphor of the town meeting, has also been highly influential.[60]

Perhaps even more clearly than the marketplace of ideas, the town-meeting conception is underprotective of intellectual privacy. The metaphor of a town meeting enshrines the importance of the public airing of viewpoints, not the privacy of potential speakers to engage in free thinking and

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50. *Id.* at 375 (Brandeis, J., concurring).

51. *E.g.*, Schaefer v. United States, 251 U.S. 466, 495 (1920) (Brandeis, J., dissenting).

52. 277 U.S. 438 (1928).

53. *Id.* at 465–66.

54. *Id.* at 478 (Brandeis, J., dissenting).

55. For examples of Meiklejohn on self-governance, see MEIKLEJOHN, *supra* note 48, at 93–94, and ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

56. MEIKLEJOHN, *supra* note 48, at 22–27.

57. *Id.* at 25.

58. For examples of this, see Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 254 n.20 (2005).

59. *Compare* MEIKLEJOHN, *supra* note 55, at 78–79 (reflecting that freedom of political discussion is necessary for self-government but that nonpolitical speech is outside the scope of necessary protection), *with* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("The final end of the State was to make men free to develop their [minds] . . . . [L]iberty [is valued] both as an end and as a means.").

60. For some examples of the widespread and lasting influence of Meiklejohn's theory of the First Amendment, see OWEN M. FISS, THE IRONY OF FREE SPEECH 2 (1996); KALVEN, *supra* note 43, at 67; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971); and Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 889 (1986).

inquiry. And because it prevents the abridgment of the collective right to freedom of speech, rather than an individual right to speak,[61] it is not directly concerned with the thought or speech processes of individuals. Moreover, it is almost exclusively concerned with freedom of speech rather than thought. Self-governance theory protects most strongly the ideas and information necessary for a self-governing citizenry to make informed decisions about political issues affecting the body politic, but not other areas.[62] It is thus far more about the processes of collective self-governance than the processes of individual cognition. Although Meiklejohn did discuss the "freedom of ideas,"[63] in his later work, his theory is rooted in the rights of voting listeners rather than those of thinkers or speakers.[64] As such, it is a theory centered not around "private intellectual curiosity" but instead around public collective action.[65] What matters under self-governance theory, then, is that all viewpoints get aired publicly, not that each speaker gets to speak or each thinker gets to think privately.

Thus, although both of the principal theories of the First Amendment have their roots in the freedom of thought, the metaphors by which they have been conventionally understood direct our attention away from the freedom of the mind and towards problems of censorship and public discourse. Why has orthodox First Amendment theory taken this move and minimized the freedom of thought and intellectual privacy? Four factors seem particularly important. First, free speech theory has been *reactive*. By this, I mean that it has been generated by judges and academics in response to external real-

61. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.").

62. One example of this conception of self-governance theory can be seen in *id.* at 256. Meiklejohn writes: "[T]he First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation." *Id.*

63. *See A Survey of the Extent to Which the Rights Guaranteed by the First Amendment Are Being Respected and Enforced in the Various Government Loyalty-Security Programs: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 84th Cong. 5 (1955) (statement of Alexander Meiklejohn, Former President, Amherst College, Former Chairman, University of Wisconsin Experimental College) ("[W]hen men govern themselves . . . unwise ideas must have a hearing as well as wise ones, dangerous ideas as well as safe, un-American as well as American."); *see also* MEIKLEJOHN, *supra* note 48, at 27 ("To be afraid of ideas, any idea, is to be unfit for self-government"); Meiklejohn, *supra* note 61, at 256 ("[I]n addition to speech, press, assembly, and petition, . . . there are many forms of thought and expression . . . from which the voter derives the knowledge, intelligence, sensitivity to human values [and] the capacity for sane and objective judgment which . . . a ballot should express . . . . These, too, must suffer no abridgment of their freedom.").

64. MEIKLEJOHN, *supra* note 48, at 25.

65. *See id.* at 45–46 ("The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game. . . . It was written to clear the way for thinking which serves the general welfare.").

world stimuli, rather than from abstract theory.[66] These stimuli have primarily involved government punishment for speaking bad words rather than thinking bad thoughts. Thus, the marketplace-of-ideas and town-meeting metaphors were developed in response to claims that spoken words that have a "bad tendency" to promote harmful conduct could be regulated for the same reasons that the bad conduct itself could be.[67] Other key issues that have driven the development of doctrine and theory, like the advocacy of illegal conduct,[68] obscenity,[69] profanity,[70] and the threat to public discussion of overbroad libel laws,[71] have also involved government attempts to censor words rather than control or monitor cognition.[72] Although there has been much imaginative work done in the field, First Amendment theory has understandably reacted to the salient legal issues of the day, and these have principally been acts of censorship of speech rather than threats to freedom of thought.

A second reason is that the threat to intellectual privacy has only become significant in recent years with the growth of new technologies and the creation of massive quantities of intellectual records. First Amendment theory remains principally guided by the search-for-truth and self-governance rationales.[73] And these theories owe their forms to the ways in which the First Amendment came to be conceptualized as a principal constitutional right over the course of the first half of the twentieth century.[74] During this period, large-scale electronic surveillance and access to electronic records were simply impossible because surveillance technologies were immature and electronic records were minimal. Brandeis famously predicted in 1928 that:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the

66. For some historical evidence suggesting that Justice Oliver Wendell Holmes developed his marketplace theory of the First Amendment in response to the "Red Scare" of 1919–1920 and the government's overreaction to industrial unrest, see RABBAN, *supra* note 19, at 350–52.

67. White, *supra* note 20, at 318–19, 344–49.

68. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

69. *See generally* Miller v. California, 413 U.S. 15 (1973).

70. *See generally* Cohen v. California, 403 U.S. 15 (1971).

71. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); LEE C. BOLLINGER, IMAGES OF A FREE PRESS (1991); LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION (1991).

72. Lee Bollinger refers to this conception as the "fortress model" of the First Amendment. For a discussion, see LEE C. BOLLINGER, THE TOLERANT SOCIETY 76–103 (1986).

73. *See* Post, *supra* note 33, at 2363–69 (categorizing First Amendment theory as focused either on the search for truth in a marketplace of ideas or on self-government rationales).

74. *Id.* at 2356.

> home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.[75]

This prediction has typically been used by scholars to show Brandeis's foresightedness.[76] But of course the fact that Brandeis was being prophetic also reveals that in his time, the problem of intellectual records was one of science fiction, not reality. It is thus no surprise that our formative theories of the First Amendment did not respond to the problem directly.

Third, to the extent that government access to records and private papers has been thought to implicate constitutional concerns, this problem has typically been addressed by the Fourth rather than the First Amendment.[77] During the *Lochner* period, Supreme Court case law gave strong protection to the security of "papers and effects," guaranteed by the Fourth Amendment against unreasonable state intrusion.[78] Ultimately, such protection was dismantled as inconsistent with the needs of the modern regulatory state,[79] and the Fourth Amendment is now generally understood as inapplicable to information held by third parties.[80] Today the regulation of records is protected in the first instance by a complicated statutory regime.[81] But for a variety of reasons, the protection of records has largely been thought to involve constitutional criminal procedure under the Fourth and Fifth Amendments rather than substantive issues of expressive and cognitive liberty under the First.[82]

Finally, to the extent that privacy has been considered in connection with free speech, it has usually been contrasted as a hostile value. American

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75. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

76. For examples of such scholarly commentary, see Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEXAS L. REV. 1349, 1366–67 (2004); Solove, *supra* note 6, at 1137–38; Daniel J. Solove, *Privacy and Power: Information Privacy Law and Metaphors for Privacy*, 53 STAN. L. REV. 1393, 1394 n.2 (2001); and Merrick D. Bernstein, Note, *"Intimate Details": A Troubling New Fourth Amendment Standard for Government Surveillance Techniques*, 46 DUKE L.J. 575, 577 n.12 (1996).

77. Richards, *supra* note 9, at 1117.

78. *See* Boyd v. United States, 116 U.S. 616, 630 (1886) (holding that the Fourth and Fifth Amendments precluded a district court from requiring a defendant to produce an invoice of merchandise); *see also* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 31–38 (2004); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1049–54 (1995); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419–33 (1995) [hereinafter Stuntz, *Substantive Origins*] (all discussing *Boyd* and the Fourth and Fifth Amendments during the *Lochner* Era).

79. Stuntz, *Substantive Origins*, *supra* note 78, at 430.

80. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (holding that telephone call records kept by telephone companies are not protected by the Fourth Amendment); United States v. Miller, 425 U.S. 435, 444–45 (1976) (holding that financial records kept by accountants are not protected by the Fourth Amendment).

81. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 850–52 (2004).

82. Solove, *supra* note 17, at 116–17.

notions of privacy have their origins in a famous 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis, which called for the recognition of a tort against the press for disclosing true but embarrassing facts.[83] Warren and Brandeis argued that the common law should remedy the emotional injury and hurt feelings of unwilling subjects of press attention.[84] This initial conception of privacy as an anti-press value placed it in tension with the First Amendment.[85] In a series of Supreme Court cases running to the present day, the tort-law conception of privacy has encountered the First Amendment as a conflicting value.[86] In a series of cases running to the present day, the tort-law conception of privacy has encountered the First Amendment as a conflicting value before the Supreme Court. When the Supreme Court has been presented with such a seemingly stark choice between privacy and a free press, privacy has lost.[87]

In other contexts, such as where homeowners wish to exclude unwanted speakers from their homes, privacy has had more success; however in these contexts it has often been buttressed by private-property rules and characterized as a "right not to speak."[88] This is not to say that privacy is wholly absent from First Amendment law, but that even where it has been included, it has often been justified as an adjunct to expression rather than as deserving protection in its own right. A good example is anonymous speech doctrine, under which the right to speak anonymously has been guaranteed in order to avoid the chilling effect of public disapproval.[89] On rare occasion, the

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83. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213–14 (1890).

84. *Id.*

85. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 154 (2007). For an early case grappling with this tension, see Corliss v. E.W. Walker Co., 57 F. 434, 435 (D. Mass. 1893).

86. *See id.* at 279. In *Sullivan*, the Court rejected a rule that would have insulated libel laws from constitutional challenge so long as they provided for truth as a defense. *Id.* The Court reasoned that allowing truth as a defense would "not mean that only false speech will be deterred" and would create an unacceptable risk that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and is in fact true, because of doubt whether it can be proved in court." *Id.*

87. *See supra* note 3 and accompanying text.

88. *See infra* notes 172–176 and accompanying text.

89. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995); Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002); Talley v. California, 362 U.S. 60, 64 (1960) (all affirming that anonymous speech is entitled to First Amendment protection because anonymity is often particularly important to speakers espousing unpopular political views). *See generally* David W. Ogden & Joel A. Nichols, *The Right to Anonymity Under the First Amendment*, FED. LAW., Mar.–Apr. 2002, at 44, 44 (arguing that even content-neutral bans on anonymous speech should be subjected to strict scrutiny because their inevitable effect is to disproportionately deter the most unpopular forms of expression). Another example is expressive-association doctrine, in which the anonymity of members of political organizations like the NAACP has been protected from state scrutiny because the expressive mission of the organization would be hampered by the harassment of members were their identities to become public. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group associations may be

Supreme Court has linked privacy and the First Amendment in order to protect the freedom of the mind.[90] But these cases have not been broadly read or extended into other contexts. They remain isolated and limited exceptions to the general rule that privacy not linked to the act of expression is a value hostile to the First Amendment.[91] Most scholarly commentary also accepts the basic proposition that privacy and free speech are competing values.[92]

For these reasons, intellectual privacy has been embodied in First Amendment theory and doctrine only peripherally. Although some courts and scholars have examined intellectual-privacy concepts like freedom of thought, these concepts remain undertheorized. Issues of intellectual privacy are frequently seen to lack any salience under the First Amendment. Thus, in a recent case assessing the constitutionality of the NSA's warrantless wiretapping program, the Sixth Circuit was able to rely upon this consensus to casually dismiss any suggestion that First Amendment values were threatened by government surveillance of private phone conversations.[93] As that court tellingly put it, "The First Amendment protects public speech and the free exchange of ideas . . . while the Fourth Amendment protects citizens from unwanted intrusion into their personal lives and effects."[94] Because the case did not involve public speech, the First Amendment was deemed inapplicable.

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indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

90. *E.g.*, Stanley v. Georgia, 394 U.S. 557, 564–65 (1969) ("[The] right to receive information and ideas . . . is fundamental to our free society . . . . [A]lso fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy. . . . If the First Amendment means anything, it means that a State has no . . . power to control men's minds.").

91. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 108 (1990); United States v. 12 200-Foot Reels of Super 8mm Film, 413 U.S. 123, 126 (1973); United States v. Reidel, 402 U.S. 351, 356 (1971) (all declining to extend *Stanley* to the importation or sale of obscene materials).

92. *See, e.g.*, DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 132 (2007); C. Edwin Baker, *Autonomy and Information Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & PUB. POL'Y 215, 215 (2004); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEXAS L. REV. 1195, 1196 (1990); Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966); Daniel J. Solove, *The Virtues of Knowing Less*, 53 DUKE L.J. 967, 981–82 (2003); Volokh, *supra* note 11, at 1050–51; Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983) (all positing or acknowledging a basic tension between First Amendment values and the right to privacy). For a few examples of exceptions to this trend of positing privacy in tension with free speech, see Richards, *supra* note 2, at 1151; Julie E. Cohen, *Examined Lives: Information Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000); and Sean M. Scott, *The Hidden First Amendment Virtues of Privacy*, 71 WASH. L. REV. 683, 687 (1996).

93. ACLU v. NSA, 493 F.3d 644, 657 (6th Cir. 2007).

94. *Id.* at 658 n.15; *see also id.* at 660 n.20 (suggesting that surveillance can never offend the First Amendment).

B. The Importance of Intellectual Privacy to Expressive Values

It is unfortunate that the principal theories of the First Amendment have failed to treat intellectual privacy as an important First Amendment value. This deficiency is a critical one, because meaningful freedom of speech requires meaningful intellectual privacy. To illustrate this point, imagine a system of free speech law that is deeply protective of the act of *speaking*, but which has little protection for the act of *thinking*. Under a system like this, people could speak freely on a whole host of controversial issues, and could engage in widespread obscene, racist, libelous, or inciting speech. Current theory would consider such a regime to be deeply speech-protective.[95] But if this system had little protection for intellectual privacy, the government would be free to secretly monitor phone calls, Internet usage, and the movements and associations of individuals. Private industry would also be relatively unconstrained in its ability to participate in a market for the same information. Such a world would have plenty of speech but little privacy; indeed, some observers have predicted that this is the future of our online world and, by extension, the expressive topography of our society as a whole.[96]

A regime that protected speech but not thoughts would be deeply problematic, to say the least. In a world of widespread public and private scrutiny, novel but unpopular ideas would have little room to breathe. Much could be said, but it would rarely be new, because original ideas would have no refuge in which to develop, save perhaps in the minds of hermits. Such a world has in the past been the domain of writers of speculative and science fiction,[97] but it should be no less familiar as a result. Indeed, the word "Orwellian" strikes with deep resonance in this context.[98] Moreover, as many scholars have argued, surveillance has a deep effect on the actions of the subject.[99] The knowledge that others are watching (or may be watching) tends the preference of the individual towards the bland and the

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95. *See, e.g.*, BOLLINGER, *supra* note 72, at 3 (explaining that "highly subversive and socially harmful speech activity is protected against government regulation" in the United States while "[n]o other society permits this kind of speech activity to nearly the same degree").

96. *E.g.*, DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? (1998); *see also* Declan McCullagh, *Database Nation: The Upside of "Zero Privacy,"* REASON MAG., June 2004, at 26, 26 ("That view was summed up with cynical certitude by Sun Microsystems CEO Scott McNealy. 'You have zero privacy anyway,' he said a few years ago. 'Get over it.'").

97. *See generally, e.g.*, JEREMY BENTHAM, PANOPTICON (1787); RAY BRADBURY, FAHRENHEIT 451 (1953); GEORGE ORWELL, 1984 (1949).

98. *See* SOLOVE, *supra* note 8, at 19 ("Journalists, politicians, and jurists often describe the problem created by databases with the metaphor of Big Brother—the harrowing totalitarian government portrayed in George Orwell's *1984*.").

99. *See, e.g.*, Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 186 (2008) ("Surveillance in the panoptic sense thus functions both descriptively and normatively. It does not simply render personal information *accessible* but rather seeks to render individual behaviors and preferences *transparent* by conforming them to preexisting frameworks.").

mainstream.[100] Thoroughgoing surveillance, whether by public or private actors, has a normalizing and stifling effect.[101]

Intellectual privacy creates a screen against such surveillance. As the English philosopher Timothy Macklem has argued, "The isolating shield of privacy enables people to develop and exchange ideas, or to foster and share activities, that the presence or even awareness of other people might stifle. For better and for worse, then, privacy is sponsor and guardian to the creative and subversive."[102] When there is protection from surveillance, new ideas can be entertained, even when they might be deeply subversive or threatening to conventional or orthodox views. If we value a pluralistic society or the cognitive processes that produce new ideas, then some measure of intellectual privacy, some respite from cognitive surveillance, is essential. Any meaningful freedom of speech requires an underlying culture of vibrant intellectual innovation. Intellectual privacy nurtures that innovation, protecting the engine of expression—the imagination of the human mind.[103] To the extent that orthodox First Amendment theory is underprotective of intellectual privacy, we must rehabilitate it to take account of these vital norms.

How should this be done? At the outset, we should take a broader view of the search-for-truth and self-governance theories of speech. Although they are directed at other harms and their metaphors are in tension with intellectual privacy, their underlying theories need not be. The search for truth does not always take place in the public world of the marketplace of ideas. On the contrary, truth can be sought in private contemplation, in acts of reading, thinking, and confidential conversation. Not everyone is able or psychologically prepared to participate in the marketplace of ideas as it has been conceptualized by Holmes's metaphor. Nor should they be. The First Amendment should protect cognitive activities even if they are wholly private and unshared because of the importance of individual conscience and autonomy.[104] It should also protect them under an "infant industries" rationale, serving to nurture and shield new ideas from social disapproval before they are ready to be disclosed. Protecting the freedom of thought thus has

100. *See* Cohen, *supra* note 92, at 1426 (hypothesizing that the knowledge of being watched "will constrain, ex ante, the acceptable spectrum of belief and behavior").

101. Cohen, *supra* note 99, at 192–93; *cf.* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (illustrating the Panopticon effect by describing a group of prisoners who will never misbehave because they know that they are being watched); MILL, *supra* note 34, at 9 (indicating that a person's decision to abide by a certain standard of judgment is based on the need to comply with society's rules of conduct).

102. TIMOTHY MACKLEM, INDEPENDENCE OF MIND 36 (2006).

103. For a discussion of the importance of imagination to First Amendment values, see generally Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

104. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 385 (noting the First Amendment interests in conscience and autonomy).

important instrumental value for the kind of pluralistic society we aspire to be. Freedom of thought also has an intrinsic value as an exercise in individual cognitive autonomy.

Self-governance theory can be reconciled with intellectual privacy as well. The Meiklejohnian metaphor of the town meeting was responsive to the intellectual climate of post-World War II politics in which questions of responsible democratic self-government were paramount. The threat of totalitarianism was all too real—the specters of defeated Nazi Germany and expanding Stalinist Russia loom ominously in Meiklejohn's writings, especially his most famous work in which he laid out the town-meeting metaphor.[105] Meiklejohn was aware of threats to intellectual privacy,[106] but given the context of his time it is understandable that he was more concerned about what was for him (and the rest of the world) a much more immediate problem—the problem of self-governance itself. Today, six decades later, other problems require other solutions. Self-governance must remain at the core of why we accord speech and expression special protection under our law. But self-governance theory need not focus on the collective processes of the body politic to the exclusion of individual rights. For example, Robert Post has argued that self-governance theory should not be rooted in the mechanisms of corporate decision making, but rather in the social processes by which individuals come to identify a government as their own.[107] Post concludes that for individuals to fully participate in the project of self-governance, the state should be "constitutionally prohibited from preventing its citizens from participating in the communicative processes relevant to the formation of democratic public opinion."[108] Post's theory remains focused on acts of communication rather than cognition, but there is no reason why a self-governance theory focused on the individual cannot include the cognitive processes necessary for self-governance as well as the communicative ones. Because intellectual privacy serves to protect the engine of free expression, it must be protected so that self-government can be achieved by the sorts of autonomous individuals that Post describes. Without freedom of thought, meaningful self-governance is impossible.

Self-governance theory and intellectual privacy can be reconciled under a second rationale. Sociologist Erving Goffman has argued that individuals

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105. For an example of this, see MEIKLEJOHN, *supra* note 48, at xiii–xiv. Meiklejohn lays out his "town meeting" metaphor in *id.* at 22–24.

106. *See id.* at 105 (claiming that many things done in the name of "freedom" actually serve as "flagrant enslavements of our minds and wills").

107. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995) [hereinafter POST, CONSTITUTIONAL DOMAINS]; Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115–16 (1993); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523 (1997) (book review).

108. Post, *supra* note 33, at 2368.

play a variety of roles in their lives, like actors in a play.[109] These roles may be quite different from one another, depending on their contexts.[110] Thus, our role as a public member of the polity might be quite different from the person we are with our family or friends.[111] Goffman's insights suggest that intellectual privacy can contribute to self-governance in two related ways. First, psychologically we may have a deep need to relax and "relieve the tensions that are a necessary part of public performance."[112] Without such an opportunity, if we are always intellectually "on stage" before the gaze of others, we might find ourselves unable to freely participate in governance. We may therefore need protection to be our nonpublic selves and explore ideas when the glare of public performance is not on us. Second, if we are to participate in our public roles as self-governing citizens, we must ensure that the state cannot scrutinize our intellectual dabblings in the controversial or deviant. If the state can find out what we read and what we think, it has a powerful weapon to silence dissent. Disclosure of such information, or even the threat thereof, would enable the state to chill dissent and thereby skew the processes of self-government.

Ultimately, intellectual privacy can be reconciled with First Amendment theory because all leading theories of the First Amendment rest on the importance of freedom of thought. The metaphors of the marketplace of ideas and the town meeting are useful insofar as they direct our attention to particular sets of important problems, but by focusing on those problems, they inevitably direct us away from others, like intellectual privacy, which may be just as important. In other words, First Amendment theory needs to keep one eye on the big picture. Freedom of thought is essential to meaningful self-government or truth seeking. But it is not unique to those theories. In recent years, scholars have advanced a series of individual-centered theories of the First Amendment.[113] These theories, while diverse in many particulars, tend to justify special treatment for First Amendment liberties in terms of the

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109. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 252–55 (Overlook Press 1973) (1959).

110. *Id.*

111. *Id.* at 35.

112. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 12 (2000). For a similar argument, see also ALAN F. WESTIN, PRIVACY AND FREEDOM 33–34 (1967).

113. This view of the First Amendment comes in a number of variations. For some examples of works arguing that the First Amendment serves the ends of, respectively, "individual self-fulfillment," "individual self-realization," "autonomous self-determination," and "autonomy," see C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); and Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 210–19 (1972). Unfortunately, as the critics of autonomy theory have pointed out, lots of things can promote autonomy and self-realization, such as working as a bartender or trading on the stock market, but not all of those things have much to do with First Amendment values. For such an argument see Bork, *supra* note 60, at 25.

autonomy or self-definition of the individual.[114] For these theories, too, freedom of thought in the sense of intellectual autonomy would be a precondition to any meaningfully autonomous self-determination or fulfillment.

My purpose here is not to advance a new theory of the First Amendment or to argue that one theory should take precedence over the others. It is instead to assert that no matter which theory we proffer for why we protect speaking and writing, freedom of thought is essential to that theory. If we value what people have to say, we need to ensure they develop something to say that is not skewed or chilled before it can be uttered. Regardless of whether we privilege truth seeking, or self-governance (or autonomy, or something else), intellectual privacy is needed to shelter the exercise of free thought. Bringing intellectual privacy within First Amendment theory thus helps us to understand how and why threats to intellectual privacy are really threats to traditional First Amendment values.

Making room for intellectual privacy within First Amendment theory allows a better assessment of the complex relationship between privacy and free speech. It also complicates the assumption that these two values are always in tension. To be sure, some kinds of privacy claims—like the paradigmatic Warren and Brandeis claim against the press based upon hurt feelings[115]—do threaten First Amendment values, in this case the need to protect the institution of the press so that it can provide information of public concern.[116] But other kinds of privacy claims, like intellectual privacy, protect and nurture First Amendment activities. Because intellectual privacy is essential to a robust culture of expression, a more nuanced understanding of the relationship between privacy and speech actually permits better protection of First Amendment values than the traditional understanding. Marking intellectual-privacy issues as having First Amendment saliency is thus essential.[117]

II. A Theory of Intellectual Privacy

Of course, if we are to mark issues of intellectual privacy for any reason, we first need to know what they are. What I have been calling "intellectual privacy" has been protected by Anglo-American legal culture under a variety of names and guises. In this Part, I collect these strands together and show the ways in which they have been rooted in our laws and social institutions. Some of the traditions that embody intellectual privacy are

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114. *See, e.g.*, Richards, *supra* note 113, at 62 (characterizing the "value of free expression" as arising from one's ability to conduct "autonomous self-determination").

115. *See* Warren & Brandeis, *supra* note 83, at 196 (lamenting the problem of the press's "idle gossip").

116. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 298–99 (1964); *see supra* note 71.

117. *Cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (describing the complex sociological processes by which our law determines which contexts are thought to implicate the First Amendment).

among the most ancient, important, and cherished values we hold as a society. Others are less salient and are to be found in the nooks and crannies of our legal tradition. Nevertheless, all are related and important, as they provide the foundation upon which modern notions of expressive liberty rest. I believe that there are at least four related areas in which intellectual privacy has been protected and nurtured—the freedom of thought and belief, spatial privacy, the right of intellectual exploration, and the confidentiality of communications.

Although intellectual privacy has been recognized and protected in various areas of the law, it has received surprisingly little systematic attention in the legal literature. While its constituent parts have been examined here and there, we lack a broad theory of why and how we should protect privacy in intellectual explorations. This Part offers such a normative theory. It is my claim that we should understand intellectual privacy as a series of nested protections, with the most private area of our thoughts at the center, and gradually expanding outward to encompass our reading, our communications, and our expressive dealings with others. At its core—the freedom of thought and belief—intellectual privacy should be all but absolute. As the interest expands to include other things and other people, however, some accommodation of competing interests must necessarily take place. Thus, for example, we should not expect our communications to be as robustly protected as our thoughts. However, each of the elements of intellectual privacy is worthy of strong protection, each is coherent, and each is critical to the ongoing project of civil liberties in the Information Age.

A. Freedom of Thought and Belief

The core of intellectual privacy is the freedom of thought and belief. The freedom to think and to believe as we want is arguably the defining characteristic of a free society and our most cherished civil liberty.[118] This right encompasses the range of thoughts and beliefs that a person might hold or develop, dealing with matters that are trivial and important, secular and profane. And it protects the individual's thoughts from scrutiny or unwilling disclosure by anyone, whether a government official or a private actor such as an employer, a friend, or a spouse. At the level of law, if there is any constitutional right that is absolute, it is this one, which is the precondition for all other political and religious rights guaranteed by the Western tradition.

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118. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("[Freedom of thought] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal."); *see also* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."); Schneiderman v. United States, 320 U.S. 118, 158 (1943) ("[F]reedom of thought . . . is a fundamental feature of our political institutions.").

Given the analysis in Part I, it should be no surprise that for centuries legal scholars throughout the Western world have held the freedom of thought and belief in high regard.[119] In his influential tract *Areopagitica*, John Milton privileged "the liberty to know, to utter, and to argue freely according to conscience above all [other] liberties."[120] Blackstone's *Commentaries* also stressed the importance of the common law protection for the freedom of thought and inquiry, even under a system that allowed subsequent punishment for seditious and other kinds of dangerous speech.[121] Blackstone explained that:

> Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials.[122]

The poisons metaphor, though Blackstone did not attribute it, was actually coined by Jonathan Swift in *Gulliver's Travels*,[123] further evidence of the penetration of norms of free thought into Anglo-American culture. Blackstone's conceptual treatment of freedom of thought was itself adopted by Joseph Story in his own *Commentaries*, the leading American treatise on constitutional law in the early Republic.[124] Story was not the only early American lawyer to note the importance of freedom of thought. Thomas Jefferson's famous *Virginia Statute for Religious Freedom* enshrined religious liberty around the declaration that "Almighty God hath created the mind free,"[125] a theme Jefferson also advanced in his letter to the Danbury Baptists[126] and other correspondence.[127] James Madison also forcefully articulated the need for freedom of thought and conscience.[128]

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119. *See, e.g.*, BENEDICT SPINOZA, THEOLOGICAL–POLITICAL TREATISE (1670), *reprinted in* FREE PRESS ANTHOLOGY 20, 20 (Theodore Schroeder ed., 1909) (asserting that a government that tries to control the thoughts and speech of its people is tyrannical).

120. John Milton, *Areopagitica* (1644), *reprinted in* FREE PRESS ANTHOLOGY, *supra* note 119, at 16.

121. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52.

122. *Id.* at *152.

123. JONATHAN SWIFT, GULLIVER'S TRAVELS 124 (Herbert Davis ed., Oxford Univ. Press 1977) (1726).

124. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 705–07 (Carolina Academic Press 1987) (1833). In his discussion of freedom of religion, Story also noted: "The rights of conscience are, indeed, beyond the just reach of any human power." *Id.* at 727.

125. An Act for Establishing Religious Freedom, 12 HENINGS STATUTES AT LARGE 84 (facsimile reprint 1969) (1823).

126. *See* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Comm. of the Danbury Baptist Ass'n (Jan. 1, 1802), *in* CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES 74 (John F.

The most sophisticated discussion of freedom of thought in the nineteenth century was by John Stuart Mill. In *On Liberty*, Mill insisted on a broad conception of freedom of thought as an essential element of his theory of human liberty, which comprised "the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological."[129] In Mill's view, free thought was inextricably linked to and mutually dependent upon free speech, with the two concepts being a part of a broader idea of political liberty. Moreover, Mill recognized that private parties as well as the state could chill free expression and thought.[130]

At the level of doctrine, the freedom of thought and belief is the closest thing to an absolute right guaranteed by the Constitution. It was first recognized by the Supreme Court in the 1878 Mormon polygamy case of *Reynolds v. United States*,[131] which recognized that although law could regulate religiously inspired actions such as polygamy, it was powerless to control "mere religious belief and opinions."[132] As noted above, freedom of thought in secular matters was identified by Justices Holmes and Brandeis as part of their dissenting tradition in free speech cases in the 1910s and 1920s.[133] Holmes argued further in *United States v. Schwimmer*[134] that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[135] And in his dissent in the Fourth Amendment wiretapping case of *Olmstead v. United States*, Brandeis argued that the framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[136] Brandeis's dissent in *Olmstead* introduced his theory of tort

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Wilson & Donald L. Drakeman eds., 3d ed. 2003) (explaining that a person's religious beliefs are a private matter that should be free from government interference).

127. For some examples of this theme in Jefferson's writings, see Letter from Thomas Jefferson to John Adams (Jan. 22, 1821), *in* 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 338, 338–39 (Thomas J. Randolph ed., 1830); and Letter from Thomas Jefferson to William G. Munford (June 18, 1799), *in* THE ESSENTIAL JEFFERSON 193, 195 (Jean M. Yarbrough ed., 2006).

128. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 2 THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901).

129. MILL, *supra* note 34, at 9.

130. *Id.* at 8.

131. 98 U.S. 145 (1878).

132. *Id.* at 166.

133. *See supra* notes 44–54 and accompanying text. For discussion of the foundational influence of the Holmes and Brandeis dissents on First Amendment law, see KALVEN, *supra* note 43, at 179; RABBAN, *supra* note 19, at 343; and White, *supra* note 20, at 321–22.

134. 279 U.S. 644 (1929).

135. *Id.* at 654–55 (Holmes, J., dissenting).

136. *Id.* at 478 (Brandeis, J., dissenting).

privacy—which came to be deeply influential in subsequent Fourth Amendment and constitutional right-to-privacy cases—into federal constitutional law.[137]

Freedom of thought became enshrined in constitutional doctrine in the mid-twentieth century in a series of key cases that sketched out the basic blueprint of the modern First Amendment. In *Palko v. Connecticut*,[138] Justice Cardozo characterized freedom of thought as "the matrix, the indispensable condition, of nearly every other form of freedom."[139] And in a series of cases involving the Jehovah's Witnesses, the Court developed a theory of the First Amendment under which the rights of free thought, speech, press, and exercise of religion were placed in a "preferred position."[140] Freedom of thought was central to this new theory of the First Amendment,[141] exemplified by Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*,[142] which invalidated a state regulation requiring that public school children salute the flag each morning. Jackson declared that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .
>
> [The flag-salute statute] transcends constitutional limitations on [legislative] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[143]

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137. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Brandeis's dissent in *Olmstead* as recognizing a constitutional right to privacy); Katz v. United States, 389 U.S. 347, 353 (1967) (concluding that *Olmstead* is not controlling because of the important privacy interests at stake); Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (offering Brandeis's dissent in *Olmstead* as support for recognizing a constitutional right to privacy).

138. 302 U.S. 319 (1937).

139. *Id.* at 327.

140. White, *supra* note 20, at 330–42; Neil M. Richards, *The "Good War," the Jehovah's Witnesses, and the First Amendment*, 87 VA. L. REV. 781, 781–82 (2001) (book review).

141. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) ("The Constitution guarantees freedom of thought and expression to everyone in our society."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (stating that the liberties protected by the First Amendment have a preferred position in the Constitution); Jones v. City of Opelika, 316 U.S. 584, 594 (1942) ("[T]he mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that the freedoms of conscience and belief are absolute).

142. 319 U.S. 624 (1943).

143. *Id.* at 642. Justice Murphy argued further that "[t]he right of freedom of thought and of religion as guaranteed by the Constitution against state action includes both the right to speak freely and the right to refrain from speaking at all . . . ." *Id.* at 645 (Murphy, J., concurring).

Modern doctrine continues to reflect this legacy. The Supreme Court has repeatedly declared that the constitutional guarantee of freedom of thought is at the foundation of what it means to be a free society.[144] In particular, freedom of thought has been invoked as a principal justification for preventing punishment based upon possessing or reading dangerous media. Thus, the government cannot punish a person for merely possessing dangerous books based upon their content,[145] with the exception of actual child pornography.[146] Freedom of thought remains, as it has for centuries, the foundation of the Anglo-American tradition of civil liberties. As relevant here, it is also at the core of intellectual privacy.

B. Intellectual Activity and Private Spaces

Although freedom of thought is in many ways the bedrock of our normative theories of the First Amendment, it has an important and underappreciated relationship to spatial privacy. Spatial privacy refers to the protection of places—physical, social, or otherwise—against intrusion or surveillance.[147] It is most clearly reflected in the well-known examples of trespass law[148] and in the Fourth Amendment's protections of the person and home against unreasonable searches and seizures.[149] The relationship

144. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will . . . ."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (stating that "individual freedom of mind" is a broad concept, of which the right to speak and refrain from speaking are "complementary components"); United States v. Reidel, 402 U.S. 351, 356 (1971) (stating that the freedom to read obscene materials and freedom of thought are independent of whether obscenity is itself protected by the Constitution); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . freedom of inquiry [and] freedom of thought . . . ."); Mapp v. Ohio, 367 U.S. 643, 672–74 (1961) (Harlan, J., dissenting) (arguing that criminalization of the mere knowing possession of obscene material is inconsistent with the freedom of thought protected against state action by the Fourteenth Amendment).

145. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

146. Osborne v. Ohio, 495 U.S. 103, 111 (1990); *cf. Free Speech Coal.*, 535 U.S. at 258 (holding that the government may not make it a crime for one person to possess materials containing sexually explicit depictions that another person had inaccurately marketed, sold, or described as child pornography).

147. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202 (1998).

148. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160 (Wis. 1997) ("The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded."); Semayne's Case, (1603) 77 Eng. Rep. 194, 195 (K.B.) ("[T]he house of every one is to him as his castle and fortress . . . .").

149. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) (stating that the right to retreat into one's own home and be free from unreasonable governmental intrusion is at the core of the

between spatial privacy and intellectual activity is this: we often need spaces—physical, social, or otherwise—to allow us to think freely and without interference. Without the space and time to think, legal protections on free thought become merely empty promises.[150] Spatial privacy therefore buttresses free thought and our other processes of belief formation, giving them a context in which they can operate more effectively.

Although the relationship between spatiality and thought has been poorly appreciated, there are a few exceptions. One early discussion of the importance of private spaces to intellectual activity was Dr. Samuel Johnson. Writing in 1750, Johnson argued that "retirement" from the bustle and demands of daily life was an essential requirement for "those minds, which have been most enlarged by knowledge, or elevated by genius."[151] Contemplation thus required an individual to "snatch an hour of retreat, to let his thoughts expatiate at large, and seek for that variety in his own ideas."[152] Johnson's argument is helpful, because it makes the important point that without some ability to withdraw to a private place, without some control of the boundaries between the self and society,[153] it becomes difficult, if not impossible, to reflect on the issues that are important to us, either alone or in the company of confidants.

A number of mid-twentieth century works of literature also echoed these themes. Of course, George Orwell's *1984* is the most famous literary defense of privacy as a refuge from totalitarianism,[154] but there are other examples. In *A Room of One's Own*, Virginia Woolf argued that women needed a place apart in which to develop their selves, for it was only through spatial privacy and inaccessibility that women could develop their individuality.[155] As Woolf put it: "[F]ive hundred a year stands for the power to contemplate [and] a lock on the door means the power to think for oneself."[156] Timothy Macklem argues that Woolf's metaphor was not literal, but was intended to make the point that "creative endeavor, and the values it sustains, requires privacy."[157] Ray Bradbury's novel *Fahrenheit 451* also made the case for spatial privacy as a precondition for free thought. Bradbury depicted a society in which giant television screens constantly broadcast loud, colorful spectacle devoid of intellectual content to a passive

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Fourth Amendment); Wilson v. Layne, 526 U.S. 603, 610, 609–10 (1999) ("The Fourth Amendment embodies [a] centuries-old principle of respect for privacy of the home . . . .").

150. For a similar argument in the context of digital-rights-management technologies, see generally Cohen, *DRM and Privacy*, *supra* note 17.

151. Samuel Johnson, *The Rambler No. 7* (Apr. 10, 1750), *reprinted in* 1 THE WORKS OF SAMUEL JOHNSON, L.L.D. 11 (Arthur Murphy ed., Henry G. Bohn 1854).

152. *Id.*

153. For a broader theory of privacy-as-boundary-setting, see Cohen, *supra* note 99, at 190–94.

154. *See* ORWELL, *supra* note 97.

155. VIRGINIA WOOLF, A ROOM OF ONE'S OWN (Mark Hussey ed., ann. ed. 2005) (1929).

156. *Id.* at 105.

157. MACKLEM, *supra* note 102, at 37.

audience.[158] In Bradbury's dystopia, independent thought itself becomes impossible due to the constant bombardment of the senses with noise and color. As the fictional Professor Faber explains to the protagonist Montag at a crucial part of the novel, free thought requires quality of information, leisure to digest it, and the right to carry out actions based upon insights developed from the first two.[159] Under this view, legal guarantees for freedom of thought become futile without some place or solace to engage in critical thought and contemplation.

Although it has been more clearly articulated by literature, the overlap between freedom of thought and spatial privacy has also made fleeting appearances in First Amendment case law. Again, the bulk of these authorities date from the mid-twentieth century. In *Kovacs v. Cooper*,[160] the Supreme Court held that the First Amendment did not bar municipalities from regulating the "loud and raucous noises" produced by sound trucks on a public street.[161] Justice Frankfurter's concurrence explained the critical nexus between spatial privacy and freedom of thought, noting "the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."[162]

This issue arose again a few years later in *Public Utilities Commission v. Pollack*,[163] in which the District of Columbia's practice of playing radio in its municipal train cars was sustained against a First Amendment challenge.[164] In dissent, Justice Douglas articulated a powerful theory of the relationship between privacy and liberty.[165] For Douglas, under our constitutional scheme, privacy or "[t]he right to be let alone is indeed the beginning of all freedom."[166] Indeed, in an early statement of his views on constitutional privacy that later culminated in *Griswold v. Connecticut*,[167] Douglas asserted that the "First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone."[168] Although he recognized that the radio broadcasts on the trains were fairly innocuous and mostly music, Douglas was concerned that

158. BRADBURY, *supra* note 97, at 84.

159. *Id.* at 83–85.

160. 336 U.S. 77 (1949).

161. *Id.* at 78, 87.

162. *Id.* at 97 (Frankfurter, J., concurring).

163. 343 U.S. 451 (1952).

164. *Id.* at 453, 463.

165. *Id.* at 467–69 (Douglas, J., dissenting).

166. *Id.* at 467.

167. 381 U.S. 479 (1965); *see also* Richards, *supra* note 9, at 1107 (characterizing Douglas's *Griswold* opinion as a First Amendment privacy case).

168. *Pollack*, 343 U.S. at 468 (Douglas, J., dissenting).

giving the government the power to impose unwanted programming would allow the government to act as propagandist.[169] He concluded by arguing:

> If liberty is to flourish, government should never be allowed to force people to listen to any radio program. The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds.[170]

Justice Frankfurter would apparently have agreed with Douglas, but as a D.C. train rider himself, he felt compelled to recuse himself from the case. As he dryly put it in his separate opinion, "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."[171]

Mid-century First Amendment doctrine rejected the opportunity to expressly link spatial privacy and freedom of thought, relying instead on property rights to protect privacy against unwanted speech.[172] Subsequent cases have protected what some scholars have called the right not to receive information.[173] Thus, the rights of residents to exclude door-to-door speakers,[174] targeted antiabortion protestors,[175] and unwanted junk mail[176]

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169. *Id.* at 469.

170. *Id.*

171. *Id.* at 467 (separate opinion of Frankfurter, J.).

172. *See* Martin v. Struthers, 319 U.S. 141, 147–49 (1943) (relating the traditional American law of trespass to the constitutional right to choose whether or not to receive literature from a person knocking at one's door).

173. For a discussion of some of these cases, see Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U. L. REV. 153, 157–74 (1972). *See also, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) ("While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit . . . ."); Redrup v. New York, 386 U.S. 767, 769 (1967) (holding that pornographic magazine sales cannot be restricted absent a suggestion that they were "so obtrusive as to make it impossible for an unwilling individual to avoid exposure"); Breard v. Alexandria, 341 U.S. 622, 645, 641–45 (1951) ("It would be . . . a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."); Kovacs v. Cooper, 336 U.S. 77, 86 (1949) (rejecting a First Amendment challenge to an ordinance that banned the use of loud speakers on city streets, reasoning that without such an ordinance "[t]he unwilling listener . . . [i]n his home or on the street is practically helpless to escape this interference with his privacy").

174. *Martin*, 319 U.S. at 147–49.

from their homes have been sustained on residential privacy grounds over the claims of speakers. Despite this partial protection, the need for quiet places—physical or otherwise—for reflection has remained. Indeed, the irritations affecting individuals in the *Pollack* and *Kovacs* cases seem almost quaint from the vantage point of a half century on. The modern information society—with its concepts of information overload[177] and permanent accessibility via electronic communications devices such as Blackberries or cell phones—seems to be fast approaching Bradbury's world of vast information bombardment but little contemplation.[178] Even technologists lament the phenomenon of "limited partial attention," in which the connectedness of modern life squeezes out opportunities for contemplation and reflection.[179] A similar intuition appears to have prompted the Tenth Circuit to recently sustain the federal Do Not Call Registry against a First Amendment challenge, noting that a sufficient interest to counteract the commercial speech rights of telemarketers in that case was "protecting the privacy of individuals in their homes."[180]

Despite its rejection by doctrine, spatial privacy remains essential to any culture we might call "free" in any meaningful sense. Spatial privacy provides isolation and inaccessibility, which in turn allow the detachment necessary for contemplation and the exercise of our cognitive liberty. Creativity in isolation enables us to think for ourselves, free from the warping effect that the gaze of others might have on us. This isolation "makes it possible for people to reach different conclusions and thereby develop different ways of life, the ways of life that liberal societies draw upon for the diversity that makes freedom valuable there."[181] Isolation may be relative; it can be the much-romanticized great mind working in isolation, or it can involve a small group developing their ideas collectively. But a space, real or virtual, within which to withdraw and develop new ideas, is essential. As such, spatial privacy is a critical component of intellectual privacy.

C. Freedom of Private Intellectual Exploration

The third dimension of intellectual privacy is the freedom of private intellectual exploration. Whereas the freedom of thought and belief protects our ability to hold beliefs, the freedom of intellectual exploration protects our ability to develop new ones by reading, thinking, and discovering new truths. Although essential to any free and self-governing society, the freedom of

175. Frisby v. Schultz, 487 U.S. 474, 483–84 (1988).

176. *Rowan*, 397 U.S. at 738.

177. The phrase was first popularized in ALVIN TOFFLER, FUTURE SHOCK 311 (1970).

178. *See supra* notes 158–60 and accompanying text.

179. *See, e.g.*, Steven Levy, *(Some) Attention Must Be Paid!*, NEWSWEEK, Mar. 26, 2006, at 16 (discussing how technologies such as mobile phones and e-mail create distractions that can interfere with tasks requiring contemplation and reflection).

180. Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1237 (10th Cir. 2004).

181. MACKLEM, *supra* note 102, at 56.

intellectual exploration has not been as broadly recognized as, for example, the freedom of thought and belief. Nevertheless, this freedom remains essential to intellectual privacy.

The freedom of intellectual exploration has been recognized in several places in American law, although under different names. A number of cases have recognized the right to receive information and ideas.[182] Most famously, in *Stanley v. Georgia*,[183] the Supreme Court held that a prosecution for the possession of obscenity in a home violated the First Amendment because of the fundamental need for privacy surrounding an individual's intellectual explorations.[184] The Court explained that the First Amendment protected a "right to receive information and ideas, regardless of their social worth" that was "fundamental to our free society."[185] Although the Court agreed that the possession of obscene books and films could be criminalized, the First Amendment had special application to the circumstances of the case. In a famous passage overtly linking the freedom of thought, spatial privacy, and the right to autonomous intellectual exploration, the Court concluded:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[186]

Thus, *Stanley* protects intellectual privacy and the right to read in the home, recognizing the close relationship between privacy and the intellectual activities that are the bedrock of our expressive culture.

Although the right of private intellectual exploration is undertheorized in American legal theory, *Stanley* is not its only manifestation. A few other cases have recognized the constitutional right to receive, read, and engage with information in private. For example, in *Lamont v. Postmaster*

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182. *See* Stanley v. Georgia, 394 U.S. 557, 562 n.7 (1969) (citing cases in which the Court expressed reluctance to make nonpublic distribution of obscene materials illegal); *see also* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1964) (holding unconstitutional a law requiring addressees to request in writing delivery of mail determined to be communist political propaganda); Thomas v. Collins, 323 U.S. 516, 534 (1945) (stating that a prohibition on speech soliciting union membership was also a restriction on the rights of the workers to hear what the speaker had to say); Martin v. Struthers, 319 U.S. 141, 143 (1943) (stating that First Amendment freedom of speech includes the right to receive literature); Blitz, *supra* note 17, at 834–41 (contrasting the Court's approach to public parks with its approach to public libraries as forums in which the right to receive information should be protected); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 3 (citing cases in which the Court has recognized a constitutional right to know).

183. 394 U.S. 557 (1969).

184. *Id.* at 565.

185. *Id.* at 564.

186. *Id.* at 565.

General,[187] the Supreme Court used this theory to invalidate a federal law permitting the government to hold "communist political propaganda" mailed from overseas unless the recipient affirmatively requested it in writing.[188] And a few state courts have held that state access to bookstore records creates particular threats to free speech guarantees.[189]

Beyond constitutional doctrine, the right of intellectual exploration has been protected and encouraged by a number of state and federal statutes. Quite often, these statutes mandate confidentiality for intellectual records. For example, virtually all states protect the confidentiality of library records,[190] and federal law safeguards the confidentiality of video rental records.[191] But such protections are piecemeal rather than comprehensive. Thus, although libraries and video stores must guarantee confidentiality to their patrons and customers, under current law bookstores and search engines need not.[192]

A number of legal scholars have also recognized the importance of private intellectual exploration. In a series of articles about the intersection between digital-rights-management (DRM) technologies and copyright law, Julie Cohen has explained the critical First Amendment and privacy implications at stake in the ways in which flows of information in the electronic environment are created. She has argued that DRM tools—which permit novel methods of identifying, monitoring, and restricting the intellectual activity of readers—threaten the First Amendment right of anonymous reading.[193] In addition, she has argued that a better recognition of autonomy-based privacy rights in information relating to expressive activity (such as the records of libraries, video stores, and cable companies) provides a critically important "breathing space for thought, exploration, and personal growth."[194] A few other scholars have argued that the First Amendment requires a level of

187. 381 U.S. 301 (1965).

188. *Id.* at 305.

189. *See, e.g.*, Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1053 (Colo. 2002) ("Search warrants directed to bookstores, demanding information about the reading history of customers, intrude upon the First Amendment rights of customers and bookstores because compelled disclosure of book-buying records threatens to destroy the anonymity upon which many customers depend.").

190. Library-records confidentiality is protected in at least forty-eight states and the District of Columbia. For a catalogue of such statutes, see State Laws on the Confidentiality of Library Records (Apr. 20, 2005), http://www.library.cmu.edu/People/neuhaus/state_laws3.html.

191. Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2006).

192. *See* James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 18 (2007) (suggesting that internet users are not protected against dissemination of their search queries by search engines); Geoffrey R. Stone, *Revisiting The Patriot Act*, CHI. TRIB., July 8, 2005, at 29 (describing the lack of any protection from government viewing of bookstore records).

193. Cohen, *Right to Read*, *supra* note 17, at 1029.

194. Cohen, *DRM and Privacy*, *supra* note 17, at 578.

privacy to protect access to new ideas, principally through the act of reading the written word.[195]

A crucial aspect of the ability to engage in intellectual exploration is that it be both *private* and *confidential*. The distinction between privacy and confidentiality is not one that is often made in American law, so it may require some elaboration.[196] Intellectual exploration must be private insofar as the act of reading must be free from interference by outsiders, and also unwatched, lest the surveillance of others chill the development of new thoughts in the direction of the bland and the mainstream.[197] Sometimes, however, intellectual exploration cannot be private, for the assistance of others becomes necessary to access new information. The paradigmatic example of a reference librarian comes to mind, but one can imagine others such as video-store clerks and entities providing Internet access. In these cases, in order to protect the integrity of the exploration, the reader must be able to rely on some guarantee of confidentiality—the expectation that the assistant will not divulge secrets learned in the act of helping.

If freedom of intellectual exploration is so important, one might wonder why it has not received as much protection in law as other dimensions of intellectual privacy. I would suggest that much of this has to do with the ways in which social norms and institutions have shepherded this freedom in the past, rendering explicit legal protection less necessary. Institutions and social norms, more so than law, have played a particularly important role in the freedom of intellectual exploration. A number of institutions have nurtured our ability to read, explore, and receive ideas, including the post office,[198] bookstores, and schools and universities.[199]

The best example of how social institutions have nurtured the freedom of intellectual exploration is that of libraries. Libraries are the traditional institution in which the right to read privately and autonomously has been developed and protected. Until relatively recently, the only place available to

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195. *E.g.*, Blitz, *supra* note 17, at 800; *see, e.g.*, Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 318 (2004) (arguing that cyber surveillance compromises anonymous speech).

196. For a more developed discussion of both this problem and the differences between privacy and confidentiality, see generally Richards & Solove, *supra* note 85.

197. Cohen, *supra* note 93, at 1426.

198. For historical discussions of the role the postal system has played in the dissemination of information, see RICHARD JOHN, SPREADING THE NEWS 282 (1998), and Anuj Desai, *Wiretapping Before the Wires*, 60 STAN. L. REV. 553 (2007).

199. *See* Rosenburger v. Rector of the Univ. of Va., 515 U.S. 819, 835 (1995) (noting that the danger of chilling free expression "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophical tradition"); Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community."). For further discussion of the role universities play in the freedom of intellectual exploration, see Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007), and Post, *supra* note 33, at 2365.

most people for unfettered reading was the library—very often a public library provided by the government. But it is in this context that librarians developed many of the most important norms of intellectual freedom and privacy. Much of the tradition of libraries as places of private intellectual exploration in the United States is a product of the American Library Association (ALA).[200] In 1939, the ALA adopted its first library bill of rights, a ringing declaration of intellectual freedom and privacy that enshrined the intellectual autonomy of library patrons as the heart of a library's institutional mission.[201] Previous theories of the role of public libraries had understood them as didactic institutions intended to "elevate" the lower classes and, where necessary, act as a "moral censor."[202] By contrast, the 1939 Library Bill of Rights "affirm[ed] that all libraries are forums for information and ideas, and that . . . [l]ibraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."[203] The emergence of the 1939 document paralleled quite closely two other developments in democratic and free speech theory during this period: a new understanding of free speech as an essential part of democratic theory, and the increased receptivity of progressives and New Dealers to a special and protected role for intellectual inquiry and speech in American legal theory.[204] But it also represents a major recognition of the role of unmonitored reading in the genesis of the ideas that are essential to these values, as well as the special institutional role of the library in providing both the substance of intellectual materials to read as well as a space in which to do it safely.

The norm of patron autonomy embodied in the Library Bill of Rights and championed by the ALA has been enormously influential in affecting the norms within which libraries operate and librarians envision their own professional roles and duties.[205] In recent years, against the backdrop of the rise of the Internet and post-September 11 terrorism, the ALA has continued its fight for intellectual liberty against government surveillance.[206] This effort

200. *See* Blitz, *supra* note 17, at 837–39 (discussing the role of the ALA in the early twentieth century).

201. *Id.* at 837–38.

202. EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939: A STUDY IN CULTURAL CHANGE, at xv (1984); WAYNE A. WIEGAND, THE POLITICS OF AN EMERGING PROFESSION: THE AMERICAN LIBRARY ASSOCIATION 1876–1917, at 9–10 (1986).

203. Library Bill of Rights, *reprinted in* CENSORSHIP AND THE AMERICAN LIBRARY: THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939–1969, at 13–14 (1996).

204. MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 165–67 (1991); White, *supra* note 20, at 330–31.

205. *See* Blitz, *supra* note 17, at 838, 837–38 (noting the Library Bill of Rights and ALA influences as key elements to public libraries' evolution "from settings where censorship was acceptable into settings where intellectual liberty was paramount").

206. *See* INTELLECTUAL FREEDOM COMM., AM. LIBRARY ASS'N, QUESTIONS AND ANSWERS ON PRIVACY AND CONFIDENTIALITY 1–2 (2006) [hereinafter ALA, QUESTIONS AND ANSWERS], *available at* http://staging.ala.org/ala/aboutala/offices/oif/statementspols/statementsif/interpretations

has produced a large amount of written material designed to assert librarians' professional duties of privacy and confidentiality involving their patrons' reading habits.[207] For example, a recent official interpretation of the Library Bill of Rights argues that libraries, whether physical or virtual, must maintain both the right to privacy—"the right to open inquiry without having the subject of one's interest examined or scrutinized by others"—and confidentiality with respect to patron records.[208] The document concludes: "The American Library Association affirms that rights of privacy are necessary for intellectual freedom and are fundamental to the ethics and practice of librarianship."[209] The ALA has also taken a strong public stand on these issues, adopting resolutions strongly opposing the federal government's use of § 215 of the Patriot Act and National Security Letters to obtain library records.[210]

The leadership of the ALA in developing theories of the right of intellectual exploration is important on its own terms as a thoughtful exploration of why intellectual freedom is important and why it should be protected. It is also instructive because it shows important *ways* these values can be protected beyond the formal pronouncements of law. By folding the professional duties of librarianship around the substantive value of intellectual privacy, the ALA example shows the importance of social norms and institutions in advancing First Amendment values. And it shows more generally the role that norms and institutions can play in providing the infrastructure in which the freedom of thought can be exercised.

D. Freedom of Confidential Communications

The fourth dimension of intellectual privacy is freedom of confidential communications. Confidentiality protects the relationships in which information is shared, allowing candid discussion away from the prying ears of others. It allows us to share our questions and tentative conclusions with confidence that our thoughts will not be made public until we are ready. Confidentiality protects the disclosure of our shared secrets in a number of

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/qandaonprivacyandconfidentiality.pdf (describing the ALA Intellectual Freedom Committee's work on "ongoing privacy developments in technology, politics and legislation," including the "implications of September 11 on privacy issues").

207. *E.g.*, AM. LIBRARY ASS'N, INTELLECTUAL FREEDOM MANUAL (7th ed. 2006); ALA, QUESTIONS AND ANSWERS, *supra* note 206.

208. Am. Library Ass'n, Privacy: An Interpretation of the Library Bill of Rights (June 19, 2002), http://staging.ala.org/ala/aboutala/offices/oif/statementspols/statementsif/interpretations/privacy.cfm.

209. *Id.*

210. Am. Library Ass'n, Resolution on the USA PATRIOT Act and Related Measures that Infringe on the Rights of Library Users (Jan. 20, 2003), http://staging.ala.org/ala/aboutala/offices/oif/statementspols/ifresolutions/resolutionusa.cfm [hereinafter ALA, PATRIOT Act Resolution]; ALA, Resolution on the Use and Abuse of National Security Letters: On the Need for Legislative Reforms to Assure the Right to Read Free of Government Surveillance (June 27, 2007), http://www.ala.org/ala/aboutala/offices/oif/statementspols/ifresolutions/nationalsecurityletters.cfm.

ways, although two are especially relevant here: (1) preventing *interception* of our communications by third parties and (2) sometimes also preventing *betrayal* of confidences by our confidants. A good example is a telephone call, where confidentiality rules prevent both wiretapping by third parties and the telephone company from sharing the contents of our communications.[211] Under some circumstances, such as when we talk to our lawyers, our confidant is also prohibited from disclosing our communications.[212] Because it involves the sharing of information, confidentiality is further removed from the freedom of thought that forms the core of intellectual privacy, and is subject to more exceptions. Nevertheless, by enabling us to share our ideas before they are ready for "prime time," confidentiality rules preventing interception and betrayal are an essential element of intellectual privacy's protection of new ideas.

Anglo-American law has long protected the communication of ideas from sender to recipient. As I have argued elsewhere, the tradition of confidentiality in Anglo-American law predates that of privacy by hundreds of years.[213] Indeed, confidentiality rules preventing interception of the contents of conversations are ancient. Such protections have taken a variety of forms, providing remedies against government and nongovernment actors. Blackstone colorfully described the ancient common law crime of eavesdropping—quite literally the dropping in under the eaves of a house to listen in on conversations.[214] And since colonial times, the contents of letters have been protected by law in a variety of ways, including criminal laws prohibiting opening the letters of others.[215] These and other administrative decisions by early postal officials were ultimately incorporated into constitutional law in 1877, when the Supreme Court held that the Fourth Amendment prohibited federal agents from inspecting letters without a warrant.[216] Nineteenth-century public opinion treated the confidentiality of communications as having the utmost importance, and the "sanctity of the mails" was often treated as having an almost religious quality, in part because of their connectedness to the freedom of thought.[217] As one postal official put it: "The laws of the

211. 18 U.S.C. § 2511 (2006).

212. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18, 1.6, 1.8(b), 1.9(c) (1983) (imposing a variety of duties of confidentiality on lawyers with respect to prospective, current, and former clients).

213. Richards & Solove, *supra* note 85, at 133–34.

214. 4 WILLIAM BLACKSTONE, COMMENTARIES *169.

215. *See* DAVID J. SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY 9 (1978) (citing the British Post Office Act of 1710, 9 Anne cap. X, § 40).

216. *Ex parte* Jackson, 96 U.S. 727, 733 (1877); *see also* Desai, *supra* note 198, at 574–75 (placing *Jackson* in the broader context of the evolution of antebellum communications-privacy norms).

217. *See* Richards & Solove, *supra* note 85, at 142 ("The 'sacredness' of personal correspondence promoted by the postal system's public law regime was buttressed by related private law doctrines protecting the unpublished expressions in letters from unwanted disclosure."); Note, *The Right to Privacy in the Nineteenth Century*, 94 HARV. L. REV. 1892, 1899 (1981)

land are intended not only to preserve the person and material property of every citizen sacred from intrusion, but to secure the privacy of his thoughts, so far as he sees fit to withhold them from others."[218]

In the Electronic Age, the contents of communications are protected from interception by the complicated Electronic Communications Privacy Act[219] (ECPA), which requires police to obtain a warrant before they may obtain the contents of telephone calls and e-mails, and subjects unlawful interceptors to serious criminal and tort liability.[220] In addition, over forty states have passed similar laws, many of which are more protective than ECPA.[221] Such communications are also protected by the Fourth Amendment, as held by *Katz v. United States*[222] and its progeny, which recognize the importance of communications privacy.[223]

Confidentiality rules preventing *betrayal* of confidences are also of ancient origin. Of course, not every recipient of a secret is under a legal duty not to disclose it. Such duties are appropriately imposed only where there is a special relationship between the parties, such as where confiding potentially damaging information is necessary for some service the confidant is providing. Such duties are particularly appropriate if disclosure of the information could be embarrassing or damaging to the confider.[224] Although confidentiality rules of this sort have been developed more fully by English law,[225] numerous such duties exist in American law as well. Evidentiary privileges protect a wide variety of relationships by preventing adverse testimony that would violate the trust of spouses, patients, and others.[226] Outside the context of testimony, broader duties of confidentiality are imposed upon professionals like doctors and lawyers, who need candid information in order to provide advice to their clients.[227] Similarly, duties of confidentiality have long been placed upon the carriers of communications, be they

("Nineteenth century public opinion regarded the 'sanctity of the mails' as absolute in the same way it esteemed the inviolability of the home.").

218. Note, *supra* note 217, at 1899 (quoting J. HOLBROOK, TEN YEARS AMONG THE MAIL BAGS, at xviii (1855)).

219. 18 U.S.C. § 2511(1) (2006).

220. *Id.*

221. *See* Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting) (collecting examples).

222. 389 U.S. 347 (1967).

223. *See id.* at 359 (declaring that rights do not vanish when they are "transferred from the setting of a home, an office, or a hotel room to that of a telephone booth").

224. This was the theory of the law of confidential relations, a forerunner of modern fiduciary law, which protected vulnerable parties in information transactions against abuse, including misuse of information for the confidant's gain and disclosure of confidences. Richards & Solove, *supra* note 85, at 135–37.

225. *See id.* (discussing the English common law of confidentiality).

226. Richards, *supra* note 2, at 1195; *see* Richards & Solove, *supra* note 85, at 134–35 (describing common law recognition of the attorney–client and spousal evidentiary privileges).

227. Richards, *supra* note 2, at 1195.

government postal employees,[228] telegraph companies in the nineteenth century, or telephone company employees today.[229] Given the importance attached to the contents of communications as both the exchange of ideas and a source of embarrassment or liability if disclosed, clients of communications companies have long expected that their communications will be unopened by those they entrust to carry them.

Confidential communications are essential to meaningful intellectual privacy. Our confidants are a source of new ideas and information, but without confidentiality they may be reluctant to share subversive or deviant thoughts with us lest others overhear. On the other hand, without the ability to speak with trusted confidants, we lack the ability to develop our own ideas[230] in collaboration with others before we are ready to share them publicly. Consultation with intimates allows us to better determine if an idea is a good one, and to gauge some expectation of how it will be received if we finally decide to publish it. Without a meaningful expectation of confidentiality, then, we would have fewer ideas, and those that we did have might be unlikely to be shared.

Of course, to say that confidentiality of communications should be meaningful is not to say that it must be absolute—there is certainly a legitimate government interest in being able to investigate those suspected of plotting criminal acts that justifies some inroads into absolute confidentiality. But given the importance of confidentiality to intellectual privacy and the First Amendment values that support it, such inroads must be carefully managed. There are good reasons why government should be able to monitor particular communications where it has reasonable belief that they are being used to facilitate illegal activity. But a broad-ranging and unconstrained power to secretly monitor is an entirely different proposition—one that is deeply corrosive of the kind of trust and reliance necessary for the development of ideas. Indeed, although largely forgotten today, such concerns were at the core of why Congress passed the Wiretap Act in 1968.[231] A Presidential commission at the time put it aptly: "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously

228. *See* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 46 (1995) (discussing nineteenth-century postal statutes prohibiting the opening of mail); *supra* note 198 and accompanying text.

229. *See supra* note 211 and accompanying text.

230. *Cf.* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 165 (arguing that people are best able to express themselves when they do not fear public exposure or being made the subject of gossip).

231. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211–23 (codified as amended in scattered sections of 18, 42, and 47 U.S.C.).

inhibiting effect upon the willingness to voice critical and constructive ideas."[232]

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Each of the four strands of intellectual privacy contributes to the generation of new ideas and new ways of thinking about the world. Without *free thought*, the freedom to think for ourselves, to entertain ideas that others might find ridiculous or offensive, we would lack the ability to reason, much less the capacity to develop revolutionary or heretical ideas about (for instance) politics, culture, or religion. Engaging in these processes requires a *space*, physical and psychological, where we can think for ourselves without others watching or judging. But despite the prevailing cultural myth of the creator toiling alone, few of our ideas come from the operation of a single mind. The *freedom of intellectual exploration* allows us to read and to receive exposure to the ideas of others so we can evaluate them and improve or adapt them for ourselves. And at a certain point, when our ideas are ready to share with others but not yet developed enough for widespread dissemination, we might want to communicate our ideas to a few trusted friends in confidence. The *freedom of confidential communications* affords us this opportunity.

The theory of intellectual privacy I have articulated nurtures the cognitive and communicative processes by which we as individuals can come to think for ourselves. It allows us to imagine, test, and develop our ideas free from the deterring gaze or interfering actions of others. Without intellectual privacy, we would be less willing to investigate ideas and hypotheses that might turn out to be wrong, controversial, or deviant. Intellectual privacy thus permits us to experiment with ideas in relative seclusion without having to disclose them before we have developed them, considered them, and decided whether to adopt them as our own.

This is admittedly an ambitious claim, and I do not want to overstate it. The theory of intellectual privacy I have laid out is a necessary condition for intellectual freedom, but it is not by itself a sufficient one. A couple of caveats are thus in order. First, my goal in the present Article is to focus on the core of intellectual privacy—to state the strongest possible case for it. The outer boundaries of intellectual privacy—like those of the freedom of speech itself[233]—are less definite. For example, one could certainly extend my theory outward one additional level to include the freedom of association. As I have argued elsewhere, freedom of association is arguably the interest that undergirds the Supreme Court's first "great" constitutional privacy case of

232. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967).

233. *See* Schauer, *supra* note 32, at 1768 (arguing that the outermost boundaries of the First Amendment are vague and do not appear to reflect any principled theory of coverage other than mysterious sociological processes of constitutional salience).

Griswold v. Connecticut.[234] Association can definitely advance the formation of ideas,[235] and privacy of association can thus be seen as an element of intellectual privacy. But association is further from the core of free thought and raises enough complex issues of its own that I am content to leave such an extension for future work.

A second necessary caveat is that intellectual privacy is not a panacea by itself. Guaranteeing robust intellectual freedom will likely require other conditions, such as the vibrant democratic culture,[236] political tolerance,[237] and good character,[238] that other First Amendment theorists have articulated. Taken to its logical conclusion, intellectual freedom in the broadest sense might even require affirmative access to education or the nutrition necessary to guarantee cognitive development. That may be, but my goal at present is more modest than a full-blown theory of an affirmative entitlement to intellectual freedom. My goal here is, first, to sketch out the basic preconditions for meaningful intellectual privacy and, second, to show how they contribute to the overall project of the First Amendment in ways that are consistent with traditional First Amendment theory. My conception of intellectual privacy is as a negative right against public and private actors who seek to interfere with it. But even with these caveats in mind, I hope to have demonstrated that intellectual privacy is not only consistent with our understandings of the First Amendment, but also essential to it in some very basic ways.

III. Protecting Intellectual Privacy

My argument so far has sought to articulate the importance of intellectual privacy in terms of the theory and history of the First Amendment. Intellectual privacy is an important part of these traditions, yet it has been underappreciated. I have also maintained that intellectual privacy

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234. *See* Richards, *supra* note 9, at 1109 (arguing that Justice Douglas "viewed the case as being what we would today consider a First Amendment associational privacy case").

235. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 869 (2005).

236. *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 107, at 192–93 (theorizing that "responsive democracy," understood as a public culture that cultivates civil and respectful speech and deliberation, "requires the maintenance of healthy and vigorous forms of community life"); Balkin, *supra* note 1, at 50 ("To protect freedom of speech in the digital age, we will have to reinterpret and refashion both telecommunications policy and intellectual property law to serve the values of freedom of speech, which is to say . . . with the goals of a democratic culture in mind.").

237. *See* BOLLINGER, *supra* note 72, at 243 ("[A] presumption of tolerance, or what I have sometimes referred to as the tolerance ethic . . . is consistent in a very broad way with the view of the underlying purpose of free speech represented here.").

238. *Cf.* Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60, 62 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (extolling the virtues of "a culture that prizes and protects expressive liberty" because such a culture tends to "nurture[] in its members certain character traits such as inquisitiveness, distrust of authority, willingness to take initiative, and the courage to confront evil," which enable those members to make important instrumental contributions to the well-being of a democratic culture).

has a practical significance as well; that it can help us ask better questions of a series of contemporary issues involving information relating to intellectual activity, and that it can help point us to more satisfactory solutions. In this Part, I return to the four practical cases I introduced at the outset and use them to suggest how this can be so.

Broadly put, the practical contemporary problem of intellectual privacy is this: Information relating to intellectual activity is increasingly being created, tracked, and maintained by government and private entities. Such information practices have conventionally been thought of as raising privacy concerns, but privacy has frequently failed to stand up to the countervailing interests that have been arrayed against it. Intellectual privacy, I would suggest, represents a more helpful way of looking at these problems because it illuminates the First Amendment values at stake. Understanding these problems in this way allows us to appreciate their true importance to our constitutional culture and to think more creatively about possible solutions. In this Part, I suggest some ways that this can occur. My argument has two elements. First, I argue that intellectual privacy needs to be protected—not only through First Amendment doctrine, but also (and more importantly) by building its protection into other legal and social structures. Second, I use the four policy cases with which I began this Article to suggest some practical ways that this can happen. My goal here is not to assert ironclad outcomes but more tentatively to spark a discussion about how best to reconcile the First Amendment values inherent in the protection of new ideas with competing considerations of efficiency and security in concrete cases.

A. The Potential and Limits of Constitutional Doctrine

Most people would agree that intellectual privacy can be threatened quite directly by the government. From this perspective, the protection of intellectual privacy can be seen to embody a kind of anti-totalitarian principle that the government should not be able to influence, monitor, or dominate the autonomous cognitive processes of the people. Such a principle is both familiar and well developed in legal and popular culture.

But private actors can threaten intellectual privacy as well. Even within the anti-totalitarian framework sketched above, private monitoring and logging of intellectual activity can be dangerous, for the government can enlist private data-gatherers to act as its agents. Totalitarian governments have a long tradition of such activities; to use a recent example, China has apparently obtained and used search-query information from Google and other information companies in order to locate political dissidents.[239] But such practices are not limited to totalitarian governments. Western democracies (including the United States) have frequently used either private agents or

239. *See* Rhys Blakely, *Google Faces Shareholder Vote Over China*, TIMES ONLINE (London), May 10, 2007, http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article1773239.ece.

acquired databases created by private entities in order to obtain information about their citizens for a variety of purposes ranging from the innocuous to the sinister.[240] Since 2001, the federal government has been a keen consumer of all sorts of privately held records relating to its citizens.[241] Under current law, these techniques can be used by the government to accomplish indirectly what it would be constitutionally forbidden from doing itself, as constitutional restrictions on government action generally do not apply if private actors engage in the otherwise forbidden conduct.[242]

How, then, should intellectual privacy be protected? A logical place to begin would be First Amendment doctrine, which could be used to supply public law rules regulating government access to information.[243] But First Amendment doctrine alone cannot solve the problem of intellectual records for at least three reasons. First, as explained earlier,[244] although intellectual privacy is necessary to serve critical First Amendment values, the traditional formulations of First Amendment theory and doctrine tend to underprotect activities that do not involve speaking or writing. These can, of course, be changed, but a second reason is that because the First Amendment limits only state action, it has no regulatory force over the use of intellectual records by private entities. To the extent that private uses of expressive information are part of the problem, the First Amendment as a doctrinal mechanism is ineffective. Third, the First Amendment is no bar to the government's buying or requesting expressive information, or receiving it when it is offered voluntarily by private entities.[245] First Amendment doctrine is a useful tool, but it is incomplete.

Fortunately, there are other ways to protect intellectual privacy. Although First Amendment *doctrine* may be unable to solve the problem of intellectual records, First Amendment *values* suffer from no such limitations. First Amendment values are broader than doctrine; they are the goals and policies which animate it, and represent our aspirations for the kind of free society we want to live in. The answer to the problem lies in building First Amendment values (which, as I have argued, include intellectual privacy) into other legal and social structures. Given the substantive importance of

240. *See* Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1333 (2004) (chronicling the expansion of surveillance authority and its legal consequences).

241. *Id.*; *see also* O'HARROW, *supra* note 6, at 214–46 (detailing the increased use by the government of private-sector information-gathering services); Jon D. Michaels, *All the President's Spies: Private–Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 908–21 (2008) (documenting the dramatic post-9/11 increase in the executive branch's use of informal agreements to obtain data and information from the private sector).

242. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 128 (2004).

243. For one such proposal, see Solove, *supra* note 17, at 176.

244. *See supra* Part II.

245. Solove, *supra* note 17, at 140–41.

intellectual privacy and intellectual freedom, we need not confine the protection of these crucial values merely to the prevention of formal state actions that might threaten them. As Rodney Smolla has correctly pointed out in a related context: "The life of the mind should not be cramped by the artificial distinctions of law."[246] We ought therefore to think about intellectual privacy as a value that cuts across the public–private distinction and which should be nurtured against threats from private as well as public actors. This would be the case even if one were committed only to the anti-totalitarian version of my theory, given the risk of data transfers to the state. But it would be doubly the case if one seeks an expressive culture more broadly and takes seriously John Stuart Mill's insight that free discourse can be threatened just as much by private power as by that of the state.[247]

In a recent essay, Jack Balkin suggests that digital technologies have altered the social conditions of speech and the ways in which we should protect First Amendment values.[248] He argues that these developments should cause us to change the focus of First Amendment theory from traditional concerns of protecting democratic deliberation to broader concerns of protecting a democratic culture, meaning that individuals should have a real ability to participate in the creation and distribution of culture, rather than having culture dictated from above by mass media.[249] Balkin notes that throughout the twentieth century, the "judicial model" of protecting freedom of speech predominated—the familiar model by which courts (especially the Supreme Court) protect free speech by declaring government acts unconstitutional.[250] But our emphasis on the judicial model overlooked a variety of social features—free public education and libraries, public mail, etc.—that provided us with the "expressive infrastructure" on which the judicial model could operate.[251] While the judicial model will remain important in the Digital Age, he claims, we should pay greater attention to our expressive infrastructure. We should move beyond looking merely to "free speech rights" enforceable by courts and instead look to embody a broader idea of "free speech values" into technology, social norms, government subsidies, and legislative and administrative rules.[252] Balkin's essay parallels a recent trend among First Amendment theorists to think more concretely about the important role that "First Amendment institutions" like the press, libraries,

246. Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW LIBR. J. 71, 78 (1993).

247. *See supra* note 130 and accompanying text.

248. Balkin, *supra* note 1, at 2.

249. *Id.* at 3–4.

250. *Id.* at 50–51.

251. *Id.*

252. *Id.* at 51–54.

and universities play in securing expressive and cognitive liberty more generally.[253]

Balkin is concerned with the participation of individuals in the production of a democratic culture, but his analysis maps nicely onto the problem of intellectual privacy as well. Because intellectual privacy is a First Amendment value, it can also be encoded into the legal and social structures that make up our expressive infrastructure. The latent tradition of intellectual privacy already includes these sorts of protections to a limited extent. For example, consider again the professional tradition of the American Library Association, protecting both the confidentiality of library records against scrutiny by third parties and the privacy of library patrons against the library itself.[254] In this context, a combination of confidentiality law and professional norms have contributed to preserving libraries as enclaves of private intellectual exploration. The importance of social norms in the protection of intellectual privacy should not be minimized. Much of the best work on intellectual privacy has been done by the ALA out of a sense of moral and professional duty rather than that imposed merely by law—one good reason why we trust the discretion of our librarians more than our video store clerks, even though statutes impose strong duties of confidentiality on both of them.[255]

Encoding expressive and cognitive values into the fabric of our society may seem radical, but it is actually a very old way of doing things. Before the ascendancy of the judicial model of rights protection in the mid-twentieth century, a variety of what we now think of as constitutional values were encoded into common law doctrines, legislative rules, and social institutions. This was true even in what today we think of as the First Amendment context. For example, policy decisions by early federal bureaucrats regarding the post office (such as subsidies for newspapers and the confidentiality of letters) contributed greatly to the development of First Amendment culture in the nineteenth century.[256] And before *New York Times Co. v. Sullivan* constitutionalized the law of reputation, defamation law and the privacy torts had developed an elaborate series of requirements designed to ensure that

253. For some examples from this line of scholarship, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 816 (1999); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 184 (2003); Horwitz, *supra* note 199, at 1497; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1539 (2005); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84–86 (1998); and Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005).

254. *See supra* notes 200–210 and accompanying text.

255. *See supra* notes 190–191 and accompanying text.

256. *See* Desai, *supra* note 198, at 568, 568–69 ("The 1792 Post Office Act firmly embedded the concept of communications privacy into law and postal policy. Through the nineteenth century, the law remained in place, and expectations about the role of the post office and the importance of postal privacy developed.").

expressive interests were not sacrificed in the name of protecting the reputations of plaintiffs.[257] There was little First Amendment doctrine in those days, but First Amendment values were protected nevertheless. It is relatively easy to suggest tweaking a constitutional rule, but much harder to build respect for substantive values into the structures of our society. But particularly where issues like intellectual privacy transcend the public–private distinction, we must look to more creative solutions for such complex legal problems. Recognizing the importance of intellectual privacy is a first step, but still leaves much work to do. Nevertheless, it holds out the promise that as we continue to shape the contours of our law, we can do so in a way that makes better room for the creation of new ideas and preserves the integrity of private and confidential intellectual activities.

Protecting intellectual privacy in the digital age thus requires a two-pronged strategy. First Amendment doctrine can be used to directly restrain government actions that threaten intellectual privacy. But constitutional doctrine has its limits. Because many threats to intellectual privacy lie beyond the reach of constitutional doctrine, we must also seek to encode protections into our statutory laws and the very fabric of our social norms and institutions.

B. Four Practical Examples

Let us finally return to the four practical cases that demonstrate the ways in which intellectual privacy is increasingly under threat: (1) government surveillance, (2) private records of intellectual activity, (3) government access to such records, and (4) the introduction of reading habits in criminal trials. These four categories are not the only examples of this trend, but I have chosen them because I think they helpfully illustrate different ways in which the collection and use of personal information about intellectual activities can threaten First Amendment values.

1. Government Surveillance.—The most high-profile issue of intellectual privacy in recent years has been government antiterror surveillance, including the National Security Agency's Terrorist Surveillance Program (TSP). Shortly after the September 11 terrorist attacks, President Bush authorized the NSA to conduct warrantless surveillance of potentially millions of international telephone and e-mail communications originating from the United States.[258] After a lengthy public debate and legal challenges

257. For a contemporaneous discussion of this body of law, see John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 76–81 (1950).

258. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

to the program,[259] the Bush Administration declared that it was suspending the TSP in early 2007 and would only eavesdrop on future telephone calls involving Americans after a judicial finding of probable cause.[260] But the TSP was only one part of a larger program of secret communications surveillance,[261] and Congress has moved towards both expressly authorizing such programs[262] and immunizing the telecommunications companies whose cooperation made the wiretapping possible.[263]

The Bush Administration justified the TSP on the grounds that it was consistent with both the Foreign Intelligence Surveillance Act (FISA)[264] and the Fourth Amendment, and that the program was justified both expressly by Congress and impliedly as an inherent power of the President as Commander in Chief.[265] The TSP debate has remained framed in these terms, and critical analysis of the program has centered on its merits under FISA and Fourth Amendment law.[266] The debate has been understood by all sides as a balance between the government interest in security and individual interests in

259. *See* Eric Lichtblau, *Two Groups Planning to Sue over Federal Eavesdropping*, N.Y. TIMES, Jan. 17, 2006, at A14 (discussing lawsuits planned by the ACLU and the Center for Constitutional Rights to challenge the legality of the TSP).

260. Dan Eggen, *Court Will Oversee Wiretap Program*, WASH. POST, Jan. 18, 2007, at A1.

261. Dan Eggen, *NSA Spying Part of Broader Effort: Intelligence Chief Says Bush Authorized Secret Activities Under One Order*, WASH. POST, Aug. 1, 2007, at A1.

262. On August 5, 2007, Congress passed the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007), which appears to pave the way for warrantless programs like the TSP in the future. The Act, which lapsed after six months on February 16, 2008, modified FISA to allow for generalized TSP-style warrantless surveillance subject only to "clearly erroneous" review before the FISA court. *Id.* §§ 105B, 105C(b). For a discussion of this extension of FISA, see Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 753 (2008).

263. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, sec. 201, § 802, 122 Stat. 2436, 2468–70 (to be codified at 50 U.S.C. 1885a) (granting immunity to electronic-communications service providers that cooperated with intelligence agencies in domestic surveillance after September 11, 2001).

264. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

265. Letter from Dep't of Justice to the Leadership of the Senate Select Comm. on Intelligence and House Permanent Select Comm. on Intelligence (Dec. 22, 2005), *in* Symposium, *War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century*, 81 IND. L.J. 1360, 1360 (2006); *accord* John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007); Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5.

266. For examples of analysis of the program under FISA and Fourth Amendment law, see Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 152 (2006); Lawrence Friedman & Renee M. Landers, *Domestic Electronic Surveillance and the Constitution*, 24 J. MARSHALL J. COMPUTER & INFO. L. 177, 180–86 (2006); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1049 (2007); John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 140 (2006); *Recent Developments: The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 517 (2006); and Debate Between Professor David D. Cole and Professor Ruth Wedgwood, NSA Wiretapping Controversy (Feb. 9, 2006), *in* 37 CASE W. RES. J. INT'L L. 509, 512 (2006).

privacy under the Fourth Amendment. Under existing law, the government can in general search and examine most things as long as it makes some showing of relevance to a legitimate law-enforcement purpose. This evidentiary burden can vary from context to context, but essentially as long as the government makes its showing, it can override the privacy interest on the other side.[267]

A greater appreciation of intellectual privacy changes this calculus. The traditional "privacy versus security" framework strikes the wrong balance between government power and individual rights when intellectual activities are involved. It is one thing to search a person's house where there is probable cause that a murder weapon is inside, and quite another to listen to that person's phone calls without a warrant. Although the government interest in deterring terrorism is significant, so too is the First Amendment value of the freedom of confidential communications on the other side. When the government is keenly interested in what people are saying to confidants in private, the content of that private activity is necessarily affected and skewed towards the ordinary, the inoffensive, and the boring, even if the subject of surveillance is not a terrorist. If the government is watching what we say and who we talk to, so too will we, and we will make our choices accordingly. The ability of the government to monitor our communications is a powerful one, and one that cuts to the very core of our cognitive and expressive civil liberties.

Yet the debate over post-September 11 government surveillance has largely neglected these crucial issues of First Amendment and intellectual liberty. Even when they were raised in court, they were dismissed as insubstantial by the Sixth Circuit.[268] That court dismissed any idea that First Amendment values were threatened by secret surveillance of journalists, academics, and lawyers who regularly communicated with overseas contacts and clients believed to be monitored under the TSP.[269] The opinion noted with derision that:

> To call a spade a spade, the plaintiffs have only one claim, namely, breach of privacy, based on a purported violation of the Fourth Amendment or FISA—i.e., the plaintiffs do not want the NSA listening to their phone calls or reading their emails. That is really all

267. *See, e.g.*, 18 U.S.C. § 2703 (2006) (stating that the Electronic Communications Privacy Act allows a court to issue an order for disclosure only if a "governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe" the information sought is "relevant and material to an ongoing criminal investigation"); 50 U.S.C. § 1805 (2000) (requiring the government to make a showing of probable cause before a judge can issue an order approving electronic surveillance under FISA); *cf.* Katz v. United States, 389 U.S. 347, 359 (1967) (reaffirming that the Fourth Amendment requires "a neutral predetermination of the scope of a search").

268. ACLU v. NSA, 493 F.3d 644, 664–65 (6th Cir. 2007).

269. *Id.* at 661–65.

> there is to it . . . . [T]his claim does not implicate the First Amendment.[270]

What, then, should the solution to this problem be? The theory of intellectual privacy I have articulated here suggests that the interest in confidential communications also needs to be considered, and that this interest is a First Amendment one. Government surveillance—even the mere possibility of interested watching by the state—chills and warps the exercise of this interest. This effect was understood by the drafters of the Fourth Amendment, who grasped the relationship between preventing government searches of papers and protecting religious and political dissent.[271] Because government surveillance involves direct state action, it is also a rare case where constitutional doctrine could do useful work on its own. Because we are some distance removed from the freedom of thought, the confidentiality of communications need not be protected absolutely, particularly given the legitimate government interest in the prevention of international terrorism. But by the same token, this interest is not always sufficient to override the First Amendment interests in intellectual privacy. Constitutional doctrine—either First Amendment law or Fourth Amendment law taking expressive interests into account—could therefore mandate warrants for all surveillance of intellectual activity. This standard should at least be the level of the current Fourth Amendment warrant requirement, and could possibly be higher, given the particular expressive interests that could elevate scrutiny of intellectual activity beyond a search for contraband or other kinds of incriminating evidence.

2. Privacy Policies and Expressive Information.—Over the past decade, the Internet has increasingly come to serve as a hub of communication, expression, and intellectual exploration. In the course of this transformation, intellectual processes like reading and letter writing have migrated to the electronic environment. Today, it is becoming increasingly rare for a person's intellectual activity to take place without the aid of electronic information or communications in one form or another.[272] For better or worse, intellectual activity in the future will increasingly be mediated and assisted by the use of networked computer systems.

A variety of businesses now provide intellectual services to Internet users. Internet Service Providers (ISPs) like AOL and EarthLink provide access to e-mail and the Web. Companies like Amazon serve as vast electronic bookstores. Search engines like Google and Yahoo allow users to search the Internet for anything that interests them and provide RSS feed

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270. *Id.* at 657.

271. Rubenfeld, *supra* note 103, at 10.

272. For statistics to this effect, see LEE RAINIE & JOHN HORRIGAN, PEW INTERNET & AM. LIFE PROJECT, A DECADE OF ADOPTION: HOW THE INTERNET HAS WOVEN ITSELF INTO AMERICAN LIFE (2005), http://www.pewinternet.org/PPF/r/148/report_display.asp.

services that function like a massive notebook of their users' reading interests. Such companies also keep detailed logs of their customers' activities.[273] The use of this information is largely unregulated, and left to be governed through contract law by the companies' privacy policies—statements by businesses about what data they collect about their customers and how it is used.[274] These privacy policies are unregulated, and grant the businesses vast power over their use of the records.

Although privacy policies and online privacy have been discussed in the legal literature, scholars have underappreciated the First Amendment issues raised by the subset of privacy policies relating to intellectual records. Businesses argue that as long as they provide notice of what information they are collecting and some ability to choose to opt out of the information collection, there are no problems.[275] Businesses also point out that Internet businesses like search engines and free e-mail services often provide valuable services for no charge, and should thus be entitled to retain a property right in the information.[276] Privacy advocates counter that the collection of information from users creates privacy problems, though they have struggled to conceptualize the problem in a way that is comprehensible to those who are skeptical about privacy claims. Recent scholarship has tended to characterize the harms of privacy by reference to either the power differences between individuals and companies involved in information transactions,[277] or the tangible risks of identity theft.[278]

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273. For information regarding Google's data-collection and retention policies, see Google Privacy Policy, http://www.google.com/intl/en/privacypolicy.html, and Another Step to Protect User Privacy, Googleblog, http://googleblog.blogspot.com/2008/09/another-step-to-protect-user-privacy.html.

274. Privacy policies are generally not required by law, except in a few cases such as Web sites targeted at children. *See, e.g.*, 16 C.F.R. § 312.4(b) (2008) (requiring that commercial Web sites post privacy policies before collecting personal information from children). The Federal Trade Commission has also investigated alleged false statements made in privacy policies in the past. *E.g.*, FTC v. Toysmart.com, LLC, No. 00-11341-RGS, 2000 WL 34016434, at *2 (D. Mass. July 21, 2000).

275. For one such example, see Ellen Nakashima, *Internet Firm Says It Targeted Ads to Customers' Web-Surfing Habits*, WASH. POST, July 25, 2008, at D2 (discussing Embarq's defense of its information-gathering techniques because the company posted a privacy policy and allowed customers to opt out of the service). One study has shown that 93% of major Web sites post such privacy policies. Jeri Clausing, *Fate Unclear For F.T.C.'s Privacy Push*, N.Y. TIMES, May 22, 2000, at C1.

276. *Cf.* Katy McLaughlin, *For Resourceful Students, the Internet Is a Key to Scholarships*, N.Y. TIMES, Mar. 31, 2002, at C8 (explaining that FastWeb.com "does not have to charge fees for its services because it makes money by selling registered users' information to marketing partners").

277. *See, e.g.*, SOLOVE, *supra* note 92, at 91 (arguing that "the core of the database problem" is "the power inequalities that pervade the world of information transfers between individuals and bureaucracies").

278. For some examples, see Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 251–54 (2007); Brandon McKelvey, Comment, *Financial Institutions' Duty of Confidentiality to Keep Customer's Personal Information Secure from the Threat of Identity Theft*, 34 U.C. DAVIS L. REV.

In the particular context of intellectual records, this debate misses the point. Intellectual records—such as lists of Web sites visited, books owned, or terms entered into a search engine—are in a very real sense a partial transcript of the operation of a human mind. They implicate the freedom of thought and the freedom of intellectual exploration. They are fundamentally different in kind from purchases of consumer goods,[279] and raise wholly different issues. If First Amendment activities are increasingly going to take place in the electronic environment, thinking separately about the intellectual-privacy issues that this new context raises is vital.

As the functions performed by real-world institutions like libraries increasingly take place in virtual space. Search engines, ISPs, online bookstores, and other social institutions that are spaces for free thought and inquiry must provide the same guarantees to their users that libraries have for the intellectual privacy of their patrons. These companies have become indispensable social institutions through which cognitive, intellectual, and expressive activities take place. Accordingly, some strong and meaningful guarantee of intellectual privacy is essential to ensure the autonomous exercise of these liberties. Just as we do not rely merely on market forces and goodwill to mandate confidentiality from our lawyers or librarians, so too should information fiduciaries like search engines and online bookstores be subject to meaningful requirements of confidentiality to safeguard the vitally important interests at stake.[280] Such a claim is not a radical one, but rather a conservative one insofar as it calls for the protection of our traditional values despite changing social context.

The intellectual-privacy ramifications of businesses' records of mental activity are significant on their own. But the stakes are raised even higher when the government seeks to access these private repositories of intellectual data. Since 2001, the government has secretly purchased a vast amount of information about its citizens.[281] Often, however, the government does not need to buy the information at all. In a number of documented cases, companies have handed large quantities of information over to the government.[282] So much communications data has been handed over, for example, that the federal government has contracted with telephone companies to reimburse the companies for their administrative costs.[283]

1077, 1113 (2001); and James P. Nehf, *Incomparability and the Passive Virtues of Ad Hoc Privacy Policy*, 76 U. COLO. L. REV. 1, 42 (2005).

279. *But see* Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393, 399 (2002) (arguing that consumption is an expressive activity).

280. Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1700–01 (1999).

281. O'HARROW, *supra* note 6, at 6–7; Michaels, *supra* note 241, at 904.

282. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at 1A; Barton Gellman & Arshad Mohammed, *Data on Phone Calls Monitored*, WASH. POST, May 12, 2006, at A1.

283. Luke O'Brien, *FBI Confirms Contracts with AT&T, Verizon and MCI*, WIRED.COM, Mar. 20, 2007, http://blog.wired.com/27bstroke6/2007/03/fbi_confirms_co.html.

When government seeks intellectual information, businesses often have the choice whether or not to do so, but will likely do so based upon an internal profit-making calculus rather than one which takes into account the interests of their customers in preserving their cognitive autonomy. Intellectual-privacy values can be encoded through law and social norms to affect the incentive structures of businesses holding intellectual records. In these cases, protecting the intellectual-privacy issues at stake could require notification of the subjects of the data sale, and could also include heightened government burdens beyond relevance. We could also impose retention rules mandating that records only be used for the purposes for which they were created and must be destroyed entirely after a certain period of time. For particularly sensitive types of intellectual data, duties of nondisclosure analogous to those placed on lawyers and librarians could be imposed on businesses.

3. Government Access to Intellectual Records.—If businesses are reluctant to sell or donate intellectual data, the government can fairly easily compel the holders of this information to share it. Three government information-gathering tools are worth mentioning here. First, the government can seek discovery orders in civil cases or grand jury subpoenas as part of an investigation with a criminal nexus.[284] These have been used in the past to obtain large numbers of queries from Internet search engines.[285] Second, the government can compel the production of intellectual records under § 215 of the Patriot Act, which allows the *government* to obtain "any tangible things" from any business, organization, or person.[286] Third, the government can compel the production of personal information held by third parties through National Security Letters (NSLs). These are statutory authorizations by which the FBI can obtain information about people from telephone companies, ISPs, communications companies, and other institutions.[287] NSLs can be issued after the minimal process of a certification by the government that the information is relevant to an antiterrorism investigation.[288]

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284. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS 13 (2007) [hereinafter SECTION 215 REVIEW].

285. Arshad Mohammed, *Google Refuses Demand for Search Information*, WASH. POST, Jan. 20, 2006, at A1.

286. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act § 215, 50 U.S.C. § 1861 (Supp. V 2005).

287. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681u, 1681v (2006) (allowing access to various information in a consumer credit report); Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2006) (allowing access to telephone and e-mail information); National Security Act of 1947, 50 U.S.C. § 436 (2000) (allowing the issuance of NSLs in connection with investigations of improper disclosure of classified information by government employees).

288. For examples of the various entities that can be required by NSLs to provide information to the FBI and other investigative agencies, see Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5)(A) (2006) (financial institutions); Fair Credit Reporting Act, 15 U.S.C. §§ 1681u(b), 1681v (2006) (consumer reporting agencies); Electronic Communications Privacy Act, 18 U.S.C. § 2709(b)(1)–(2) (2006) (wire or electronic service providers); National Security Act of 1947, 50

Section 215 orders do require warrants, but the evidence is clear that warrants are rarely, if ever, denied.[289] Both tools also come with "gag orders" that bar recipients from disclosing the requests to either the public or the persons to whom the requests relate.[290] The Section 215 power in particular has been quite controversial,[291] in part because it expressly permits the secret production of "library circulation records, library patron lists, book sales records, book customer lists," and other records cataloging the intellectual activities of people being investigated.[292]

Taken together, the government can use these methods to engage in a highly detailed investigation of the intellectual preferences of its citizens, allowing scrutiny of who a person's friends and contacts are, and when they called or e-mailed them. Moreover, a person whose information is being secretly accessed typically lacks both notice of the request and the power to challenge it. These broad powers are constrained by little or no judicial oversight or statutory regulation, permitting widespread abuse and overreaching by investigators—much of which has been documented by recent internal studies by the FBI and the Office of the Inspector General.[293]

The interest of individuals in protecting their intellectual privacy in these cases has been largely ignored. The government can easily access records that reveal the communications and intellectual preferences of individuals, subject only to minimal legal constraints once it invokes the trump card of antiterrorism. Here, too, the government's interest in security and preventing acts of terrorism is presented in contrast to an amorphous

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U.S.C. § 436(a)(3) (2000) (financial agencies and institutions, holding companies, and consumer-reporting agencies); and USA PATRIOT Act, 50 U.S.C. § 1861 (Supp. V 2005) (nonspecific). RFPA and ECPA NSLs are subject to the requirement that the FBI certify that "such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States." Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5)(A); Electronic Communications Privacy Act, 18 U.S.C. § 2709(b)(1)–(2).

289. *See* SECTION 215 REVIEW, *supra* note 284, at 17 (reporting that all pure § 215 applications submitted between 2002 and 2005 were approved).

290. *See, e.g.*, 18 U.S.C. § 2709(c)(1) (prohibiting disclosure of NSL requests for telephone records); 50 U.S.C. § 1861(d) (prohibiting disclosure of § 215 requests); *cf.* 18 U.S.C. § 3511(b) (2006) (allowing the recipient of an NSL to seek judicial review of a nondisclosure order).

291. The American Library Association, for instance, adopted a resolution stating that it considers this and other provisions of the Patriot Act to be "a present danger to the constitutional rights and privacy rights of library users." ALA, PATRIOT Act Resolution, *supra* note 210; *see also* Charles Babington, *Patriot Act Compromise Clears Way for Senate Vote*, WASH. POST, Feb. 10, 2006, at A1 (describing compromise efforts to amend § 215 in order to "do better . . . to protect civil liberties"); Eric Lichtblau, *At F.B.I., Frustration Over Limits on an Antiterror Law*, N.Y. TIMES, Dec. 11, 2005, at 48 (reporting that the Justice Department had not used § 215 to obtain medical or gun records because of the privacy and civil rights concerns raised by critics of the law).

292. 50 U.S.C. § 1861(a)(3); *cf.* § 1861(d) (prohibiting disclosure of requests for such material).

293. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 70 tbl.6.1 (2007) (summarizing possible Intelligence Oversight Board violations triggered by the use of NSLs); John Solomon, *FBI Finds It Frequently Overstepped in Collecting Data*, WASH. POST, June 14, 2007, at A1 (reporting that an FBI internal audit of NSL requests found frequent violations of laws and regulations).

individual right of privacy.[294] But there is more than just a vague privacy right at stake in these contexts. Consider a list of book purchases, library records, Web sites read, or the log of a search engine: these records reveal our interests and often our aspirations or fantasies. When such records are not kept in confidence, but are instead available for access by the government, what is at stake is not merely our privacy in general, but the intellectual privacy necessary for us to engage in the freedom of thought that enables the exercise of our First Amendment rights.

In this case as well, the theory of intellectual privacy illuminates better than vague notions of privacy both what is and what is not at stake. In some of these cases, the government seeks to secretly obtain from third parties intellectual records such as book purchases, library records, Web-use histories, and search-engine queries. Such records reveal not just reading habits but intellectual interests, and in the case of search-engine records come very close to being a transcript of the operation of a human mind. As such, they threaten both the freedom of thought and the freedom of intellectual exploration. But the theory of intellectual privacy also tells us what is not at stake. Not all government access to personal records under these tools threatens intellectual privacy—for example, it is hard to imagine what First Amendment values are threatened by access to ordinary sorts of financial and credit-reporting information. While there may be valid reasons to keep such information away from the government, they are not intellectual-privacy reasons.

But for those records that implicate intellectual privacy, what should be done? Constitutional doctrine might do some of the work here as well. Some privacy scholars have suggested that NSLs can be remedied by applying the Fourth Amendment warrant requirement when the government seeks intellectual records held by third parties.[295] This would also require a reinterpretation of cases like *United States v. Miller*[296] and *Smith v. Maryland*[297] that suggest a reasonable expectation of privacy is waived by sharing information with others. In this regard, the doctrine could follow the lead of the recent case, *United States v. Warshak*,[298] in which e-mails held by an ISP were

294. *See, e.g.*, Grimmelmann, *supra* note 192, at 43–44 (discussing the privacy concerns that arise when governments harness the power of search engines to conduct surveillance).

295. *See, e.g.*, Lauren M. Weiner, Comment, *"Special" Delivery: Where Do National Security Letters Fit into the Fourth Amendment?*, 33 FORDHAM URB. L.J. 1453, 1470 (2006) (explaining that National Security Letters must fit within an exception to the Fourth Amendment warrant requirement if they are to be used for domestic criminal investigations); *cf.* Solove, *supra* note 17, at 116–17 (arguing that the First Amendment should serve as a source of criminal procedure rules constraining the government's access to intellectual records).

296. 425 U.S. 435, 443 (1976) (holding that personal financial records kept by the defendant's bank were not protected by the Fourth Amendment).

297. 442 U.S. 735, 745–46 (1979) (holding that telephone call records kept by a telephone company were not protected by the Fourth Amendment).

298. 490 F.3d 455 (6th Cir. 2007), *vacated*, 532 F.3d 521 (6th Cir. 2008).

protected by the Fourth Amendment, so that police were required to obtain a warrant before reading them.[299]

As I have argued above, the privacy of communications like e-mail is an important aspect of intellectual privacy. As such, it is not that much of an extension to imagine First Amendment analysis informing a conclusion that searches of e-mail contents are objectively unreasonable under the *Katz* "reasonable expectation of privacy" test.[300] Moreover, because government surveillance of more than just e-mail threatens intellectual privacy, one could imagine a warrant requirement for intellectual records more generally, including library and bookstore records, ISP records of Web sites visited, search-engine queries, and perhaps other sorts of records with a close connection to private intellectual activity. This would mean that NSLs, or at least those NSLs seeking these kinds of intellectual records, would also require a warrant. In practice, this would mean that a judge would have to decide that there was probable cause to search or seize intellectual records, rather than an executive branch investigator determining that records were relevant or merely interesting. This would be a good first step, though the sheer number of requests might overwhelm the ability of judges to adjudicate them in a timely and conscientious manner. Other steps might thus be needed to safeguard intellectual activity.

The theory of intellectual privacy also suggests two ways beyond doctrine that the interests at stake with expressive records can be protected. First, intellectual-privacy norms could be encoded by legislatures into the statutes that authorize government requests. Government investigators could be required to make heightened certification requirements for certain kinds of records. Indeed, given the close nexus between search-engine queries and the freedom of thought, one could make a strong argument that the government could be barred from obtaining them at all, or perhaps could obtain them only in the most serious cases. Alternatively, the individuals to whom the records relate could be given notice and an opportunity to contest the government access as a matter of statutory right. Taking notions of intellectual privacy seriously could thus allow the legislative process to craft statutes that balance both the need to investigate and the need to protect and nurture intellectual activity—a task to which it is better suited than the courts.[301]

The second nondoctrinal way in which intellectual privacy could help to resolve these issues is by the use of norms and institutions to advance the constitutional interests at stake. For example, the First Amendment interests in unfettered and unmonitored reading and thinking were articulated

299. 490 F.3d at 475–76.

300. *See* Katz v. United States, 389 U.S. 347, 360, 360–62 (1967) (Harlan, J., concurring).

301. *See* Kerr, *supra* note 81, at 858–59 (noting the numerous institutional advantages legislatures possess over courts in balancing competing objectives to create effective rules).

enthusiastically by libraries in their political opposition to § 215;[302] indeed, the salience of such an argument is likely one reason why § 215 does not appear to have been used against libraries.[303] But this argument has remained moored to the library context, and has not been applied in a systematic way to the problem of intellectual records. Librarians see their professional ethic as including stewardship of the reading rights of their patrons.[304] If search-engine companies and ISPs recognized their own institutional roles in our cognitive and expressive infrastructure, they might be persuaded to adopt similar norms protecting the intellectual privacy of their own clients, and to advocate these norms in the political process.

4. Reading Habits as Evidence.—A fourth context implicating intellectual privacy is the introduction of reading materials as evidence to prove intent in criminal trials. The Ninth Circuit's recent decision in *United States v. Curtin*[305] is a good example. In *Curtin*, a male federal agent posing as a 14-year-old girl engaged in a lengthy instant-messenger chat with Curtin, and arranged to meet him in Las Vegas for a sexual encounter.[306] When the defendant arrived at the meeting point, he was arrested and charged with interstate travel with intent to engage in a sexual act with a minor[307] and using an interstate facility to attempt to persuade a minor to engage in a sexual act.[308] At trial, over Curtin's objection, the government successfully introduced a number of text files from his PDA containing pornographic stories of incest. Curtin was convicted, and on appeal, the Ninth Circuit rejected his argument that his First Amendment rights had been violated by the introduction of the stories into evidence.[309] As long as the evidence was relevant, the Court reasoned, nothing in the First Amendment prohibited its introduction into evidence.[310] Other cases have reached similar conclusions, holding that no First Amendment issues are raised by the introduction of reading materials as relevant evidence.[311]

From the perspective of intellectual privacy, *Curtin* and cases like it are wrongly decided because they fail to account for the freedom of intellectual

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302. ALA, PATRIOT Act Resolution, *supra* note 210.

303. *See* SECTION 215 REVIEW, *supra* note 284, at 77–79 (detailing the various contexts in which § 215 has been employed, but not mentioning libraries).

304. *See supra* notes 200–21 and accompanying text.

305. 489 F.3d 935 (9th Cir. 2007).

306. *Id.* at 937–38.

307. *See generally* 18 U.S.C. § 2423(b) (2006).

308. *See generally* 18 U.S.C. § 2422(b).

309. *Curtin*, 489 F.3d at 955–56.

310. *Id.* at 953. The case was remanded for a new trial because the trial judge had neglected to actually read the stories before he balanced their relevance against their prejudicial value under Federal Rule of Evidence 403. *Id.* at 955–56.

311. *Cf., e.g.*, United States v. Brand, 467 F.3d 179, 198 n.18, 199–201 (2d Cir. 2006) (allowing the introduction of child pornography found on defendant's computer to show his predisposition to molest children).

exploration. When we read, we are doing much more than entertaining ourselves. We are engaging with ideas and information, and the act of selecting reading material is a basic act of expressive liberty, regardless of the subject matter of what we read. The introduction of our reading habits into evidence not only makes public these private cognitive processes, but also threatens to chill others in the future from engaging in the unfettered act of reading. Consider the example of *Curtin*. His possession of the stories was entirely lawful, and indeed protected by the First Amendment, as the stories were neither unprotected child pornography nor obscene.[312] The crimes of which he was convicted have only two elements: interstate travel or activity, and bad intent. Interstate travel is of course perfectly innocuous and even constitutionally protected by itself.[313] This leaves only bad intent. Curtin apparently liked reading or collecting incest stories, but surely his disturbing choice of reading material cannot be enough to convict him of a serious federal felony. At a practical level, inferring criminal intent from the contents of a person's library is fraught with peril to say the least. Reading even disturbing incest stories does not necessarily make a person a child molester any more than owning a copy of *Natural Born Killers*[314] makes one a serial killer. While there may certainly be a correlation between the reading or watching of such materials and criminal intent, such a link is tenuous at best.

But more fundamentally, subjecting the contents of a person's library to public scrutiny is an unreasonable infringement on the right to read. Reading is often an act of fantasy, and fantasy cannot be made criminal without imperiling the freedom to think as one wants. Moreover, the chilling effect of such an intrusion into intellectual privacy could cause others to skew their reading habits for fear of attracting the attention of the government.

The problem goes well beyond child-abuse cases if we consider the broader principle underlying *Curtin* and cases like it—that the Constitution permits the introduction of reading habits for a wide range of evidentiary purposes, subject to no additional protections than other evidence receives. Imagine the introduction into evidence of possession of the Koran to suggest

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312. Images of child sexual abuse are unprotected by the First Amendment. New York v. Ferber, 458 U.S. 747, 764 (1982). Other depictions of adult–child sexual contact, such as text (like Curtin's stories or Vladimir Nabokov's *Lolita*) or "virtual" child pornography (doctored digital or simulated images) are protected by the First Amendment as long as they are not obscene. Ashcroft v. Free Speech Coal., 535 U.S. 234, 249–51 (2002) (holding that, where non-obscene materials were not produced by the abuse of actual children, the Government did not have a compelling interest that could override the protection of the First Amendment). It is possible that Curtin's stories could have been found to be obscene under *Miller v. California*, 413 U.S. 15, 24 (1973), which defines "obscenity" for constitutional purposes, but this was not proven by the prosecution, and in any event, possession of obscenity receives significant protection against government searches and seizures. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.").

313. *See* Saenz v. Roe, 526 U.S. 489, 511–12 (1999) ("The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens.").

314. NATURAL BORN KILLERS (Warner Bros. Pictures 1994).

susceptibility to radical Islam, white-supremacist literature to prove motive to engage in hate crimes, or *A Clockwork Orange*[315] to show intent to engage in battery. Under the predominant view of the Federal Rules of Evidence, there is no First Amendment protection against the prosecution introducing these into evidence other than a single trial judge's discretionary determination that the evidence was relevant and not unduly prejudicial.[316] Such determinations are reviewable on appeal only under the highly deferential "abuse of discretion" standard.[317] By failing to appreciate the critical importance of the private act of reading to First Amendment activities, the courts permitting the introduction of reading habits to prove intent have sanctioned a dangerous incursion on the expressive activities of unfettered reading and thinking. It is easy for the government to introduce reading habits, but there are good reasons to believe that our commitment to free thought and inquiry should require the government to prove substantially more than bad thoughts to convict someone of a serious federal felony.

With this in mind, the theory of intellectual privacy suggests that federal evidence law could be modified to create a very high presumption against the introduction of reading materials and diaries. Introduction of such materials could perhaps be considered for impeachment purposes or in instances where the defendant had opened the door to the issue. For example, if a defendant denied having the ability to make a bomb, evidence that she was in possession of multiple bomb-making textbooks could be admitted. But evidence of fantasies should be inadmissible, as should the use of reading habits to establish motive or intent, for all of the unreliability and First Amendment reasons discussed earlier. There is a parallel here to another area of evidence law where substantive values of constitutional magnitude have been encoded into the Rules of Evidence. Feminist law reformers have been quite successful at debunking the myth that female rape victims were "asking" to be raped by their choice of attire or past sexual practices.[318] Such protections encode substantive notions of sexual equality (and sexual autonomy) into evidentiary procedures without explicitly invoking the constitutional values that animate

315. ANTHONY BURGESS, A CLOCKWORK ORANGE (1962).

316. *See* FED. R. EVID. 401 (defining "relevant evidence" as evidence that makes a fact more or less probable); FED. R. EVID. 403 (allowing for the exclusion of otherwise relevant evidence if the probative value of that evidence is outweighed by the danger of unfair prejudice); FED. R. EVID. 404 (providing that, in general, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"); United States v. Curtin, 489 F.3d 935, 955 (9th Cir. 2007) ("[W]e do not believe that Curtin or anyone similarly situated can use the First Amendment or any other constitutional principle to exclude relevant evidence . . . on the specific ground that the evidence is 'reading material' or literature otherwise within constitutional protection in another setting.").

317. Old Chief v. United States, 519 U.S. 172, 183 n.7 (1997).

318. *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 319–20 (2000) (discussing feminist-inspired changes in evidentiary rules for rape cases).

them.[319] Given the centrality of private reading and fantasizing as a substantive First Amendment value, the freedom of the mind could easily be protected in an analogous way.

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If the examples I have chosen reveal the difficulty and complexity of the issues that intellectual privacy raises, I hope that they also suggest their importance as well. Invocation of intellectual privacy is not, as I noted at the outset, a silver bullet that allows us to solve these problems with ease, particularly as some of the interests on the other side are important ones. But an increased focus on intellectual privacy reveals the importance of the issues on the other side of the ledger; issues of cognitive liberty that have been underappreciated in the past. Protecting intellectual privacy will require some difficult choices, but it will allow us to ask better questions, and hold out the hope for a better resolution of these and other disputes.

IV. Conclusion

In this Article, I have tried to do three things. First, I have tried to show that our traditions of civil liberties include a vibrant but latent protection for the intellectual privacy of the individual working in isolation and in small groups. Second, I have articulated a theory of intellectual privacy that justifies its protection as a valued aspect of our civil liberties; one that is supportive of our foundational commitments to free speech rather than in conflict with them. Third, I have sketched out how a greater attention to intellectual privacy could work in practice.

As cognitive processes increasingly become mediated by computers—in libraries and schools, in cyberspace, and in society at large—we face the challenge of deciding what norms of privacy and confidentiality should accompany this migration of thought and speech to the electronic environment. I have tried to show that there are compelling historical, theoretical, and practical reasons why our underappreciated tradition of intellectual privacy should be given greater attention and realized more fully in order to protect intellectual inquiry and the generation of ideas.

The present Article represents a first step in this direction. My goal is to begin a conversation about intellectual privacy and suggest some implications of taking it seriously. But we must take it seriously. Although often overlooked, the protection of intellectual activity in private is central to our understandings of what it means to be a free and self-governing people. We must therefore recognize and protect it if we are to retain our traditional

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319. *See* FED. R. EVID. 412 (stating that, in general, neither evidence offered to prove that an alleged victim engaged in other sexual behavior, nor evidence offered to prove an alleged victim's sexual predisposition, is admissible in any civil or criminal proceeding involving alleged sexual misconduct).

commitments of free thought and inquiry in the face of the political, technological, and cultural challenges of the new century.