

***387 INTELLECTUAL PRIVACY**

Neil M. Richards [\[FN1\]](#)

***388** For most of the last century, First Amendment theory has been principally concerned with protecting the act of speaking from interference and censorship. [\[FN1\]](#) 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, [\[FN2\]](#) as illustrated by the line of Supreme Court cases invalidating actions for unlawful disclosure of private facts on free speech grounds. [\[FN3\]](#)

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--***389** recognized for centuries as perhaps the most vital of our liberties. [\[FN4\]](#) 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. [\[FN5\]](#) 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. [\[FN6\]](#) Data-driven decision making--what Ian Ayres has termed the "super-cruncher" phenomenon [\[FN7\]](#)--has fueled a vast market for a wide variety of electronic information about individuals: you, me, and everyone we know.

* * *

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. [\[FN16\]](#) 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.

* * *

I. Intellectual Privacy and First Amendment Theory

* * *

A. Privacy and First Amendment Theory

* * *

***395** The leading modern theory of the First Amendment is the search for truth. Relying upon the philosophical work of John Stuart Mill [\[FN34\]](#) and the judicial writings of Justice Oliver Wendell Holmes, [\[FN35\]](#) search-for-truth theory justifies heightened protection for First Amendment values because of the belief that public discourse better allows the truth to emerge. [\[FN36\]](#) This theory is usually operationalized via the "marketplace of ideas" metaphor from *Abrams v. United States*. [\[FN37\]](#) *Abrams* upheld a conviction under the Espionage Act of 1917 for distributing leaflets with the intent to induce draft resistance. [\[FN38\]](#) 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. [\[FN39\]](#)

Holmes understood the problem of government to be the necessary clash of competing claims to truth that might ultimately be irreconcilable. [FN40] 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. [FN41] 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 marketplace *396 of ideas as "the best test of truth." [FN42] Holmes's theory has been enormously influential in both free speech theory and jurisprudence. [FN43]

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. [FN44] And the market metaphor does characterize the competition as one of "thoughts" competing in the market. [FN45] 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. [FN46] 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 [FN47] and Alexander Meiklejohn. [FN48] Brandeis discussed issues of intellectual freedom a number of times in his writings. For example, his famous concurrence in *Whitney v. California* [FN49] 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 *397 are means indispensable to the discovery and spread of political truth. [FN50]

Brandeis addressed the importance of freedom of thought in other writings. [FN51] For example, dissenting from the Court's holding in *Olmstead v. United States* [FN52] (that warrantless wiretapping does not violate the Fourth Amendment), [FN53] he argued that the framers of the Fourth Amendment "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations," [FN54] 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. [FN55] 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. [FN56] 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." [FN57] Although it drew heavily upon Brandeis's earlier work, [FN58] Meikle-

john's self-governance theory revised Brandeis's ideas, placing much less emphasis on freedom of the mind. [\[FN59\]](#) Meiklejohn's theory, in particular his metaphor of the town meeting, has also been highly influential. [\[FN60\]](#)

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 ***398** inquiry. And because it prevents the abridgment of the collective right to freedom of speech, rather than an individual right to speak, [\[FN61\]](#) 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. [\[FN62\]](#) 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," [\[FN63\]](#) in his later work, his theory is rooted in the rights of voting listeners rather than those of thinkers or speakers. [\[FN64\]](#) As such, it is a theory centered not around "private intellectual curiosity" but instead around public collective action. [\[FN65\]](#) 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.

* * *

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. [\[FN93\]](#) 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." [\[FN94\]](#) Because the case did not involve public speech, the First Amendment was deemed inapplicable.

***403 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. [\[FN95\]](#) 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. [\[FN96\]](#)

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, [\[FN97\]](#) but it should be no less familiar as a result. Indeed, the word "Orwellian" strikes with deep resonance in this context. [\[FN98\]](#) Moreover, as many scholars have argued, surveillance has a deep effect on the actions of the subject. [\[FN99\]](#) The knowledge that others are watching (or may be watching) tends the preference of the individual towards the bland and the *404 mainstream. [\[FN100\]](#) Thoroughgoing surveillance, whether by public or private actors, has a normalizing and stifling effect. [\[FN101\]](#)

* * *

II. A Theory of Intellectual Privacy

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.

* * *

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. [\[FN118\]](#) 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.

* * *

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. [\[FN147\]](#) It is

most clearly reflected in the well-known examples of trespass law [\[FN148\]](#) and in the Fourth Amendment's protections of the person and home against unreasonable searches and seizures. [\[FN149\]](#) The relationship *413 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. [\[FN150\]](#) Spatial privacy therefore buttresses free thought and our other processes of belief formation, giving them a context in which they can operate more effectively.

* * *

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 *417 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. [\[FN182\]](#) Most famously, in *Stanley v. Georgia*, [\[FN183\]](#) 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. [\[FN184\]](#) 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." [\[FN185\]](#) 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. [\[FN186\]](#)

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.

* * *

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, [\[FN190\]](#) and federal law safeguards the confidentiality of video rental records. [\[FN191\]](#) 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. [\[FN192\]](#)

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. [\[FN193\]](#) 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." [\[FN194\]](#) A few other scholars have argued that the First Amendment requires a level of *419 privacy to protect access to new ideas, principally through the act of reading the written word. [\[FN195\]](#)

* * *

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 *422 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. [\[FN211\]](#) Under some circumstances, such as when we talk to our lawyers, our confidant is also prohibited from disclosing our communications. [\[FN212\]](#) 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.

* * *

In the Electronic Age, the contents of communications are protected from interception by the complicated Electronic Communications Privacy Act [\[FN219\]](#) (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. [\[FN220\]](#) In addition, over forty states have passed similar laws, many of which are more protective than ECPA. [\[FN221\]](#) Such communications are also protected by the Fourth Amendment, as held by *Katz v. United States* [\[FN222\]](#) and its progeny, which recognize the importance of communications privacy. [\[FN223\]](#)

* * *

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 [\[FN230\]](#) 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. [\[FN231\]](#) 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 ^{*425}inhibiting effect upon the willingness to voice critical and constructive ideas." [\[FN232\]](#)

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.

* * *

III. Protecting Intellectual Privacy

* * *

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.

* * *

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. [\[FN239\]](#) But such practices are not limited to totalitarian governments. Western democracies (including the United States) have frequently used either private agents or ***428** 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. [\[FN240\]](#) Since 2001, the federal government has been a keen consumer of all sorts of privately held records relating to its citizens. [\[FN241\]](#) 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. [\[FN242\]](#)

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. [\[FN243\]](#) But First Amendment doctrine alone cannot solve the problem of intellectual records for at least three reasons. First, as explained earlier, [\[FN244\]](#) 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. [\[FN245\]](#) 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 *429 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." [\[FN246\]](#) 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. [\[FN247\]](#)

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. [\[FN248\]](#) 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. [\[FN249\]](#) 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. [\[FN250\]](#) 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. [\[FN251\]](#) 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. [\[FN252\]](#) 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, *430 and universities play in securing expressive and cognitive liberty more generally. [\[FN253\]](#)

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 in-

cludes 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. [\[FN254\]](#) 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. [\[FN255\]](#)

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. [\[FN256\]](#) 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 ***431** expressive interests were not sacrificed in the name of protecting the reputations of plaintiffs. [\[FN257\]](#) 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.--

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. [\[FN272\]](#) 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 ***435** services that function like a massive notebook of their users' reading interests. Such companies also keep detailed logs of their customers' activities. [\[FN273\]](#) 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. [\[FN274\]](#) 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. [\[FN275\]](#) 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. [\[FN276\]](#) 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, [\[FN277\]](#) or the tangible risks of identity theft. [\[FN278\]](#)

***436** 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, [\[FN279\]](#) 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. [\[FN280\]](#) 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. [\[FN281\]](#) 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. [\[FN282\]](#) 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. [\[FN283\]](#)

*437 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.—

* * *

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* [\[FN305\]](#) 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. [\[FN306\]](#) 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 [\[FN307\]](#) and using an interstate facility to attempt to persuade a minor to engage in a sexual act. [\[FN308\]](#) 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. [\[FN309\]](#) As long as the evidence was relevant, the Court reasoned, nothing in the First Amendment prohibited its introduction into evidence. [\[FN310\]](#) Other cases have reached similar conclusions, holding that no First Amendment issues are raised by the introduction of reading materials as relevant

evidence. [\[FN311\]](#)

From the perspective of intellectual privacy, Curtin and cases like it are wrongly decided because they fail to account for the freedom of intellectual *442 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. [\[FN312\]](#) 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. [\[FN313\]](#) 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* [\[FN314\]](#) 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 *443 susceptibility to radical Islam, white-supremacist literature to prove motive to engage in hate crimes, or *A Clockwork Orange* [\[FN315\]](#) 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. [\[FN316\]](#) Such determinations are reviewable on appeal only under the highly deferential "abuse of discretion" standard. [\[FN317\]](#) 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 de-

nied 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. [FN318] Such protections encode substantive notions of sexual equality (and sexual autonomy) into evidentiary procedures without explicitly invoking the constitutional values that animate *444 them. [FN319] 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.

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