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## The First Amendment as Criminal Procedure

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# THE FIRST AMENDMENT AS CRIMINAL PROCEDURE

DANIEL J. SOLOVE\*

82 NEW YORK UNIVERSITY LAW REVIEW 112 (2007)

*This Article explores the relationship between the First Amendment and criminal procedure. These two domains of constitutional law have long existed as separate worlds, rarely interacting with each other despite the fact that many instances of government information gathering can implicate First Amendment freedoms of speech, association, and religion. The Fourth and Fifth Amendments used to provide considerable protection for First Amendment interests, as in the famous 1886 case Boyd v. United States, in which the Supreme Court held that the government was prohibited from seizing a person's private papers. Over time, however, Fourth and Fifth Amendment protection has shifted, and countless searches and seizures involving people's private papers, the books they read, the websites they surf, and the pen names they use when writing anonymously now fall completely outside the protection of constitutional criminal procedure. Professor Solove argues that the First Amendment should protect against government information gathering that implicates First Amendment interests. He contends that there are doctrinal, historical, and normative justifications for developing what he calls "First Amendment criminal procedure." Solove sets forth an approach for determining when certain instances of government information gathering fall within the regulatory domain of the First Amendment and what level of protection the First Amendment should provide.*

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## INTRODUCTION

Suppose the government is interested in finding out about your political beliefs, religion, reading habits, or the things you write and say to others. To uncover this information, law enforcement officials construct a bibliography of the books you read using records at bookstores and libraries. They assemble a list of people with whom you communicate using records obtained from your Internet Service Provider (ISP) and phone company. They seize your diary and personal writings. To what extent do the Fourth and Fifth Amendments restrict the government's investigation?

In many instances, not at all. A century ago, the Fourth and Fifth Amendments would have significantly restricted government informa-

tion gathering that involves what I will refer to as “First Amendment activities”—speech, association, consumption of ideas, political activity, religion, and journalism.<sup>1</sup> But today, the Fourth and Fifth Amendments play a much diminished role in these contexts. First, the Supreme Court has held that the use of a subpoena to obtain documents and testimony receives little, if any, Fourth or Fifth Amendment protection.<sup>2</sup> Subpoenas are orders compelling the production of documents or information. They are issued without judicial approval, and they have few limitations beyond a requirement that the information be relevant to an investigation.<sup>3</sup> As a result, the government can readily use subpoenas to gather information pertaining to communications, writings, and the consumption of ideas. Second, the Court has held that the Fourth Amendment does not cover instances when a person’s information is gathered from third parties.<sup>4</sup> In the Information Age, a massive amount of data about our lives—data that may pertain to First Amendment activities—is maintained by third-party businesses and organizations.

Does the First Amendment provide any protection? At first blush, the question seems odd. The rules that regulate government investigations have typically emerged from the Fourth and Fifth Amendments, not the First. Lawyers and judges generally do not think of the First Amendment as having much relevance to criminal procedure, let alone as providing its own criminal procedure rules. The First Amendment is usually taught separately from the Fourth and Fifth Amendments, and judicial decisions on criminal procedure only occasionally mention the First Amendment. I contend in this Article, however, that the First Amendment must be considered alongside the Fourth and Fifth Amendments as a source of criminal procedure.

First Amendment activities are implicated by a wide array of law enforcement data-gathering activities. Government information gathering about computer and Internet use, for example, can intrude on a

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<sup>1</sup> The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>2</sup> See *Fisher v. United States*, 425 U.S. 391, 397 (1976) (holding that use of subpoena to obtain records from third party does not violate Fifth Amendment privilege of person under investigation); *United States v. Dionisio*, 410 U.S. 1, 9 (1973) (holding that subpoenas are not searches under Fourth Amendment).

<sup>3</sup> See generally DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 202–03 (2004) (describing subpoenas and contrasting them with warrants).

<sup>4</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

significant amount of First Amendment activity. Searching or seizing a computer can reveal personal and political writings. Obtaining e-mail can provide extensive information about correspondence and associations. Similarly, ISP records often contain information about speech, as they can link people to their anonymous communications. AOL, for example, receives about a thousand requests per month for use of its customer records in criminal cases.<sup>5</sup>

The government can also use subpoenas to gather information about First Amendment activities such as book reading and personal writing. Indeed, the FBI once subpoenaed six years of customer records from Arundel Books, an alternative book retailer, in connection with an investigation of political campaign contributions.<sup>6</sup> Independent Counsel Kenneth Starr subpoenaed records of Kramerbooks & Afterwords, a bookstore in Washington, D.C., regarding books Monica Lewinsky purchased for President Bill Clinton.<sup>7</sup> The government has also subpoenaed people's writings, documents, and even their diaries. The Senate Ethics Committee, for example, subpoenaed the diaries of Republican Senator Bob Packwood as part of its investigation of sexual harassment charges against the senator.<sup>8</sup>

Government information gathering can also implicate other First Amendment protections, such as freedom of association and freedom of the press. Freedom of association can be implicated when the government monitors or attempts to infiltrate political groups. Freedom of the press can be compromised when the government subpoenas journalists to provide the identities of confidential sources, or when the police search the offices or computers of media entities. And with blogs supplementing the traditional media, searches of individual homes and computers might also implicate journalistic activities.<sup>9</sup>

Today, in an effort to fight the war on terrorism and protect national security, the government gathers extensive information about people's associational ties and their communicative activity. Section 215 of the USA PATRIOT Act permits the FBI to "make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an

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<sup>5</sup> Saul Hansell, *Online Trail Can Lead to Court*, N.Y. TIMES, Feb. 4, 2006, at C1.

<sup>6</sup> Bob Tedeschi, *Patriot Act Has Led Online Buyers and Sellers to Watch What They Do. Could It Threaten Internet Business?*, N.Y. TIMES, Oct. 13, 2003, at C6.

<sup>7</sup> Felicity Barringer, *Using Books as Evidence Against Their Readers*, N.Y. TIMES, Apr. 8, 2001, at 4.3.

<sup>8</sup> JEFFREY ROSEN, *THE UNWANTED GAZE* 31-33 (2000).

<sup>9</sup> See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 434-35 (2002) (noting that what constitutes "the press" for constitutional purposes is called into question by blogging).

investigation . . . to protect against international terrorism or clandestine intelligence activities.”<sup>10</sup> Shortly after September 11th, the Bush Administration authorized the National Security Agency (NSA) to engage in warrantless wiretapping of international phone calls and the gathering of phone records en masse.<sup>11</sup> The FBI began canvassing for information about worshippers at several mosques.<sup>12</sup> Furthermore, the government has been engaging in “data mining”—examining data for various links between people or for certain patterns of behavior.<sup>13</sup>

Although First Amendment activities are frequently involved in government investigations, the First Amendment is rarely invoked when courts apply the constitutional procedural safeguards that govern such investigations.<sup>14</sup> This Article endeavors to establish a foundation for the development of First Amendment criminal procedure. I contend that there are doctrinal, historical, and normative foundations for the First Amendment to play a significant role in regulating government information gathering. I explore when government investigations should trigger First Amendment protection and what kinds of safeguards the First Amendment should require.

Part I discusses the current landscape of criminal procedure protections for First Amendment activity and argues that current rules leave many activities that are central to First Amendment values unprotected. Government information gathering frequently implicates First Amendment values, but courts and commentators analyzing the constitutionality of government searches have traditionally focused only on the Fourth and Fifth Amendments. Under current law, however, much government information gathering affecting First

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<sup>10</sup> USA PATRIOT Act § 215, 115 Stat. 287 (2001) (codified as amended at 50 U.S.C. § 1861 (Supp. III 2005)).

<sup>11</sup> See Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1 (reporting on NSA program to collect millions of call records from telephone companies and noting that while NSA wiretapping authority is limited to international calls, acquisition of phone records may facilitate broad access to personal information about domestic callers). While the details of the NSA surveillance and information gathering programs are still shrouded in secrecy, it seems clear that the information gathered by the NSA relates to communication and association. See Seymour M. Hersh, *Listening In*, NEW YORKER, May 2006, at 25 (describing, in conjunction with NSA surveillance and information gathering programs, NSA's “chaining” process that begins with suspect phone number and then expands outward through several “levels of separation” to observe calling patterns of persons associated with suspect number).

<sup>12</sup> Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 625–26 (2004).

<sup>13</sup> U.S. GEN. ACCOUNTING OFFICE, DATA MINING: FEDERAL EFFORTS COVER A WIDE RANGE OF USES 1–3 (2004) (discussing various government data mining endeavors); DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 604–17 (2d ed. 2006) (describing government data mining programs).

<sup>14</sup> See *infra* Part I.

Amendment activity falls outside the scope of Fourth and Fifth Amendment regulation.

Part II sets forth the positive case for First Amendment criminal procedure. I contend that First Amendment protection against government information gathering is justified by the historical connections between the First, Fourth, and Fifth Amendments, the history of government investigations into First Amendment activity, and several lines of First Amendment doctrine.

Part III explores the contours and consequences of developing First Amendment criminal procedure. The First Amendment could conceivably be applied so broadly that it would swallow up the field of criminal procedure. I discuss where the boundaries of First Amendment protection should extend and the kind of protection the First Amendment should require. I then apply my theory of First Amendment criminal procedure to various examples of government information gathering.

## I

### CRIMINAL PROCEDURE AND FIRST AMENDMENT ACTIVITIES

Although government information gathering can implicate central First Amendment values, it has typically been regulated by criminal procedure rules established under the Fourth and Fifth Amendments. I argue that current criminal procedure rules underprotect First Amendment activities, leaving them exposed to intrusive government information gathering. While courts have acknowledged that searches for certain materials may implicate First Amendment values, the Supreme Court has not resolved the question of how to protect First Amendment activities when they fall outside the scope of the Fourth Amendment. I argue that the First Amendment itself must be understood as an independent source of criminal procedure rules.

#### *A. Two Separate Worlds of Constitutional Law*

Constitutional criminal procedure and the First Amendment currently occupy two worlds that rarely intermingle. In law schools, the First Amendment is taught separately from the Fourth and Fifth Amendments. First Amendment scholars rarely delve into constitutional criminal procedure, and criminal procedure scholars rarely consider the First Amendment implications of government searches. This is not surprising, given that the criminal procedure amendments and the First Amendment operate to protect constitutional rights in very different ways. The Fourth and Fifth Amendments establish proce-

dures for government information gathering—thresholds to justify searches, requirements for judicial oversight, rules to minimize the scope of searches, and limits on interrogation. The First Amendment, in contrast, works primarily by striking down the application of particular laws, regulations, or executive activities.

In examining a challenge to a government activity under the Fourth Amendment,<sup>15</sup> a court must first determine whether the government action falls within the scope of the Amendment's protection, and only then ask whether appropriate procedures were followed. To determine whether a particular information gathering practice falls within the scope of the Fourth Amendment, courts apply the "reasonable expectation of privacy" test set forth in Justice Harlan's concurrence in *Katz v. United States*.<sup>16</sup> The test examines whether a person exhibits an "actual (subjective) expectation of privacy" and whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'"<sup>17</sup>

If the Fourth Amendment applies, it requires that a search or seizure be "reasonable." In most cases, a search will be reasonable if government officials have obtained a search warrant, which requires establishing "probable cause" before a neutral judge or magistrate.<sup>18</sup> Probable cause requires "reasonably trustworthy information . . . sufficient . . . to warrant a man of reasonable caution in the belief that an offense has been or is being committed" or that evidence will be found in the place to be searched.<sup>19</sup> When the Fourth Amendment is violated, the typical remedy is the "exclusionary rule"—the evidence obtained through the violation is suppressed at trial.<sup>20</sup>

The Fifth Amendment regulates government interrogations meant to glean incriminating information. The Fifth Amendment's privilege against self-incrimination provides: "No person shall . . . be compelled in any criminal case to be a witness against himself."<sup>21</sup> As interpreted by the Supreme Court, the privilege bars compelled testi-

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<sup>15</sup> The Fourth Amendment provides that people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>16</sup> 389 U.S. 347 (1967).

<sup>17</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>18</sup> See *Winston v. Lee*, 470 U.S. 753, 759 (1985) (noting general rule that when probable cause is present "a search is generally 'reasonable'" for purposes of Fourth Amendment).

<sup>19</sup> *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (internal quotation marks omitted).

<sup>20</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>21</sup> U.S. CONST. amend. V.



monial self-incrimination.<sup>22</sup> If a defendant's statement is obtained in violation of the Fifth Amendment, it cannot be used at trial.<sup>23</sup>

In contrast, a court hearing a First Amendment challenge to a law generally examines the law's substantive validity. The First Amendment restricts laws "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>24</sup> Most restrictions on freedom of speech or association are analyzed under either strict or intermediate scrutiny, depending on the nature of the restriction. Under strict scrutiny, a law must be the "least restrictive means" to achieve a "compelling" government interest,<sup>25</sup> while intermediate scrutiny requires a law to be "narrowly tailored" to a "significant government interest" and "leave open ample alternative channels of communication."<sup>26</sup> Laws and actions that do not survive the appropriate level of scrutiny are invalid.

Thus, under current doctrine, the Fourth and Fifth Amendments mandate procedures for investigating violations of law, while the First Amendment is largely about the validity of substantive laws. First Amendment doctrine tells us a lot about what conduct can or cannot be criminalized, but it tells us little about what process the government must follow to conduct investigations. As a result, when government information gathering implicates First Amendment activities, it is regulated, if at all, only by the Fourth and Fifth Amendments. But as I demonstrate below, Fourth and Fifth Amendment doctrine is inadequate to safeguard central First Amendment values that are implicated by government information gathering.

### *B. First Amendment Values and Government Information Gathering*

Today in the United States, few question the importance of the First Amendment. Perhaps more than any other constitutional amendment, the First Amendment has iconic status and wields tre-

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<sup>22</sup> The information must be compelled; it must involve testimony (not documents and things); and it must be incriminating. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757, 761 & n.5 (1966) (upholding use of compulsory blood test because Fifth Amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature").

<sup>23</sup> *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Ziang Sung Wan v. United States*, 266 U.S. 1, 14 (1924).

<sup>24</sup> U.S. CONST. amend. I.

<sup>25</sup> *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>26</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

mendous power.<sup>27</sup> It covers a broad constellation of fundamental freedoms, encompassing speech, association, the consumption of ideas, the press, and religion. As John Milton eloquently argued in 1644, “the liberty to know, to utter, and to argue freely according to conscience [is] above all liberties.”<sup>28</sup> First Amendment freedoms promote individual autonomy<sup>29</sup> and are essential for democracy.<sup>30</sup> As Justice Brandeis argued, “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,” and “without free speech and assembly discussion would be futile.”<sup>31</sup> The Supreme Court once observed that the First Amendment is “the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>32</sup>

Understood broadly, the First Amendment aims to ensure freedom of thought and belief. The Court clearly articulated this value in *West Virginia Board of Education v. Barnette*<sup>33</sup> when it invalidated a compulsory flag salute because it invaded “the [individual’s] sphere of intellect and spirit.”<sup>34</sup> Vincent Blasi and Seana Shiffrin have noted that “what underpins *Barnette* is the First Amendment interest in the speaker’s freedom of thought and freedom of conscience.”<sup>35</sup> Further, they observe: “The speaker, as well as the community of which she is a part, has an interest in her thinking and reasoning about

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<sup>27</sup> See Robert L. Tsai, *Speech and Strife*, 67 *LAW & CONTEMP. PROBS.* 83, 86 (2004) (“The right to free speech remains the most cherished and recognizable right . . .”).

<sup>28</sup> JOHN MILTON, *AREOPAGITICA* (1644), reprinted in *AREOPAGITICA AND OTHER PROSE WRITINGS* 58 (William Haller, ed., MacMillan 1927).

<sup>29</sup> See Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593 (1982) (“[F]ree speech ultimately serves only one true value, which I have labeled ‘individual self-actualization.’”); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. PA. L. REV.* 45, 62 (1975) (“The value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination . . .”); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334, 353–60 (1991) (presenting autonomy as justification for principle that speech cannot be restricted solely on grounds of its persuasiveness).

<sup>30</sup> See OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996) (“Speech is valued so importantly in the Constitution . . . not because it is a form of self-expression or self-actualization but rather because it is essential for collective self-determination.”); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960) (contending that First Amendment exists to protect political deliberation); Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255, 301 (1992) (“[T]he First Amendment is principally about political deliberation.”).

<sup>31</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927).

<sup>32</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>33</sup> 319 U.S. 624 (1943).

<sup>34</sup> *Id.* at 642.

<sup>35</sup> Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *CONSTITUTIONAL LAW STORIES* 433, 457 (Michael C. Dorf ed., 2004).

subjects sincerely and authentically.”<sup>36</sup> Democracy depends upon citizens who are free to formulate their own beliefs.<sup>37</sup> Government information gathering can threaten the ability to express oneself, communicate with others, explore new ideas, and join political groups.

Government probing can lessen the effectiveness of democratic participation by depriving speakers of anonymity, which can be essential for forthright expression. The Supreme Court has held that protecting anonymity is necessary to foster speech about unpopular views: “Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”<sup>38</sup> According to the Court, “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”<sup>39</sup> Sociologist Robert Putnam points out that “[a]nonymity and the absence of social cues inhibit social control—that is, after all, why we have the secret ballot.”<sup>40</sup> Investigative inquiries into the identities of speakers can thus deter them from uttering their views or dilute the vitality of their speech.

Government information gathering can also discourage or subdue conversations. Traditionally, the First Amendment was understood as protecting the speaker at the street corner or the political group staging a public demonstration. Alexander Meiklejohn’s vision of free speech exemplifies this view; he uses the analogy of the town meeting as the epitome of what the First Amendment protects.<sup>41</sup> But political discourse does not just occur on soapboxes before large crowds; it also thrives in private enclaves between small groups of people. Freedom of speech should and does protect the ability of individuals to communicate with each other, regardless of whether the exchange of ideas occurs between two people or among a million. In other words, the First Amendment safeguards not just speeches and rallies but *conversations*. People formulate their political opinions and debate politics mostly off-stage, between friends, family, and acquaintances, among

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<sup>36</sup> *Id.* at 461.

<sup>37</sup> See Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1653 (1999) (“The health of a democratic society depends both on the group-oriented process of democratic deliberation and the functioning of each person’s capacity for self-governance.”).

<sup>38</sup> *Talley v. California*, 362 U.S. 60, 64 (1960).

<sup>39</sup> *Id.* at 65.

<sup>40</sup> ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 173 (2000); see also C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 8 (1983) (“Privacy seems vital to a democratic society [because] . . . it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal.”).

<sup>41</sup> See MEIKLEJOHN, *supra* note 30, at 24 (describing “the traditional American town meeting” as “a model by which free political procedures may be measured”).

fellow religious worshippers, and within groups with shared values and commitments. Such conversations depend upon privacy. Without protection against government probing, countless conversations might never occur or might be carried on in more muted and cautious tones.

In addition to protecting expression, the First Amendment safeguards the receipt of ideas.<sup>42</sup> Reading, listening, and engaging in intellectual inquiry facilitate the formulation of the thoughts and beliefs from which speech germinates.<sup>43</sup> Even when not leading to speech, the right to receive ideas is still valuable, for as Marc Blitz contends, it promotes “vigorous self-examination and free intellectual exploration.”<sup>44</sup> “[W]hen individuals encounter dissenting or obscure views merely by receiving or exploring information,” Blitz argues, “they exercise their First Amendment freedom without saying a word about what they believe.”<sup>45</sup> The receipt of ideas is essential for furthering not just individual autonomy, but also democratic participation. Exposure to ideas shapes people’s political beliefs even if they are never publicly expressed. People might vote differently, for example, after encountering new ideas. Government information gathering of the consumption of ideas can make people reticent to read controversial books or probe unpopular viewpoints. People might be fearful of being linked to ideas they merely want to investigate rather than adopt or endorse.

As with the communication and receipt of ideas, freedom of association can be quelled by governmental invasions of privacy. Free association is fundamental to democratic participation; in the words of Alexis de Tocqueville, it is one of the “foundations of society.”<sup>46</sup> People may be reluctant to join certain groups if the government is recording membership information. As the Supreme Court once declared: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>47</sup>

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<sup>42</sup> See *infra* Part II.B.3.

<sup>43</sup> Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1006 (1996) (“Thoughts and opinions, which are the predicates to speech, cannot arise in a vacuum. Whatever their content, they are responses formed to things heard or read.”).

<sup>44</sup> 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, 803 (2006).

<sup>45</sup> *Id.* at 802–03.

<sup>46</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (Vintage Books 1990) (1835).

<sup>47</sup> NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

Therefore, uninhibited conversations, association, and exchange of ideas can be stifled by the searching light of government inquest and observation. Surveillance can make people reluctant to engage in robust and candid discourse.<sup>48</sup> It can inhibit deliberative democracy and individual self-determination.<sup>49</sup> Government information gathering can thus strike at the heart of First Amendment values.

### C. *Criminal Procedure and First Amendment Values*

Although government information gathering often implicates First Amendment values, courts and commentators have generally analyzed information gathering under the Fourth and Fifth Amendments, leaving First Amendment activities with little protection. In many cases, Fourth and Fifth Amendment protection has receded in precisely those areas most important to First Amendment values.

The ability to keep personal papers and records of associational ties private is a central First Amendment value. But despite their First Amendment importance, the broad subpoena power and the Fourth Amendment's third-party doctrine leave these documents unprotected from government scrutiny. If the government wants to search a person's home for documents, the Fourth Amendment will usually require a search warrant supported by probable cause.<sup>50</sup> However, if the government uses a subpoena, the level of Fourth and Fifth Amendment protection is different. Under the Federal Rules of Criminal Procedure, a "subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates."<sup>51</sup> Subpoenas do not require probable cause or even judicial supervision.<sup>52</sup> Although subpoenas may be challenged in court,

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<sup>48</sup> See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1260 (1998) ("Simply put, surveillance leads to self-censorship."); see also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000) (arguing that surveillance results in "a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines"); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 242-47 (2002) (arguing that exposure to surveillance alters people's behavior, causing them to become more cautious in their actions).

<sup>49</sup> See, e.g., Schwartz, *supra* note 37, at 1648-59 (arguing that lack of adequate privacy protection on Internet undermines its potential as forum for deliberative democracy, which depends on capacity for individual self-determination online).

<sup>50</sup> See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

<sup>51</sup> FED. R. CRIM. P. 17(c)(1).

<sup>52</sup> FED. R. CRIM. P. 17(a) ("The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served."); *In re Subpoena Duces Tecum*, 228 F.3d 341, 347-48 (4th Cir. 2000) ("While the Fourth Amendment protects people against unreasonable searches and

they usually are quashed only if they severely overreach.<sup>53</sup> As William Stuntz notes, Kenneth Starr in his investigation of President Clinton used subpoenas much more than search warrants:

This use of the grand jury and its power to subpoena, rather than the police and their power to search, gave Starr's team the authority to find out just about anything it might have wanted. For while searches typically require probable cause or reasonable suspicion and sometimes require a warrant, subpoenas require nothing, save that the subpoena not be unreasonably burdensome to its target. Few burdens are deemed unreasonable.<sup>54</sup>

The Fourth and Fifth Amendments provide only minimal limitations on subpoenas. In *United States v. Dionisio*,<sup>55</sup> the Supreme Court held that subpoenas generally do not constitute a Fourth Amendment search.<sup>56</sup> The Fifth Amendment will also not generally bar subpoenas for a person's documents even when they contain incriminating statements; instead, it will only provide protection when the act of producing documents "has communicative aspects of its own, wholly aside from the contents of the papers produced."<sup>57</sup> As Christopher Slobogin observes, however, the "lion's share of subpoenas that seek personal papers . . . are directed at third parties."<sup>58</sup> The Court concluded in *Couch v. United States*<sup>59</sup> and in *Fisher v. United States*<sup>60</sup> that

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seizures, it imposes a probable cause requirement only on the issuance of warrants. Thus, unless subpoenas are warrants, they are limited by the general reasonableness standard of the Fourth Amendment[.] . . . not by the probable cause requirement." (internal quotation marks and citation omitted); *Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 106 (3d Cir. 1992) ("Specifically, Fed.R.Crim.P. 17 provides in relevant part that the clerk of the court, without judicial supervision, shall issue a subpoena to a party requesting it.").

<sup>53</sup> A subpoena will be quashed on relevancy grounds if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

<sup>54</sup> William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 857-58 (2001).

<sup>55</sup> 410 U.S. 1 (1973).

<sup>56</sup> *Id.* at 8. The Court was nonetheless not prepared to conclude that subpoenas always fall outside the Fourth Amendment, stating that "[t]he Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms 'to be regarded as reasonable.'" *Id.* at 11 (quoting *Hale v. Henkel*, 201 U.S. 43, 76 (1906)).

<sup>57</sup> *Fisher v. United States*, 425 U.S. 391, 410 (1976).

<sup>58</sup> Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 822 (2005).

<sup>59</sup> 409 U.S. 322, 329 (1973) (subpoena to individual's accountant for his documents did not violate Fifth Amendment).

<sup>60</sup> *Fisher*, 425 U.S. at 410-11 (1976) (holding that subpoena for documents in possession of attorney for party being investigated did not violate Fifth Amendment); see also *Andresen v. Maryland*, 427 U.S. 463, 477 (1976) (holding that gathering information already in existence and voluntarily committed to writing did not violate Fifth Amendment).

subpoenas to third parties for a person's papers do not implicate the Fifth Amendment.

Likewise, the Fourth Amendment does not provide protection when the government seeks information about a person from a third party, whether through a subpoena or through some other means. Under the third-party doctrine, if a person's information is maintained by a third party, then she has no reasonable expectation of privacy in that information. In *United States v. Miller*,<sup>61</sup> the Supreme Court concluded that there is no reasonable expectation of privacy in financial records maintained by one's bank: "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities."<sup>62</sup> The Court held in *Smith v. Maryland*<sup>63</sup> that people cannot "harbor any general expectation that the [phone] numbers they dial will remain secret" because they "know that they must convey numerical information to the phone company."<sup>64</sup> Thus, the government could access the phone numbers dialed (via a pen register) without implicating the Fourth Amendment.<sup>65</sup>

In several cases, lower courts have also applied the third-party doctrine to records held by ISPs of a person's communications via computer. In *United States v. Hambrick*,<sup>66</sup> the government obtained a defendant's customer records from his ISP, MindSpring. With these records, law enforcement officials were able to link his pseudonymous pen name to his real name. The court concluded that the defendant had no Fourth Amendment protection in his records because he "knowingly revealed his name, address, credit card number, and telephone number to MindSpring and its employees."<sup>67</sup> Likewise, in *United States v. Kennedy*,<sup>68</sup> the court concluded that a defendant's ISP records were not protected by the Fourth Amendment because he "knowing[ly] revealed [to his ISP] all information connected to [his] IP address."<sup>69</sup> In *Guest v. Leis*,<sup>70</sup> the Sixth Circuit held that individuals "lack a Fourth Amendment privacy interest in their [Internet ser-

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<sup>61</sup> 425 U.S. 435 (1976).

<sup>62</sup> *Id.* at 443.

<sup>63</sup> 442 U.S. 735 (1979).

<sup>64</sup> *Id.* at 743.

<sup>65</sup> *Id.* at 745–46. "A pen register is a device that is typically installed at the telephone company's offices that can record the telephone numbers a person dials." Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1134 n.306 (2002).

<sup>66</sup> 55 F. Supp. 2d 504 (W.D. Va. 1999).

<sup>67</sup> *Id.* at 508.

<sup>68</sup> 81 F. Supp. 2d 1103 (D. Kan. 2000).

<sup>69</sup> *Id.* at 1110.

<sup>70</sup> 255 F.3d 325 (6th Cir. 2001).

vice] subscriber information because they communicate[ ] it to the systems operators.”<sup>71</sup>

Therefore, if one’s papers are confined to one’s home, they are protected by the general rule that the government needs a warrant to search one’s home. But if one’s papers (or the data contained within them) are in the hands of another, they enjoy little or no Fourth and Fifth Amendment protection. As I have discussed extensively elsewhere, much of our personal information today is in the hands of third parties,<sup>72</sup> and much of this information concerns activities protected under the First Amendment.

The third-party doctrine reflects a broader principle about how the Fourth Amendment operates. The Fourth Amendment focuses not on what various records or documents can reveal, but rather upon where they are located or who possesses them. For example, bags and containers are protected from searches under the Fourth Amendment, but garbage is not.<sup>73</sup> As the Court observed in another case, “Once placed within . . . a container, a diary and a dishpan are equally protected by the Fourth Amendment.”<sup>74</sup>

Due to changes in technology and the realities of modern life, much First Amendment activity now leaves digital fingerprints beyond private zones protected by the Fourth Amendment. In the past, personal papers and correspondence were often located in people’s homes, which have always received strong Fourth Amendment protection. People’s conversations would take place in private places or through sealed letters, often shielding them from government access without a search warrant. Today, however, Internet surfing in the seclusion of one’s own home creates data trails with third parties in distant locations. The books a person buys can be tracked by looking at records maintained by booksellers such as Amazon.com. Much of what a person says and does today finds its way into the record systems of various companies. In the past, much speaking, association, and reading occurred in secluded places, walled off from the rest of the world. But with modern technology, First Amendment activity

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<sup>71</sup> *Id.* at 336.

<sup>72</sup> See SOLOVE, *supra* note 3, at 165–75.

<sup>73</sup> See *California v. Greenwood*, 486 U.S. 35, 39–40 (1988) (holding that individuals lack reasonable expectation of privacy in garbage left for collection because it will be conveyed “to a third party, the trash collector”).

<sup>74</sup> *Robbins v. California*, 453 U.S. 420, 425–26 (1981). Not all searches of containers require a warrant, such as containers in automobiles. See *United States v. Ross*, 456 U.S. 798, 822–23 (1982) (“As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view. But the protection afforded by the Amendment varies in different settings.” (internal citation omitted)).



occurs via e-mail, the Internet, and the telephone. It is no longer confined to private zones such as the home and no longer benefits from Fourth Amendment protection.

The ability to engage in political activity and discussion in public is also of central importance to the First Amendment, but falls outside Fourth Amendment protection. Merely observing something in “plain view” is not a search.<sup>75</sup> For example, the government may monitor various political groups or may send officers to record information about public demonstrations. The Court has held that the Fourth Amendment does not apply to surveillance in public.<sup>76</sup>

In addition, government officials may use informants or pose as secret agents to infiltrate a political group. Under the “assumption of risk” doctrine in Fourth Amendment law, information is not protected if a person revealed it to a police informant or undercover officer.<sup>77</sup> In *Hoffa v. United States*,<sup>78</sup> for example, the Court concluded that there was no Fourth Amendment protection when a defendant made statements to an undercover informant because the informant was “not a surreptitious eavesdropper.”<sup>79</sup> The defendant willingly spoke with the informant and relied “upon his misplaced confidence that [the informant] would not reveal his wrongdoing.”<sup>80</sup> Informants or undercover agents can even use concealed electronic surveillance devices without triggering Fourth Amendment protection.<sup>81</sup>

Thus through a combination of the Court’s interpretive maneuverings and technological change, the Fourth and Fifth Amendments have receded from protecting against many instances of law enforcement activity that implicate First Amendment values. When the Fourth and Fifth Amendments protected these activities, First Amendment protection may have been redundant and unnecessary. Although the Fourth and Fifth Amendments have receded from this

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<sup>75</sup> *Harris v. United States*, 390 U.S. 234, 236 (1968).

<sup>76</sup> *See Florida v. Riley*, 488 U.S. 445, 448–50 (1989) (holding that aerial surveillance of greenhouse interior with roof panels missing was not covered by Fourth Amendment as observed activity was visible to public from sky); *see also Slobogin, supra* note 48, at 233 (“Meaningful legal strictures on government use of public surveillance cameras in Great Britain, Canada, and the United States are non-existent.”).

<sup>77</sup> *See, e.g., Lewis v. United States*, 385 U.S. 206, 210–11, 213 (1966) (holding that Fourth Amendment did not apply when defendant invited undercover agent into his home to engage in illegal sale of narcotics).

<sup>78</sup> 385 U.S. 293 (1966).

<sup>79</sup> *Id.* at 302.

<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g., United States v. White*, 401 U.S. 745, 751 (1971) (holding that Fourth Amendment does not protect information conveyed to government informant who wears radio transmitter); *On Lee v. United States*, 343 U.S. 747, 753–54 (1952) (concluding that Fourth Amendment does not apply when person misplaces trust by talking to bugged government informant).

area, First Amendment protection should remain. Since the Fourth and Fifth Amendments are increasingly not applicable, it is even more imperative that the First Amendment safeguard activities central to its values and purpose.

#### D. *An Open Question*

Although the First Amendment itself has seldom been applied in the context of a search, seizure, or other government investigation,<sup>82</sup> the Supreme Court has on rare occasion considered how First Amendment values affect traditional Fourth Amendment cases. In one line of cases, the Supreme Court recognized the relationship between the First and Fourth Amendments in searches and seizures of expressive material. These cases hold that when First Amendment activities are implicated by a search or a seizure, Fourth Amendment procedures must be followed with “scrupulous exactitude.” But despite the rigorous-sounding language, the “scrupulous exactitude” standard merely requires following the typical protections of the Fourth Amendment (i.e., warrants supported by probable cause). More importantly, the scrupulous exactitude cases tell us nothing about what procedures should apply when First Amendment activity falls outside the scope of current Fourth and Fifth Amendment protection.

The scrupulous exactitude cases began in 1961 when the Supreme Court held in *Marcus v. Search Warrant*<sup>83</sup> that large-scale searches and seizures of obscene publications provided too much discretion to police officers to determine which materials to seize.<sup>84</sup> The Court concluded that these searches and seizures were unconstitutional, noting that “[h]istorically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.”<sup>85</sup> A few years later, a plurality of Justices explained in *A Quantity of Books v. Kansas*<sup>86</sup> that because obscene books

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<sup>82</sup> Occasionally, in dissents and dicta, Justices have mentioned how government investigations can implicate First Amendment rights. See, e.g., *United States v. U.S. Dist. Court*, 407 U.S. 297, 314 (1972) (“Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.”); *White*, 401 U.S. at 762 (Douglas, J., dissenting) (“Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value . . . is not free if there is surveillance.”); *Lopez v. United States*, 373 U.S. 427, 470 (1963) (Brennan, J., dissenting) (noting that “historically the search and seizure power was used to suppress freedom of speech and of the press” and that “freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office”).

<sup>83</sup> 367 U.S. 717 (1961).

<sup>84</sup> See *id.* at 731–32.

<sup>85</sup> *Id.* at 724.

<sup>86</sup> 378 U.S. 205 (1964).

enjoyed First Amendment protection, they could not be treated like any other form of contraband.<sup>87</sup>

In later cases, the Court went on to find that First Amendment rights could be sufficiently protected by means of usual Fourth Amendment procedures. *Stanford v. Texas*<sup>88</sup> concerned an investigation by Texas authorities into John Stanford's involvement with the Communist Party. Pursuant to a warrant, Texas police searched Stanford's home to gather evidence that he had violated a Texas statute outlawing the Communist Party.<sup>89</sup> The police hauled away fourteen cartons consisting of about two thousand books and papers, including works by Karl Marx, Jean-Paul Sartre, Fidel Castro, Pope John XXIII, and, ironically, Justice Hugo Black. Stanford's records, bills, and personal correspondence were also seized. The Supreme Court held first that the seizure violated the Fourth Amendment because it took place pursuant to a "general warrant," the "kind which it was the purpose of the Fourth Amendment to forbid."<sup>90</sup> The Court then noted that the search also implicated First Amendment rights, which could be adequately protected only by careful adherence to the requirements of the Fourth Amendment:

In short . . . the constitutional requirement that warrants must particularly describe the "things to be seized" is to be *accorded the most scrupulous exactitude* when the "things" are books and the basis for their seizure is the ideas which they contain. No less a standard could be faithful to First Amendment freedoms.<sup>91</sup>

In at least one case, *Roaden v. Kentucky*,<sup>92</sup> the Court suggested that the First Amendment might expand the scope of the Fourth Amendment, while not necessarily expanding the type of protections required. *Roaden* involved a sheriff who watched a film at a drive-in theater, concluded it was obscene, arrested the manager, and seized a copy of the film without a warrant. The Court found that the seizure implicated the First Amendment right to free speech, and suggested that the First Amendment implications provided a basis for Fourth Amendment protection: "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First

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<sup>87</sup> *Id.* at 211–12.

<sup>88</sup> 379 U.S. 476 (1965).

<sup>89</sup> TEX. REV. CIV. STAT. ANN. art. 6889-3A, § 2 (Vernon 1957) (repealed 1993).

<sup>90</sup> *Stanford*, 379 U.S. at 480.

<sup>91</sup> *Id.* at 485 (emphasis added) (internal citations omitted). In *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), the Court appeared to reaffirm the rule of *Marcus* and *Stanford* when it invalidated a warrant to seize obscene films because the evidentiary support offered for it "fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.* at 637.

<sup>92</sup> 413 U.S. 496 (1973).

Amendment, invokes such Fourth Amendment warrant requirements because we examine what is ‘unreasonable’ in the light of the values of freedom of expression.”<sup>93</sup>

A 1978 case illustrated that Fourth Amendment “scrupulous exactitude” protection of First Amendment activity will in most cases only require a warrant supported by probable cause. *Zurcher v. Stanford Daily* involved a police search of a college newspaper’s office to gather photographs of a demonstration that had turned violent.<sup>94</sup> Although the newspaper did not participate in the demonstration and nobody at the newspaper was suspected of criminal activity, the Fourth Amendment only required that the police obtain a warrant by demonstrating probable cause that the search would uncover evidence of a crime.<sup>95</sup> The newspaper argued that search of its offices implicated the First Amendment because it “seriously threaten[ed] the ability of the press to gather, analyze, and disseminate news.”<sup>96</sup>

Although the Court recognized that First Amendment activities were implicated by the search, it concluded that “the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search.”<sup>97</sup> Accordingly, First Amendment interests are sufficiently protected by “the preconditions for a warrant.”<sup>98</sup> In later cases, the Court clarified that the First Amendment does not require a “higher standard” than a warrant supported by probable cause for seizures of books or films.<sup>99</sup> So while the Court has recognized that government information gathering implicates First Amendment rights, it has found that these rights are not deserving of more criminal procedure protections than other activities.

In these cases, however, the Court left a key question unanswered. In each case where the Court found that First Amendment

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<sup>93</sup> *Id.* at 504.

<sup>94</sup> 436 U.S. 547, 550–51 (1978).

<sup>95</sup> *Id.* at 554.

<sup>96</sup> *Id.* at 563.

<sup>97</sup> *Id.* at 565.

<sup>98</sup> *Id.* Congress responded to the problem in the *Zurcher* case with the Privacy Protection Act, which prevents government officers from collecting documents from “a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” 42 U.S.C. § 2000aa(a) (2000).

<sup>99</sup> *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873–74 (1986) (internal quotation marks omitted); *see also* *Maryland v. Macon*, 472 U.S. 463, 470 (1985) (holding that police officer merely purchasing book does not implicate Fourth or First Amendment). *But cf.* *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (holding that where allegedly obscene films or books are seized for purposes of destroying them or blocking their distribution, as opposed to seizing single copy to preserve evidence of criminal undertaking, probable cause alone is insufficient to justify seizure).

rights were compromised, the government information gathering fell within the ambit of the Fourth Amendment. But when the Fourth Amendment does not apply, there are no procedures to follow with scrupulous exactitude. If government information gathering implicates First Amendment activities but the Fourth Amendment does not apply, what protections should be required?

One approach would be to conclude that the First Amendment is implicated only when government information gathering falls within the Fourth Amendment's scope. However, although they overlap to some degree, the First and the Fourth Amendments protect different things. The Fourth Amendment is currently understood by the Court to protect privacy, and the test for determining the scope of the Fourth Amendment is the existence of a reasonable expectation of privacy.<sup>100</sup> First Amendment activity, in contrast, can be hindered without a violation of privacy, such as when the government engages in public surveillance of political activity. If First Amendment activities are implicated, it is not clear why protection should depend upon whether the activities are also encompassed within the scope of the Fourth Amendment.

Another approach is to conclude that the First Amendment enlarges the scope of the Fourth Amendment. The Court could draw on *Roaden v. Kentucky* and the scrupulous exactitude cases to conclude that the scope of the Fourth Amendment must be determined not only by reference to the reasonable expectation of privacy test but also based on the extent to which First Amendment activities are implicated. Akhil Amar, for example, has argued that First Amendment activities should be a factor in assessing the reasonableness of a search. According to Amar, reasonableness is a way of "integrating First Amendment concerns explicitly into the Fourth Amendment analysis,"<sup>101</sup> because, as the Court itself has noted, "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."<sup>102</sup> Integrating First Amendment values into Fourth Amendment analysis certainly might protect some First Amendment activities involved in government information gathering. But the substantive values underpinning the First Amendment are more thoroughly developed in First

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<sup>100</sup> See *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

<sup>101</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994).

<sup>102</sup> *Zurcher*, 436 U.S. at 564 (quoting *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973)).

Amendment jurisprudence, and it is more appropriate to look to that jurisprudence for guidance.

In this Article, I argue that the First Amendment should and does provide an independent basis for protection from intrusive government information gathering. The scrupulous exactitude cases hold that where both the First and the Fourth Amendment are applicable, the procedures of the Fourth are sufficient to satisfy the demands of the First. But when those Fourth Amendment procedures are unavailable because the Court has concluded that the Fourth Amendment does not cover a particular activity, the scrupulous exactitude cases do not tell us what to do. If the government information gathering still implicates First Amendment rights, the First Amendment should require its own procedural safeguards. Under this approach, the First Amendment serves as an independent source of criminal procedure.

## II

### FIRST AMENDMENT CRIMINAL PROCEDURE

In this Part, I set forth the historical and doctrinal basis for developing the First Amendment as an independent source of criminal procedure. While courts have not traditionally looked to the First Amendment as an independent source of procedural rules, important strands of history and doctrine justify First Amendment protections in the information gathering context. First, the amendments in the Bill of Rights need not be compartmentalized to isolated and separate domains. The First, Fourth, and Fifth Amendments share a common history. Among the factors that motivated the adoption of these amendments were government inquests into speech, religion, belief, and association. More recent history also shows that our Founders' concerns about these inquests are still relevant. Second, current First Amendment doctrine on surveillance of political activities, anonymity, free association, press protection, and subpoenas provides a foundation for the development of First Amendment criminal procedure.

#### *A. Historical Justifications*

##### *1. The Origins of the First, Fourth, and Fifth Amendments*

An examination of the historical ties between the First, Fourth, and Fifth Amendments demonstrates the significant extent to which First Amendment values are implicated in criminal procedure.<sup>103</sup>

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<sup>103</sup> The scholars I discuss in this Section have many significant disagreements over the historical background of the First, Fourth, and Fifth Amendments. Rather than address these disagreements, I have focused on certain dimensions of the history relevant to this Article. For more background on these debates, see Morgan Cloud, *Searching Through*

Contemporary constitutional pedagogy has often splintered the Bill of Rights into separate domains, but as Akhil Amar argues, “our Constitution is a *single* document . . . not a jumble of disconnected clauses.”<sup>104</sup> “Instead of being studied holistically,” Amar observes, “the Bill [of Rights] has been chopped up into discrete chunks of text, with each bit examined in isolation.”<sup>105</sup> This is especially true with the First Amendment and the Fourth and Fifth Amendments, which are often taught separately in different courses. But while the First, Fourth, and Fifth Amendments are often studied separately, they in fact emerged to protect related values.

The First, Fourth, and Fifth Amendments share a common background in concerns about seditious libel.<sup>106</sup> As William Stuntz observes: “Fourth and Fifth Amendment history . . . has more in common with the First Amendment . . . than with criminal procedure as we know it today.”<sup>107</sup> Prosecutions for seditious libel were frequently used in Britain in the eighteenth century as a device to suppress criticism of the government, and there were well over a thousand seditious speech prosecutions in the colonies.<sup>108</sup>

The Framers were influenced by a series of high-profile seditious libel cases that took place both in the colonies and in England.<sup>109</sup> In particular, John Peter Zenger was tried for seditious libel in 1735 in colonial New York, and a jury nullified the law to acquit him.<sup>110</sup> The

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*History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996) (reviewing William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with the *New York University Law Review*)).

<sup>104</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201 (1991).

<sup>105</sup> *Id.* at 1131.

<sup>106</sup> See, e.g., *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961) (“The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”).

<sup>107</sup> William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 395 (1995).

<sup>108</sup> Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700*, 39 AM. J. LEGAL HIST. 337, 337 (1995).

<sup>109</sup> See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1035 & n.364 (“[T]here is strong historical support for the protection of ‘papers,’ that is, materials related to free speech.”); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1499-1500 (1996) (arguing that First and Fourth Amendments were infused by same “spirit” of protecting dissent); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1241 (1988) (“Since colonial days, governmental search and seizure powers have been used to curb freedom of speech.”).

<sup>110</sup> For a description of the Zenger trial, see 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:28, at 1-24.1 to 1-26 (2d ed. 2000 & Supp. 2005).

Zenger case, in the words of one commentator, served “as a crucible for the flames of liberty and freedom of the press that were stirring in the Colonies.”<sup>111</sup>

An English case, *Wilkes v. Wood*,<sup>112</sup> also generated an enormous buzz in the colonies. In 1763 in England, John Wilkes, a prominent member of Parliament, published a series of anonymous pamphlets titled *The North Briton*, including an issue Number 45 that sharply criticized the King.<sup>113</sup> Pursuant to a general warrant authorizing a search for anything connected to *The North Briton* Number 45, government officials searched Wilkes’s home, seized his papers, and arrested him.<sup>114</sup> The warrant did not mention Wilkes by name. Such general warrants were common at the time and were used to muzzle the press and squelch political dissent.<sup>115</sup>

Wilkes and others initiated a civil trespass lawsuit challenging the general warrant. At trial, Chief Justice Pratt instructed the jury that if the government had the power to use general warrants, “it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.”<sup>116</sup> The jury found for Wilkes and the case became the stuff of legend. It was seen as an enormous victory for freedom of the press, and the British press ensured that news about the case was spread far and wide.<sup>117</sup> The number “45” was etched in chalk throughout London, and Benjamin Franklin noted after a visit that he observed a fifteen-mile stretch where “45” was marked on practically every door.<sup>118</sup> Hailed as a hero in Britain, Wilkes became a champion in the American colonies as well.<sup>119</sup> As Cuddihy observes: “Because American newspapers repeated whatever the British press reported on Wilkes and general

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<sup>111</sup> William R. Glendon, *The Trial of John Peter Zenger*, N.Y. St. B.J., Dec. 1996, at 48, 52.

<sup>112</sup> 19 Howell’s State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489 (K.B.).

<sup>113</sup> Stuntz, *supra* note 107, at 398. For more information on this case, see TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 29–35 (1969).

<sup>114</sup> Stuntz, *supra* note 107, at 398–99.

<sup>115</sup> See Cuddihy, *supra* note 103, at 651–52 (“To control the press and religious as well as political dissent, the secretaries of state maintained a steady barrage of general warrants until 1763.”).

<sup>116</sup> *Wilkes*, 19 Howell’s State Trials at 1167, 98 Eng. Rep. at 498.

<sup>117</sup> See Cuddihy, *supra* note 103, at 927–30 (noting that press accounts of Wilkes’s trial allowed “stirring proclamations against general warrants [to] reach[ ] countless numbers of the literate”).

<sup>118</sup> *Id.* at 942.

<sup>119</sup> See Amar, *supra* note 104, at 1177 (“John Wilkes, and the author of the opinion, Lord Chief Justice Pratt (soon to become Lord Camden), were folk heroes in the colonies.”).



warrants, those topics received the same saturation coverage in the colonies as in the mother country.”<sup>120</sup>

Two years after the *Wilkes* case, John Entick challenged a general warrant in a seditious libel investigation. Like Wilkes, Entick’s home had been searched and his papers seized. In *Entick v. Carrington*,<sup>121</sup> Lord Camden, who was formerly Chief Justice Pratt and the author of the *Wilkes* opinion, issued a blistering critique of general warrants. Camden declared that with a general warrant, a person’s “house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.”<sup>122</sup> Word of the *Entick* case was also greeted with cheer in America, and Wilkes and Lord Camden were so venerated that towns were named in their honor.<sup>123</sup>

William Stuntz suggests that *Wilkes* and *Entick* were so eminent because of their protection of First Amendment activities. Stuntz notes that restrictions on searches and seizures made it “harder to prosecute” political crimes such as seditious libel.<sup>124</sup> As Stuntz goes on to argue:

*Entick* and *Wilkes* are classic First Amendment cases in a system with no First Amendment, no vehicle for direct substantive judicial review. Restricting paper searches had the effect of limiting government power in a class of cases that were, even at the time, deemed seriously troubling in substantive terms, as shown not only by Camden’s remarks in *Entick* but also by the public’s embrace of the two decisions.<sup>125</sup>

Stuntz contends that the law of search and seizure is the “consequence of the strong tradition of using Fourth and Fifth Amendment law as a shield against government information gathering—a tradition that has

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<sup>120</sup> Cuddihy, *supra* note 103, at 1106. In the year following the *Wilkes* case, the *Boston Gazette* and the *Country Journal* discussed the case in thirty-six different stories. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 876 n.38 (1985). “Reprints of Wilkes’ *Authentic Account* of his arrest appeared at Boston, New York, and Philadelphia before 1763 was finished. In 1767, at least ten newspapers from Rhode island [sic] to South Carolina carried either Wilkes’ recollections of *The North Briton* searches or comments on those recollections.” Cuddihy, *supra* note 103, at 1105–06 (internal citations omitted).

<sup>121</sup> 19 Howell’s State Trials 1029 (C.P. 1765), 95 Eng. Rep. 807 (K.B.).

<sup>122</sup> *Entick*, 19 Howell’s State Trials at 1064.

<sup>123</sup> See Amar, *supra* note 104, at 1177 (“Pennsylvania residents named the town of Wilkes-Barre after the plaintiff; New Jersey and South Carolina each dedicated a city in Camden’s honor.”).

<sup>124</sup> Stuntz, *supra* note 107, at 402–03.

<sup>125</sup> *Id.* at 403.

more to do with protecting free speech than with regulating the police.”<sup>126</sup>

The origins of the Fifth Amendment privilege against self-incrimination are in considerable dispute. The Fifth Amendment privilege is based upon a privilege that arose at common law,<sup>127</sup> but there is significant disagreement as to when and why it emerged. Leonard Levy traces the origins of the privilege to resistance to the practice of ex officio oaths in England in the Middle Ages.<sup>128</sup> Puritans and others who did not conform to the Church were forced to “answer upon their oath in causes against themselves—and also to answer interrogations touching their own contempts and crimes objected against them.”<sup>129</sup> In mid-seventeenth-century England, John Lilburne’s famous refusal to submit to the oath when accused of seditious libel led to an intense public distaste for the ex officio oath and its ultimate abolition in 1641.<sup>130</sup>

Recent scholarship, however, has proposed an alternative theory of the creation of the privilege. John Langbein contends:

[T]he true origins of the common law privilege are to be found not in the high politics of the English revolutions, but in the rise of adversary criminal procedure at the end of the eighteenth century. The privilege against self-incrimination at common law was the work of defense counsel.<sup>131</sup>

For a long time after their ratification, the Fourth and Fifth Amendments lay dormant, unexplored by the Supreme Court. But in

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<sup>126</sup> *Id.* at 395; see also ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 18 (2006) (“The abusive searches and seizures that captured colonial Americans’ attention frequently involved state efforts to suppress dissent.”). A desire to protect expressive activity from government intrusion was only one of the many influences on the Fourth Amendment. See David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 255 (2005) (“The Fourth Amendment proscription against unreasonable searches originated with English laws that protected homes against breaking and entering by private citizens.”).

<sup>127</sup> Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 237 (1998).

<sup>128</sup> See generally LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 43–82 (2d ed. 1986) (describing history of ex officio oaths).

<sup>129</sup> Letter from Charles I to the High Commission (Feb. 4, 1637), in HISTORICAL COLLECTIONS; CONSISTING OF STATE PAPERS, AND OTHER AUTHENTIC DOCUMENTS; INTENDED AS MATERIALS FOR AN HISTORY OF THE UNITED STATES OF AMERICA 428 (Ebenezer Hazard ed., Books for Libraries Press 1969) (1792–94).

<sup>130</sup> LEVY, *supra* note 128, at 273–82.

<sup>131</sup> John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994); see also Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1118 (1994).

the late nineteenth century, when the Supreme Court first interpreted the Fourth and Fifth Amendments, it turned to *Wilkes* and *Entick*.

Early Fourth and Fifth Amendment cases involved people's correspondence and papers. In 1878, in *Ex Parte Jackson*,<sup>132</sup> the Court held that the Fourth Amendment prohibited the government from opening mail: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."<sup>133</sup> *Ex Parte Jackson* provided crucial protection for First Amendment activities, as the mail was an essential medium of communication at the time.

*Ex Parte Jackson* was a prelude to the 1886 case *Boyd v. United States*,<sup>134</sup> the most important Fourth and Fifth Amendment decision of the nineteenth century. In *Boyd*, law enforcement officials issued a subpoena in a civil forfeiture proceeding to compel Edward A. Boyd, a merchant, to produce invoices on cases of imported glass. As Stuntz notes, the Court viewed the subpoena as "the functional equivalent of a search or seizure" because it was "compelled rather than voluntary."<sup>135</sup>

In its interpretation of the Fourth and Fifth Amendments, *Boyd* placed *Wilkes* and *Entick* at the center of constitutional criminal procedure. The Court noted that *Entick* was one of the "landmarks of English liberty" and "was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country."<sup>136</sup> Furthermore, the Court stated that *Entick's* "propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."<sup>137</sup> The Court then held that the subpoena violated the Fourth and Fifth Amendments:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [Lord Camden's] judgment. In this regard the Fourth and Fifth Amendments run almost into each other.<sup>138</sup>

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<sup>132</sup> 96 U.S. 727 (1878).

<sup>133</sup> *Id.* at 733.

<sup>134</sup> 116 U.S. 616 (1886).

<sup>135</sup> Stuntz, *supra* note 107, at 423.

<sup>136</sup> *Boyd*, 116 U.S. at 626.

<sup>137</sup> *Id.* at 626–27.

<sup>138</sup> *Id.* at 630.

The Court declared that the Fourth and Fifth Amendments “throw great light on each other” and that “we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.”<sup>139</sup> Although *Boyd* did not mention the First Amendment, it functioned to protect a significant amount of First Amendment activity by guarding personal papers.<sup>140</sup>

The days of *Boyd* have long come to an end. In 1967, with its decision in *Warden v. Hayden*, the Supreme Court began an assault on *Boyd*.<sup>141</sup> In several cases in the 1970s, the Court held that subpoenas to third parties for a person’s papers do not implicate the Fifth Amendment.<sup>142</sup> Moreover, the Court concluded, subpoenas do not constitute a Fourth Amendment search.<sup>143</sup> The third-party doctrine and doctrine on public surveillance have also severely curtailed the Fourth Amendment’s protection of personal writings, reading habits, associations, and other First Amendment activities.<sup>144</sup>

## 2. *Government Information Gathering from the Twentieth Century to the Present*

Some might argue that the history of the First, Fourth, and Fifth Amendments is no longer relevant since seditious libel prosecutions no longer lurk as a major threat. But experiences in the twentieth century through the present demonstrate that government investigations continue to pose a substantial threat to First Amendment activity. Throughout the past century, the government has gathered information about activities protected by the First Amendment in troubling ways.<sup>145</sup> Between 1940 and 1973, the FBI and CIA secretly

<sup>139</sup> *Id.* at 633.

<sup>140</sup> See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 592–93 (1996) (“*Boyd*’s interpretive linkage of the Fourth Amendment with the Fifth Amendment privilege against self-incrimination suggested that papers could be treated differently from other tangible personal property.”).

<sup>141</sup> See *Warden v. Hayden*, 387 U.S. 294, 301–10 (1967) (rejecting “mere evidence” rule of *Boyd*, which had held that under Fourth Amendment police could only seize instrumentalities or fruits of crime, but could not seize items, like papers at issue in *Boyd*, that had only evidentiary value). For further discussion of *Warden* and its limitation of *Boyd*, see Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55–58 (2005).

<sup>142</sup> See, e.g., *Fisher v. United States*, 425 U.S. 391, 409–11 (1976); *Couch v. United States*, 409 U.S. 322, 329 (1973).

<sup>143</sup> See *United States v. Dionisio*, 410 U.S. 1, 10 (1973).

<sup>144</sup> See *supra* Part I.C.

<sup>145</sup> See *Fisher*, *supra* note 12, at 623 (finding that from its founding until at least 1970s, “the FBI regularly conducted politically motivated surveillance, choosing targets based on their political or religious beliefs”).

read the mail of thousands of people.<sup>146</sup> The FBI has engaged in extensive surveillance of student political and speech activities on college campuses.<sup>147</sup> During the 1980s, through the “Library Awareness Program,” the FBI gathered information from people’s library records.<sup>148</sup>

During the McCarthy era, from 1946–1956, the FBI gathered extensive information about Communist Party members for use in Congress’s inquest into the Party.<sup>149</sup> As Ellen Schrecker has observed, “the FBI was the bureaucratic heart of the McCarthy era. It designed and ran much of the machinery of political repression, shaping the loyalty programs, criminal prosecutions, and undercover operations that pushed the communist issue to the center of American politics during the early years of the Cold War.”<sup>150</sup> In the 1950s, the FBI maintained a “Security Index” of about 26,000 individuals to round up in case of a national security emergency.<sup>151</sup> The FBI also used a network of informers to infiltrate the Communist Party.<sup>152</sup>

From 1956 to 1971, the FBI engaged in a massive attempt to gather information about scores of political groups as part of its Counterintelligence Program known as COINTELPRO.<sup>153</sup> Among the targets were the Communist Party, the Ku Klux Klan, antiwar groups, civil rights groups, women’s rights groups, and gay rights groups.<sup>154</sup> The FBI used the data it collected to hinder the activities

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<sup>146</sup> WHITFIELD DIFFIE & SUSAN LANDAU, *PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION* 138 (1998).

<sup>147</sup> See HERBERT N. FOERSTEL, *SURVEILLANCE IN THE STACKS: THE FBI’S LIBRARY AWARENESS PROGRAM* 4 (1991).

<sup>148</sup> *Id.* at 2–4; Ulrika Ekman Ault, Note, *The FBI’s Library Awareness Program: Is Big Brother Reading over Your Shoulder?*, 65 N.Y.U. L. REV. 1532, 1533–39 (1990).

<sup>149</sup> See RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 321 (1987).

<sup>150</sup> ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 203 (1998).

<sup>151</sup> See *id.* at 207–08.

<sup>152</sup> See *id.* at 228.

<sup>153</sup> See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, *FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE*, S. REP. NO. 94-755, at 10–12 (1976) [hereinafter *Church Committee Report*] (describing COINTELPRO counterintelligence tactics in detail and characterizing them as “indisputably degrading to a free society”); DAVID CUNNINGHAM, *THERE’S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* 6–9 (2004) (describing COINTELPRO program and noting that it led to “thousands of actions” against suspected Communist Party members, as well as actions against many other civil rights organizations); POWERS, *supra* note 149, at 338–39 (discussing origins of COINTELPRO and fact that it applied “wartime counterintelligence methods to domestic groups”).

<sup>154</sup> David Cunningham provides a list of scores of targeted groups. CUNNINGHAM, *supra* note 153, at 273–84; see also DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 6–7

of these groups.<sup>155</sup> It engaged in zealous surveillance of the civil rights movement, especially focusing on Martin Luther King, Jr.<sup>156</sup> Over a span of many years, the FBI wiretapped King extensively and attempted to use the recordings to threaten and intimidate him.<sup>157</sup>

In 1975, a congressional committee led by Senator Frank Church (and thus known as the Church Committee) began a sweeping inquiry into intelligence abuses. In its 1976 report (the Church Committee Report), the Church Committee stated:

The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone “bugs,” surreptitious mail opening, and break-ins, has swept in vast amounts of information about the personal lives, views, and associations of American citizens. . . . Groups and individuals have been harassed and disrupted because of their political views and their lifestyles. Investigations have been based upon vague standards whose breadth made excessive collection inevitable.<sup>158</sup>

In response to the Church Committee Report, Attorney General Edward Levi established a set of guidelines for FBI investigations in 1976.<sup>159</sup> The guidelines specifically addressed First Amendment activities: “First, investigations based solely on unpopular speech, where there is no threat of violence, were prohibited. Second, techniques designed to disrupt organizations engaged in protected First Amendment activity, or to discredit individuals would not be used in any circumstance.”<sup>160</sup>

However, under the pressure of a new wave of concerns about national security, the protections of the guidelines have been slowly dismantled. In 1983, Attorney General William French Smith revised the guidelines to create a lower threshold to open an investigation.<sup>161</sup> After the September 11th attacks, Attorney General John Ashcroft made numerous changes to the guidelines. Among other things, the new guidelines allow the FBI to gather “publicly available informa-

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(2002) (“At the peak of its efforts, the FBI was investigating all major protest movements, from civil rights activists to Vietnam war protesters to women’s liberation advocates.”).

<sup>155</sup> CUNNINGHAM, *supra* note 153, at 8–9.

<sup>156</sup> For more on the FBI’s surveillance of Martin Luther King, Jr., see generally DAVID J. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.* (1981).

<sup>157</sup> See GARROW, *supra* note 156, at 101–50.

<sup>158</sup> Church Committee Report, *supra* note 153, at 5.

<sup>159</sup> OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUSTICE, *DOMESTIC SECURITY INVESTIGATION GUIDELINES* (1976).

<sup>160</sup> William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 69 (2000).

<sup>161</sup> See *id.* at 69–70 (stating that where old guidelines required “specific and articulable facts” before opening investigation, new guidelines required only “reasonable indication”).

tion, whether obtained directly or through services or resources (whether nonprofit or commercial) that compile or analyze such information; and information voluntarily provided by private entities.”<sup>162</sup> The FBI can also “carry out general topical research, including conducting online searches and accessing online sites and forums.”<sup>163</sup>

Today, government information gathering—especially in the name of national security—remains a significant threat to First Amendment activities. In response to the threat of terrorism, the NSA has engaged in warrantless wiretapping of telephone calls; government agencies have increased their demands for personal information maintained in business records; the government has gathered extensive information about financial transactions; and numerous data mining programs have involved the collection of massive amounts of personal information.<sup>164</sup> These data gathering programs have occurred under a veil of secrecy, but it is nonetheless clear that monitoring telephone calls, analyzing financial transactions, and mining other personal data likely will yield information relating to conversations, religious and political activity, and group associations.

While legitimate investigation of terrorist plots may require collecting and examining data about communication and association, the implications for First Amendment activities advise caution. In the famous *Keith* case,<sup>165</sup> Justice Powell wrote that “[n]ational security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.”<sup>166</sup> With the lack of transparency surrounding information gathering in the name of national security, it is difficult to find out precisely what makes a particular person suspicious and how people’s First Amend-

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<sup>162</sup> OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 21–22 (2002), available at [http://www.usdoj.gov/olp/general\\_crimes2.pdf](http://www.usdoj.gov/olp/general_crimes2.pdf).

<sup>163</sup> *Id.* at 22. For more background about the guidelines, see generally Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1296–98 (2004).

<sup>164</sup> See, e.g., SOLOVE, *supra* note 3, at 168–75 (describing data mining and government requests for personal data from businesses); Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1144–52 (2006) (discussing government data mining programs); Cauley, *supra* note 11 (discussing NSA program to collect phone call records of millions of Americans without authorization under Foreign Intelligence Surveillance Act); Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1 (describing CIA program examining financial transactions).

<sup>165</sup> *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972). This case has come to be known as *Keith* based on the name of the District Court Judge, Damon Keith.

<sup>166</sup> *Id.* at 313.

ment activities might turn them into targets of investigation. People might be targeted on the basis of their political views, religious beliefs, and associations. Even if First Amendment activities play no role in these determinations, people may nonetheless be reticent to say certain things, worship in certain places, associate with certain groups, or even read certain materials out of fear that they might end up on a list of suspicious persons.<sup>167</sup> As David Cole observes, during the McCarthy era, “most ‘radicals’ were punished not for their speech but for their membership, affiliation, or sympathetic association with the Communist Party.”<sup>168</sup>

The history of government information gathering in the twentieth century thus suggests that even though concerns raised by seditious libel may have faded, government investigation practices can still pose a significant threat to First Amendment activities. Relying on government investigators to police themselves in those areas that are unprotected by current criminal procedure law is highly risky in light of the historical record. Developing First Amendment protections against government information gathering would add a vital and missing dimension to the current landscape of criminal procedure.

### B. Foundations in Doctrine

Several lines of First Amendment cases provide a foundation on which to develop First Amendment criminal procedure. The Supreme Court has noted that “governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights,”<sup>169</sup> and government information gathering will often indirectly affect the exercise of First Amendment rights by discouraging expressive and associational activity. Indirect effects on First Amendment activities are addressed through the “chilling effect” doctrine. The chilling effect doctrine recognizes that the First Amendment can be implicated indirectly and not just through direct legal prohibitions on speech.<sup>170</sup> The key to chilling effect is deterrence: “A chilling effect occurs when individuals seeking to

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<sup>167</sup> See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 6–7 (2003) [hereinafter Cole, *New McCarthyism*] (discussing chilling effect of guilt by association on Communist political activity in McCarthy era); David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 282–86 (2000–2001) (discussing guilt by association in terrorism-related cases).

<sup>168</sup> Cole, *New McCarthyism*, *supra* note 167, at 6.

<sup>169</sup> *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972).

<sup>170</sup> See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 692–93 (1978) (finding chilling effect doctrine independently significant only for “indirect governmental restriction[s] of protected expression”).



engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”<sup>171</sup>

Courts have concluded that government information gathering indirectly inhibits or “chills” First Amendment liberties in a wide range of contexts, including surveillance of political activities, identification of anonymous speakers, prevention of the anonymous consumption of ideas, discovery of associational ties to political groups, and enforcement of subpoenas to the press or to third parties for information about reading habits and speech. While the cases addressing these issues are mostly civil, their principles are just as relevant and applicable to criminal cases and to government information gathering for national security and other purposes.

### *1. Surveillance of Political Activities*

Courts sometimes have found that government surveillance of political activities can implicate the First Amendment. The Supreme Court confronted this issue in a 1972 case, *Laird v. Tatum*,<sup>172</sup> in which a group of individuals brought a First Amendment challenge to the Department of the Army’s surveillance of civil rights activities in the aftermath of Martin Luther King, Jr.’s assassination. The Army had harvested information on political activities from news reports and from intelligence agents who attended public meetings.<sup>173</sup> While acknowledging that “constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights,”<sup>174</sup> the Court nonetheless concluded that the plaintiffs failed to establish a cognizable First Amendment injury because “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”<sup>175</sup>

*Laird* was not especially clear about when government surveillance (and information gathering practices more generally) will cause a cognizable First Amendment injury. Indeed, one view of *Laird* interprets it as a very narrow, fact-specific holding based on the plaintiffs’ highly tenuous First Amendment injury. The Court concluded that the plaintiffs merely articulated “speculative apprehensiveness that the Army may at some future date misuse the information in

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<sup>171</sup> *Id.* at 693.

<sup>172</sup> 408 U.S. 1.

<sup>173</sup> *Id.* at 6.

<sup>174</sup> *Id.* at 11.

<sup>175</sup> *Id.* at 13–14.

some way that would cause direct harm to respondents.”<sup>176</sup> In other words, *Laird* might be read to state only that naked allegations of “speculative apprehensiveness” are insufficient to establish a cognizable chilling effect.

Lower courts have interpreted *Laird* to mean that the mere presence of the police or recording of information at public meetings do not constitute cognizable First Amendment injuries.<sup>177</sup> However, when plaintiffs have produced evidence of deterrence (as opposed to mere allegations of discomfort or dislike), courts have found cognizable First Amendment injuries.<sup>178</sup> In addition, several courts have distinguished *Laird* when the government surveillance went beyond public meetings to closed and private meetings.<sup>179</sup> Other courts have distinguished *Laird* when plaintiffs alleged that the police not only collected information but also used it in harmful ways.<sup>180</sup> Therefore, the rule in *Laird* can be limited to situations involving mere allegations of government information gathering in public meetings without

<sup>176</sup> *Id.* at 13; see also Slobogin, *supra* note 48, at 253–55 (offering such analysis of *Laird*).

<sup>177</sup> See, e.g., *Phila. Yearly Meeting of the Religious Soc’y of Friends v. Tate*, 519 F.2d 1335, 1337 (3d Cir. 1975) (holding that *Laird* foreclosed finding “a constitutional violation on the basis of mere police photographing and data gathering at public meetings”); *Donohoe v. Duling*, 465 F.2d 196, 201–02 (4th Cir. 1972) (finding alleged chilling effect of police photography not cognizable on basis of *Laird*).

<sup>178</sup> For example, in *Bee See Books Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968), uniformed police officers routinely were stationed in plaintiffs’ bookstores, which sold some hard-core pornography. The court concluded that the officers’ presence violated the First Amendment because evidence showed that it resulted in a considerable drop in book sales. *Id.* at 623–24, 626. In *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), Immigration and Naturalization Service (INS) agents wearing bugging devices entered churches and recorded religious services. The INS argued that *Laird* controlled, but the court concluded that the church had established a cognizable First Amendment injury because it had alleged “a concrete, demonstrable decrease in attendance at those worship activities.” *Id.* at 522.

<sup>179</sup> See, e.g., *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770–71 (S.D.N.Y. 1972) (noting that government informers infiltrating groups, urging members to engage in illegal activities, and keeping dossiers on members “would seem by far to exceed the passive observational activities” upheld in *Laird*); *White v. Davis*, 533 P.2d 222, 226–27, 229 (Cal. 1975) (distinguishing *Laird* and concluding that “[a]s a practical matter, the presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students”). *But see* *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 780–81 (6th Cir. 1983) (holding that undercover agents investigating drug trafficking in high school did not create chilling effect because “there is not a single allegation that the covert operation in and of itself resulted in tangible consequences”).

<sup>180</sup> *Phila. Yearly Meeting*, 519 F.3d at 1338–39 (finding “immediately threatened injury to plaintiffs by way of a chilling of their rights to freedom of speech and associational privacy” when collected information was available to nonpolice parties and was disclosed on television); *Alliance to End Repression v. Rochford*, 407 F. Supp. 115, 116–17 (N.D. Ill. 1975) (holding that allegations of wiretapping, unlawful entry, and dissemination of information “differ greatly” from those in *Laird*).

any evidence of deterrence or any indication of palpable harmful future uses of the information.

## 2. *Identifying Anonymous Speakers*

The Supreme Court has held that restrictions on the ability to speak anonymously violate the First Amendment. In *Talley v. California*,<sup>181</sup> the Court held that a law prohibiting the distribution of anonymous handbills violated the First Amendment.<sup>182</sup> The Court reasoned that anonymity is essential to protecting robust and uninhibited speech, and it noted that the “old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.”<sup>183</sup> As the Court declared in 1995 in reaffirming its protection of anonymity in *McIntyre v. Ohio Elections Commission*,<sup>184</sup> an author’s “decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”<sup>185</sup>

The right to speak anonymously is implicated when the government seeks to obtain ISP records that can identify anonymous speakers on the Internet.<sup>186</sup> In several lower court decisions, courts have used heightened standards for civil subpoenas requesting the identities of anonymous speakers. For example, in *Doe v. 2TheMart.com Inc.*,<sup>187</sup> the court noted:

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communication and thus on basic First Amendment rights.<sup>188</sup>

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<sup>181</sup> 362 U.S. 60 (1960).

<sup>182</sup> *Id.* at 64–65.

<sup>183</sup> *Id.*

<sup>184</sup> 514 U.S. 334, 357 (1995).

<sup>185</sup> *Id.* at 341–42; *see also* Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002) (quoting *McIntyre*, 514 U.S. at 341–42).

<sup>186</sup> Under the Stored Communications Act, the government can obtain customer records at ISPs by providing “specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(c)(1)(B)–(C), (d) (2000).

<sup>187</sup> 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

<sup>188</sup> *Id.* at 1093.

Numerous other cases have concluded that the First Amendment requires special, tougher standards before a subpoena can be enforced to reveal an anonymous speaker's identity.<sup>189</sup>

### 3. *Curtailing the Right to Receive Ideas*

A corollary to the right to free speech is the right to receive ideas. In *Stanley v. Georgia*,<sup>190</sup> the Court declared: "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."<sup>191</sup> Government information gathering can target information about the ideas a person is consuming. Subpoenas for library or bookstore records can reveal what books a person reads, and subpoenas to ISPs also implicate the right to receive ideas. As Julie Cohen contends, "The freedom to read anonymously is just as much a part of our tradition, and the choice of reading materials just as expressive of identity, as the decision to use or withhold one's name."<sup>192</sup>

The Supreme Court has also held that disallowing an individual from anonymously consuming ideas places an unconstitutional burden on First Amendment rights. For example, in *Lamont v. Postmaster General*,<sup>193</sup> the Court struck down on First Amendment grounds a statute that required that foreign mail deemed "communist political propaganda" be kept at the post office, with the addressee having to make a special request to receive it. The Court reasoned that having to "request in writing that [one's mail] be delivered" was "almost certain to have a deterrent effect."<sup>194</sup> Under such a system, people are "likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'"<sup>195</sup>

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<sup>189</sup> See, e.g., *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (finding "limiting principals [sic]" on discoverability of defendant's identity due to "legitimate and valuable right to participate in online forums anonymously"); *Doe No. 1 v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (holding that, because of potential chilling effect of low standard, defamation plaintiffs must satisfy "summary judgement" standard to obtain anonymous defendant's identity); *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (offering guidelines for balancing First Amendment right to anonymous speech against plaintiff's right to assert claims against actionable anonymous conduct).

<sup>190</sup> 394 U.S. 557 (1969).

<sup>191</sup> *Id.* at 564 (citation omitted).

<sup>192</sup> Cohen, *supra* note 43, at 1012; see also Blitz, *supra* note 44, at 800 ("It is now well established that the First Amendment protects not only the rights of people to engage in speech but also the right of audiences to receive it." (citing *Stanley*, 394 U.S. at 564)).

<sup>193</sup> 381 U.S. 301 (1965).

<sup>194</sup> *Id.* at 307.

<sup>195</sup> *Id.*

Several lower courts have required a “compelling interest” for any subpoena pertaining to First Amendment activities, such as one’s reading habits or speech.<sup>196</sup> For example, in *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*,<sup>197</sup> Independent Counsel Kenneth Starr, in his investigation of President Bill Clinton, subpoenaed records relating to Monica Lewinsky’s book purchases at Kramerbooks and Barnes & Noble. Kramerbooks challenged the subpoena on First Amendment grounds. The court concluded that First Amendment activities, namely the “right to receive information and ideas,” were implicated by the subpoenas.<sup>198</sup> Accordingly, in order to determine whether a “compelling need” was present, the court ordered that the Office of Independent Counsel submit a “filing describing its need for the materials sought by the subpoenas to Kramerbooks and Barnes & Noble and the connection between the information sought and the grand jury investigation . . . .”<sup>199</sup>

#### 4. *Revealing Associational Ties to Political Groups*

Government information gathering about people’s associations can also trigger First Amendment scrutiny. The Supreme Court has concluded that the First Amendment protects “expressive” association, which is association for the purpose of engaging in expressive activities.<sup>200</sup> In *NAACP v. Alabama ex rel. Patterson*,<sup>201</sup> the Court held that the NAACP could not be compelled to publicly disclose the names and addresses of its members. The Court declared that “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Pro-

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<sup>196</sup> *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996) (“A grand jury subpoena will be enforced despite a First Amendment challenge if the government can demonstrate a compelling interest in . . . the information sought . . . .” (citation omitted)); *A Grand Jury Witness v. United States (In re Grand Jury Proceedings)*, 776 F.2d 1099, 1102–03 (2d Cir. 1985) (noting “well established” standard that government interests must be “compelling” and “sufficiently important to outweigh the possibility of infringement” when grand jury subpoena implicates First Amendment rights (citations omitted)); *Grandbouche v. United States (In re Grand Subpoena to First Nat’l Bank)*, 701 F.2d 115, 119 (10th Cir. 1983) (holding that if enforcement of subpoena will chill freedom of association, government “must show a compelling need to obtain documents identifying petitioners’ members” (citation omitted)).

<sup>197</sup> 26 Media L. Rep. (BNA) 1599 (D.D.C. 1998).

<sup>198</sup> *Id.* at 1600 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

<sup>199</sup> *Id.* at 1601. The case was settled before the court engaged in the requisite First Amendment balancing.

<sup>200</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing “expressive association” as distinct from “intimate association”); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568–70 (1995) (finding marching in parade to be constitutionally protected expressive association).

<sup>201</sup> 357 U.S. 449 (1958).

cess Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>202</sup> Noting that there is a “vital relationship between freedom to associate and privacy in one’s associations,”<sup>203</sup> the Court went on to conclude that exposing members’ identities would subject them “to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>204</sup>

The Court reached similar conclusions in *Bates v. City of Little Rock*<sup>205</sup> and *Gibson v. Florida Legislative Investigation Committee*,<sup>206</sup> cases also involving the compulsory public disclosure of NAACP membership lists. In *Buckley v. Valeo*,<sup>207</sup> the Court applied “exacting scrutiny” to disclosure requirements for certain campaign contributions and expenditures under the Federal Election Campaign Act of 1971.<sup>208</sup> Although ultimately upholding the law as to contribution limits, the Court noted that “[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”<sup>209</sup>

The Court has also held that First Amendment rights are implicated when information about an individual’s associations is compelled by the government, even if no public disclosure is threatened. In *Sweezy v. New Hampshire*,<sup>210</sup> the Court held that a state attorney general could not compel a witness before a state legislature to divulge his associations with particular Communist organizations: “Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters.”<sup>211</sup> In *Shelton v. Tucker*,<sup>212</sup> moreover, the Court invalidated a statute that required instructors to file an annual affidavit “listing without limitation every organization to which [they had] belonged or regularly contributed within the preceding five years” as a condition of employment in a

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<sup>202</sup> *Id.* at 460 (citations omitted).

<sup>203</sup> *Id.* at 462.

<sup>204</sup> *Id.*

<sup>205</sup> 361 U.S. 516, 523–24 (1960) (holding that disclosure of NAACP membership lists “would work a significant interference with the freedom of association of their members” because of “uncontroverted” likelihood of ensuing “harassment and threats of bodily harm”).

<sup>206</sup> 372 U.S. 539, 546 (1963) (finding that publicizing NAACP membership information during committee hearing would amount to “a substantial abridgment of associational freedom”).

<sup>207</sup> 424 U.S. 1 (1976) (per curiam).

<sup>208</sup> *Id.* at 64.

<sup>209</sup> *Id.* at 68.

<sup>210</sup> 354 U.S. 234 (1957).

<sup>211</sup> *Id.* at 250.

<sup>212</sup> 364 U.S. 479 (1960).

state school or college.<sup>213</sup> The Court concluded that “[t]he statute’s comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of its teachers.”<sup>214</sup> In particular, the Court was troubled by the breadth of the inquiry, which extended to “every conceivable kind of associational tie—social, professional, political, avocational, or religious.”<sup>215</sup> The Court reached a similar conclusion in *Baird v. State Bar of Arizona*,<sup>216</sup> finding that questioning a bar applicant about membership in any organization “that advocate[d] overthrow of the United States Government by force or violence” infringed on freedom of association.<sup>217</sup>

These Supreme Court cases all involved direct interrogation, but their logic could apply to searches and subpoenas for papers and documents. Lower federal courts applying *Baird*, *Sweezy*, and *Shelton* have found that subpoenas for associational information implicate the First Amendment.<sup>218</sup> The case law thus suggests that the government creates indirect burdens on free association when it seeks information about a person’s expressive associations. The mere collection of information on association by the government can be sufficient to establish a First Amendment injury.

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<sup>213</sup> *Id.* at 480, 490.

<sup>214</sup> *Id.* at 490.

<sup>215</sup> *Id.* at 488.

<sup>216</sup> 401 U.S. 1 (1971).

<sup>217</sup> *Id.* at 5. “[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution.” *Id.* at 6.

<sup>218</sup> *See, e.g.,* *Grandbouche v. United States (In re Grand Subpoena to First Nat’l Bank)*, 701 F.2d 115, 119 (10th Cir. 1983) (finding that First Amendment was implicated by grand jury subpoena to bank for account records of two antitaxation groups because “the constitutionally protected right, freedom to associate freely and anonymously, will be chilled equally whether the associational information is compelled from the organization itself or from third parties”); *Local 1814 v. Waterfront Comm’n*, 667 F.2d 267, 272 (2d Cir. 1981) (concluding that subpoena for list of contributors to political committee violated First Amendment because “compelled disclosure of the Fund’s contributors under the circumstances of this case would give rise to a chilling effect similar to the one recognized by the Supreme Court in *Shelton v. Tucker*”); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (finding that antitax group’s allegations that subpoena to bank for account records caused “adverse effects” on its “organizational and fundraising activities” established “prima facie showing of arguable First Amendment infringement”); *Paton v. LaPrade*, 524 F.2d 862, 865, 870 (3d Cir. 1975) (holding that “mail cover”—recording of information appearing on outside of envelopes—violated individual’s First Amendment rights because “factfinder reasonably might conclude that the FBI investigation adversely affected Paton’s standing in school and in her community”).

### 5. *Subpoenas to the Press*

First Amendment doctrine also protects against government information gathering directed toward the press, though the limits of this protection are still unclear. In *Branzburg v. Hayes*,<sup>219</sup> journalists raised First Amendment challenges to subpoenas to testify before grand juries about the identities of several sources for their stories. While the Court concluded journalists did not enjoy a *special* First Amendment privilege to refuse to testify before the grand jury about their sources,<sup>220</sup> it also noted:

[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. . . . Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.<sup>221</sup>

The majority opinion in *Branzburg* thus acknowledged the First Amendment values implicated by forcing reporters to testify before grand juries but refused to create an explicit reporter's privilege.

Swing voter Justice Powell's concurrence offered up an interpretation of the majority holding that suggested somewhat stronger First Amendment protections. Powell noted that the "Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>222</sup> Rather, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."<sup>223</sup> He went on to argue that privilege claims should be assessed "by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>224</sup>

Despite the conflict between the majority opinion and the concurrence,<sup>225</sup> the "overwhelming numbers of state and federal courts

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<sup>219</sup> 408 U.S. 665 (1972).

<sup>220</sup> *Id.* at 682–83 ("[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").

<sup>221</sup> *Id.* at 707–08.

<sup>222</sup> *Id.* at 709 (Powell, J., concurring).

<sup>223</sup> *Id.* at 710.

<sup>224</sup> *Id.*

<sup>225</sup> Subsequent decisions have done little to clarify the scope of the First Amendment privilege for journalists. C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWS-GATHERING AND THE LAW § 16.06, at 930 (3d ed. 2005). In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court held that in defamation cases, the First Amendment does not restrict



have interpreted *Branzburg*, and the subsequent Supreme Court decisions that have had occasion to revisit it, as recognizing in the First Amendment a qualified journalists' privilege."<sup>226</sup> Accordingly, the majority of courts balance the interest in protecting freedom of the press against the interest in compelling testimony about confidential sources to determine whether compelling a journalist to testify passes constitutional muster.<sup>227</sup>

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Taken together, these many lines of First Amendment cases establish a foundation for First Amendment protection against certain instances of government information gathering. The cases recognize that government information gathering through surveillance, subpoenas, questioning, and other techniques can chill freedom of speech, consumption of ideas, association, and other rights. First Amendment criminal procedure thus has substantial roots in existing First Amendment doctrine.

### III

#### CONTOURS AND APPLICATIONS

As I have shown, current criminal procedure leaves much First Amendment activity unprotected.<sup>228</sup> I have argued that based on its history, values, and doctrine, the First Amendment should serve as an independent source of procedure to protect expressive and associational activity from government information gathering. Any theory of First Amendment criminal procedure will have to determine when the First Amendment applies to a government investigation and, if it applies, what types of procedures are required. In this part, I set forth an approach to First Amendment criminal procedure, and I explore how this approach would work by applying it to several examples.

#### A. *When Should the First Amendment Apply?*

When should government information gathering trigger First Amendment protection? The answer depends upon the resolution of two questions:

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plaintiffs from "inquiring into the editorial processes of those responsible for the publication." *Id.* at 155.

<sup>226</sup> DIENES ET AL., *supra* note 225, § 16.07, at 948.

<sup>227</sup> *Id.* § 16.07, at 948–50 (arguing that "majority approach" of lower courts is exemplified by Second Circuit, which has held that journalist's right to protect confidential sources can only be outweighed by overriding and compelling interest).

<sup>228</sup> *See supra* Part I.

- (1) Does the government information gathering affect activities that fall within the boundaries of the First Amendment?
- (2) Does it have a chilling effect upon such activities?

### 1. *First Amendment Boundaries*

In determining whether the First Amendment regulates an instance of government information gathering, the first question is whether it implicates an activity that falls within the boundaries of the First Amendment. To make this determination, we cannot simply ask whether a particular law enforcement investigation implicates expressive or associational activity, as nearly all law enforcement investigations do. Instead, we must ask whether First Amendment *values* are implicated.

The First Amendment currently covers a veritable kingdom of territory, so it is often not implausible to find the First Amendment implicated by a wide array of government conduct. Almost every search or seizure could be understood to have some dimension that might involve a First Amendment activity because all human interaction involves communication and association.<sup>229</sup> In the end, the First Amendment could swallow up all of criminal procedure.

Moreover, some commentators have argued that First Amendment coverage is not only broad, but cannot be contained by any limiting principle. As Frederick Schauer aptly observes, “if there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found.”<sup>230</sup> According to Schauer:

Little case law and not much more commentary explain why the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud, conspiracy law, the law of evidence, and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues.<sup>231</sup>

Schauer notes that First Amendment “coverage may often be a function simply of the persistent visibility of First Amendment rhetoric, and noncoverage may conversely be a function of the failure of such rhetoric to take hold.”<sup>232</sup>

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<sup>229</sup> As David Cole notes, “The right of association is potentially limitless. Virtually everything we do in society involves some degree of association with someone else.” David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 232.

<sup>230</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004).

<sup>231</sup> *Id.* at 1768.

<sup>232</sup> *Id.* at 1807.

To overcome this problem, First Amendment criminal procedure should adopt the approach suggested by Robert Post and look to whether a particular government activity implicates First Amendment values.<sup>233</sup> Post argues that not all communications are expressive in ways that promote First Amendment values. For example, he observes that navigation charts “are clearly media in which speakers successfully communicate particularized messages,” but “when inaccurate charts cause accidents, courts do not conceptualize suits against the charts’ authors as raising First Amendment questions.”<sup>234</sup> According to Post, to determine the scope of the First Amendment we must examine “the social contexts that envelop and give constitutional significance to acts of communication.”<sup>235</sup>

Thus, in determining whether an instance of government information gathering implicates the First Amendment, we cannot merely look to whether a particular instance of government information gathering has *any possible* expressive or associational dimensions, but also to whether the expressive or associational dimension implicates the values that the First Amendment protects. The First Amendment protects communication, association, and other activities when they implicate belief, discourse, or relationships of a political, cultural, or religious nature. The Supreme Court itself has recognized that some expressive and associational activity is less central to, or not protected at all by, the First Amendment. Obscenity,<sup>236</sup> fighting words,<sup>237</sup> and child pornography<sup>238</sup> are considered low-value speech and receive diminished First Amendment protection. The Court has also not considered conspiracy, quid pro quo sexual harassment, insider trading, and other forms of communicative activity to be protected speech.<sup>239</sup>

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<sup>233</sup> Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995) (“First Amendment analysis is relevant only when the values served by the First Amendment are implicated.”).

<sup>234</sup> *Id.* at 1254.

<sup>235</sup> *Id.* at 1255.

<sup>236</sup> *Miller v. California*, 413 U.S. 15, 36–37 (1973) (holding that obscene material is not generally protected by First Amendment and can be regulated even absent demonstration that it is without redeeming social value). *But see Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (holding that First Amendment prohibits states from criminalizing mere private possession of obscene material).

<sup>237</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *But see R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (holding that First Amendment requires that restrictions on use of fighting words, as well as on other low-value speech, be viewpoint neutral).

<sup>238</sup> *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

<sup>239</sup> I am not defending as a normative matter the Court’s existing doctrinal categorizations of speech and nonspeech; rather, I am merely pointing out that the Court has recognized that not every instance of communication and association falls within the scope of the First Amendment.

Looking to First Amendment values prevents the First Amendment from unduly limiting government information gathering in other contexts. For example, government collection of business records would generally not trigger First Amendment restrictions. In the days when *Boyd* barred most paper searches, the Court in *Hale v. Henkel*<sup>240</sup> concluded that subpoenas for corporate documents were not restricted by the Fourth Amendment.<sup>241</sup> The First Amendment also does not apply to a large dimension of business regulation, even when companies must disclose records to regulators. In other words, First Amendment law has adopted, at least in part, the Fourth Amendment distinction between personal and business papers.

In sum, First Amendment criminal procedure protections should not apply whenever *any* expressive or associational activity is involved but only when such activity implicates values protected by the First Amendment.

## 2. *Chilling Effect*

Even where government information gathering implicates First Amendment values, First Amendment procedural protections should only apply if there is a discernible “chilling effect.” As with determining whether an activity falls within the scope of the First Amendment, the challenge is defining the boundaries of “chilling effect.” Schauer has observed that all government action can have some chilling effect; “[w]hat we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments” or executive information gathering.<sup>242</sup> We need an approach for distinguishing between cognizable and noncognizable chilling effects. The

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<sup>240</sup> 201 U.S. 43 (1906).

<sup>241</sup> See *id.* at 74. But cf. Slobogin, *supra* note 58, at 815–17 (noting that although many cases in first half of twentieth century, including *Hale*, allowed very low standard for subpoenas for business papers, *Hale* suggested that subpoenas for private records might require higher standard). According to William Stuntz, the *Hale* approach was a cheat, a way to “keep *Boyd* and *Entick* but cabin them with illogical boundaries, making the protection non-threatening (or at least non-fatal) to the emergence of the regulatory state.” Stuntz, *supra* note 107, at 432. However, although the Court’s boundaries do not follow strict logic, they are not entirely indefensible. After all, it is a fiction to call a corporation a “person,” and once one fiction is created, other departures from a strictly logical approach might be needed to cabin the fiction within logical boundaries. In other words, the fact that the Court held that a corporation should enjoy some of the rights that persons have under the Constitution does not require the Court to conclude that corporations should have all of those rights.

<sup>242</sup> Schauer, *supra* note 170, at 701.

chilling effect cases unfortunately do not provide a clear approach to the problem.<sup>243</sup>

Determining the existence of a chilling effect is complicated by the difficulty of defining and identifying deterrence. It is hard to measure the deterrence caused by a chilling effect because it is impossible to determine with certainty what people would have said or done in the absence of the government activity. Often, the primary evidence will be a person's own assertions that she was chilled, but merely accepting such assertions at face value would allow anyone claiming a chilling effect to establish one. At the same time, demanding empirical evidence of deterrence is impractical because it will often be impossible to produce.

In order to deal with this problem, courts have allowed some speculation about deterrence but have required more than mere apprehensiveness. While the case law is somewhat muddled, the Supreme Court is prepared to recognize a cognizable chilling effect from the imposition of civil damages, as in defamation cases,<sup>244</sup> or from public disclosure of information gathered by the government, as sometimes occurs in association cases.<sup>245</sup> Although in some cases exposure of information to the government alone can trigger a chilling effect—for example, in cases involving anonymous expression or associations<sup>246</sup>—in many other instances, as with surveillance of public meetings, such exposure is not, by itself, sufficient.<sup>247</sup>

In freedom of association cases, the Court may be especially willing to find a chilling effect. In *NAACP v. Alabama ex rel. Patterson*,<sup>248</sup> the NAACP did not need to proffer statistics about declining membership. Instead, it could point to palpable consequences that were likely (though not certain) to follow from the government's actions.<sup>249</sup> In other freedom of association cases, the Court has concluded that mere government collection of information about associations was sufficient to create a cognizable First Amendment injury.<sup>250</sup>

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<sup>243</sup> Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 916 (1989) (“*Laird v. Tatum* did not clarify the difference between objective and subjective chills, and the lower courts have not reached agreement on the meanings of these terms.”).

<sup>244</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (arguing that although libel can be restricted under First Amendment, “breathing space” must be provided so as not to chill protected speech).

<sup>245</sup> See *supra* Part II.B.4.

<sup>246</sup> See *supra* Parts II.B.2–3.

<sup>247</sup> See *supra* Part II.B.1.

<sup>248</sup> 357 U.S. 449 (1958).

<sup>249</sup> *Id.* at 462–63.

<sup>250</sup> *E.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *Shelton v. Tucker*, 364 U.S. 479 (1960).

At a minimum, use of previously gathered information in a criminal prosecution would be sufficient to show deterrence. In many cases involving government information gathering about First Amendment activities, the government is collecting data to generate evidence for use in criminal cases. In *Dombrowski v. Pfister*,<sup>251</sup> the Court found First Amendment standing based on the threat of criminal prosecution because “[t]he chilling effect on the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”<sup>252</sup>

*Dombrowski* involved a statute that directly targeted free expression and political activity,<sup>253</sup> but similar chilling effects can also occur when the government is investigating non-speech-related crimes. Many government investigations implicating First Amendment interests will be for the prosecution of crimes such as conspiracy, murder, robbery, or computer hacking, and not for crimes based on the illegality of speech or association. Even where the criminalized activity is not itself expressive or associational, there may be a chilling effect sufficient to trigger First Amendment procedural protections. People might be chilled in writing or saying certain things, owning certain books, visiting particular websites, or communicating with particular individuals, groups, and organizations if the government can obtain and use information about these activities in a criminal prosecution. A person might not want to purchase a book about making bombs or flying a plane if it will be used against him or her in a trial for conspiracy to engage in terrorist acts. A person might not go to various religious or political websites if she knew that the government might use this as evidence in such a case. Even if there were no criminal case brought, the fear that engaging in First Amendment activities might trigger an arrest or a potential criminal probe might be sufficiently daunting to chill such activities. Whether criminal investigation alone is sufficient to create a chilling effect will depend upon the specific facts of each case, including whether the person being investigated can demonstrate deterrence of First Amendment activities.

In contrast, certain government information gathering activities for criminal investigations may not have a chilling effect. Under existing First Amendment doctrine, when the government merely gathers information that is widely exposed to the public, there is no

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<sup>251</sup> 380 U.S. 479 (1965).

<sup>252</sup> *Id.* at 487.

<sup>253</sup> *Id.* at 492–95 (striking down Louisiana’s Subversive Activities and Communist Control Law, LA. REV. STAT. ANN. §§ 14:358–374 (Cum. Supp. 1962), which required members of “Communist Front Organizations” to register with authorities).

cognizable chilling effect.<sup>254</sup> For example, suppose a person publishes a political manifesto, and an FBI agent purchases it in a bookstore.<sup>255</sup> Although this is government information gathering for the purpose of finding out about the person's speech, the First Amendment should not apply because the book was written for public consumption. In contrast, a violation of the First Amendment might occur if law enforcement authorities read private writings that were shared with a small group of people, but not with the public at large. Similarly, limited surveillance of activities visible to the public would most likely not trigger First Amendment protection, but a more systematic campaign of public surveillance might present a different situation.

Criminal investigations and prosecutions are not the only potential source of chilling effects. In many instances, the government engages in broad information gathering that is not directly tied to a concrete penalty or consequence, but which still may chill speech. For example, people might fear that if the government learns about their speech or associations, they will wind up on a terrorist watch list. However, they might never know if they are in fact on a watch list, and the consequences of being placed on such a list might be unclear. Being placed on a watch list might result in extra airline screening, or it might have no impact on the individual at all. Or the information could go into a government database for some unknown future use when the time is ripe.

These uses are speculative, and they present a difficult case for chilling effect analysis. Courts might conclude that people should wait to see how the information is used; if the government uses their information against them, defendants would then be able to allege a cognizable chilling effect. However, this ignores the central premise of the chilling effect doctrine—that many will not be willing to accept the risk and will instead simply change their behavior. Therefore, even if the information is never used at trial, uncertainty about the government's intentions may still deter First Amendment activities. The government might argue that it must keep secret the uses of the information it gathers, but this only exacerbates the problem—lack of transparency makes it especially difficult for individuals to allege a sufficiently concrete chilling effect. By collecting data and obscuring its potential uses, the government can effectively limit people's ability to assert their First Amendment rights by making it impossible for them to establish a sufficient chill.

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<sup>254</sup> *Laird v. Tatum*, 408 U.S. 1, 3, 6 (1972).

<sup>255</sup> This hypothetical is based on *Maryland v. Macon*, 472 U.S. 463 (1985), where the Court concluded that the mere purchase of a book by a law enforcement official does not implicate either the Fourth Amendment or the First. *Id.* at 468–70.

The First Amendment concept of overbreadth might provide a solution to the problems presented by situations involving such large-scale information gathering programs. According to the Supreme Court, “a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>256</sup> Overbreadth doctrine relaxes the normal standing rules to allow people to bring suit without having to show that the law is unconstitutional as applied to them.<sup>257</sup> To challenge a statute as overbroad, an individual need only show that some application of the law is unconstitutional and might chill the speech of parties not before the court. For a statute “to be facially challenged on overbreadth grounds” there “must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.”<sup>258</sup>

The concept of overbreadth in connection with government information gathering has a close analogue in the Fourth Amendment’s concept of particularity, which mandates procedures to prevent overbroad searches. The Fourth Amendment requires that a warrant must describe with “particular[ity] . . . the place to be searched, and the persons or things to be seized.”<sup>259</sup> The Framers included the particularity requirement because they wanted to restrict general warrants and writs of assistance.<sup>260</sup> Writs of assistance were pernicious because they allowed “sweeping searches and seizures without any evidentiary basis.”<sup>261</sup> General warrants “resulted in ‘ransacking’ and seizure of the personal papers of political dissidents, authors, and printers of seditious libel.”<sup>262</sup> Overbreadth is therefore not a concept foreign to criminal procedure.

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<sup>256</sup> NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964).

<sup>257</sup> Thornhill v. Alabama, 310 U.S. 88, 98 (1940) (holding that after arrest and conviction under overbroad statute, “[a]n accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities”).

<sup>258</sup> Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

<sup>259</sup> U.S. CONST. amend. IV.

<sup>260</sup> Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 8 (1994). Indeed, as Maclin notes, “Everyone . . . agrees that the Framers opposed general warrants.” *Id.* at 9; see also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 157–58 (1999) (discussing history of colonial opposition to writs of assistance and that history’s connection to adoption of Fourth Amendment).

<sup>261</sup> Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 82 (1988).

<sup>262</sup> See DAVID M. O’BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 38 (1979); see also LEVY, *supra* note 260, at 150 (describing British use of general warrants and its role in development of Fourth Amendment).



We can adapt overbreadth doctrine to address the problem of proving a chilling effect when the government engages in large-scale information gathering initiatives. In this context, litigants could challenge an information gathering program as overbroad, regardless of whether they could prove that they personally suffered a concrete chilling effect. Instead, courts would determine whether the government program sweeps so broadly that it captures a substantial amount of First Amendment activity. A program that sweeps in a great deal of First Amendment activity will be deemed unconstitutionally overbroad if not narrowly tailored to a substantial government interest. Allowing such challenges will have the secondary benefit of bringing greater transparency to information gathering programs, as the government will be forced to justify its activities and the breadth of their scope.

In sum, to determine whether First Amendment procedural protections will apply, courts should first look to see whether the activity at issue is within the scope of the First Amendment. Next, courts must determine whether the government information gathering has a cognizable chilling effect on First Amendment activity. Criminal prosecutions will almost always have some chilling effect. In situations involving large-scale programs, litigants should be able to bring overbreadth challenges without having to prove individual chilling effect.

### *B. What Level of Protection Should the First Amendment Require?*

Even if an instance of government information gathering triggers First Amendment protection, collection of the data will not necessarily be prohibited. Rather, the First Amendment will require the government to demonstrate (1) a significant interest in gathering the information and (2) that the manner of collection is narrowly tailored to achieving that interest. As I will discuss in this Section, the use of a warrant supported by probable cause will, in most cases, suffice to satisfy the narrow tailoring requirement. In other words, in cases where the First Amendment applies, it often will require procedures similar to those required by the Fourth Amendment.

#### *1. First Amendment Information Gathering Procedures*

If the First Amendment is implicated by government information gathering, how should it regulate the government's activities? Under one possible approach, the First Amendment might serve as an absolute prohibition, preventing the government from gathering data involving First Amendment activities. For example, Michael Mello and Paul Perkins have argued that the contents of a diary "are entitled

to absolute protection from governmental intrusion—regardless of how much probable cause the government possesses, and regardless of how many procedurally valid search warrants the government obtain[s].”<sup>263</sup>

However, such an approach is impractical. First Amendment protection involves balancing,<sup>264</sup> and it need not absolutely bar the government from engaging in information gathering. In general, First Amendment balancing begins by assessing the strength of the government interest. If the government interest is compelling or substantial, the court then analyzes whether the government action is sufficiently narrowly tailored to the achievement of the government interest.<sup>265</sup>

Under my approach, the same standard would apply to government investigations. When the First Amendment applies, the government information gathering would only be upheld if it serves a substantial government interest and employs narrowly tailored means to achieve that interest. The First Amendment would rarely completely ban a particular instance of government information gathering. Instead, the court would balance the need for unencumbered government information gathering against the impact on First Amendment rights. If the government interest is substantial, the First Amendment would mandate procedures that must be followed in order for the information gathering to take place, such as obtaining a warrant.

On the first question, the government must be able to establish a substantial interest in the information or it will be restricted by the First Amendment from engaging in its investigation. For example, investigating serious crimes and preventing terrorism would qualify as substantial. This part of the balancing approach would root out government information gathering initiatives that lack a compelling purpose. It would also force the government to be more transparent about the reasons for its information gathering activities.

A court would then analyze whether the means used to gather the information were narrowly tailored to achieve the government’s interest. Courts would look to whether the information gathering effectively furthers the government’s interest, and whether the proce-

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<sup>263</sup> Michael Mello & Paul Perkins, *Ted Kaczynski’s Diary*, 22 VT. L. REV. 83, 90 (1997).

<sup>264</sup> It is worth noting that the Fourth Amendment also involves balancing. The government can search nearly anything after meeting the appropriate threshold. *But see* *Winston v. Lee*, 470 U.S. 753, 766 (1985) (surgical removal of bullet in suspect’s chest, with warrant supported by probable cause, was nonetheless unreasonable under Fourth Amendment). Indeed, the government can even search the intimate sanctuaries of a person’s home with a warrant supported by probable cause.

<sup>265</sup> For a detailed discussion of First Amendment balancing, see Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 981–89 (2003).

dural safeguards and judicial oversight available are sufficient to prevent abuse without rendering the investigation ineffective.<sup>266</sup>

In many cases, if applicable, the First Amendment would require that information be gathered pursuant to a warrant and probable cause. Warrants and probable cause have several attributes that will help safeguard First Amendment activities. First, warrants prevent government information gathering from becoming excessively broad by requiring that government officials specify with “particular[ity] . . . the place to be searched, and the persons or things to be seized.”<sup>267</sup> Second, warrants require judicial oversight of the executive branch’s law enforcement activities, thus serving as a check against interference with First Amendment activities. Warrants require the government to justify its search in advance, thereby preventing it from “dreaming up post hoc rationalizations.”<sup>268</sup> By the same token, advance justification for information gathering prevents the government from searching people because of disfavored speech or associations in order to uncover evidence that could be used to prosecute them for unrelated offenses. Third, by requiring that government officials “document their requests for authorization,” warrants force officials to exercise more circumspection in deciding when to gather information.<sup>269</sup> Fourth, the probable cause requirement prevents information gathering based on the mere hunch or whim of government officials; it prevents the government from searching people merely because their associations, expression, or beliefs are unpopular.<sup>270</sup> Under my First Amendment approach, law enforcement officials would apply for a search warrant in much the same way they do under the Fourth Amendment. In other words, we would see the birth of what might be called the “First Amendment warrant.”

Some might argue that a warrant requirement would not adequately protect First Amendment interests. In fact, a case decided in 2002 by the Colorado Supreme Court directly examined this issue. In

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<sup>266</sup> Nadine Strossen suggests importing a “least intrusive alternative” analysis into Fourth Amendment law, which, she argues, would protect a wide range of constitutional rights such as free speech, substantive due process privacy, procedural due process, equal protection, and more. See Strossen, *supra* note 109, at 1176–77, 1210. The “narrow tailoring” requirement I propose is less stringent than the least intrusive alternative analysis, which is typically employed in cases involving strict scrutiny.

<sup>267</sup> U.S. CONST. amend. IV.

<sup>268</sup> AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 39 (1997).

<sup>269</sup> Christopher Slobogin, *The World Without a Fourth Amendment*, 39 *UCLA L. REV.* 1, 17 (1991).

<sup>270</sup> Probable cause requires that the government have “reasonably trustworthy information” that the search will turn up evidence of a crime. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

*Tattered Cover, Inc. v. City of Thornton*,<sup>271</sup> police officers searching a methamphetamine lab seized two “how to” books about operating drug laboratories. The officers also found an envelope and invoice from the Tattered Cover bookstore and subsequently obtained a search warrant to examine the bookstore’s records for the books the suspect purchased. The bookstore challenged the warrant under the First Amendment and the Colorado Constitution. The Colorado Supreme Court agreed that the warrant was not enforceable and should not have been issued.<sup>272</sup> The court reasoned that gathering information about reading habits infringes “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.”<sup>273</sup> The court held that the Colorado Constitution requires that “law enforcement officials must make a heightened showing of their need for the innocent bookstore’s customer purchase records.”<sup>274</sup> The court then rejected the warrant because the gathered evidence was not sufficiently important to the prosecution’s case to justify the chilling effect that execution of the warrant would cause.<sup>275</sup>

While in many cases the warrant and probable cause requirements would adequately protect First Amendment activities, there may be some instances when the *Tattered Cover* case’s approach would be preferable. In some circumstances, warrants will not provide the optimal protection to First Amendment activities. Warrants enable the police to look around in their search for particular papers, increasing the risk that they will discover other documents. In addition, unlike with subpoenas, people cannot challenge warrants beforehand. But *Zurcher* forecloses stronger protections than warrants under the United States Constitution.<sup>276</sup> Nonetheless, although warrants are not perfect, they still provide significant protections for First Amendment activities.

Eugene Volokh has criticized attempts to raise the threshold requirements for law enforcement officials to obtain information about First Amendment activities. Pointing out the great difficulties in establishing an appropriate standard, he argues that a higher bar

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<sup>271</sup> 44 P.3d 1044 (Colo. 2002).

<sup>272</sup> *Id.* at 1047.

<sup>273</sup> *Id.* at 1053.

<sup>274</sup> *Id.* at 1056.

<sup>275</sup> *Id.* at 1061–63.

<sup>276</sup> See *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978) (“[W]e decline to reinterpret the [First] Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.”).

will “dramatically interfere with the investigation of many crimes and torts, especially those that have an ideological motive.”<sup>277</sup> Furthermore, to the extent the law requires only a marginally higher threshold, it will not prevent chilling effects.<sup>278</sup>

Although Volokh is certainly correct to note that setting the right standard is difficult, the warrant requirement is a workable standard that has a proven track record. Warrants are not so difficult to obtain that they prevent effective government investigations, yet they still require law enforcement officials to justify information gathering endeavors. The warrant requirement will subject many currently unregulated government information gathering activities to judicial oversight, creating accountability and preventing overreaching executive power.

## 2. *Enforcement of First Amendment Rights*

If the government gathers information in violation of the First Amendment, what remedies should the First Amendment provide? To start, if the government seeks to introduce improperly gathered information in a criminal trial, the First Amendment should require that the evidence be excluded. This is, of course, the typical Fourth Amendment enforcement mechanism for failure to obtain a valid warrant. Information obtained in violation of the First Amendment would be suppressed at trial, though most of the Fourth Amendment warrant exceptions, such as exigency and consent, would apply to First Amendment warrants as well.

Some might object that the First Amendment should not borrow from the Fourth Amendment’s toolkit. While warrants and probable cause are mentioned in the Fourth Amendment, no specific procedural requirement is discussed in the First. Nor is there currently an exclusionary rule for First Amendment violations. However, the lack of a textual basis under the First Amendment should not preclude importing warrants, probable cause, the exclusionary rule, and other concepts from the Fourth Amendment. The Fourth Amendment’s exclusionary rule was shaped in *Weeks v. United States* and is not based on the text of the Amendment.<sup>279</sup> It is not at all unprecedented for the Court to pollinate one amendment with concepts from

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<sup>277</sup> Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper?*, 93 CAL. L. REV. 1413, 1448 (2005).

<sup>278</sup> See *id.*

<sup>279</sup> See *Weeks v. United States*, 232 U.S. 383, 392 (1914) (arguing that unlawful seizures “should find no sanction in the judgments of the courts”). Morgan Cloud notes that the Fourth Amendment exclusionary rule “is at least implicit in *Boyd*.” Cloud, *supra* note 140, at 581.

another. For example, in *Mapp v. Ohio*, the Court extended the Fourth Amendment exclusionary rule to the states,<sup>280</sup> and justified its holding by importing concepts from the Fifth Amendment and noting the “intimate relation” between the Amendments.<sup>281</sup> The Court observed that “[t]he philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.”<sup>282</sup> A close relationship also exists between the First and Fourth Amendments. For example, *Zurcher* and the other scrupulous exactitude cases explicitly look to Fourth Amendment procedures to protect First Amendment rights.<sup>283</sup> The logic of these cases could easily be expanded to include not only warrants and probable cause, but also the exclusionary rule and other Fourth Amendment protections.

Therefore, in the event that the government seeks to use information obtained in violation of the First Amendment as evidence in a criminal trial, the exclusionary rule could serve as a viable way to enforce First Amendment protections. When the government wants to use the fruits of its information gathering in criminal trials, the sanction of exclusion will provide the necessary incentive to seek prior judicial approval through a warrant.

These protections, however, will not cover the many instances where there is no criminal case brought against the person whose First Amendment rights are infringed. Suppose, for example, the government subpoenas John Doe’s diary because it contains evidence that will assist in the prosecution of another person. Doe’s First Amendment rights might be implicated, but he is not the subject of the criminal probe. In this instance, Doe should be allowed to initiate a civil action to quash the subpoena or block the government from gathering the information. The court would then require the government to make a showing of probable cause in order to obtain the information. If Doe is not able to challenge the information gathering prior to its occurrence, then he could seek damages in a subsequent lawsuit.

In other instances, individuals’ First Amendment rights may be implicated by broad information gathering programs that do not result

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<sup>280</sup> 367 U.S. 643, 655 (1961).

<sup>281</sup> *Id.* at 655–57 (quoting *Bram v. United States*, 168 U.S. 532, 543 (1897)). The Court asked rhetorically: “Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?” *Id.* at 656.

<sup>282</sup> *Id.* at 657.

<sup>283</sup> *See supra* Part I.D.

in the use of data in criminal trials. In these cases, overbreadth doctrine would allow individuals to sue by demonstrating that the information gathering has a chilling effect on the exercise of First Amendment rights.<sup>284</sup> The First Amendment could also allow for flexibility in crafting other remedies. In cases involving dragnet searches with no foreseeable threat of criminal prosecution, the exclusionary rule obviously will be ineffective as a remedy. Under these circumstances, a suit for injunctive relief might be more appropriate. The injunctive relief need not bring a government investigation completely to a halt. Courts might narrow an overly broad information gathering program rather than simply enjoin it, or impose certain minimization procedures.<sup>285</sup>

Making the First Amendment an independent source of criminal procedure will thereby bring judicial scrutiny to government information gathering that has an impact on First Amendment activities and will force consideration of First Amendment values in the balance between security and liberty, in the context of criminal trials and beyond.

### *C. Applications*

In the previous Sections, I have set forth an approach to applying the First Amendment in the criminal procedure context. First, courts should determine whether the First Amendment applies, a determination that involves analyzing whether the government information gathering implicates activity within the First Amendment's scope of protection and whether it has a sufficient chilling effect on the First Amendment activity. Second, if the First Amendment applies, courts must determine whether the government had a significant interest in gathering the information, and, if so, whether the process was narrowly tailored to the government interest. Under most circumstances, this will require the government to obtain a warrant supported by probable cause in order to collect the information. Improperly gathered data can be suppressed at trial by means of the exclusionary rule. Beyond the criminal trial context, injunctive relief or damages might also be available. In this Section, I will examine some applications of my approach.

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<sup>284</sup> See *supra* text accompanying notes 256–63.

<sup>285</sup> Cf. *Berger v. New York*, 388 U.S. 41, 56–57 (1967) (discussing how electronic surveillance orders can be crafted so as to be compatible with particularity requirement of Fourth Amendment).

### 1. *Subpoenas for Book Records or Search Query Data*

Suppose the police suspect John Doe of murdering somebody with the use of an unusual poison. The police issue subpoenas to bookstores to find out whether Doe purchased any books on poison. They also subpoena his search queries from Google to see if he did any searches on poison.<sup>286</sup>

The bookstore records clearly fall within the boundaries of the First Amendment because they concern the consumption of ideas.<sup>287</sup> Internet search queries are very similar to book records in that they involve a person's reading habits and intellectual pursuits. In *Reno v. ACLU*,<sup>288</sup> the Supreme Court likened the Internet to a "vast library including millions of readily available and indexed publications."<sup>289</sup> The content of the Internet, the Court noted, "is as diverse as human thought."<sup>290</sup>

Having established that First Amendment activities are implicated, the court would turn to the question of whether the government activity will have a chilling effect on consumption of ideas. In this case, the police are seeking information for use in prosecuting Doe. Use in a criminal prosecution, under my approach, will almost always cause a chilling effect. In this case, use of the information in a criminal prosecution penalizes Doe for his reading and Internet searching. Therefore, the First Amendment would regulate the government's gathering of the information.<sup>291</sup> If the evidence were used at Doe's criminal trial, Doe could suppress it because it was obtained via an ordinary subpoena without requiring probable cause.<sup>292</sup> If he had notice of the subpoena, Doe could seek to quash it before its ex-

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<sup>286</sup> Search engine companies often maintain logs of which IP addresses are connected to particular searches. If provided with a particular IP address, these companies can produce a list of terms searched by that user. IP addresses can be connected to specific individuals by obtaining ISP records about the customer accounts assigned to particular addresses. Hansell, *supra* note 5; Declan McCullagh & Elinor Mills, *Verbatim: Search Firms Surveyed on Privacy*, CNET NEWS, Feb. 3, 2006, [http://news.com.com/Verbatim+Search+firms+surveyed+on+privacy/2100-1025\\_3-6034626.html?tag=st.prev](http://news.com.com/Verbatim+Search+firms+surveyed+on+privacy/2100-1025_3-6034626.html?tag=st.prev).

In 2006, the government attempted to subpoena, *inter alia*, records of people's Internet search query activity over a two-month period in the summer of 2005. The government sought queries from Yahoo, Google, MSN, and other search companies. Google challenged the request, but the other companies complied. Eventually, the government backed down significantly, asking only for 5000 search queries, but a district court denied even the scaled-down request for search queries as unnecessary. *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 678, 679, 686 (N.D. Cal. 2006).

<sup>287</sup> *See supra* Part I.A.

<sup>288</sup> 521 U.S. 844 (1997).

<sup>289</sup> *Id.* at 853.

<sup>290</sup> *Id.* at 852.

<sup>291</sup> *See supra* Part III.A.2.

<sup>292</sup> *See supra* Part III.B.2.



cution if the police were unable to demonstrate probable cause. In short, the First Amendment would require that the police seek prior judicial approval and show probable cause before requesting the data.

## 2. *Obtaining ISP Records of an Anonymous Speaker*

Suppose the FBI is investigating an organization for providing “material support” to terrorists.<sup>293</sup> FBI agents come across an anonymous blog where the blogger declares that he is a member of the organization, expresses how much he supports the organization’s values, and urges others to join the group. The FBI obtains the IP address of the blogger and issues a National Security Letter (NSL) to the blogger’s ISP to find out his identity. An NSL works similarly to a subpoena, although its use often involves even fewer protections.<sup>294</sup> With an NSL, the FBI can compel ISPs and telephone companies to reveal customer records if they are “relevant” to a terrorism or intelligence investigation.<sup>295</sup>

The use of the NSL would trigger First Amendment protections. The information sought pertains to the blogger’s anonymous speech and the political groups with which he associates, so First Amendment values are implicated.<sup>296</sup> The blogger’s political expression may be substantially chilled by the government’s actions. Even if the evidence was not used in a criminal case against the blogger, the mere exposure of the blogger’s identity to the government could have significant chilling effects. Given the blogger’s radical and unpopular

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<sup>293</sup> See 18 U.S.C. § 2339A(a)–(b) (Supp. III 2003), *amended by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 208 (criminalizing provision of “material support” to terrorists, including “financial services, lodging, training, expert advice or assistance,” among other things).

<sup>294</sup> The FBI can obtain an individual’s financial records using an NSL if it:

certifies in writing to the financial institution that such records are sought for foreign counterintelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the [F]irst [A]mendment to the Constitution of the United States.

12 U.S.C. § 3414(a)(5)(A) (Supp. III 2003). The Fair Credit Reporting Act provides for NSLs that allow the FBI to obtain “the names and addressees of all financial institutions . . . at which a customer maintains or has maintained an account,” 15 U.S.C. § 1681u(a) (Supp. III 2003), as well as “identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment.” *Id.* § 1681u(b). According to one estimate, 30,000 NSLs are issued every year. Barton Gellman, *The FBI’s Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1.

<sup>295</sup> 18 U.S.C. § 2709 (2000 & Supp. III 2003), *amended by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 213.

<sup>296</sup> See *supra* Part I.B.

beliefs, she might be speaking anonymously precisely in order to shield her identity from the government.

Some might contend that the NSL's built-in safeguards for First Amendment activity are sufficient to satisfy the First Amendment's demands. Most NSL provisions, including the one for ISP records, require that the FBI certify that the records are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the [F]irst [A]mendment to the Constitution of the United States."<sup>297</sup> This provision, however, is far too narrow. Hardly any investigations are conducted "solely" on the basis of First Amendment activities. Law enforcement officials will invariably argue that their investigation is based at least in some part on criminal activity. The focus of the inquiry should not be on whether the investigations are targeted exclusively to First Amendment activities but on whether the investigations have a chilling effect on such activities. Therefore, the First Amendment provisions of the NSL are not sufficiently protective of First Amendment rights, and the warrant requirement would apply.

### 3. *Collecting Phone Call Records*

In *Smith v. Maryland*,<sup>298</sup> the Supreme Court held that the Fourth Amendment does not apply to pen register data.<sup>299</sup> Accordingly, lists of phone numbers that people dial and logs of the numbers of incoming calls are not protected by the Fourth Amendment, although they are given minimal statutory protection.<sup>300</sup> The USA PATRIOT Act extends this same minimal protection to e-mail headers and routing information (such as IP addresses).<sup>301</sup> Whether this minimal protection is sufficient to comply with the Constitution is an open question since the Court has not addressed whether *Smith v.*

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<sup>297</sup> 18 U.S.C. § 2709(b) (Supp. III 2003); *see also* 12 U.S.C. § 3414(a)(5)(A) (Supp. III 2003) (similar language). The Privacy Act, 5 U.S.C. § 552a(e)(7) (2000), also provides some First Amendment protection, requiring that agencies shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." *Id.*

<sup>298</sup> 442 U.S. 735 (1979).

<sup>299</sup> *Id.* at 745–46.

<sup>300</sup> Pen Register Act, 18 U.S.C. § 3122 (2000) (requiring court order to obtain pen register information upon showing that such information "is relevant to an ongoing criminal investigation").

<sup>301</sup> USA PATRIOT Act § 216, 18 U.S.C. § 3123(a) (Supp. III 2003).

*Maryland* applies to e-mail headers or IP addresses, though such an interpretation is arguably possible.<sup>302</sup>

Although the Supreme Court has focused on the Fourth Amendment, obtaining pen register data without a warrant potentially violates the First Amendment. A log of incoming and outgoing calls can be used to trace channels of communication. It is relatively easy to link a phone number to a person or organization. Pen registers can reveal associational ties, since association in contemporary times often occurs by way of telephone or e-mail. As David Cole argues, modern communications technology has made association possible without physical assembly.<sup>303</sup> For example, if the government scrutinized the phone logs of the main office of the Communist Party, it might discover many of the Party's members. The information would not be equivalent to a membership list, but it would probably include identifying data about countless individuals who would not want the government to discover their connection to the Communist Party. If the government were to examine the phone logs or e-mail headers of a particular individual, it might discover that the individual contacted particular organizations that the individual wants to keep private. The pen register information, therefore, implicates First Amendment values.

To make the First Amendment analysis more concrete, consider the following hypothetical case: A domestic political group known as the Terrorist Sympathizers Association seeks to demonstrate that although violent means are wrongheaded, the underlying political causes of terrorists have merit. The FBI suspects that a few members might be providing assistance to terrorists, and it wants to identify the group's members so it can investigate them more thoroughly. Under the very lax standard of the Pen Register Act, the government certifies that "the information likely to be obtained by such installation and use [of a pen register] is relevant to an ongoing criminal investigation."<sup>304</sup> With the pen register order, it obtains from the phone company a log of all the incoming and outgoing calls to the group's office so it can identify the individuals who have been in contact with the group.

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<sup>302</sup> *But see* Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV. 1375, 1403–09 (2004) (arguing that *Smith* and similar third-party cases should not be extended to communications held by service provider); Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1576–82 (2004) (arguing that there are several limiting principles in business record cases like *Smith* that prevent their application to e-mail communication).

<sup>303</sup> Cole, *supra* note 229, at 226.

<sup>304</sup> 18 U.S.C. § 3123(a).

In this hypothetical, association with the group would fall within the boundaries of the First Amendment because it is association “for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>305</sup> The association here is for the “pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>306</sup>

As for chilling effect, this is a criminal investigation for the potential purpose of prosecuting some of the group’s members. People will likely be chilled from associating with the group if they are identified as members. The First Amendment would require a warrant supported by probable cause to obtain the phone logs.

Suppose instead that the NSA wants to obtain the phone call logs of everybody in the United States so that it can feed the data into its computers to determine who has called phone numbers associated with known terrorists or terrorist organizations. It is unclear how the government intends to use the information, and therefore it is difficult to demonstrate that the data collection will create a chilling effect. If the information were used to prosecute individuals, this would clearly chill some telephone communications. But in the hypothetical posed, the NSA is merely planning to analyze the data. It may use it for myriad purposes, most likely to identify individuals who should be subject to additional scrutiny. People will not know whether they have been so identified. Nevertheless, people might avoid calling certain groups for fear that they will wind up on a watch list or suspicious persons list. The problem is that the consequences in this case are unclear, as the government has not yet indicated what precisely it intends to do with the information. Under existing doctrine, establishing a chilling effect would likely be difficult.

In this case, overbreadth doctrine might provide the appropriate protection. Without more information about what groups the government is targeting, it is hard for any individual or group to bring a direct challenge to the information gathering. Any given person might have no idea whether the government is analyzing her associations or what precisely the government is doing with the data. Because the NSA’s information gathering program is extremely broad and could capture a wide range of associational activity, an individual could bring an overbreadth challenge without being required to show that he personally has been chilled.

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<sup>305</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>306</sup> *Id.* at 622.

#### 4. Obtaining Financial Records

In *United States v. Miller*,<sup>307</sup> which established the third-party doctrine, the Court concluded that the Fourth Amendment did not apply to the subpoena at issue because individuals have no reasonable expectation of privacy in financial records held by financial institutions.<sup>308</sup> In a footnote, the Court explicitly left open the question of whether the First Amendment might limit subpoenas for financial records, noting that the respondent did “not contend that the subpoenas infringed upon his First Amendment rights.”<sup>309</sup> Moreover, the Court noted that “[t]here was no blanket reporting requirement . . . nor any allegation of an improper inquiry into protected associational activities.”<sup>310</sup>

To what extent should the First Amendment protect financial records? Although financial records can reveal much activity that falls outside the scope of the First Amendment—such as fraud, conspiracy, embezzlement, money laundering, and other crimes—they can also reveal political associations. A few years before *Miller*, when the Supreme Court decided *California Bankers Ass’n v. Shultz*,<sup>311</sup> many Justices recognized that disclosure of bank records to the government might implicate freedom of association. *Shultz* involved a blanket reporting requirement, under the Bank Secrecy Act of 1970, which compels banks to provide information about people’s financial transactions to the government.<sup>312</sup> A group of bankers and a group of account holders challenged the constitutionality of the Bank Secrecy Act. The primary purpose of the Act was to make it easier to detect fraud and other forms of white collar crime.<sup>313</sup> Under regulations to implement the Act, all international transactions exceeding \$5000,<sup>314</sup> as well as domestic transactions exceeding \$10,000,<sup>315</sup> had to be reported to the government. The Court held that the bankers did not have Fourth Amendment rights in the data because “corporations can claim no equality with individuals in the enjoyment of a right to pri-

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<sup>307</sup> 425 U.S. 435 (1976).

<sup>308</sup> *Id.* at 442–43.

<sup>309</sup> *Id.* at 444 n.6. For a discussion of how the third-party doctrine cases might be more narrowly interpreted, see the sources cited in note 302, *supra*.

<sup>310</sup> *Miller*, 425 U.S. at 444 n.6. (citation omitted).

<sup>311</sup> 416 U.S. 21 (1974).

<sup>312</sup> Bank Secrecy Act of 1970, Pub. L. No. 91-508, §§ 101–102, 84 Stat. 1114 (current version at 12 U.S.C. § 1829(b) (2000)).

<sup>313</sup> See H. JEFF SMITH, *MANAGING PRIVACY* 24 (1994) (stating that trend toward reduction in paper records in banking industry made criminal investigations more difficult, leading to adoption of Bank Secrecy Act).

<sup>314</sup> 31 C.F.R. § 103.23 (1974); see also *id.* § 103.25 (listing information subject to reporting requirements).

<sup>315</sup> *Id.* § 103.22.

vacy.”<sup>316</sup> The account holders failed to allege that they engaged in transactions exceeding \$10,000, and as a result, lacked standing.<sup>317</sup> The Court further rejected a Fifth Amendment challenge, concluding that the bankers lacked “standing to assert Fifth Amendment claims on behalf of customers in general” and that the account holders failed to allege that “any of the information required by the Secretary will tend to incriminate them.”<sup>318</sup>

The Court also addressed a First Amendment challenge by the ACLU, which claimed that the reporting requirements infringed upon its right to freedom of association.<sup>319</sup> However, the Court found that the ACLU failed to allege that it engaged in the kinds of financial transactions that would be subject to reporting and therefore lacked standing.<sup>320</sup>

Nonetheless, concurring and dissenting opinions noted that reporting requirements could infringe on First Amendment freedoms. In a concurrence, Justices Powell and Blackmun observed that the scope of the Act was limited by the reporting requirements, which only required reporting of transactions over particular amounts.<sup>321</sup> They then noted, however, that “[a] significant extension of the regulations’ reporting requirements . . . would pose substantial and difficult constitutional questions . . . . Financial transactions can reveal much about a person’s activities, associations, and beliefs.”<sup>322</sup> Justice Douglas in dissent argued that “banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests.”<sup>323</sup> Justices Brennan and Marshall also noted that First Amendment rights were potentially implicated.<sup>324</sup> Thus in both *Miller* and *Shultz*, several Justices acknowledged that First Amendment activities could be implicated by the collection of financial records, but the Court nonetheless managed to avoid squarely addressing the issue.

If the issue were properly before the Court, would the First Amendment be implicated? Suppose the government were to sub-

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<sup>316</sup> *Cal. Bankers*, 416 U.S. at 65 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

<sup>317</sup> *Id.* at 67–68.

<sup>318</sup> *Id.* at 71–73.

<sup>319</sup> *Id.* at 75–76.

<sup>320</sup> *Id.* at 76 (“Until there is some showing that the reporting requirements contained in the Secretary’s regulations would require the reporting of information with respect to the organization’s financial activities, no concrete controversy is presented to this Court for adjudication.”).

<sup>321</sup> *Id.* at 78–79 (Powell, J., concurring and joined by Blackmun, J.).

<sup>322</sup> *Id.* at 78.

<sup>323</sup> *Id.* at 85 (Douglas, J., dissenting).

<sup>324</sup> *Id.* at 93 (Brennan, J., dissenting); *id.* at 97–99 (Marshall, J., dissenting).

poena the bank account records of the hypothetical Terrorist Sympathizers Association, discussed earlier, because it suspects that the group might be furnishing financial assistance to terrorists and wants to investigate contributors to the group. This investigation would be an “inquiry into protected associational activities” that fall within the boundaries of the First Amendment.<sup>325</sup> Providing donations is an essential part of freedom of association. As the Court noted in *Buckley v. Valeo*,<sup>326</sup> “The right to join together ‘for the advancement of beliefs and ideas’ . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective.”<sup>327</sup> As David Cole argues, “Groups cannot exist without the material support of their members and associates. If the right of association meant only that one had the right to join organizations but not to support them, the right would be empty.”<sup>328</sup> The government’s criminal investigation could ultimately have a chilling effect and inhibit people from donating money to controversial groups.

In several cases, federal circuit courts have held that subpoenas to banks for the account records of political groups trigger First Amendment scrutiny.<sup>329</sup> For example, in *First National Bank v. United States*,<sup>330</sup> the court held that a grand jury subpoena for bank account records of antitaxation groups implicated the First Amendment because “the constitutionally protected right, freedom to associate freely and anonymously, will be chilled equally whether the associational information is compelled from the organization itself or from third parties.”<sup>331</sup> Because the activities affected fall within the boundaries of the First Amendment and a chilling effect is likely, I would argue that the First Amendment should regulate the government investigation of the Terrorist Sympathizers Association.

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<sup>325</sup> *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976).

<sup>326</sup> 424 U.S. 1 (1976) (per curiam).

<sup>327</sup> *Id.* at 65–66 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

<sup>328</sup> Cole, *New McCarthyism*, *supra* note 167, at 11.

<sup>329</sup> See, e.g., *Local 1814 v. Waterfront Comm’n*, 667 F.2d 267, 272 (2d Cir. 1981) (concluding that subpoena for contributors to Fund violated First Amendment because “compelled disclosure of the Fund’s contributors under the circumstances of this case would give rise to a chilling effect similar to the one recognized by the Supreme Court in *Shelton v. Tucker*”); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (finding that antitax group’s allegation that subpoena on bank for account records caused “adverse effects” on its “organizational and fundraising activities” was sufficient to establish “a prima facie showing of arguable First Amendment infringement”).

<sup>330</sup> 701 F.2d 115 (10th Cir. 1983).

<sup>331</sup> *Id.* at 118.

Suppose instead that the government subpoenaed the bank records of John Doe, whom it suspected of engaging in money laundering for a drug cartel. Criminal liability for money laundering is disconnected from Doe's political associations. Although the information gathering has the potential to cause some chilling, the limited purpose and scope of the investigation minimize the likelihood of a chilling effect on the exercise of First Amendment rights. In contrast, the Terrorist Sympathizers Association example involves potential criminal liability in connection with the expressive associational activities of that group.

A final question worth examining is whether the Bank Secrecy Act of 1970 is constitutional under the First Amendment. Its purpose is to gather evidence about criminal activity, so it does not appear to be directed toward First Amendment activities. Its effect, however, poses a risk of chilling many legitimate financial transactions involving political groups. Because of its great breadth and lack of procedures to prevent the government from using it to ferret out information about group membership, the Act presents a much greater threat of chilling effect than a targeted inquiry would.

A finding that the First Amendment applies would not necessarily invalidate the Act. Instead, one would analyze whether the government interest justifying the Bank Secrecy Act is substantial and whether the Act is appropriately tailored to achieve that government interest. Ferreting out crime would clearly be a substantial government interest. The Court would then look to whether the law does so in an appropriately tailored manner so as not to unduly compromise First Amendment freedoms. I believe that this analysis as applied to the Bank Secrecy Act would be a difficult and contestable one. It would examine whether the government could achieve its goals with more narrowly tailored means. Such an analysis involves matters of white collar criminal investigation that are beyond the scope of this Article, but it is worth noting that such an analysis can and should take place.

An individual might also attack the Bank Secrecy Act under the overbreadth prong of my analysis. As Justice Douglas noted in dissent in *Shultz*, "making [financial transactions] automatically available to all federal investigative agencies is a sledge-hammer approach to a problem that only a delicate scalpel can manage."<sup>332</sup> While the Act might further substantial government interests in detecting unlawful financial activity, it also sweeps in a significant amount of lawful finan-

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<sup>332</sup> Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).



cial activity that is related to expressive associations. The Act might therefore be overbroad under the First Amendment.

### 5. *Questioning a Person's Friends*

Suppose the police are investigating John Doe for a hate crime. They interview Doe's friends to find out if he said anything to them about his attitudes toward minorities. Such interviews might indeed have a chilling effect on Doe's associational activities. However, even if the First Amendment were implicated, a warrant with probable cause would be too stringent a standard. Requiring a warrant with probable cause for instances when people talk voluntarily to government officials would restrict a large range of investigative activity. Under Fourth Amendment law, there are exceptions to the warrant and probable cause requirements when they are impractical.<sup>333</sup> In these cases, the courts engage in a general balancing, weighing the invasiveness of a particular government practice against the government's need for the information.<sup>334</sup>

A rule requiring a warrant whenever law enforcement officials spoke to a person about a suspect would be extremely cumbersome. Police could not talk to witnesses of crimes—or even victims—without first getting a warrant. The voluntary nature of the dialogue between the government and the individuals makes the information gathering much less problematic than coerced forms of information gathering, such as subpoenas or National Security Letters or even surveillance. The First Amendment would simply require that the information gathering be voluntary. Gathering information from other individuals who voluntarily supply it would be sufficiently narrowly tailored to achieve the government's significant interest in investigating a crime. Such an approach is not perfect, as there may be some instances where people's conversations with others will be chilled. But a rule requiring a warrant with probable cause whenever the government speaks to a person about conversations with another would simply be too impractical, making many law enforcement investigations impossible without providing substantial benefits in terms of First Amendment protection.

If instead of seeking information voluntarily, the government were to issue a subpoena compelling witnesses to testify about

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<sup>333</sup> One example is when the police use random checkpoints, such as fixed sobriety checkpoints for drivers. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>334</sup> See *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (“[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” (internal citations and quotation marks omitted)).

another person's First Amendment activity, the First Amendment would require a higher procedural threshold, such as a warrant with probable cause or a subpoena with heightened standards (perhaps probable cause rather than relevance).

#### CONCLUSION

For far too long, courts and commentators have viewed the First Amendment as irrelevant to criminal procedure. But as Fourth and Fifth Amendment protections recede from those areas where First Amendment activity is most likely to occur, it is time to look to the First Amendment for protection. Perhaps more so than any other amendment in the Bill of Rights, the First Amendment has iconic status, and it has grown massively in power and scope over the past century. Unlike the Fourth and Fifth Amendments, the First Amendment shows no sign of weakening. In this Article, I have demonstrated that First Amendment criminal procedure is both justified and necessary to prevent the infringement of First Amendment rights in the course of government investigations. It is time for the First Amendment to take its place alongside the Fourth and Fifth Amendments as a source of constitutional criminal procedure.