The Where and Why of Intellectual Privacy

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Freedom of thought has long been a celebrated part of First Amendment jurisprudence. As Professor Richards notes, Justice Cardozo called it "the matrix, the indispensable condition, of nearly every other form of freedom."[1] First Amendment scholars have described it as providing the foundation of, and justification for, the special place of freedom of speech in our constitutional system.[2] So too has the Supreme Court, which in 1977 described "freedom of mind" as "the broader concept" of which freedom of speech is one "component."[3]

But although it has been reverently and often invoked, it has also seemed largely redundant, at least when viewed as a type of legal protection. That is because we hardly need constitutional protection, or any other type of legal wall, to insulate an activity—like purely mental activity—that is *already* fully insulated by nature. As John Locke observed as long ago as 1689, "such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force."[4] Professor Frederick Schauer made the same observation in 1982, when he wrote that "thought is intrinsically free. The internal nature of the thought process erects a barrier between thought and the power of government sanction."[5]

Thus, freedom of thought has largely been celebrated not as a means for protecting our *already protected* internal mental freedom,[6] but rather as a justification for shielding certain *external* actions—like putting our thoughts into spoken or written words—that many view as having a close connection to, or providing indispensable support for, our capacity to think freely and autonomously. The Supreme Court, for example, has invoked freedom of thought in cases barring the government from penalizing us for joining, or

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1. Neil M. Richards, *Intellectual Privacy*, 87 TEXAS L. REV. 387, 411 (2008) (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

2. *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 11 (1992) (stating that "the preferred position of freedom of speech" over other liberties can be traced to the fact that "speech is connected to thought in a way that other forms of gratification are not").

3. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

4. JOHN LOCKE, A LETTER CONCERNING TOLERATION 20 (Prometheus 1990) (1689)

5. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 93 (1982).

6. There is one recently developed direct threat to this internal freedom, which is the government-mandated use of psychotropic medication, surgery, or other medical intervention to alter individuals' psychological functioning. *See generally* Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 20 (1989).

refusing to join, certain political groups,[7] for refusing to affirm certain government-mandated messages or commitments (in loyalty oaths,[8] flag salutes,[9] or license plates[10]), or for watching an obscene film in our own home.[11] All of these activities are performed in the external world, not in the realm of pure fantasy or imagination. But the Court held that punishing them was tantamount to punishing thought.

Professor Richards's terrific Article provides an insightful and persuasive case for opening a new chapter in this legal elaboration of our freedom of thought. Protecting our mental freedom, he argues, requires not just insulating our channels of thought against state-imposed punishment or control, but also against government *surveillance*. Freedom to think, in other words, requires not only that we have a constitutionally secured sphere of liberty, but also a constitutionally secured sphere of informational privacy.[12]

This analysis of freedom of thought has significant implications for how we think about both privacy protection and First Amendment law and theory. First, Professor Richards proposes that many activities that currently receive limited protection under information-privacy laws should be *supplemented* by an *additional* First Amendment-derived layer of legal insulation against external monitoring. Courts shortchange us, he argues, when they treat our reading records or Internet explorations as garden-variety examples of private activity.[13] Such intellectual acts are not merely one more example of an activity we normally do silently and in isolation. They are, he says, "close prox[ies] for our thoughts."[14] Hence, government intrusion into, or monitoring of, these acts threatens not simply embarrassment or insult to the integrity of our personal space or information, but the very groundwork for free and autonomous thinking.[15] Second, Professor Richards's argument does not only ask us to recognize and provide appropriate protection for a new, distinct form of informational privacy (namely, "intellectual privacy"). He also asks us to question a long-standing assumption about First Amendment theory, namely that First Amendment freedom is first and foremost about protecting the *public* expression of ideas. All the predominant justifications for First Amendment freedom of speech, he argues, require just as much protection for *private thinking* as for public speaking.

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7. *E.g.*, Elrod v. Burns, 427 U.S. 347, 355–56 (1976).

8. *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 592, 601 (1967)

9. *E.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

10. *E.g.*, Wooley v. Maynard, 430 U.S. 705, 715–16 (1977).

11. *E.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969).

12. Richards, *supra* note 1, at 389 ("[T]he development of ideas and beliefs often takes place best in solitary contemplation or in collaboration with a few trusted confidants.").

13. *Id.* at 389–90.

14. *Id.*

15. *Id.*

I find this double argument about privacy and First Amendment theory highly persuasive on both counts—and I believe it deserves to have a significant impact in both the law of privacy and the law and theory of freedom of thought and speech. Thus, I hope that numerous scholars and judges will follow the Article's suggestion that we "begin a conversation"[16] about how privacy and First Amendment law must change—or inspire changes in statutes or social norms—in order to provide sufficiently strong armor for our freedom of thought.

And I would like to use these brief comments to make a modest contribution to this conversation, by sketching some ways in which I think the framework for intellectual privacy that Professor Richards has started us with might benefit from a little less First Amendment theory in one respect, and a little more theory in another.

First, the way in which we can do with a little less ambitious First Amendment theory. This has to do with "the where . . . of intellectual privacy." In other words, it has to do with the question of where intellectual privacy is triggered or—to use a term familiar in other First Amendment scholarship[17]—with its "coverage." What kinds of activities count as "close prox[ies] for thought" of the kind that should be covered by intellectual privacy protections? This is a difficult question, one that is a little more troublesome than the Article acknowledges. It is not merely about more precisely mapping the blurry outer boundaries of the realm of activity that qualifies for privacy protection.[18] It is about understanding what kind of logic, principle, or convention justifies such borders in the first place.

The Article offers an intriguing map of these boundary lines—where intellectual privacy is envisioned "as a series of nested protections, with the most private area of our thoughts at the center, and gradually expanding outward to encompass our reading, our communications, and our expressive dealings with others."[19] As we move outward, and increase the "distance" that we are "removed from the freedom of thought," the less absolutely we have to protect the privacy of the activity.[20] Also, beyond the outer most concentric circle are realms of life where, although privacy protection of some kind may still play a role, *intellectual* privacy concerns are absent—realms such as "ordinary commercial or criminal contexts"[21] or "ordinary sorts of financial and credit-reporting information."[22] Wherever we are on this map of constitutional protection, the core logic for protecting intellectual

16. *Id*. at 444.

17. *See, e.g.*, SCHAUER, *supra* note 5, at 89.

18. The Article recognizes that "[t]he outer boundaries of intellectual privacy—like those of the freedom of speech itself"—are indefinite. *See* Richards, *supra* note 1, at 425.

19. *Id*. at 408.

20. *Id*. at 422.

21. *Id*. at 390.

22. *Id*. at 439.

privacy is to bar government (and other external actors) from monitoring our thinking processes that, although naturally invisible to others, are made visible to some degree in the intellectual explorations we undertake in the library, the Web, and in discussions with friends and colleagues.

Although I think Professor Richards's "nested protections" model of intellectual privacy is exactly the right one to begin with, I also think we can better explain its appeal by abandoning the notion that the mapping is based on closeness to pure cognition.[23] It is not the case that the books we choose to read or the Web pages we choose to search are generally more revealing of, or closer to, our internal thoughts than are the conversations we have—or associational activities we engage in—with others. We may well reveal our innermost thoughts more fully in heartfelt confessions made in a phone call, at an Alcoholics Anonymous meeting, or at a church or social gathering than we do when we choose a book or search a set of Web pages (leaving any observers to guess about why we are doing so). Rather, what better explains the appeal of the system of nested protections proposed by Professor Richards is not that every move inward in this model is a move toward our innermost thoughts, but rather that every move inward is a move further *away* from the intersubjective world that we share with others, and where the government (and other external authority) thus has an inevitable role to play in regulating social interaction. Even in the most intimate of conversations, we are interacting with other people who we could conceivably harm with fraudulent statements, threats, or by causing them severe emotional distress. By contrast, when we read or merely search the Web for our own benefit, our contact with the social world is generally far less substantial. We are often alone, isolated from social contact, and to the extent we are engaged in deliberations, these deliberations are *intra*personal, rather than interpersonal.

Thus, what best explains the appeal of Professor Richards's concentric circles of protection is *not* the notion that the legal protection needed for our thought—like gravitational force—grows weaker as one moves farther and farther away from the center of the source from which it emanates. Rather, it is a variant of John Stuart Mill's notion that there are realms that—although they may be of interest to other people—are generally realms of *intra*personal activity that must remain subject to the individual's own decisions if she is to have any autonomy at all, realms where state and society have a far weaker claim (if any claim) to exercise authority over our actions.[24] Indeed, I believe that for this reason, we cross a significant dividing line in terms of First Amendment and privacy protection when we move from purely solitary activities (such as thinking, reading, or solitary

23. *See id.* at 422 (using the "distance" from the pure cognition at the core of freedom of thought as a basis for understanding the level of privacy protection that courts would likely find necessary).

24. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., 1991) (1859).

artistic activity) into realms of life—even the private communicative realms Professor Richards discusses—where we interact with, and are more likely to cause harm to, other people.

There is another coverage question where I think our theoretical claims must be more modest than they are in the Article: the question of what activity deserves intellectual-privacy protection at all. Professor Richards writes that acts that embody "freedom of thought and the freedom of intellectual exploration" are "fundamentally different in kind from purchases of consumer goods."[25] I am not so sure. Consider the example of someone who is passionate about physical fitness and countering the effects of aging. This interest will probably make an appearance in library records and Google searches. But it will just as likely be revealed in purchases of gym memberships or exercise equipment and nutritional supplements, and in decisions about which foods to buy at the supermarket or order at restaurants. A person's interest in certain genres of music will likewise be revealed not just in song downloads, or choices about which Internet radio stations to listen to (or to create on Pandora), but also in choices about what music lessons to take, what concerts to attend, and what instruments to buy. In fact, such commercial activity not only reveals and embodies intellectual exploration, it also sometimes enables it to take place, or to reach the next stage in a person's progress. The same is true of many activities that people often take greater care to hide from others. A person's sexual interests, for example, may be reflected in the sex aids they buy and the bars they frequent, as well as the Web sites they visit. Thus, intellectual privacy concerns arise not only when government officials or businesses spy on our reading choices or Web browsing, but also when they monitor our credit-card records and other purchase histories, our medical history (including use of medications), and keep records of the places we have explored and physical sites we have frequented.[26]

This raises an important line-drawing problem: intellectual privacy cannot plausibly shield *every* activity that embodies "a partial transcript of the operation of a human mind."[27] Virtually everything we do reveals such a transcript—and helps us write the next line therein. But, of course, we don't want police or other government officials to cover their eyes with respect to *all* realms of human life. On the contrary, we demand that they be vigilant. But how can we square this demand with the demand that they turn their eyes

25. Richards, *supra* note 1, at 436.

26. Some records, such as histories of bank withdrawals or stock-market activities, will generally be less likely to reveal information about our personal interests—because the fact that we withdraw or invest money does not reveal much about what intellectual explorations or passions we spend (or wish to spend) that money on. *See* Richards, *supra* note 1, at 439. But even such information can reveal certain aspects of our internal mental life—such as which companies we might be disassociating ourselves from (through divestment) or how risk-averse or risk-seeking we are.

27. *Id*. at 436.

away when signs of our thought emerge, as they do in almost all intentional action? This potential borderlessness is by no means a problem unique to the project of defining intellectual privacy's scope. For reasons I explore elsewhere,[28] it arises even when courts use more familiar First Amendment arguments to strike down government restrictions that the Court has deemed to limit our freedom of thought (as the *Stanley* decision did, for example, in holding that our right to possess or view the film of our choice in our homes followed from our freedom of thought).

How then can we assure that intellectual privacy does not crowd out *all* government regulation or surveillance? We might begin by abandoning any assumption we may have that intellectual privacy should automatically attach to any and all *activities* that embody or support our thoughts. We might instead view it as a constitutionally mandated *space* or *realm.* For example, the home has long been a site in which we carry out intellectual explorations in private that might at other times and places be carried out with greater social interaction and more visibility. There are likewise certain enclaves, even in the public space, that we share with others—such as libraries, bookstores, Web sites, and anonymous support groups—which people often use as platforms to engage in intellectual explorations outside the watch of their social, professional and political communities.

What makes these places so deserving of the intellectual privacy that Professor Richards rightly wants to secure for them is not that they are by any means *unique* in providing settings for intellectual exploration. Rather, it is the fact that our society has *by convention or tradition* set aside such sites (or sites where analogous activity takes place) as sites where individuals can externalize, and thus develop, their thinking without simultaneously revealing it to their communities. In short, the sanctuaries for intellectual privacy that Professor Richards calls on us to protect have gained the status of sanctuaries in much the same way that quintessential or traditional public forums have gained the status of sites for untrammeled public debate: (1) because of a sense on the part of many individuals that we need *some* kind of constitutionally protected enclaves for this kind of private creativity or intellectual exploration, and (2) because of traditions or conventions that have marked out some spaces as sanctuaries for such activity.

Even if these conventions were largely arbitrary—even if it were simply a series of accidental developments that have led homes, libraries, or postal-service deliveries to develop the privacy they offer—this should not lead to their abandonment. The fact that a crucial roadway could just as easily have been built along a different path does not mean that we are not justified in preserving, maintaining, and using such a road where it has already been built. Similarly, the fact that we can imagine a counterfactual world that would justifiably protect intellectual privacy with different institutions, or by

28. *See* Marc Jonathan Blitz, *The Freedom of 3D Thought: First Amendment Rights in Virtual Reality*, 30 CARDOZO L. REV. (forthcoming).

setting aside different spaces, does not mean we should abandon and cease to build upon, the intellectual-privacy traditions that we have.[29]

As it so happens, the intellectual privacy afforded by homes, libraries, and private phone or mail exchanges is *not* a product of purely accidental historical choices: just as the siting of a road is often not the product of a purely arbitrary decision or historical accident, but also a function of natural topography, so people's use of certain spaces or realms as sites for unconventional or unorthodox intellectual exploration is partly a function of physical or institutional "architecture."[30] The walls of a private living room; the inability of neighbors to track us as we surf the Web through a private Internet connection; the chance to browse a book anonymously in the corner of a library or a bookstore. We have found intellectual privacy in such activities for the simple reason that the characteristics of these spaces have usually made it hard for others to observe us there. In libraries and Web spaces, the intellectual component of intellectual privacy has also made possible by the rich set of informational resources available for intellectual exploration. In the home, it is likewise enabled by the extraordinary degree of control that individuals have over the space that they privately own and control.

Thus, while we cannot have privacy for every activity that embodies or supports our thinking, we can at least insist that our constitutional order provide a *sufficient* measure of such intellectual privacy by recognizing and insulating the spaces and institutions where we have been able to exercise it thus far, and in analogous realms opened up by new technologies.[31] And while commercial activity, like much other activity in the public realm, may embody, reflect, or enable our intellectual exploration, it may be that we have sufficient space for private intellectual exploration in homes, libraries, and Web searches, even if we do *not* have intellectual privacy when such exploration enters the commercial realm (that government must regulate to assure fairness in contractual dealings and to safeguard the public interest).

Apart from thus recognizing that sanctuaries for intellectual privacy are as much a matter of social convention and physical architecture as they are a

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29. In this sense, the enclaves we choose to create room for the intellectual privacy we need, like roads we choose to create a path we need, may be similar to the "focal points" that sometimes provide solutions to coordination games where any solution is fine so long as different people can agree upon it. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 54–58 (1960).

30. For an example of a discussion of how architecture affects constitutional choices, see LAWRENCE LESSIG, CODE VERSION 2, 123 (2006).

31. More specifically, one might argue that we need to assure for intellectual privacy what Professor Anthony Amsterdam has proposed we assure for freedom from monitoring more generally—namely, that whatever government surveillance we allow, "the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974). For intellectual privacy, we might specifically demand that we have sheltering spaces sufficient to secure "the amount of freedom of thought" necessary in "a free and open society."

matter of First Amendment logic, we might also elaborate upon Richard's insightful analysis by noting one place where we might benefit from a little *more* First Amendment theory rather than a little less of it. This is the issue I refer to in this comment's title as "the why of intellectual privacy." It concerns understanding why it is that solitary and private intellectual exploration is so valuable. The primary answer that the Article offers to this question focuses on the reasons that free expression cannot do its work without antecedent thinking that makes such expression possible. This answer is an example of what Cass Sunstein has called an incompletely theorized "intermediate-level" theory.[32] It avoids taking sides in the scholarly debates about ultimate First Amendment purposes and instead sets forth a logical module of sorts that is theoretically neutral enough to fit into, and form a component of, any of these larger frameworks.[33] Whether one believes the First Amendment's freedom of speech guarantee is most valuable because it enhances the search for truth, because it anchors democratic deliberation and self-government, or because it allows for individual autonomy or self-development, intellectual privacy contributes to *all* of these goals by giving individuals' intellectual space to develop the unconventional and novel thoughts crucial to advancing each of these purposes.[34]

But while there are advantages in setting out an argument that has appeal across very different theoretical commitments, there is also a cost. Professor Richards's analysis forgoes (or at least postpones) the chance to build an even stronger case for intellectual privacy by drawing on resources specific to particular accounts of First Amendment purposes. More specifically, an account of the First Amendment that emphasizes individual autonomy and self-development provides a much stronger foundation for intellectual privacy protection than do the other accounts. This is because in the other accounts, the value that intellectual privacy has is its value in setting the stage for more public activity that contributes to searches for (and testing of) truth or to collective self-government. Private thinking is valuable, in other words, primarily (if not solely) because it provides a prelude for public discussion—or a setting for individual listeners to absorb and evaluate the results of such discussion. But these claims about intellectual privacy are, I think, likely to be controversial, and vulnerable to

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32. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 63, 67 (1996) (noting that one way of reaching incompletely theorized agreement is to propose "principles operating at a low or intermediate level of abstraction").

33. The notion that philosophers or other thinkers might sometimes propose a "module" that can fit into a variety of other more partisan views was proposed by John Rawls in JOHN RAWLS, POLITICAL LIBERALISM 144–45 (1993).

34. *See* Richards, *supra* note 1, at 407 ("My purpose here is not to advance a new theory of the First Amendment or to argue that one theory should take precedence over the others. It is instead to assert that whichever theory we proffer for why we protect speaking and writing, freedom of thought is essential to that theory.").

empirical challenge. Yes, there are times privacy will provide invaluable space for someone to discover a truth about the natural or social world that her community is committed to rejecting. And there are times when a voter will act more wisely only if she can reflect upon her choices free from others' influence. But the same legal insulation that guarantees this freedom from external influence will *frustrate* First Amendment purposes where it allows people to isolate themselves from alternative points of view and communal projects.

By contrast, it is harder to deny the value that private and solitary exploration and creative activity have in allowing for self-understanding, self-fulfillment, and for building people's capacity to think autonomously. While the pull of community judgment may provide a truth-enhancing corrective to false belief, or to thinking that undervalues the public interest, the community is far less well-equipped to educate an individual about his or her *own* deep passions or talents. On the contrary, uninterrupted community observation will almost certainly *prevent* the introspection and honesty with oneself that have often been indispensable to such self-discovery and self-development. While discussions with others may certainly aid us in such self-discovery and self-development (and indeed, may play an essential role in it), much of the "raw material" for such exploration is—unlike the data for reaching intersubjective agreement about the external world, or for reaching consensus about community interests—to be found only in personal experience to which each individual has privileged (and in some cases, exclusive) access. Indeed, on the account of the First Amendment as a guarantor of individual autonomy and self-fulfillment, private acts of creativity or learning are valuable not merely when they serve as a *prelude* to public discussion, but also even when they begin and end in a person's solitary experience. In such circumstances, private intellectual exploration is valuable as an *alternative* to public deliberation rather than as a step towards it.[35]

35. This is not a claim I have room to develop at any length here. For a more extensive discussion of my reasons for claiming that silent intellectual exploration might best be understood as (1) independent of, rather than simply a supplement to, free expression, and (2) based in the autonomy account of First Amendment purposes see Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 802–03, 816–18, 829–34. I believe much of this analysis can be applied not only to intellectual exploration in libraries (which is my focus in that Article) but also to many of the other examples of intellectual exploration that Professor Richards considers in his broader argument for intellectual privacy. Indeed, Professor Richards—while refusing to endorse a particular vision of First Amendment purposes in most of the Article—does seem to embrace this vision of the First Amendment to some degree when he writes that "the First Amendment should protect cognitive activities even if they are wholly private and unshared." Richards, *supra* note 1, at 35.