Citation: (Neil M. Richards, professor at Washington University School of Law, “The Dangers of Surveillance,” Harvard Law Review, volume 126, http://harvardlawreview.org/wp-content/uploads/pdfs/vol126_richards.pdf, May 20 2013)

II. SURVEILLANCE AND INTELLECTUAL PRIVACY

The most salient harm of surveillance is that it threatens a value I have elsewhere called “intellectual privacy.” Intellectual-privacy theory suggests that new ideas often develop best away from the intense scrutiny of public exposure; that people should be able to make up their minds at times and places of their own choosing; and that a meaningful guarantee of privacy — protection from surveillance or interference — is necessary to promote this kind of intellectual freedom. It rests on the idea that free minds are the foundation of a free society, and that surveillance of the activities of belief formation and idea generation can affect those activities profoundly and for the worse. I want to be clear at the outset that intellectual-privacy theory protects “intellectual” activities, broadly defined — the processes of thinking and making sense of the world with our minds. Intellectual privacy has its limits — it is a subset of all things that we might call “privacy,” albeit a very important subset. But importantly, intellectual privacy is not just for intellectuals; it is an essential kind of privacy for us all.

At the core of the theory of intellectual privacy are two claims, one normative and one empirical. The normative claim is that the foundation of Anglo-American civil liberties is our commitment to free and unfettered thought and belief — that free citizens should be able to make up their own minds about ideas big and small, political and trivial. This claim requires at a minimum protecting individuals’ rights to think and read, as well as the social practice of private consultation with confidantes. It may also require some protection of broader social rights, whether we call them rights of association or assembly. Protection of these individual rights and social practices allows individuals to develop both intellectual diversity and eccentric individuality. They reflect the conviction that big ideas like truth, value, and culture should be generated from the bottom up rather than from the top down.

These commitments to the freedoms of thought, belief, and private speech lie at the foundation of traditional First Amendment theory, though they have been underappreciated elements of that tradition. But as I have argued elsewhere, a careful examination reveals that a commitment to freedom of thought is present in virtually every major text in First Amendment theory. In particular, freedom of thought lies at the core of the modern American tradition of First Amendment libertarianism, which began with the opinions of Justices Holmes and Brandeis in the decade following the end of the First World War. Dissenting from the majority position of the Supreme Court, the two friends developed theories that justified special protection for speech and ideas under the First Amendment. The two men advanced slightly different reasons why speech should be protected — Justice Holmes justified protection in terms of the search for truth, while Justice Brandeis privileged democratic self-government — but each theory enshrined protection for free thought at its core. For example, Justice Holmes’s dissent in Abrams v. United States is a forceful statement of the idea that democratic institutions depend on minds’ being able to freely and fearlessly engage in the search for political truth. As he put it poetically:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better

reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Justice Brandeis also placed the freedom of thought at the foundation of his justification for special protection for free speech. In Whitney v. California, he wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .

Thus, in each of the traditional American justifications for freedom of speech, a commitment to freedom of thought — to intellectual freedom — rests at the core of the tradition. The second claim at the core of the theory of intellectual privacy is an empirical one — that surveillance inclines us to the mainstream and the boring. It is a claim that when we are watched while engaging in intellectual activities, broadly defined — thinking, reading, websurfing, or private communication — we are deterred from engaging in thoughts or deeds that others might find deviant. Surveillance thus menaces our society's foundational commitments to intellectual diversity and eccentric individuality.

Three different kinds of arguments highlight the ways in which surveillance can restrain intellectual activities. The first set of arguments relies on cultural and literary works exploring the idea that surveillance deters eccentric or deviant behavior. Many such works owe a debt to Jeremy Bentham's idea of the Panopticon, a prison designed around a central surveillance tower from which a warden could see into all of the cells. In the Panopticon, prisoners had to conform their activities to those desired by the prison staff because they had no idea when they were being watched. As Bentham describes this system, "[t]o be incessantly under the eyes of an Inspector is to lose in fact the power of doing ill, and almost the very wish." Of course, the most famous cultural exploration of the conforming effects of surveillance is Orwell's harrowing depiction in Nineteen Eighty-Four of the totalitarian state personified by Big Brother. Orwell's fictional state sought to prohibit not just verbal dissent from the state but even the thinking of such ideas, an act punished as "thoughtcrime" and deterred by constant state surveillance. Some scholars have documented how the modern surveillance environment differs from both the classic Panopticon and a fully realized Big Brother in important ways. Nevertheless, Orwell's insight about the effects of surveillance on thought and behavior remains valid — the fear of being watched causes people to act and think differently from the way they might otherwise.

Our cultural intuitions about the effects of surveillance are supported by a second set of arguments that comes from the empirical work of scholars in the interdisciplinary field of surveillance studies. Moving beyond the classic metaphors of the Panopticon and Big Brother, these scholars have tried to understand modern forms of surveillance by governments, companies, and individuals in all of their complexities. The scope of this burgeoning literature has been wideranging and provides many examples of the normalizing effects of surveillance in a wide variety of contexts. In his pioneering work in the 1980s, for example, Professor Anthony Giddens argues that surveillance continually seeks the supervision of social actors and carries with it a permanent risk that supervision could lead to domination. More recent scholars have explored the risks that surveillance poses to democratic self-governance. One such risk is that of self-censorship, in terms of speech, action, or even belief. Studies of

communist states give social-scientific accounts of many of the cultural intuitions about these self-censoring effects of surveillance, but so too do studies of modern forms of surveillance in democratic societies. For example, one study of the EU Data Retention Directive notes that "[u]nder pervasive surveillance, individuals are inclined to make choices that conform to mainstream expectations." As I explore below, the scope of surveillance studies is much broader than merely the study of panoptic state surveillance; scholars working in this field have examined the full scope of modern forms of watching, including data surveillance by private actors. But above all, surveillance scholars continually reaffirm that, while surveillance by government and others can have many purposes, a recurrent purpose of surveillance is to control behavior.

A third and final set of arguments for intellectual privacy comes from First Amendment doctrine. A basic principle of free speech law as it has developed over the past century is that free speech is so important that its protection should err on the side of caution. Given the uncertainty of litigation, the Supreme Court has created a series of procedural devices to attempt to ensure that errors in the adjudication of free speech cases tend to allow unlawful speech rather than engage in mistaken censorship. These doctrines form what Professor Lee Bollinger calls the "First Pillar" of First Amendment law — the "[e]xtraordinary [p]rotection against [c]ensorship." Such doctrines take various forms, such as those of prior restraint, overbreadth, and vagueness, but they are often characterized under the idea of the "chilling effect." This idea maintains that rules that might deter potentially valuable expression should be treated with a high level of suspi-cion by courts. As the Supreme Court put it in perhaps its most important free speech decision of the twentieth century, New York Times Co. v. Sullivan, the importance of uninhibited public debate means that, although "erroneous statement is inevitable in free debate, . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" As Professor Frederick Schauer explains, "the chilling effect doctrine recognizes the fact that the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech." Although the chilling-effect doctrine has been criticized on grounds that it overprotects free speech and makes empirically unsupported judgments, such criticisms miss the point. The doctrines encapsulated by the chilling effect reflect the substantive value judgment that First Amendment values are too important to require scrupulous proof to vindicate them, and that it is (constitutionally speaking) a better bargain to allow more speech, even if society must endure some of that speech's undesirable consequences.

Intellectual-privacy theory explains why we should extend chilling effect protections to intellectual surveillance, especially traditional-style surveillance by the state. If we care about the development of eccentric individuality and freedom of thought as First Amendment values, then we should be especially wary of surveillance of activities through which those aspects of the self are constructed. Professor Timothy Macklem argues that "[t]he isolating shield of privacy enables people to develop and exchange ideas, or to foster and share activities, that the presence or even awareness of other people might stifle. For better and for worse, then, privacy is sponsor and guardian to the creative and the subversive." A meaningful measure of intellectual privacy should be erected to shield these activities from the normalizing gaze of surveillance. This shield should be justified on the basis of our cultural intuitions and empirical insights about the normalizing effects of surveillance. But it must also be tempered by the chilling-effect doctrine's normative commitment to err on the side of First Amendment values even if proof is imperfect.