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A Theory of Intellectual Privacy

UP TO THIS point, we've looked at the traditional way lawyers and scholars have thought about the relationship between privacy and speech. Under this view, tort privacy and free speech are values in conflict, and we have to choose between them in a kind of zero-sum game. I've tried to show that while the traditional way has been dominant in people's minds, it has been a failure as a practical matter and represents something of a dead end for our law.

In this part of the book, I want to show that there is a different way of thinking about privacy and speech. Instead of being conflicting values, privacy and speech can instead be mutually supportive. In fact, I want to argue that a certain kind of privacy is essential if we care about freedom of expression. This kind of privacy is different from tort privacy. Let's call it "intellectual privacy."

So what is intellectual privacy? Essentially, it's is a zone of protection that guards our ability to make up our minds freely. More formally, intellectual privacy is the protection from surveillance or unwanted interference by others when we are engaged in the processes of generating ideas and forming beliefs—when we're thinking, reading, and speaking with confidants before our ideas are ready for public consumption. Intellectual privacy is an old idea and shares its roots with some of our most ancient traditions of civil liberties. Curiously, like tort privacy, the germ of a theory of intellectual privacy can be traced in the writings of Louis Brandeis. In a series of constitutional law opinions in the 1920s, Brandeis

argued for the protection of freedom of thought, intellect, and private speech as essential preconditions of freedom.

But although it is an old idea, intellectual privacy has remained underappreciated and underdeveloped. This is not because intellectual privacy is trivial, but because until very recently, it has been difficult as a practical matter to interfere with the generation of ideas. The state, market, and our social contacts could not monitor our thoughts, our reading habits, and our private conversations, at least not in an efficient, comprehensive, and unobtrusive way. Law was not needed to tackle such a problem. But the context surrounding intellectual activities has changed dramatically, and the pace of this change is increasing. Continual always-on intellectual surveillance is increasingly possible, ironically as a result of the vast intellectual opportunities offered by the Internet.

Part II of this book is about this idea of intellectual privacy—what it is, where it comes from, and how it is increasingly under siege in our digital world. This chapter lays out the basic theory of intellectual privacy in our law and identifies three of its elements—the freedom of thought, the right to read, and the right to communicate in confidence. The three chapters that follow give greater content and context to each of the elements and develop the theory in greater detail.

Why Intellectual Privacy Matters

Where do new ideas come from? Think for a moment about how new ideas were generated in a pre-Internet era. Some new ideas are just thought up by clever people sitting alone in their offices or walking in the woods. This is the tradition of romantic individualism epitomized by Henry David Thoreau, who retreated to Walden Pond to think and to learn. As Thoreau put it, "I went to the woods because I wished to live deliberately, to front only the essential facts of life, and see if I could not learn what it had to teach, and not, when I came to die, discover that I had not lived."[1] When we are alone, we have time to think, to contemplate, to make sense of the world and our beliefs about it.

Contemplation is essential to a free and diverse society. It allows us to decide what we think about existing ideas, and to imagine new ones. The Canadian philosopher Timothy Macklem explains that "isolation is the source of human difference, for it is the exercise of creativity in isolation that makes it possible for people to reach different conclusions and thereby develop different ways of life, the ways of life that liberal societies draw upon for the diversity that makes freedom valuable there."[2]

In practice, of course, few ideas are just thought up by arboreal prodigies (or office-bound academics) working in isolation. Most human inventions are the product of building on the ideas of other people. This is as true of ideas like racial equality or freedom of speech as it is of innovations like the Internet or the iPad. The stuff of our culture—our ideas, our beliefs, our inventions—is invariably the product of a series of small improvements on the ideas of others. Essential to this process is the existence of a large body of work from other people against and upon which we can construct our own ideas. Legal scholar Jessica Litman expresses this point eloquently:

> Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship.[3]

New ideas—political, scientific, artistic, or otherwise—thus depend on access to the ideas of others and the ability to engage with them. And to do this, we need to be able to read freely and then think privately about what we've read in our own time. In the past, access to ideas has come principally from print media—newsstands, bookstores, and libraries, but also from public speeches and performances, television, and radio. However, access to ideas is now increasingly digital—using computers, tablets, and smartphones to access search engines, websites, social networks, and to send texts, emails, and instant messages.

Even access to knowledge isn't by itself enough. We need places and spaces (real and virtual) in which to read, to think, to explore. The process of idea generation is one of trial and error. Very often, what seems like a good idea at the time turns out to be a terrible one after testing or further

reflection. But to test or examine ideas, we again turn to other people—our friends and confidants, our family and colleagues. We rely on these people for their frank and confidential assessments of whether we're on to something, or whether we're crazy.

It's not just new ideas that get tested this way. When we're trying to make up our minds about whether we like government policy, a war, a movie, or even our appearance, we often test novelty with our intimates. We share with our small groups before we are ready to share with the world. We trust them to keep our half-formed notions and beliefs confidential and not to share them with others. At the same time, we also expect that when we are talking to our confidants, third parties are not listening in or recording what we say. These activities and expectations allow us to discuss, test, and reevaluate our ideas before they are ready for public exposure. Intellectual privacy, then, is the protection of all of these individual and social processes, so we may, as Brandeis put it in *Whitney*, have the "freedom to think as [we] will and to speak as [we] think."[4]

If we're interested in the creation of new ideas, we should want people to experiment with controversial ideas. But this notion has not been deeply developed in First Amendment law or theory. First Amendment cases and scholarship are full of explanations about *why* we allow the expression of large amounts of often offensive and harmful speech—for instance, because lots of speech enhances the search for truth, the processes of democratic self-government, or individual autonomy.[5] By contrast, discussions of free speech have only rarely addressed the question of *how* we ensure that new and interesting ideas get generated.

This is a curious omission, because if we care about free speech, we should care about speakers having something interesting to say. Many of today's most cherished ideas were once highly controversial. Consider the notion that governments should be elected by the people, or the separation of church and state, or the idea of the equality of all people under law regardless of race, sex, or religion. At various times, believing or promoting each of these ideas was to be done at your peril. Think of the thousands of people killed in early modern Europe for believing differently in matters of faith, or the violent persecution of American civil rights activists who believed in racial equality. Ideas matter because they can be destabilizing, which explains why those in power have resorted to

extreme measures—burnings at the stake, lynchings, Selma Bridge—to keep those destabilizing ideas in check.

Modern First Amendment law has broadly rejected the notion that brute force can be used to keep dangerous ideas out of public debate. And this idea has significant social support. We now believe that in a free society, individuals can be trusted to sort out good ideas from evil ones, and that the state cannot keep an idea from the people on the ground that they cannot be trusted to handle it. A free society that does not allow its people to think for themselves does not seem particularly free. As the Anglo-American philosopher Alexander Meiklejohn put it, "to be afraid of ideas—any idea—is to be unfit for self-government."[6]

Recall the leading justifications for freedom of speech from chapter 2—truth, self-government, and autonomy. The generation of new ideas is central to each of them. Consider the search for truth rationale first. In his famous dissent in *Abrams v. United States*, Justice Holmes eloquently expressed the idea that people in a free society cannot be persecuted based on the beliefs that they hold or the words that they say:

> [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. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[7]

Holmes believed that free societies must resist the urge to oppress those who believe differently from the majority. Those in power might feel certain that they are right and that the dissidents are crazy and dangerous, holding opinions "that we loathe and believe to be fraught with death."[8] But any sense of moral certainty must be tempered by the indisputable fact that most firmly held beliefs from the past ("fighting faiths") have been rejected and abandoned over the years. Faced with this evidence, we must acknowledge the doubt that our ideas, too, might be found false or

incomplete in the future. We must let the dissidents believe their beliefs and have their say.[9]

The self-governance and autonomy rationales for free expression are also consistent with a commitment to the generation of new ideas and the protection of the processes of belief formation. Self-governance theory suggests that democratic citizens need a wide variety of perspectives and information to make the informed decisions that are essential to good government. Because it depends upon the informed decisions of the citizenry, the processes of belief formation and decision making are *the* critical element of self-governance, as Brandeis reminded us in *Whitney*.

More directly, if we can't make up our minds freely and without constraint or surveillance, self-government is impossible. This is why democracies protect the privacy of voting through the secret ballot and the voting booth—we make the decisions of self-governance in a private, unmonitored, untracked place. Similarly, the government is forbidden from freely listening in on private conversations about politics, or monitoring the meetings of political groups. Autonomy theory is even easier to square with autonomous belief formation—why else would we want people to think for themselves or develop their individuality if not to generate new ideas and new forms of identity and expression?

Intellectual freedom thus requires more than just protection from censorship or punishment for unpopular speech. If we are interested in the kind of new ideas that cause us to revise or displace existing "fighting faiths," we need to go beyond protecting merely the *expression* of dissident ideas and think about their *production*. The existing theories of why we care about free expression may not have spoken directly in terms of the production of new ideas and the processes of how they come to be accepted. But this is because oppressive regimes in the past have taken the easier step of censoring speech directly rather than the more difficult (and expensive) means of monitoring or constraining individual thoughts and preferences. But under any theory, the creation and acceptance of new ideas are critical to the reasons we protect freedom of expression.

Imagine a society in which there were few if any barriers to the airing of racist, hurtful, or shocking speech. In such a society, citizens could speak on virtually any matter secure from the risk that the content of their expression would subject them to imprisonment, criminal fines, or civil liability. Unpopular or radical speech might face social sanction, but incur no legal liability. But imagine further that in this society the government had access to all sorts of information about the reading habits and private communications of individuals. One might imagine the state engaging in this kind of surveillance to protect intellectual property from infringement, deter the consumption of obscenity and child pornography, and prevent acts of crime and terror. We would have a society in which there was little punishment by the state for spoken words, but heavy intellectual surveillance.

By the standards of current law, we would probably say that this was a highly speech-protective society. A society with little legal punishment for harmful speech is speech-protective almost by definition. But in such a society, something important is missing, which is intellectual privacy. Intellectual privacy matters because it gives new and possibly heretical ideas room to develop and grow before they are ready for publication. Intellectual privacy gives us the ability to make up our minds about controversial ideas by ourselves or with a few trusted confidants, free from being watched or discovered by others. By contrast, surveillance of intellectual activity deters people from engaging with new ideas and inclines our intellectual explorations to the boring, the bland, and the mainstream. If we know that someone is watching and listening, we will be careful with not just what we say but also what we read and even what we think.

Intellectual surveillance gives the watcher great power over the watched. Even when what we read or think or say privately might not subject us to imprisonment or liability, the threat of its disclosure could nevertheless cause us to guard our words or thoughts. A watcher can use the threat of disclosure to discredit political opponents. Imagine if there were a public critic of government policy on race relations who was subject to pervasive electronic surveillance. By watching what she read and what she said, the government would not only have an advantage in any debate with this dissident, but it could also use the threat of disclosure of her reading habits to keep her in check. One can imagine such a critic of government policy, if she were aware of surveillance, not only being careful of what she said privately to her confidants but also being careful in what she read and what websites she visited. Without some meaningful guarantee of intellectual privacy, political freedom as we understand it could become impossible.

This "hypothetical" society is arguably very similar to the one we live in today. By almost any traditional standard, modern American law is highly

protective of free speech restrictions by the state. Recall the *Snyder v. Phelps* case, which protected a horrific funeral protest that caused serious emotional harm to the family of a deceased soldier.[10] More generally, modern American society is exceptionally speech protective, even by the standards of modern Western democracies. In Europe and Canada, the government can regulate and even censor speech that is racist or hurtful. By contrast, in the United States, such speech is protected, frequently to the horror of Canadian or European observers, who believe that a free and civilized society must protect its citizens from hate speech and other forms of dignitary or emotional harm.[11]

Reasonable societies can certainly disagree about the extent to which government can restrict certain kinds of harmful speech to promote the public good; such a conversation has taken place in the United States and is ongoing in the context of cyber hate speech.[12] But I would maintain that some commitment to intellectual privacy is a necessary requirement for the kinds of democratic freedom that all Western societies aspire to.

The aforementioned surveillance example might sound far-fetched, but it is not. For example, concerned that Martin Luther King Jr. was a threat to public order, the FBI listened in to his private telephone conversations in order to seek information with which to blackmail him. As the official government investigation into the King wiretaps concluded in 1976:

> The FBI collected information about Dr. King's plans and activities through an extensive surveillance program, employing nearly every intelligence-gathering technique at the Bureau's disposal. Wiretaps, which were initially approved by Attorney General Robert F. Kennedy, were maintained on Dr. King's home telephone from October 1963 until mid-1965; the SCLC headquarter's telephones were covered by wiretaps for an even longer period. Phones in the homes and offices of some of Dr. King's close advisers were also wiretapped. The FBI has acknowledged 16 occasions on which microphones were hidden in Dr. King's hotel and motel rooms in an "attempt" to obtain information about the "private activities of King and his advisers" for use to "completely discredit" them.[13]

Imagine a dissident like King living in today's information age. Government officials (or political opponents) who wanted him silenced

might be able to obtain not just access to his telephone conversations but also his reading habits and emails. Our critic could be blackmailed outright, or he could be discredited by disclosure of the information as an example to others. Perhaps he has not been having an affair but has some other secret. Maybe he is gay, or has a medical condition, or visits embarrassing websites, or has cheated on his expenses or his taxes. All of us have secrets we would prefer not be made public. Surveillance allows those secrets greater opportunities to come out, and it gives the watchers power that can be used nefariously.[14]

Of course, we have laws protecting against some kinds of surveillance and information collection by individuals and the state, such as the federal Electronic Communications Privacy Act.[15] But when revelations about secret government spying come out, we sometimes lack a vocabulary to explain why it is wrong. My goal here is to illustrate exactly *why* we have these kinds of laws and the important constitutional values they serve. We normally justify the protection of thinking, reading, and private communication under a vague rubric of "privacy," but as we have seen, privacy can mean many things. Looking at these questions from the perspective of *intellectual* privacy illuminates not only the importance of these sorts of legal rules but also how they contribute directly to the kinds of political freedom we often take for granted. It can also point the way toward thinking about how and why we should expand these kinds of protections to take account of gaps in their coverage and changes in technology.

All Western societies share a foundational commitment to the freedom of speech on public matters—a belief that new ideas should be aired and given their say.[16] But if we are interested in freedom of speech and the ability to express new and possibly heretical ideas, we should care about the social processes by which these ideas are originated, nurtured, and developed. After all, a society that cares about the free exchange of ideas should be committed to producing new ideas and not just in shouting the same old ones as loudly as possible.

How Intellectual Privacy Works

Intellectual privacy rests on the intuition 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 belief 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.

Writers have long noted the intuition that when we are watched, our behavior inclines to the mainstream, the inoffensive, and the "normal." This is the insight behind Jeremy Bentham's famous image of the Panopticon, a circular prison designed around a central surveillance tower that could see into all of the cells in such a way as to create a sense of permanent surveillance on the part of the prisoners.[17] The wardens could watch any prisoner at any time, but each individual prisoner had no idea when or even if he was being watched. The purpose of this arrangement was to create an environment of permanent surveillance in the minds of the prisoners so they would behave in the manner that the wardens desired.

Bentham's invention was famously explored by French philosopher Michel Foucault, who dramatically described the Panopticon as follows:

> We know the principle: at the periphery, an annular building; at the center, a tower. . . . All that is needed, then, is to place a supervisor in a central tower and to confine in each cell a madman, someone sick, someone condemned, a worker, or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive silhouettes in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualized and constantly visible.[18]

The Panopticon's purpose was to change behavior; those in the cells were aware that they could be watched at any one time. This was a calculated design feature intended to create the sense of pervasive surveillance at any time. As Bentham himself put it, "[t]he fundamental advantage of the Panopticon is so evident that one is in danger of obscuring it in the desire to prove it. To be incessantly under the eyes of the inspector is to lose in effect the power to do evil and almost the thought of wanting to do it."[19]

The most striking illustration of the Panopticon in Western culture is George Orwell's description of the mechanics of surveillance in his

novel *Nineteen Eighty-Four.*[20] Orwell famously depicted a society of total state surveillance, designed to produce not just obedience on the part of the people but uniformity of thought. In Orwell's society, it was not just a crime to express dissent against the state, but a crime to think such an idea—a "Thoughtcrime." Orwell's fictional state—personified by the sinister image of "Big Brother"—achieved its control over the mouths and minds of its people through old-fashioned methods such as human informers and a secret police, but also through the technology of the "telescreen." This omnipresent tool operated like a videoconferencing device—broadcasting propaganda outward, but also monitoring all that happened within view of its cameras. Orwell describes the operation of the telescreens as experienced by his protagonist, Winston Smith, as follows:

> The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it, moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[21]

By eliminating any vestige of intellectual privacy in this and other ways, Big Brother sought—successfully in Orwell's work of fiction—to shrink the freedoms of thought and speech through surveillance, and to eliminate any possibility of intellectual or political freedom for the people under its sway.

The commitment to intellectual freedom outlined here is a moral one—that we should protect intellectual freedom and intellectual privacy because they are necessary elements of a good and free society. But my claim about surveillance chilling intellectual experimentation contains a factual assertion as well—that intellectual surveillance deprives people

of the privacy they need to make up their minds autonomously. When our intellectual activities are secretly watched, this is an injury to our civil liberties, but my argument that the processes of intellectual experimentation and belief formation are deterred and affected for the worse by surveillance depends upon (1) subjects being watched; (2) the subjects knowing or fearing that they are being watched; and (3) the surveillance causing a disruption in their intellectual activities.

At one level, it would seem obvious that surveillance chills and deters free thought, reading, and communications. This is the long-standing insight of Bentham, Foucault, and Orwell. But there is other interesting evidence that people under surveillance change their behavior toward the ordinary and the inoffensive. Over the last twenty years, a burgeoning academic literature of "surveillance studies" in sociology and other fields has attempted to document the effect of surveillance on a wide variety of human activities.[22] Although the starting point for this body of work has been the classic image of the Panopticon, this literature has explored and illustrated the normalizing effects of surveillance in a wide variety of settings. These scholars have studied the effects on behavior from (for example) state monitoring of welfare recipients and the use of undercover policing and closed-circuit television systems to deter sex in public places, public urination, and crime in general.[23] Other scholars have documented the effects and the implications of electronic and other forms of "new surveillance" in our increasingly information-based society.[24] One experiment revealed that workers put more money in a break room honesty box as requested by a sign when the background of the sign had eyeballs on it.[25] When we feel we are being watched, we act differently.

Of course, the normalizing effects of surveillance can sometimes be a good thing—one of the reasons we have police in uniform is to encourage people to obey the law and stop them from speeding or engaging in robbery. Surveillance can deter unpopular bad behavior as well as unpopular good behavior. As sociologist David Lyon explains, "surveillance is not unambiguously good or bad."[26] A recent study of the use of CCTV in holding cells, for example, found that the presence of a camera restrained the violent behavior of both police and arrestees.[27] As we saw in chapter 2, even Brandeis himself remarked shortly after publishing *The Right to Privacy* that surveillance could be beneficial at keeping wrongdoers in check; that sunlight is the best of disinfectants.

Crimes and frauds are one thing. But questions of civil liberties, of speech and thought, are quite another. When the tools of criminal deterrence affect civil liberties, we need to treat them with care. Like other Western societies, we have made a commitment to civil liberties that requires us to keep the state out of such matters. We allow the state to watch us when we might be speeding, but not when we might be voting against the party in power. Surveillance and observation are powerful tools. But their power requires us as a society to keep them within carefully circumscribed limits, and especially away from our most cherished civil liberties.

First Amendment law reflects this insight. We let the state regulate the content of nutritional labels on cereal, but not the editorials in newspapers or the placards of protestors. One of the basic elements of First Amendment law is the idea that when people are subject to punishment for speaking, there is a "chilling effect" on the exercise of their constitutional right to free expression. In First Amendment freedom of speech cases, courts rarely require proof of a chilling effect. For example, in *Hustler Magazine v. Falwell*, Chief Justice Rehnquist, writing for the Court, accepted without proof the idea that a civil liability rule for journalists would have a chilling effect, even when the journalists were not telling the truth.[28] The late Chief Justice was not usually a defender of a robust First Amendment. Nevertheless, even he treated it as a given that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value."[29] If I am correct that free thinking and free reading are critical to the exercise of First Amendment rights, then it would logically follow that government surveillance causing a chill to intellectual experimentation would violate the First Amendment. The law on this point is currently unclear, though a few courts have suggested something along these lines.[30] But if we think that surveillance by companies or other private actors would affect our reading and thinking as well, then we should be concerned about a threat to our culture of free speech, even if the First Amendment does not apply as a formal matter.

Keeping out those who would monitor our reading and private communications is essential if we want to generate new ideas, a fact our law has long recognized in subtle and sometimes underappreciated ways. Timothy Macklem has argued 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 subversive."[31] When there is protection from surveillance, new ideas can be entertained, even when they might be deeply subversive or threatening to conventional beliefs. If we value a pluralistic society or the mental processes that produce new ideas, then some measure of intellectual privacy, some respite from cognitive surveillance, is essential. Any meaningful freedom of speech requires an underlying culture of vibrant intellectual innovation. Intellectual privacy nurtures that innovation, protecting the engine of expression—the imagination of the human mind. To the extent our existing theories of law—First Amendment, Fourth Amendment, or otherwise—are under-protective of intellectual privacy, we must rehabilitate them to take these vital processes into account.

The Elements of Intellectual Privacy

Let's recap my argument. Intellectual privacy has at least three related dimensions—(1) the freedom of thought and belief, (2) the right to read and engage in intellectual exploration, and (3) the confidentiality of communications. Each of these elements is needed for intellectual privacy to work, and all of them are related and build on the others. Thus, while *freedom of thought and belief* is the core of a free society, developing our thoughts and opinions requires access to the ideas of others. So that we can read and follow the dictates of our conscience and imagination, *the right to read freely* protects our ability to read without being deterred by the observation, disapproval, or interference of others. Finally, before our ideas are ready for public consumption, it is often helpful to test them privately in discussions with our trusted intimates, which requires the *confidentiality of communication*. Intellectual privacy may require other things to be fully protected—access to education or associational liberties, or a place to read privately, for example—but the three elements I identify in this book are the most important, and the easiest for the state or private parties to undermine. Each of the next three chapters addresses an element of intellectual privacy, shows how they are mutually supportive, and gives examples of why they matter and how they are increasingly coming under threat in our digital world.

7

Thinking

The Search Subpoena

The Justice Department's subpoena was straightforward enough. It directed Google to disclose to the U.S. government every search query that had been entered into its search engine for a two-month period, and to disclose every Internet address that could be accessed from the search engine. Google refused to comply. And so on Wednesday January 18, 2006, the Department of Justice filed a court motion in California, seeking an order that would force Google to comply with a similar request—a random sample of a million URLs from its search engine database, along with the text of every "search string entered onto Google's search engine over a one-week period."[1] The Justice Department was interested in how many Internet users were looking for pornography, and it thought that analyzing the search queries of ordinary Internet users was the best way to figure this out. Google, which had a 45-percent market share at the time,[2] was not the only search engine to receive the subpoena. The Justice Department also requested search records from AOL, Yahoo!, and Microsoft. Only Google declined the initial request and opposed it, which is the only reason we are aware that the secret request was ever made in the first place.[3]

The government's request for massive amounts of search history from ordinary users requires some explanation. It has to do with the federal government's interest in online pornography, which has a long history, at least in Internet time. In 1995 *Time Magazine* ran its famous "Cyberporn" cover, depicting a shocked young boy staring into a computer monitor, his eyes wide, his mouth agape, and his