COERCIVE DISCOVERY AND THE FIRST AMENDMENT: TOWARDS A HEIGHTENED DISCOVERABILITY STANDARD

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This Comment addresses whether the First Amendment restricts a litigant's or the government's ability to compel disclosure of information about protected First Amendment activities. In evaluating whether such speech-related information may be subpoenaed, courts have struggled to balance a speaker's right to anonymous or confidential speech with the evidentiary needs of prosecutors or plaintiffs.

The fractured jurisprudence addressing this issue contains a multitude of discoverability standards that vary dramatically in the level of protection afforded to speakers. In some circumstances, such as when a party subpoenas confidential membership or donor lists, courts have refused to compel disclosure absent a showing of a compelling interest and need for the information. In other situations, for instance subpoenas seeking confidential statements, the requesting party need only demonstrate mere relevance. In still other cases, such as when the discovery request seeks to identify an anonymous blogger or a journalist's anonymous source, courts balance the competing interests through application of multifactor tests. Yet notwithstanding such doctrinal compartmentalization, an important commonality exists between different types of cases involving compelled disclosures: the risk that coercive discovery techniques, such as subpoenas and search warrants, will chill freedom of expression.

This Comment argues that given the inadequacy of current discovery laws and constitutional criminal procedure standards as a safeguard of free speech interests, the First Amendment should operate as an additional restriction on coercive investigatory powers. It thus makes the case for subjecting coercive discovery requests for information about speech-protected activities to a uniform, heightened discoverability standard. Specifically, it proposes a five-part framework under which courts should analyze whether certain speech-related information can be coercively discovered.

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INTRODUCTION

When can a court compel a litigant to identify himself as the author of anonymously written material, or force him to reveal what he said in confidence to a colleague, at the behest of his adversary? When can a prosecutor compel a suspect to disclose what books he recently read, or which organizations he belongs to, in an effort to establish his guilt?

Coercive discovery techniques, such as subpoenas and search warrants, provide easy and effective means of obtaining such information.[1] Subpoenas can generally be used to compel disclosure of information or testimony where there is a reasonable possibility that the subpoena will produce relevant information.[2] Relevant information, or "information [that] tends to prove or disprove something the governing substantive law says matters," is generally interpreted broadly in discovery matters.[3] This relatively undemanding standard, not surprisingly, renders subpoenas widely available to litigants.

Although search warrant procedures are comparatively more restrictive, the discoverability standard for search warrants is far from rigorous. For a search to be considered reasonable—and thus constitutional, under the Fourth Amendment—the government is required to show probable cause that a crime

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1. Subpoenas are orders that command a party to produce certain information or to testify on a given matter. They do not require judicial approval unless the target of the request refuses to comply and challenges enforcement by bringing a motion to quash. *See* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 30 (1986) ("[S]ubpoenas and summonses for documents have become a staple of investigations regarding every variety of sophisticated criminal activity, from violations of regulatory provisions to political corruption and large-scale drug dealing."); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 805–06 (2005) (describing subpoenas as a "primary mechanism" for acquiring access to records and other documents, and noting that "[a]lthough both [grand jury and administrative] subpoenas can be challenged by the recipient before any documents are handed over, both are also extremely easy to enforce" (footnote omitted)).

2. *See* United States v. R. Enters., 498 U.S. 292, 301 (1991) ("[W]e conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that 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."). Civil subpoenas served on a party to the action are governed by Rule 26 of the Federal Rules of Civil Procedure, while civil third-party subpoenas are subject to the requirements of Rule 45 of the Federal Rules of Civil Procedure. Judicial approval is only required where the target resists the subpoena and challenges its enforcement on a motion to quash.

Subpoenas in criminal actions are governed by Rule 17(c) of the Federal Rules of Civil Procedure. Third-party subpoenas in criminal actions have been interpreted to require a showing of relevancy, admissibility, and specificity by the requesting party. *See* United States v. Nixon, 418 U.S. 683, 699–700 (1974); *see also* United States v. King, 194 F.R.D. 569, 572–75 (E.D. Va. 2000) (applying the *Nixon* test and enforcing a subpoena duces tecum requesting production of "outtakes" of a television reporter's interview of a government witness).

3. STEPHEN C. YEAZELL, CIVIL PROCEDURE 416 (7th ed. 2008).

has been or is being committed, or that the search will produce evidence. Probable cause is satisfied where the government can show "'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."[4]

However, the Fourth Amendment's utility as a check on broad coercive investigatory powers is limited, at best. It is inapplicable in many situations where the government employs a search warrant to discover speech-related information,[5] and the probable cause requirement is not imposed where a prosecutor employs a criminal subpoena rather than a search warrant. Moreover, once probable cause has been shown and a search warrant has been issued, the target of a search has no recourse to challenge the warrant's constitutionality prior to its execution.

That liberal discoverability standards render confidential information vulnerable to disclosure through coercive discovery is not necessarily a matter of constitutional concern. However, where a discovery request implicates information about protected speech-related activities, an important constitutional question is raised: whether the First Amendment can operate as an additional legal ground for restricting the scope of coercive discovery.[6]

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4. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 118 (2007) (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

5. The Supreme Court has held that the Fourth Amendment only applies to governmental activities that intrude upon an individual's "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347 (1967). A reasonable expectation of privacy is recognized only where a claimant satisfies a two-part test: "first that [he] . . . exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). *See generally* Solove, *supra* note 4, at 117–18. Under the "third party doctrine," individuals lack a reasonable expectation of privacy in information that has been communicated to third parties. For example, in *Guest v. Leis*, the Sixth Circuit rejected the claim that individuals have a "Fourth Amendment privacy interest in their [internet service] subscriber information because they communicate[ ] it to the systems operators." 255 F.3d 325, 336 (6th Cir. 2001); *see also* United States v. Kennedy, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (holding the Fourth Amendment was inapplicable because the defendant "knowing[ly] revealed [to his ISP] all information connected to [his] IP address"). Moreover, the Supreme Court has repeatedly held that the Fourth and Fifth Amendments provide little protection against subpoenas. *See* Fisher v. United States, 425 U.S. 391, 398 (1976) (holding that third party subpoenas requesting personal documents do not implicate the Fifth Amendment); United States v. Dionisio, 410 U.S. 1, 9 (1973) (holding that subpoenas generally do not constitute a Fourth Amendment search).

6. Some may question whether sufficient state action exists in such situations to warrant invocation of the First Amendment. However, even where a private plaintiff subpoenas a defendant to compel disclosure of speech-related information, the court's action in enforcing or quashing the subpoena brings it within the ambit of the First Amendment. *Cf.* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (holding that the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the Fourteenth Amendment).

The fractured nature of the judicial response to this inquiry points to a problem that courts and scholars have yet to adequately resolve. As this Comment will argue, the question of whether the First Amendment limits litigants' ability to compel disclosure of anonymous or confidential coercive discovery of speech-related information is a single legal question properly analyzed under a single legal framework. Courts, however, have compartmentalized this question, creating context-based subdoctrines that vary according to the type of information sought, the identities of the litigants, or the nature of the underlying action. The resulting variance in discoverability standards has generated doctrinal inconsistencies and confusion as to the proper measure of procedural protection from coercive discovery.

For instance, where the requested information involves protected associational activities—such as an organization's membership or donor list—courts have consistently held that a showing more rigorous than relevance is necessary to protect individuals' First Amendment interests in freedom of association. Here, judicial orders compelling discovery are subjected to a heightened standard of review resembling strict scrutiny. The "compelling interest" requirement was first set forth in the seminal case of *NAACP v. Alabama*.[7] In refusing to compel disclosure of the NAACP's membership list, the U.S. Supreme Court reasoned that the state failed to demonstrate an interest "sufficient to justify the deterrent effect which . . . disclosures may well have on [NAACP members'] free exercise . . . of their constitutionally protected right of association."[8]

Similarly, a First Amendment–based right to read anonymously has also been invoked as justification for applying a heightened procedural standard to coercive discovery requests for information related to personal reading materials. For example, the Colorado Supreme Court held that law enforcement officers could not compel a third-party bookstore to disclose customer purchase records related to a book found during a criminal drug investigation unless the government could demonstrate both a compelling need for the information and a lack of alternative means of obtaining the information that would be less destructive of First Amendment rights.[9]

Conversely, where information relating to an individual's oral or written statements is subpoenaed, courts do not recognize any First Amendment–based restrictions on discovery at all.[10] Rather, oral and written statements

7. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
8. *Id.* at 463.
9. Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1055 (Colo. 2002).
10. Eugene Volokh, *Deterring Speech: When Is It "McCarthyism"? When Is It Proper?*, 93 CAL. L. REV. 1413, 1445–46 & nn.108–11 (2005) ("Courts don't even require police to show a 'compelling need' for each piece of speech-related evidence for which they subpoena or search.").

are discoverable upon a showing of bare relevance, a standard of review more akin to rational basis than strict scrutiny. In this context, the issue is often framed in terms of the existence of certain privileges. For instance, in two notable cases, the Supreme Court refused to recognize First Amendment–based editorial[11] and academic[12] privileges that would shield confidential statements made during editorial boardroom discussions and tenure reviews. Relatedly, the Supreme Court has held that protected speech can be admissible as evidence to establish that a defendant committed a hate crime or discriminatory act.[13] In reaching these conclusions, the Court has reasoned that to require a standard more particularized than relevance would frustrate litigation and obstruct law enforcement efforts.[14]

Yet in other situations, courts have adopted a middle ground and employed various multifactor tests designed to balance a speaker's interest in preventing disclosure against the requesting party's interest in obtaining the information. Perhaps the most prominent cases utilizing this multifactor approach involve a journalist's privilege to shield the identity of his confidential sources from coercive investigatory techniques. In *Branzburg v. Hayes*,[15] the Supreme Court refused to recognize an absolute journalist privilege to shield sources' identities. However, most appellate circuits have adopted the case-by-case approach endorsed by Justice Powell's concurring opinion in *Branzburg*, and recognize some form of qualified reporter's privilege.[16] Substantial disagreement currently exists amongst circuits as to both whether a reporter's privilege exists and, if so, what framework should be utilized in applying it.[17] Perhaps not surprisingly, this jurisprudence is beset by confusion. More recently, multipart tests have been applied in actions involving internet speech to determine when a plaintiff can compel disclosure of an anonymous "John Doe" defendant's identity.[18] The compelled disclosure

11. Herbert v. Lando, 441 U.S. 153 (1979).

12. Univ. of Pa. v. EEOC, 493 U.S. 182 (1990).

13. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476 (1993); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

14. In *Herbert*, the Court refused to recognize an absolute "editorial privilege" made in the course of editorial boardroom deliberations from discovery in defamation actions. 441 U.S. at 169–77. Similarly, in *University of Pennsylvania*, the Court rejected the claim that an "academic freedom" immunized confidential statements made in tenure review discussions from discovery in Title VII actions. 493 U.S. at 200–01.

15. 408 U.S. 665 (1972).

16. *See infra* Part I.C (discussing the circuit split arising from Justice Powell's concurrence).

17. *See infra* Part I.C.

18. *See, e.g.*, Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); Mobilisa, Inc. v. Doe 1, 170 P.3d 712 (Ariz. Ct. App. 2007); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Ct. App. 2008); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct.

issue most frequently arises when plaintiffs who claim to have been harmed by speech on internet websites, blogs, online bulletin boards, or chat rooms subpoena the relevant third-party Internet Service Provider (ISP) to compel disclosure of subscriber information that will unmask the individual who posted the allegedly actionable message. To the extent that courts apply a strict scrutiny–like review to information about reading and associations, and a level of review similar to rational basis to information relating to confidential statements, the middling standard of review applied in cases involving journalist privilege and anonymous internet speech is most akin to intermediate scrutiny.

This Comment makes the case for subjecting coercive discovery requests about protected First Amendment activities to a uniform, heightened standard of discoverability. Two key components inhere in this claim: (1) that, notwithstanding the current doctrinal compartmentalization, these cases present a unitary legal question warranting a uniform analytical framework; and (2) that First Amendment interests at stake in discovery determinations warrant application of a heightened standard of discoverability.

Courts have yet to meaningfully explain why, for instance, a party who subpoenas the Church of Scientology cannot compel disclosure of group members' identities without demonstrating a compelling interest in obtaining the information, but the same party could compel disclosure of confidential statements made during a private Scientology meeting merely by showing that the statements are relevant to the action. Likewise, to the extent that the First Amendment restricts the government's ability to coercively discover a list of book purchases in a criminal investigation, it is unclear why no role exists for the First Amendment in evaluating whether the government can compel disclosure of what the suspect said to the clerk at the bookstore checkout counter. Though valid reasons may exist for distinguishing between these situations, such a rationale has yet to be persuasively articulated.

Moreover, by categorizing compelled-disclosure disputes based purely on contextual factors, courts have obscured a key commonality: the threat that coercive discovery will "chill" free expression. In essence, coercive discovery chills speech by deterring people from speaking, writing, or joining an organization. Anonymity and, to a lesser degree, confidentiality foster free expression by relieving an individual's fear that he'll be fired, harassed, or socially ostracized based on the content of his speech. Put differently, people

App. Div. 2001); *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

cannot freely express unpopular or incendiary viewpoints if they are afraid that what they say could be revealed to police officers, judges, opposing counsel, or the general public against their will.

Thus, in an effort to avoid the harmful or prejudicial effects accompanying public disclosure, many will resort to self-censorship. They will be less apt to purchase potentially incriminating books; less apt to join organizations that promote controversial or disfavored agendas; less apt to jeopardize their careers by secretly leaking evidence of corporate misfeasance; and less apt to jeopardize their reputations by anonymously posting offensive or inflammatory statements online.

Determinations about whether to compel disclosure must, to some extent, be fact specific. Yet where courts balance unarticulated factors to arrive at disparate conclusions, the ad hoc nature of decisionmaking fosters uncertainty about the scope of permissible discovery. Faced with this uncertainty, rational individuals will aim to steer clear of the perceived boundary, and avoid engaging in activities protected by the First Amendment as well as unprotected acts. Speech, in other words, will be chilled.

Although some scholars have noted a connection between compulsory disclosures in one or two of the contexts discussed,[19] none have approached this issue from as broad a vantage point. In so doing, this Comment reveals an important insight. Regardless of whether the discovery request pertains to membership lists, book purchase records, identities of anonymous bloggers or informants, confidential statements made in internal deliberations, or ordinary emails, courts evaluating the permissibility of disclosure engage in the same analytical task: reconciling First Amendment interests in fostering free expression with evidentiary needs for information.

Yet while broad in scope, the focus of this Comment is far narrower. Its central concern lies not with courts' ultimate conclusions as to whether to compel disclosure, but, rather, with *how* courts arrive at such determinations. This Comment proposes a single, heightened discoverability standard to evaluate the discoverability of coercive requests for information about First Amendment activities. What it proposes, in essence, is an application of "First Amendment Due Process"—a procedural prophylactic intended to diminish self-censorship without imposing an undue burden on law enforcement.[20]

19. *See, e.g.*, Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075 (2008).

20. *See generally* Henry P. Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518 (1970).

The discoverability standard proposed herein consists of five inquiries: (1) whether reasonable efforts have been made to notify the speaker of the discovery request; (2) whether the information sought merits qualified First Amendment protection; (3) whether the requesting party can make a prima facie showing of an actionable claim; (4) whether the information has sufficient probative value; and (5) whether reasonable alternative means of obtaining the information exist.

This Comment proceeds in three parts. Part I surveys a broad range of case law involving compelled disclosures of information about First Amendment activities. This Part elucidates both the contrast between levels of First Amendment–based procedural protection from discovery across categories of cases, as well as the disparate discoverability tests utilized by courts faced with this issue. Part II lays the groundwork of the case for applying a uniform analytical framework to coercive discovery requests for information about First Amendment activities. It discusses the rationale for affording speech-related information enhanced procedural protection and explains why a uniform standard is desirable. Part III then articulates a novel, five-part discoverability framework and explains each component by means of examples from existing case law. This Part considers some potential objections, but ultimately concludes that the costs of such a framework are a fair price to pay to prevent coercive discovery from chilling freedom of expression.

I. THE FRACTURED STATE OF CURRENT LAW

As this Comment argues, the use of coercive discovery to obtain information about people's First Amendment activities implicates a single legal issue properly resolved under consistent analytical framework. Yet the current landscape presents a very different picture. This Part examines numerous applications of this issue, emphasizing the disparate standards of discoverability and levels of protection in different contexts.

A. Applications of a Compelling Interest Standard to Coercive Discovery Requests for Speech-Related Information

1. Subpoenas of Confidential Information About Associational Activities

Courts have consistently restricted a party's ability to compel disclosure of information about protected associational activities, such as an

organization's membership or donor list,[21] by requiring the requesting party to make a heightened showing of need for the information.[22]

In 1958, the Supreme Court held in *NAACP v. Alabama*[23] that because compelling disclosure of the NAACP's membership list would deter participation in the organization, the state had to "justify the deterrent effect" by showing a "[compelling] interest in obtaining the disclosures."[24] The Court reasoned that disclosure would result in a deterrent effect because it "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."[25]

Noting prior instances where NAACP members were harassed, the Court concluded that disclosure would expose NAACP members "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[26] It held that the state of Alabama "[fell] short of showing

21. Even though association is not explicitly mentioned in the text of the First Amendment, the Supreme Court has expressly granted First Amendment protection to expressive associational activities. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). Moreover, the Supreme Court has defined protected "expressive" association as "association for the purpose of engaging in expressive activities." Solove, *supra* note 4, at 147 (citing *U.S. Jaycees*, 468 U.S. at 618). This purpose, however, need not be directed towards advancing a particular viewpoint or message to warrant First Amendment protection. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) ("An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.").

22. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (Disclosure depends on whether the government demonstrates "so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."); *Patterson*, 357 U.S. at 464 ("Whether there was 'justification' in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists."). The highly protective standard for discoverability applied in this context is thus reminiscent of the strict scrutiny test applied in other areas of First Amendment law.

23. 357 U.S. 449 (1958).

24. *Id.* at 460–63.

25. *Id.* at 462–63. Though the Court's decision in *Patterson* was largely based on the desire to prevent such deterrence, subsequent cases have held that the right to associate anonymously is not restricted to members of controversial or unpopular organizations for whom the chilling effect is most probable. *See* Britt v. Superior Court, 574 P.2d 766, 772 (Cal. 1978) ("[A]ll legitimate organizations are the beneficiaries of these [privacy of association] protections . . . ." (quoting Gibson v. Fla. Legislative Comm., 372 U.S. 539, 556 (1963))).

26. *Patterson*, 357 U.S. at 462.

a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have."[27]

Similarly, in *Bates v. Little Rock*,[28] the Supreme Court held that disclosure of the identities of NAACP members "would work a significant interference with the freedom of association of their members" because of likelihood that "harassment and threats of bodily harm" would accompany disclosure.[29] The Court thus demanded the requesting party demonstrate "so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect," holding that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[30]

The same year, in *Shelton v. Tucker*,[31] the Court invalidated a law that required teachers to annually disclose their group affiliations. Reasoning that teachers would be deterred from participating in certain groups out of fear that such affiliations would be disclosed, the court held that "to compel [disclosure of] every associational tie is to impair that teacher's right of free association."[32]

Since the 1960s, courts have continued to subject coercive discovery requests for information about associational activities to a heightened discoverability standard. For example, in 2008, a church sued a Florida town alleging that the town's denial of the church's building permit was improper.[33] During discovery, the town subpoenaed the church to compel disclosure of the identities of church members. The court quashed the subpoena, holding that the town had failed to demonstrate a "compelling need" that justified

27. *Id.* at 466. Alabama's purported reason for seeking the membership lists was to prove that NAACP had conducted intrastate business in violation of its charter.

28. 361 U.S. 516 (1960).

29. *Id.* at 523–24.

30. *Id.* at 524.

31. 364 U.S. 479 (1960).

32. *Id.* at 485–87 ("[F]ear of public disclosure is neither theoretical nor groundless. Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty." (footnote omitted)). It is worth mentioning that *Shelton* constituted a stronger case for disclosure than *Patterson* and *Bates*, where no substantially relevant correlation existed between the governmental interest asserted and the requested membership list. However, in *Shelton*, the requested information sought was considerably more relevant to the asserted state interest in assessing the "fitness and competence of its teachers." *Id.* at 485.

33. Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV, 2008 WL 2686860 (S.D. Fla. June 29, 2008).

compromising the church's First Amendment interests through disclosure.[34] In making this determination, the court applied a five-part standard that included, among other requirements, that the disclosure "went to the heart of the matter," that it was not was available from other sources, and that it was not the least restrictive means available for accomplishing the town's objectives.[35]

2. Subpoenas of Confidential Information About Reading Material

The First Amendment protects an individual's right to free receipt of information as a corollary of the right to free speech.[36] This proposition was first articulated in *Stanley v. Georgia*,[37] in which the Supreme Court stated that "[i]t 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."[38] In recognizing this right, courts have explicitly linked forcing recipients of information to identify themselves with chilling speech.

34. *Id.* at *8.

35. In full, the five factors enumerated by the court were: (1) whether the information sought went to the heart of the matter; (2) the availability of the information from alternative sources; (3) the nature of the information sought, including the likelihood of injury to the association and its members if the desired information is released; (4) the requesting party's role in the litigation (i.e. whether they were a defendant in the suit); and (5) whether the disclosure sought constituted the least restrictive means for accomplishing requesting party's objectives, and would not unnecessarily sweep aside constitutional rights. *See id.* The court noted that the five factors articulated were "[a]mong other considerations" courts have taken into account. *Id.* at *7.

36. 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, 800 (2006) (describing a First Amendment right to "silently quarry . . . for information that will enlighten, enrich, or simply entertain"). The broad First Amendment protection afforded to receipt of information is derived from its close relationship to speech. *Cf.* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) ("This right [to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.").

As Professor Blitz observes, the First Amendment right of readers and listeners to receive information is far less developed than aspects of free speech relating to speakers' rights. Blitz, *supra*, at 800; *see also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1003 (1996) (contending that courts and scholars should give more attention to "reading, its relationship to speech, and its place in our jurisprudence of speech and speaker's rights").

37. 394 U.S. 557 (1969).

38. *Id.* at 564 (citations omitted).

For example, in *Lamont v. Postmaster General*,[39] the Supreme Court invalidated a federal statute that required any citizen who wished to receive "communist political propaganda" in the mail to specifically identify himself to the post office.[40] The Court reasoned that the identification requirement would discourage individuals from reading any material that might lead the government to infer they were involved in criminal activities.[41] Justice Brennan, concurring, noted that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[42]

A similar rationale underlies the Supreme Court's repeated invalidation of laws prohibiting the anonymous publication of pamphlets and other materials.[43] It struck down one such law prohibiting the anonymous distribution of campaign literature in *McIntyre v. Ohio Elections Commission*,[44] lauding anonymity as a "shield from the tyranny of the majority."[45] In invalidating the Ohio statute the Court reasoned that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[46]

Similarly, support for a First Amendment–based right to anonymous receipt of information has informed a more rigorous discovery standard where a party seeks to compel disclosure of information about reading material, such as bookstore or library records.

For example, in the 2002 case of *Tattered Cover, Inc. v. City of Thornton*,[47] the Colorado Supreme Court held that law enforcement officers could not compel a third-party bookstore to disclose customer purchase information related to two drug-related books found near a methamphetamine lab during a criminal investigation without demonstrating a compelling interest in or

39. 381 U.S. 301 (1965).

40. *Id.* at 302.

41. *Id.* at 307 (stating that a "request in writing that [one's mail] be delivered" was "almost certain to have a deterrent effect"); *cf.* Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) ("Privacy of communication is an important interest [that] 'encourag[es] the uninhibited exchange of ideas and information among private parties.'" (citation omitted)).

42. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

43. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (finding a state violation of the pamphleteer's "right to remain anonymous"); Talley v. California, 362 U.S. 60, 64–65 (1960) (invalidating a Los Angeles ordinance requiring all handbills to bear the name of the person responsible for writing or distributing them).

44. 514 U.S. 334 (1995).

45. *Id.* at 357. Incidentally, it is worth noting that, in part, the Court invalidated the identification in *McIntyre* because it directly regulated the content of the speech. Such reasoning is inapplicable in the context of normal discovery requests, which generally are not content-based. Volokh, *supra* note 10, at 1444 n.105 (citing *McIntyre*, 514 U.S. at 345).

46. *Talley*, 362 U.S. at 65.

47. 44 P.3d 1044 (Colo. 2002).

need for the information and a sufficient connection between the information and the criminal investigation.[48] The court noted that because discovery would destroy customers' expectations of anonymity, a "more substantial justification" than the Fourth Amendment's probable cause standard was required before customer purchase records could be compelled.[49] Rejecting the government's claim that the book purchase records were needed to prove which suspect resided in the bedroom where the books and drugs were found, the court found that the government failed to demonstrate a compelling need for the information sufficient to justify the "harm to constitutional interests" that would likely ensue from execution of the search warrant.[50] It therefore concluded that the search warrant violated the first amendment of the Colorado constitution.[51]

In so holding, the Colorado Supreme Court relied on an approach adopted in the similar case of *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc*.[52] In *Kramerbooks*, Kenneth Starr subpoenaed records of Monica Lewinsky's book purchases at Kramerbooks and Barnes & Noble in connection with his investigation of President Bill Clinton.[53] The court agreed with Kramerbooks that the subpoenas implicated the "right to receive information and ideas" under the First Amendment. Accordingly, it required the Office of Independent Counsel to submit a "filing describing its need for the materials" so that it might determine whether a compelling need for the information existed.[54]

48. *Id.* at 1048–49, 1057.

49. The court further noted that lower courts applying this standard may consider "whether there are reasonable alternative methods of meeting the government's asserted need, whether the search warrant is unduly broad, and whether law enforcement officials seek the purchase records for reasons related to the content of the books bought by any particular customer." *Id.* at 1047.

50. The court's "basic rationale for this holding is that, before law enforcement officials are permitted to take actions that are likely to chill people's willingness to read a full panoply of books and be exposed to diverse ideas, law enforcement officials must make a heightened showing of their need for the innocent bookstore's customer purchase records." *Id.* at 1056. It further reasoned that the City's argument that the books would connect Suspect A to the crime are "somewhat amorphous because it never elaborates on the specific reason as to why the connection exists." *Id.* at 1063.

51. *But see* Brown v. Johnston, 328 N.W.2d 510 (Iowa 1983) (holding that the Iowa statutory section governing confidentiality of library records did not bar enforcement of a governmental subpoena seeking library records of all persons who checked out certain books). The court acknowledged the Supreme Court's declaration in *Zurcher v. Stanford Daily* that the First Amendment does not serve as a limitation on seizures of expressive material under the Fourth Amendment. *See Tattered Cover*, 44 P.3d at 1055 (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978)). Therefore, believing that the case presented "[one of the] situations where the Fourth Amendment simply does not go far enough," the court grounded its holding in the Colorado Constitution which, it reasoned, afforded "broader protection." *Id.* at 1054–55.

52. 26 Med. L. Rptr. 1599 (D.D.C. 1998).

53. *Id.* at 1599.

54. *Id.* at 1601.

Similarly, in 2005, a Maryland appellate court applied a comparable heightened discoverability standard in quashing an order to compel production of an investment newsletter's subscriber list.[55] The requesting party, the court stated, must establish a "substantial relation between the information sought and an overriding and compelling state interest" in order to compel production.[56] Because no "substantial nexus" existed between the investigation into potential violations of Maryland securities laws and the requested subscriber information, the court concluded that "the speculative value of the purchaser information does not outweigh the burden that compelled disclosure would place on the First Amendment interest of the individuals identified."[57]

B. Applications of a Bare Relevance Standard to Coercive Discovery Requests for Speech-Related Information

1. Subpoenas of Confidential Statements Made During Internal Deliberative Processes

In direct contrast to the heightened procedural standard applied to subpoenas for information involving anonymous association and/or confidential receipt of information, courts generally require no more than a showing of relevance when the information sought involves confidential oral or written statements. In two notable cases, *Herbert v. Lando*[58] and *University of Pennsylvania v. EEOC*,[59] the Supreme Court held that the First Amendment does not restrict coercive discovery of confidential statements made in private internal deliberations, such as editorial board discussions and tenure reviews.

In *Herbert*, the petitioner brought a defamation suit based on the portrayal of him on defendants' program, *60 Minutes*. In a purported effort to establish that the story was published with "actual malice,"[60] Herbert sought

55. Lubin v. Agora, Inc., 882 A.2d 833, 846 (Md. 2005). This case is an example of a "hybrid," as discussed in Part II.B, because it could be construed as involving both associational rights as well as the right to free receipt of information.

56. *Id.*

57. *Id.* at 847–48.

58. 441 U.S. 153 (1979).

59. 493 U.S. 182 (1990).

60. Under *New York Times v. Sullivan*, a public figure who is a plaintiff in a defamation action must demonstrate "actual malice" (meaning knowledge of falsity or reckless disregard for the truth of the information) to establish liability. 376 U.S. 254, 280 (1964). Reckless disregard for the truth may be established upon showing clear and convincing evidence that the defendant "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). The Supreme Court has, moreover, "equated reckless disregard of the truth with subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 334–35 n.6 (1974).

disclosure of statements made by editors during private board room meetings regarding selection of material for the program.[61] In response to the request, the defendants claimed that a First Amendment editorial privilege barred discovery of the editor's "thoughts, opinions, and conclusions with respect to the material gathered by him and about his conversations with his editorial colleagues."[62]

The Supreme Court disagreed, and rejected the assertion of editorial privilege. Instead, it held that enforcement of the subpoena would not impermissibly compromise the editor's First Amendment interests.[63] The Court reasoned that immunizing the editorial process from discovery would substantially interfere with a plaintiff's ability to prove the subjective state-of-mind requirement demanded by the actual malice standard, and that "firm[application]" of Rules 26(b) and 26(c) of the Federal Rules of Civil Procedure were sufficiently protective of the petitioner's First Amendment interests.[64]

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61. Specifically, Herbert sought to compel:

> (1) Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;
>
> (2) Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
>
> (3) The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
>
> (4) Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
>
> (5) Lando's intentions as manifested by his decision to include or exclude certain material.

Herbert, 441 U.S. at 157 n.2 (quoting Herbert v. Lando, 568 F.2d 974, 983 (2d Cir. 1977)).

62. *Id.* at 158.

63. Notably, Justice Powell's concurrence and Justice Brennan's partial dissent both advocated heightened procedural standards based on First Amendment concerns. *See id.* at 177–80 (Powell, J., concurring); *id.* at 180–99 (Brennan, J., dissenting in part). Though their arguments differed (Powell contended a stricter relevance inquiry was necessary while Brennan proposed application of a qualified privilege), both opinions indicated that a speech-protective balancing test was needed to protect First Amendment values without forgoing a plaintiff's ability to discover directly relevant evidence. *See* Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1, 26–27 (1994).

64. *See Herbert*, 441 U.S. at 170, 174, 177 ("The evidentiary burden Herbert must carry to prove at least reckless disregard for the truth is substantial indeed, and we are unconvinced that his chances of winning an undeserved verdict are such that an inquiry into what Lando learned or said during the editorial process must be foreclosed."); *see also* Faulkner, *supra* note 63, at 24–25 (enumerating "three principal reasons for the majority's rejection of defendants' arguments: (1) defendants were seeking an absolute privilege, that is, an 'impenetrable barrier' to protect the editorial process; (2) *Sullivan* made editorial processes directly relevant to the issue of actual malice; and (3) *Sullivan* had already imposed a high evidentiary burden ('clear and convincing') on public-figure defamation plaintiffs" (footnotes omitted)).

In a similar vein, the Supreme Court rejected a claim of academic privilege from coercive discovery in *University of Pennsylvania v. EEOC*, where it held that confidential statements made during the tenure review process were discoverable upon a showing of mere relevance.[65] In *University of Pennsylvania*, the respondent subpoenaed the University for her confidential peer review file, along with the tenure files of five male professors, in connection with her claim that she was denied tenure because she was an Asian American female.[66] The University refused to comply, asserting that a First Amendment–based academic privilege shielded the identities of peer reviewers, the content of peer review files, and the discussions of tenure boards from discovery.[67]

As in *Herbert*, the Court was unwilling to recognize a constitutional privilege where it was "unclear how often and to what extent informers are actually deterred from furnishing information . . . [and to] embark the judiciary on a long and difficult journey to . . . an uncertain destination," holding that confidential statements in tenure review materials were not protected from discovery.[68] The Court went on to distinguish previous case law on

65. 493 U.S. 182, 201–02 (1990).

66. *Id.* at 185–86. As indicated, the respondent sued the University for discrimination, alleging that she was denied tenure because of her sex and her race in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, which makes it unlawful "'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Id.* at 185 (quoting 42 U.S.C. § 2000e-2(a) (1982)).

67. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 601–04 (1967) (invalidating a New York statute on the grounds that regulating what teachers could or could not say would impermissibly chill their academic freedom and might deter them from teaching controversial topics); Hetrick v. Martin, 480 F.2d 705, 708–09 (6th Cir. 1973) (upholding a university's decision to terminate the employment of a nontenured teacher because of her unconventional pedagogical methods); Clark v. Holmes, 474 F.2d 928, 931–32 (7th Cir. 1972) (upholding a university's decision to terminate a nontenured teacher due to the teacher's refusal to conform to the university's proscribed course content); *see also* Laura I. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege*, 33 COLUM. J.L. & SOC. PROBS. 313, 314 (2000) (discussing the University's claim).

It is worth noting that the crux of the argument for an academic privilege from compelled disclosures was grounded in the threat of deterring speech. *See, e.g.*, EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983) ("It is clear that the peer review process . . . plays a most vital role in the proper and efficient functioning of our nation's colleges and universities . . . . Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process . . . . Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future." (citation omitted)).

68. *Univ. of Pa.*, 493 U.S. at 201 (citation omitted). This holding resolved a circuit court split over academic privilege, overruling the Second Circuit's recognition of qualified privilege with respect to academic peer reviews in *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982) (reasoning that because confidentiality was integrally related to safeguarding academic freedom, the plaintiff was only entitled to the limited disclosure of votes on his unsuccessful petition for promotion

grounds that disclosure was unlikely to significantly chill candid participation in the tenure review process, even though disclosure would breach participants' legitimate expectation of confidentiality.[69] Because the "subpoena process [did] not infringe any First Amendment right" to academic freedom, the Court thus concluded that "the EEOC need not demonstrate any special justification" for disclosure.[70]

2. Coercive Discovery of Oral or Written Statements in Criminal Investigations and Civil Litigation

The First Amendment also does not restrict police from using coercive investigatory techniques to obtain suspects' or witnesses' statements in ordinary criminal investigations.[71] Although the use of governmental subpoenas and search warrants could similarly deter individuals from communicating candidly in this context, it has nonetheless been justified as a necessary means of law enforcement. The rationale behind this policy is the presumption that a suspect's statements serve as the best way to establish whether he had a motive for committing a particular crime.[72] Moreover, where a particular mental state is itself an element of the crime, a suspect's written or oral statements can provide the critical circumstantial evidence necessary for conviction.

For these reasons, the Supreme Court has held that the use of racist speech as evidence to prove ideologically motivated crimes does not violate

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and tenure reappointment). *See also Univ. of Notre Dame Du Lac*, 715 F.2d 331 (holding that because proper functioning of the faculty tenure review process was contingent on confidentiality, a university may redact the names and identities of individual reviewers before disclosing files).

69. *Univ. of Pa.*, 493 U.S. at 199–200 ("[B]y comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated. To repeat, it argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is . . . .").

70. *Id.* at 201.

71. This is not to say that there are no constitutional limitations on coercive investigatory techniques in criminal investigations, since the Fourth and Fifth Amendments currently provide some protection. *See infra* Part II.A (discussing probable cause requirement).

72. Pursuant to Rule 403 of the Federal Rules of Evidence, all relevant evidence is to be admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403. Some scholars have contended that this standard, and its similar formulations under state law, are not sufficiently sensitive to First Amendment concerns. *See generally* Faulkner, *supra* note 63 (proposing a heightened evidentiary standard to be applied to evidence of expressive, associational, and religious activity); Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622 (1977).

the First Amendment. In *Wisconsin v. Mitchell*,[73] the Court unanimously rejected a First Amendment challenge to Wisconsin's penalty-enhancement statute, which increased a criminal's sentence where he had selected his victim on account of the victim's race.[74] Rejecting the defendant's argument that admitting evidence of his racist statements would impermissibly chill speech, the Court stated that the "prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property . . . is simply too speculative a hypothesis to support [the defendant's] overbreadth claim."[75] Similarly, courts frequently apply a relevance standard in evaluating the discoverability of information about an individual's beliefs and associations offered into evidence during sentencing proceedings, although the Supreme Court has suggested that the First Amendment may limit the scope of admissibility of such information under certain circumstances.[76]

Moreover, just as a criminal defendant's statements can be easily obtained for purposes of establishing guilt, incriminating remarks are also easily

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73. 508 U.S. 476 (1993).

74. *Id.* at 489 ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."). Likewise, in *People v. Lindberg*, for example, the California Supreme Court held that evidence of defendant's racial animus towards Asians sufficiently supported the hate-murder special circumstance as a basis for the enhanced penalty for first degree murder. *See* 190 P.3d 664, 694–95 (Cal. 2008).

75. *Mitchell*, 508 U.S. at 489.

76. *See* Dawson v. Delaware, 503 U.S. 159, 164–65 (1992). In *Dawson*, the Court held that the First Amendment barred admission of evidence of a criminal defendant's membership in a white supremacist prison gang in the sentencing phase of a capital punishment case. *Id.* at 166–67. The court reasoned that the defendant's affiliation with the group demonstrated no more than abstract beliefs that "[had] no bearing on the issue being tried." *Id.* at 168. Therefore, because information about the defendant's affiliations would prejudice the jury, its admission would impermissibly penalize the defendant for exercising his associational rights. However, it was unclear from *Dawson* whether the Court intended to apply a heightened standard of admissibility. *See* Faulkner, *supra* note 63, at 38 n.233 ("Although *Dawson* can be read narrowly to mean that evidence of First Amendment conduct is admissible if it is at all relevant, that reading ignores the vehemence and logic of the Thomas dissent and is inconsistent with the pride Justice Stevens has taken in the case as upholding First Amendment values." (citation omitted)); *see also* Quint, *supra* note 72, at 1643–45 (noting that using evidence of a criminal defendant's protected speech or association poses a "danger that the jury may draw a stronger inference than is warranted from the defendant's speech or association to his guilt of the offense charged, and thereby impose[s] a burden on the exercise of First Amendment rights"). This issue has also emerged in a line of "tattoo" cases, where the criminal defendant alleges that the use of evidence relating to his tattoo violates his First Amendment rights. *See, e.g.*, Vera v. Woods, No. 06-CV-1684 (JFB), 2008 WL 2157112 (E.D.N.Y. May 21, 2008) (holding that the state court's decision to allow the display of the defendant's gang-related tattoo did not violate his First Amendment rights); Aguilar v. Texas, No. 05-07-00660-CR, 2008 WL 3823992 (Tex. App. Aug. 18, 2008) (same).

discoverable for purposes of establishing civil liability. For instance, in *Price Waterhouse v. Hopkins*,[77] the Supreme Court held that evidence of allegedly sexist comments made by partners in an accounting firm was sufficient to demonstrate that a female partnership candidate's rejection violated Title VII.[78]

C. Applications of Multifactor Balancing Tests to Coercive Discovery Requests for Speech-Related Information

1. Subpoenas Seeking the Identity of a Journalist's Confidential Source

Courts have also been confronted with coercive discovery of First Amendment activities in cases where a journalist claims a "privilege" to shield the identities of their confidential sources from being forcibly discovered. A number of recent, high-profile cases have brought attention to this issue, notably the 2005 controversy involving former *New York Times* reporter Judith Miller, who spent eighty-five days in jail for refusing to comply with a grand jury subpoena that sought disclosure of the name of a source—later determined to be Lewis "Scooter" Libby—in connection with a CIA leak investigation.[79]

Though the question has been framed in terms of the journalist's privilege, rather than as a source's right to confidentially disseminate newsworthy information to the press, courts have faced a similar tension between interests in speech and press freedoms and the need for obtaining reliable evidence.[80]

77. 490 U.S. 228 (1989).

78. *Id.* The Court noted, however, that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision." *Id.* at 251.

79. For a personal account of this high-profile case, see Judith Miller, *My Four Hours Testifying in the Federal Grand Jury Room*, N.Y. TIMES, Oct. 16, 2005, at 31. Another high-profile example involved *New York Times* reporter James Rise, who was subpoenaed in an effort to discover the confidential sources for his 2006 book on the Bush administration's illegal wiretapping program. *See* Philip Shenon, *Times Reporter Subpoenaed Over Source for Book Chapter*, N.Y. TIMES, Feb. 1, 2008, at A17. Courts must balance interests of press freedom against the need for evidence. *See* Samantha Fredrickson, *Newspaper Won't Have to Disclose Identities of Posters*, REP.'S COMM. FOR FREEDOM OF THE PRESS, Jan. 7, 2009, http://www.rcfp.org/newsitems/index.php?i=9877. Moreover, though this issue has contemporary salience, it has roots in the early days of the American republic. *See* Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 202 n.6 (2005) (noting that Benjamin Franklin and John Peter Zenger asserted claims similar to those made by modern journalists of journalist privilege).

80. Courts and scholars also refer to this privilege as a "newsgatherers' privilege," a term that currently encompasses reporters, authors, and television producers. Much debate exists over how courts should define "journalist" and, accordingly, determine the scope of the privilege. This Comment will only touch on this briefly. Further, claims of journalistic privilege also arise when the subpoena requests unpublished information, such as notes or video outtakes, or when the journalist is subpoenaed to testify about events witnessed in the course of reporting.

Reporters have argued that assurances of confidentiality are necessary to encourage people to provide journalists with newsworthy but potentially incriminating information, as sources may otherwise be deterred out of fear they will be fired or harassed for leaking such information to the press.[81] Likewise, those opposing the privilege assert that shielding important information from discovery will obstruct the efficient administration of justice.[82]

In *Branzburg v. Hayes*,[83] the Supreme Court refused to grant journalists an absolute privilege to shield their confidential sources from coercive discovery, while acknowledging that the newsgathering process is not entirely without First Amendment protection.[84] A five-member majority held that requiring journalists to testify in response to grand jury subpoenas "like other citizens"[85] "[does not] abridge[ ] the freedom of speech and press guaranteed by the First Amendment."[86] Further, noting the absence of empirical evidence supporting the assertion that unmasking confidential sources would "significant[ly constrict] the flow of news to the public," the Court dismissed petitioners' claim of a chilling effect as too speculative.[87]

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81. In *Caldwell v. United States*, for instance, a *New York Times* reporter assigned to cover the Black Panther Party and other black militant groups was served a subpoena duces tecum ordering him to testify before the grand jury and to bring with him notes and tape recordings of interviews with Black Panther Party spokesmen "concerning the aims, purposes, and activities of that organization." Branzburg v. Hayes, 408 U.S. 665, 675 (1972). The reporter and the *New York Times* objected and moved to quash, arguing that the "unlimited breadth of the subpoenas and the fact that [the reporter] would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and 'suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants.'" *Id.* at 676 (quoting Caldwell v. United States, 434 F.2d 1081, 1084 (9th Cir. 1970)).

82. To determine whether creation of new privileges is warranted, courts have employed Professor John Wigmore's four-part test. Under this approach, a privilege should be found where: (1) communications originate in a *confidence* that they will not be disclosed; (2) the element of *confidentiality is essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* is one which in the opinion of the community ought to be sedulously *fostered*; and (4) *injury* that would inure to the relation by the disclosure is *greater than the benefit* thereby gained for the correct disposal of litigation. 8 WIGMORE, EVIDENCE § 2285 (John T. McNaughton ed., rev. 1961). Some have argued that this framework offers little support for an unqualified journalist-source privilege. *See, e.g.*, Nestler, *supra* note 79, at 213. While alternative frameworks have proffered a more expansive view of when new privileges should be recognized, it is nonetheless widely recognized that privileges obstruct the "[public's] right to everyman's evidence." WIGMORE, *supra*, § 2192 (citations omitted).

83. 408 U.S. 665 (1972).

84. In addition to the lead case, the *Branzburg* opinion encompassed the consolidated cases of *In re Pappas* (No. 70-94) and *Caldwell v. United States*, 434 F. 2d 1081.

85. *Branzburg*, 408 U.S. at 690–91.

86. *Id.* at 667. The Court made an exception, however, for inquiries not in good faith and those designed to "disrupt a reporter's relationship with his news sources . . . ." *Id.* at 707–08.

87. *Id.* at 693–94. Interestingly, in several prior cases (for example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)), the Court accepted the premise of a chilling effect without demanding any showing of empirical evidence. *Cf.* Nestler, *supra* note 79, at 248–49 (suggesting

Despite the Court's clear rejection of an absolute reporter's privilege, many lower courts have nonetheless relied on *Branzburg* in recognizing a qualified journalists' privilege.[88] The doctrinal confusion reflected in *Branzburg*'s progeny cases is largely owed to Justice Powell's three paragraph concurrence. Though his opinion provided the critical fifth vote for a majority, Powell's emphasis on the "limited nature of the Court's holding"[89] and his endorsement of balancing constitutional and societal interests on a "case-by-case basis"[90] suggests an approach that may be more easily squared with Justice Stewart's dissent[91] than the majority's holding.[92]

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that the Court's demand for empirical evidence was a meritless demonstration of the "Court's antagonism toward the idea of press privileges").

88. Numerous courts have adopted an approach similar to Justice Powell's in determining when a qualified reporter's privilege may shield information from compulsory disclosure. *See* United States v. Burke, 700 F.2d 70, 76–77 (2d Cir. 1983) (requiring the information sought to be: 1) highly material and relevant; 2) necessary or critical to the claim; and 3) not obtainable from other available sources); Storer Commc'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584–85 (6th Cir. 1987) (noting the other circuits that, at least partially, relied on Justice Powell's concurrence in recognizing a journalist's privilege). On numerous occasions, courts have granted a qualified privilege to journalists based on the same chilling theory that informed the *Branzburg* dissents. *See, e.g.*, Titan Sports, Inc. v. Turner Broad. Sys. (*In re* Madden), 151 F.3d 125, 128–29 (3d Cir. 1998); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1292–93 (9th Cir. 1993); United States v. Long (*In re* Shain), 978 F.2d 850, 852 (4th Cir. 1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181–82 (1st Cir. 1988); Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977); Cervantes v. Time, Inc., 464 F.2d 986, 992–93 & n.9 (8th Cir. 1972) (as cited in Volokh, *supra* note 10, at 1444 n.106).

89. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

90. *Id.* at 710.

91. Arguing that the "[First Amendment] right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source," Justice Stewart proposed the following three-pronged test in dissent:

> I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. at 728, 743 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting) (footnote omitted). Justice Stewart had previously announced this framework while sitting as a circuit judge in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

92. The critical section in Justice Powell's opinion reads:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts 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. The balance of

The doctrinal confusion is evident in the disparate analytical approaches taken by circuit courts addressing this issue. The Second and Ninth Circuits adopt the most speech-protective approach and recognize the broadest qualified privilege from compulsory source disclosure.[93] The D.C., First, Third, Fourth, Fifth, Tenth, and Eleventh Circuits use varying forms of qualified privileges that are generally less robust than the Second and Ninth Circuit approaches.[94] The Eighth Circuit has yet to make a definitive ruling on the issue,[95] while the Sixth and Seventh Circuits have rejected the claim of journalist privilege.[96]

> these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Branzburg, 408 U.S. at 710 (Powell, J., concurring).

93. *See, e.g.*, Gonzales v. NBC, 194 F.3d 29, 35–36 (2d Cir. 1998); *Shoen*, 5 F.3d at 1292 ("When facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play."); *In re* Grand Jury Proceedings, 5 F.3d 397, 402–03 (9th Cir. 1993); *Von Bulow*, 811 F.2d at 142.

94. *See, e.g.*, Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000) ("News reporters are 'entitled to some constitutional protection of the confidentiality of [their] sources.'" (quoting Pell v. Procunier, 417 U.S. 817, 834 (1974))); *LaRouche Campaign*, 841 F.2d at 1181 ("'[C]ourts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.'" (quoting Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st. Cir. 1980))); *Caporale*, 806 F.2d at 1504 ("The standard governing the exercise of reporter's privilege as articulated in *Miller v. Tranamerican Press, Inc.* (5th Cir. 1980) provides that information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources."); *Zerilli*, 656 F.2d at 711 ("[A] qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify."); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (noting a journalists' privilege for criminal cases); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041, (1981) (holding that reporters possess a qualified privilege in civil libel suits not to disclose the identity of confidential informants); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (journalists' privilege for civil cases); *Silkwood*, 563 F.2d at 437; Carey v. Hume, 492 F.2d 631, 633–36 (D.C. Cir. 1974).

95. *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530, 531–32 (7th Cir. 2003) ("A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. A few cases refuse to recognize the privilege, at least in cases, which *Branzburg* was but this case is not, that involve grand jury inquiries. Our court has not taken sides." (citations omitted)); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 n.8 (8th Cir. 1997) ("Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* [*v. Time*, 464 F.2d 986 (8th Cir. 1972),] for support, we believe this question is an open one in this Circuit.").

96. *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003); Storer Commc'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987) ("Because we conclude that acceptance of the position urged upon us by Stone would be tantamount to our substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion, we must reject that position.").

2. Subpoenas Seeking to Identify Anonymous Internet Speakers

Coercive discovery has recently been used to unmask anonymous or pseudoanonymous internet speakers in lawsuits arising out of allegedly actionable statements posted on websites, blogs, or internet bulletin boards. In an effort to learn the poster's identity and obtain redress, plaintiffs in such actions typically subpoena the relevant third-party Internet Service Provider (ISP),[97] seeking disclosure of specific subscriber information that will reveal the identity of the anonymous "John Doe" defendant.[98]

To determine whether to enforce such subpoenas and unveil an anonymous speaker, courts have employed a variety of multipart tests designed to balance an aggrieved plaintiff's right to discovery with an anonymous defendant's privacy and First Amendment interests. The multifactor approach provides speakers with a level of protection less than that afforded by the "compelling interest" approach utilized in *NAACP v. Alabama*, but more than the minimal showing of relevance required in *Herbert v. Lando* and *EEOC v. University of Pennsylvania*.

Most courts faced with this issue require the plaintiff to demonstrate valid evidentiary basis for the claim before compelling revelation of an anonymous internet speaker's identity. However, courts differ markedly in the strength of showing deemed satisfactory. For example, under California's so-called *Seescandy*[99] test, a plaintiff must show that the underlying action

97. Though a plaintiff would find it easier and more lucrative to sue an ISP for posting a harmful statement, the ISP is not a party to the action in the majority of cases. ISPs have both statutory and common law protection against liability in cyberlibel suits. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (reasoning that holding an ISP liable for defamatory postings would chill speech by forcing the ISP to restrict certain messages determined to pose a risk of liability); Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2755–57 (2002) (discussing congressional intent in enacting the Communications Decency Act to shield ISPs from liability for content posted on their sites by third parties); *see also* Julie Hilden, *Why Anonymous Internet Speakers Can't Count on ISPs to Protect Them*, FINDLAW, Jan. 1, 2001, http://writ.news.findlaw.com/hilden/20010101.html ("[I]f the target of anonymous, damaging Internet speech wants to seek out the speaker, the ISP is still the entity to which he must direct his subpoena. After all, he can't serve a subpoena on a person he can't even identify.").

98. Generally, an IP address is recorded at the local server providing internet access (which relates to the individual user's login name) as well as at the server of any visited websites (which can correlate particular IP addresses' activities on the website). Knowledge of an IP address enables an ISP to ascertain the domain name along with the name, physical location, and contact information of persons who originally registered that name. *See* David L. Sobel, *The Process That "John Doe" Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, 7 n.12 (2000). Moreover, because forging an IP address is complicated and difficult, discovery of the IP address will nearly always lead to discovery of the individual user's identity. *See id.* (citing Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1225, 1233 (1998)).

99. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

could withstand a motion to dismiss.[100] In contrast, Virginia's *AOL*[101] standard merely requires "a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed."[102]

Other jurisdictions have disagreed with both approaches. The Delaware Supreme Court rejected both tests in *Doe v. Cahill*[103] as insufficiently protective of free speech interests, holding instead that a plaintiff seeking to unmask an anonymous online defendant through coercive discovery "must support his defamation claim with facts sufficient to defeat a summary judgment motion."[104] In another important decision, the Maryland Court of Appeals rejected both the good faith and summary judgment alternatives in evaluating whether to compel disclosure of identities of content providers on a

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100. Under the so-called *Seescandy* test, the requesting party must: (1) identify the missing party with sufficient specificity to ensure that the real person is subject to jurisdiction; (2) identify all previous steps to locate the defendant; (3) establish that the suit could withstand a motion to dismiss; and (4) file a discovery request that justifies the need for the identifying information. *Id.* at 578–80; *see also* Rocker Mgmt. LLC v. John Does, No. 03-MC-33, 2003 WL 22149380 (N.D. Cal. May 29, 2003) (applying the four-part *Seescandy* test in a business libel action brought by an investment management firm against anonymous posters in an chat room).

101. *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd on other grounds sub nom.*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

102. The *AOL* standard was set forth in a case involving a subpoena duces tecum requesting identification of four subscribers who allegedly breached fiduciary duties and contractual obligations to the defendant corporation by anonymously posting certain statements online. *Id.* Reasoning that the corporation had demonstrated a legitimate, good faith basis for its claim against the unidentified party, and that the requested identities were needed, the court held that disclosure was permissible. It stated that a nonparty ISP should only be ordered to disclose a subscriber's identifying information where: 1) the court is satisfied by the pleadings or evidence supplied; 2) the requesting party has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed; and 3) when the subpoenaed identity information is centrally needed to advance that claim. *Id.* at 37. In so holding, the court interpreted VA. SUP. CT. R. 4:9(C)'s "unreasonable and oppressive" standard for determining when to quash a subpoena to require consideration of all the circumstances surrounding the subpoena in determining "reasonableness." *Id.*

103. 884 A.2d 451 (Del. 2005). In *Cahill*, an elected town councilman sought to coerce the third-party ISP, Comcast, to unmask an anonymous internet user named "Proud Citizen" who had made highly critical, and allegedly defamatory, statements anonymously on his blog. Applying the test discussed in the text, the court concluded that the defendant's statements describing the town council member as paranoid and mentally deteriorating were not defamatory. The court reasoned that because guidelines at the top of the blog specifically stated that the forum was dedicated to opinions, no reasonable person could have interpreted statements as being anything other than opinion. *See also* Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205 (D. Nev. 2008.) (applying *Cahill* in federal court); Best W. Int'l., Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. 2006) (applying *Cahill*).

104. To survive a summary judgment motion, a litigant must show that there are genuine issues of material fact in dispute that must be resolved by the fact finder at trial. FED. R. CIV. P. 56(c). In *Cahill*, the court condensed the *Dendrite* test. It retained *Dendrite*'s notice requirement but held that the second requirement and the fourth requirement (discussed, *supra* note 57 and accompanying text) should both be considered implicit in the third requirement. *Cahill*, 884 A.2d at 461.

newspaper's internet discussion forum.[105] Instead, the court required the plaintiff to, inter alia, "identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech [and] determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters."[106]

Discrepancies in discoverability tests applied in this context reflect differing levels of judicial concern about protecting individuals' First Amendment right to speak anonymously. For instance, in *Dendrite International, Inc. v. Doe, No. 3*,[107] one of the most speech-protective rulings to date, a New Jersey state court imposed a reasonable notice requirement out of concern that third-party subpoena recipients lack the same incentive as a defendant speaker to shield the subscriber information from coercive discovery. The court thus held that a plaintiff must take reasonable efforts to notify an anonymous poster about the subpoena and allow the poster opportunity to challenge its enforcement.[108] Though gaining traction,[109] this requirement has not been adopted in many jurisdictions.

Some courts have explicitly justified a heightened showing requirement on grounds that an unchecked subpoena power would impermissibly chill internet users' freedom of speech.[110] In *Cahill*, for example, the Court reasoned

105. *See* Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 435 (Md. 2009) (holding that the circuit court judge abused his discretion when ordering the identification of the five anonymous internet forum participants "because the three participants sued, concededly, did not make the alleged defamatory statements, while the other two anonymous participants, who allegedly made the actionable remarks, were not sued").

106. *Id.* at 457.

107. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The *Dendrite* framework requires (1) "the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena"; (2) "the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech"; (3) the plaintiff establish "that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted"; (4) the plaintiff "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis"; and (5) the court to "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id.* at 760–61.

Though protective of First Amendment interests, application of the *Dendrite* test does not necessarily presuppose that the subpoena will be quashed. For example, in *Immunomedics, Inc. v. Doe*, the defendant allegedly revealed proprietary information anonymously on an internet message board. 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001). The court, applying *Dendrite*, held the plaintiff corporation had made a prima facie case and its right to disclosure outweighed the defendant's First Amendment rights to anonymous speech. *Id.*

108. According to the court, "notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board." *Dendrite*, 775 A.2d at 760.

109. This will be discussed further, *infra* Part III.A.

110. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870 (1997); Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092–93 (W.D. Wash. 2001) (recognizing fear of disclosure of internet speakers' anonymity

that "allowing a defamation plaintiff to unmask an anonymous defendant's identity . . . too easily . . . will chill the exercise of First Amendment rights to free speech."[111] Other courts have justified application of a heightened discoverability standard as a means of preventing litigants from using discovery as a way to monitor and penalize individuals who expressed particular viewpoints.[112]

More recently, in *Solers v. Doe*,[113] a software developer brought suit against a "John Doe" defendant, alleging defamation and tortious interference with prospective advantageous business opportunities based on an anonymous internet report to a trade association that claimed the developer was using unlicensed software. The plaintiff subpoenaed the trade association to compel disclosure of the defendant's identity.[114] The D.C. Court of Appeals ruled as a matter of first impression that the First Amendment right to anonymous internet speech warranted application of a rigorous five-part discoverability test before the defendant's identity could be forcibly discovered.[115]

The right to speak anonymously, however, is not absolute, and not all courts have sought to impede plaintiffs' efforts to unmask a "John Doe" defendant. Some courts, rather, have reasoned that existing civil procedural rules adequately protect the First Amendment interests of anonymous speakers.[116] Others have declined to impose heightened procedural standards in "cyberlibel"

"would have a significant chilling effect on Internet communications and thus on basic First Amendment rights"); *In re* Does 1–10, 242 S.W.3d 805, 821 (Tex. 2007). *See generally* Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195 (2006).

111. Doe v. Cahill, 884 A. 2d. 451, 462 (Del. 2005).

112. For an example of the abusive potential of subpoenas in litigation, see Complaint, Raytheon Co. v. John Does 1–21, No. 99-816 (Mass. Super. Ct. Feb. 1, 1999) (voluntarily dismissed). In *Raytheon*, the plaintiff sued twenty-one "John Doe" defendants, whom it suspected were employees of the company, for breach of contract and disclosure of proprietary information on a Yahoo! message board. Raytheon subpoenaed Yahoo! for the subscriber information, and, upon obtaining the identities of the twenty-one defendants, voluntarily dismissed its suit. The facts suggest that the company's sole objective was to unmask the anonymous posters, and that filing suit and obtaining subpoena power was the most expedient means of realizing that goal.

113. 977 A.2d 941 (D.C. 2009).

114. *Id.* at 944.

115. Specifically, the D.C. Court of Appeals held that

> [w]hen presented with a motion to quash (or to enforce) a subpoena which seeks the identity of an anonymous defendant, the court should: (1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of claim that is within its control, and (5) determine that information sought is important to enable the plaintiff to proceed with his lawsuit.

Id. at 954.

116. *See, e.g.*, Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 WL 37020 (Pa. C.P. Jan. 4, 2006) (not designated for publication).

suits on grounds that "the protection afforded by the First Amendment to anonymous speech [is] outweighed by the state's interest in making its libel laws available to public figures."[117] Still others have ordered disclosure of a user's identity without any mention of the First Amendment,[118] framing the question as one of privacy[119] or of statutory interpretation instead.[120]

As the foregoing discussion illustrated, courts have utilized a wide range of approaches in an effort to reconcile the evidentiary needs of the requesting party with a speaker's First Amendment interests in preserving his anonymity or confidentiality. Perhaps not surprisingly, the current state of law is thus one of uncertainty and confusion.

II. THE CASE FOR SUBJECTING COERCIVE REQUESTS FOR SPEECH-RELATED INFORMATION TO A HEIGHTENED, UNITARY DISCOVERABILITY STANDARD

Having illuminated the absence of a unifying theory in this area of First Amendment law, this Part makes the case for applying a unitary analytical approach to discoverability determinations, under which the requesting party is required to make a heightened showing of relevance and need for the information. Two critical components inhere in this argument: (1) that First Amendment interests merit heightened procedural protection; and (2) that a uniform analytical framework is needed to reduce risks of uncertainty and problems with judicial discretion. This Part addresses both arguments in turn.

A. The Case for Requiring a Heightened Showing in Coercive Discovery Requests for Information About Protected First Amendment Activities

As the following section will demonstrate, it is both necessary and appropriate to restrict the discoverability of requests for speech-related information

117. *See, e.g.*, Melvin v. Doe, 49 Pa. D. & C. 4th 449 (Pa. C.P. 2000) (ordering disclosure of the identity of an anonymous internet speaker who allegedly posted defamatory statements about a superior court judge).

118. *See, e.g.*, Hvide v. Does, No. 99-22831 (11th Jud. Cir. May 25, 2000), *cert denied*, 770 So. 2d 1237 (Fla. 3d Dist. Ct. App. 2000) (denying, without a written opinion or First Amendment analysis, Doe defendants' motion to quash third-party subpoenas to an ISP seeking their identities).

119. *See, e.g.*, State v. Delp, 178 P.3d 259, 263 (Or. Ct. App. 2008) (affirming the denial of a motion to suppress evidence of the defendant's identity, which AOL had revealed to the government in response to a subpoena) ("Even assuming that some individuals select user names that purposely disguise their identities, and that those individuals do so out of a desire to use the Internet anonymously, those subjective intentions and expectations do not necessarily translate into a protected privacy interest . . . .").

120. *See* Macrander, *supra* note 19, at 1091–92 (discussing state shield laws).

through a heightened showing requirement. A heightened standard is necessary to prevent broad coercive investigatory powers from chilling protected and socially desirable First Amendment activity. Furthermore, other well-established limitations on discovery and the adoption of heightened procedural protection in other areas of First Amendment jurisprudence suggest that a heightened discoverability standard is appropriate here.

1. Why Heightened Procedural Protection Is Necessary

a. The Value of Free Speech and the Harm in Chilling It

The unifying theory at the heart of the case for restricting coercive discovery of speech-related information lies in the notion of a chilling effect on protected speech. To better understand the extent of risk and magnitude of harm, it is useful to consider at the outset why society values free speech in the first place. Four theories have been recognized as justification for recognizing freedom of expression as a "preferred value"[121] and, accordingly, affording it special constitutional protection[122]: (1) the First Amendment's truth-seeking function;[123] (2) its close relation to self-governance;[124] (3) its role

121. Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 732 (1978) (noting that "[t]he chilling effect is premised upon the recognition of the first amendment as a preferred value"). As Professor Schauer observed, "[f]ree speech is an affirmative value—we are concerned with encouraging speech almost as much as with preventing its restriction by the government." *Id.* at 691. However, it is worth noting that while free speech is unquestionably of great import, there are other constitutional values "no less precious" that speech rights often conflict with. *See* Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223, 231 (1996) ("Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." (citing Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting))). However, as discussed *infra* Part II.B, not all speech is afforded equal First Amendment value. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) ("We have long recognized that not all speech is of equal First Amendment importance.").

122. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 4–8 (3d ed. 2007).

123. As John Milton famously wrote: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?" JOHN MILTON, AREOPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644) (cited in SULLIVAN & GUNTHER, *supra* note 122, at 4). For an eloquent articulation of the First Amendment's role in preserving the "marketplace of ideas," see *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

124. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (The Lawbook Exchange, Ltd. 2000) (1948) (arguing that the First Amendment protects "public" speech from governmental regulation).

in fostering individual liberty, autonomy, and self-fulfillment;[125] and (4) its function as a check on governmental regulation.[126] Recognizing the value of free speech as a means through which an individual can contribute meaningfully to the marketplace of ideas, as a means to participate in democratic decisionmaking, and as a means to further his own self-realization suggests what is lost when speech is chilled. Although often described as an "an act of deterrence,"[127] a chilling effect is, more precisely, an act of overdeterrence: occurring when an idea that would otherwise be expressed is stifled.

Libel law is a classic example. Though only false speech is proscribed, where an editor is unsure about the veracity of a statement, she may not be willing to risk incurring libel liability by publishing the statement. To this end, she may steer clear of the perceived legal boundary, and only publish material that is clearly protected by the First Amendment. The problem with this (assuming, for the sake of argument, that she does in fact correctly identify the line of demarcation between protected and unprotected speech) is that her efforts to play it safe constitute potentially unwarranted self-censoring. Speech that falls close to the perceived boundary of legality will thus not be published, even if it would have been protected under the First Amendment.

Relatedly, the value of anonymity (and, to a lesser degree, confidentiality) is that it enables a speaker to articulate controversial or unpopular views without fear of being scorned, ridiculed, socially ostracized, or fired based on the content of his speech.[128] The power to compel identification of an anonymous or pseudoanonymous speaker through coercive discovery techniques thus undermines this sense of security.[129] Not surprisingly, many persons will

125. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) ("Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."); 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 . . . labeled 'individual self-realization.'").

126. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

127. Schauer, *supra* note 121, at 689.

128. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) ("The 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. . . . [Anonymity enables a speaker] who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."). For an example of workplace retribution, see *Swiger v. Allegheny Energy, Inc.*, No. 05-CV-5725, 2006 WL 1409622 (E.D. Pa. May 19, 2006), in which a power company employee was fired after a third-party subpoena to Yahoo! revealed he had anonymously posted statements critical of the company.

129. Some might question whether the threat of reprisals from private parties, as opposed to the government, is of legitimate First Amendment concern. But the Supreme Court dismissed this

resort to self-censorship rather than risk being unmasked during litigation or a government or employer investigation.

Not all chilling effects, of course, are socially harmful. Where legal boundaries are clear, inducing self-censorship is an effective way to deter the commission of illegal or undesirable acts. But coercive investigatory techniques are not subjected to clear, bright line rules. Rather, as Part I illustrates, the power to compel disclosure varies widely, depending on a number of contextual factors, including the jurisdiction in which the action is brought. As a result of the current nebulous state of law, speakers are likely uncertain about whether they could be forced to identify themselves or disclose confidential information. Such uncertainty, in turn, results in a chilling effect on free speech.

As a skeptical reader may observe, a chilling effect is an elusive and incalculable concept. Ascertaining the extent of deterrence is simply not conducive to precise, empirical conclusions. It follows that the case for a heightened discoverability standard does not, nor could not, rest in empirics.[130] Rather, as the Court has observed, it rests in "human experience."[131] Laws have often been held invalid on grounds of overbreadth notwithstanding specific findings as to the existence of deterrence. Therefore, the absence of empirical evidence of a chilling effect alone does not negate the conclusion that use of coercive discovery techniques to compel disclosure of information about an individual's protected speech activities constitutes a situation where the "inevitable chilling effect becomes great enough . . . to justify the creation of substantive rules that recognize and account for the invidious chill."[132]

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very argument in *Patterson*, stating that "[i]t is not sufficient to answer . . . that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures." NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 463 (1958).

130. *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); *Patterson*, 357 U.S. at 462–63; *see also* Branzburg v. Hayes, 408 U.S. 665, 733 (1972) (Stewart, J., dissenting) ("But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.").

131. United States v. Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").

132. Schauer, *supra* note 121, at 701.

b. The Lack of Meaningful Restrictions on Coercive Investigatory Powers

Subpoenas are broadly available to compel disclosure of information. Courts will enforce subpoenas so long as a reasonable possibility exists that the subpoena will produce relevant information.[133] Given the liberal interpretation of relevance in the Federal Rules of Civil Procedure,[134] this standard is easily satisfied. Subpoenas can be challenged prior to execution on grounds of privilege, burdensomeness, or irrelevance, but motions to quash are seldom granted.[135]

The Fourth and Fifth Amendments offer similarly insufficient protection to anonymous or confidential speakers from the coercive investigatory powers of the government.[136] In *United States v. Dionisio*,[137] the Supreme Court held that subpoenas do not qualify as searches under the Fourth Amendment, thereby largely removing them from the ambit of constitutional protection.[138] Similarly, the Court has found that subpoenas for documents containing incriminating statements typically do not violate the Fifth Amendment right against self-incrimination.[139] Moreover, under the Fourth Amendment's third-party doctrine, no constitutional protection is available to information

133. United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991).

134. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). The liberal treatment of 'relevance' under the Federal Rules sets the bar low for the purpose of coercive discovery requests. Interpretation of relevance in the Federal Rules, FED. R. CIV. P. 45, which governs third-party subpoenas, similarly affords little protection to First Amendment interests.

135. Slobogin, *supra* note 1, at 806 ("A successful privilege claim is rare . . . [and] [o]bjections that . . . a subpoena is too burdensome or expensive also 'are almost always doomed to failure.'" (quoting WAYNE R. LAFAVE ET AL., 3 CRIMINAL PROCEDURE 135 (2d ed. 1999))). In *United States v. Nixon*, the Supreme Court interpreted Rule 17(c) of the Federal Rules of Criminal Procedure, which authorizes the quashing or modification of a subpoena "if compliance would be unreasonable or oppressive," to require a showing of relevancy, admissibility, and specificity. 418 U.S. at 689–700. The requirements have not been interpreted stringently in subsequent cases.

136. For an argument that the First Amendment should be considered an independent source of procedure, see Solove, *supra* note 4, at 116 ("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 . . . [thus leaving many] activities that are central to First Amendment values unprotected."). For a general critique of Fourth Amendment as inadequately protective, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 800 (1994).

137. 410 U.S. 1 (1973).

138. *Id.* at 9. The Court left a small window of availability for Fourth Amendment protection from subpoenas, noting 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)).

139. *See* Fisher v. United States, 425 U.S. 391, 397 (1976). Rather, the Fifth Amendment only protects documents having "communicative aspects of [their] own, wholly aside from the contents of the papers produced." *Id.* at 410 (cited in Solove, *supra* note 4, at 124).

maintained by third parties.[140] Developed in cases involving bank records and telephone pen register data, the third party doctrine has recently been relied on by lower courts in holding that disclosure of an ISP's records does not violate the Fourth Amendment.[141]

Governmental use of search warrants, rather than subpoenas, to compel disclosure of information triggers greater procedural protection under the Fourth Amendment.[142] The Fourth Amendment's probable cause standard requires that a search be reasonable, meaning that the search was executed pursuant to a properly issued warrant.[143] Akin to a more-likely-than-not standard, probable cause requires the government to show (a) that a crime has been or is about to be committed, and (b) that the search will uncover evidence of the crime.[144] However, because this requirement is more demanding than a showing

140. *See* Smith v. Maryland, 442 U.S. 735, 745 (1979) (holding that pen register data, lists of phone numbers of outgoing and incoming calls, are not subject to Fourth Amendment protection); United States v. Miller, 425 U.S. 435 (1976) (holding that Fourth Amendment requirements were inapplicable to a subpoena for financial records because individuals have no reasonable expectation of privacy in information disclosed to third parties). However, as Professor Solove observes, a footnote in *Miller*, noting that the Respondent did "not contend that the subpoenas infringed upon his First Amendment rights," indicates that such subpoenas could possibly be subject to First Amendment restrictions. Solove, *supra* note 4, at 171.

141. For example, in *Guest v. Leis*, the Sixth Circuit rejected the claim that individuals have a "Fourth Amendment privacy interest in their [internet service] subscriber information because they communicate[ ] it to the systems operators." 255 F.3d 325, 336 (6th Cir. 2001); *see also* United States v. Kennedy, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (holding that the Fourth Amendment was inapplicable because the defendant "knowing[ly] revealed [to his ISP] all information connected to [his] IP address").

142. The Fourth Amendment protects against unreasonable government searches and seizures of their "persons, houses, papers, and effects." U.S. CONST. amend. IV. To determine whether a particular claim falls within the scope of the Fourth Amendment, courts decide whether there was a "reasonable expectation of privacy." This determination possesses both subjective and objective dimensions—asking (1) whether a person exhibits an "actual (subjective) expectation of privacy"; and (2) whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). The Fifth Amendment protects an individual from government interrogations meant to induce self-incrimination. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself.").

143. Probable cause constitutes "'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." Solove, *supra* note 4, at 118 (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)); *see also* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . and . . . the belief of guilt must be particularized with respect to the person to be searched or seized." (citation omitted)). For an argument that courts ought to explicitly consider First Amendment interests in interpreting whether a search was reasonable under the Fourth Amendment's "reasonableness" standard, see Amar, *supra* note 136, at 806.

144. Some have contended that the relatively undemanding nature of the probable cause requirement reflects judicial concern with encumbering governmental investigatory efforts. *See, e.g.*, Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 807–09 (2005) (noting that

that a request is not unreasonably burdensome, search warrants are used less frequently than subpoenas to compel disclosure.[145] Thus, while the Fourth Amendment necessitates greater procedural protection from coercive investigatory powers in some circumstances, it is by no means a panacea.

2. Why Heightened Procedural Protection Is Appropriate

a. The Existence of Other Common Law Privileges

Subjecting coercive requests for information about speech-related activities to a heightened discoverability standard is consonant with other established limitations on discovery. As the existence of numerous common law privileges demonstrates, interests in preserving confidentiality are not always subjugated to claims of evidentiary needs. Rather, "to protect 'interests and relationships which . . . are regarded as of sufficient social importance [there must be] . . . some incidental sacrifice of sources of facts needed in the administration of justice.'"[146] As the Supreme Court explained in *Jaffee v. Redmond*,[147] "[e]xceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[148]

This policy judgment informs existing privileges, such as the attorney-client privilege, marital communications privilege, physician-patient privilege, and psychotherapist-patient privilege. Whereas these privileges protect the content of confidential communications, others, such as the government-informer privilege, protect the anonymous *source* of certain communications.[149] But regardless of the content or scope of the privilege being invoked, all such privileges reflect judicial efforts to elevate the preservation of a private sphere of unfettered communication over interests in procuring disclosure of relevant information during discovery.

"[i]mposition of rigorous Fourth Amendment requirements on subpoenas would stultify important government investigations").

145. *See* Solove, *supra* note 4, at 124 (noting that subpoenas were the preferred coercive discovery tool during the investigation of President Clinton following the Monica Lewinsky scandal) ("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." (internal citations omitted)).

146. Herbert v. Lando, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting in part) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 152 (2d ed. 1972)).

147. 518 U.S. 1 (1996).

148. *Id.* at 9 (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

149. *See* Nestler, *supra* note 79, at 212.

As in *Jaffee*, where the Court recognized a federal psychotherapist-patient privilege based on "reason and experience,"[150] restricting coercive discovery of speech-related information also promotes a "transcendent public good": freedom of expression.[151] This is not to suggest that existing privileges should serve as a model for creation of an absolute common law First Amendment privilege from coercive discovery, but rather to emphasize that similar policies support restricting discovery of information about First Amendment activities in certain circumstances.

b. Existing Limitations in the Federal Rules of Civil Procedure

Support for constraining discovery of information about First Amendment activities also lies in various provisions of the Federal Rules of Civil Procedure. Though "pretrial discovery is normally to be 'accorded a broad and liberal treatment,'"[152] the Rules contain several limiting provisions designed to reduce a party's burden of complying with discovery requests.[153] While generally interpreted as pertaining to the financial burdens of discovery, certain language suggests it may be possible to read existing discovery-limiting provisions broadly enough to encompass the First Amendment interests implicated in certain discovery requests. For instance, under Rule 26(b)(2)(C)(iii) of the Federal Rules of Civil Procedure, a court "must limit the frequency or extent of discovery otherwise allowed . . . if it determines" that "the burden

150. *Jaffee*, 518 U.S. at 9–10.

151. *See id.* at 10 (noting that well established privileges were "rooted in the imperative need for confidence and trust"). This argument was also made by Justice Brennan, in partial dissent in *Herbert v. Lando*. *See* 441 U.S. at 195 (Brennan, J., dissenting in part) ("I find compelling these justifications for the existence of an editorial privilege. The values at issue are sufficiently important to justify some incidental sacrifice of evidentiary material.").

152. *Herbert*, 441 U.S. at 183 (Brennan, J., dissenting in part) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

153. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(C) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); FED. R. CIV. P. 26(b)(3)(B) ("If the court orders discovery of [documents prepared in anticipation of litigation], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."); FED. R. CIV. P. 45(c)(3)(A)–(B) (allowing a court to quash or modify a subpoena that "requires disclosure of privileged or other protected matter and no exception or waiver applies; . . . subjects a person to undue burden[;] . . . [or] requires . . . disclosing a trade secret or other confidential research, development, or commercial information").

or expense of the proposed discovery outweighs its likely benefit . . . considering the . . . importance of the issues at stake in the action, and the importance of the discovery in resolving issues."[154] Both the reference to the importance of issues at stake as well as the broader endorsement of a balancing approach to determine restrictions on discovery are strikingly similar to language in judicial decisions about whether to permit coercive discovery of information about protected First Amendment activities.

c. Enhanced Procedural Protection in Other First Amendment Doctrines

In other areas of First Amendment law, such as libel and obscenity, courts have relied on enhanced procedural requirements as a means of safeguarding rights to freedom of expression. On more than one occasion, the Supreme Court has articulated "special prophylactic rules" to specifically diminish the risk of a chilling effect.[155]

In *New York Times Co. v. Sullivan*,[156] for example the Supreme Court announced two different heightened procedural standards to guard against dangers of self-censorship by the press.[157] First, the Court required that public officials bringing libel suits demonstrate that the allegedly defamatory statement was published with "actual malice."[158] By imposing a standard that required a plaintiff to show knowledge of falsity or reckless disregard for the truth of the statements, the Court offered the press substantially more protection from the chill-inducing effect of libel suits. Second, the Court replaced the preponderance of evidence standard with a requirement that the plaintiff prove actual malice by clear and convincing evidence. In so holding, the Court reasoned that a defamation law could chill speech by generating "doubt whether [the alleged defamatory statements] can be proved in court or fear of the expense of having to do so" and, accordingly, that such doubt would lead people "to make only statements which 'steer far wider of the unlawful zone.'"[159]

The Court has likewise (although for different reasons) noted the procedural inadequacy of the Fourth Amendment's probable cause requirement where the search or seizure involves expressive material, requiring a judge to assess whether the materials at issue are obscene before authorizing their

154. FED. R. CIV. P. 26(b)(2)(C)(iii); *see also* FED. R. CIV. P. 26(b)(2)(C)(i)–(ii).

155. Quint, *supra* note 72, at 1648–49; *see generally* Monaghan, *supra* note 20 (discussing applications of "First Amendment Due Process").

156. 376 U.S. 254 (1964).

157. *Id.*

158. *Id.* at 280.

159. *Id.* at 279 (internal citations omitted).

seizure.[160] Further, some commentators have suggested that the Supreme Court's refusal to allow admittance of evidence of gang membership in *Dawson v. Delaware*[161] supports subjecting information about a defendant's First Amendment activities to a heightened evidentiary standard where it is introduced as character evidence at trial.[162]

In sum, application of a heightened discoverability standard finds support in both law and policy, and begs the question of why courts do not uniformly refuse to compel disclosure of information about an individual's protected speech activities unless the requesting party satisfies a showing more demanding than mere relevance.

B. The Case for Applying a Uniform Analytical Framework

What, if anything, is wrong with affording different treatment to different kinds of cases involving First Amendment restrictions on coercive investigatory powers? First, while this issue arises in a broad range of contexts, courts and scholars have yet to articulate a coherent justification for the dramatic variance in discoverability standards. Moreover, the doctrinal compartmentalization has obscured an important commonality that unifies cases otherwise thought to be unrelated. The discussion below explores both theoretical and practical problems with the current scheme.

1. Conceptual Inconsistencies in the Current Scheme

In determining whether to compel disclosure of certain speech-related information, courts must reconcile interests in fostering freedom of expression with interests in promoting truth and enforcing laws. Regardless of whether the coercive request seeks the identities of thousands of anonymous individuals who donated to a well-established political organization, or seeks to identify one blogger on an obscure website, the question of discoverability implicates this same fundamental tension.

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160. *See, e.g.*, Marcus v. Search Warrant, 367 U.S. 717, 731 (1961) ("[T]he use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications."); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62–64 (1989); Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1965); A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964). *But cf.* Maryland v. Macon, 472 U.S. 463 (1985) (holding that neither the Fourth nor First Amendments were implicated by the mere purchase of a book by a law enforcement official).

161. 503 U.S. 159 (1992).

162. *See, e.g.*, Faulkner, *supra* note 63; Quint, *supra* note 72.

The nomenclature has contributed to an obscuring of commonality between the lines of cases discussed. In some situations (where, more often than not, the court decides to compel disclosure), the issue is cast as whether a common law privilege protects the information from coercive discovery, while in others (again where, more often than not, the court refuses to do so), the question is framed as whether an individual has an affirmative right to speak anonymously or confidentially. Both situations, however, implicate the same legal question: how to allocate the requesting party's right to evidence and the subpoenaed party's right to shield certain evidence. And in both situations, at stake in the decision to compel disclosure is whether free expression will be fostered or chilled.

Moreover, the current approach of employing dramatically different analytical frameworks makes little sense in cases where more than one approach is applicable.[163] *Anderson v. Hale*[164] is one such hybrid.[165] In *Anderson*, the plaintiff subpoenaed four ISPs for emails, activity logs, and address books for thirteen internet accounts, nearly all of which were linked to the email addresses of anonymous individuals who were affiliated with The World Church of the Creator (WCOTC).

Under existing law, it is unclear what approach guides the analysis. Does *NAACP* compel application of a rigorous compelling-interest test, since evidence of prior harassment of group members indicates disclosure would chill WCOTC's associational activities?[166] Or, because the issue involves compelled revelation of an internet user's identity, should *Cahill*'s four-pronged test govern? Since the information pertained to standard email communications, should any First Amendment restrictions apply at all?

Or suppose a scholar publishes her research in a publicly available academic journal and is later subpoenaed in an effort to discover the identity of a confidential source upon which she relied. Does the mere fact of publication entitle her to qualified journalist privilege?[167] Or might this be an issue of academic privilege and therefore discoverable upon a showing of mere relevance?[168]

163. Consideration of cases that could be analyzed under multiple approaches brings to mind Justice Kennedy's reference to the "tyranny of labels" in recent oral arguments in *Pleasant Grove v. Summum*. Here, courts will apply different analytical standards depending on whether the situation is labeled as a "journalist privilege" case, a "right to anonymous internet speech" case, or a "right to anonymous association" case, to name a few. Transcript of Oral Argument at 35, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (2009) (No. 07-665).

164. No. 00 C 2021, 2001 WL 503045 (N.D. Ill. May 10, 2001).

165. *Id.* at *1.

166. *Id.* at *7.

167. This assumes that she resides in a jurisdiction that has one.

168. For a real example of this debate, compare *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (holding that scholars engaged in prepublication research are entitled to the

Moreover, if one assumes—as many courts do—that a journalist's role in disseminating newsworthy information to the public warrants privileging source identity information from discovery, it is unclear why an editor's role in selecting material that is the product of journalist's newsgathering is afforded no protection at all. The distinction between the editorial and newsgathering processes is particularly puzzling given that for both editors and journalists, assurances of confidentiality further the mutual goal of facilitating a free flow of information to the public. Additionally, as some commentators have observed, it is unclear that courts should distinguish "new media" speakers (such as bloggers) from those in traditional media (like journalists) when evaluating whether the identity of an anonymous speaker can be compelled.[169]

2. Practical Inconsistencies and Judicial Discretion

The doctrinal inconsistency detailed in Part I gives rise to more than theoretical fodder for academic debate. Rather, the lack of a coherent, consistent framework under which courts should evaluate coercive requests for speech-related information creates practical problems for both courts and litigants. For instance, given the considerable jurisdictional disparity in journalist privilege case law, an individual who leaks a story to a reporter can be unmasked far more easily in Illinois (given the Seventh Circuit's recent holding that there is no common law privilege rooted in the First Amendment[170]) than he could for leaking the exact same story to a reporter subsequently subpoenaed in New York (as the Second Circuit has recognized a qualified, First Amendment–based privilege[171]). Moreover, had the individual decided to post the incriminating information pseudoanonymously on a widely read blog, rather than confidentially disclose it to a reporter, an entirely different analysis would guide the discoverability determination.

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same protection as journalists), with *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (holding that the First Amendment did not afford a graduate student a scholar's privilege similar to that of reporters—to withhold information from confidential sources where the information was claimed to be incidental to his scholarly research).

169. *See, e.g.*, Wolf v. United States, 201 F. App'x 430, 431–32 (9th Cir. 2006) (involving a videographer-blogger summoned to testify before a grand jury who claimed protection as a journalist under the First Amendment, a question that the Ninth Circuit never reached).

170. *See* McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

171. *See* Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987) ("[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public.").

As previously suggested, such inconsistency generates uncertainty about how courts balance protecting an individual's right to anonymity and holding that individual accountable for his speech by enforcing discovery requests.

The current doctrinal scheme also raises concerns about excessive judicial discretion. Some amount of latitude will, of course, be necessary for judges to decide cases with reference to the specific facts at issue.[172] But by sanctioning ad hoc balancing of opaque, unarticulated factors, the current law gives judges ample room to infuse discoverability decisions with their own value judgments about the content of the speech. A judge who is especially offended by an anonymous blogger's use of racial slurs on an online bulletin board could conceivably be more likely to conclude that the plaintiff's interest in redress outweighs the defendant's right to anonymous speech.

Clearly defined inquiries thus clarify judicial decisionmaking, which, accordingly, facilitates more accurate litigant expectations. Accurate litigant expectations, in turn, not only reduce the risk of a chilling effect, but also promote judicial economy and efficient functioning of our legal system. In contrast, the absence of clearly defined inquiries in assessing discoverability evokes the Court's observation in *Upjohn Co. v. United States*[173] that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[174]

In sum, implementing a single uniform framework will increase the consistency and predictability of analysis as to whether the First Amendment restricts coercive investigatory powers. Increased consistency, moreover, is not merely an end in itself, but rather a means to reduce the risk that coercive discovery techniques will chill protected speech.

III. TOWARDS A SOLUTION: A PROPOSED FRAMEWORK FOR DETERMINING THE FIRST AMENDMENT LIMITS ON COERCIVE DISCOVERY

If, as this Comment has argued, a heightened, uniform standard is needed to prevent coercive discovery from eroding First Amendment rights, an important question follows: What would such a standard look like? The framework presented in this Part provides one possible answer. When presented with a motion to quash or compel a discovery request, courts should engage

172. *Cf.* Dendrite Int'l, Inc. v. Doe, No.3, 775 A.2d 756, 761 (N.J. Super. Ct. App. Div. 2001) (stressing that case-by-case analysis ensures a result "based on a meaningful analysis and a proper balancing of the equities and rights at issue").

173. 449 U.S. 383 (1981).

174. *Id.* at 393.

in the following five inquiries, asking: (1) whether reasonable efforts have been made to notify the speaker of the request; (2) whether the information sought merits qualified First Amendment protection; (3) whether the requesting party can make a prima facie showing of an actionable claim; (4) whether the information has sufficient probative value; and (5) whether reasonable alternative means of obtaining the information exist. These inquires are addressed through the following subsections.

A. Threshold Inquiry of Reasonable Notice

It bears mention that the framework proposed here does not automatically apply to every subpoena or search warrant seeking information about First Amendment activities. Rather, consistent with standard subpoena procedures, courts need only engage in the proposed analysis where a party challenges the discovery request in court. The limited application of this analytical framework thus preserves judicial economy in cases where a party decides to cooperate with the subpoena and discloses the requested information.

However, where the recipient of the request is not the same party whose First Amendment rights are implicated, the limited applicability of this framework is more troubling. In many cases, a third-party subpoena recipient lacks the same incentive to challenge the subpoena as the individual whose First Amendment rights are implicated.[175] In fact, the third-party target frequently has an incentive *not* to challenge the subpoena. Acting rationally, a third-party target will comply with the request unless it believes that the cost of disclosure (such as, in the case of an ISP, the loss of subscribers who are unhappy with its disclosure policy) outweighs the tertiary costs involved in challenging the request. As the estimated costs of litigation will likely be perceived as greater than the cost of compliance, the third-party target will usually cooperate.[176]

Though efficient, this result is nonetheless problematic. The power to disclose information enables third parties to compromise others' First

175. This will be common where the requesting party employs a subpoena duces tecum under Rule 25 of the Federal Rules of Civil Procedure to obtain information. A common example is a subpoena served on an ISP to compel disclosure of subscriber information that will unmask an anonymous internet speaker.

176. *Cf.* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 347 (2008) ("[A]n ISP's primary interest is in minimizing cost and maximizing profit, not in protecting anonymous speech." (quoting Orit Goldring & Antonia L. Hamblin, Note, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. & EMP. L.J. 383, 396 (2003))). Though uncommon, there is evidence of third parties who refuse to comply with coercive discovery requests based on concerns with loss of customers and goodwill. For example, Tattered Cover Bookstore, discussed *supra* Part I, refused to comply on such grounds.

Amendment interests before those individuals have the wherewithal to protest. Once the third-party subpoena target chooses to unmask a speaker, the speaker is essentially unable to defend his interests. And, of course, once the information is disclosed, confidentiality or anonymity cannot be restored.

Accordingly, the first part of this proposal imposes a reasonable notice requirement upon requesting parties to ensure that speakers' interests are meaningfully represented before a court can compel disclosure. To comply with this requirement, the requesting party must make reasonable efforts to notify the individual whose rights are implicated that he is the subject of a third-party subpoena, and afford him a reasonable opportunity to challenge the request on a motion to quash.[177] Requiring the requesting party, rather than the third-party subpoena recipient, to notify the speaker makes sense because in many cases the third party will often have little connection to the underlying action.[178]

Reasonable notice, of course, will vary according to the circumstances.[179] As a guideline, courts could require reasonable notice to be made via the same medium that the speaker transmitted the allegedly actionable message.[180] In the internet context, this could mean posting notice that a subpoena was served on the website, blog, chat room, or other forum in which the defendant made the allegedly actionable statement.[181]

Nevertheless, in some circumstances, the requesting party will be unable to notify the speaker that he is the subject of a subpoena. In such cases, the burden of notice must fall to the third-party subpoena recipient. Consider, for instance, a defamation action where a subpoena is served to identify the source of a news story. Here, a journalist may know how to locate the confi-

177. *See Dendrite*, 775 A.2d at 760 (requiring a plaintiff to "[post] a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board"); Doe No. 1 v. Cahill, 884 A.2d 451, 461 (Del. 2005) (adopting *Dendrite*'s notice requirement and stating a plaintiff must "post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted"); *see also* Doe I v. Individuals, 561 F. Supp. 2d 249, 254 (D. Conn. 2008) (plaintiffs satisfied notice requirement by "posting notice regarding the subpoenas on [a law school admissions website, where the allegedly defamatory statements had been posted] . . . which allowed the posters ample time to respond, as evidenced by Doe 21's activity in this action"); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 244 (Ct. App. 2008) ("We agree with the Delaware Supreme Court that the first requirement, an attempt to notify the defendant, does not appear to be unduly burdensome.").

178. *See* Gleicher, *supra* note 176, at 346–48 (discussing notice requirements in cases involving subpoenas to ISPs for the identities of John Doe defendants).

179. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–15 (1950).

180. *See, e.g.*, Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 719–20 (Ariz. Ct. App. 2007). A similar guideline was imposed by the D.C. Circuit in *Solers, Inc. v. Doe*, 977 A.2d 941, 955 (D.C. Cir. 2009).

181. Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1598 (2007).

dential source, while the defamation plaintiff likely will not. In such situations, interests of fairness require that the requesting party (a) demonstrates an inability to give reasonable notice (or, in criminal actions, shows that notice would substantially frustrate a valid investigatory purpose); and (b) reimburses the third-party target for reasonable costs incurred in providing notice. If reasonable notice has been given, a speaker's subsequent failure to respond by challenging the subpoena's enforcement will not alone suffice as justification for quashing a subpoena.

To date, a reasonable notice requirement has only been imposed in cases involving anonymous internet speech.[182] Recent case law, however, suggests that the notion may be gaining greater traction. For example, the Maryland Court of Appeals recently adopted the notice requirement first articulated in *Dendrite* in dismissing a motion to compel a local newspaper to disclose the identities of the plaintiff's anonymous critics.[183]

B. Qualified First Amendment Protection[184]

Expressive elements inhere in most discovery requests. For instance, consider email exchanges between two businesses over terms of a contract, between a landlord and a tenant discussing a rental property, or between law students gossiping about romantic lives of their classmates. A discovery request for the emails in each example would all involve speech. Yet few would seriously contend that disclosure of these emails would violate the First Amendment. Herein lies an interesting conceptual quandary: We want to prevent coercive discovery techniques from inducing self-censorship and corroding free expression. Yet to apply the requirements of this framework to every request that contains any communicative element would be extremely impractical. More specifically, an overly restrictive disclosure rule would

182. *See, e.g.*, *Solers, Inc.*, 977 A.2d at 955 ("[W]hen presented with a motion to quash (or enforce) a subpoena . . . the court should require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served . . . .").

183. Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 442–44, 449 (Md. 2009). *Dendrite*, along with *Cahill*, require the plaintiff to provide the defendant notice of the subpoena, typically by posting the notice in the same manner in which the allegedly defamatory statement was published. *See* Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); Doe No. 1 v. Cahill, 884 A.2d 451, 461 (Del. 2005).

184. As might be inferred from earlier Parts of this Comment, "privilege" is a loaded term infused with statutory and common law meaning. Because the first prong of my test is intended as more of a threshold inquiry and extensive analysis of Rule 501 and corresponding case law is therefore unnecessary, I deliberately employed the phrasing here to circumvent complicated (and, in this case, distracting) associations with "privilege."

frustrate the fact-finding process, and may not offer sufficient marginal benefits to free speech to justify encumbering law enforcement with procedural hurdles.

It is clear that courts must therefore draw a line and afford only certain types of speech-related information qualified First Amendment protection. Under this framework, establishing qualified First Amendment protection creates a presumption of protection from coercive discovery. The presumption can be rebutted, and disclosure compelled, only where the requesting party overcomes the presumption by satisfying the remaining inquiries under this framework.[185]

This, however, presents a difficult, normative question: How should qualified First Amendment protection be established?[186] The ideal test should distinguish circumstances where disclosure will significantly chill speech from those in which the chill-inducing effect of coercive discovery is de minimus. However, as previously discussed, ascertaining when a cognizable chilling effect exists is an inherently vague and unworkable inquiry.

Another approach we might consider inquires whether the information implicates core speech that has been recognized as most deserving of First Amendment protection.[187] Scholars generally agree that core speech includes, at the very least, "discussions of political, literary, artistic, historical, cultural and social concerns."[188] As some have suggested, in determining when a qualified First Amendment privilege exists, courts should consider "the social contexts that envelop and give constitutional significance to acts of communication" in determining when speech activities reflect core "First Amendment values."[189] Under this theory, a party opposing disclosure could establish qualified First Amendment protection where "expressive or associational

185. This requirement is similar to the first prong of the standard employed in Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV, 2008 WL 2686860, at *5–6 (S.D. Fla. June 29, 2008) (analyzing whether the party resisting disclosure properly invoked a First Amendment–based privilege in the context of Rule 26(b) analysis).

186. *Cf*. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (noting the complexity in determining which contexts are thought to implicate the First Amendment).

187. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 ("The [First] Amendment has a 'central meaning'—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.'").

188. Lidsky & Cotter, *supra* note 181, at 1599 n.277.

189. *See* Solove, *supra* note 4, at 153 (adopting Robert Post's theory to analyze when First Amendment values are implicated).

dimensions" in the requested information relate to "belief[s], discourse, or relationships of a political, cultural, or religious nature."[190]

While this approach offers useful insights, it is ultimately of limited utility. "Political," "social," and "cultural" are relatively amorphous concepts, and—absent a more specific definition—determinations about when to afford speech-related information qualified First Amendment protection are likely to be highly subjective.

For instance, a confidential statement made by an editor at the *Los Angeles Times* during the newspaper's deliberations about which candidate to endorse in an upcoming election would warrant qualified First Amendment protection because of the discussion's political nature. But would the same be true about a confidential statement made by a senior Coca Cola executive during deliberations about which product line to promote in an upcoming marketing campaign?

One might argue that the underlying focus on profit in this scenario makes the speech commercial,[191] rather than political or cultural, and, accordingly, that it should not merit qualified protection. On the other hand, a decision to promote diet beverages might reflect a social emphasis on health or a cultural normative view that equates thinness with attractiveness. Similarly, discussions about targeting marketing campaigns to certain demographic groups—for instance, black males under twenty-five or stay-at-home moms—could easily be construed as having political or cultural components. These definitional dilemmas suggest that we need to look further in articulating a test for establishing qualified First Amendment protection.

Rather than affording qualified protection to core speech, a better approach can be drawn from the general observation that courts are, and should be, more willing to protect speech that contributes to important public debates. As one California court held, "when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information."[192] Similarly

190. *Id.* (citing Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254–55 (1995) ("First Amendment analysis is relevant only when the values served by the First Amendment are implicated.")).

191. *See also* Connick v. Myers, 461 U.S. 138 (1983) (holding that the First Amendment generally only protects government employees from being fired for speech about matters of public concern).

192. Mitchell v. Superior Court, 690 P.2d 625, 634 (Cal. 1984) (holding that a journalist was entitled to a privilege from compulsory source disclosure). The investigation and revelation of hidden criminal or unethical conduct is one of the most important roles of the press in a free society—a role that may depend upon the ability of the press and the courts to protect sources who may justifiably fear exposure and possible retaliation.

in *Dun & Bradstreet, Inc. v. Greenmoss Builders*,[193] Justice Powell reasoned that while speech involving "matters of public concern [was] at the heart of the First Amendment's protection . . . speech on matters of purely private concern is of less First Amendment concern."[194]

Many commentators have criticized the distinction between public and private speech as unworkable and unsound.[195] But even though vagaries of the public concern doctrine may counsel against importing it wholesale, a modified public interest standard focused on descriptive elements can nonetheless provide a workable test for establishing what speech-related information should be entitled qualified First Amendment protection.

Thus, to establish qualified First Amendment protection, a party challenging a discovery request must satisfy two showings. First, it must establish that disclosure would violate an expectation of anonymity or confidentiality that he had at the time of the speech act at issue. This requirement is premised on the theory that absent a reasonable expectation of confidentiality, compelling disclosure would not significantly chill speech. Second, it must demonstrate that the requested information pertains to a matter of public concern.

This could be shown in a variety of ways. The involvement of the media or of a public figure, for instance, suggests that the information involves such a matter. Accordingly, subpoenas seeking to identify a journalist's confidential source, subpoenas seeking subscriber information from ISPs in cyberlibel actions, and subpoenas for statements made during editorial board room discussions would all qualify as involving matters of public concern under this test.

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193. 472 U.S. 749 (1985).

194. *Id.* at 758–59 (internal citations omitted). The Court noted that in matters of private speech,

> there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.

Id. at 760 (internal citations omitted). The Court held that a libel plaintiff could recover punitive damages without showing "actual malice" where the allegedly libelous statement was not about a matter of public concern. It went on to conclude that a confidential bankruptcy report provided to five credit-agency subscribers was not a matter of public concern, given the limited circulation and commercial nature of the information.

195. *See, e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1115 (2000) ("[A] good deal of speech that reveals information about people, including speech that some describe as being of merely 'private concern,' is actually of eminently legitimate interest."); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697 (2003) ("[T]he Court has not been very good at deciding what is a matter of 'public concern' and what isn't . . . .").

A matter may also be deemed to be of public concern where it involves the public dissemination of ideas or information. Subpoenas for information about associational activities, bookstore or library records, anonymous blog postings, and other information related to published materials all fall within the ambit of this factor. In contrast, many emails requested as part of civil discovery, or statements sought during criminal investigations, would not. It is also unlikely that the tenure review files in *University of Pennsylvania* would constitute matters of public importance under this test, although published academic scholarship would probably qualify.

C. Overcoming Qualified First Amendment Protection

Where reasonable notice has been given, and qualified First Amendment protection has been established, the burden shifts to the requesting party to overcome the presumptive protection and compel disclosure. To do so, the requesting party must demonstrate (1) a prima facie showing of an actionable claim; (2) that the information sought has sufficient probative value; and (3) that there exists no alternative means less destructive of First Amendment interests that would serve the same evidentiary purpose.

1. Prima Facie Showing of an Actionable Claim

To ensure that coercive discovery is not used as a means to "harass or embarrass the speaker or stifle legitimate criticism,"[196] this framework requires the party requesting disclosure to make a prima facie showing of an actionable claim before the information may be compelled. This requirement is important because once a speaker's anonymity is pierced, even an eventual decision in his favor on the merits may not be able to undo whatever harm or prejudice arose from disclosure.

Accordingly, the requesting party must specify the factual basis supporting each essential element of the underlying cause of action.[197] This ensures courts will not compel disclosure of anonymous or confidential information unless they are persuaded that there is a "real evidentiary basis for believing

196. Krinksy v. Doe 6, 72 Cal. Rptr. 3d 231, 244–45 (Ct. App. 2008) (applying a prima facie showing requirement in an online defamation action).

197. Because of this connection with the substantive cause of action, the requirements of this prong may vary slightly by jurisdiction. For instance, if the elements needed to establish liability for libel in California differed from what would establish libel liability in Oregon, the prima facie showing requirement would mirror that deviation.

that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff . . . ."[198]

Ideally, the showing should address all factual inferences necessary to prevail in the underlying action. However, courts must be mindful that many facts, particularly those relating to a defendant's subjective mental state, will not be accessible to a plaintiff in the early phases of discovery. Therefore, while the requesting party should ideally "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind,"[199] a party need not insist that the proffered factual justification eliminate all inferences to the contrary to satisfy this element.[200]

The prima facie showing requirement proposed herein strikes a middle ground between the standards currently applied in cases involving anonymous internet speakers as discussed in Part I.[201] It declines to adopt *Cahill*'s summary judgment standard on grounds that requiring such a rigorous showing could deter plaintiffs who have incomplete information from bringing legitimate claims, if they felt they could not obtain evidence necessary to their case.[202] Yet on the other hand, it recognizes that the motion-to-dismiss standard applied in *Seescandy* and other cases offers speakers meager protection from coercive discovery. Accordingly, this framework adopts the heightened showing standard of Rule 9(b) of the Federal Rules of Civil Procedure, under which a party must "state *with particularity* the circumstances constituting fraud or mistake."[203] For an illustration of both the operation of the prima facie showing requirement, as well as its importance, consider *Greenbaum v. Google*.[204] In *Greenbaum*, the plaintiff, an elected member of a school board, brought a libel

198. Highfields Capital Mgmt., L.P., v. Doe, 385 F. Supp. 2d 969, 975 (N.D. Cal. 2005).

199. This is drawn from the heightened pleading requirements in the Private Securities Litigation Reform Act. *See* 15 U.S.C. §§ 78u–4(b)(2) (2006).

200. *See, e.g.*, Doe No. 1 v. Cahill, 884 A.2d 451, 464 (Del. 2005) (stating that a plaintiff need only articulate facts pertaining to elements within plaintiff's control).

201. *See supra* Part I.C.2.

202. Summary judgment, under the Federal Rules, is granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

203. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b) (emphasis added). I recognize the issue presented by the Supreme Court's ambiguous ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Read most broadly, *Twombly* suggests a transsubstantive requirement of heightened factual pleading in a complaint, which—as the skeptical reader will surely point out—would render my second prong little more than a futile exercise in formalism. However, in the absence of clear guidance on the scope of *Twombly*'s holding, for the purposes of this Comment I will assume that the heightened pleading standard required in *Twombly* pertains exclusively to antitrust actions.

204. 845 N.Y.S.2d 695 (Sup. Ct. 2007).

suit against an anonymous blogger who posted statements on blog known as the "Orthomom blog" that allegedly described her as a bigot and an anti-Semite.[205] To identify the posters, the plaintiff subpoenaed the ISP that maintained the website hosting the blog.

The court noted that, in light of an upcoming school board election, the request for disclosure of anonymous speakers' identities would have a "chilling effect on protected political speech," and refused to compel disclosure without first ascertaining whether the speech was defamatory.[206] It ultimately concluded that the plaintiff failed to state an actionable claim for defamation because the statements at issue constituted protected opinion.[207] Importantly, if the court was to make the same finding *after* the speakers' identities had been disclosed, no available remedy would adequately compensate the speaker-defendants for the loss of anonymity.

In sum, to protect the valuable speech interest implicated in cases such as *Greenbaum*,[208] my proposed framework not only requires a court to review the claims to determine whether the plaintiff has a prima facie cause of action in the first instance, but also requires a plaintiff to produce evidence sufficient to make a prima facie showing reviewed under a heightened pleading standard that supports each element in the proposed cause of action.

2. Probative Value

When faced with decisions about whether to compel disclosure of speech-related information, courts have disagreed about how relevant the speech-related information must be to the plaintiff's claim. As Part I

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205. *Id.* at 697. The Orthomom blog, written by an Orthodox Jewish parent of school-age children, "is devoted to issues within both the Five Towns community on Long Island and the larger community of Orthodox Jewry." *Id.* at 699.

The statements at issue in *Greenbaum* concerned Pamela Greenbaum, an elected member of the school board of the Lawrence, Long Island, public schools, who opposed the use of public school funds for educational programs for private school children within the district. Specifically, Orthomom wrote: "Way [for Greenbaum] to make it clear that you have no interest in helping the private school community." *Id.* Various anonymous commentators responded with the following statements which petitioner claims are also actionable: "Pam Greenbaum is a bigot and really should not be on the board," and "Greenbaum is smarter than she seems. Unfortunately, there is a significant group of voters who can't get enough of her bigotry." *Id.* at 699–700 (internal quotations omitted).

206. *Id.* at 701.

207. *Id.* at 700–01.

208. The reasoning underlying a prima facie showing requirement applies equally to traditional libel cases, including those involving journalist privilege. *See* Cervantes v. Time, Inc., 464 F.2d 986, 993 (8th Cir. 1972) ("[T]o routinely grant motions seeking compulsory disclosure . . . without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles [of *New York Times* and similar cases.]").

demonstrated, in some circumstances courts permit discovery of anything that might be useful (or might lead to other useful information), while in others the requesting party must demonstrate that the information be "directly and materially relevant to [a core] claim or defense,"[209] or that the request "goes to the heart of the matter."[210]

This proposal similarly imposes a standard beyond mere relevance, requiring the party requesting disclosure to demonstrate that the information has significant probative value to the underlying claim. To evaluate whether the information is sufficiently probative, a court must gauge whether the information is central to advancing the claim or defense.[211] The requesting party should be able to articulate a specific, logical relationship between the requested information and the specific element(s) of the claim to which the information is relevant.[212] The probative value showing forces a party to only request that which is absolutely necessary to prove its claim. By focusing on the extent to which the information will advance a claim or defense, this requirement seeks to ensure that a party cannot compel disclosure of information that is merely tangential or unimportant to the underlying claim.

Courts should be particularly cautious in evaluating probative value where the requested information pertains to reading habits or associational activity. Generally, information about what someone read or with whom he

209. Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1096 (W.D. Wash 2001) ("Under the Federal Rules of Civil Procedure discovery is normally very broad, requiring disclosure of any relevant information that 'appears reasonably calculated to lead to the discovery of admissible evidence.' But when First Amendment rights are at stake, a higher threshold of relevancy must be imposed." (internal citations omitted) (quoting FED. R. CIV. P. 26(b)(1))).

210. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977); Baker v. F. & F. Inv., 470 F.2d 778, 784 (2d Cir. 1972); *cf.* Britt v. Superior Court., 574 P.2d 766, 776 (Cal. 1978).

211. As the reader may observe, to find that the information is found sufficiently probative is essentially to find that the plaintiff's evidentiary needs outweigh the defendant's First Amendment interests in shielding the information from discovery. In this sense, this requirement is not entirely unlike Rule 403 of the Federal Rules of Evidence, which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, unlike Rule 403 and many of the standards discussed in Part I, my framework does not explicitly call upon courts to balance these interests. Because my five-part framework, including a more rigorous relevance inquiry, addresses the competing concerns, an explicit balancing requirement would be superfluous.

212. *See* Faulkner, *supra* note 63, at 21 (proposing a similar requirement in the admissibility context) ("Evidence of speech, activity or belief that is substantially protected by the First Amendment should be considered presumptively prejudicial . . . [and] may only be admitted if its probative content substantially outweighs its prejudicial effects, which are to be assessed at their maximum reasonable value.") My conceptualization of probative value differs in that it does not require the court to balance the harmful effects of the information against the prejudicial value, as observed in the footnote above.

associated is not especially probative of what he might have done.[213] Consider *Tattered Cover, Inc. v. City of Thornton*.[214] Ordinarily, a subpoena of customer purchase records of two particular books about clandestine drug laboratories in connection with a criminal drug investigation would not be sufficiently probative under this framework, given the generally tenuous connection between buying books about drugs and running a methamphetamine lab. People buy books for a variety of perfectly innocuous reasons and as gifts for other people. Thus, the information usually is not sufficiently probative. Moreover, the information's lack of strong probative value means that that law enforcement will not be unduly burdened or prejudiced by its absence.

However, the facts in *Tattered Cover* point to a different result. There, the police found books, along with a mailer from the target bookstore, a few feet away from an illegal methamphetamine lab. Thus, given the close connection between the drug-related books and the drug-related crime, as well as the temporal nexus (an envelope found in the trash indicated that the books had been recently purchased), the government could demonstrate that information about recent customer purchase records for those books had sufficient probative value.[215]

For another example, consider a cyberlibel plaintiff who subpoenas an ISP in an effort to unmask an anonymous blogger. Here, to establish probative value, the requesting party must show that information will actually identify the speaker (and thus bear a specific, logical relationship), and that knowledge of the speaker's identity will centrally advance the plaintiff's claim. Plaintiffs in these cases will likely satisfy the probative value requirement because without being able to identify the defendant, a plaintiff cannot obtain redress.[216]

Similarly, coercive discovery of a defendant's statements is more likely to be probative of elements of a claim or defense that relate to the defendant's

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213. *See* Volokh, *supra* note 10, at 1445 n.110 ("Evidence that the suspect read a supposedly racist book won't be as probative of his actions or intentions as evidence that he expressed supposedly racist views.").

214. 44 P.3d 1044 (Colo. 2002).

215. *See* Volokh, *supra* note 10, at 1447 (noting that certain unique books can prove relevant in criminal investigations, as evident in the case of a serial killer whose methods were inspired by books of an obscure Scottish mystic).

216. This requirement will likely be satisfied in such cases, because the identity of an anonymous defendant is going to be necessary for the plaintiff to obtain redress. However, it is not of concern that the probative value requirement is relatively weaker here than in the *Tattered Cover* context. This is because other prongs, particularly the prima facie showing requirement, will be far more rigorous in internet cases than in cases like *Tattered Cover*, where there was clear evidence of an illegal methamphetamine lab. Thus, although these prongs will vary in their rigor depending on context, on balance the framework affords a consistent level of First Amendment protection. *See Tattered Cover, Inc.*, 44 P.3d at 1048–49.

state of mind.[217] For instance, the request in *University of Pennsylvania* to compel disclosure of certain confidential statements in the plaintiff's tenure review files would also be held to be sufficiently probative, because statements regarding the plaintiff's academic merits are central to establishing a claim of discriminatory intent. Because it is reasonable to infer that someone who holds certain beliefs acted in accordance with them, speech that indicates beliefs is more likely to be probative of a finding of guilt or liability predicated on the defendant's beliefs.

There are, concededly, practical and theoretical problems with a probative value requirement. The biggest practical problem is defining how courts should treat speech-related information that is sought as circumstantial, rather than direct, evidence. To some degree, the reasonable alternative-means requirement (discussed below) will address the concern that the information will be too tangential by requiring the requesting party to seek alternative means of accomplishing the same objective. However, it is nonetheless possible that even where a plaintiff can obtain alternative, nonconfidential information that serves the same evidentiary purpose, his case would be strengthened by allowing the court or jury to piece together bits of circumstantial evidence to arrive at a broader conclusion. Another more troubling problem with imposing a probative value requirement is that, as with any relevance-type inquiry, the analysis will be factually dependent. Thus, the standard for any probative value test will be inherently indeterminate. And the more indeterminate the standard, the more it will be subject to the same failings of approaches criticized earlier in this Comment.

Such reasoning, however, invites an all-or-nothing approach that affords speech-related information either absolute First Amendment protection or none at all. Such bright line rules, however, are woefully ill-equipped to address the inherently factually dependent nature of such determinations. Admittedly, the judicial discretion, concomitant with factually determinant standards, may be less than desirable. Yet as Kathleen Sullivan has observed, "[b]alancing can function effectively as a rule if it is given a sufficiently speech-protective

217. It is worth noting that the "state of mind" must be an element of the action which is the basis for the lawsuit, as it is in defamation and discrimination actions. *Cf.* Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (holding that evidence relating to a medical society's meeting and resolution was inadmissible in an antitrust action) ("Admissibility, we think, should be governed by a test that weighs the probativeness of the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights. The medical society's meeting and resolution have some evidentiary bearing on the character of the doctors' other actions and may aid in demonstrating Palmer's sympathies, but the probative value of this evidence is low.").

form."[218] Such is the case here. Where the question is one of discoverability, the flexibility subsumed in the probative value requirement may well be the price of preserving liberty.

3. Reasonable Alternative Means of Obtaining the Information

Lastly, the final prong of this framework requires the requesting party to show that no available alternative means of obtaining information exist that would serve the same evidentiary purpose, but be equally less destructive of First Amendment interests. Like the probative value showing discussed above, this requirement is intended to limit coercive discovery of information about people's First Amendment activities to only those situations where disclosure is truly necessary. While a litigant need not exhaust every imaginable alternative, this requirement demands "at a minimum . . . a showing that the information sought is not obtainable from another source."[219] To satisfy this requirement, a party seeking to compel disclosure can show that they have made reasonable efforts to discover the information from alternative sources and that no other reasonable source is available.[220]

This requirement is particularly apposite to journalist privilege cases. Where a party could have deposed other nonconfidential sources to obtain the same testimony that he hopes to obtain by compelling disclosure of a confidential source's identity, this requirement will bar disclosure. Similarly, where reasonable, noncoercive means of identifying the confidential source are available, the requesting party cannot compel a journalist to disclose the source's identity.

For instance, consider again the facts of *Tattered Cover*. Law enforcement agents sought customer purchase records of drug-related books found near a drug lab on the theory that the individual who bought the book lived in the room where it was found. But, as the court noted, if the officers "need[ed] evidence of who occupied the master bedroom, as indirect evidence of who must have operated the lab, the record reveal[ed] a number of alternative ways in which this information could have been ascertained."[221] The

218. SULLIVAN & GUNTHER, *supra* note 122, at 12.

219. Shoen v. Shoen, 5 F.3d 1289, 1296 (9th Cir. 1993) (holding that the requesting parties failed to demonstrate the exhaustion of reasonable alternative means for obtaining a journalist's materials because they failed to depose the source before seeking to compel disclosure of protected materials).

220. *See* Price v. Time, Inc., 416 F.3d 1327, 1346 (11th Cir. 2005) (finding that a defamation plaintiff could not compel disclosure of an anonymous source's identity since he had not formally deposed four persons identified by reporter who possibly had direct knowledge of the source's identity).

221. *Tattered Cover, Inc.*, 44 P.3d at 1062.

officers could have, for example, fingerprinted other objects in the room, examined clothing and shoes found in the bedroom to see if the sizes matched one of the suspects, searched for DNA samples, or interviewed witnesses who might have seen the suspect(s) engaging in illegal behavior.[222] Given these reasonable alternatives, the customer purchase records sought in *Tattered Cover* would not be discoverable under this framework.

Additionally, where circumstances permit, a court can modify coercive discovery requests to better comport with First Amendment interests. For instance, a court could compel disclosure of speech-related information but permit a party to redact certain confidential elements.[223] In *University of Pennsylvania*, this would have meant permitting the discovery of the content of the tenure review files but redacting the names of faculty members who made certain statements. A judge could also stay the motion to compel, in the hope that future discovery will render the contested speech-related information extraneous and unnecessary. For example, where nonconfidential witnesses are available to testify about the same information as would a journalist's confidential source, a court could order the nonconfidential witnesses be deposed before deciding whether the source's identity can be coercively discovered.

CONCLUSION

Coercive discovery techniques and the First Amendment both aim at uncovering truth. But notwithstanding this shared goal, courts deciding whether to compel disclosure of information about First Amendment activities must pit one against the other and reconcile a speaker's interest in preventing disclosure with the requesting party's interest in obtaining relevant and reliable evidence. This has not proved an easy task.

As Justice Frankfurter once wrote, "the history of American freedom . . . is, in no small measure, the history of procedure."[224] Indeed, procedure lies at the heart of both the problem and the solution discussed herein. Left unchecked, the power to compel disclosure of anonymous or confidential speech-related information generates fear, uncertainty, and a chill on protected speech.

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222. *Id.*

223. *See, e.g.*, Schneider v. Nw. Univ., 151 F.R.D. 319, 323–24, (N.D. Ill. 1993); *see also* Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (upholding the journalist's privilege, even though the information sought was crucial to the plaintiff's case, because alternative methods to access the information had not been exhausted).

224. Monaghan, *supra* note 20, at 518 (citing Malinski v. New York, 324 U.S. 401, 414 (1945)).

As this Comment has argued, the best response is a heightened discoverability requirement that will be appropriately sensitive to constitutional concerns while still recognizing the evidentiary need for information. Moreover, to reduce the doctrinal confusion that has resulted from the use of disparate standards, this heightened discoverability standard should be uniformly applied to the numerous kinds of coercive discovery disputes. Despite the challenges of implementing such a framework, coercive investigatory tools should not be allowed to corrode the cherished right to free expression. Accordingly, to give First Amendment interests implicated in coercive discovery their proper due, courts must recognize the need for First Amendment due process.