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Gary T. Schwartz Professor of Law Eugene Volokh teaches Constitutional Law II (Free Speech), Copyright, Firearms Regulation, and the law of government and religion. He is a nationally recognized expert on the First Amendment, cyberspace law, harassment law, and gun control. He has written three books, more than 50 law review articles, and more than 75 op-eds on constitutional law, cyberspace law, and other topics. He is widely recognized for his article, "Mechanisms of the Slippery Slope," (Harvard Law Review, 2003), where he insightfully analyzes how to sensibly evaluate the risk of slippery slopes, a surprisingly underinvestigated topic.

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# DETECTING SPEECH: When Is It “McCarthyism”? When Is It Proper?

Excerpt from:

by Eugene Volokh\*

What may government officials do to prevent speech that they think is evil and dangerous? What may businesses, organizations, or individuals do? Some actions are clearly permitted, even laudable: Persuading people that the speech is bad is the obvious example. Neither we nor the government need sit idle when evil ideas are spread.<sup>1</sup>

Introduction

It's also quite proper to make sure that our ideological groups are not taken over by evil movements. The 1950s ACLU, for instance, rightly rejected members who supported totalitarian ideologies.<sup>2</sup> Totalitarianism is the antithesis of civil liberties: A civil libertarian organization may rightly support totalitarians' right to speak, but it should also want to avoid involving pro-totalitarians in its decision making.<sup>3</sup> Likewise, groups that take controversial but well-meaning stands on racial issues may rightly want to exclude racists from their ranks, and especially from their leadership. That's both good politics and good policy.

A third acceptable option is to create social norms that condemn contemptible views and the people who express them. These norms may deter even those speakers who aren't persuaded by them — unlike pure persuasion, the norms may, in some sense, be socially coercive. Racists, for example, often feel reluctant to express their views because they fear social opprobrium. This is generally good. Likewise, people are legally free to praise rape, child molestation, or other crimes, but they tend to keep quiet about such views in most circles. That also is generally good.

Of course, such norm creation is proper only if the condemned views are indeed contemptible. Social norms that condemn thoughtful and polite criticism of race-based affirmative action, American foreign policy, or various religions are counterproductive — because they stifle potentially enlightening debate — and unfair. Yet this merely counsels caution and thoughtfulness in adopting and applying such norms; it doesn't undermine the legitimacy of anti-speech social norms as such. We should be polite and welcoming to those who have unorthodox views on social security reform. We needn't, however, apply the same social ground rules to those who have the unorthodox view that certain races are subhuman.

Other actions to combat evil views are rightly forbidden by the First Amendment — often by First Amendment doctrines that spring from reactions to the McCarthy era — or by well-accepted social norms.<sup>4</sup> The government may not throw people in prison for their bad ideas, whether Communist, racist, or pro-terrorist.<sup>5</sup> The government may not

ban political parties that express those views.<sup>6</sup> The government shouldn't bar people from professions or from universities,<sup>7</sup> threaten civil liability,<sup>8</sup> or strip divorcing parents of child custody for expressing or tolerating such views.<sup>9</sup>

Likewise, both governmental critics and private critics shouldn't resort to lies or unfounded accusations. They shouldn't use excessive rhetoric that smears people with labels that they don't deserve, such as calling everyone on the Left "[C]ommunist sympathizers,"<sup>10</sup> or calling people racists simply because they oppose affirmative action or support English-only instruction.<sup>11</sup>

Yet between the easy cases of mere persuasion and clear First Amendment violation lie practices that are rightly contested. May government officials argue that the government's political opponents are unwittingly helping evil? May private parties properly use their economic power to retaliate against those whose views they condemn? May the government subpoena library and bookstore records to help uncover the identities of political criminals or terrorists?

Such practices sometimes trigger charges of "McCarthyism." Critics correctly point out that these practices may deter — even without legally prohibiting — certain kinds of speech. Some of the practices may even be intended to deter such speech.

Yet as the example of social norms against racist speech shows, some deterrence of bad speech is socially and legally permissible. The hard question, which this Essay focuses on, is when such practices really deserve to be labeled "McCarthyism" and to be forbidden by the First Amendment, by statute, or by social norm.<sup>12</sup> I regret that I can't offer a general answer, or even discuss more than a few such practices. But in this Essay, I hope to offer some thoughts on the subject, thoughts which surely aren't conclusive, but which I hope will be helpful.

Condemnation  
of Those Who  
Inadvertently  
Help the Enemy

“To those who scare peace-loving people with phantoms of lost liberty,” Attorney General Ashcroft famously said not long after September 11, “my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies....”<sup>13</sup> That's McCarthyism, some replied.<sup>14</sup>

Here's another quote, this one from the president: “Our nation has felt the lash of terrorism.... We can't let [a certain group] turn America into a safehouse for terrorists. Congress should get back on track and send me tough legislation that cracks down on terrorism. It should listen to the cries of the victims and the hopes of our children, not the back-alley whispers of the [group].” The president was Bill Clinton, and the group that he was condemning was the “gun lobby,” which opposed some gun-control proposals that Clinton favored.<sup>15</sup>

Likewise, following the Oklahoma City bombing, President Clinton argued on national television that violence is caused “not just [by] the movies showing violence. It’s the words spouting violence, giving sanction to violence, telling people how to practice violence that are sweeping all across the country. People should examine the consequences of what they say and the kind of emotions they’re trying to inflame.”<sup>16</sup> He might have meant to condemn only those who actually urge violence, and not those who simply “giv[e] sanction to violence” by harshly criticizing the government. But his words could also have been interpreted (and were interpreted, by at least one sympathetic commentator) as a criticism of strident anti-government rhetoric more broadly.<sup>17</sup>

Similarly, consider Winston Churchill’s lament that his critics’ wartime statements were (among other things) “weaken[ing] confidence in the Government,” “mak[ing] the Army distrust the backing it is getting from the civil power,” and “mak[ing] the workmen lose confidence in the weapons they are striving so hard to make,” all “to the distress of all our friends and to the delight of all our foes.”<sup>18</sup> And, finally, consider this quote from George Orwell during World War II: “Pacifism is objectively pro-fascist. This is elementary common sense. If you hamper the war effort on one side, you automatically help out that of the other.”<sup>19</sup> Orwell’s message, I take it, was this: The pacifists’ tactics only aid the Nazis, for they erode the Allies’ national unity and diminish their resolve. They give ammunition to the Allies’ enemies.

Such statements have some things in common. They accuse people of doing things that help the enemy. The great majority of the accused are probably decent people, who have no desire to help terrorists or Nazis.<sup>20</sup> The statements may also deter dissenters: People don’t like to be told that they are helping the nation’s mortal enemies, especially when the charge comes from an official to whom millions listen. Even if the accused think the accusation is unjust, they may keep quiet, or at least tone down their arguments, to avoid such attacks in the future.<sup>21</sup> The accusers likely intended to deter dissent by making potential dissenters feel embarrassed to make certain criticisms that the accusers thought baseless and harmful.<sup>22</sup>

And the accusations may also have been factually correct. Pacifists’ opposition to the Allied war effort may have helped the Nazis as much as pro-Nazi opposition would have. Excessive insistence on gun owners’ rights might likewise help terrorists.<sup>23</sup> Similarly, criticisms of the administration’s actions may well erode national unity, diminish national resolve, give ammunition to our enemies, and aid terrorists. This is especially true when the criticisms come from legislative leaders. Recall that Ashcroft’s statement came at a hearing organized by Senator Patrick Leahy, then-chair of the Democrat-run Senate Judiciary Committee and a leading adversary of Ashcroft.<sup>24</sup> The hearing had apparently been called in part to criticize the administration’s antiterrorism policy on civil liberties grounds.<sup>25</sup> Enemies who see our political leaders divided on the war on terror may well be emboldened, and foreign neutrals may see us as less likely to prevail than if we seemed united. Such internal division may well “distress . . . all our friends and . . . delight

all our foes.”<sup>26</sup> And if Senator Leahy’s and others’ criticisms were indeed unfounded or at least exaggerated (a hotly contested position, of course, but one that Ashcroft defended on the merits in his testimony), then Ashcroft could have reasonably concluded that the critics’ actions were both unjustified and dangerous.

Good intentions may sometimes yield bad results. That’s true of well-intentioned administration actions, which the party out of power often warns about. It’s also true of well-intentioned criticisms of such actions. If such bad results seem likely, then the public ought to be warned of this danger, though of course those who disagree should likewise argue that the danger is itself a “phantom.”

And government officials are as entitled as anyone else to note such dangers. The administration, which is responsible for keeping the country safe, has a responsibility to warn of a wide range of dangers. People who ignore the danger, if the danger is real, may well deserve to be criticized. And when political leaders debate questions of liberty and national security, plausible claims that one side’s actions may jeopardize liberty may reasonably be met by plausible claims that the other side’s actions may jeopardize security.<sup>27</sup>

Now it’s true, as many critics argue, that such accusations try to move people through fear.<sup>28</sup> But terrorists ought to be feared. Many groups rightly try to influence voters by making them afraid of environmental catastrophe, crime, gun violence, terrorism, war, special interests, or suppression of civil rights. Well-founded fear is better than foolish fearlessness. Some fear is excessive or even irrational, but some is eminently justified, or is at least a reasonable response to uncertainty.<sup>29</sup>

It’s also true that politicians sometimes harness fear for political advantage. That’s what they’re supposed to do in a democracy. When national security is a big part of an election campaign, each side likely believes that its program will protect the nation, and the other side’s will (at least comparatively) endanger the nation — and each side then has the right and even the duty to make these arguments to the voters.<sup>30</sup>

In 2004 Democrats sincerely believed that re-electing George W. Bush would endanger America, because they thought that Bush’s national security policy was dangerous. House Minority Leader Nancy Pelosi, for instance, argued that “the president has failed in how he has tried to protect America.... We are less safe — we are less safe because he is president....”<sup>31</sup> Republicans sincerely believed the same of Kerry, and argued accordingly.<sup>32</sup> One might find one side’s case to be erroneous or even dishonest, but making fear of terrorism an “underlying theme of domestic and foreign policy”<sup>33</sup> is quite proper when terrorists are doing frightening things.

Yet at the same time, pointing out (even if accurately) that criticism of the administration is helping America’s foreign or domestic enemies has costs. To begin with, it can distract from the legitimate arguments that the critic is making. Perhaps

paying more attention to civil liberties will actually help the war effort by showing us to be a humane and tolerant nation and thus making us more popular throughout the world. Or maybe broadly protecting civil liberties will hurt the war effort, but some cost to the war effort is a tolerable price to pay for preserving our traditional rights.

Moreover, arguing that critics of the government are helping our enemies can wrongly tar people with the implication of bad purpose, even if no such charge is explicitly made. This may be unfair. It may breed unnecessary political hostility — not just disagreement but contempt or hatred — that is itself harmful to the nation. It can over-deter speech by making speakers afraid to level even those criticisms that, on balance, help the country more than hurt it. As Orwell himself wrote, just two years after the lines I quote above;

We are told that it is only people's objective actions that matter, and their subjective feelings are of no importance. Thus pacifists, by obstructing the war effort, are "objectively" aiding the Nazis; and therefore the fact that they may be personally hostile to Fascism is irrelevant. I have been guilty of saying this myself more than once....

...In my opinion a few pacifists are inwardly pro-Nazi....The important thing is to discover *which* individuals are honest and which are not, and the usual blanket accusation merely makes this more difficult. The atmosphere of hatred in which controversy is conducted blinds people to considerations of this kind. To admit that an opponent might be both honest and intelligent is felt to be intolerable. It is more immediately satisfying to shout that he is a fool or a scoundrel, or both, than to find out what he is really like.<sup>34</sup>

Now perhaps Orwell's change of mind was occasioned by the change from the dark days of 1942 to post-D-day, post-Stalingrad 1944. It is easier to be generous to those who, in your view, helped Hitler (even unintentionally) when Hitler is nearly defeated. Yet I think that Orwell's second thoughts, whatever their reason, were objectively the right ones. Explaining why your adversaries' arguments unintentionally help the enemy is legitimate. But expressly acknowledging that this effect is likely unintentional — even when you're tussling with a senator who you think has unfairly attacked you — is fairer, less politically divisive, and often more rhetorically effective. I suspect John Ashcroft's quote alienated more Americans than it persuaded. Likewise, the vitriolic Bush-the-Nazi attacks from some parts of the Left probably, on balance, helped Bush in the 2004 election.

So it seems to me that, first, the quotes with which I began this Part could have been put better. Second, because people tend to overestimate the bad effects of their adversaries' speech, we should often be skeptical about allegations of such bad effects. And third, such allegations provide a convenient way to evade (deliberately or subconsciously) the substantive criticisms leveled by the adversaries' speech.



Nonetheless, responding to such allegations with charges of McCarthyism is likewise a convenient way to evade the merits of those allegations. If Ashcroft, Clinton, Orwell, and Churchill were wrong in their estimates of the harm that their adversaries' arguments were causing, one should certainly call them on that. One should do likewise if the harms are exceeded by the benefit of the remedies that the adversaries propose. But these arguments need to be made on the merits. Labeling allegations as "McCarthyism" is likely to distract listeners more than it helps them assess which allegations are sound and which aren't....

“ [Rabbi Max] Wall is distressed at the echoes of McCarthyism he hears today. The USA Patriot Act, [among other things]...allows investigators to inspect library records. 'It bothers me very much,' Wall said. Just as he was bothered 50 years ago by [McCarthyism].”<sup>100</sup> Under this “New McCarthyism,” another commentator writes, “[y]ou are no longer free to patronize a bookstore without fear of government scrutiny.”<sup>101</sup>

As it happens, the Patriot Act has no special provisions regarding library subpoenas, and its general subpoena provision — section 215 of the Act — isn't particularly novel: The government has long had the power to subpoena lots of records, including library records, simply by using the normal grand jury subpoena.<sup>102</sup> Still, while the Patriot Act isn't at fault here, there surely is a plausible argument against library and bookstore subpoenas:

- (1) Reading books is constitutionally protected activity.
- (2) Reading certain books can make the police suspect that you're prone to do illegal things and can make juries think you're the one who did some act suggested by those books. This may be true of bombmaking manuals, pro-Communist propaganda, or racist tracts. It may also be true of chemistry textbooks that discuss explosives, books that harshly condemn government policies, or scholarly volumes on supposed genetic differences among the races. Naturally, not everyone who reads such books will attract police attention. But if the police are trying to find out who's involved in some bomb plot, subversive conspiracy, or hate crime, they might try to use reading records to identify potential suspects.
- (3) If the police can easily learn who bought or borrowed certain books, then some people may be deterred from reading suspicious books.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas for bookstore or library records.

In 2002, the Colorado Supreme Court accepted this very argument in holding that the

Colorado Constitution barred subpoenas or searches of bookstore records unless prosecutors could “demonstrate a sufficiently compelling need for the specific customer purchase record” and in particular that there are no “reasonable alternate ways of conducting an investigation other than by seizing a customer’s book purchase record.”<sup>103</sup> This is a deliberately demanding standard, much higher than the usual standard for subpoenas (that there’s a “reasonable possibility [that the subpoena]... will produce information relevant to the [investigation]”<sup>104</sup>) or even the probable cause standard for searches. This logic should also apply to library records.

And there is precedent for this sort of restriction on the government’s investigative powers: The Court has long restricted the government’s ability to forcibly discover who belongs to or contributes to expressive associations, precisely because government scrutiny may deter people from participating in such groups.<sup>105</sup> Likewise, many circuit courts have relied on this argument in granting journalists a qualified privilege not to reveal the identities of confidential sources.<sup>106</sup>

Yet appealing as this argument might seem, consider its close analog:

- (1) Speaking or sending email is constitutionally protected activity.
- (2) Saying or writing certain things can make the police suspect you of various illegal conduct and can make juries think you’re guilty of such conduct. This may be true of pro-terrorist, pro-Communist, or racist statements, as well as statements that are well-intentioned but might be interpreted as pro-terrorist, pro-Communist, or racist.
- (3) If the police (or civil litigants) can easily learn who said what, then some people may be deterred from saying or writing suspicious things.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas demanding that people testify about what someone said or wrote.

The two arguments are similar — yet the latter argument is quite unlikely to prevail. First Amendment law doesn’t bar the police from investigating what suspects have said or written to acquaintances, or who has said or written something that might make him a suspect.<sup>107</sup> Nor does it bar prosecutors from using subpoenas or other techniques to coerce the suspect’s acquaintances into testifying about such things.<sup>108</sup> Say the police are investigating the killing of an abortion provider, the bombing of a federal building, or the burning of a black church. Surely they would ask around: Who has been saying things that reveal an ideological motive to commit the crime? Has this particular person sent you any email that revealed such a motive?<sup>109</sup> These are legitimate and valuable questions.<sup>110</sup> If need be, the police might try to pressure people to talk, or subpoena them to testify before a grand jury or at trial. When they find a suspect, and have

probable cause to believe that his computer contains information that might reveal (among other things) a motive, they can search the suspect's files. They may subpoena the suspect's Internet service provider for records of messages that he had sent or received, looking both for evidence against him and for evidence that others shared his motive and may thus have acted together with him. And, of course, in civil cases it's routine for litigants to demand a wide range of email and other records from the other side, hoping that these records may contain helpful evidence.<sup>111</sup>

This necessarily has a deterrent effect on speakers. Even nonviolent people who hold pro-life, anti-government, or racist views might become reluctant to express these views to acquaintances, especially in writing (such as email). It's true that because bookstore records can be subpoenaed, you aren't "free to patronize a bookstore without fear of government scrutiny" of what you read. But you have never been free to speak or email without fear of similar government scrutiny of what you say or write — yet this deterrent effect has not prevented government investigations of who said what. Courts don't even require police to show a "compelling need" for each piece of speech-related evidence for which they subpoena or search.<sup>112</sup>

We see, then, a tension in the First Amendment law related to potentially speech-detering government inquiries. On the one hand, the law restricts coercive discovery of who belongs to a group, or, in some jurisdictions, who said something to a journalist. On the other hand, it does not restrict the discovery of what a suspect said, discovery of what university professors said in tenure reviews,<sup>113</sup> or what reporters said in editorial discussions about an allegedly libelous story,<sup>114</sup> though such discovery can deter people from speaking candidly.<sup>115</sup> And notwithstanding what some lower courts have done, the Court's *Branzburg v. Hayes* opinion held — and the Court later reaffirmed — that prosecutors can indeed discover the names of a journalist's confidential sources.<sup>116</sup>

The search for truth in the courtroom, like the search for truth in public debate, usually benefits from more information.<sup>117</sup> The First Amendment bars the government from outlawing certain speech, or making it subject to civil liability. But the legal system's investigative power may often properly be used to uncover relevant evidence even when that discovery may deter valuable speech.

What, if anything, can be done about these deterrent effects? First, courts or legislatures could indeed impose demanding standards for subpoenaing or searching library or bookstore records, though not for discovery of what people have said or written. The theory would be that people's reading habits (as opposed to people's statements) are important evidence in only a few cases, so the legal system can operate well enough without such evidence.<sup>118</sup>

Yet reading habits are potentially relevant. In the Unabomber case, the FBI combed

library records for people who might have borrowed two obscure (and by themselves innocent) books that the bomber quoted in his manifesto; unfortunately, the FBI could look only in the few geographic areas to which they had linked the bomber, so the searches didn't help.<sup>119</sup>

Police tracking the Zodiac serial killer noticed that the killer's modus operandi seemed to be inspired by a Scottish mystic's books (which were again by themselves innocent), and the police thus subpoenaed the records of people who had borrowed the books from local libraries.<sup>120</sup> A disclosure rule that's demanding enough to diminish readers' fears that the police can learn what they're reading will also substantially interfere with these investigations.<sup>121</sup> And focusing on the rare subpoenas that deter reading without doing anything about the more common subpoenas that deter actual speech (or writing) may be a largely empty step.

Second, courts or legislatures could impose a higher threshold for bookstore and library subpoenas than on normal subpoenas, but not a much higher standard. This would interfere less with government investigations, but it will also do little to satisfy readers' concerns about a chilling effect.<sup>122</sup> We'll still be unable to patronize a library or bookstore without fear of government scrutiny, even though the scrutiny might require a bit more justification on the government's part.

Third, courts or legislatures could constrain discovery of any information related to any First Amendment-protected activities. For example, we could require the police to pass a high threshold before they could investigate what people said or wrote, at least when the speech has some ideological component. Or perhaps we could demand this threshold requirement only for coercive investigations (using subpoenas or search warrants), and not simple questioning.<sup>123</sup> The same rule may also be applied to subpoenas in civil cases, thus reversing *Herbert v. Lando* and *University of Pennsylvania v. EEOC*. Yet this would dramatically interfere with the investigation of many crimes and torts, especially those that have an ideological motive.

Or, fourth, courts and legislatures could conclude that the deterrent effects of subpoenas for library or bookstore records are acceptable, just as the deterrent effects of subpoenas for testimony about a person's statements are acceptable. In this, they would simply be following the logic of *Branzburg*, *Herbert*, and *University of Pennsylvania*.

But in any event, it's a mistake to view subpoenas of library or bookstore records as a radical innovation. They are simply special cases of a more general and well-established phenomenon, subpoenas of information related to First Amendment activities. Some such subpoenas, for instance subpoenas of membership records, are presumptively forbidden. Yet others are generally allowed even when they may deter people from saying or writing suspicious-seeming things.

Perhaps the First Amendment test should be different for subpoenas about reading than for subpoenas about speaking or writing — but that conclusion is far from obvious. And it hardly seems McCarthyite to treat subpoenas of bookstore and library records like the subpoenas for speech-related information that the courts have routinely upheld.

First Amendment law rightly recognizes that laws can have a “chilling effect.” Libel laws may, on their face, prohibit only false speech, but they may also deter true speech.<sup>124</sup> Vague laws may cause people to “steer far wider of the unlawful zone” than clear laws, and may thus deter more speech than they ultimately punish.<sup>125</sup>

But not all actions that deter speech are unconstitutional or even improper. Some speech should be deterred. One reason that evil and offensive speech can remain constitutionally unpunished is that it is kept in check through social norms and economic retaliation.<sup>126</sup>

Racist speech is a classic example: Many people, including those who have some racist views, are likely reluctant to say racist things for fear of social opprobrium. Media outlets generally refuse to carry racist propaganda.

Outlets that do carry racist material may face economic retaliation. At times, this has led to too much speech being deterred. But, on balance, checking racist speech through social and market pressures — as well as through persuasion — is a good solution. It’s better than suppressing racist speech through legal sanctions. And it’s better than not trying to deter it at all, or confining ourselves to polite persuasion, much as we do for erroneous views about tax policy or highway-construction funds.

Naturally, which deterrents are proper and which aren’t is a difficult question. As a general matter, deterrence through factually accurate denunciation and social opprobrium (Part I) is likely the least troublesome.

Deterrence through private economic pressure (Part II) is potentially troublesome, but still often acceptable. Deterrence as an effect of the government’s coercive investigative tools, such as subpoenas (Part III), is potentially more troublesome, but probably inevitable and proper in at least some situations. But I’m sure that there are exceptions to many of these generalities.

This discussion also hasn’t dealt with many other deterrents that are sometimes labeled “McCarthyism” but that can’t always be dismissed so easily: infiltration of allegedly dangerous political or religious groups; infiltration of groups that are not themselves dangerous, but that may be meeting places for potential terrorists or saboteurs; firing of government employees who express certain views or belong to certain groups;

legislative investigation of alleged attempts to subvert various organizations to evil ends; and more. I have no good solutions to those problems, but I thought I would close this Essay with a hypothetical scenario that we might use to think through them. I hope this scenario won't come to pass, but I am afraid it's not implausible.

The year 2022 is a dangerous one for America. The White Rights Movement (slogan: "for the race, everything; for those outside the race, nothing"), has been on the rise. While the White Rights Party itself has only a couple of hundred thousand members, civil rights activists suspect that it has millions of sympathizers.

The Party has urged its members to join other groups and covertly take them over, so that they seem to be independent voices but are actually aligned with the Party's political plans. Many civil rights leaders claim that many groups — including important political and social organizations from the National Rifle Association to many chapters of the Jaycees — have been taken over by Party faithful. The leaders of the groups, and the Party itself, deny this.

What exactly is the Party's agenda? That too is hotly disputed. Some of the Party's ideological documents suggest a desire to take over the government, by violent means if necessary, and then institute a massive campaign of governmental discrimination against non-whites: limits on non-white immigration, exclusion of non-whites from key government jobs, denial of the franchise, and eventually forcible expulsion. Similar movements in a few European countries, which had long been racked by racial hostility against Middle Easterners, have implemented such a program.

But the Party leadership dismisses these documents as mere theoretical speculation. When asked, party leaders say that the Party's goals of "protecting the race" can be accomplished through peaceful change in social attitudes, such as voluntary self-segregation by all racial groups. If that is done, Party leaders point out, there'll be no need for any harsher action.

In any event, when they have the choice, Party members don't talk theory much, at least to the public. Rather, they stress a wide range of specific policy proposals, many quite mainstream: harsher prison sentences and broader death penalty provisions for violent criminals (who still happen to be disproportionately black and Hispanic, even in 2022); restrictions on immigration; repeal of affirmative action programs, many of which are still in effect; an end to welfare; and so on.

Because these proposals have broad public support, and because many people think that major party politicians have soft-pedaled these issues in the 2010s and early 2020s, the Party has attracted substantial support from some nonmembers, despite its racist theories. "We don't buy any of the Party's racist nonsense," people have been heard to say, "but they're the only ones who are taking seriously the country's real problems."

Civil rights activists, and decent Americans more generally, are naturally appalled. Finally, more than fifty years after the Civil Rights Act of 1964, it looked like the battle for racial tolerance was nearly won — and now it looks like those gains might be reversed.

Serious observers don't, of course, worry that the Party will take over the government anytime soon. About 40% of the population is now non-white, and, even among whites, only 10% tell pollsters that they have a favorable view of the Party (though some respondents might be concealing their true feelings). The Party has never gotten more than a few percent of the vote in any election. Most Americans think racism is downright un-American.

But the Party and its message are dangerous even if the Party never wins an election. First, many people suspect that Party members and sympathizers will discriminate against non-whites every chance they get: in employment, in grading in schools and universities, in awarding contracts, in law enforcement, in political decisionmaking, in judicial decisions, in jury verdicts, and so on. There have been plenty of discrimination lawsuits in which the plaintiffs have somehow discovered that the person who fired them or arrested them was a Party member; and while the members have always claimed that their real reasons for the decisions were nonracial, naturally few people have believed them.

What's more, many people suspect that there's a lot more racism than is visible. Discrimination is hard to detect. When a non-white American is arrested or fired by a white, the thought often crosses his mind: Was this a White Rights thing? This fear is nothing new, and by all accounts there's less discrimination in 2022 than there was in 1982 or even 2002. But the White Rights movement has heightened people's awareness of the persistence of racism. And some controversial data suggest the movement has indeed led to an increase in discrimination from the lows seen in the mid-2010s.

So non-whites are suffering. Institutions, private and public, are suffering, too, because non-whites' reasonable fear of discrimination decreases the institutions' credibility. Police departments have worked hard to build trust among minority communities, but that trust is now disappearing.

Likewise for universities, banks, and big corporations. And many whites are suffering, too: They also hate racism, and they're troubled by the social harm caused by this increased discrimination and reasonable fear of discrimination.

Second, people are worried about what will happen ten or twenty years from now. For the first time in many decades, university professors are openly teaching classes on supposed racial differences in intelligence or on the moral value of racial purity and racial segregation.

The professors argue that they're just trying to present a balanced perspective on important issues, but in many instances, the professors seem to be sympathizing with the White Rights line. And the mood among students has shifted, too: While the majority strongly disagrees with the pro-White-Rights professors, a vocal minority stridently (and sometimes violently) resists any attempts to criticize the White Rights view. Civil rights activists fear that the students on their side have become complacent after many decades during which racial equality has been the official orthodoxy, and that the students on the other side have energy and organization that makes them powerful far beyond their numbers.

Likewise, some private racist schools have sprung up, and the Party has seemingly made inroads among teachers even in public schools and nonracist private schools. Some former Party members also say that the Party has made it a priority to infiltrate newspapers, broadcasters, and movie studios. The Party's method seems not to be the inclusion of overt propaganda, but subtle shadings: A few more black villains here, a story twisted to make a racist character seem more sympathetic, and so on.

People worry: What will happen when these seeds grow? In Europe, the racists have made their main inroads in times of economic trouble. The American economy is slowing too, and some people are predicting a serious recession.

What will happen then, or perhaps the next time, especially if the recession is blamed on competition from Third World nations? An outright racist revolution, even an unsuccessful one, is unlikely, but will there be racist riots? Will covert Party members in the police and the National Guard help the rioters, or at least be deliberately slow in stopping them?

Will we discover that the Party's proselytizing has created millions of racist white teenagers and twenty-somethings, some of whom will be angry enough and misguided enough to get violent? Will black Americans again be afraid to walk in white parts of town or be seen with white women?

Many leaders, including respected, thoughtful, and well-intentioned politicians, civic leaders, and intellectuals, demand action. When faulted for seeking "witch hunts," they respond, "Witch hunts are bad because we know there are no witches. There are racists, and they can cause real harm. Nothing needs to be done about witches. Something needs to be done about large nationwide racist conspiracies."

This scenario is, of course, not identical to Communist conspiracies of the 1950s. Racists jeopardize equality; Communists jeopardized democracy and freedom. People were worried about Communists partly because our enemies abroad were Communist; that doesn't appear in my hypothetical.



Sabotage and espionage are rarer than discrimination, though each single instance of sabotage and espionage might be more harmful than each single instance of discrimination.

But I don't think these differences matter that much. Tomorrow's problems won't be identical to yesterday's, but they may be similar enough. "History doesn't repeat itself, but it rhymes."<sup>127</sup>

Someday we will again face an ideological movement that seeks to undermine fundamental American values and uses speech not just to advocate for lawful (but evil) political change, but also to promote illegal, or even violent, behavior. I give one possible example, but there are others.

How should our government and our society fight back? When speech can genuinely cause harm — and when we have rightly forsworn the ability to simply lock up the speakers or bankrupt them with damages awards — what tools do we have left to fight the harm? What can we do to protect liberty, while also effectively fighting a movement that itself threatens liberty?

<sup>1</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the judgment) (“[T]he fitting remedy for evil counsels is good ones.”).

<sup>2</sup> See ACLU, *America’s Need: A New Birth of Freedom: 34th Annual Report* 128 (1954) (“The ACLU needs and welcomes the support of all those—and only those—whose devotion to civil liberties is not qualified by adherence to Communist, Fascist, KKK, or other totalitarian doctrine.”); see also Mary McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in *The Specter: Original Essays on the Cold War and the Origins of McCarthyism* 154, 154-58 (Robert Griffin & Nathan Theoharis eds., 1974) (discussing the ACLU’s policy in more detail). The ACLU may have been partly concerned about deflecting public criticism, but that’s perfectly sensible: If it was proper, as I argue, for civil liberties advocates to want nothing to do with those who would extinguish civil liberties, it was also proper for civil liberties advocates to make this desire clear to the public.

<sup>3</sup> I thus disagree with Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from The Seditious Act of 1798 to The War on Terrorism* 420-21 (2004), which says this was a sign of “falter[ing]” by an “organization[ ] expressly dedicated to the protection of civil liberties,” and with McAuliffe, *supra* note 2, which takes a similar view.

<sup>4</sup> I take it, for instance, that critics of the statements discussed in Part I — statements that assert that “our adversaries’ speech is helping the enemy” — would urge a social norm that such statements be condemned, rather than a legal rule prohibiting the statements.

<sup>5</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>6</sup> See *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974).

<sup>7</sup> But see *In re Hale*, 723 N.E.2d 206, 206 (Ill. 1999) (Heiple, J., dissenting) (“The crux of the [Illinois Bar Committee on Character Fitness] decision to deny petitioner’s application to practice law is petitioner’s open advocacy of racially obnoxious beliefs. The Inquiry Panel found that, in regulating the conduct of attorneys, certain ‘fundamental truths’ of equality and nondiscrimination ‘must be preferred over the values found in the First Amendment.’”).

<sup>8</sup> Cf. Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000) (describing how hostile environment harassment law suppresses speech that expresses sexist, racist, and religiously offensive viewpoints in workplaces, educational institutions, and places of public accommodation); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (same, in more detail and only as to workplaces); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (criticizing many aspects of hostile work environment law on First Amendment grounds), available at <http://www1.law.ucla.edu/~volokh/harass/substanc.htm> in updated form.

<sup>9</sup> See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 80 N.Y.U. L. REV. (forthcoming 2006), at <http://www1.law.ucla.edu/~volokh/custody.pdf> (noting cases from the 1930s and 1950s in which parents’ Communist affiliations were counted against them in child custody decisions, and cases from the 1970s to the present in which parents’ racist advocacy was counted against them in child custody decisions).

<sup>10</sup> See, e.g., Helen Dewar, *A GOP Campaign Document on Metzenbaum Stirs Furor; ‘Communist Sympathizer’ Label Was Proposed*, Wash. Post, July 30, 1987, at A1 (discussing “a secret Senate Republican campaign document urging that Sen. Howard M. Metzenbaum (D-Ohio) be characterized as a [C]ommunist sympathizer” on the grounds that Metzenbaum had “sa[id] that

'the long-range solution for unemployment lies in creating a healthy atmosphere for industrial expansion' and... declin[ed] to rule out 'use of WPA and Jobs Corps techniques as a pump primer").

<sup>11</sup> See, e.g., Sharon Bernstein, *Storm Rises over Ex-Klansman at Debate*, L.A. Times, Sept. 11, 1996, at A3 ("Proposition 209 is racist, [Patricia Ewing, who heads the campaign to defeat Proposition 209,] said...."). Prop. 209 is the California measure that barred government officials from using race and sex preferences in employment, education, and contracting. *Id.*; see also George Cothran & John Mecklin, *The Grid*, S.F. Weekly (May 27, 1998), available at [http://www.sfweekly.com/issues/1998-05-27/news/columns\\_print.html](http://www.sfweekly.com/issues/1998-05-27/news/columns_print.html) ("Ron Unz, the hateful creep who supports the elimination of all bilingual education in the state, knows nothing about education policy.... Proposing to harm children for political reasons is a special type of sin that should earn Mr. Unz a special place in hell. Before he gets there, give him his earthly reward. Vote to defeat ugly, racist Proposition 227."); Greg Lucas, *Brown Decries Plans to End Affirmative Action*, S.F. Chron., Feb. 15, 1995, at A10 ("An impassioned Assembly Speaker Willie Brown lashed out yesterday at proposals to end affirmative action in California, branding them 'pure, unadulterated exploitation of racism."); Kara Platoni, *Money, Sex, and Politics*, Sacramento News & Rev., Mar. 26, 1998 ("Proposition 227, which would do away with bilingual education, also came under heavy fire [at the California Democratic Party Convention] and was roundly denounced by Steve Ybarra, Chairman of the Chicano/Latino Caucus, as 'racist thuggery.'). Cf. Jacques Steinberg, *Increase in Test Scores Counters Dire Forecasts for Bilingual Ban*, N.Y. Times, Aug. 20, 2000, § 1, at 1 ("Two years after Californians voted to end bilingual education and force a million Spanish-speaking students to immerse themselves in English as if it were a cold bath, those students are improving in reading and other subjects at often striking rates, according to standardized test scores released this week."). This is precisely the effect that Ron Unz had predicted and worked for.

<sup>12</sup> "McCarthyism," according to the American Heritage Dictionary of the English Language 1084 (4th ed. 2000), is "[t]he practice of publicizing accusations of political disloyalty or subversion with insufficient regard to evidence" or "[t]he use of unfair investigatory or accusatory methods in order to suppress opposition"; the definition I've heard used most often is the latter one, which I'm using here. Hence, to decide whether some behavior is properly called by the pejorative label "McCarthyism," we need to ask whether the behavior is indeed improper.

<sup>13</sup> *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (Dec. 6, 2001).

<sup>14</sup> See, e.g., John W. Dean, *Liberties Disappearing Before Our Eyes*, L.A. Times, Sept. 21, 2003, at R3; Geoffrey R. Stone, *America's New McCarthyism*, Chi. Trib., Oct. 17, 2004, at C 11.

<sup>15</sup> William J. Clinton, President Clinton's Weekly Radio Address, 1996 PUB. PAPERS 463, 464 (Mar. 16, 1996).

<sup>16</sup> William J. Clinton, Interview on CBS' "60 Minutes", 1995 PUB. PAPERS 574, 578 (Apr. 23, 1995).

<sup>17</sup> E.J. Dionne Jr., *A Time for Politicians to Look Within*, Wash. Post, Apr. 25, 1995, at A17 ("It's wrong to suggest that honest advocates of smaller government have anything in common with killers and fanatics.... [But m]ainstream politicians... have to assess whether they have stood silently as [violent] attitudes took hold [among far-right militias], whether they exploited them and whether, at times, they may even have encouraged them.... After the suffering in Oklahoma City, the country needs an extended period in which political rhetoric is toned down, words are more carefully weighed and, as the president said yesterday, 'the purveyors of hatred and division' and 'the promoters of paranoia' are resisted and condemned."). *But cf.* Virginia I. Postrel, *Does Reading This Make You a Terrorist?*, ReasonOnline, July 1995, at <http://reason.com/9507/VIPedit.jul.shtml> (criticizing Dionne's article).

<sup>18</sup> What a remarkable example [the debate] has been of the unbridled freedom of our Parliamentary institutions in time of war! Everything that could be thought of or raked up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the Army distrust the backing it is getting from the civil power, to make the workmen lose confidence in the weapons they are striving so hard to make, to represent the Government as a set of nonentities over whom the Prime Minister towers, and then to undermine him in his own heart and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes. Winston Churchill, Speech in the House of Commons (July 2, 1942), in *Never Give In! The Best of Winston Churchill's Speeches* 339 (Winston S. Churchill ed., 2003). Churchill stressed that he was "in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing." *Id.* But it was clear that he saw certain uses of the freedom as being helpful to the nation's enemies. See also Letter from Thomas Jefferson to the Republican Young Men of New London, (Feb. 24, 1809) in 16 *The Writings of Thomas Jefferson* 339 (Andrew A. Lipscomb ed., 1903) ("That in a free government there should be differences of opinion as to public measures and the conduct of those who direct them, is to be expected. It is much, however, to be lamented, that these differences should be indulged at a crisis which calls for the undivided counsels and energies of our country...."); Letter from Thomas Jefferson To His Excellency Governor Daniel D. Tompkins, (Feb. 24, 1809), *Id.* at 341 ("The times do certainly render it incumbent on all good citizens attached to the rights and honor of their country, to bury in oblivion all internal differences .... All attempts to enfeeble and destroy the exertions of the General Government in vindication of our national rights... merit the discountenance of all."). Thanks to Bob Turner and to <http://etext.lib.virginia.edu/jefferson/quotations/> for pointers to these Jefferson quotes.

<sup>19</sup> George Orwell, *Pacifism and the War*, *PARTISAN REV.*, Sept.-Oct. 1942, reprinted in 2 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 226 (Sonia Orwell & Ian Angus eds., 1968).

<sup>20</sup> If the statements condemned people who did support terrorists or Nazis, I take it they would be clearly proper.

<sup>21</sup> Some have argued that Ashcroft's quote was particularly threatening because he made the statement as the nation's chief federal law enforcement official. The same could be said about President Clinton's statement, since presidents give orders to federal law enforcement. But I think neither quote can reasonably be interpreted as an actual threat to prosecute those who criticize the administration's policies on some aiding-the-terrorists theory. If it were a threat, it would have been an uncommonly empty one — neither the Clinton nor the Bush Justice Departments ever engaged in any such prosecutions, either before the statements or after. Nor did such prosecutions seem likely at the time. Only unusually fearful defenders of gun rights or of other civil liberties would have been silenced because they interpreted either statement as threatening prosecution. (Noncitizens did indeed have more to fear from the Justice Department; if they drew the government's attention, and the government then found that the noncitizens had committed technical immigration violations, they could be deported. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488-91 (1999). But Ashcroft's domestic civil-libertarian critics at the time, to whom he was responding, were overwhelmingly citizens.) Both Ashcroft and Clinton likely did want to deter people from expressing certain views — but with the threat of social opprobrium, not of criminal prosecution.

<sup>22</sup> Of course Ashcroft and Clinton also likely hoped that some critics would be persuaded that their criticisms were simply mistaken; there can be little objection to such an outcome. But I suspect they realized that many people wouldn't be persuaded on the merits but might, nonetheless be deterred from speaking by the risk of public opprobrium.

<sup>23</sup> I think gun controls probably won't materially interfere with terrorists' plans, but reasonable minds may differ.

<sup>24</sup> See *supra* note 13.

<sup>25</sup> See Abraham McLaughlin & Dante Chinni, *Ashcroft Finally Faces Hill Critics*, Christian Sci. Monitor, Dec. 5, 2001, at 1 (“As he sits down before the Senate Judiciary Committee tomorrow, Attorney General John Ashcroft can expect a grilling not seen since his Senate confirmation hearing. The line of questioning will likely boil down to one issue: whether he and the Bush administration have been overly authoritarian in prosecuting the war on terrorism and protecting the public.”).

<sup>26</sup> Churchill, *supra* note 18.

<sup>27</sup> I’ve heard some ask why, if this point was to be made, Ashcroft was the one to make it. Why not leave it to some less controversial administration official, or even to private parties? To begin with, I think that controversial attorneys general have as much right to express their views as do less controversial figures in other jobs. It may sometimes be more politic for an administration to leave some statements to less controversial officials, but political effectiveness is a different matter from propriety. But more importantly, Ashcroft was responding to criticisms of proposals that came from his Justice Department, that were associated with him in the public mind, and that were often tied to him by name. See, e.g., Gail Gibson, *Ashcroft Faulted Over Civil Liberties*, Balt. Sun, Nov. 25, 2001, at 1A (noting that a “liberal activist” called Ashcroft “the most dangerous threat to civil liberties in the federal government”); David Jackson, *Bush Defends Call for Military Trials*, Dallas Morning News, Nov. 30, 2001, at 18A (“Next week, Mr. Leahy’s committee will hear from Attorney General John Ashcroft, who is bearing the brunt of criticism from civil libertarians.”); John Lancaster, *Hearings Reflect Some Unease With Ashcroft’s Legal Approach*, Wash. Post, Dec. 2, 2001, at A25 (“A few critics, led by Sen. Patrick J. Leahy (D-Vt.), have been vocal about what they regard as overreaching by the executive branch, Attorney General John D. Ashcroft in particular.”); McLaughlin & Chinni, *supra* note 25 (“[P]artisanship is resurrecting itself on Capitol Hill. Furthermore, Ashcroft himself, ‘has become the clear face of hard-core conservatism’ for some Democrats, ‘and that has fueled opposition to him on civil liberties and other issues,’ says [Hudson Institute congressional analyst Marshall] Wittmann.... [R]ecently on Capitol Hill lawmakers who have been only quietly criticizing the administration have grown bolder....”). Ashcroft’s political adversaries challenged him for allegedly threatening Americans’ liberty. Ashcroft responded by pointing out in some detail why he thought the charges were groundless, and in the process he also said that such charges were not only unfounded but harmful. It makes sense that a politician criticized by other politicians would defend himself, rather than expecting others to defend him.

<sup>28</sup> See, e.g., Stone, *supra* note 14 (condemning Dick Cheney’s “assertion that a vote for John Kerry would endanger the nation” as “part of a cynical campaign to frighten and confound the American people”). If one is watching for McCarthyism, one might note that Democratic vice presidential candidate John Edwards promptly denounced Cheney’s remarks as “un-American.” *Judy Woodruff’s Inside Politics* (CNN television broadcast, Sept. 8, 2004).

<sup>29</sup> Cf. Stone, *supra* note 14 (distinguishing “reasoned fear of Soviet espionage” from what the author sees as “an unreasoned fear of ‘un-Americanism’”).

<sup>30</sup> Cf. Editorial, *In Defense of Dick Cheney*, L.A. Times, Sept. 9, 2004, at B10: The war on terrorism is the central issue in the campaign, and both parties’ candidates have various points to make about it. But the issue boils down to one question: Which candidate would do the best job, as president, of making sure that we don’t “get hit again.” That is what people really care about. Sens. Kerry and John Edwards have been criticizing President Bush’s performance on terrorism since 9/11 and promising to do a better job at it if given the chance. In doing so, they surely mean to suggest that the risk of another terrorist attack will be greater if Bush and Cheney win the election. A vote for George W. Bush, in other words, is a vote for more terrorism. Or if Kerry and Edwards don’t mean that, it’s hard to know what they do mean. See also Mickey Kaus, *Kausfiles*, Slate (Sept. 9, 2004), at <http://www.slate.com/id/2106296>: Why can the [New York] Times say the administration has increased the danger but Cheney can’t make his arguments that the administration has reduced the danger? Isn’t that what a discussion of the actual major issue of the campaign looks like?... In this increased/decreased argument, I tend to side with Kerry and

Edwards — we've now angered enough people around the world that our chances of getting hit will probably be higher if Bush is reelected than if Kerry wins. But it's not an argument in which only Kerry's side is allowed to participate.

<sup>31</sup> *This Week With George Stephanopoulos* (ABC television broadcast, Oct. 31, 2004).

<sup>32</sup> See Transcript, White House, Vice President and Mrs. Cheney's Remarks and Q&A at a Town Hall Meeting (Sept. 7, 2004) (making the allegation that Professor Stone apparently refers to, in the course of a fairly detailed criticism of Kerry's proposed policies), available at <http://www.whitehouse.gov/news/releases/2004/09/20040907-8.html> (last visited Apr. 7, 2005).

<sup>33</sup> See Stone, *supra* note 14 (quoting James Goodby).

<sup>34</sup> George Orwell, *As I Please*, *Tribune*, Dec. 8, 1944, reprinted in 3 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 288-89 (Sonia Orwell & Ian Angus eds., 1968).

<sup>99</sup> See *supra* Part II.B. Both cases involved on-the-job speech; firings based on similar off-the-job speech would even more clearly be overreaction.

<sup>100</sup> Brent Hallenbeck, *When McCarthyism Hit Vermont*, *Burlington Free Press*, Sept. 7, 2003, at 1A. See also, e.g., Bessy Reyna, *Poet Uses Her Art to Fight Social Injustice*, *Hartford Courant*, Apr. 20, 2003, at G1.

<sup>101</sup> Matthew Rothschild, *The New McCarthyism*, *Progressive*, Jan. 1, 2002, at 20.

<sup>102</sup> For a state case involving a normal subpoena served against a library, see *Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983). I have faulted section 215 for allowing the government to subpoena records and at the same time order the subpoena recipients not to disclose the subpoena's existence. This provision and similar provisions that have long existed in other subpoena, search, or wiretap statutes are speech restrictions — they bar people from revealing certain information that may be relevant to public debate about the government's investigative practices—and I think they are unconstitutional, though understandable. See Eugene Volokh, *Crime-Facilitating Speech*, 57 *STAN. L. REV.* 1095, especially 1100 n.29 (2005). But whether people may be ordered to remain quiet about the subpoenas is a separate issue from whether the subpoenas should be permissible in the first place.

<sup>103</sup> *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1059 (Colo. 2002); see also *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 *MED. L. RPTER.* 1599 (D.D.C. 1998) (reaching a similar result).

<sup>104</sup> *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

<sup>105</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a requirement that people's political contributions and expenditures be disclosed, despite the potential deterrent effect on such behavior. But *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), held that even this requirement must be waived when a minor party to which the contribution is made is unpopular enough that the deterrent effect is likely to be especially severe. The Court has also generally struck down requirements that people identify themselves in their publications. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Such requirements, though, not only deter certain kinds of speech, but also forcibly change the content of speech: They bar speech of a certain content (unsigned material) and mandate the inclusion of content (the author's name) that the author might want to avoid. The Court thus held the identification requirements to be unconstitutional partly because they are "a direct regulation of the content of speech," *id.* at 345, a justification that doesn't apply equally to normal discovery requests, which don't directly regulate the content of a publication.

<sup>106</sup> 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). But see *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) (reasoning, I believe correctly, that the Supreme Court's *Branzburg v. Hayes* decision should be read as foreclosing such a privilege, and disagreeing with the cases cited above); *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005) (rejecting such a privilege); *Scarce v. United States* (In re Grand Jury Proceedings), 5 F.3d 397, 402-03 (9th Cir. 1993) (likewise); *Storer Communications, Inc. v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580, 584-86 (6th Cir. 1987) (likewise); *In re Letellier*, 578 A.2d 722 (Me. 1990) (likewise); *Capuano v. Outlet Co.*, 579 A.2d 469, 474 (R.I. 1990) (likewise).

<sup>107</sup> It doesn't even bar the admission of such evidence at trial, see cases cited *supra* note 74; a fortiori, it doesn't bar inquiries about such statements.

<sup>108</sup> See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (holding that there is no First Amendment bar to subpoenas for evidence of what people said in tenure reviews); *Herbert v. Lando*, 441 U.S. 153 (1979) (likewise as to what people said in editorial-room conferences).

<sup>109</sup> This speech is likely to be just among friends, and not intended for publication; but such speech is an important part of political debate: Many people are more persuaded by political discussions with friends they trust than by public speech that comes from strangers. See Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 Sup. Ct. Rev. 217 (1979).

<sup>110</sup> One difference between investigating what someone said and what he read is that what people read is usually less telling than what they say. Imagine that the police or jurors are trying to find out whether a person committed some hate crime, or whether the crime he allegedly committed was indeed motivated by racial hostility. 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. Therefore, the argument might go, the police have less need to discover the person's reading habits than to discover his past statements. But for this very reason, the threat of discovery is less likely to deter a person from reading a book than from making a statement. If the person is contemplating reading a racist book, he knows that he can likely give a plausible innocent explanation: He was just curious about what this notorious book really said; he doesn't agree with the book's views but wanted to know what the other side was arguing; he saw something online praising the book and picked it up without really knowing what it contained. But if the person is contemplating writing a racist email, he knows that the email—were it to come to light—would likely be much more incriminating.

<sup>111</sup> See, e.g., George Brandon, *Workers' Web Use a Growing Concern for More Employers*, *Kiplinger Bus. Forecasts*, Feb. 21, 2005 ("Plaintiff attorneys routinely subpoena e-mail records in sexual harassment, racial discrimination and hostile work environment cases, says Jennifer Brown Shaw, a partner in the Sacramento office of employment law firm Jackson Lewis. And when e-mails with sexually explicit or other inappropriate content are introduced as evidence in workplace harassment lawsuits, 'the question that will inevitably come up is why the employer didn't know,' Shaw adds."); Bill Atkinson & Stacey Hirsh, *1 E-mail. Many Lives*, *Balt. Sun*, Oct. 10, 2004, at 1C ("Chances are big brother is reading over your electronic shoulder. If you are involved in a workplace lawsuit, whether it is sexual harassment, racial discrimination, wrongful termination, hostile work environment, you can take it to the bank . . . that e-mail is going to be subpoenaed and used as evidence for or against your case.") (quoting Nancy Flynn, "author of several books on e-mail").

<sup>112</sup> See *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

<sup>113</sup> *Univ. of Pa.*, 493 U.S. at 182. Of course, like all subpoenas, such subpoenas could seek only relevant evidence, but that's an easy standard to meet.

<sup>114</sup> *Herbert v. Lando*, 441 U.S. 153 (1979).

<sup>115</sup> As *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), pointed out, the "fear of [civil] damage awards" can be at least as "inhibiting [as] fear of prosecution."

<sup>116</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," and noting as an example that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source") (citation omitted); *Univ. of Pa.*, 493 U.S. at 201 (analogizing the case, in which the Court rejected a privilege, to *Branzburg*, and characterizing *Branzburg* as "reject[ing] the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"); (Powell, J., concurring) (joining the majority opinion and specifically rejecting the qualified privilege proposed by the dissent, though elaborating that "harassment" of journalists without "legitimate need" would not be allowed under the majority's opinion).

<sup>117</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 709-10 (1974). Naturally, the analogy can only go so far: Time constraints, for instance, necessarily require some truthful evidence to be excluded as duplicative or too tangential.

<sup>118</sup> See also *supra* note 110 (responding to another version of this argument).

<sup>119</sup> See Lance Gay, *Suspect Fit Profile but Went Unnoticed*, *Plain Dealer*, Apr. 6, 1996, at 7A (noting that the police searched records in the San Francisco area and the Chicago area); Gary Marx & Peter Kendall, *Unabomber Path Leads Back to Utah*, *Chi. Trib.*, Sept. 25, 1995, at N1 (noting that the police subpoenaed records from the Brigham Young University library, and were planning to do the same as to the University of Utah library); see also ABC World News Tonight, (ABC television broadcast, Apr. 8, 1996) ("FBI agents in Montana have also subpoenaed library records to see if they can tie Kaczynski to two books. One is a war novel entitled *Ice Brothers*, in which the Unabomber concealed a bomb. And the other is *Chinese Political Thought in the 20th Century*, which was mentioned in the Unabomber's manifesto."). Unfortunately, the library had apparently deleted these records. See Carol M. Ostrom, *Unabomber Case Gives Librarians Privacy Fits*, *Seattle Times*, May 1, 1996, at A1.

<sup>120</sup> *Library Files Checked In Zodiac Investigation*, *N.Y. Times*, July 18, 1990, at B4; see also Kathy M. Flanders, *Whitesboro Library Posts New Privacy Law*, *Post-Standard* (Syracuse, N.Y.), July 28, 1998, at B1 (noting a case in which a prosecutor subpoenaed a book's circulation records to find out who had written a death threat against the president on the book's flyleaf); *Kidnapping May Have Been Copied out of Book*, *UPI*, Sept. 18, 1987 ("[P]rosecutors subpoenaed library circulation records in three cities attempting to learn if two suspects in the kidnapping and slaying of a media heir borrowed the crime plot from a book about a similar 1968 case.").

<sup>121</sup> See *Univ. of Pa.*, 493 U.S. at 194 (1990) ("Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a 'specific reason for disclosure'... beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination.") (citation omitted).



<sup>122</sup> See *id.* at 200 (“Moreover, some disclosure of peer evaluations would take place even if petitioner’s ‘special necessity’ test were adopted. Thus, the ‘chilling effect’ petitioner fears is at most only incrementally worsened by the absence of a privilege.”).

<sup>123</sup> Bulk seizures of many copies of books and films are subject to special First and Fourth Amendment restrictions, because there is a risk that such a seizure would physically prevent people from buying, reading, or watching constitutionally protected material. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-64 (1989). But seizures of individual items to be used as evidence are generally permissible under the normal probable cause standard, subject only to slightly increased procedural requirements. *Heller v. New York*, 413 U.S. 483, 492-93 (1973).

<sup>124</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>125</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

<sup>126</sup> Cf. *Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting) (reasoning that Communist advocacy ought not be criminalizable partly because the Communists had already been rendered harmless by other means, including surveillance by the FBI and “the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards”).

<sup>127</sup> Often attributed to Mark Twain.