

# CONNECTICUT LAW REVIEW

---

VOLUME 46

FEBRUARY 2014

NUMBER 3

---

## Essay

### A Tale of Two Searches: Intrusive Civil Discovery Rules Violate the Fourth Amendment

CHAD DEVEAUX

*In this Essay, I argue that civil discovery rules compelling the production of private papers violate the Fourth Amendment's prohibition against unreasonable searches. A "search" occurs when a government agent intrudes upon a sphere in which society recognizes "a reasonable expectation of privacy." Implicit in this definition is an affinity for private papers such as letters and diaries. Creators of such media possess a reasonable expectation of privacy in their contents. Thus, when police seek to examine such documents to look for evidence of crime, they usually must obtain a search warrant. For the warrant to issue, the police must establish probable cause. Conversely, under the Federal Rules of Civil Procedure and parallel state provisions, all a litigant needs to do to "unlock the doors of discovery" is file a complaint endowed with "well-pleaded factual allegations" that "plausibly give rise to an entitlement to relief." When this modest obligation is met, the Federal Rules direct courts to compel the production of any papers sought that are "relevant to the claim or defense of any party." No detail is too intimate to shield it from scrutiny. Courts even routinely order the production of personal diaries. I assert that to pass constitutional muster such orders, like search warrants, must be premised on a showing of probable cause.*

## ESSAY CONTENTS

I. INTRODUCTION .....	1085
II. CIVIL DOCUMENT PRODUCTION ORDERS CONSTITUTE “SEARCHES” WITHIN THE MEANING OF THE FOURTH AMENDMENT .....	1092
A. THE COURT-ORDERED PRODUCTION OF DOCUMENTS CONSTITUTES GOVERNMENTAL ACTION .....	1092
B. THE COMPELLED PRODUCTION OF PRIVATE PAPERS FALLS WITHIN THE SUPREME COURT’S DEFINITION OF “SEARCH” .....	1093
III. THE FRCP’S DOCUMENT PRODUCTION RULES DO NOT EMPLOY SUFFICIENT RIGOR TO SATISFY THE FOURTH AMENDMENT’S REASONABLENESS REQUIREMENT .....	1101
IV. A PARTY SEEKING TO COMPEL THE PRODUCTION OF PRIVATE PAPERS SHOULD BE REQUIRED TO SHOW PROBABLE CAUSE THAT THE DOCUMENTS SOUGHT WILL YIELD ADMISSIBLE EVIDENCE .....	1104
V. COURTS SHOULD ISSUE PROTECTIVE ORDERS BARRING THE DISCLOSURE OF PRIVATE PAPERS PRODUCED DURING DISCOVERY TO THE MEDIA .....	1106
VI. CONCLUSION .....	1109



# A Tale of Two Searches: Intrusive Civil Discovery Rules Violate the Fourth Amendment

CHAD DEVEAUX\*

*“[T]he power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.”<sup>1</sup>*

## I. INTRODUCTION

A common cultural trope posits that just societies invariably promulgate a set of foundational premises prefaced by a benevolent “rule number one.”<sup>2</sup> This rule embodies the *Volksgeist* of the community.<sup>3</sup> It establishes the benchmark the society uses to judge its leaders. Rule number one of the Federal Rules of Civil Procedure (FRCP) and parallel state provisions charge the judiciary with “secur[ing] the just, speedy, and inexpensive determination of every action and proceeding.”<sup>4</sup> By every

---

\* Associate Professor of Constitutional Law, Concordia University School of Law; LL.M., Harvard Law School; J.D., University of Notre Dame Law School. I am gratefully indebted to my student, Craig Cannon, who suggested the title for this Essay. I also thank Professors Andy Kim, Jack McMahon, and Joe Tomain for providing thoughtful comments on earlier drafts. Finally, I thank Kerry Lohmeier and Anne Mostad-Jensen of Concordia’s Law Library for their invaluable assistance researching this Essay, and the editors and staff of the *Connecticut Law Review* for their hard work preparing it for publication. Any mistakes are mine.

<sup>1</sup> Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

<sup>2</sup> See, e.g., *Matthew* 22:34–40 (New American Bible) (“You shall love the Lord, your God with all thy heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second is like it: You shall love your neighbor as yourself. The whole law and the prophets depend on these two commandments.”).

<sup>3</sup> The *Volksgeist* is “the historically developed legal consciousness of a particular people.” Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 398 (1964).

<sup>4</sup> FED. R. CIV. P. 1. While I refer to the FRCP throughout this Essay, my critiques are equally directed at the states and the District of Columbia, as the overwhelming majority of American jurisdictions have codified the FRCP virtually verbatim, including Rule 1. See ALA. R. CIV. P. 1 (construing rules “to secure the just, speedy and inexpensive determination of every action”); ALASKA R. CIV. P. 1 (construing rules “to secure the just, speedy and inexpensive determination of every action and proceeding”); ARIZ. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); ARK. R. CIV. P. 1 (construing rules “to secure the just, speedy and inexpensive determination of every action”); CAL. RULES OF COURT R. 1.5 (construing rules “liberally . . . to ensure the just and speedy determination of the proceedings that they govern”);

objective measure, our courts have fallen spectacularly short of this goal.<sup>5</sup>

Several factors contribute to public dissatisfaction with our courts, including docket congestion,<sup>6</sup> legislative underfunding,<sup>7</sup> and the inefficient

---

COLO. R. CIV. P. 1 (construing rules “liberally . . . to secure the just, speedy, and inexpensive determination of every action”); DEL. SUPER. CT. R. CIV. P. 1 (construing rules “to secure the just, speedy and inexpensive determination of every proceeding”); D.C. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); FLA. R. CIV. P. 1.010 (same); HAW. R. CIV. P. 1 (same); IDAHO R. CIV. P. 1 (construing rules “liberally . . . to secure the just, speedy and inexpensive determination of every action and proceeding”); IND. R. TRIAL PROC. R. 1 (construing rules “to secure the just, speedy and inexpensive determination of every action”); KAN. STAT. ANN. § 60-102 (West 2010) (construing rules “liberally . . . to secure the just, speedy and inexpensive determination of every action and proceeding”); MINN. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); MISS. R. CIV. P. 1 (same); MONT. R. CIV. P. 1 (construing rules to “secure the just, speedy, and inexpensive determination of every action and proceeding”); NEB. CT. R. PLDG. § 6-1101; NEV. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); N.M. R. CIV. P. 1-001 (construing rules “to secure the just, speedy and inexpensive determination of every action”); N.D. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action and proceeding”); OHIO R. CIV. P. 1 (construing rules to “eliminat[e] delay, unnecessary expense and all other impediments to . . . justice”); R.I. SUPER. CT. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); S.C. R. CIV. P. 1 (same); S.D. CODIFIED LAWS 15-6-1 (construing rules “to secure the just, speedy and inexpensive determination of every action”); TENN. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); TEX. R. CIV. P. 1 (calling for rules “to obtain a just, fair, equitable and impartial adjudication . . . [w]ith as great expedition and dispatch and at the least expense”); UTAH R. CIV. P. 1 (construing rules “liberally . . . to achieve the just, speedy, and inexpensive determination of every action”); VT. R. CIV. P. 1 (construing rules “to secure the just, speedy, and inexpensive determination of every action”); WASH. CIV. R. 1 (same); W.V. R. CIV. P. 1 (same); WYO. R. CIV. P. 1 (same).

<sup>5</sup> See, e.g., Ruggero J. Aldisert, *All Right, Retired Judges, Write!*, 8 J. APP. PRAC. & PROCESS 227, 233 (2006) (lamenting the FRCP’s failure “to live up to their promise to deliver a ‘just, speedy and inexpensive determination of every action’” (quoting FED. R. CIV. P. 1)); Lindsey D. Blanchard, *Rule 37(a)’s Loser-Pays “Mandate”: More Bark than Bite*, 42 U. MEM. L. REV. 109, 131 (2011) (arguing that courts’ systemic failure to impose sanctions for litigation misconduct “undermines the very reason for the Federal Rules’ existence—to secure the just, speedy, and inexpensive determination of every action” (quoting FED. R. CIV. P. 1)); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 310 (1986) (noting criticism that the FRCP have failed “to achieve [their] self-proclaimed goal of ‘the just, speedy, and inexpensive determination’ of controversies” (quoting FED. R. CIV. P. 1)); Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (arguing that the Supreme Court failed in interpreting the FRCP by not reading them actively in light of Rule 1).

<sup>6</sup> See, e.g., Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 KAN. J.L. & PUB. POL’Y 1, 1–3 (1997) (documenting vast increases in federal appellate congestion, pondering its causes, and noting its deleterious effects); Rifkind, *supra* note 1, at 98 (stating that courts’ caseloads are “increasing at a pace far beyond the growth in population”).

<sup>7</sup> See, e.g., Michael L. Buenger, *Do We Have 18th Century Courts for the 21st Century?*, 100 KY. L.J. 833, 833 (2012) (calling the court-funding crisis “potentially devastating” and a “crisis in a stream of crises”); Paul J. De Muniz, *The Invisible Branch: Funding Resilient Courts Through Public Relations, Institutional Identity, and a Place on the “Public Radar,”* 100 KY. L.J. 807, 807 (2012) (“State courts . . . are struggling under prolonged budget cuts severe enough to jeopardize judicial infrastructure and constitutional democracy.”).

allocation of judicial resources.<sup>8</sup> But the primary impediment to the just, speedy, and inexpensive resolution of disputes lies in the FRCP's expansive discovery devices or, more precisely, in their abuse.<sup>9</sup> Discovery, as any experienced litigator can profess, "is war,"<sup>10</sup> and not just any war, mind you. Discovery is a "war of attrition."<sup>11</sup>

Originally conceived as a shield against obfuscation,<sup>12</sup> the FRCP's expansive discovery devices have become "a weapon capable of imposing large and unjustifiable costs on one's adversary"<sup>13</sup> and a tool enabling unethical litigants to "stonewall[] for no purpose other than to deplete . . . resources and enlarge . . . billable time."<sup>14</sup>

Scholarly criticism of the modern discovery regime is legion. Commentators have sacrificed untold forests lamenting its economic costs.<sup>15</sup> But comparatively little ink has been spilled exploring the extensive invasion of personal privacy entailed by the reach of contemporary document production rules.<sup>16</sup> As the late federal judge

---

<sup>8</sup> See, e.g., Carlton, *supra* note 6, at 3–9 (describing the dearth of specialized courts, glut caused by statutory appeals, underemployment of alternative-resolution procedures, lack of "jumbo" courts of appeals, and outmoded appellate opinions as the key culprits in judicial inefficiency); Rifkind, *supra* note 1, at 105 (arguing that probate courts are a waste of judicial resources, as much of the work is uncontested).

<sup>9</sup> See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) (decrying a "significant potential for abuse" given the "liberality of pretrial discovery"); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989) (providing data on the widespread recognition of discovery problems by federal judges); Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT. L. REV. 357, 365 (2006) (noting that in the American scheme, parties, rather than courts, have primary control over discovery); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6 (1983) (noting that the promulgation of the FRCP massively dilated the scope of discovery); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 24 (2001) (noting that "American federal discovery provides for more liberal discovery than any other legal system in the world"); Rifkind, *supra* note 1, at 107 (calling the discovery process "an endurance contest" that proceeds without "serious regulation"); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 579–86 (1989) (using a protracted examination of game theory to show that abusive "impositional" requests will proliferate under the FRCP); see also Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413, 420 (1998) (noting that disapproval of U.S. discovery practices extends internationally).

<sup>10</sup> Easterbrook, *supra* note 9, at 635; accord Setear, *supra* note 9, at 579.

<sup>11</sup> Easterbrook, *supra* note 9, at 635.

<sup>12</sup> See Hickman v. Taylor, 329 U.S. 495, 500–01 (1947) (comparing the illuminating effects of the discovery rules to the opacity present under the prior federal procedures).

<sup>13</sup> Easterbrook, *supra* note 9, at 636.

<sup>14</sup> Douglas M. Branson, Book Review, 48 CASE W. RES. L. REV. 459, 460 (1998).

<sup>15</sup> See, e.g., Easterbrook, *supra* note 9, at 636 (remarking that "[l]itigants with weak cases have . . . every reason to heap costs on" their opposition to coerce settlement "on favorable terms"); *id.* at 637 ("The party in a position to threaten exhaustive discovery can claim for itself in settlement a portion of the costs that should not have been imposed in the first place.").

<sup>16</sup> But see Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 808 (2005) ("[T]he Fourth Amendment mandates that discovery not be ordered where the basic element of relevancy is lacking."); Rifkind,

Simon Rifkind observed, “[T]he power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint.”<sup>17</sup>

This expansive power stands in sharp contrast with that afforded to law enforcement. As Justice Brandeis famously observed:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>18</sup>

When it comes to matters of personal privacy, ours is both an “age of wisdom” and an “age of foolishness.”<sup>19</sup> In the context of criminal investigations—where public interest in ascertaining the *truth* is the highest<sup>20</sup>—twentieth-century courts became zealous defenders of the right to be let alone.<sup>21</sup> Yet during the same period, they wholly eviscerated the right to privacy in civil litigation.<sup>22</sup> In the civil arena nothing is sacred, no detail too intimate to shield it from scrutiny. For example, “courts . . . have routinely ordered the production of personal diaries in response to requests

---

*supra* note 1, at 107 (arguing that document production orders facilitate unreasonable invasions of privacy); *see also* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (“[D]iscovery . . . may seriously implicate privacy interests of litigants and third parties.”).

<sup>17</sup> Rifkind, *supra* note 1, at 107.

<sup>18</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967); *see also* *Eisenstadt v. Baird*, 405 U.S. 438, 453 n.10 (1972) (quoting Justice Brandeis’s text approvingly); *Katz*, 389 U.S. at 350 (finding that the Fourth Amendment “protects individual privacy against certain kinds of governmental intrusion”).

<sup>19</sup> CHARLES DICKENS, *A TALE OF TWO CITIES* 5 (Richard Maxwell ed., Penguin Books 2000) (1859).

<sup>20</sup> *Stone v. Powell*, 428 U.S. 465, 488 (1976); *see also* *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“The [Fourth Amendment] exclusionary rule generates ‘substantial social costs,’ which sometimes include setting the guilty free and the dangerous at large.” (citation omitted) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984))).

<sup>21</sup> *See, e.g., Katz*, 389 U.S. at 350 (“[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion.”). *But see* David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe: Hudson v. Michigan, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 698–99 (2007) (arguing that the Roberts Court has deliberately eroded some Fourth Amendment protections recognized in the latter half of the twentieth century).

<sup>22</sup> *See* Rifkind, *supra* note 1, at 107 (explaining how civil litigation undermines personal privacy). The Rules Enabling Act empowers the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.” 28 U.S.C. § 2072(a) (2012). Utilizing this power, the Court promulgated the FRCP in 1938. *Houben v. Telular Corp.*, 309 F.3d 1028, 1032 (7th Cir. 2002).

for production of documents.”<sup>23</sup> Worse, many courts recognize a “presumption that discovery materials . . . are open to public inspection,” and permit the dissemination of such information to the media.<sup>24</sup>

This discontinuity in matters of personal privacy represents more than just a curious paradox to be explored by academics.<sup>25</sup> It violates the Constitution. The Fourth Amendment explicitly protects “papers” from “unreasonable searches and seizures.”<sup>26</sup> At the beating heart of the Fourth Amendment lies a fundamental respect for the “dignity, and security of persons.”<sup>27</sup> To that end, the Amendment limits the ability of government agents to make intrusions into “sphere[s] in which society recognizes reasonable expectations of privacy.”<sup>28</sup> Informed by both “historical

---

<sup>23</sup> Gill v. Beaver, No. CIV. A. 98-3569, 1999 WL 461821, at \*1 (E.D. La. July 2, 1999); *see, e.g.*, Hawkins v. St. Clair Cnty., No. 07-142-DRH-CJP, 2008 WL 4279994, at \*2 (S.D. Ill. Sept. 17, 2008) (ordering production of diary to reveal plaintiff’s “most private thoughts and feelings”); Zakrzewska v. New Sch., No. 06 Civ. 5463(LAK), 2008 WL 126594, at \*1–2 (S.D.N.Y. Jan. 7, 2008) (allowing discovery of diary to undermine expert witness testimony); Simpson v. Univ. of Colo., 220 F.R.D. 354, 360–62 (D. Colo. 2004) (requiring production of thirty-four enumerated diary passages over plaintiff’s objections to support plaintiff’s prior voluntary diary submissions), *rev’d on other grounds*, 500 F.3d 1170 (10th Cir. 2007); Quiroz v. Hartgrove Hosp., No. 97 C 6515, 1998 WL 341812, at \*1–3 (N.D. Ill. June 12, 1998) (mandating six specific diary disclosures relevant to dispute); Topol v. Trs. of the Univ. of Pa., 160 F.R.D. 476, 477 (E.D. Pa. 1995) (allowing discovery of diary when “undue annoyance, embarrassment, and oppression” was unlikely due to a confidentiality stipulation); Dogan Enters., Inc. v. Hubsher, No. CV-84-3984, 1987 WL 20312, at \*7 (E.D.N.Y. Nov. 4, 1987) (ordering diary production in an accounting case); Eidukonis v. Se. Pa. Transp. Auth., No. 86-5142, 1987 WL 9286, at \*2–3 (E.D. Pa. Apr. 9, 1987) (ordering production when diarist failed to stress personal nature of diary); Zises v. Dep’t of Soc. Servs., 112 F.R.D. 223, 224–25, 227 (E.D.N.Y. 1986) (dismissing a plaintiff’s claim after a refusal to produce diaries); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 626 (S.D. Ohio 1983) (allowing possibility of diary production after in-camera review); Chang-Craft v. Cameron, No. 3AN-05-13737 CI, 2006 WL 6886441, at \*1 (Alaska Super. Ct. Nov. 24, 2006) (ordering production of a diary but limiting scope of inspection); Robinson v. Robinson, 764 N.Y.S.2d 93, 93 (N.Y. App. Div. 2003) (allowing admission of a diary obtained by improper means when party “would have been entitled to its production”); Faragiano v. Town of Concord, 741 N.Y.S.2d 369, 369 (N.Y. App. Div. 2002) (remanding with order for in-camera review of a diary by lower court); Hollingworth v. Hollingworth, 145 P.2d 466, 466–67 (Ore. 1944) (using a diary to indict defendant’s “loose morals and overindulgence in alcohol”).

<sup>24</sup> Mathias v. Jacobs, 197 F.R.D. 29, 43 (S.D.N.Y. 2000); *accord* Flaherty v. Seroussi, 209 F.R.D. 295, 297–99 (N.D.N.Y. 2001); Hawley v. Hall, 131 F.R.D. 578, 581 (D. Nev. 1990).

<sup>25</sup> The discontinuity may stem from the fact that “the literatures of criminal procedure and constitutional law do not speak to one another, and the cases do not cite each other.” William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016–17 (1995) (footnote omitted).

<sup>26</sup> U.S. CONST. amend. IV.

<sup>27</sup> Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 613 (1989).

<sup>28</sup> United States v. Concepcion, 942 F.2d 1170, 1171–72 (7th Cir. 1991); *see* California v. Ciraolo, 476 U.S. 207, 211 (1986) (“The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))); Katz, 389 U.S. at 361 (1967) (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

practices<sup>29</sup> and prevailing “social norms,”<sup>30</sup> the Fourth Amendment embodies a particularly deep respect for the high expectation of privacy inherent in private papers.<sup>31</sup> For this reason, the Fourth Amendment’s text accords “papers” special protection.<sup>32</sup>

Yet civil litigants seeking access to an opponent’s private papers face little scrutiny. Judge Rifkind imagined that “[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.”<sup>33</sup> The FRCP empowers litigants to demand the production of private papers from opponents—and even third parties—virtually as a matter of right.<sup>34</sup> As Justice Murphy noted, bestowing a private party with the power “to demand the books and papers of an individual is an open invitation to abuse that power.”<sup>35</sup>

In this Essay, I argue that the judicially compelled production of one’s private papers constitutes a quintessential Fourth Amendment search. I assert that to pass constitutional muster, document production orders seeking private papers should be premised on a showing of probable cause: a showing by the moving party that “there is a fair probability” that the papers sought will yield admissible evidence.<sup>36</sup> In determining whether the movant has satisfied her burden, courts should independently evaluate the allegations offered, probing “the veracity, reliability, and basis of knowledge” of the source.<sup>37</sup> Allegations premised upon the naked surmise

---

<sup>29</sup> *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring); *see also* *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (“[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates.”).

<sup>30</sup> *Robbins v. California*, 453 U.S. 420, 428 (1981) (plurality opinion).

<sup>31</sup> *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“Letters . . . are in the general class of effects in which the public at large has a legitimate expectation of privacy . . .”); *United States v. Hinckley*, 525 F. Supp. 1342, 1362 (D.D.C. 1981) (“[P]risoners ‘have and should have’ a reasonable expectation of privacy in the contents of a personal diary.” (quoting *Diguisepp v. Ward*, 514 F. Supp. 503, 505 (S.D.N.Y. 1981), *rev’d in part*, 698 F.2d 602 (2d Cir. 1983))); James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 68 (1978) (arguing that private papers “should occupy a type of preferred position” under the Fourth Amendment); *see also* *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) (“Email is the technological scion of tangible mail . . . [and] requires strong protection under the Fourth Amendment . . .”).

<sup>32</sup> U.S. CONST. amend. IV.

<sup>33</sup> Rifkind, *supra* note 1, at 107.

<sup>34</sup> *See* Erichson, *supra* note 9, at 365 (“What is extraordinary about United States discovery . . . is not only its breadth, but also the extent to which it is controlled by the parties rather than the court.”).

<sup>35</sup> *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting).

<sup>36</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>37</sup> *United States v. Archibald*, 685 F.3d 553, 557 (6th Cir. 2012); *see, e.g.*, *United States v. Hodge*, 354 F.3d 305, 309 (4th Cir. 2004) (considering the “veracity” and “basis of knowledge” of persons who supplied information that formed the basis for a search warrant affidavit); *United States v. Davis*, 313 F.3d 1300, 1303 (11th Cir. 2002) (evaluating the validity of a search warrant affidavit based on an “informant’s veracity and basis of knowledge,” among other factors).



of “information and belief” will not suffice.<sup>38</sup>

This Essay continues with four Parts. Part II explores the Supreme Court’s evolving conception of what constitutes a search for Fourth Amendment purposes. I assert that the compelled production of private papers, such as diaries, letters, and e-mails, constitutes a search because the authors of such documents possess a “reasonable expectation of privacy” in their contents.<sup>39</sup>

Part III addresses the level of scrutiny required to render the search of private papers reasonable. I argue that the limitations imposed by the FRCP are insufficient because they do not require a showing of probable cause—the standard which provides the ordinary measure of reasonableness for Fourth Amendment purposes.<sup>40</sup>

Part IV explores how the Supreme Court’s probable-cause jurisprudence, developed for the issuance of search warrants, may be tailored to fit the field of pre-trial discovery. I contend that a litigant seeking the production of private papers—like a constable seeking a search warrant—should bear the burden of establishing that “there is a fair probability” that the documents sought will yield admissible evidence.<sup>41</sup> While far more burdensome than the FRCP’s current regime, probable cause is “a standard well short of absolute certainty” that a majority of litigants will be able to satisfy.<sup>42</sup> This standard will prevent current abuses because its satisfaction requires litigants to identify the basis of their knowledge.<sup>43</sup> Allegations premised on information and belief will not suffice.

Finally, Part V argues that when the compelled disclosure of private papers is deemed reasonable, courts should issue protective orders preventing the public disclosure of information obtained that is not admitted into evidence.<sup>44</sup> Litigants will inevitably “obtain—incidentally or purposefully—information that not only is irrelevant but if publicly

---

<sup>38</sup> See *Schencks v. United States*, 2 F.2d 185, 187 (D.C. Cir. 1924) (noting that “information and belief” allegations fall short of demonstrating “probable cause”); *Carden v. Ensminger*, 161 N.E. 137, 141 (Ill. 1928) (same).

<sup>39</sup> See *California v. Ciraolo*, 476 U.S. 207, 219 (1986) (acknowledging that the determination of whether a search occurred must, by necessity, turn on whether a person had a “reasonable expectation of privacy” in regard to the subject matter of the search).

<sup>40</sup> *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013).

<sup>41</sup> *Gates*, 462 U.S. at 238–39.

<sup>42</sup> *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 615 (2007) (per curiam).

<sup>43</sup> *United States v. Archibald*, 685 F.3d 553, 557 (6th Cir. 2012); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999); *United States v. Wilhelm*, 80 F.3d 116, 119 (4th Cir. 1996).

<sup>44</sup> The First Amendment requires that private papers actually received into evidence be made available to the public. See, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 586–88 (1976) (Brennan, J., concurring) (asserting that the First Amendment prohibits judicial restraints on media coverage of trials).

released could be damaging to reputation and privacy.”<sup>45</sup> When based on a showing of probable cause, such intrusions are justified by the judicial system’s “interest in determination of truth.”<sup>46</sup> But I assert that the humiliation caused by such intrusions should not be amplified by allowing unnecessary exposure of the private information.

## II. CIVIL DOCUMENT PRODUCTION ORDERS CONSTITUTE “SEARCHES” WITHIN THE MEANING OF THE FOURTH AMENDMENT

The Fourth Amendment’s ambit is limited to searches and seizures, “legal term[s] of art whose history is riddled with complexity.”<sup>47</sup> Further, the Amendment “proscrib[es] only governmental action; it is wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.’”<sup>48</sup> Thus, my thesis is premised upon the threshold conclusions that the court-ordered production of private papers constitutes “governmental action” and that such action amounts to a search or seizure within the meaning of the Fourth Amendment.

### A. *The Court-Ordered Production of Documents Constitutes Governmental Action*

The Supreme Court recognized in *New York Times Co. v. Sullivan*<sup>49</sup> that the Bill of Rights applies with equal vigor to legislative and judicial action.<sup>50</sup> In *Sullivan*, the respondent argued that the First Amendment was inapplicable to a common law defamation action between private parties because the Amendment “is directed against [governmental] action and not private action.”<sup>51</sup> The Court rejected this contention:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their

---

<sup>45</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984).

<sup>46</sup> *Stone v. Powell*, 428 U.S. 465, 488 (1976).

<sup>47</sup> *Widgren v. Maple Grove Twp.*, 429 F.3d 575, 578 (6th Cir. 2005) (citing *Kyllo v. United States*, 533 U.S. 27, 32 (2001)); *see* *Walsh v. City of New York*, No. 99 Civ. 4586(NRB), 2001 WL 83221, at \*6 (S.D.N.Y. Jan. 31, 2001) (noting that “what constitutes a ‘reasonable’ search or seizure for Fourth Amendment purposes is often a complex question that has led to voluminous case law”).

<sup>48</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

<sup>49</sup> 376 U.S. 254 (1964).

<sup>50</sup> *Id.* at 291–92; *see also* *Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (“State power may be exercised as much by a . . . judge’s . . . application of a state rule of law in a civil lawsuit as by a statute.” (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996))).

<sup>51</sup> *Sullivan*, 376 U.S. at 265.

constitutional freedoms . . . . It matters not that that law has been applied in a civil action . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>52</sup>

Civil discovery orders are no different. Discovery is the “coerced production of information”<sup>53</sup> and it is backed by the full coercive power of the State. “If a litigant fails to comply with an appropriate discovery request, the Court may have to interject itself and order compliance, enforceable by the court’s contempt powers. Thus, there is government compulsion involved.”<sup>54</sup> As such, document production orders constitute a form of governmental action implicating the Constitution. But the question remains whether the government conduct involved constitutes a “search” within the meaning of the Fourth Amendment.<sup>55</sup>

B. *The Compelled Production of Private Papers Falls Within the Supreme Court’s Definition of “Search”*

1. *Nineteenth-Century Precedent Recognized that Document Production Orders Constitute Fourth Amendment Searches*

Nineteenth- and early twentieth-century Fourth Amendment jurisprudence was bound by the shackles of property law. Modern notions of privacy were foreign to criminal procedure.<sup>56</sup> A “search” simply meant “a quest by an officer of the law” for *property* and a “seizure” was “a forcible dispossession of” that *property* from its possessor by the government.<sup>57</sup>

Implicit in this property-centric view of searches and seizures was a limitation quite foreign to modern jurists. Case law of this era recognized

<sup>52</sup> *Id.* (citing *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)).

<sup>53</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35–36 (1984).

<sup>54</sup> *Hawkins v. St. Clair Cnty.*, No. 07-142-DRH-CJP, 2008 WL 4279994, at \*2 (S.D. Ill. Sept. 17, 2008) (citing *Seattle Times Co.*, 467 U.S. at 30).

<sup>55</sup> Because document production usually involves the production of duplicates, the Fourth Amendment’s seizure clause is not ordinarily implicated. *But see* Cooper, *supra* note 16, at 789–806 (arguing that the coerced production of documents constitutes a Fifth Amendment taking).

<sup>56</sup> *See* *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (noting that nineteenth-century Fourth Amendment jurisprudence was rooted in property rights, not privacy).

<sup>57</sup> *Hale v. Henkel*, 201 U.S. 43, 76 (1906). Until the mid-twentieth-century, the Supreme Court defined a Fourth Amendment search as a common-law trespass committed by a government actor upon one’s “person, . . . house, . . . papers or . . . effects.” *Olmstead v. United States*, 277 U.S. 438, 464 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). The Supreme Court recently recognized that such trespasses—along with certain invasions of privacy—still constitute Fourth Amendment “searches.” *See Jones*, 132 S. Ct. at 951–52 (noting that the modern “reasonable-expectation-of-privacy test” for whether a search has occurred “has been added to, not substituted for, the common-law trespassory test”).

a:

[D]istinction between merely evidentiary materials, on the one hand, which [could] not be seized . . . under the authority of a search warrant . . . and on the other hand, those objects which [could] validly be seized including the instrumentalities and means by which a crime [was] committed, the fruits of crime such as stolen property, weapons . . . and [contraband].<sup>58</sup>

Possession of so-called “mere evidence”<sup>59</sup>—items that tend to link an individual with a crime but that are not contraband, an instrumentality, or a fruit of crime—is perfectly legal.<sup>60</sup> Because a search for or seizure of such property interferes with the owner’s use and enjoyment of it, Supreme Court precedent regarded such acts as per se unreasonable within the meaning of the Fourth Amendment.<sup>61</sup> Conversely, the Court viewed the government to possess “a superior property interest” in illegal subject matter like contraband.<sup>62</sup> Hence, government searches for or seizures of such property were deemed reasonable.<sup>63</sup> But absent this requisite superior claim of title, the government could not use a search warrant to “gain[] access to a man’s house . . . and papers solely for the purpose of making a search to secure evidence to be used against him in a . . . proceeding.”<sup>64</sup>

Pursuant to the mere evidence rule, virtually “all government attempts to procure a person’s private papers were unconstitutional under . . . the reasonableness clause of the fourth amendment.”<sup>65</sup> This was so because with the exception of documents that are the instrumentalities of crime, such as “stolen or forged papers,” papers almost always qualify as mere evidence.<sup>66</sup> Because the government lacks “a superior property interest” in documents lawfully in the possession of their owner, it could not search for them.<sup>67</sup>

During the mere evidence rule’s reign, the Supreme Court confronted several statutes authorizing federal agencies to subpoena documents from

---

<sup>58</sup> *Harris v. United States*, 331 U.S. 145, 154 (1947) (citing *Boyd v. United States*, 116 U.S. 616, 623 (1886)).

<sup>59</sup> *Couch v. United States*, 409 U.S. 322, 349 (1973) (Marshall, J., dissenting) (quoting *Boyd*, 116 U.S. at 623–24).

<sup>60</sup> *Gouled v. United States*, 255 U.S. 298, 309 (1921).

<sup>61</sup> *See id.* (stating that the search and seizure of the accused’s property is only valid if possession of the property by the accused is unlawful).

<sup>62</sup> *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

<sup>63</sup> *Gouled*, 255 U.S. at 309.

<sup>64</sup> *Id.*

<sup>65</sup> *United States v. Abrams*, 615 F.2d 541, 547 (1st Cir. 1980) (citing *Boyd v. United States*, 116 U.S. 616, 622 (1886)).

<sup>66</sup> *Gouled*, 255 U.S. at 309 (citing *Langdon v. People*, 24 N.E. 874, 877 (Ill. 1890)).

<sup>67</sup> *Hayden*, 387 U.S. at 304.

parties they were tasked with regulating. On each occasion, the Court condemned the law as an attempt “to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.”<sup>68</sup> In 1886, the Court held in *Boyd v. United States*<sup>69</sup> that “any compulsory discovery by . . . compelling the production of [one’s] private books and papers . . . is contrary to the principles of a free government . . . and . . . obnoxious to the prohibition of the Fourth Amendment.”<sup>70</sup>

Twenty years later, in *Hale v. Henkel*,<sup>71</sup> the Court backtracked slightly, holding that “an order for the production of books and papers *may* constitute an unreasonable search and seizure within the Fourth Amendment.”<sup>72</sup> *Hale* acknowledged that with respect to corporations, some documents could be discoverable because a “corporation is a creature of the State,” and as a condition of incorporation, the State “reserve[s] [a] right . . . to investigate” certain papers to “find out whether [the corporation] has exceeded its powers.”<sup>73</sup> But the Court adhered to the view that “the compulsory extortion of a man’s . . . private papers” generally constitutes “an unreasonable search and seizure . . . within the Fourth Amendment.”<sup>74</sup>

While the Supreme Court would not apply the Fourth Amendment to state governments for another half century,<sup>75</sup> state courts similarly construed their own constitutions to prohibit the forced disclosure of private papers, even in civil litigation.<sup>76</sup> Reversing a lower court’s finding of contempt for a litigant’s refusal to comply with an order to produce documents during trial, the California Supreme Court noted: “A man does

---

<sup>68</sup> Fed. Trade Comm’n v. Am. Tobacco Co., 264 U.S. 298, 306 (1924); accord *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *Boyd v. United States*, 116 U.S. 616, 631–32 (1886).

<sup>69</sup> 116 U.S. 616 (1886).

<sup>70</sup> *Id.* at 631–32. *Boyd* also rested on a second, now-discredited ground: that the coerced production of one’s papers violated the Fifth Amendment prohibition against compelled self-incrimination. *Id.* at 630. The Court reasoned that “any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, [was] within the condemnation of [an English] judgment” describing analogous philosophical principles. *Id.* The Court concluded that “the Fourth and Fifth Amendments run almost into each other.” *Id.* The Court laid this notion to rest in *Andresen v. Maryland*, finding that the admission of a defendant’s papers against him as evidence did not violate the Fifth Amendment because government actors did not compel him to create the papers. 427 U.S. 463, 472–73 (1976).

<sup>71</sup> 201 U.S. 43 (1906).

<sup>72</sup> *Id.* at 76 (emphasis added).

<sup>73</sup> *Id.* at 74–75.

<sup>74</sup> *Id.* at 71.

<sup>75</sup> See *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (finding that the Fourteenth Amendment’s Due Process Clause makes the privacy provisions of the Fourth Amendment applicable to state governments).

<sup>76</sup> E.g., *McClatchy Newspapers v. Superior Court*, 159 P.2d 944, 950–51 (Cal. 1945); *Ex parte Clarke*, 58 P. 546, 548 (Cal. 1899); *Red Star Lab. Co. v. Pabst*, 194 N.E. 734, 735 (Ill. 1935); *Carden v. Ensminger*, 161 N.E. 137, 141 (Ill. 1928); *Morrison v. Sturges*, 26 How. Pr. 177, 177–78 (N.Y. Sup. Ct. 1863).

not lose all his civil rights because he is brought into court as a party to a suit.”<sup>77</sup>

This precedent gave way in 1967 when the Supreme Court abandoned the mere evidence rule in *Warden v. Hayden*.<sup>78</sup> *Hayden* found that mid-twentieth-century case law had come to recognize “that the principal object of the Fourth Amendment is the protection of privacy rather than property, and ha[d] . . . discarded fictional and procedural barriers rested on property concepts.”<sup>79</sup> Consistent with this new conception of the Fourth Amendment, the Court held that the reasonableness of a search rests not on who has “superior” interest in the property sought, but whether the means the government uses to acquire it impermissibly intrudes upon privacy.<sup>80</sup> The Court reasoned that “[t]he requirement that the Government assert . . . some property interest in material it seizes, has long been a fiction, obscuring the reality that government has an interest in solving crime.”<sup>81</sup> The Court concluded that “[t]he requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for ‘mere evidence’ or for fruits, instrumentalities or contraband.”<sup>82</sup>

The demise of the mere evidence rule led lower courts to conclude that *Boyd* and *Hale* had been “wounded . . . mortally.”<sup>83</sup> Hence, modern courts have uniformly held that the FRCP’s coerced document production devices do not offend the Constitution.<sup>84</sup> This new conception is too clever by half. I do not advocate a return to the misguided mere evidence rule.

---

<sup>77</sup> *Ex parte Clarke*, 58 P. at 548.

<sup>78</sup> 387 U.S. 294 (1967).

<sup>79</sup> *Id.* at 304.

<sup>80</sup> *Id.* at 304–06.

<sup>81</sup> *Id.* at 306 (footnote omitted).

<sup>82</sup> *Id.* at 306–07. Some commentators have greeted *Hayden*’s renunciation of the mere evidence rule with incredulity. See Greg S. Sergienko, *Self Incrimination and Cryptographic Keys*, 2 RICH. J.L. & TECH. 1, 64 (1996), available at <http://jolt.richmond.edu/v2i1/sergienko.html> (“*Warden v. Hayden*, in which the Supreme Court discerned a “shift in emphasis from property to privacy” in Fourth Amendment rights, significantly eroded protection against governmental searches and seizures.” (footnotes omitted) (quoting *Hayden*, 387 U.S. at 304)).

<sup>83</sup> *United States v. Abrams*, 615 F.2d 541, 547 (1st Cir. 1980); cf. *United States v. Sasson*, 334 F. Supp. 2d 347, 362 (E.D.N.Y. 2004) (“*Boyd* set out the now discredited ‘mere evidence’ rule . . . .”); *United States v. Braswell*, 436 F. Supp. 669, 672 (E.D.N.C. 1977) (“Suffice it to say, this ‘mere evidence’ rule . . . has been wholly abrogated by the Supreme Court . . . .”).

<sup>84</sup> See, e.g., *Hyster Co. v. United States*, 338 F.2d 183, 184–86 (9th Cir. 1964) (rejecting argument that subpoena seeking papers constituted a Fourth Amendment search); *Gen. Petrol. Corp. v. Dist. Court of the U.S. for Western Dist. of Wash.*, 213 F.2d 689, 692 (9th Cir. 1954) (finding that compliance with FRCP guidelines rendered document production order reasonable for Fourth Amendment purposes); *Rekeweg v. Fed. Mut. Ins. Co.*, 27 F.R.D. 431, 437–38 (N.D. Ind. 1961) (finding that documents sought were “reasonably calculated to lead to the discovery of admissible evidence” and defeated the defendant’s assertion that production demand constituted “unreasonable search and seizure”); *United States v. Aluminum Co. of Am.*, 1 F.R.D. 57, 58 (D.N.Y. 1939) (finding mere “showing of materiality” by party demanding documents sufficient to render production order reasonable under Fourth Amendment), *rev’d on other grounds*, 334 U.S. 258 (1948).

Documents can be evidence of wrongdoing and, as such, the government has an interest in obtaining them. But *Hayden*'s renunciation of the rule was not a rejection of the notion that "an order for the production of books and papers may" qualify as a "search . . . within the Fourth Amendment."<sup>85</sup> The Court simply recognized that the government's *reasonable search* of private papers is consistent with the Fourth Amendment.<sup>86</sup> Unbroken precedent—both before and after *Hayden*—demonstrates that such conduct constitutes a *search*.<sup>87</sup>

## 2. *Individuals Possess a "Reasonable Expectation of Privacy" in Their Private Papers*

The Supreme Court formally abandoned its property-centric view of the Fourth Amendment in *Katz v. United States*.<sup>88</sup> Recognizing that the Amendment "protects people, not places,"<sup>89</sup> *Katz* stands for the proposition that a search occurs when a government agent intrudes upon "sphere[s] in which society recognizes reasonable expectations of privacy."<sup>90</sup> In other words, a search ordinarily involves government encroachment on mediums that "tend to be the locus of activities that most people like to keep secret."<sup>91</sup> Document production demands frequently constitute such an intrusion.

While many documents entail no expectation of privacy and thus trigger no Fourth Amendment concerns—letters to the editor, for example<sup>92</sup>—production orders often compel disclosure of private papers revealing the writer's innermost confidences.<sup>93</sup> E-mails,<sup>94</sup> text messages,<sup>95</sup>

<sup>85</sup> *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

<sup>86</sup> *Hayden*, 387 U.S. at 306–07.

<sup>87</sup> See *infra* Part II.B.2.

<sup>88</sup> 389 U.S. 347 (1967).

<sup>89</sup> *Id.* at 351.

<sup>90</sup> *United States v. Concepcion*, 942 F.2d 1170, 1171–72 (7th Cir. 1991) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); accord *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

<sup>91</sup> Stuntz, *supra* note 25, at 1016; see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.").

<sup>92</sup> A writer would not have an expectation of privacy with respect to such a letter because "an individual does not have an expectation of privacy in items exposed to the public." *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012) (Ginsberg, J., concurring) (quoting *Delia v. City of Rialto*, 621 F.3d 1069, 1099 (9th Cir. 2010)).

<sup>93</sup> In my view, only the compelled production of "private papers" constitutes a "search" for Fourth Amendment purposes. While "private papers" elude simple classification, consistent with Fourth Amendment jurisprudence, I would define the term to include all documents in which the writer enjoys a reasonable expectation of privacy—e.g., private letters, e-mails, text messages, and diaries. See McKenna, *supra* note 31, at 55 n.1 ("Those papers having a close relationship to an individual's personality, especially to the private aspects of personality, are clearly 'private.'"). It should be noted that the standard I advocate would apply with much greater vigor to individuals than to corporations.

love letters,<sup>96</sup> and even diaries<sup>97</sup> are the regular targets of production orders. In the criminal justice arena, precedent recognizes the obvious: It is beyond cavil that creators of such media possess a reasonable expectation of privacy in their contents.<sup>98</sup> For this reason, the Fourth Amendment expresses a special affinity for private papers, and explicitly calls for their protection.<sup>99</sup> Precedent recognizes that “[t]he privacy of private books and papers is . . . of inestimable value to the owner on account of . . . personal and sentimental reasons.”<sup>100</sup>

An individual’s papers are “little more than an extension of [her] person.”<sup>101</sup> Intrusion into “private files” inherently yields “exposure of [the writer’s] intimacies and confidences.”<sup>102</sup> As such, jurists have long recognized that “papers are almost inseparable from the privacy and security of the individual.”<sup>103</sup> As Samuel Warren and Louis Brandeis famously observed, “[t]he principle which protects personal writings” from public scrutiny is “that of an inviolate personality.”<sup>104</sup> Thus, “the act of reading someone’s correspondence” is regarded as a “paradigmatic infringement . . . of privacy.”<sup>105</sup>

The protection of papers from government scrutiny was historically “bound up” with the “struggle for freedom of speech” in England.<sup>106</sup> English authorities frequently sought the private writings of suspected dissidents, using “the power of search and seizure as an adjunct to a system

<sup>94</sup> *E.g.*, *Miller v. Citgo Ref. & Chem. Co. LP*, No. C-11-22, 2012 WL 113781, at \*9–11 (S.D. Tex. Jan. 13, 2012); *Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 684 (S.D. Fla. 2011).

<sup>95</sup> *E.g.*, *Flagg v. City of Detroit*, 268 F.R.D. 279, 288 (E.D. Mich. 2010); *Rodriguez v. City of Fresno*, Nos. 105CV00661OWWDLB, 105CV01017OWWDLB, 2006 WL 2067063, at \*5 (E.D. Cal. July 24, 2006).

<sup>96</sup> *E.g.*, *Peacock v. Merrill*, No. CA 05-0377-BH-C, 2008 WL 176375, at \*2 n.4 (S.D. Ala. Jan. 17, 2008); *McFarland v. McFarland*, 107 A.2d 615, 616–17 (Pa. Super. Ct. 1954).

<sup>97</sup> See cases cited *supra* note 23.

<sup>98</sup> See, *e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy . . . .”); *United States v. Warshak*, 631 F.3d 266, 283–85 (6th Cir. 2010) (recognizing a reasonable expectation of privacy in e-mail); *Quon v. Arch Wireless Operating Co.*, 554 F.3d 769, 771 (9th Cir. 2009) (recognizing a reasonable expectation of privacy in text messages); *In re Application of U.S. for a Order Authorizing the Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578, 585 (E.D.N.Y. 2010) (“[T]he diary’s author enjoys a reasonable expectation of privacy in its contents.”); *United States v. Hinckley*, 525 F. Supp. 1342, 1362 (D.D.C. 1981) (“[P]risoners ‘have and should have’ a reasonable expectation of privacy in the contents of a personal diary.” (quoting *Diguiseppa v. Ward*, 514 F. Supp. 503, 505 (S.D.N.Y. 1981), *rev’d in part*, 698 F.2d 602 (2d Cir. 1983))).

<sup>99</sup> U.S. CONST. amend. IV.

<sup>100</sup> *Ex parte Clarke*, 58 P. 546, 547 (Cal. 1899).

<sup>101</sup> *Fisher v. United States*, 425 U.S. 391, 420 (1976) (Brennan, J., concurring).

<sup>102</sup> *State v. Bisaccia*, 213 A.2d 185, 192 (N.J. 1965).

<sup>103</sup> *Id.* at 191.

<sup>104</sup> Warren & Brandeis, *supra* note 91, at 205.

<sup>105</sup> Stuntz, *supra* note 25, at 1021.

<sup>106</sup> *Marcus v. Search Warrants of Prop.*, 367 U.S. 717, 724 (1961).



for the suppression” of dissenters.<sup>107</sup> Similarly, it is widely documented that well-heeled litigants often file meritless Strategic Lawsuits Against Public Participation (“SLAPP” suits) to quell dissent.<sup>108</sup> Such suits deploy the FRCP’s expansive discovery provisions as a weapon to deter “citizens from exercising their political rights or to punish them for having done so.”<sup>109</sup>

Evidence of the preferred status enjoyed by private papers predates the Fourth Amendment itself. Lord Camden recognized the fundamental privacy interests implicit in one’s papers in his 1765 opinion, *Entick v. Carrington*.<sup>110</sup> The Supreme Court recently characterized *Entick* as “a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure.”<sup>111</sup> Noting that private papers “are often the dearest property a man can have,”<sup>112</sup> *Entick* contended—somewhat hyperbolically—that empowering agents of the state to examine “a man’s private letters of correspondence, family concerns, [or] trade and business” without showing probable cause would be a “monstrous” invasion of personal privacy “worse than the Spanish Inquisition.”<sup>113</sup>

Yet, the FRCP empowers private litigants to gain access to opponents’ and third parties’ private papers with little difficulty.<sup>114</sup> Remarkably, the public and the courts have accepted this status quo as a fact of modern life. When asked whether she kept a diary, then-First Lady Hillary Rodham Clinton famously replied, “Heavens no! It could get subpoenaed. I can’t write anything down.”<sup>115</sup> A perusal of precedent shows that Mrs. Clinton’s fears were well founded. “[C]ourts . . . have routinely ordered the production of personal diaries in response to requests for production of documents.”<sup>116</sup>

Federal and state reporters are littered with decisions that casually

---

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3–6 (1989) (noting countless SLAPP suits have been filed to exploit the expense and emotional distress of civil litigation in order to chill victims and others from speaking out).

<sup>109</sup> *Id.* at 5–6.

<sup>110</sup> (1765) 95 Eng. Rep. 807, 817 (C.P.).

<sup>111</sup> *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989)) (internal quotation marks omitted).

<sup>112</sup> *Entick*, 95 Eng. Rep. at 817–18.

<sup>113</sup> *Id.* at 812.

<sup>114</sup> See *infra* Part III.

<sup>115</sup> *Newsmaker: Hillary Rodham Clinton* (PBS Newshour television broadcast May 28, 1996), transcript available at [http://www.pbs.org/newshour/bb/white\\_house/jan-june96/hillaryclinton\\_05-28.html](http://www.pbs.org/newshour/bb/white_house/jan-june96/hillaryclinton_05-28.html).

<sup>116</sup> *Gill v. Beaver*, No. CIV. A. 98-3569, 1999 WL 461821, at \*1 (E.D. La. July 2, 1999); see also cases cited *supra* note 23.

reveal diary writers' "most private thoughts and feelings."<sup>117</sup> Examples include the discussion of entries concerning "on-and-off relationship[s],"<sup>118</sup> sexual encounters,<sup>119</sup> physical assaults,<sup>120</sup> stream of conscious ruminations,<sup>121</sup> "observations and musings" concerning the "perplexing transition from adolescence to adulthood,"<sup>122</sup> and writers' supposed "loose morals."<sup>123</sup>

Defendants<sup>124</sup> and plaintiffs<sup>125</sup> alike are subject to this indignity.<sup>126</sup> A constable pursuing a suspected murderer or rapist enjoys no such access. Criminal procedure jurisprudence embraces the obvious: a "diary's author enjoys a reasonable expectation of privacy in its contents."<sup>127</sup> As such, the police must obtain a warrant before intruding upon such intimacies.<sup>128</sup> One

<sup>117</sup> *Hawkins v. St. Clair Cnty.*, No. 07-142-DRH-CJP, 2008 WL 4279994, at \*2 (S.D. Ill. Sept. 17, 2008).

<sup>118</sup> *Quiroz v. Hartgrove Hosp.*, No. 97 C 6515, 1998 WL 341812, at \*1 (N.D. Ill. June 12, 1998).

<sup>119</sup> *Zakrzewska v. New Sch.*, No. 06 Civ. 5463(LAK), 2008 WL 126594, at \*1 (S.D.N.Y. Jan. 7, 2008); *Topol v. Trs. of the Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995).

<sup>120</sup> *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 361 (D. Colo. 2004), *rev'd on other grounds*, 500 F.3d 1170 (10th Cir. 2007).

<sup>121</sup> *Zises v. Dep't of Soc. Servs.*, 112 F.R.D. 223, 224 (E.D.N.Y. 1986).

<sup>122</sup> *Simpson*, 220 F.R.D. at 361.

<sup>123</sup> *Hollingworth v. Hollingworth*, 145 P.2d 466, 466-67 (Ore. 1944).

<sup>124</sup> Federal and state courts have compelled defendants to produce their private diaries to opposing counsel or the court for inspection. *E.g.*, *Kalima v. Regents of the Univ. of Cal.*, No. C 06-1503 SI, 2007 WL 1514785, at \*2 (N.D. Cal. May 21, 2007); *Dogan Entrs., Inc. v. Hubsher*, No. CV-84-3984, 1987 WL 20312, at \*7 (E.D.N.Y. Nov. 4, 1987); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 626 (S.D. Ohio 1983); *Chang-Craft v. Cameron*, No. 3AN-05-13737, 2006 WL 6886441, at \*1 (Alaska Super. Ct. Nov. 24, 2006); *Robinson v. Robinson*, 764 N.Y.S.2d 93, 93-94 (N.Y. App. Div. 2003); *Faragiano v. Town of Concord*, 741 N.Y.S.2d 369, 370-71 (N.Y. App. Div. 2002); *Hollingworth*, 145 P.2d at 466-67; *King v. Fimia*, No. 06-2-00803-1 SEA, 2007 WL 4350387, at \*1 (Wash. Super. Ct. June 5, 2007).

<sup>125</sup> Federal and state courts have compelled plaintiffs to produce their private diaries to opposing counsel or the court for inspection. *E.g.*, *Hawkins v. St. Clair Cnty.*, No. 07-142-DRH-CJP, 2008 WL 4279994, at \*2 (S.D. Ill. Sept. 17, 2008); *Zakrzewska v. New Sch.*, No. 06 Civ. 5463(LAK), 2008 WL 126594, at \*1-2 (S.D.N.Y. Jan. 7, 2008); *Simpson*, 220 F.R.D. at 360-62; *Gill v. Beaver*, No. CIV. A. 98-3569, 1999 WL 461821, at \*1 (E.D. La. July 2, 1999); *Quiroz v. Hartgrove Hosp.*, No. 97 C 6515, 1998 WL 341812, at \*1-3 (N.D. Ill. June 12, 1998); *Topol v. Trs. of the Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995); *Eidukonis v. Se. Pa. Transp. Auth.*, No. 86-5142, 1987 WL 9286, at \*2-3 (E.D. Pa. Apr. 9, 1987); *Zises*, 112 F.R.D. at 224-25.

<sup>126</sup> One might contend that plaintiffs should be treated differently than defendants because, by bringing a suit, a plaintiff forfeits some of her privacy rights. I reject this contention because "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984). One should not be compelled to forfeit one constitutional right in order to exercise another.

<sup>127</sup> *In re Application of U.S. for a Order Authorizing the Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578, 585 (E.D.N.Y. 2010); *see also* *United States v. Hinckley*, 525 F. Supp. 1342, 1362 (D.D.C. 1981) ("[P]risoners 'have and should have' a reasonable expectation of privacy in the contents of a personal diary." (quoting *Diguisepp v. Ward*, 514 F. Supp. 503, 505 (S.D.N.Y. 1981), *rev'd in part*, 698 F.2d 602 (2d Cir. 1983))).

<sup>128</sup> *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (citing *United States v. Chadwick*, 433 U.S. 1, 10 (1977)).

who finds herself on the receiving end of a civil summons or subpoena should enjoy the same rights as those suspected of perpetrating crimes. To paraphrase the Bard, a *search* “by any other name,” is still a *search*.<sup>129</sup>

### III. THE FRCP’S DOCUMENT PRODUCTION RULES DO NOT EMPLOY SUFFICIENT RIGOR TO SATISFY THE FOURTH AMENDMENT’S REASONABLENESS REQUIREMENT

That the compulsory production of private papers constitutes a Fourth Amendment search is, of course, merely the beginning of our inquiry. The Amendment does not bar searches; “it merely prohibits searches . . . that are ‘unreasonable.’”<sup>130</sup> “Reasonable searches are permitted.”<sup>131</sup>

The California Supreme Court squarely addressed the reasonableness of civil document production orders in *Greyhound Corp. v. Superior Court*.<sup>132</sup> The court acknowledged that the compelled production of documents sometimes constitutes a search,<sup>133</sup> but concluded that such searches are reasonable because modern discovery rules regulate production orders in a manner analogous to the issuance of search warrants.<sup>134</sup> “[J]ust as search warrants are justifiable on the showing of good cause,” *Greyhound* asserted, “so an order for the inspection of material in a civil case is reasonable when similar provision is made.”<sup>135</sup> Other courts have accepted this argument.<sup>136</sup>

<sup>129</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

<sup>130</sup> *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

<sup>131</sup> *Greyhound Corp. v. Superior Court*, 364 P.2d 266, 287 (Cal. 1961), *superseded by statute on other grounds*, Stats. 1963, ch. 1744, § 1 (current version at CAL. CIV. PROC. CODE § 2018.030 (West (2012))). In *Greyhound*, the defendant sought to avoid compliance with a trial court’s document-production order, asserting that such orders when made “without reference to its admissibility” constitute unreasonable searches and seizures. *Id.* at 286. In support of its argument, the defendant relied on California opinions predating *Warden v. Hayden*, 387 U.S. 294 (1967), recognizing that the court-ordered production of private papers constituted unreasonable searches and seizures. *Greyhound*, 364 P.2d at 286 (citing *McClatchy Newspapers v. Superior Court*, 159 P.2d 944 (Cal. 1945)). *Greyhound* overruled these opinions, holding that modern discovery statutes render document-production orders reasonable per se. *Id.* at 286–87. In an unrelated portion of its opinion, the court also rejected the defendant’s contention that documents sought by the plaintiff were protected by the work-product doctrine. *Id.* at 290–92. Following the decision, the California Legislature amended one of the state’s discovery laws to amplify work-product protections. See CAL. CIV. PROC. CODE § 2018.030 (West (2012)), *noted in* *Coito v. Superior Court*, 278 P.3d 860 (Cal. 2012). But *Greyhound*’s finding that modern discovery rules render document-production orders immune to Fourth Amendment challenges remains good law. See *Coito*, 278 P.3d at 864–68 (noting that statutory amendments have bolstered the work-product protections recognized by California law, but making no reference to *Greyhound*’s Fourth Amendment holding).

<sup>132</sup> *Greyhound*, 364 P.2d at 287.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See, e.g., *Gen. Petrol. Corp. v. Dist. Court of the U.S. for Western Dist. of Wash.*, 213 F.2d 689, 692 (9th Cir. 1954) (finding that compliance with FRCP rendered a document production order

The flaw in the *Greyhound* court's logic is that the limits imposed by the FRCP and state discovery rules do not even remotely compare to those imposed by the warrant clause. Search warrants are not premised on mere *good cause*, but upon a showing of *probable cause*.<sup>137</sup> This standard, which has "roots that are deep in our history, represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make" searches and seizures "reasonable under the Fourth Amendment."<sup>138</sup>

The government bears the burden of establishing the existence of probable cause.<sup>139</sup> The assessment of whether the government has met its burden calls for "a practical, common-sense decision whether, given all the circumstances set forth . . . there is a fair probability that contraband or evidence . . . will be found in a particular place."<sup>140</sup> In determining whether a search warrant should issue, magistrate judges must independently evaluate the evidence offered, probing "the veracity, reliability, and basis of knowledge" of its source.<sup>141</sup>

In the criminal procedure context, the probable cause requirement significantly protects the expectation of privacy inherent in one's private papers. As one commentator observed: "Requiring a showing of probable cause as to the existence of the [individual's private] papers and their evidentiary relationship with a crime would seem to provide almost

---

reasonable for Fourth Amendment purposes); *Rekeweg v. Fed. Mut. Ins. Co.*, 27 F.R.D. 431, 437–38 (N.D. Ind. 1961) (finding that because the documents sought were "reasonably calculated to lead to the discovery of admissible evidence" a defendant's assertion that a production demand constituted "unreasonable search and seizure" was defeated); *United States v. Aluminum Co. of Am.*, 1 F.R.D. 57, 58 (D.N.Y. 1939) (finding a mere "showing of materiality" by the party demanding documents was sufficient to render a production order reasonable under the Fourth Amendment), *rev'd on other grounds*, 334 U.S. 258, 264–65 (1948). *But see* *Carden v. Ensminger*, 161 N.E. 137, 141 (Ill. 1928) (finding a well-pleaded complaint was insufficient to show probable cause for authorizing a search).

<sup>137</sup> *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

<sup>138</sup> *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (alteration in original) (citation omitted) (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959), and *Dunaway v. New York*, 442 U.S. 200, 208 (1979)) (internal quotation marks omitted). The Supreme Court has recognized two principal exceptions to the rule that probable cause is required to make a search or seizure reasonable: limited, protective searches based on reasonable suspicion of imminent danger, *Terry v. Ohio*, 392 U.S. 1, 27 (1968), and searches incident to lawful arrest, *Chimel v. California*, 395 U.S. 752, 763 (1969). *See* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 61 (2010) ("The only exception to the prohibition on searches, absent traditional probable cause, is a very narrow and definite one: officer safety."). Both *Terry* and *Chimel* represent very narrow exceptions designed to protect law enforcement officers from attacks from persons the officer reasonably suspects to be dangerous. *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983). This consideration is wholly absent in the context of the compelled production of private papers.

<sup>139</sup> *United States v. Andrews*, 454 F.3d 919, 922 (8th Cir. 2006).

<sup>140</sup> *Gates*, 462 U.S. at 238.

<sup>141</sup> *United States v. Archibald*, 685 F.3d 553, 557 (6th Cir. 2012); *accord* *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999); *United States v. Wilhelm*, 80 F.3d 116, 119 (4th Cir. 1996).

complete protection against the seizure of those papers that ‘constitute an integral aspect of a person’s private enclave.’”<sup>142</sup>

While probable cause is “a standard well short of absolute certainty,”<sup>143</sup> it is significantly more stringent than that imposed on civil litigants seeking document production orders. All a litigant needs to do to “unlock the doors of discovery” is file a complaint endowed with “well-pleaded factual allegations” that “plausibly give rise to an entitlement to relief.”<sup>144</sup> When this modest obligation is met, Rules 26 and 34 of the FRCP direct courts to compel the production of any papers that are “relevant to the claim or defense of any party.”<sup>145</sup>

The reach of “discovery is not limited to matters that will be admissible at trial,”<sup>146</sup> but extends to demands that facially appear to be “reasonably calculated to lead to the discovery of admissible evidence.”<sup>147</sup> Importantly, the Federal Rules “do not distinguish between public and private information.”<sup>148</sup> Further, Rule 26’s requirement of relevancy “is to be construed broadly, and material is relevant if it bears on, or reasonably could bear on, an issue that is or may be involved [in] the litigation.”<sup>149</sup> The FRCP thus empowers litigants “to obtain—incidentally or purposefully—information that not only is irrelevant [to the action] but if publicly released could be damaging to reputation and privacy.”<sup>150</sup>

In sharp contrast to “the veracity, reliability, and basis of knowledge” analysis used to seize documentary evidence in the criminal justice arena,<sup>151</sup> the FRCP requires courts assessing civil document requests to “assume [the] veracity” of pleaded accusations.<sup>152</sup> It permits no inquiry regarding the basis of knowledge underlying a litigant’s factual claims.<sup>153</sup> Allegations premised entirely upon “information and belief” will suffice.<sup>154</sup>

---

<sup>142</sup> McKenna, *supra* note 31, at 74 (quoting *Fisher v. United States*, 425 U.S. 391, 427 (1976) (Brennan, J., concurring)).

<sup>143</sup> *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 615 (2007) (per curiam).

<sup>144</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

<sup>145</sup> *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 358 (D. Colo. 2004) (citing FED. R. CIV. P. 26(b)(1)), *rev’d on other grounds*, 500 F.3d 1170 (10th Cir. 2007). In addition, Rule 37 dictates “that if . . . a party refuses to obey an order compelling discovery, the court may impose sanctions against that individual, including, where appropriate, dismissal of the action.” *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 734 (2d Cir. 1987) (citing FED. R. CIV. P. 37(b)(2)(A)).

<sup>146</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984) (citing FED. R. CIV. P. 26(b)(1)).

<sup>147</sup> FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 34(a).

<sup>148</sup> *Seattle Times Co.*, 467 U.S. at 35.

<sup>149</sup> *Topol v. Trs. of the Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1994).

<sup>150</sup> *Seattle Times Co.*, 467 U.S. at 35.

<sup>151</sup> See *supra* note 141 and accompanying text.

<sup>152</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

<sup>153</sup> *Id.* at 679.

<sup>154</sup> See, e.g., *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 327–28 (3d Cir. 2012) (referring to a lower court’s decision to permit further discovery on information and belief); *Tri-*

It is settled law in the criminal arena that accusations made on “information and belief” fall far short of satisfying the probable cause standard.<sup>155</sup> By definition, such allegations do not “state the facts upon which the belief is based.”<sup>156</sup> As the D.C. Circuit has explained, “[C]ourts will not permit the evasion of the Constitution by [issuing warrants] on sworn declarations, . . . which fail to establish probable cause, inasmuch as they state the facts on information and belief . . . instead of positively alleging the material facts.”<sup>157</sup> Thus, the basic assumption of *Greyhound* and like opinions that civil discovery rules limit production orders in a manner analogous to the issuance of search warrants is fallacious.

#### IV. A PARTY SEEKING TO COMPEL THE PRODUCTION OF PRIVATE PAPERS SHOULD BE REQUIRED TO SHOW PROBABLE CAUSE THAT THE DOCUMENTS SOUGHT WILL YIELD ADMISSIBLE EVIDENCE

The expansive discovery permitted by the FRCP and state statutes was wholly unknown when the Fourth Amendment was ratified.<sup>158</sup> For the first century and a half of United States jurisprudence—before the adoption of the FRCP in 1938<sup>159</sup>—“the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily . . . by the pleadings.”<sup>160</sup> Courts held fast to the common-law rule that “discovery sought upon suspicion, surmise or vague guesses [was] called a fishing bill, and [would] be dismissed.”<sup>161</sup> Compulsory pre-trial document production was barred,<sup>162</sup> and to compel the production of a document during trial, federal law required the litigant to prove to the court both that “the document sought contain[ed] evidence pertinent to [a disputed] issue”<sup>163</sup> and was “material to the support of the complainant’s own case.”<sup>164</sup>

---

Star Theme Builders, Inc. v. OneBeacon Ins. Co., 426 Fed. App’x 506, 514 (9th Cir. 2011) (referring to an appellant’s pleadings, made upon information and belief, that allowed for further discovery).

<sup>155</sup> *Schencks v. United States*, 2 F.2d 185, 187 (D.C. Cir. 1924).

<sup>156</sup> *Carden v. Ensminger*, 161 N.E. 137, 141 (Ill. 1928).

<sup>157</sup> *Schencks*, 2 F.2d at 187.

<sup>158</sup> See *Carpenter v. Winn*, 221 U.S. 533, 540 (1911) (finding compelled pre-trial production of documents was forbidden prior to FRCP); see also Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691–93 (1998) (discussing limited reach of pre-FRCP discovery).

<sup>159</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 n.14 (2007) (quoting Easterbrook, *supra* note 9, at 645).

<sup>160</sup> *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

<sup>161</sup> *Carpenter*, 221 U.S. at 540.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 537 (internal quotation marks omitted).

<sup>164</sup> *Id.* at 540. Pursuant to pre-FRCP practice, the production of a document could be compelled when “the document sought contain[ed] evidence pertinent to the issue, and in cases and under circumstances when they might be compelled to produce the same by the ordinary rules or proceeding in chancery.” *Id.* at 537–38. The rules of chancery dictated that “a bill must seek only evidence which

The power granted to litigants by the FRCP is not only unprecedented in U.S. history, but it is also unknown elsewhere in the free world. “[N]o other country—common law or civil law—has any system of discovery approaching that provided for in the [FRCP].”<sup>165</sup> Around the world, “there is widespread disapproval of pretrial discovery of documents as that discovery is conducted in U.S. courts.”<sup>166</sup> At least fifteen nations have enacted “blocking statutes” barring compliance with discovery orders issued by American courts.<sup>167</sup>

Despite these criticisms, I am not advocating for a return to the pre-FRCP regime. Compelled document production, like police-executed search warrants, serves the public’s interest in the “determination of truth.”<sup>168</sup> But the compelled production of private papers and the execution of warrants both involve *searches*. Thus, I posit that both should be brought into alignment with the concept of probable cause—the standard that “represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make” searches and seizures “reasonable under the Fourth Amendment.”<sup>169</sup>

This does not mean the end of the compulsory production of documents, but instead merely means the end of the virtually unfettered access to an opponent’s private papers currently authorized by the FRCP. A litigant seeking discovery of such papers—like a constable seeking a search warrant—should bear the burden of establishing that “there is a fair probability” that the documents sought will yield admissible evidence.<sup>170</sup>

Probable cause, while much more stringent than the criterion for disclosure currently imposed by Rule 26, is “a standard well short of absolute certainty.”<sup>171</sup> In assessing whether a moving party has satisfied this burden, the court should assess the “veracity” of his allegations and his

---

is material to the support of the complainant’s own case, and prying into the nature of his adversary’s case [would] not be tolerated.” *Id.* at 540. While these limitations only applied in federal courts, state discovery laws authorizing court-ordered document production were inapplicable in federal court, even in diversity cases. *Ex parte Fisk*, 113 U.S. 713, 720–25 (1885). Further, state laws authorizing discovery of private papers would not have been subjected to Fourth Amendment scrutiny because the Amendment was not applied to the states until 1949. *See Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (finding that the Fourteenth Amendment’s Due Process Clause makes the provisions of the Fourth Amendment applicable to state governments), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961).

<sup>165</sup> Mullenix, *supra* note 9, at 6.

<sup>166</sup> Weintraub, *supra* note 9, at 420 (citing *British Airways Bd. v. Laker Airways*, [1985] 1 A.C. 58 (H.L.), at 78).

<sup>167</sup> *Id.*

<sup>168</sup> *Stone v. Powell*, 428 U.S. 465, 488 (1976).

<sup>169</sup> *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (alteration in original) (citations omitted) (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959), and *Dunaway v. New York*, 442 U.S. 200, 208 (1979)) (internal quotation marks omitted).

<sup>170</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>171</sup> *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 615 (2007) (*per curiam*).

“basis of knowledge.”<sup>172</sup> As with the issuance of search warrants, this does not mean that a movant’s allegations “must be seen and weighed . . . in terms of library analysis by scholars.”<sup>173</sup> Rather, it entails a “totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending” a movant’s pleaded accusations.<sup>174</sup> If the movant’s allegations provide the court with a “substantial basis” for concluding that the papers sought will yield admissible evidence, then the probable cause standard has been satisfied and their production should be compelled.<sup>175</sup>

A majority of litigants will be able to satisfy this “flexible standard,”<sup>176</sup> and it should only apply to demands for documents embodying a “reasonable expectation of privacy.”<sup>177</sup> But when this standard is applicable, it cannot be satisfied by the naked surmise of “information and belief” allegations.<sup>178</sup>

The application of this standard will strike the proper balance between litigants’ interests in the “determination of truth” and the “the protection of Fourth Amendment values”<sup>179</sup>—i.e., the prohibition of “unjustifiable intrusion[s] . . . upon the privacy of the individual.”<sup>180</sup> Of course, applying this standard may shield some unsavory conduct from scrutiny, but that is the price of the Fourth Amendment. “[T]here is nothing new in the realization that the Constitution sometimes insulates the [wrongdoing] of a few in order to protect the privacy of us all.”<sup>181</sup>

#### V. COURTS SHOULD ISSUE PROTECTIVE ORDERS BARRING THE DISCLOSURE OF PRIVATE PAPERS PRODUCED DURING DISCOVERY TO THE MEDIA

Following the advent of the FRCP, courts grappled with the question of whether the First Amendment commands that information obtained through discovery be available to the media for publication.<sup>182</sup> After nearly

---

<sup>172</sup> *Gates*, 462 U.S. at 233.

<sup>173</sup> *Id.* at 231–32 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

<sup>174</sup> *Id.* at 234.

<sup>175</sup> *Id.* at 239.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* text accompanying note 90.

<sup>178</sup> See cases cited *supra* note 38.

<sup>179</sup> *Stone v. Powell*, 428 U.S. 465, 488 (1976).

<sup>180</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967); *accord* *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 n.10 (1972) (quoting Justice Brandeis’s text approvingly).

<sup>181</sup> *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (White, J., concurring).

<sup>182</sup> Compare *In re Halkin*, 598 F.2d 176, 182–83, 196–97 (D.C. Cir. 1979) (finding that the First Amendment barred the court from issuing a protective order preventing media disclosure of materials received in discovery process), with *Nichols v. Phila. Tribune Co.*, 22 F.R.D. 89, 92 (E.D. Pa. 1958) (permitting plaintiff to file documents under seal).



a half century of tumult, the Supreme Court resolved this question in *Seattle Times Co. v. Rhinehart*.<sup>183</sup> Concluding that “discovery may seriously implicate privacy interests of litigants and third parties,” the Court held that the Constitution permits courts to issue protective orders prohibiting parties from publicly disseminating information obtained in discovery.<sup>184</sup>

The Court reasoned that discovery “is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”<sup>185</sup> Despite this limited purpose, the Court recognized that modern discovery mechanisms can be easily abused. The FRCP empowers “litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.”<sup>186</sup> For this reason, the Court concluded that “[t]he prevention of the abuse that can attend the coerced production of information under a . . . discovery rule is sufficient justification for the authorization of protective orders.”<sup>187</sup>

Despite the clarity of the *Seattle Times* ruling, few lower courts seem to have taken notice.<sup>188</sup> Several courts continue to recognize a “presumption that discovery materials are open to public inspection,” permitting dissemination of such information to the media.<sup>189</sup> Furthermore, significant lower court case law “suggests that even when a party admittedly seeks [to use information obtained during discovery] to publicly embarrass his opponent, no protection should issue absent evidence of substantial embarrassment or harm.”<sup>190</sup>

This precedent not only ignores *Seattle Times*, but it does not accord with the Supreme Court’s Fourth Amendment jurisprudence. In *Wilson v. Layne*,<sup>191</sup> the Court addressed whether the First Amendment empowers police to invite media representatives to accompany them while they execute search warrants.<sup>192</sup> In *Wilson*, police invited a *Washington Post*

---

<sup>183</sup> 467 U.S. 20 (1984).

<sup>184</sup> *Id.* at 34–37.

<sup>185</sup> *Id.* at 34.

<sup>186</sup> *Id.* at 35.

<sup>187</sup> *Id.* at 35–36.

<sup>188</sup> See Cooper, *supra* note 16, at 776 (“*Seattle Times* has been sometimes sidestepped, occasionally ignored, and often overwhelmed by the rigorous good cause findings required by lower federal court decisions.” (footnotes omitted)).

<sup>189</sup> *Flaherty v. Seroussi*, 209 F.R.D. 295, 297–99 (N.D.N.Y. 2001); accord *Mathias v. Jacobs*, 197 F.R.D. 29, 47 (S.D.N.Y. 2000); *Hawley v. Hall*, 131 F.R.D. 578, 581 (D. Nev. 1990).

<sup>190</sup> *Burgess v. Town of Wallingford*, No. 3:11-CV-1129 (CSH), 2012 WL 4344194, at \*11 (D. Conn. Sept. 21, 2012) (internal quotation marks omitted); accord *Pia v. Supernova Media, Inc.*, 275 F.R.D. 559, 561–62 (D. Utah 2011); *Flaherty*, 209 F.R.D. at 299; *Hawley*, 131 F.R.D. at 584–85.

<sup>191</sup> 526 U.S. 603 (1999).

<sup>192</sup> *Id.* at 612–13.

reporter and photographer to accompany them during the execution of a warrant to arrest the petitioners' son and search their home.<sup>193</sup> Because the officers possessed a warrant, the Court noted that "they were undoubtedly entitled to enter [the petitioners'] home . . . . But it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them."<sup>194</sup> The execution of warrants necessarily entail a significant invasion of privacy. "Valid warrants will issue to search the innocent, and [such] people . . . unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real . . . ."<sup>195</sup>

The *Wilson* Court reasoned that officers may not unnecessarily magnify this humiliation by exposing private information to the media.<sup>196</sup> The Fourth Amendment "require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion."<sup>197</sup> The reporters and photographers did not meet this limitation, as their presence was not related to the warrant: "[T]he reporters did not engage in the execution of the warrant, and did not assist the police in their task. The reporters therefore were not present for any reason related to the justification for police entry into the home . . . ."<sup>198</sup> The Court concluded:

[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.<sup>199</sup>

*Wilson* provides instruction with respect to civil document production orders. Both the execution of search warrants and the compelled production of private papers involve the exposure of "private activity" threatening significant "frustration, embarrassment, and humiliation."<sup>200</sup> Such embarrassment—when based on a showing of probable cause—may be outweighed by "the public interest in determination of truth at trial."<sup>201</sup> But as both *Wilson* and *Seattle Times* recognize, the humiliation resulting from such intrusions should not be magnified by allowing unnecessary

---

<sup>193</sup> *Id.* at 606–07.

<sup>194</sup> *Id.* at 611.

<sup>195</sup> *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 615–16 (2007) (per curiam).

<sup>196</sup> *Wilson*, 526 U.S. at 611–14.

<sup>197</sup> *Id.* at 611.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 614.

<sup>200</sup> *See Rettele*, 550 U.S. at 615–16 (describing the undesired side effects accompanying the execution of search warrants); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) ("[D]iscovery . . . may seriously implicate privacy interests of litigants and third parties.").

<sup>201</sup> *Stone v. Powell*, 428 U.S. 465, 488 (1976).

third parties to view this material.<sup>202</sup>

Of course, the First Amendment requires that private papers actually received into evidence be made available to the public.<sup>203</sup> This does not make the contents of private papers produced in discovery presumptively public. The purpose of discovery is to assist “in the preparation and trial, or the settlement, of litigated disputes.”<sup>204</sup> A litigant’s use of this information, like an officer’s execution of a warrant, should be restricted “to the objectives of the authorized intrusion.”<sup>205</sup>

The Fourth Amendment bars police from bringing third parties with them during the execution of warrants unless those parties are needed to “assist the police in their task.”<sup>206</sup> For the same reason, courts should issue protective orders limiting disclosure of the contents of private papers received in discovery to third parties who assist litigants or counsel in their task.

## VI. CONCLUSION

Since their advent in 1938, the FRCP’s expansive discovery provisions have fundamentally transformed civil litigation. Gone are the days of dramatic courtroom triumphs. For the modern litigator, “victory is not in the scathing cross [examination], but in the tedious review of documents.”<sup>207</sup> The battle for documents “is the numbing, ditch-digging work that determines the winner.”<sup>208</sup>

Discovery serves the public’s interest in arriving at the truth. But the expansive power to compel the production of private papers that the FRCP conveys enables litigants to intrude into “sphere[s] in which society recognizes reasonable expectations of privacy.”<sup>209</sup> Under this standard, nothing is sacred, and no detail is too intimate to shield it from scrutiny.

The compelled production of private papers constitutes a quintessential Fourth Amendment search. Yet, the FRCP bestows upon civil litigants the power to compel disclosure of such documents virtually as a matter of right. I do not contend that compelled document production should be wholly eliminated. While the disclosure of private papers necessarily

---

<sup>202</sup> *Wilson*, 526 U.S. at 611–14; *Seattle Times Co.*, 467 U.S. at 35.

<sup>203</sup> *See, e.g., Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 586–88, 595–600 (1976) (Brennan, J., concurring) (asserting that the First Amendment prohibits judicial restraints on media coverage of trials).

<sup>204</sup> *Seattle Times Co.*, 467 U.S. at 34.

<sup>205</sup> *Wilson*, 526 U.S. at 611.

<sup>206</sup> *Id.*

<sup>207</sup> *Discovery*, 23 LITIGATION 5 (1997).

<sup>208</sup> *Id.*

<sup>209</sup> *United States v. Concepcion*, 942 F.2d 1170, 1171–72 (7th Cir. 1991); *accord California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

threatens significant “frustration, embarrassment, and humiliation,” the same intrusions attend the execution of search warrants.<sup>210</sup> I simply assert that like search warrants, orders compelling the production of private papers should be premised on a threshold showing of probable cause. The failure to apply this standard to invasions of privacy outside the realm of criminal procedure gives parties “more leeway” to litigate often trivial personal matters than it gives the government to “enforc[e] laws against rape or murder.”<sup>211</sup>

While probable cause is much more stringent than the bar for disclosure currently imposed by the FRCP, it is “a standard well short of absolute certainty.”<sup>212</sup> If the moving party’s pleaded allegations demonstrate that “there is a fair probability” that the papers sought will yield admissible evidence, then the probable cause standard has been satisfied and their production should be compelled.<sup>213</sup> A majority of litigants will be able to satisfy this “flexible, easily applied standard.”<sup>214</sup> But its application will thwart many of the “fishing expeditions” currently permitted by the FRCP.<sup>215</sup>

The Supreme Court itself promulgated the FRCP. Thus, acceptance of my argument requires the Court to do something it has never done before: acknowledge that its own actions violated the Constitution.<sup>216</sup> “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>217</sup> With this charge comes the responsibility to exercise the humility and detachment necessary to recognize that it, like its coordinate branches of government, is not infallible. I can think of no greater endorsement of America’s tripartite system of government than a Supreme Court decision recognizing this fact.<sup>218</sup>

---

<sup>210</sup> See *supra* note 200.

<sup>211</sup> Stuntz, *supra* note 25, at 1018.

<sup>212</sup> Los Angeles Cnty. v. Rettele, 550 U.S. 609, 615 (2007) (per curiam).

<sup>213</sup> Illinois v. Gates, 462 U.S. 213, 238 (1983).

<sup>214</sup> *Id.* at 239.

<sup>215</sup> See Vincent Mercier & Drake D. McKenney, *Obtaining Evidence in France for Use in United States Litigation*, 2 TUL. J. INT’L & COMP. L. 95, 118 (1994) (noting that the motive behind France’s blocking statute “is not the revelation of damaging material but . . . the occurrence of fishing expeditions, *i.e.*, any request that is not for a clearly identified document”).

<sup>216</sup> See Robert K. Harris, Comment, *Brown v. Nichols: The Eleventh Circuit Refuses to Play the Erie Game with Georgia’s Expert Affidavit Requirement*, 29 GA. L. REV. 291, 300 n.54 (1994) (citing *Hanna v. Plumer*, 380 U.S. 460, 472–74 (1965)) (noting that Supreme Court regards the FRCP as entitled to “presumptive validity” and that the Court has never found any Rule it promulgated unconstitutional).

<sup>217</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>218</sup> To complete the metaphor of this Essay, I note that such an opinion may be “a far, far better thing” than the Court “ha[s] ever done.” DICKENS, *supra* note 19, at 390.