
Essay

Chilling Effects and Unequal Subjects: A Response to Jonathon Penney's *Understanding Chilling Effects*

Karen Levy[†]

The mark of a strong theoretical argument is that it opens our minds to new empirical questions. In his generative article *Understanding Chilling Effects*, Jonathon Penney provides a persuasive and nuanced argument for interpreting chilling effects through the lens of *social conformity*, rather than self-censorship of lawful conduct.¹ Penney's own previous scholarship has provided us with crucial empirical knowledge about how chilling effects function in society.² And his current work fruitfully marries legal theory with social theory, giving us a clearer account of how law and social life mutually shape one another.

This conceptual move by Penney opens the door to a richer understanding of how chilling effects operate in the social world. Rather than merely a dynamic that accounts for the *absence* of activity, Penney's account draws our attention to how chilling effects *create and shape* socially compliant behaviors.³ In this view, the conventional understanding of chilling effects as acts of self-censorship—as creating voids where lawful expression, association, and activity used to be⁴—is both incomplete (in that it fails to account for what activity *does* arise in the presence of chill) and less interesting than it might be (in

[†] Assistant Professor, Department of Information Science, Cornell University; Associated Faculty, Cornell Law School. Copyright © 2022 by Karen Levy.

1. Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451 (2022).

2. Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117 (2016); Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 INTERNET POL'Y REV. 1 (2017) [hereinafter Penney, *Comparative Case Study*].

3. Penney, *Comparative Case Study*, *supra* note 2, at 4–5.

4. Penney, *supra* note 1, at 1454–55.

that the emergence of socially conforming behavior has important consequences that are left out of scope).

Penney argues that the integration of social and psychological perspectives into the chilling effects discourse can better illuminate the “relationship [between chilling effects and] existing social, economic, and political structures, power, and hierarchies.”⁵ Here, I take up Penney’s suggestion and ask: what do we know (and what do we want to know) about the relationship between chilling effects and social inequality? How might we expect chilling effects to manifest differently based on the subject position of the person being chilled? And what are the *effects* of chilling effects—that is, how do they actually manifest in people’s lives?

Many accounts of social and psychological influence, including some renditions of chilling effects theory, contemplate a relatively flat subject—they make assertions or predictions about how “people” are impacted in the abstract, but stop short of asking *who* is likely to be impacted and to what ends. In what follows, I explore the implications of Penney’s theory for people with different resources available to them. First, drawing from empirical accounts of how vulnerable groups respond to generalized surveillance anxiety, I ask how Penney’s theory might lead us to ask new questions about resistance. Second, reflecting on sociological research on markedness, I observe that social conformity is not equally available as an avenue for action for all people. Finally, I consider an implication of Penney’s reading of chilling effects on collective action and intentional norm formation.

I. UNCERTAINTY AND SYSTEM AVOIDANCE

In her research on criminal justice surveillance and institutional attachment, sociologist Sarah Brayne demonstrates empirically that people who have had contact with the criminal justice system—who have been stopped by police, arrested, convicted, or incarcerated—are less likely to develop subsequent attachments to social and economic institutions that might engage in formal record-keeping about them.⁶ Using longitudinal data drawn from a large, nationally representative panel (the National Longitudinal Study of Adolescent Health), Brayne reveals that people who have experienced criminal justice contact are less likely to establish relationships later with “surveilling institutions” like banks, employers, hospitals, and schools—

5. Penney, *Comparative Case Study*, *supra* note 2, at 7.

6. See generally Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367 (2014).

while, in contrast, these groups do *not* show lower levels of engagement with religious or volunteer associations, which are less likely to keep formal records.⁷ Brayne hypothesizes that a reason for the difference is the concern that formal records kept by surveilling institutions may become integrated with or leveraged by law enforcement; being “in the system,” whatever that system is, may create a perception of surveillance risk that drives previously justice-involved individuals away from record-keeping institutions more generally.⁸

The effects of system avoidance can be profound, both for affected individuals and for social stratification more broadly. Brayne explains the highly detrimental effects that this disengagement can have on the lives of people who have had contact with the criminal justice system (and who are disproportionately racially minoritized).⁹ She explains that system avoidance “severs an already marginalized subpopulation from institutions that are pivotal to desistance from crime and their own integration into broader society.”¹⁰ Being formally employed, having a bank account, using health services, and attending school are all clearly activities essential to social life; without these attachments, people may lack the resources and stability they need to avoid criminal justice involvement in the future, as well as to provide for their own and their families’ social and economic needs.

I observe a related dynamic in my own ethnographic research examining surveillance of long-haul truck drivers.¹¹ Since 2017, long-haul truck drivers in the United States have been required by federal mandate to install electronic logging devices (ELDs) in their trucks.¹² These devices track a trucker’s location and driving activity for purposes of compliance with federal hours-of-service regulations—that is, to provide a record of activity that disincentivizes drivers from driving for longer than they are legally permitted to do.¹³ ELDs do *not* automatically transmit data in real time back to law enforcement officers—rather, the records they keep can be manually assessed after-the-fact by commercial vehicle inspectors at roadside or at a weigh

7. *Id.* at 368–69.

8. *Id.* at 372.

9. *Id.* at 367.

10. *Id.*

11. See KAREN LEVY, DATA DRIVEN: TRUCKERS, TECHNOLOGY, AND THE NEW WORKPLACE SURVEILLANCE (forthcoming Dec. 6, 2022) (on file with author).

12. Electronic Logging Devices and Hours of Service Supporting Documents, 80 Fed. Reg. 78292 (Dec. 16, 2015) (codified at 49 C.F.R. § 395.20 *et seq.*).

13. LEVY, *supra* note 11 (manuscript at 54–57).

station, much as inspectors would look over the paper-and-pencil log-books that preceded electronic logging.¹⁴

However, many truckers with whom I spoke were under the impression that electronic logging devices *were* capable of monitoring and wirelessly transmitting a constant stream of data about them, in real time, to law enforcement.¹⁵ This concern (alongside many others) helped to animate truckers' strong opposition to the ELD mandate and supported a wide variety of resistant behaviors in response to it.¹⁶ It is entirely understandable why truckers sometimes misunderstood the capabilities of the device they were compelled to install in their trucks. This is because ELDs bundle many different surveillance capacities together. The devices have timekeeping modules, which log data for regulatory purposes but do not transmit them in real time to the government.¹⁷ But in addition, ELDs commonly feature a variety of performance management tracking functionalities (like geolocation, fuel consumption monitoring, speed monitoring, and many others) which *do* transfer data in real time to the trucker's *employer*.¹⁸ And some of this data is then also put to use subsequently by third parties, like insurers, for other purposes.¹⁹ In the face of this amalgam of data flows and capabilities bundled into a single black box, it is no wonder truckers tended to conflate who was receiving what data at what time, and that this conflation impacted their attitudes and behaviors.²⁰

In both the truckers' case and the case of system avoidance explored by Brayne, it is crucial to recognize that the source of chill is the *ambiguity* around what information is being tracked, by whom, and when. The beliefs held by truckers and the justice-involved, even

14. *Id.* (manuscript at 100–02).

15. *Id.*

16. *Id.* (manuscript at 115–48) (cataloguing a number of resistance strategies truckers employed in opposition to monitoring devices); Karen Levy & Michael Franklin, *Driving Regulation: Using Topic Models to Examine Political Contention in the U.S. Trucking Industry*, 32 SOC. SCI. COMPUT. REV. 182 (2014) (describing truckers' political opposition to electronic monitoring).

17. LEVY, *supra* note 11 (manuscript at 68–69).

18. *Id.* (manuscript at 90–94).

19. *Id.*

20. *Id.* (manuscript at 96) (“The confluence of multiple forms of surveillance in one unit means that they can be quite difficult for drivers to disentangle. In my conversations with drivers, it was not uncommon for them to conflate the data collection directed at them by their employers, by insurers, and by the government—for example, believing that the government had automatic ‘back-office’ access to all data collected through an ELD. This conflation is understandable, of course, given the union of all these data flows within a single artifact, and lack of transparency about data re-use.”).

if mistaken, are not unreasonable—they are rooted in real experiences, the emergence of public/private surveillance partnerships, and sometimes misleading or inflated messaging about the capabilities of a technology. The result is a generalized feeling of being watched by powerful entities, leading to a concomitantly generalized anxiety. And this anxiety, in turn, affects and constrains behavior: as constitutional scholar Frank Askin wrote, “anxious men are rarely free men.”²¹ Both groups are already in positions of relative vulnerability due to their structural positions and cultural and economic marginalization; the chill of surveillance technology only exacerbates and entrenches these dynamics.

It is worth asking how we might reason about these two cases with the aid of Penney’s perspective on chilling effects. Certainly, in the truckers’ case, the chill of generalized surveillance anxiety leads to a variety of behaviors that are not merely the “absence” of something, as previous chilling effects theory might have portended. To be sure, some truckers do exit the industry due to increased surveillance, which we might think of in some sense as the absence of (employment) activity.²² But others engage in a variety of new activities, including a multitude of strategies to tamper with, avoid detection by, or express dissatisfaction with ELDs.²³ Penney’s perspective fruitfully draws attention to what new behavior arises in the presence of chilling effects, and thus can help to direct our analytic lens to these resistance activities.

In the case of system avoidance among justice-involved populations, Penney’s perspective might similarly lead us to ask new questions. Brayne’s methodological strategies demonstrate quantitatively that justice-involved people are less likely to engage with institutions they may perceive as surveillant.²⁴ Her study does not aim to answer the question of what strategies they *do* engage in as a result of this avoidance. Further empirical research would be useful for better understanding the relationship between system avoidance and social conformity. On first blush, it seems as though the problem Brayne has identified is that justice-involved people end up being socially *nonconforming* as a result of surveillance—that surveillance anxiety drives them further and further from the norms of institutional attachment

21. Frank Askin, *Social Science and Surveillance*, 4 COLUM. HUM. RTS. L. REV. 59, 63 (1972).

22. LEVY, *supra* note 11 (manuscript at 115–48).

23. *Id.*

24. See Brayne, *supra* note 6.

that are essential for living a stable life. This does seem to be in some tension with Penney's theory that chill leads to *more* conforming social behaviors. This therefore may be a fruitful site to investigate further for both empirical knowledge and theory testing.

II. CONFORMITY AND SUSPICION

Penney's account construes chilling effects as social conformity.²⁵ It is worth digging deeper into what social conformity looks like and to whom it is available. From the outset, we should note that the ability to engage in conforming behavior—desirable or not—is not equally accessible to all. Social scientists and linguists have long documented the ways in which some identities are “marked out” by difference from a perceived norm.²⁶ Markedness may be a result of (often immutable) facets of social identity—race, gender, disability, etc.—that are perceived not to “fit” a norm, or to be unusual, for one reason or another.²⁷ Markedness can also result from social stigma attached to past behavior—for example, a history of involvement with the justice system, made salient through instruments like mugshot databases, background checks, employment applications, or physically visible indicators like ankle-worn monitoring devices.²⁸ Crucially, markedness is externally imposed, and often impossible (or at the very least quite burdensome) to escape—even when a marked individual's behavior is substantively identical to that of an unmarked individual. Therefore, it can make conformity effectively impossible for some people.

25. Penney, *supra* note 1, at 1502–13.

26. In language, the concept of being marked manifests when, for example, we use terms like “nurse” and “male nurse.” The “male” adjective attached to the latter term is the marked category, while the unmarked default—“nurse”—passively indicates the assumption that the “normal” or “default” gender status for nurses is female. See Wayne Brekhus, *A Sociology of the Unmarked: Redirecting Our Focus*, 16 SOC. THEORY 34, 34–35 (1998).

27. On the impact of race-, gender-, and class-discriminatory norms on what constitutes “reasonable” expectations of privacy in the Fourth Amendment context, see Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 288–94 (2021).

28. See generally DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (discussing the impact of race and criminal history on employment outcomes); Sarah Esther Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 127 (2016) (discussing the effects of mugshot databases and criminal history websites on family engagement); Lauren Kilgour, *The Ethics of Aesthetics: Stigma, Information, and the Politics of Electronic Ankle Monitor Design*, 36 INFO. SOC. 131 (2020) (discussing the visual stigma introduced by the design of electronic ankle monitors).

We might concede that chilling effects indeed do drive social conformity in those to whom conforming behavior is an available avenue. But what becomes of the non-conforming subject in Penney's account of chilling effects? If, as Penney suggests, chilling effects drive conforming behavior in chilled subjects, what becomes of those who *cannot* conform, due to the imposition of social stigma or marked identity?

Chilling effects understood as social conformity may leave non-conforming individuals between a rock and a hard place. On one hand, acting "normal" in the face of surveillance—where normal means, quite literally, attempting to conform to a norm—in order to avoid arousing suspicion or being subject to additional scrutiny imposes significant burdens, and may ultimately be unsuccessful or unavailable as a course of action.²⁹ In the absence of this opportunity, though, evasion of surveillance can *itself* raise suspicion of wrongdoing.³⁰ A natural extension of Penney's contribution, then, might be further empirical and theoretical inquiry into how a subject's marked social identity may moderate the manifestation of chilling effects when conformity is difficult or impossible to achieve.

III. BEING THE HAY IN THE HAYSTACK

Thus far, we can see that social vulnerability, mistaken belief, and differential availability of conformity may be useful concepts to put into conversation with Penney's account of chilling effects. I would like to highlight one additional and potentially quite powerful implication of Penney's account. If we can best view chilling effects as acts of social conformity, this understanding may open new possibilities for thinking about collective action as a weapon to combat chill.

This possibility owes to the fact that "conforming" behavior is necessarily constructed with reference to what others do. On Penney's reading, chilled subjects behave so as not to stand out from the

29. See L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1524–25 (2011) (explaining that the Fourth Amendment effectively imposes a "tax" even on law-abiding individuals to act "normally" and avoid arousing suspicion that can give rise to a search); Solon Barocas & Karen Levy, *Privacy Dependencies*, 95 WASH. L. REV. 555, 599–605 (2020) (explaining why perceived difference from a norm can facilitate adverse inference).

30. Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997 (2013); Barocas & Levy, *supra* note 29, at 601–02. A clear case in point arises in *Illinois v. Wardlow*, 528 U.S. 119 (2000), in which the Black defendant fled upon noticing police cars in the area. The majority deemed that the defendant's flight—an act of surveillance evasion—itself gave rise to reasonable suspicion for the police to stop him. *Id.* at 124.

crowd.³¹ As the sociologist Howard Becker wrote in his classic work on the social construction of deviance, “social groups *create* deviance by making the rules whose infraction constitutes deviance”³²— what stands out is, by necessary implication, that which is different from what the crowd is doing. In dragnet surveillance regimes, *everyone* whose data is collected is implicitly enrolled in the project of identifying (and in fact constructing) outliers, because nonconforming behavior is only understood with reference to what is typical.³³

This observation may seem simple, or even tautological—behavior that is abnormal is that which is not normal—but it reveals that individuals have an important role to play in determining what normal behavior looks like, and what stands out in contrast. People can “weaken the signal of wrongdoing” that may be associated with abnormal behavior through deliberate and collective effort to change the norm—for example, through obfuscation of data collection or interpretation, through the use of technologies like encryption, or through other means.³⁴ Understanding chilling effects through the lens of conformity, as Penney implores us to do, thus leads us to ask new questions about what power we have collectively to diminish chill, and how we might mobilize to do so, in ways that previous accounts of chilling effects as absence do not.

31. Penney, *supra* note 1, at 1502–03.

32. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (emphasis added). *See also* Barocas & Levy, *supra* note 29, at 597–99 (noting that an outside observer can only understand behavior as anomalous “by establishing what *normal* behavior looks like and assessing abnormal behavior with reference to that norm—a norm established by the aggregated data of multiple [others]. The group of conforming [others], and the provision of their own data, are essential to constructing the comparison group that defines [an outlier’s] data as anomalous.”).

33. Barocas & Levy, *supra* note 29, at 597–99.

34. *Id.* at 602; *see also* Bruce Schneier, *Why We Encrypt*, SCHNEIER ON SEC. (June 23, 2015), https://www.schneier.com/blog/archives/2015/06/why_we_encrypt.html [<https://perma.cc/2TA8-8MUQ>] (explaining why universal encryption protects others by reducing the information signal that the use of encryption sends). *See generally* FINN BRUNTON & HELEN NISSENBAUM, *OBFUSSION: A USER’S GUIDE FOR PRIVACY AND PROTEST* (2015) (describing multiple collective action techniques that obfuscate the meaningful interpretation of data).