

# The Value of Deviance: Understanding Contextual Privacy

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*The value of deviance lies in highlighting the infirmity in our present concept of privacy. Deviance helps explain privacy in two ways. First, deviance helps define what might be protected by “privacy concerns.” Second, a sociological definition of deviance provides a helpful model to rebut the popular “Nothing to Hide” argument and to understand a non-binary concept of contextual privacy. This article uses a sociological definition of deviance to explain a contextual idea of privacy, where the critical inquiry is not a dualistic response to whether sensitive information deserves protection as private or not, but rather a contextual analysis of the disclosure of information that includes the type of information, to whom disclosure was made, by whom, for what purpose, and to what potential detriment. A deeper understanding of deviance brings us to the realization that we shape our identities through a contextual disclosure of our differences, and that personal control over those disclosures is a value worthy of protection.*

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#### INTRODUCTION

This article explains the value of deviance. Whether in a mathematical or sociological context, deviance describes difference. From a sociological perspective, deviance can be observed in behaviors or tendencies, physical characteristics, or even thoughts or ideas. The defining feature of deviance—the thing that makes something *deviant*—is difference, there must be something that separates the deviant from the normal, and that difference must generate a negative consequence. Typically, that negative consequence manifests itself in a social context, such as being stigmatized or ostracized from a group. This social consequence, in turn, may result in a suppression of the difference. Sometimes that suppression is a good thing, for example, when a deviant behavior causes physical harm to another. But in other contexts, deviance can stifle engagement in valuable activities such as discussing medical conditions, joining social groups, or expressing political views.

In a digital era, deviance provides a helpful lens to examine exchanges of information and concepts of *privacy*. The ease of aggregating, storing, and distributing vast quantities of information magnifies the suppression effect. Because deviance depends on the imposition of sanctions by others, the manner and extent of disclosure of information matters. Until very recently, both constitutional and civil precedents declined to recognize harm from the distribution of information. In Fourth Amendment jurisprudence, the “third-party doctrine” prevented an individual from asserting a reasonable expectation of privacy in

information disclosed to a third party—any third party.<sup>1</sup> In civil contexts, courts have been reluctant to find “injury in fact” where the plaintiff asserted only a naked disclosure of information without an additional allegation of harm or damages.<sup>2</sup>

The Supreme Court’s recent decision in *Carpenter v. United States* and a recent decision by the Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corporation*<sup>3</sup> both signal a shift in the traditional understanding of harm to individuals emanating from the collection and distribution of sensitive information. *Carpenter* involved the capture and use of cell site location information (CSLI), which provides a record of a person’s movement by tracking the signaling information of the subject’s cell phone.<sup>4</sup> The Court grappled with two questions: first, does the capture of CSLI constitute a search within the meaning of the Fourth Amendment, and second, was the search reasonable? In a significant

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1. The “third-party” doctrine developed from two Supreme Court cases, *Miller v. United States*, 425 U.S. 435, 444 (1976), and *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Since *Katz v. United States*, 389 U.S. 347 (1967), a government intrusion constitutes a search under the Fourth Amendment when the actions violate the “reasonable expectation of privacy” test. *Smith*, 442 U.S. at 740. In *Miller*, the Court found no reasonable expectation of privacy in the government’s acquisition through subpoena of defendant’s bank records, including cancelled checks. *Miller*, 425 U.S. at 440–43. In *Smith*, the Court found no reasonable expectation of privacy in the numbers dialed from a telephone where the government used a pen register device to record the outgoing numbers dialed from defendant’s phone line. *Smith*, 442 U.S. at 741–45. The Court held “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Id.* at 743–44. In each case, the Court relied on the defendant’s disclosure, in *Miller* to the bank and in *Smith* to the phone company, of the information to a third party. *Miller*, 425 U.S. at 443; *Smith*, 442 U.S. at 744–45. Over time the third-party doctrine has been severely criticized. *See, e.g.*, Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & C. 249, 251–52 (1993); Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199 (2009); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239 (2009) (responding to Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009)).

2. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013). *See generally* *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012). The issue of pleading sufficient harm to meet standing requirements in surveillance cases, such as *Clapper*, 568 U.S. at 422–23 (Breyer, J., dissenting), or in data breach cases, such as *Resnick*, 693 F.3d at 1329–30, is an interesting issue of civil procedure and one that lies beyond the scope of this article.

3. *Rosenbach v. Six Flags Entm’t Corp.*, No. 123186, 2019 WL 323902, at \*8 (Ill. Jan. 25, 2019). A similar case, *Patel v. Facebook, Inc.*, was just decided in the Ninth Circuit. *See generally* *Patel v. Facebook, Inc.*, No. 18-15982, 2019 WL 3727424 (9th Cir. Aug. 8, 2019) (holding the district court did not abuse its discretion regarding the predominance requirement and superiority requirement).

4. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). *See* Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977, 1005–10 (2008) (examining the litigation history of cell site location information).

move, the Court limited the third-party doctrine, which had excluded from fourth amendment protection information disclosed to third parties.<sup>5</sup> In reaching its conclusion, the *Carpenter* majority opinion sharply curtailed the third-party doctrine and emphasized that the Fourth Amendment protected “privacy concerns,” even where those concerns were unconnected to an intrusion on a property interest.<sup>6</sup>

In *Rosenbach*, the plaintiff sued under the Biometric Information Privacy Act (BIPA) in Illinois.<sup>7</sup> The statute requires notice and consent when biometric information is collected or stored.<sup>8</sup> At issue was whether a plaintiff could sustain a cause of action without pleading specific injury from the violation of the statute.<sup>9</sup> The Illinois Supreme Court concluded that separate allegations of harm were unnecessary to sustain a cause of action for a violation of the BIPA.<sup>10</sup>

These decisions signal a new understanding of the concept of privacy and provide additional guidance on the question of what exactly is protected by a privacy interest. Under previous Fourth Amendment precedents, a search occurs when the government intrudes on an area protected by a “reasonable expectation of privacy.”<sup>11</sup> The third-party doctrine held that there could be no reasonable expectation of privacy where information is disclosed to another party—any other party. Thus, under this doctrine, the only way to maintain an expectation of privacy was to never reveal the information. A disclosure to one person was treated the same as a publication to the entire world.

Sometimes there is value in disclosing information in a limited manner. The third-party doctrine’s binary conception of privacy ignored

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5. *Carpenter*, 138 S. Ct. at 2217. See also *Id.* at 2220 (“We therefore decline to extend *Smith* and *Miller* to the collection of CSLI.”).

6. Compare *Carpenter*, 138 S. Ct. at 2214 n.1 (citations omitted) (“*Katz* of course ‘discredited’ the ‘premise that property interests control,’ . . . and we have repeatedly emphasized that privacy interests do not rise or fall with property rights . . .”), with *Carpenter*, 138 S. Ct. at 2224 (Kennedy, J., dissenting) (arguing for a “property-based concept” of Fourth Amendment protection).

7. Illinois Biometric Information Protection Act, 740 ILL. COMP. STAT. 14/1–99 (2008).

8. *Id.*

9. *Rosenbach*, 2019 WL 323902, at \*1 (“The central issue in this case . . . is whether one qualifies as an ‘aggrieved’ person and may seek liquidated damages and injunctive relief pursuant to the Act if he or she has not alleged some actual injury or adverse effect, beyond violation of his or her rights under the statute.”).

10. *Id.* at \*6.

11. Justice Roberts articulated the reasonable expectation of privacy standard as follows: “When an individual ‘seeks to preserve something as private,’ and his expectation of privacy is ‘one that society is prepared to recognize as reasonable,’ we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” *Carpenter*, 138 S. Ct. at 2209 (citation omitted).

the possibility that a teenager suffering from depression might want to meet privately with other teens with the same condition,<sup>12</sup> or that a gay or transgender person might want to find a relationship without publishing to the world intimate details of gender identity or sexual preferences<sup>13</sup>, or that a sperm donor might not want to be identified by the family of a biological child,<sup>14</sup> or that a person curious about a hereditary medical condition might not want a DNA sample provided to a private company to be shared with the FBI.<sup>15</sup> Each of these scenarios involves disclosure of information about deviance. And each of these scenarios suggests the value of a contextual disclosure of information, where a disclosure for a limited purpose or to a limited degree is very different from a wholesale disclosure to all.

The law is moving—slowly—toward the “contextual” understanding of privacy. *Carpenter* recognized that a single observation of a person making a phone call was contextually different from a perpetual catalogue of a person’s movements. Although the information gathered through a police officer’s physical observation of a suspect—the suspect’s location—was qualitatively the same as the location information provided by CSLI, the pervasive and vast *quantity* of information—a continuous recording of the suspect’s location—made a difference. In *Rosenbach*, the court focused on the quality or nature of the information collected—an individual’s biometric markers. The *Rosenbach* court found that the *quality* of information meant that the disclosure and consent requirements of the statute were not “merely

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12. See Madeline Halpert & Eva Rosenfeld, *Depressed, But Not Ashamed*, N.Y. TIMES, (May 22, 2014), <https://www.nytimes.com/2014/05/22/opinion/depressed-but-not-ashamed.html> [<https://perma.cc/C5LY-DC4H>] (recounting the story of high school administrators prohibiting teenagers from publishing their own stories of mental health challenges because they “might regret it later”).

13. See *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (denying claim for discrimination based on sexual orientation). The question of whether sexual orientation falls under the protection of Title VII of the Civil Rights Act is currently under review by the Supreme Court. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 Fed. App’x 964 (11th Cir. 2018) (mem.) (per curiam), *cert. granted sub. nom.*, *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019) (mem.) (consolidated with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.)).

14. Jacqueline Mroz, *A Mother Learns the Identity of Her Child’s Grandmother. A Sperm Bank Threatens to Sue.*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/16/health/sperm-donation-dna-testing.html> [<https://perma.cc/V42Z-Y9DA>].

15. Salvador Hernandez, *One of the Biggest At-Home DNA Testing Companies Is Working with the FBI*, BUZZFEED NEWS (Jan. 31, 2019), <https://www.buzzfeednews.com/article/salvadorhernandez/family-tree-dna-fbi-investigative-genealogy-privacy> [<https://perma.cc/TY4B-EPBG>]; see also Matthew Haag, *FamilyTreeDNA Admits to Sharing Genetic Data with the F.B.I.*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/business/family-tree-dna-fbi.html> [<https://perma.cc/9EFA-NYHM>].

technical in nature.”<sup>16</sup> The foundation of both decisions lies in the realization that information ostensibly gathered for one purpose could easily be misappropriated for another more nefarious purpose, causing harm to the individual. Before these two decisions, courts had approached the privacy of information as a binary concept: the information was either private and therefore protected from intrusion under the law or it was not. In contrast, under contextual privacy, the scope of what is considered protected as private depends on the quality and quantity of the information, as well as to whom the information is disclosed, for what purpose, and to what potential detrimental effect.

It turns out that deviance provides a useful model for understanding contextual privacy because both privacy and deviance are misunderstood as binary principles. At first blush it might seem that a behavior or characteristic is either deviant or not, depending on how the behavior or characteristic falls in comparison to norms within a population. A better understanding of deviance requires a more nuanced examination. In deviance, a behavior, characteristic, or idea only becomes deviant when viewed from an external perspective—meaning it is observed, compared, and distinguished from “normal”—and importantly, when the normative group applies a negative consequence. People sharing the same deviant characteristic are not deviant when observed and compared to each other. They are only considered deviant when compared to those outside of the insular group. Like deviance, privacy is not binary. An individual might want to disclose information to one person, but not to others. It may be important, but difficult to quantify, why a person would have an interest in controlling the disclosure of personal information, especially when that information reveals intimate details.

Deviance carries a pejorative connotation: a common understanding of deviance might include aberrant, illegal, and immoral behavior. While some deviant behavior is illegal and subjects the actor to punishment, deviance can also apply to static characteristics and behaviors, or medical conditions over which the actor has no control. Moreover, there may be artistic and social value acquired through expressions of deviance. Examples of valuable deviance include creative enterprises, such as art and music, where the unique nature of a composition can be so different

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16. “In reaching a contrary conclusion, the appellate court characterized violations of the law, standing alone, as merely ‘technical’ in nature. . . . Such a characterization, however, misapprehends the nature of the harm our legislature is attempting to combat through this legislation.” *Rosenbach v. Six Flags Entm’t Corp.*, No. 123186, 2019 WL 323902, at \*6 (Ill. Jan. 25, 2019) (citation omitted).

as to be initially rejected or scorned, and only later recognized to hold inherent artistic value.<sup>17</sup> Art, music, and literature are full of examples of works that were considered deviant, only later to be recognized as brilliant. Some behaviors or characteristics that were once considered deviant have become commonplace because more people openly engage in the behavior or display the characteristic. In some situations, such as political expression or civil disobedience, deviant behavior has a moral justification.

Privacy also carries a pejorative connotation, summarized in the common refrain that privacy only matters if one has something to hide. Just as the common understanding of deviance is mistaken, this common rebuttal to questions about protecting private information is also mistaken. Even though Professor Daniel Solove and others have artfully responded to the nothing to hide argument, it persists.<sup>18</sup>

This paper explains the concept of deviance, primarily from a sociological perspective, and applies the concept to the popular retort to claims of privacy—the nothing to hide argument—which continues to carry weight in public discussions. Beginning with the most simplistic definition of deviance, Section I explains theories describing deviance. Deviance is not synonymous with illegal. Indeed, deviant behavior may be perfectly legal, and illegal behavior may not be considered deviant. Section I notes that deviance is highly contextual and relational, depending not only on the specific behavior or characteristic, but also on the group that defines or enforces the characteristic as deviant. Section I also provides several examples of how deviance can change, either by new definitions of normal or by elimination of the negative reaction and stigma necessary for classification as deviant. These historic examples highlight the importance of context in defining deviance and demonstrate the relative and non-static nature of deviant behavior or deviant characteristics. Section I concludes with an invitation to compare concepts of deviance to concepts of privacy.

Section II applies the concept of deviance to the nothing to hide argument. The first part of Section II explains the strong and the weak

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17. *See generally* DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* (1979) (an iconic description of the development of trends among British youth as rebellion against expected norms and expression of individual identity). History reveals many examples of art that was initially banned, censored, or deemed “degenerate.” Before censors focused on rap lyrics, jazz, and rock music were in the censors’ crosshairs. In 1937, a large collection of modern art was deemed “degenerate” by the Nazi Party. *See generally* POLITICAL CENSORSHIP OF THE VISUAL ARTS IN NINETEENTH CENTURY EUROPE (Robert Goldstein & Andrew Nedd, eds., Palgrave MacMillan 2015). For more specific examples, *see infra* Section I.C.3.

18. *See infra* Part II.

versions of the nothing to hide argument. The successful rebuttal of the strong version of the nothing to hide argument relies on an expanded definition of privacy as a multi-dimensional, relational, and contextual concept. Section II examines the nothing to hide argument in the dialogue between the majority and the dissenters in *Carpenter*. The last part of Section II connects contextual privacy to deviance.

Section III argues that there is inherent value to deviance. On an abstract level, society gains through increased levels of diversity—even where that diversity fits the definition of deviance. Attempts to stifle deviant beliefs, behaviors, or characteristics through increased social control, such as monitoring or surveillance, have a poor track record of success.<sup>19</sup> Increased surveillance raises the risk of an out-of-context disclosure of sensitive personal information that could lead to negative treatment of an individual with behaviors, beliefs, or characteristics that differ from the norm. As described in more detail below, a difference only becomes deviant with the imposition of a negative consequence.<sup>20</sup> By retaining control of disclosures, individuals can assimilate with those who do not share the potentially deviant differences, as well as with those who share the differences.

In sum, a better understanding of the concept of deviance not only adds value to specific policy debates about privacy and security, but also expands our understanding of the importance of diversity in our communities.

Thus the value of deviance turns out to have several meanings. First, the concept of deviance provides a useful model for understanding contextual privacy. Second, the value of deviance signifies the importance of diversity of the human condition (at least where there is no harm to others). Finally, deviance offers insight into personal autonomy and how individuals define themselves, especially in the digital world. Although we share much in common, the things that define us are our differences. We define ourselves in the way we recognize our

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19. Although many arguments about the danger of surveillance rely on the stifling effect on freedoms of speech and association, the research to support these claims is rather thin. Sociological research tends to support the notion that increased measures of social control create *more* deviant behavior, such that social control is a cause of deviance. Neither side of the privacy versus security debate will find this satisfying—on one hand we conclude that surveillance does not have a deterrent effect, and therefore other justifications must exist for its use; on the other hand we must rely on other explanations of the harm of surveillance. See generally David Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069 (2014) (explaining the difficulties with the stultification thesis).

20. The negative consequences frequently consisted of the imposition of a social stigma or an exclusion from social groups. See *infra* Sections I.B, I.C.



differences—our deviances, our intimate feelings, our creative thoughts—and we shape our identities in the way we share these details with others.<sup>21</sup>

### I. DEFINING DEVIANCE

The term deviance derives from the examination of differences. Mathematical definitions of deviation begin with an examination of data for central tendencies and dispersion—in simple terms, the way data tend to clump together.<sup>22</sup> The standard deviation refers simply to degrees of difference from an average value. In applying the concept of deviance to human behaviors, beliefs, or characteristics, it may be helpful, but not necessary, to analyze whether a given behavior, belief, or characteristic is statistically deviant within a general population—or the extent of the deviation. The critical notion is that there is a definable difference when compared to a dominant norm or group.

A sociological definition of deviance applies to behaviors, beliefs, or characteristics that are likely to generate a negative reaction from others.<sup>23</sup> Social scientists use three central questions to determine when deviance exists.<sup>24</sup> First, is the behavior, belief, or characteristic different from normal, expected, or proscribed behaviors, beliefs, or characteristics?<sup>25</sup> Second, is there an audience or a group that judges this

21. Some sociologists attribute identity and conceptions of self to the way one interacts with others. *See, e.g.*, GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: THE DEFINITIVE EDITION* (Hans Joas & Daniel R. Huebner eds., ann ed. 2015) (Charles W. Morris ed., 1934); Timothy J. Owens, Dawn T. Robinson & Lynn Smith-Lovin, *Three Faces of Identity*, 36 *ANN. REV. SOC.* 477 (2010) (discussing how identity is based on conceptions of self and social positions that exist outside of the individual).

22. For example, if we were to examine the physical characteristic of height in humans, we would expect to find that most of the population falls close to the mean, with a few people who are either extremely tall or extremely short. The central tendency describes the clumping together of heights in the middle of the range of values for height. Central tendency can be measured by calculating the mean or average height. The degree to which heights are dispersed in terms of the frequency of extremely tall people and how much taller than the average person a person must be to be considered extremely tall can be measured by the standard deviation. *See generally* SARAH BOSLAUGH & PAUL ANDREW WATTERS, *STATISTICS IN A NUTSHELL: A DESKTOP QUICK REFERENCE* 55–63 (Mary Treseler ed., 1st ed. 2008) (explaining the basics of statistics, specifically how to identify standard deviation and outsiders in a pool of data).

23. ERICH GOODE, *DEVIANT BEHAVIOR* 7 (9th ed. 2011). It bears noting that in general sociologists do not attribute a value to deviance, in the sense that deviance is inherently good or bad. Rather, their interest lies in describing, explaining and understanding the concept. As noted below, for some powerful sectors of society, there may not be a “negative” consequence. *See infra* Section I.B.2 on Constructivist Theories of Deviance.

24. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 1–39 (1963); GOODE, *supra* note 23, at 7.

25. I have included “characteristics” as well as behaviors. In the sociological definition, the

difference?<sup>26</sup> Third, does discovery of the difference result in a negative consequence such as mockery, censure, scorn, punishment, stigma, isolation, or public condemnation?”<sup>27</sup> In addition to these central questions, sociologists examine how norms are established and communicated, and how differences from norms emerge and propagate.

The classification of a behavior, belief, or characteristic as deviant depends on both the actor and the audience. Deviance is contextual. In many cases, the same behavior, belief, or characteristic will be considered deviant among one group of people and non-deviant within another group.<sup>28</sup> In fact, a deviant behavior, belief, or characteristic may create interpersonal relationships based on a shared experience.<sup>29</sup> As discussed below, these interpersonal relationships, and the ideas generated and shared through them, have value both to the individuals involved, and to society at large by increasing the diversity of thought and promoting the exchange of ideas.

Because the term deviance is not defined according to a purely objective standard, but depends instead on the subjective reactions of an audience, the manner and scope of information disclosures matters. Information regarding one’s deviance may provide value to the individual. But the same information, revealed in a different context, may

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critical inquiry involves the reaction to the attribute, not the attribute itself. Sociologists distinguish between an achieved status and an ascribed status, but this distinction does not bear weight in the definition of deviance. GOODE, *supra* note 23, at 13; *see also* PATRICIA ADLER & PETER ADLER, CONSTRUCTION OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION 8–9 (2009) (identifying the “ABC’s of deviance” as attitudes, behaviors, conditions). Thus, if there is a difference, a judge, and a negative consequence to the discovery of the attribute, then it is considered deviant. *Id.*

26. BECKER, *supra* note 24, at 15–18 (discussing who are considered deviant “outsiders” and who are “normal” members to identify the deviance); GOODE, *supra* note 23, at 6.

27. BECKER, *supra* note 24, at 8–14 (noting how others respond to deviant behavior); GOODE, *supra* note 23, at 6. *See also* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) (reviewing the work on stigma to formulate concepts on the information individuals convey about themselves). *See generally* Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363 (2001) (redefining the term stigma). Here I use “public condemnation” to mean something different from “expressive condemnation.” Michel Foucault described the importance of expressive condemnation as a way for communities to express disdain and disapproval for the actions. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1977) (1975). Tracy Meares and other scholars have applied the concept of expressive condemnation to policy debates on issues of criminal law. *See, e.g.*, Jeffrey Fagan & Tracy L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

28. The same condition may provide the holder with an advantage in one context and subject to the holder to penalties in another context. *See infra* Section I.C.1.

29. *See, e.g.*, HEBDIGE, *supra* note 17, at 151 n.18 (describing the mod, punk, and other youth cultures where members shared the same “deviance”).

subject the individual to scorn, stigmatization, ostracism, discrimination, or worse. Therefore, a person has an interest in controlling information related to a deviant belief, behavior, or characteristic. The degree to which a person values privacy may depend on the type of information disclosed and the audience receiving the disclosure. The concept of deviance, like the concept of privacy, is more complex and contextual than is immediately apparent. A proper understanding of deviance helps us to define exactly what is at stake when we assert privacy interests. But before examining the sociological definitions of deviance, let's look at an example.

#### *A. A Basic Example of Deviance*

A survey conducted in Middletown found that 50% of pedestrians jaywalked across the intersection of Main Street and First Avenue. One year ago, a pedestrian jaywalking across Main Street in Middletown was struck by a vehicle and seriously injured. Middletown recently installed closed-circuit cameras to monitor the intersection. After the installation of the closed-circuit camera, a new survey found that only 30% of pedestrians jaywalked across the street. The cameras were located in obvious positions on the streetlamps, and signs on each corner informed pedestrians about the cameras. The cameras worked intermittently—sometimes they were on and sometimes they were off—but there was no way to tell whether the cameras were on or off. Jaywalking is a violation of the municipal code, punishable by a fine of \$25. In addition, the names of violators are published in the local newspaper in well-read section entitled the “Police Blotter.”

Yesterday, Nic stood at the intersection of Main Street and First Avenue in Middletown. The light was red in the direction Nic wanted to proceed. Nonetheless, Nic jaywalked across the street. Andi, another pedestrian standing next to Nic, proceeded across the street as well, closely following Nic. At the other side of the intersection, Andi turned to Nic and said, “hope we meet again, fellow jaywalker,” before walking away.

Nic, a lawyer, charges \$300 per hour, billed in ten-minute increments. On the day in question, Nic was running late to a meeting. Nic could make it to the meeting on time only if he jaywalked across the intersection. The difference between arriving late to the meeting and arriving on time to the meeting meant that Nic would lose ten minutes of billed time, even though the delay caused by waiting for the light to change would be only two minutes.

With this example in mind, let's turn to an explanation of the formal definitions of deviance.

### B. Sociological Definitions of Deviance

Sociologists study the actions that comprise deviance and the causes of deviance.<sup>30</sup> But they also examine the contexts and power dynamics that separate deviant and normative behavior. These two distinct approaches are referred to as the positivist or objective approach and the constructionist or subjective approach.<sup>31</sup> The former is more focused on the actor—the one engaged in the deviance—while the latter focuses more on the observer—the person or group that reacts to the deviance.<sup>32</sup>

#### 1. The Positivist Approach to Deviance

The positivist approach to deviance holds that there are objectively quantifiable differences that can be properly labeled as deviant. The positivist or objective definition begins with the assumption that deviant behavior is definable and fixed, and that certain acts or attributes fall outside well-known norms of moral behavior.

The positivist perspective relies on three central ideas: empiricism, objectivism, and determinism.<sup>33</sup> “Positivists *reject* the notion that definitions of right or wrong are really as relative as constructionist sociologists of deviance argue.”<sup>34</sup> The three central ideas describe different approaches to positivism. Empiricism describes the relationship between the scientist and the subject of examination. Empiricists rely on their senses (and instruments) to provide directly observable or measurable information about the world they study. Objectivism relates to the objective or internally consistent characteristics that distinguish deviant from normal behavior. Determinism refers to the causes of deviance, such as underlying physical, mental, or environmental conditions.<sup>35</sup> Positivist theories share a common attempt to describe deviance through explanatory cause and effect relationships.<sup>36</sup>

Those who use the positivist approach examine not only what causes

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30. See generally DAVID DOWNES, PAUL ELLIOTT ROCK & EUGENE MCLAUGHLIN, UNDERSTANDING DEVIANCE (7th ed. 2016).

31. PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS 1 (2010). See also GOODE, *supra* note 23, at 19–46 (describing positivist theory of deviance); *id.* at 49–65 (describing constructionist theories of deviance).

32. One could distinguish the two approaches by looking at the focus of the study and asking who is considered the “outsider.” In positivist theories, the deviant is considered the outsider, while in constructionist theories, the judge is considered the outsider. BECKER, *supra* note 24, at 1–39 (explaining different theories perspectives).

33. GOODE, *supra* note 23, at 24.

34. *Id.* at 25.

35. *Id.* at 25–26.

36. *Id.* at 26.

deviance, but also how to stop or suppress the underlying deviant behavior.<sup>37</sup> A number of specific theories of deviant behavior rely on the positivist approach to deviance.<sup>38</sup> Examples include: the “free will” school, which holds that deviant behavior can be attributed to a rational decision favoring pleasure over pain;<sup>39</sup> the “social disorganization” theory (the Chicago School), which holds that deviance resulted from disintegration of living environments and neighborhoods;<sup>40</sup> and Robert Merton’s Anomie theory, which holds that deviance resulted from upheaval in the social structure.<sup>41</sup> Anomie theory explained the social forces that nurtured deviant tendencies and assumed that everyone had latent deviant tendencies. All the positivist theories have declined in popularity since their inception; however, Anomie theory resurged in the late 1990s and 2000s.<sup>42</sup>

The theories mentioned above examine the factors related to expressions of deviance. Other positivist theories focus on factors that inhibited the expression of deviance. Examples include social control

37. CONRAD & SCHNEIDER, *supra* note 31, at 2 (discussing the positivist area of deviant study).

38. GOODE, *supra* note 23, at 24–42 (describing, for example, Merton’s anomie or strain theory, free will or rational choice theory, and social control theory). *See generally* Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672 (1938) [hereinafter Merton, *Social Structure*].

39. GOODE, *supra* note 23, at 27–28; *see also* Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rates Trends: A Routine Activity Approach*, 44 AM. SOC. REV. 588 (1979) (discussing the routine activities theory); RONALD V. CLARKE & MARCUS FELSON, *ROUTINE ACTIVITY AND RATIONAL CHOICE* (1st paperback prtg. 2004) (1993) (discussing the similarities and differences between the routine activity theory and rational choice theory). The most widely supported of the “free-will” theories is described as the routine activities theory, where deviant behavior results from a “motivated offender, a suitable target, and the absence of a capable guardian.” GOODE, *supra* note 23, at 28.

40. GOODE, *supra* note 23, at 29–30; *see also* Robert E. Parks, *The Urban Community as a Spacial Pattern and a Moral Order*, in *THE URBAN COMMUNITY* (Ernest W. Burgess ed., 1926) (exploring the composition and development of modern cities and the effect on moral order). This theory was pronounced dead by Professor Unnever in 1987 but revived in early 1990s by Pfohl and others. STEPHEN J. PFOHL, *IMAGES OF DEVIANCE AND SOCIAL CONTROL: A SOCIOLOGICAL HISTORY* 133–69 (1994). A modern conception of disorganization theory includes not only understanding of collective environmental conditions that impact the likelihood of deviant behavior, but also an understanding or empathy for the deviant. GOODE, *supra* note 23, at 31.

41. GOODE, *supra* note 23, at 31 (quoting ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 132 (1957) [hereinafter MERTON, *SOCIAL THEORY*]) (“Social structures exert a definite pressure upon certain persons in the society to engage in non-conforming rather than conforming conduct.”). *See generally* Merton, *Social Structure*, *supra* note 38 (discussing Merton’s theory that disruption in social structure causes deviance). Merton defined anomie as “the disjunction between culturally defined goals and structurally available opportunities.” MERTON, *SOCIAL THEORY*, *supra*.

42. GOODE, *supra* note 23, at 34–35. *See also* PHILIPPE BOURGOIS, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* 326 (2d ed. 2003) (illustrating Anomie theory in the context of drug dealers); MITCHELL DUNEIER, *SIDEWALK* 60–62 (1999) (illustrating the same).

theory, which compares an individual's preference for conformity to the prevalence of deviant behavior;<sup>43</sup> and self-control theory, which holds that low self-control and an inability to regulate current behavior (especially in light of short-term low gains and long-term high costs) results in deviant behavior. Self-control theory gained popularity with the introduction of the "general theory of crime" described by Michael Gottfredson and Travis Hirschi.<sup>44</sup>

## 2. The Constructionist Approach to Deviance

Constructionist theories of deviance assume that deviance cannot be defined without reference to the power structures that define *normal*.<sup>45</sup> Researchers operating under this definition explore issues such as how to define morality, and how certain groups assert power in a manner that defines normative or moral behavior.<sup>46</sup> A range of theories rely on this basic framework.<sup>47</sup>

Constructionists focus on social control—the means through which society defines and enforces normative behavior.<sup>48</sup> Several specific theories examine the relationship between the deviant behavior and the entities that judge the behavior as deviant. Interactionist theory (also known as labeling) rests on three central assumptions: first, people act in response to things that have meaning to them; second, meaning derives from interaction with other people; third, meaning changes over time.<sup>49</sup> An example is Frank Tannenbaum's research on youth living in a slum area, where nearly all boys engaged in behavior they considered normal but that others considered deviant (fighting, truancy, etc.).<sup>50</sup> Tannenbaum notes that increased efforts by authorities to curtail the deviant behavior escalated the likelihood that the boys would engage in more serious criminal acts.<sup>51</sup> By labeling the conduct as deviant, the enforcers

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43. GOODE, *supra* note 23, at 37.

44. *See generally* MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

45. GOODE, *supra* note 23, at 49–61; CONRAD & SCHNEIDER, *supra* note 31, at 2.

46. CONRAD & SCHNEIDER, *supra* note 31, at 2.

47. GOODE, *supra* note 23, at 49–61 (describing, among others, the theories of formal and informal social control, labeling or interactionist theory, and conflict theory). *See also* BECKER, *supra* note 24, at 2–25.

48. GOODE, *supra* note 23, at 49–52. Within social control, there are formal, semi-formal and informal modes of communicating the social norms. *Id.* at 51.

49. *Id.* at 53.

50. FRANK TANNENBAUM, CRIME AND THE COMMUNITY 3–22 (1938). *See also* GOODE, *supra* note 23, at 53.

51. TANNENBAUM, *supra* note 50, at 15–22 (1938). *See also* GOODE, *supra* note 23, at 53.

separated the subjects from the rest of society, depriving them of social access to other segments of society, and forcing them into social groups comprised only of others sharing the same characteristics and norms of behavior.<sup>52</sup>

Another branch of Constructionism—conflict theory—examines the degree of conflict (or lack of consensus) within a given group or society. Importantly, conflict theory rejects two widely held assumptions related to the law: first, that law represents a “barometer of the moral and social thinking” reflecting “the will of the people”;<sup>53</sup> and second, that laws provide equal protection to all members of society.<sup>54</sup> Conflict theorists hold that only the most powerful receive protection of the law.<sup>55</sup> Similarly, feminist theory holds that both society, and by extension the sociological research of society, hold a specific androcentric perspective.<sup>56</sup>

A related theory of *controlology* focuses on the question of who creates the rules.<sup>57</sup> Michel Foucault’s explanation of Jeremy Bentham’s *Panopticon* as an architecture of power stands as a prime example of the theory of controlology.<sup>58</sup> Bentham described the architecture of a prison he called Panopticon (all-seeing).<sup>59</sup> His structure comprised two parts: one outer circle divided into cells, with each cell facing toward the center and a central tower in the middle of the outer ring.<sup>60</sup> A guard in the tower would be able to see into the cell of every prisoner, but each prisoner would not know whether the guard was watching at any given time.<sup>61</sup> Each prisoner on the other hand would only have a view of the central tower.<sup>62</sup> Foucault translated Bentham’s physical structure to a metaphor for the modern surveillance state, where the government, through subtle, even democratically enacted means, could exercise control and domination over the people.<sup>63</sup>

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52. EDWIN LEMERT, SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR 17 (1951). See also GOODE, *supra* note 23, at 53.

53. GOODE, *supra* note 23, at 58.

54. *Id.* at 58–59.

55. *Id.* at 58.

56. *Id.* at 60.

57. *Id.* at 62.

58. *Id.*; FOUCAULT, *supra* note 27, at 200–01; BECKER, *supra* note 24, at 2–25.

59. JEREMY BENTHAM, THE PANOPTICON WRITINGS 35–37 (Miron Božovič ed., 1995).

60. *Id.*

61. *Id.*

62. *Id.*

63. FOUCAULT, *supra* note 27, at 203–07. “Thanks to its mechanism of observation, it gains efficiency and, in the ability, to penetrate into men’s behavior; knowledge follows the advances of

### 3. Applying Theories of Deviance

Is Nic's behavior deviant? Nic's behavior in jaywalking is not normal because it is objectively different from the 70% of the population that does not jaywalk. How "different" must Nic be from the rest of the population in order for the difference to matter? In other words, is it necessary that Nic's behavior be at least one standard deviation from the mean?<sup>64</sup> Nic's behavior is unlawful: the municipal ordinance prohibits jaywalking. But the mere fact that the statute proscribes the conduct does not make the conduct deviant, at least under sociological definitions.<sup>65</sup> The publication of the names of violators in the newspaper presents a mechanism for publication of information about Nic's conduct, and accordingly, a mechanism of social control (if Nic is concerned about negative consequences if others discover his transgression).

Note that Nic may be acting rationally and in a manner approved by society. He may have engaged in a careful cost-benefit analysis. The amount of the fine and Nic's billable rate demonstrate both the cost of compliance and non-compliance. Here, the cost of compliance was 1/6 of \$300, or \$50, because Nic would have lost ten minutes of billable time. Compliance—waiting for the light to change—would have taken only two minutes, but those two minutes had the value of ten minutes because of Nic's schedule. The benefit of compliance was avoiding the fine of \$25 and avoiding the shame of having his name in the paper. Moreover, Nic may have weighed the near certain probability of losing \$50 in billable time against the probability of being caught and the penalty of the \$25 fine. For Nic, the choice to jaywalk seems like an economically favorable and rational decision.

Missing from the scenario was the critical fact that would define Nic's behavior as deviant: How would other members of the community treat Nic if they discovered his behavior? Maybe the community would respect his cost-benefit analysis. Others in society might respect and value his

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power, discovering new objects of knowledge over all the surfaces on which power is exercised." *Id.* at 204.

64. In statistics, standard deviation is a way to measure the degree of variance within a data set. When analyzing differences within a sample or a population, members of the group that are distinguished from 68% can be said to lie "one standard deviation from the mean." A distinction from 95% of the population are two standard deviations from the mean.

65. Other scholars have described illegal behavior as "formally" deviant simply because it is against the law. For example, Professor Mark Edwards defines "deviant" as contrary to formal law. Thus, "[t]o the extent regulators' enforcement decisions do not adhere to enforcement of the formal law—that is, to the extent they are formally 'deviant'—we may ask . . . what is guiding their decision-making." Mark Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 51 (2006).



rational analysis of the costs and benefits of his choice to comply with the law or not. What if everyone in the community of Middletown jaywalks—as suggested by the 50% rate before the cameras were installed? Does the degree to which Nic’s behavior differs from the norm matter (i.e., whether jaywalking is somewhat unusual or highly unusual within the community)? What if local law enforcement has decided either individually or collectively not to enforce the jaywalking provision? If jaywalking were under-enforced, then Nic would face an even lower probability of suffering the negative consequences of discovery.<sup>66</sup> In some of these scenarios, Nic’s behavior might not be deviant at all.

Nic may have found a different way to analyze the value of his decision to jaywalk. Apart from the economic value of his decision, Nic’s choice may provide social value. Often people with similar traits will form relationships or social groups. In our example, it is possible Nic might see Andi again, and through their shared experience, form a friendship. In sum, Nic (or Andi) may find benefit from disclosing his experiences within the insular group. Conversely, without disclosing his experiences, he may be denied entry to the group since the behavior provides a common bond.

Aside from the economic cost (the fine), there may be additional social costs to Nic’s behavior if he were met with scorn from other members of the community. The real social cost for Nic derives from the effect of publication in the Police Blotter. As a lawyer, Nic may lose reputational value or he may be ostracized or shamed by other members of society for his failure to respect the law. In analyzing the potential social cost, Nic should consider the degree of harm as well as the probability of the harm. Thus, the probability of being caught would be of paramount concern. Nic should consider the surveillance cameras because their presence increases the probability of being caught.

Depending on the theory of deviance applied, sociologists might examine very different questions regarding Nic’s deviance (assuming his behavior is deviant). Positivists would focus on what separates Nic from the other non-deviant members of the community. How is he different? What are the reasons for Nic’s behavior—why did he do it? They might look to Nic’s propensity for risk. They might examine Nic’s decision in light of economic cost and benefits. Does he have a nonconformist attitude? Is the deviant behavior the product of his early childhood environment? Constructivists might examine questions about the origins of the rule itself. Who created the rule? Why doesn’t the law create a

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66. Professor Mark Edwards examined the issue of discretionary enforcement. *See generally* Edwards, *supra* note 65.

preference for pedestrians? What effect did the trucking industry have on the passage of the jaywalking ordinance? Why was the ordinance under-enforced? Did the installation of the cameras serve as a mechanism of social control?

This example demonstrates the importance of context in the examination of deviance. The definition of the difference is important, as is the reaction of others and the ensuing negative effect or consequence. In some contexts, it is fairly easy to both define the type of proscribed behavior and to predict the negative consequence.<sup>67</sup> But sometimes there are errors in defining deviance.

### C. Historical Examples of Deviance

One problem with defining deviance is the poor track record of getting it right. Defining *normal* is problematic because the definition often relies on power relationships. For example, certain interests may benefit from a description of normal that favors their own characteristics. Behaviors that were considered deviant—and illegal—even a few years ago, are considered normal today. This is particularly true in the areas of mental health, sexual tendencies and behaviors, and political views. As noted above, the definition of deviance does not discriminate among behaviors, beliefs, characteristics, or even disease. In defining deviance, the questions are whether there is a recognizable difference, and whether the normative or dominant group would impose negative consequences that stem from that difference.

#### 1. Refining Definitions of Normal

Defining difference can be difficult. For example, with respect to mental functioning, classifications of disease or disorder may be modified so that the same individual, once classified as deviant, could later be classified as non-deviant. The Diagnostic and Statistical Manual of Mental Disorders (DSM) defines characteristics of mental disorders and their statistical prevalence.<sup>68</sup> The DSM is updated periodically, and in some circumstances, the same patient with the same characteristics and symptoms may move in or out of a classification of disorder with the publication of the new edition of the DSM. For example, the DSM-5

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67. For example, sexual relationships between adults and children are both proscribed and normatively condemned, and this is the correct result.

68. AM. PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. The American Psychiatric Association recently published a new edition. AM. PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

refined the definition of autism spectrum disorder.<sup>69</sup> Many patients who met the guidelines under the DSM-IV (1994) did not meet the guidelines under the DSM-5 (2013).<sup>70</sup> Neither the patient nor the behaviors changed, but the definition of the disorder—of the deviance—changed.

As noted above, the question of whether a difference causes a negative consequence can be contextual. A condition or set of behaviors may be viewed as a disease or disability in one context, and yet in another context, the same condition can be viewed as a competitive advantage.<sup>71</sup> For example, media articles have drawn attention to employers' search for candidates with Asperger's syndrome (a milder form of autism)<sup>72</sup> for certain types of jobs.<sup>73</sup> In *The Big Short*, author Michael Lewis profiled Michael Burry, an investment banker who predicted the 2008 mortgage crisis.<sup>74</sup> Burry credited his success to Asperger's syndrome, stating "only someone who has Asperger's would read a subprime mortgage bond prospectus."<sup>75</sup> A person might be reticent to disclose a mental health

69. Compare DSM-IV, *supra* note 68, at 66–71, 75–77 (defining impaired social interaction and a restricted repertoire of interests as essential features of autism spectrum disorder), with DSM-5, *supra* note 68, at 50–59 (defining in greater detail the diagnostic criteria of autism spectrum disorder, with several subtypes, specifications, and levels of severity).

70. Ferris Jabr, *Redefining Autism: Will New DSM-5 Criteria for ASD Exclude Some People?*, AM. SCI. (Jan. 30, 2012), <http://www.scientificamerican.com/article/autism-new-criteria/> [https://perma.cc/6LUS-FPDZ]; Amy S.F. Lutz, *You Do Not Have Asperger's: What Psychiatry's New Diagnostic Manual Means for People on the Autism Spectrum*, SLATE (May 22, 2013, 2:00 PM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2013/05/autism\\_spectrum\\_diagnoses\\_the\\_dsm\\_5\\_eliminate\\_asperger\\_s\\_and\\_pdd\\_nos.html](http://www.slate.com/articles/health_and_science/medical_examiner/2013/05/autism_spectrum_diagnoses_the_dsm_5_eliminate_asperger_s_and_pdd_nos.html) [https://perma.cc/XLP9-B3YK]; James Mcpartland, Brian Reichow & Fred Volkmar, *Sensitivity and Specificity of Proposed DSM-5 Criteria for Autism Spectrum Disorder*, 51 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 368 (2012) (applying new DSM-5 criteria for ASD to a sample of 933 participants, some with a DSM-IV ASD diagnosis and some without, and finding 60.6 percent of those with ASD diagnosis under DSM-IV met DSM-5 criteria, and 94.9 percent of non-ASD participants were excluded under DSM-5 criteria).

71. See, e.g., Lutz, *supra* note 70 (noting "it's almost cool to have Asperger's"); see also Benjamin Wallace, *Are You On It?*, N.Y. MAGAZINE (Oct. 28, 2012), <http://nymag.com/news/features/autism-spectrum-2012-11/> [https://perma.cc/D2Y2-68WR] (discussing the prevalence of discussion about who is and who is not on the autism spectrum).

72. The DSM-IV classified Asperger's Disorder (also known as Asperger's Syndrome) as a disorder distinct from autism. The DSM-5 replaced Asperger's Disorder and other developmental disorders with a blanket diagnosis of autism spectrum disorder (ASD). See DSM-IV, *supra* note 68; DSM-5, *supra* note 68 (comparing Asperger Disorder as it relates to the autism spectrum).

73. Reuters, *Autism in the Workplace: Companies Seek Out Autistic Workers to Fuel Innovation with Neurological Diversity*, N.Y. DAILY NEWS (June 4, 2013, 2:25 PM), <http://www.nydailynews.com/life-style/health/companies-seek-autistic-workers-fuel-innovation-article-1.1362853> [https://perma.cc/AKZ2-SHK8].

74. See generally MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010).

75. Daniel Gross, *Eve of Destruction*, N.Y. TIMES (Apr. 18, 2010) [http://www.nytimes.com/2010/04/18/books/review/Gross-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/04/18/books/review/Gross-t.html?pagewanted=all&_r=0). [https://perma.cc/FA6X-2TC9].

diagnosis—unless that diagnosis is recognized as an advantage. But to gain the advantage, the individual must be able to disclose the information in a contextually appropriate manner.

## 2. Revising Formal Definitions of Deviance

In some contexts, the label of deviance is applied to behavior that may be relatively common. Sexual tendencies and preferences comprise a large part of the sociological literature on deviance,<sup>76</sup> and “[s]exually unconventional behavior remains a central topic of discussion in most courses on deviance.”<sup>77</sup>

The legal status of sexual behavior can change rapidly, as evidenced by the Supreme Court’s decisions on consensual sodomy. In 1986, the Court decided *Bowers v. Hardwick* and upheld the constitutionality of a Georgia statute that criminalized sodomy.<sup>78</sup> Justice White, writing for the 5-4 majority, relied on the degree to which the conduct violated norms, referencing the number of states with laws similar to Georgia’s and the long tradition of proscribing such conduct. Justice White wrote:

Proscriptions against [consensual sodomy] have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original [thirteen] States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but [five] of the [thirty-seven] States in the Union had criminal sodomy laws.<sup>79</sup>

Justice Powell underscored the point, noting that the Georgia statute authorized a penalty of up to twenty years in prison for engaging in “a single act of consensual sodomy, even in the private setting of a home.”<sup>80</sup>

Seventeen years later, in 2003, the Court overruled *Bowers* in *Lawrence v. Texas*,<sup>81</sup> and invalidated Texas’s law against consensual sodomy.<sup>82</sup> Though rarely enforced, many states had similar provisions criminalizing sexual acts between consenting adults,<sup>83</sup> and several states

76. GOODE, *supra* note 23, at 197.

77. *Id.*

78. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

79. *Id.* at 192–93 (footnotes omitted) (citations omitted).

80. *Id.* at 197–98 (Powell, J., concurring) (noting that such a penalty would raise Eighth Amendment concerns, an issue not raised in the case because there had not been a conviction).

81. *Lawrence v. Texas*, 539 U.S. 558 (2003).

82. The Texas law proscribes oral or anal sex between consenting adults. TEX. PENAL CODE § 21.01 (2005) and TEX. PENAL CODE § 21.06 (1994). The Georgia statute in *Bowers* was nearly identical to the Texas statute in *Lawrence*. See GA. CODE ANN. § 16-6-2 (2019).

83. See, e.g., N.Y. PENAL LAW § 130.00(2) (McKinney 1996) (defining “deviate sexual intercourse”); N.Y. PENAL LAW § 130.38 (McKinney 1965) (repealed 2001), *declared unconstitutional* by *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (defining a misdemeanor offense of consensual sodomy).

still have statutes prohibiting sexual conduct between consenting adults, although these statutes were effectively repealed by *Lawrence*.<sup>84</sup>

Perhaps the literature on deviance is dominated by sexuality because there is simultaneously a wide diversity of behavior and a strong social pressure to conform to a narrow range of behaviors. Despite the illegal labels applied to certain sexual behaviors, empirical research demonstrated that proscribed behaviors and activities were relatively common. For example, the well-known Kinsey Reports in 1948 and 1953 demonstrated an array and prevalence of sexual conduct at odds with the legal status of the same sexual behaviors at that time.<sup>85</sup> The subject matter of the Kinsey research—human sexuality—was considered taboo and researchers received negative publicity because of the norm-breaking, deviant nature of the research.<sup>86</sup> Just as the Kinsey Reports reflected a chasm between prevalent sexual activities and social norms, the reaction to the Kinsey Reports demonstrated a dramatic divide: the Reports were simultaneously a popular success (the first volume sold more than 200,000 copies in the first two months) and the subject of vehement criticism.<sup>87</sup> Recent research on sexual behavior shows a high percentage of the population engaging in a wide range of sexual activities, suggesting that the behavior proscribed by the statutes at issue in *Bowers* and *Lawrence* was normal, even in states where similar (but unenforceable) statutes exist today.<sup>88</sup>

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84. See, e.g., LA. STAT. ANN. § 14:89 (2018) (punishing “unnatural carnal copulation” with a potential prison sentence of five years “with or without hard labor”); ARIZ. REV. STAT. ANN. § 13-1408 (2019) (“A married person who has sexual intercourse with another than his or her spouse, and an unmarried person who has sexual intercourse with a married person not his or her spouse, commits adultery and is guilty of a class 3 misdemeanor. When the act is committed between parties only one of whom is married, both shall be punished.”).

85. ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 35–40 (Ind. Univ. Press 1998) (1948); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 3–6 (Ind. Univ. Press 1998) (1953).

86. Kinsey’s research received both favorable and unfavorable reviews. One negative reaction called the Kinsey Report “an assault on the family as a basic unit of society, a negation of moral law, and a celebration of licentiousness.” Erdman Palmore, *Published Reactions to the Kinsey Report*, 31 SOC. FORCES, Dec. 1952, at 165, 165–66.

87. Regina Markell Morantz, *The Scientist as Sex Crusader: Alfred C. Kinsey and American Culture*, 29 AM. Q., Winter 1977, at 555, 564–65, 575. Morantz notes that the Female Report led to a Congressional call for the Postmaster General to bar the Report from the mail, questions about financial support of Kinsey research, and accusations that Kinsey was aiding communism. *Id.* at 575.

88. Debby Herbenick et al., *Sexual Diversity in the United States: Results from a Nationally Representative Probability Sample of Adult Women and Men* (July 20, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5519052/> [<https://perma.cc/H5RW-GKAG>]. More than 50% of respondents reported engaging in masturbation, vaginal sex, oral sex, sending and receiving digital

### 3. Informal Deviance

The example of sexual activities shows that deviance can be formally defined by law. Other examples show changes in what is considered normal, even in the absence of formal definitions. Historically, mainstream social norms disapproved of tattoos, yet the same tattoos simultaneously provided the owner with the advantage of access and acceptance into a range of subcultures. A specific tattoo might signify service in a specific military unit or affiliation with a gang or sports team.

The worlds of art and music present a constant parade of concepts and ideas that were scorned or censored at one time, only to become celebrated later. For example, Edouard Manet's *Olympia* generated controversy not for the depiction of nudity, but for the model's outward stare, a gaze that broke the hierarchical barrier between subject and viewer.<sup>89</sup> The Surrealist and Dada movements are noted for the intentional rejection of accepted norms and for creating a new definition of art that included social commentary as a part of the artistic endeavor.<sup>90</sup> Performance art by Marina Abramovic and Vito Acconci pushed boundaries of what is acceptable in the interaction between artist and patron, often leaving lasting impressions on those witnessing the exhibition.<sup>91</sup> In a poignant piece from 1969, Acconci selected a random person to follow, at least until the subject entered a private space.<sup>92</sup>

These examples show that the disclosure of information is highly contextual. The same information disclosed to one person might lead to

nude images, reading erotic stories, and watching explicit videos.

89. Charles Bernheimer, *Manet's Olympia: The Figuration of Scandal*, 10 *POETICS TODAY*, Summer 1989, at 255, 255–56.

90. Andre Breton defined surrealism as “pure psychic automatism, by which one proposes to express, either verbally, in writing, or by any other manner, the real functioning of thought. Dictation of thought in the absence of all control exercised by reason, outside of all aesthetic and moral preoccupation.” ANDRÉ BRETON, *MANIFESTOES OF SURREALISM* 26 (Richard Seaver & Helen R. Lane trans., Univ. Mich. Press 1946) (1924). The Tate Museum describes Surrealism as “a twentieth century literary, philosophical and artistic movement that explored the workings of the mind, championing the irrational, the poetic and the revolutionary. Surrealism aimed to revolutionize human experience, rejecting a rational vision of life in favor of one that asserted the value of the unconscious and dreams.” *Surrealism – Art Term*, TATE MUSEUM, <https://www.tate.org.uk/art/art-terms/s/surrealism> [https://perma.cc/8W6B-KF44].

91. Il Sapere, *Marina Abramovic on Performing 'Rhythm O' 1974* (May 29, 2017), <https://www.youtube.com/watch?v=kijKz3JzoD4> [https://perma.cc/AEB6-XXA6] (showing the artist standing still and inviting the audience to do whatever they wanted to her using any of the 72 available objects, which included a feather boa, scissors, honey, a metal bar and a gun loaded with a single bullet); see also Marina Abramovic, *Rhythm O* (1974), <https://www.guggenheim.org/artwork/5177> [https://perma.cc/T27D-KU8Y] (memorializing *Rhythm O*).

92. Vito Acconci, *Following Piece* (1969), <https://www.metmuseum.org/art/collection/search/283737> [https://perma.cc/FPJ5-Y94R].

a fulfilling relationship; while that same information, revealed to another group, could subject the individual to criminal penalties. In the art world, expressing the same idea to two different groups might generate different results, therefore an individual must reveal information to a specific individual or small group of individuals to achieve personal fulfillment. For example, if expressed within an avant-garde group of progressive thinkers, a new idea might generate laudatory acceptance while simultaneously generating rejection or scorn from a more established art world. These examples demonstrate that behaviors that might be normal can nonetheless be deviant because of the negative consequences of disclosure thereby reinforcing the importance of discreet and contextual disclosure of information related to the deviant activities.

#### 4. Political Deviance

The label of deviant may also apply to the expression of political views. The McCarthy Era investigations and prosecutions provide examples of severe repercussions for the expression of minority political views.<sup>93</sup> The actions of the FBI in infiltrating and subverting organizations through CONINTELPRO exemplify how the use of government authority can suppress deviant political views and minority political groups.<sup>94</sup> Moreover, the negative characterization of different political views (such as those expressed by demonstrators at Occupy Wall Street) or religious beliefs (such as Muslim communities) remains today, as does the effort to infiltrate and undermine them.<sup>95</sup> Thus, even behaviors or characteristics that are protected by the Constitution may nonetheless be deviant where they are different and where they result in negative consequences.

##### *D. Deviance and Information Transfer*

In relation to deviance, the manner and extent of disclosure of information is critical because the question of who receives information often determines whether the behavior or characteristic is defined as deviant. Deviant behaviors or characteristics can have both a conjunctive and a disjunctive effect on relationships with others. Among people in the

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93. See, e.g., McCarran Internal Security Act, Pub. L. No. 81-831, 64 Stat. 987 (1950) (requiring, among other actions, registration with the Subversive Activities Control Board).

94. From 1956 to 1971, the Federal Bureau of Investigation engaged in systematic efforts to infiltrate, discredit and disrupt organizations it deemed to be subversive. The Counter Intelligence Program became known as CONINTELPRO. FBI RECORDS: THE VAULT, FED. BUREAU OF INVESTIGATION, <https://vault.fbi.gov/cointel-pro> [<https://perma.cc/M8ML-WTAF>].

95. See, e.g., Sahar Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SECURITY J. 147 (2014) (describing the efforts of the federal government to infiltrate Muslim communities to bolster prosecutions).

same insular group, the behavior or characteristic is the thing that brings people together. But that same characteristic or behavior classifies an individual as deviant in the eyes of other individuals or groups. The definition and application of deviance depends, therefore, on a dynamic relationship between the actor and the observer. The characterization of an individual or a group as deviant matters, and it matters a lot, because the deviant label may trigger negative consequences, such as the use of surveillance and other mechanisms of suppression, intimidation, and social control.

In sum, deviance is highly contextual. The definition of what is deviant can depend on the opinion of experts, it may or may not reflect the common behaviors of the members of the community, and it may extend to political or religious views, which should be protected by the Constitution. The law is relevant to, but not dispositive of, a definition of deviance.

## II. DEVIANCE AND THE NOTHING TO HIDE ARGUMENT

*"I don't mind Verizon turning over records to the government if the government is going to make sure that they try to match up a known terrorist phone with somebody in the United States. I don't think you're talking to the terrorists. I know you're not. I know I'm not. So we don't have anything to worry about."*<sup>96</sup>

Many Americans responded to revelations from Edward Snowden about the NSA's surveillance activities with a collective "so what."<sup>97</sup> A poll in early 2013 found Americans unmoved by the advancing implementation of facial recognition technologies.<sup>98</sup> People who

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96. Sen. Lindsey Graham (R-S.C.) when asked about NSA collection of user phone records. Tal Kopan, *Lindsey Graham 'Glad' NSA Tracking Phones*, POLITICO (June 6, 2013, 9:39 AM), <http://www.politico.com/story/2013/06/lindsey-graham-nsa-tracking-phones-92330.html> [https://perma.cc/DM3X-GKMQ].

97. A poll by the Pew Research Center found that 56 percent of Americans found it "acceptable" for the NSA to obtain secret orders to track phone calls of Americans. Pew Research Center for the People and the Press, *Majority Views NSA Phone Tracking as Acceptable Anti-terror Tactic* (June 10, 2013), <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/> [https://perma.cc/ARE8-DN2P]. Interestingly, the same poll found while that all ages expressed a preference for security over privacy, a higher number of younger respondents expressed a preference for privacy concerns (45% of 18-29 year-olds preferred privacy) as compared with older respondents (28% of 50-64 year-olds preferred privacy). *See also* James B. Rule, *The Price of the Panopticon*, N.Y. TIMES, June 11, 2013, at A25; Adam Nagourney, *In U.S., News of Surveillance Effort Is Met With Some Concern But Little Surprise*, N.Y. TIMES, June 8, 2013, at A12 (discussing how the federal government is monitoring and gathering individuals' phone calls and online activities).

98. A survey by the Center for Data Innovation found only 26% of respondents favored strict limitations on the use of facial recognition technology. Daniel Castro & Michael McLaughlin,



responded in this way may have bought in to the nothing to hide argument.<sup>99</sup> The weak version of the argument holds that an individual has nothing to fear from increased surveillance and gathering of information if the individual has done nothing wrong, and thus has nothing to hide. A stronger form of the nothing to hide argument holds that the individuals in a society should be willing to trade control over their individual information in return for increased security through the elimination or drastic reduction of the risk of a future harm (such as a terrorist attack).<sup>100</sup>

The stronger version of the nothing to hide argument is powerful for several reasons. It pits a low-impact, individual, and incremental risk of harm—the loss of privacy—against a high-impact, collective, and immediate risk of harm—the terrorist attack.<sup>101</sup> The argument includes critical and hidden assumptions: that the security threat is real and imminent and preventable, and that the privacy-reducing measures will prevent the security threat.<sup>102</sup> The argument also assumes the security

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*Survey: Few Americans Want Government to Limit Use of Facial Recognition Technology, Particularly for Public Safety or Airport Screening*, CENT. FOR DATA INNOVATION (Jan. 7, 2019), <https://www.datainnovation.org/2019/01/survey-few-americans-want-government-to-limit-use-of-facial-recognition-technology-particularly-for-public-safety-or-airport-screening/> [https://perma.cc/MTU5-JUCT].

99. DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY (2011) [hereinafter SOLOVE, FALSE TRADEOFF]; Daniel J. Solove, “*I’ve Got Nothing to Hide*” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745, 748–53 (2007) [hereinafter Solove, *Misunderstandings of Privacy*].

100. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 748–53.

101. *Id.*

102. In this way the argument is similar to the “ticking time bomb” scenario used to defend the use of torture. Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE WESTERN RES. J. INT’L L. 231, 234–35 (2005); David Luban, *Liberalism, Torture, and the Ticking Bomb*, in INTERVENTION, TERRORISM AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY 249, 249–62 (Steven Lee ed., 2007); *see, e.g.*, Steve Benen, *What Kind of Hypothetical Is That?*, THE WASH. MONTHLY, January 16, 2009, [http://www.washingtonmonthly.com/archives/individual/2009\\_01/016465.php](http://www.washingtonmonthly.com/archives/individual/2009_01/016465.php) [https://perma.cc/QB8Y-N4F6] (recounting the exchange between Eric Holder and Sen. John Cornyn over the ticking time bomb scenario). Though philosophers had put the argument to rest years ago, like a pesky garden weed, the “ticking time bomb” scenario reappeared recently. Conor Friedersdorf, *Torture, Ticking Time Bombs, and Waterboarding Americans*, THE ATLANTIC (Apr. 30, 2014), <http://www.theatlantic.com/politics/archive/2014/04/the-tortured-logic-of-the-ticking-time-bomb-scenario/361345/> [https://perma.cc/M88G-NHX4]; Andrew McCarthy, *Sarah Palin on Baptism, Waterboarding . . . and ‘Torture’*, NAT’L REV. (Apr. 28, 2014), <http://www.nationalreview.com/corner/376733/sarah-palin-baptism-waterboarding-and-torture-andrew-c-mccarthy> [https://perma.cc/ZHL8-BGUA]. The “ticking time bomb” scenario justifies torture on a utilitarian basis by making at least five and up to ten assumptions that could never be drawn in reality. Like the ticking time bomb scenario, the security for privacy scenario assumes as certain many questions that would never be known in reality. In shorthand, the justification for the trade of privacy for security is the

threat will occur unless the privacy-reducing measures are implemented. These hidden assumptions shift the burden to those questioning the measures, who must prove that no dramatic security breach would occur if privacy were left intact. In addition, the argument presumes that individuals in a society should not have a right to hide information, especially where that information may be evidence of the individual's deviance.

As explained below, the nothing to hide argument has been effectively rebutted. One of the central problems with the argument concerns the framing of the issue: when a vague interest in privacy is weighed against a concrete harm of a terrorist action, it is very difficult for privacy to prevail.<sup>103</sup> Privacy debates center around the justification (or lack thereof) for the capture, disclosure, or dissemination of information. When the concept of privacy is fully explained, however, the harms associated with a loss of privacy become more apparent, more immediate, and more tangible. This robust understanding of privacy can be explained by looking at deviance. If there were something to hide, what would it be? Most likely, it would be something deviant.

#### *A. The Nothing to Hide Argument*

The nothing to hide argument is a frequent and powerful response when privacy concerns are implicated by the release and distribution of information, raising issues about who gives consent and who has control over sensitive personal information. Professor Daniel Solove succinctly described the nothing to hide argument:

The argument that no privacy problem exists if a person has nothing to hide is frequently made in connection with many privacy issues. When the government engages in surveillance, many people believe that there is no threat to privacy unless the government uncovers unlawful activity, in which case a person has no legitimate justification to claim that it remain private. . . . In its most compelling form, it is an argument

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assurance that the trade will work—a great unknown. While interesting and perhaps worthy of a lengthier discussion, this argument is not the one I follow in this paper.

103. The framing heuristic describes a common error in thinking, where people change their risk tolerance when a decision is framed in terms of a loss rather than a gain. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263–64 (1979) (analyzing decision making through probability and certainty by an alternative model called the prospect theory); Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 296, 297–98 (1992). See also Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 *N.W. U. L. REV.* 1115, 1116 (2003). See generally DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 13, 20–24 (2012) (discussing how the mind incorporates heuristic thinking); MALCOLM GLADWELL, *BLINK* 14–16, 23 (2005) (discussing how instincts compete with other interests and emotions).

that the privacy interest is generally minimal to trivial, thus making the balance against security concerns a foreordained victory for security.<sup>104</sup>

Solove notes two versions of the nothing to hide argument: the weak and the strong. The weak version can often be refuted with a few questions into an individual's personal preferences or medical history.<sup>105</sup>

The strong version, however, is more challenging. The strong version includes an analysis of the type of data being collected, the entities to whom the information is revealed (in some cases the entity is a computer program and no human eye sees the information), and the probability that the information would be shared with someone outside of those permitted access to the information.<sup>106</sup> In addition, the strong version of the argument includes a comparison of the value of the privacy interest against the interest in security. Solove summarizes the strong version of the nothing to hide argument as follows:

NSA surveillance, data mining, or other government information-gathering programs will result in the disclosure of particular pieces of information to a few government officials, or perhaps only to government computers. This very limited disclosure of the particular information involved is not likely to be threatening to the privacy of law-abiding citizens. Only those who are engaged in illegal activities have a reason to hide this information. Although there may be some cases in which the information might be sensitive or embarrassing to law-abiding citizens, the limited disclosure lessens the threat to privacy. Moreover, the security interest in detecting, investigating, and preventing terrorist attacks is very high and outweighs whatever minimal<sup>107</sup> or moderate privacy interests law-abiding citizens may have in these particular pieces of information.<sup>108</sup>

Solove admits that “[u]nder such a balancing scheme, it is quite difficult for privacy to prevail.”<sup>109</sup>

### *B. Solove's Rebuttal of the Nothing to Hide Argument*

Solove's elegant defense of privacy begins with a clarification of the

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104. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 746–47.

105. Solove quotes David Flaherty: “There is no sentient human being in the Western world who has little or no regard for his or her personal privacy; those who would attempt such claims cannot withstand even a few minutes’ questioning about intimate aspects of their lives without capitulating to the intrusiveness of certain subject matters.” *Id.* at 751 (quoting David H. Flaherty, *Visions of Privacy: Past, Present, and Future*, in *VISIONS OF PRIVACY: POLICY CHOICES FOR THE DIGITAL AGE* 19, 31 (Colin J. Bennett & Rebecca Grant eds., 1999)).

106. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 751–53.

107. *Id.* at 753.

108. *Id.*

109. *Id.*

term privacy.<sup>110</sup> Privacy, according to Solove, should be understood as a “set of family resemblances,” or as a “plurality of different things that do not share one element in common but . . . bear a resemblance to each other.”<sup>111</sup> According to Solove,

[p]rivacy, then, is not the trumpeting of the individual against society’s interests, but the protection of the individual based on society’s own norms and values. Privacy is not simply a way to extricate individuals from social control, as it is itself a form of social control that emerges from a society’s norms. It is not an external restraint on society, but is in fact an internal dimension of society. Therefore, privacy has a social value. Even when it protects the individual, it does so for the sake of society. It thus should not be weighed as an individual right against the greater social good.<sup>112</sup>

Solove argues that “privacy involves protecting against a plurality of different harms or problems” and therefore, “the value of privacy is different depending upon which particular problem or harm is being protected.”<sup>113</sup> Further, Solove’s “Taxonomy of Privacy” distinguishes different types of interests covered by the concept of privacy, some related to the acquisition of information, and some related to the dissemination of information.<sup>114</sup>

In sum, Solove rebuts the nothing to hide argument with two key moves. First, he exposes the framing effect. Second, he adopts an expansive definition of privacy. The nothing to hide argument derives its power from framing the issue as limited to the simple disclosure of personal information.<sup>115</sup> In contrast, Solove casts a much wider net, arguing that the problem involves much more than the potential effect on

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110. *Id.* at 755. See JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 56 (1992) (explaining the concept of privacy as intimate information, access and decisions). See also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (discussing privacy as the “right to be left alone”); Daniel Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1095–99 (2002) [hereinafter Solove, *Conceptualizing Privacy*] (examining the different theories of privacy, including the “right to be left alone” and “secrecy”).

111. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 755; see also Solove, *Conceptualizing Privacy*, *supra* note 110, at 1099–1124 (exploring the abstract theories of privacy and conceptualizing these theories to help demonstrate their complexities and limits).

112. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 763.

113. *Id.*

114. Solove’s categories are: Information Collection, Information Processing, Information Dissemination, and Invasion. Each category has a number of related infractions. Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 489 (2006) [hereinafter Solove, *Taxonomy of Privacy*]; Solove, *Misunderstandings of Privacy*, *supra* note 99, at 757–59; see also Solove, *Conceptualizing Privacy*, *supra* note 110, at 1095–99 (explaining the methods in which we conceptualize privacy).

115. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 767.

an individual. “The key misunderstanding is that the nothing to hide argument views privacy in a particular way—as a form of secrecy, as the right to hide things.”<sup>116</sup> Privacy violations—of the sort Solove describes—do not result in catastrophic and sudden injuries.<sup>117</sup> Rather, the harm emerges gradually. Solove concludes that “the balancing of privacy interests against security interests takes place in a manner that severely shortchanges the privacy interest while inflating the security interests.”<sup>118</sup>

### C. *Hidden Privacy Concerns*

Despite the valiant efforts of Professor Solove, the nothing to hide argument remains a common refrain. Part of the problem, as Solove explained, is that privacy concerns remain hidden, and it is difficult to protect or even define something that is obscured. In recent cases, courts have struggled to define and protect hidden privacy concerns.

#### 1. Nothing to Hide in *Carpenter v. United States*

Evidence of the nothing to hide argument can be seen in the interplay between the majority opinion and the dissenting opinions in *Carpenter v. United States*.<sup>119</sup> Specifically, the dissenting opinions of Justice Kennedy and Justice Gorsuch reflected the gist of the nothing to hide argument. The majority opinion of Justice Roberts rebutted the dissenters by reliance on contextual privacy.

In his dissent, Justice Kennedy stated that “[a] person’s movements are not particularly private,”<sup>120</sup> and contended that “[m]illions of Americans share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.”<sup>121</sup> Justice Gorsuch asked why “someone’s location when using a cell phone” is worthy of protection.<sup>122</sup> Both Justice Kennedy and Justice Gorsuch argued that this type of information is not sufficiently private to meet the “reasonable expectation of privacy” test.<sup>123</sup>

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116. *Id.* at 767–68.

117. *Id.* at 770.

118. *Id.* at 772.

119. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

120. *Id.* at 2242 (Kennedy, J., dissenting).

121. *Id.*

122. *Id.* at 2262 (Gorsuch, J., dissenting).

123. *See generally id.* at 2242–46 (Kennedy, J., dissenting); *id.* at 2261–72 (Gorsuch, J., dissenting).

The arguments of the respective Justices are slightly different. Justice Kennedy relied on the third-party doctrine articulated in *Miller v. United States*<sup>124</sup> and *Smith v. Maryland*.<sup>125</sup> He argued that the cell site location information at issue in *Carpenter* was less sensitive than the financial records and telephone records disclosed in *Miller* and *Smith*.<sup>126</sup> Since there was no search in the disclosure of financial and telephone records, there could be no search in the disclosure of CSLI.

Justice Gorsuch, on the other hand, presented a hypothetical case for overruling the precedents of *Smith* and *Miller*.<sup>127</sup> Justice Gorsuch explained the lack of privacy under the third-party doctrine:

Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges—me included—as pretty unlikely. . . . People often do reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private.<sup>128</sup>

Thus, Justice Gorsuch agreed that the transfer of sensitive information *does* matter and that confidential information *should* be kept private.

The majority opinion in *Carpenter* responded to the concerns articulated by the dissenters. Justice Roberts explained that the cell site location information must be examined contextually. It's not about where a person was while making a single phone call; rather, the CSLI provided a "detailed chronicle" that exposed "privacy concerns."<sup>129</sup>

Justice Gorsuch wonders why "someone's location when using a phone" is sensitive, and Justice Kennedy assumes that a person's discrete movements are "not particularly private." Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle

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124. *United States v. Miller*, 425 U.S. 435, 442–44 (1976) (finding no reasonable expectation of privacy in banking records voluntarily disclosed to financial institutions).

125. *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979) (finding no expectation of privacy in phone numbers dialed because the information was transmitted voluntarily to the telephone company).

126. *Carpenter*, 138 S. Ct. at 2242 (Kennedy, J., dissenting).

127. *Carpenter*, 138 S. Ct. at 2261–63, 2265–66 (Gorsuch, J., dissenting).

128. *Carpenter*, 138 S. Ct. at 2263–64 (Gorsuch, J., dissenting). It is unclear whether Justice Gorsuch knew at the time he wrote the opinion that, in fact, the government had searched private commercial DNA databases without consent or a warrant or probable cause. *See generally* Haag, *supra* note 15.

129. *Carpenter*, 138 S. Ct. at 2220.

implicates privacy concerns far beyond those considered in *Smith* and *Miller*.<sup>130</sup>

The pervasive quality and sheer quantity of CSLI—a person’s location “compiled . . . every moment, over several years”—transforms a simple fact of where a person was at a specific time into an unreasonable intrusion into private life.<sup>131</sup>

The initial attractiveness of the nothing to hide argument stems from a faulty proposition that privacy is about hiding things, and more specifically, that privacy is concerned with hiding wrong things. The majority opinion recognizes that privacy concerns and the protections of the Fourth Amendment are broader than simply protecting “persons, houses, papers and effects.”<sup>132</sup> By examining the context of the disclosure of information, the *Carpenter* majority recognized the fallacy of the nothing to hide argument.

## 2. Consent and Disclosure in *Rosenbach v. Six Flags*

Two recent decisions expanded the notion of a privacy interest in “mere” disclosure. In *Rosenbach v. Six Flags Entertainment Corporation*, the Illinois Supreme Court upheld the denial of defendant’s motion to dismiss a claim under the Illinois Biometric Information Protection Act (BIPA).<sup>133</sup> In a parallel class action case, *Patel v. Facebook, Inc.*,<sup>134</sup> the District Court for the Northern District of California decided a similar motion under the BIPA.<sup>135</sup>

The *Rosenbach* court explained the harm as follows:

The act vests in individuals the right to control their biometric information by requiring notice before collection and giving them the

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130. *Id.* at 2220 (citations omitted).

131. *Id.*

132. *Id.* Justice Roberts notes the connection to the First Amendment’s freedom of association: because the CSLI would reveal a person’s location, it would also reveal the people and organizations with whom a person chose to associate. Whether *Carpenter* could be read as a First Amendment opinion (especially given the prior jurisprudence of Justice Roberts) is beyond the scope of this article.

133. *See generally* Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/1–99 (2008); *Rosenbach v. Six Flags Entm’t Corp.*, No. 123186, 2019 WL 323902, at \*8 (Ill. Jan. 25, 2019).

134. *See generally* *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948 (N.D. Cal. 2018), *aff’d*, No. 18-15982, 2019 WL 3727424 (9th Cir. Aug. 8, 2019) (regarding a consolidated class action). Further, because *Patel* was litigated in federal court, under the Federal Rules of Civil Procedure, a slightly different standard applies. As noted earlier, Article III standing requirements and the precedent of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) apply to *Patel*, but not to *Rosenbach*. *See generally supra* note 2. Though worthy of further development, that issue is outside the scope of this article.

135. The Ninth Circuit recently affirmed the Northern District of California’s *Patel* decision. *See generally Patel*, 2019 WL 3727424.

power to say no by withholding consent. These procedural protections “are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual’s unique biometric identifiers—identifiers that cannot be changed if compromised or misused.” When a private entity fails to adhere to the statutory procedure, as defendants are alleged to have done here, “the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.” This is no mere technicality. The injury is real and significant.<sup>136</sup>

By recognizing the harm as the mere disclosure of biometric information, the courts engage with a contextual concept of privacy. Further, by recognizing the importance of consent—the very harm envisioned by the statute—the courts signal that context is important. The type of information at issue is not a mere phone number, or even a social security number, but rather the core immutable identifying features of an individual.<sup>137</sup>

#### *D. Deviance and Contextual Privacy*

Returning to deviance and the nothing to hide argument, a discussion of deviance adds to the nothing to hide debate in two respects. First, the contextual definition of deviance helps to explain the framing problem. Second, the contextual definition of deviance mirrors the contextual definition of privacy. As to the framing problem, the nothing to hide argument assumes a zero-sum outcome between individual privacy and collective security. The assumption encapsulates one of the central tensions in rights discourse—the tension between an individual and a collective.<sup>138</sup> Even if we were to accept the framing of the issue as individual privacy versus collective security, including the value of deviance changes the equation. The benefits of individual privacy have been undervalued because traditional views of privacy do not account for the value to individuals in controlling the release of deviant information.

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136. *Rosenbach*, 2019 WL 323902, at \*6 (citations omitted) (citing *Patel*, 290 F. Supp. at 953–54).

137. Biometric identifiers work by noting small and measurable physical differences among individuals.

138. See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 187–88, 196 (1999) (discussing the development of tension between individual privacy and governmental forces taking away privacy). See also SOLOVE, *FALSE TRADEOFF*, *supra* note 99, at 48–49 (discussing the conflict between the right of privacy to an individual and the good of society). The central tensions are: the tension between individuals, the tension between an individual and a collective, the tension between collectives, and the tension between contextual fairness and universal application. The description of these tensions deserves a more detailed analysis; however, that analysis is beyond the scope of this paper.



Individuals gain value in self-preservation and self-promotion through a nuanced and contextual disclosure of personal information. Likewise, the value of collective security has been overinflated. Calculations of collective security omit the costs to individuals of revealing deviant information, and the cost to the collective in limiting the range of human expression by suppressing the outliers.

The concept of deviance also enriches the discussion of privacy and security because the contextual definition of deviance mirrors the contextual definition of privacy. Like deviance, privacy is relative and constructed. The concept of deviance examines the behaviors, beliefs, or characteristics of the principal, as well as the effect of those behaviors, beliefs, or characteristics on others. It is the negative reaction of the receiver of the information that defines deviance. Likewise, in privacy, the audience—and the likely reaction of the audience—is what makes something worth protecting as private. Further, just as there is not a single definition of deviance, there is no single definition for privacy.

### III. PRIVACY, SURVEILLANCE, AND THE VALUE OF DEVIANCE

#### A. *Concepts of Privacy*

The concept of privacy is better understood as a range of ideas and concepts; each deserving a different treatment. In *Privacy and Freedom*, Alan Westin defined privacy as “the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>139</sup> William Prosser described common law privacy in tort law, which recognized “public disclosure of embarrassing private facts” and “intrusion . . . into private affairs.”<sup>140</sup> Louis Brandeis and Samuel Warren defined privacy as protecting “the private life, habits, acts, and relations of an individual.”<sup>141</sup>

Several scholars have proposed different schemes using privacy as a means of protecting identity. Notably, Professor Helen Nissenbaum describes privacy as “Contextual Integrity,” where determinations about privacy require an analysis of appropriateness and distribution.<sup>142</sup>

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139. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

140. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

141. Warren & Brandeis, *supra* note 110, at 193, 216.

142. *See generally* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 136–143 (2004) [hereinafter Nissenbaum, *Contextual Integrity*]; Helen Nissenbaum, *A Contextual Approach to Privacy Online*, DAEDALUS no. 4, Fall 2011, at 32–43, [https://www.amacad.org/sites/default/files/daedalus/downloads/11\\_fall\\_nissenbaum.pdf](https://www.amacad.org/sites/default/files/daedalus/downloads/11_fall_nissenbaum.pdf) [https://perma.cc/5KXD-YUNZ] [hereinafter Nissenbaum, *Privacy Online*].

Appropriateness concerns “appropriating information from one situation and inserting it into another,” while distribution, or “flow,” examines norms of transfer, including confidentiality, discretion, choice, and need.<sup>143</sup> Nissenbaum’s model builds on the work of James Rachels, who focused on relationships as a key to privacy. “[T]he sort of relationship that people have to one another involves a conception of how it is appropriate for them to behave with each other, and what is more, a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have.”<sup>144</sup>

Some scholars see two different aspects of privacy—decisional or autonomous privacy, which concerns intimate decisions, and a separate right to be left alone. Professor Julie Inness describes privacy as protecting “intimacy—privacy’s content covers intimate information, access, and decisions.”<sup>145</sup> Similarly, Professor Sherry Colb separates substantive privacy issues of contraception, familial decisions, and intimate relationships from the procedural privacy of the Fourth Amendment.<sup>146</sup> Some have described privacy as a fundamental aspect of humanity.<sup>147</sup> Others disagree with the concept of privacy as a right, holding instead that privacy should be viewed in context with other interests in line with the general good of society.<sup>148</sup> Still others have favored defining privacy-type interests as a form of personal security.<sup>149</sup>

The challenge is to avoid the temptation to use a simplistic definition of privacy when one does not exist. Privacy is a layered, dynamic, and contextual concept. Because it is difficult to define, privacy is also difficult to enforce. Frequently, privacy concerns arise when privacy is breached through surveillance technologies that continue to flourish

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143. Nissenbaum, *Contextual Integrity*, *supra* note 142, at 136–43.

144. JAMES RACHELS, *Why Privacy is Important*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 290, 294 (Ferdinand D. Schoeman ed., 1984).

145. INNESS, *supra* note 110, at 56.

146. Sherry Colb, *The Qualitative Dimensions of the Fourth Amendment’s “Reasonableness”*, 98 COLUM. L. REV. 1642, 1642–43 (1998) (describing the liberty interest in engaging in certain activities or promoting certain status).

147. Charles Fried, for example, viewed privacy in Kantian terms such that it must be recognized without regard for the maximization of welfare of the community. Charles Fried, *Privacy*, 77 YALE L.J. 475, 478 (1968); *see* Solove, *Misunderstandings of Privacy*, *supra* note 99, at 760 (discussing the social value of privacy as an individual right).

148. *See, e.g.*, ETZIONI, *supra* note 138; *see also* Solove, *Misunderstandings of Privacy*, *supra* note 99, at 761 (referring to Amitai Ezioni); SOLOVE, *FALSE TRADEOFF*, *supra* note 100, at 48–49 (referring to Amitai Ezioni’s theories on privacy).

149. *See* Casey, *supra* note 4, at 1027–31 (advocating for interpretation of the Fourth Amendment as protecting a personal right to be secure, rather than a “reasonable expectation of privacy”).

without regard for the broader implications of their impact on both individuals and on society.

### B. Predictive and Regulatory Surveillance

There are two types of surveillance, distinguished by purpose and implementation: the first is what I call predictive surveillance, and the second, I will refer to as regulatory surveillance.<sup>150</sup> Predictive surveillance is designed to gather information for the purpose of predicting future behavior based on observations of their past actions. This type of surveillance includes gathering information to predict future crimes, dangerousness, the likelihood of returning to a court hearing (pre-trial release and bail requirements), and the likelihood of recidivism.<sup>151</sup> Apart from a criminal context, predictive surveillance describes as the gathering of information about desires and preferences in order to obtain a commercial advantage over the subject or to predict voting patterns.<sup>152</sup> In law enforcement, this type of surveillance can be a valuable tool to

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150. Other scholars have defined categories of surveillance. For example, Deven Desai notes the distinction between prospective surveillance, which is highly regulated, and retrospective surveillance, which is almost limitless. See generally Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579 (2014).

151. See generally Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. UNIV. L. REV. 1115 (2016). Professor Ferguson describes the prevalence and expansion of predictive policing, “policing strategies that promise the holy grail of policing—stopping crime before it happens.” *Id.* at 1112–16. Ferguson describes the application of predictive technologies in several aspects of law enforcement, including pre-trial risk assessment models, predictions of future dangerousness, post-trial sentencing to forecast recidivism, and likely probation violations. *Id.* at 1119. The information used to make these predictions can be as varied as locations of past crimes, to social media postings. *Id.* at 1113, 1118 n.8, 1126, 1140. For our purposes, it is important to note that the gathering of information for the purpose of predictive policing would constitute what I call predictive surveillance.

152. See, e.g., Gurbaksh Chahal, *Election 2016: Marriage of Big Data, Social Data will Determine the Next President*, WIRED (May 2013), <https://www.wired.com/insights/2013/05/election-2016-marriage-of-big-data-social-data-will-determine-the-next-president/> [<https://perma.cc/3NCA-XMV5>]; Issie Lapowsky, *What Did Cambridge Analytica Really Do For Trump’s Campaign?*, WIRED (Oct. 26, 2017, 6:26 PM), <https://www.wired.com/story/what-did-cambridge-analytica-really-do-for-trumps-campaign/> [<https://perma.cc/W4RZ-CEUL>]; Nicole Kobie, *This Algorithm Knows How You Will Vote Based on the Car You Drive*, WIRED (Dec. 2, 2017), <https://www.wired.co.uk/article/car-ownership-vote-democrat-republican-algorithm-stanford> [<https://perma.cc/5MB2-R97W>]. On price discrimination, see Neil Howe, *A Special Price Just for You*, FORBES (Nov. 17, 2017), <https://www.forbes.com/sites/neilhowe/2017/11/17/a-special-price-just-for-you/#66a513e690b3> [<https://perma.cc/Y3PN-HFTV>] (describing different prices offered to consumers based on specific data points, such as origination zip code). See also Tobie Stanger, *Play the Dynamic Pricing Game to Win*, CONSUMER REPORTS (Oct. 26, 2017), <https://www.consumerreports.org/prices-price-comparison/play-the-dynamic-pricing-game-to-win-holiday-shopping/> [<https://perma.cc/7F6B-HEML>].

gather evidence of criminal behavior. In the national security context, this type of surveillance can be used to identify and track threats or to trace threats to their sources in order to identify additional threats. In commercial applications, the “holy grail” of information gathering would be a system of perfect price discrimination, such that the producer would charge each consumer exactly the maximum price that each consumer would pay.<sup>153</sup>

Predictive surveillance must remain hidden or concealed from the target of surveillance: the surveillance is covert. The subject can be observed in a natural state, and the decision-making process and the factors that influence the subject’s behavior can be recorded for use in the future. Predictive surveillance functions best in private spaces where the subject feels unconstrained by social pressures to conform. Where the subject is aware of the surveillance, he may change his behavior or his decision-making process in order to achieve an advantage over the watcher. Examples of this type of surveillance include most commercial applications, and some aspects of national security surveillance—those designed to identify and predict threats.<sup>154</sup>

In contrast, what I refer to as regulatory surveillance is designed to regulate conduct, relying on the assumption that people will modify their behavior when they are being watched. The goal of regulatory surveillance is to deter certain types of conduct. Therefore, one of the key characteristics of regulatory surveillance is that the subject must be aware of the surveillance (or the possibility of surveillance) in order to achieve the desired effect. This type of surveillance functions best where the surveillance is obvious.

Systems of regulatory surveillance often are deployed in public spaces where we are most concerned about compliance with standards of behavior. Examples of regulatory surveillance include closed circuit cameras on streets, security cameras, workplace monitoring systems, the use of metal detectors at schools, and the TSA apparatus at airports.

Over time, the two systems overlap. When systems or methods of

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153. “[A] retailer’s ultimate goal is to increase sales and profit . . . . The key to successful dynamic pricing is knowing which prices to change, when and by how much.” IBM Commerce White Paper, *Attracting and Retaining Customers with Insights-Driven Dynamic Pricing*, IBM CORPORATION (2016), <https://www.ibm.com/downloads/cas/D2PPJYGV> [<https://perma.cc/4LAJ-4B9V>].

154. See generally Daniel R. Coats, *Statement for the Record: Worldwide Threat Assessment of the U.S. Intelligence Community*, SENATE SELECT COMM. ON INTELLIGENCE (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf> [<https://perma.cc/DC8V-B39F>].

predictive surveillance become well-known, they transform into systems of regulatory surveillance. Thus, even when a covert, predictive system of surveillance becomes known, it does not lose its value. Although a system of predictive surveillance may lose efficacy in terms of catching the subject unaware, it can still function as a mechanism of behavioral control. Assuming that nothing remains a secret forever, all predictive systems of surveillance eventually become systems of regulatory surveillance.

In relation to deviance, predictive surveillance can help define difference, which is the starting point for defining deviance.<sup>155</sup> Regulatory surveillance, on the other hand, attempts to suppress deviant behavior through deterrence by increasing the subject's estimate of the probability of disclosure.

Our hypothetical case of Nic jaywalking includes examples of predictive and regulatory surveillance. If the closed-circuit cameras were hidden the surveillance would be predictive, with a goal of catching Nic and Andi. But the cameras were placed in a conspicuous location with signs identifying their presence. Thus, the surveillance was regulatory—designed to modify behavior by informing Nic (and others) of a higher probability of disclosure and deterring him from jaywalking. Note that regulatory surveillance depends on the subject's belief that surveillance is working. For that reason, a dummy camera can be an effective tool for regulatory surveillance because the subject is deterred by the belief he is under surveillance.

The idea of using a subject's belief that he is being watched as a mechanism for controlling or modifying behavior is not new. Jeremy Bentham employed a regulatory surveillance system in his description of the Panopticon, where prisoners believed they were under constant surveillance.<sup>156</sup> So, too, the idea of controlling deviant behavior (whether through regulatory surveillance or other means) is not new. Much of the sociological literature on deviance connects to a theme of social

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155. Surveillance technologies are designed to capture data from an environment. Once the data has been collected, it must be organized and analyzed. In predictive analytics, a software program or algorithm will identify patterns in the data. The patterns will detect correlations and connections between data points, often by distinguishing where one data point differs from another data point. Thus, the mathematical concept of deviation is an important step in the transformation of information to actionable intelligence.

156. *See generally* JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* (John Bowring 1843); *see also*, Thomas McMullan, *What Does the Panopticon Mean in the Age of Digital Surveillance?*, *THE GUARDIAN* (July 23, 2015), <https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham> [<https://perma.cc/4TBX-K6RT>] (summarizing Bentham's theory of Panopticon).

control.<sup>157</sup> But the question of whether we can suppress deviance is different from whether we *should* suppress deviance.

### C. Humanist Value of Deviance

There may be an economic value in deviance—people may find economic value in the very behaviors and characteristics that make them deviant. For example, Nic found economic benefit in jaywalking. Additionally, there may be a social value of deviance—people may form valued relationships based on shared qualities and traits that may be deviant. Nic and Andi may find friendship based on their jaywalking. But there is also a humanist value of deviance. Separate and apart from the value that the individual who expresses the deviant trait might have in controlling information related to that trait, society has a stake in limiting the suppression of deviance. The things that one may feel the need to hide—deviant characteristics, traits, beliefs or behavior—turn out to be the same things that define each person as an individual. We are not individuals by virtue of our similarities, but rather, because of our differences—and the fact that no two people (even genetically identical twins) are the same. Each person has defining features that make a person an individual. Deviance, at the core, is difference, and there is benefit to all in the preservation and propagation of different beliefs, behavior, and characteristics.<sup>158</sup> By expressing value for deviance we support the notion of individuality and our human capacity for self-determination.<sup>159</sup>

As noted from our earlier discussion, deviance applies to any difference that can be judged and that creates the possibility of harm to the subject. The harm could be in the form of social castigation or in formal punishment. Importantly, there is no fixed definition of deviant behavior. Deviance could describe voluntary choices or immutable characteristics over which the actor has no control. Critically, disclosure

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157. See generally DOWNES ET AL., *supra* note 30.

158. Professor Julie Cohen eloquently states the argument for privacy: “Privacy shelters dynamic emergent subjectivity from the efforts of commercial actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.” Julie Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013). Professor Cohen further explains that “[p]rivacy therefore is an indispensable structural feature of liberal democratic political systems.” *Id.* at 1905. She cautions that “a society that values innovation ignores privacy at its peril, for privacy also shelters the processes of play and experimentation from which innovation emerges.” *Id.* at 1905–06.

159. *Id.* See also JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE AND THE PLAY OF EVERYDAY PRACTICE 16–20 (2012) (discussing the history of individualism and theories of privacy).

of information about deviance could be advantageous or disadvantageous, depending on the context. Release of information to one group could create positive social interactions, while disclosure to another group could result in negative social consequences.

The disclosure of information relates specifically to the freedom of association and the free expression of ideas. Solove suggests that

[t]he value of protecting against chilling effects is not measured simply by focusing on the particular individuals who are deterred from exercising their rights. Chilling effects harm society because, among other things, they reduce the range of viewpoints expressed and the degree of freedom with which to engage in political activity.<sup>160</sup>

There is another more basic facet of deviance that concerns a fundamental aspect of human identity.<sup>161</sup> Personal identity is comprised of the aggregation of personal deviance—the manner in which each person differs from other people and from the norm. Each person has the ability to form an identity, which may require the amplification of certain characteristics and the suppression of other preferences or characteristics. We are defined by our differences and the aspects of our identity that make each person unique.

Suppression of deviance, then, results in a suppression of the range of human potential. By its definition, deviance concerns the fringes or outliers within a society or group. But as noted above, judgments about which types of behaviors, beliefs, or characteristics should be suppressed are highly subjective, and these judgments change over time.

#### *D. The Value of Deviance in Exposing Hidden Risks*

There is a danger in the collection and housing of deep wells of personal information by someone other than the owner of the information. Professor Solove notes the distinction between the Orwellian harms of surveillance, such as inhibition and social control, and the “suffocating powerlessness and vulnerability” imposed by a Kafkaesque bureaucratic state.<sup>162</sup> Solove finds Kafka’s world far more

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160. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 765; *see also* Daniel Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1117–37 (2002) (discussing lack of protection and ease of governmental access to information from third-party collectors); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 154–59 (2007) (discussing chilling effect of surveillance). *But see supra* note 10 (discussing the stultification thesis); Sklansky, *supra* note 19, at 1092–94 (discussing the effects of surveillance).

161. Deviance is not a pejorative term. It simply implies difference, although a difference that could have negative social consequences.

162. Solove, *Misunderstandings of Privacy*, *supra* note 99, at 766.

nebulous—a “bureaucracy with inscrutable purposes that uses people’s information to make important decisions about them, but denies the people the ability to participate in how their information is used.”<sup>163</sup>

The increased use of surveillance is a troubling, but perhaps unavoidable, trend. The preservation of vast quantities of data in the hands of governments and other entities, along with the capacity to confirm prejudices of the researcher, heightens the likelihood that data could be used against the interests of the subject of the surveillance.<sup>164</sup> Moreover, advances in search technology provide increased opportunities and temptations to use a person’s information against him or her. Advanced search tools can examine data for indications of emotional states, such that one could, for example, search a trove of email for indications of anger.<sup>165</sup>

A recent story about the digitization of library collections highlights the danger of huge data and advanced search technologies. Benjamin Moser, the curator of the library from Susan Sontag, remarked on the capacity to search the collection, which included thousands of emails and other electronic communications. Moser noted the power transferred to the holder of vast quantities of information, and the ability of search engines to find evidence of emotion. “Going through these things requires even more tact. There is a real temptation to go in there and say, ‘Gosh, this was a really angry woman.’ It makes it very easy to reduce people[.]”<sup>166</sup> He further noted that “you can put your prejudices into the system and see them reflected instantly due to the sheer amount of things

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163. *Id.* at 756–57; DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 8–9 (2004) (discussing Kafka’s depiction of bureaucracy).

164. Obvious examples of the use of surveillance against the subject of surveillance include the use of wire taps and other forms of electronic surveillance against criminal suspects and the use of consumer data for price discrimination. *See supra* notes 148–152 and accompanying text.

165. Researchers reported on the success of a computer system in recognizing true emotional states of people. Marian Bartlett et al., *Automatic Decoding of Deceptive Pain Expressions*, *CURRENT BIOLOGY* (Mar. 31, 2014), <http://www.cell.com/current-biology/abstract/S0960-9822%2814%2900147-X> [<https://perma.cc/SPU8-V7D9>]; Patricia Donovan, *Ouch! Computer System Can Spot Real or Faked Expressions of Pain Better Than People*, *UB NOW REPORTER S.U.N.Y. BUFFALO* (Apr. 7, 2014), [http://www.buffalo.edu/ubnow/stories/2014/April/fake\\_pain.html](http://www.buffalo.edu/ubnow/stories/2014/April/fake_pain.html) [<https://perma.cc/3YVB-ZDXX>]. Further, advances in facial recognition software enable analysis of a person’s level of understanding. *See generally* Will Knight, *Facial Analysis Software Spots Struggling Students*, *M.I.T. TECH. REV.* (July 1, 2013), <http://www.technologyreview.com/news/516606/facial-analysis-software-spots-struggling-students/> [<https://perma.cc/RMJ4-CDYY>].

166. All Tech Considered, *The New Age: Leaving Behind Everything, Or Nothing At All*, *Interview with U.C.L.A. librarian Benjamin Moser*, *NAT’L PUB. RADIO* (Apr. 9, 2014), <http://www.npr.org/blogs/alltechconsidered/2014/04/09/300614977/the-new-age-leaving-behind-everything-or-nothing-at-all> [<https://perma.cc/G5M4-HJK3>].



people say digitally.”<sup>167</sup> Given enough information, it would be possible to produce evidence of anything.

The danger of the increased levels of data collection and retention lies in the ability to find anything. But when the usual security versus privacy dichotomy is presented, these risks are not evaluated. In particular, the increased use of regulatory surveillance is flawed on two premises. First, the benefit of regulatory surveillance is overstated because instruments of social control may not effectively change behavior. In fact, increased measures of social control could result in escalation of undesired deviant behavior.<sup>168</sup> Second, the regulatory surveillance increases the risk of indiscriminate disclosure. By indiscriminate disclosure, I mean disclosure that is not controlled by the owner of the information for self-defined purposes of preservation or advancement.

Does increased social control reduce deviance? The logic of this proposition seems sound—we should be able to change the behavior of outliers to bring these outliers into conformity with normal standards. But the empirical evidence leads us to the opposite conclusion. Increased measures of social control either have no effect on deviant behavior, or, quite surprisingly, these measures may have a tendency to *increase* levels of deviance.<sup>169</sup> Thus, the imposition of measures of social control can actually be the *cause* of more deviant behavior.<sup>170</sup>

#### CONCLUSION

An analysis of deviance adds value to a discussion of privacy concerns. First, the contextual definition of deviance mirrors the complicated and contextual definition of privacy. Second, an understanding of deviance highlights the faulty risk assessment of increased surveillance because of the reliance on an assumption that deviance is always negative. Finally, there is a social value to deviance in expanding and preserving the full expression of humanity, but that full expression of humanity can only be protected through a contextual understanding of privacy.

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167. *Id.*

168. TANNENBAUM, *supra* note 50, at 17–19.

169. *See generally* EDWIN E.M. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS, AND SOCIAL CONTROL (Neil J. Smelser ed., 2d ed. 1972).

170. *See generally* TANNENBAUM, *supra* note 50 (discussing how more regulation was the cause of more rebellion of criminal behavior).