

Chilling and Warming Effects on the Production of Legal

Scholarship

Stewart Manley*

Abstract

How do legal scholars decide what to write about? I hope that most of us try to write about what interests us or, for the more idealistic, what best serves humanity. In this article though, I suggest that more insidious influences – subtle threats that intimidate us and incentives that tempt us with reward – swirl around, chilling and warming our interest in research topics. Combining personal reflections with academic research, I address how two aspects of my own research environment – the implicit intimidation of power and the pressure to increase publications in elite journals – quietly seep into my decisions about what research to pursue. I never imagined that I could simultaneously be such a coward and opportunist. The article draws on insights from psychology, sociology and other literature to better understand how we respond to and can manage these influences. In the end, I suggest that we not be too hard on ourselves. Rather than feeling bad or good about our decisions, our aim should be to decide whether our choices about research topics

* Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia. I thank the European Society of International Law, the Law Department of the European University Institute, Daniel Litwin and Sophie Schiettekatte for organising and supporting the Second EUI Doctoral Forum on International Law, ‘Practising Reflexivity in International Law’, in which this paper was first presented. I also am grateful for the critical feedback, insight and encouragement from Forum discussant Sarah Nouwen, the Forum’s other participants, an anonymous reviewer assigned by the Forum’s organizers and the reviewers for the *Modern Law Review*.

are at their foundation compatible with our personal values and those of the greater scholarly enterprise.

Key words: self-censorship, chilling effect, warming effect, publication metrics, reflexivity

Introduction

Shortly after arriving in Malaysia in 2012 to teach law, I received an unexpected invitation to join the defence team of former U.S. President George W. Bush and his top advisors before the Kuala Lumpur War Crimes Tribunal. I have no experience in criminal defence. I declined. The Tribunal later unanimously found them guilty *in absentia* for torture at Abu Ghraib prison and Guantanamo Bay detention camp.¹ Five years later, in 2017, the law faculty where I work hosted the hearings of a similar tribunal – the Permanent People’s Tribunal – that held the Myanmar government responsible for genocide, war crimes and crimes against humanity perpetrated against the Rohingya and other minority groups.²

If you are surprised that Bush has been convicted for torture and that the Myanmar government has already been found guilty of genocide, and you have never heard of these tribunals, do not feel bad – I had not either.³ An international peoples’ tribunal, I have learned,

¹ P. Winn, ‘Malaysia’s Hague Envy’ (2013) *The World*, at <https://www.pri.org/stories/2013-05-28/malaysias-hague-envy> (last visited 3 March 2022).

² ‘People’s Tribunal Finds Myanmar Guilty of Rohingya Genocide’ (22 September 2017) *The Nation Thailand*, at <https://www.nationthailand.com/aec/30327393> (last visited 3 March 2022).

³ The *MLR* has recently published an article on these tribunals. See A. Zammit Borda and S. Mandelbaum, “‘If I Would Stay Alive, I Would Be Their Voice’: On the Legitimacy of International People’s Tribunals’ (2022) *MLR* (Early View).

is a civil society process in which evidence and arguments are presented for breaches of international law that have been ignored by the formal international adjudication system.⁴ Some have called the tribunals a ‘farce’⁵ and insinuate that the verdicts are decided before the proceedings even commence.⁶ Others suggest that they should be viewed instead as ‘institutions that engage seriously with international legal norms’,⁷ ‘a space for healing and reconciliation’⁸ and a ‘valuable means of social activism’.⁹

Given these starkly opposing views, this seemed like an area ripe for research. I imagined, for instance, what an empirical study of tribunal decisions might reveal. Or how the work of the tribunals impacts transitional justice. The cases against Bush (I am American) and the Myanmar government (I worked on Myanmar rule of law issues for six years) also interested me personally. Several years have passed though and I have not started this research.

⁴ A. Byrnes and G. Simm, ‘Introduction’ in A. Byrnes and G. Simm (eds), *Peoples’ Tribunals and International Law* (Cambridge: CUP, 2018) 3-4; R.M. Paulose, ‘Can You Hear the People Sing? Victim/Survivor Rights in People’s Tribunals’ in R.M. Paulose (ed), *People’s Tribunals, Human Rights and the Law: Searching for Justice* (London: Routledge, 2020) 2.

⁵ P. Kumaraswamy, ‘Dr Ms Proposed War Crimes Tribunal a Farce’ (2007) *Malaysiakini*, at <https://www.malaysiakini.com/letters/63313> (last visited 3 March 2022); R.A. Falk, ‘International Law and the United States Role in the Vietnam War: A Response to Professor Moore’ (1966-1967) 76 *Yale Law Journal* 1095, 1101, fn 12 (referring to the International War Crimes Tribunal organised in 1966 by Bertrand Russell, Jean-Paul Sartre and others).

⁶ ‘Kuala Lumpur Tribunal: Bush and Blair Guilty’ (2011) *Aljazeera*, at <https://www.aljazeera.com/opinions/2011/11/28/kuala-lumpur-tribunal-bush-and-blair-guilty> (last visited 3 March 2022); G. Simm and A. Byrnes, ‘International Peoples’ Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?’ (2014) 4(1) *Asian Journal of International Law* 103, 104.

⁷ Simm and Byrnes, n 6 above, 104.

⁸ Paulose, n 4 above.

⁹ Byrnes and Simm, n 4 above, 7.

What has held me back? This article interrogates decisions like these – to pursue or not to pursue certain lines of research – by reflecting on the context in which they are made. Have I simply not had time to start the project? Have more interesting projects come to my attention? Or, if I think a bit longer, has the fact that the Myanmar session was hosted not just anywhere, but at my faculty, impacted my decision? Does it matter that several of the KL War Crimes Tribunal’s most ardent supporters are also colleagues, friends and, need I say, powerful? Or that the Tribunal is the brainchild of the twice former and even more powerful Prime Minister of Malaysia?

I focus on two opposites: the chilling effect and the warming effect. The chilling effect – ‘the future deterrence of free activity and speech’¹⁰ – quietly slithers under the door, grasps me by the ankles, holds me tight and subtly discourages me from topics. This slippery spectre is at its core, for me, the intimidating threat of usually political or institutional power. The warming effect, in contrast, comes in like a tropical breeze through the open window, encouraging me to take up topics by, again, sometimes so subtly, tempting me with reward. Ambitions wrap their arms around me as I strive to make a mark in legal scholarship – success, reputation, promotion. This Greek siren, in my context, is the never-ending race to increase research outputs.

Chilling and warming effects are not always bad. A chilling effect that dissuades a researcher from producing Holocaust-denial, misogynistic or racist scholarship, for instance, or the warming effect produced by grant calls that aim to assist disenfranchised groups, will likely strike most as enormously beneficial. But the chilling and warming effects that I discuss in this article are different. When I reflect upon them, I am left with an unsettling feeling that

¹⁰ J. Townend, ‘Freedom of Expression and the Chilling Effect’ in H. Tumber and S. Waisbord (eds), *Routledge Companion to Media and Human Rights* (Oxon: Routledge, 2017).

they influence me to forego conducting valuable and insightful research, either because I fear the consequences of publishing the research or I spend time instead producing less meaningful research to meet performance goals. At the very least, they are difficult to categorise as beneficial or detrimental. In some instances, particularly of chilling effects, I wonder whether I am merely imagining them. This ambivalence and uncertainty mean that a different person in my shoes might see these effects as thoroughly untroubling. Indeed, I suspect that some will read about my experiences and wonder, what's wrong with that? Aren't you being paranoid? My hope though is that the documentation of my own struggles to better understand these influences will encourage readers to grapple with their own decisions about which research topics they choose and why. What benign topics or aspects of our work do we forego because we are unsure of the repercussions? Which do we eagerly take up, to the neglect of others, given their publication potential? How can we train ourselves to become more aware of the impact of these influences? Where do we draw the line and decide finally to resist? Although my primary area of research is international law, the insights from the literature are not limited to any particular area of law and, I hope, scholars from all legal fields can appreciate, if not relate to, some of my personal reflections.

Using reflexivity to look inwards and outwards

To address these questions, this article alternates between zooming in on personal anecdotes and panning out to see how fields such as psychology, sociology, ethics and international relations can help us better understand how these pressures may influence our research decisions. For the zooming in, I employ the research practice of reflexivity. Reflexivity is 'the capacity to reflect on one's own epistemic situation and process, and how these affect the nature

and meaning of the knowledge one produces.’¹¹ Though reflexivity remains less common in law than in many other social sciences,¹² legal scholars are increasingly using it to ‘explain and help to understand the complexity of various socio-legal phenomena’.¹³

I use reflexivity to examine the context that I would likely, without introspection, otherwise miss. This context includes both the exterior – meaning the pressures from institutions or people to do or not do certain things – and the interior – meaning the terrain of my own personality that has developed over the years of my life, my fears and desires, my strengths and weaknesses. The context in which we create the social artifacts that we call scholarship is often referred to as ‘positionality’ or ‘con-text’ (with a hyphen to emphasize the ‘con’ – or ‘with’) and comprises ‘the author’s intent and personal background, the history of

¹¹ I. Hamati-Ataya, ‘Reflexivity and International Relations’ (2020) *Oxford Bibliographies*, at <https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0276.xml> (last visited 3 March 2022).

¹² R. Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1997) (suggesting that sociology is fundamentally reflexive while law presents itself as normatively secure); Y. Dezalay and M.R. Madsen, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’ (2012) 8(1) *Annual Review of Law and Social Science* 433 (noting the disregard in law for Bourdieu’s notions of reflexivity); A. Gilder, ‘Human Security, TWAIL, and the Importance of Self-Reflection in Our Own Scholarship’ (2021) *New York University Journal of International Law and Politics* (Online Forum) 1, at <https://www.nyujiip.org/human-security-twail-and-the-importance-of-self-reflection-in-our-own-scholarship/> (last visited 1 July 2022); J.A. Tyler and F. Mullen, ‘Telling Tales in School: Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education’ (2011) 18 *Clinical Law Review* 283.

¹³ J. Emtseva, ‘Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch Up with the Western International Lawyers’ (2022) 23(5) *German Law Journal* 756; see also S.M.H. Nouwen, ‘“As You Set out for Ithaka”: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict’ (2014) 27(1) *Leiden Journal of International Law* 227.

the times, other associated or contrasting texts, or something else'.¹⁴ From a constructivist perspective that 'acknowledges the historical and contextual contingencies of knowledge and meaning',¹⁵ the con-text is inseparable from the research process and results,¹⁶ and can shape our research questions¹⁷ and influence the very topics we choose.¹⁸ Underlying this relationship between research and con-text is the assumption that law, the exercise of rights and the dissemination of legal research rest upon and project to a large degree visible, hidden and invisible power.¹⁹ It is around these often concealed streams of power that my reflexivity probes.

¹⁴ D. Yanow, 'Thinking Interpretively: Philosophical Presuppositions and the Human Sciences' in D. Yanow and P. Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (Armonk: ME Sharpe, 2006) 15-16.

¹⁵ K.H. Hirokawa, 'Dealing with Uncommon Ground: The Place of Legal Constructivism in the Social Construction of Nature' (2003) 21(3) *Virginia Environmental Law Journal* 387.

¹⁶ C. Lynch, 'Reflexivity in Research on Civil Society: Constructivist Perspectives' (2008) 10(4) *International Studies Review* 708, 708.

¹⁷ *ibid* 710.

¹⁸ B. Probst, 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39(1) *Social Work Research* 37.

¹⁹ S. Lukes, *Power: A Radical View* (New York: Palgrave-MacMillan, 2nd ed, 2005); N. James, 'Law and Power: Ten Lessons from Foucault' (2018) 30(1) *Bond Law Review* 31; O. Schachter, 'The Role of Power in International Law' (1999) 93 *Proceedings of the Annual Meeting (American Society of International Law)* 200; G. Crawford and B. Andreassen, 'Human Rights and Development: Putting Power and Politics at the Center' (2015) 37(3) *Human Rights Quarterly* 662.

Reflexivity is messy and personal. It requires introspection, detachment and distance.²⁰ Its foundation is humility²¹ and it is likely to evoke vulnerability and defensiveness.²² One must shed masks and pick at scabs. Upon cold hard reflection, we will likely feel complicit in sustaining the dirtier aspects of knowledge production.²³ The utility of reflexivity and its potential benefits – accountability, trustworthiness, richness, clarity, ethics, support and personal growth – remain contested.²⁴ Merely identifying the subtle factors that shape our research encounters, after all, does nothing to address those factors.²⁵ Some view reflexivity as ultimately futile because it is not possible to transcend the constraints that govern our view.²⁶ There is a danger too that reflexivity can become excessive, leading to ‘endless narcissistic

²⁰ Lynch, n 16 above, 719; J. von Bernstorff, ‘International Legal Scholarship as a Cooling Medium in International Law and Politics’ (2015) 25(4) *European Journal of International Law* 977.

²¹ J. Soedirgo and A. Glas, ‘Toward Active Reflexivity: Positionality and Practice in the Production of Knowledge’ (2020) 53(3) *PS: Political Science & Politics* 527, 529.

²² M. Gemignani, ‘Between Researcher and Researched: An Introduction to Countertransference in Qualitative Inquiry’ (2011) 17(8) *Qualitative Inquiry* 701, 702.

²³ Nouwen, n 13 above, 237; M. Burgis-Kasthala, ‘Researching Secret Spaces: A Reflexive Account on Negotiating Risk and Academic Integrity’ (2020) 33(2) *Leiden Journal of International Law* 269, 284-285. For Nouwen, this aspect was the post-colonial division of labour in the production of knowledge; for Burgis-Kasthala, it was empire and Euro-centrism.

²⁴ Probst, n 18 above, 39, 42.

²⁵ *ibid* 38.

²⁶ A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (New York: OUP, 2016) 4-5.

personal emoting'.²⁷ Autobiographical accounts also run the risk of exaggeration, vanity and a lack of candour and objectivity.²⁸

Given these traps, my aim for reflexivity, like the reflexive process, is both inward – in that I attempt to come to terms with snapshots from my own scholarly journey – and outward – in that my self-reflective stories might prompt readers to reflect on what impacts their production of knowledge. Chilling and warming effects do not impact us all equally. Legal scholars whose work brushes up against those in positions of power, such as in the areas of public law, international law and human rights law, will likely experience the pressure to self-censor that I discuss in the first part of the article more frequently than, for instance, scholars working on private interests in property law or tort law.²⁹ Likewise, scholars working in environments that disproportionately value the quantity over the quality of publications and tie it to monetary incentives or performance reviews probably will feel the pressure to increase their publication metrics more than those in environments that encourage deeper thinking that takes more time. Many will not have the same cultural, political and research environment that I have in Malaysia. But I suggest that we all encounter chilling and warming effects regardless of our location or field of research. Do you forego your more radical ideas to fit the dominant paradigm of legal scholarship?³⁰ Do you abandon your more creative thoughts for fear of the

²⁷ L. Finlay, 'Negotiating the Swamp: The Opportunity and Challenge of Reflexivity in Research Practice' (2002) 2(2) *Qualitative Research* 209, 226.

²⁸ See, eg, G. Sjoberg, 'Intellectual Risk Taking, Organizations, and Academic Freedom and Tenure' in S. Lyng (ed), *Edgework: The Sociology of Risk-Taking* (New York: Routledge, 2005) 247.

²⁹ See, eg, AcademiaSG, 'Academic Freedom in Singapore: Survey Report' (2021) 15, at <https://www.academia.sg/academic-freedom-survey-2021/> (noting that researcher perception of freedom to choose research is significantly impacted by the political sensitivity of the topic) (last visited 1 July 2022).

³⁰ G.P. Maynard Jr., 'Killing the Motivation of the Minority Law Professor' (forthcoming 2023) 107 *Minnesota Law Review*, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052148 (last visited 15 July 2022).

‘virtual peer reviewer’?³¹ Academics in countries known for free speech, such as the U.S., arguably face the ‘moral coercion of public opinion’³² as much as anywhere.³³ If one digs enough, with sincerity and courage, one’s own chilling and warming effects will likely come to the surface.

The reflexive sections of this article are interspersed with brief insights from a broad range of academic literature. In the first part on chilling effects, these sections address self-censorship and chilling as general concepts, then narrow in on academic freedom and how self-censorship and chilling impact academia specifically. The second part, on warming effects, begins with an overview of publication incentives that are taking hold in much of academia and then discusses the problem of how these incentives impact decisions over what research to conduct. I conclude with a discussion of how we might consider the alignment of our research decisions with our values.

Throughout the article, I raise the prospect of how modern technology – specifically, computers, the Internet and, more recently, social media – has amplified, if not to a certain extent transformed the nature of, chilling and warming effects. Scholars have always been susceptible to the fear of censorship or retaliation³⁴ and similarly have always had a range of motivations for pursuing certain lines of research, from the noble (promoting human rights,

³¹ J. d’Aspremont, ‘Destination: The Wasteland of Academic Overproduction (Part 1)’ (3 February 2020) *EJIL:Talk!*, at <https://www.ejiltalk.org/destination-the-wasteland-of-academic-overproduction-part-1/> (last visited 15 July 2022).

³² G. Elford, ‘Freedom of Expression and Social Coercion’ (2021) 27(2) *Legal Theory* 149, 152.

³³ A. de Tocqueville, *Democracy in America* (Chicago: University of Chicago Press, tr H.C. Mansfield and D. Winthrop, 2000).

³⁴ L.M. Tanczer *et al*, ‘Online Surveillance, Censorship, and Encryption in Academia’ (2019) 21(1) *International Studies Perspectives* 1.

advancing social justice), to the neutral (curiosity, the development of existing ideas), to the less than admirable (self-aggrandisement, wealth, fame for its own sake). There is no evidence that today's scholars are any different in this regard. But by magnifying the amount of available information and the ease and speed with which it can be shared and analysed, modern computing technology has injected new considerations into how we generate and respond to chilling and warming effects. Online harassment, the ease with which lectures can be recorded and campus surveillance are some examples of how technological advances have increased the scale and extent of risks associated with being part of academia.³⁵

One of my former students was recently questioned by Malaysian police about his blog post on affirmative action that was based on the paper he had written in my course. When I later invited him to my class to share his experience, some of my current students likely felt the chill. I know I did. These events – from the student's ability to post on a blog, to the worldwide spread of the blog, to the ease of an aggrieved individual to screenshot or print the post and send it to the authorities – would have been impossible before computers and the Internet. Similarly with warming effects, it is the digitalisation of scholarship and the computational ability to crunch numbers, such as the calculation of Journal Impact Factor for thousands of academic journals over multiple years, that allows universities to quickly compare their academic staff's metrics and 'impact'.³⁶ I am not suggesting that these collateral effects outweigh the benefit of computers and the Internet – I cannot imagine conducting research effectively without them – but the impact of digitalization sometimes has a darker side that we should acknowledge.

³⁵ *ibid.*

³⁶ *ibid.*

PART I: THE CHILLING EFFECT

The newsletter

Every week I receive *Asia in Review*, an email newsletter from the German-Southeast Asian Center of Excellence for Public Policy and Good Governance that reviews ‘the latest happenings and developments in constitutional politics and governance, geopolitics and international relations in Asia’. Around the time when I began writing this article, I read about a Chinese journalist sentenced to four years in prison for ‘picking quarrels and provoking trouble’. She was reporting on the coronavirus pandemic. Two Cambodian musicians were sentenced up to a year-and-a half in prison for their rhymes about social injustice and loss of sovereign territory. A Vietnamese journalist was detained for social media posts criticizing tollbooths.³⁷

In Asia, the tension between free expression and public order regularly plays out in the headlines. Until a recent shift towards authoritarianism in a number of Southeast Asian countries,³⁸ the region had been transitioning to more democratic forms of governance with increased respect for human rights.³⁹ The grip on the press, though, has again tightened.⁴⁰ In

³⁷ ‘Asia in Review’ (Online Newsletter, 29 December 2020), at <http://createsend.com/t/d-79F0B59B699D39D12540EF23F30FEDED> (last visited 3 March 2022).

³⁸ See, eg, L. Morgenbesser, *The Rise of Sophisticated Authoritarianism in Southeast Asia* (Cambridge: CUP, 2020).

³⁹ J. Gomez and R. Ramcharan, ‘Democracy and Human Rights in Southeast Asia’ (2014) 33(3) *Journal of Current Southeast Asian Affairs* 3, 3.

⁴⁰ C. Quackenbush *et al*, ‘Press Freedom Is Under Attack Across Southeast Asia. Meet the Journalists Fighting Back’ (21 June 2018) *Time*, at <https://time.com/longform/press-freedom-southeast-asia/> (last visited 3 March 2022).

Malaysia, political speech that seriously challenges the government is often claimed to be a threat to national stability and racial harmony⁴¹ and, in response, curtailed by laws⁴² and defamation suits.⁴³

I would never argue that it is better not to know and not to have access to information about cases of repression and the stifling of freedoms around the world. But it is also worth noting that the chilling effect operates strongest if one knows or at least suspects the potential repercussions of speaking out. *Asia in Review* and another free online magazine that I receive by e-mail, *Index on Censorship: A Voice for the Persecuted*, keep me updated and informed but also, upon reflection, make me aware of the costs of challenging authority. Obtaining this type of detailed and narrowly-tailored information – it can come through Twitter, Facebook, listservs, rss web feeds and a whole host of other media – would have been very difficult, and definitely not free, before the development of computers and the Internet. Moreover, the information is not merely available but, for many of us, overwhelming. Our knowledge of the abuse and harassment of other researchers, lamentably, can be directly linked to our own hesitancy to publish controversial work:

⁴¹ M.A.M. Sani, 'Freedom of Speech and Democracy in Malaysia' (2008) 16(1) *Asian Journal of Political Science* 85, 86.

⁴² International Commission of Jurists, 'Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia', at <https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf> (last visited 3 March 2022).

⁴³ M. Palinto, 'Minister Sues Website for Libel' (12 June 2014) *The Diplomat*, at <https://thediplomat.com/2014/06/a-first-for-malaysia-prime-minister-sues-website-for-libel/> (last visited 3 March 2022); 'Court to Decide on Political Parties Suing Individuals for Defamation' (13 March 2020) *The Star*, at <https://www.thestar.com.my/news/nation/2020/03/13/court-to-decide-on-political-parties-suing-individuals-for-defamation> (last visited 3 March 2022).

Some of us may have considered the abuse, attacks, and online harassment directed at female, black, Asian, and minority researchers. Some of us may think more than twice before publishing a particular article or hitting send on an email or tweet. Some of us may have already given in and begun to actively practice self-censorship and risk aversion for the sake of not being perceived as controversial.⁴⁴

I ask myself: how does this environment, where even criticizing tollbooths can get one in trouble, affect my work? At first, I think that as a researcher of international law, I do not need to worry about anyone coming to arrest me or sue me. My research, usually written in dry, academic prose that is unlikely to interest the government monitors, is too remote from the rough and tumble of Malaysian politics, social media and breaking news to get me into trouble. The topics I choose are about faraway European courts or remote African villages. The journals I publish in are usually behind paywalls, rarely reaching beyond academia.

Yet again I ask myself, but in a different way: is it because I am free from the chilling effect that I research and write this way, or is it because I am beholden to it? This is the tricky thing about the chill. I don't always know when it has grabbed me. It sometimes sneaks in without me knowing and without me feeling its presence. It reminds me of a recent encounter with a leech. The leech was biting me but I didn't know it until I happened to look down at my wrist. I couldn't feel a thing. But there it was and the bruise remains.⁴⁵

⁴⁴ Tanczer *et al*, n 34 above, 4 (internal citations omitted).

⁴⁵ Hayes *et al* call this type of self-censorship, in which the person withholds an opinion without assumed or real knowledge of the beliefs of an audience, 'opinion expression inhibition'. A.F. Hayes, C.J. Glynn and J. Shanahan, 'Willingness to Self-Censor: A Construct and Measurement Tool for Public Opinion Research' (2005) 17(3) *International Journal of Public Opinion Research* 298, 299.

The chilling effect and self-censorship generally

The term ‘chilling effect’ reportedly was first used in 1952 by Justice Felix Frankfurter of the U.S. Supreme Court to describe how governmental regulations can indirectly deter protected speech through discouragement, instead of prohibition.⁴⁶ A low threshold to sue for defamation, for instance, would cause some speakers of true information to refrain from speaking out of fear of being sued.⁴⁷ Surveillance has a particularly powerful chilling effect⁴⁸ and the effect’s claws reach outside law and into society’s most private corners.⁴⁹ Those doing the chilling are not necessarily doing anything wrong.⁵⁰ In fact, in some cases they surely do not intend to cause, or even know that they are causing, a chill.

Self-censorship – ‘a self-imposed silence without being told, formally or officially, that such silence is mandated’⁵¹ – can be understood as a response to the chilling effect. Self-

⁴⁶ M.N. Dolitch, ‘Alleging a First Amendment Chilling Effect to Create a Plaintiff’s Standing: A Practical Approach’ (1994) 43 *Drake Law Review* 175, 176; L. Kendrick, ‘Speech, Intent, and the Chilling Effect’ (2012) 54(5) *William and Mary Law Review* 1633, 1649 (emphasis omitted).

⁴⁷ D. Hemel and A. Porat, ‘Free Speech and Cheap Talk’ (2019) 11 *Journal of Legal Analysis* 46, 49.

⁴⁸ B. Marder *et al*, ‘The Extended “Chilling” Effect of Facebook: The Cold Reality of Ubiquitous Social Networking’ (2016) 60 *Computers in Human Behavior* 582, 583; N.M. Richards, ‘The Dangers of Surveillance Symposium: Privacy and Technology’ (2012) 126(7) *HLR* 1934, 1935.

⁴⁹ T.D. Afifi and L. Olson, ‘The Chilling Effect in Families and the Pressure to Conceal Secrets’ (2005) 72(2) *Communication Monographs* 192; D.H. Cloven and M.E. Roloff, ‘The Chilling Effect of Aggressive Potential on the Expression of Complaints in Intimate Relationships’ (1993) 60(3) *Communication Monographs* 199.

⁵⁰ R. Smeeth, ‘The Chilling Effect of Polarisation on Measured Debate’ (9 April 2021) *Index on Censorship*, at <https://www.indexoncensorship.org/2021/04/the-chilling-effect-of-polarisation-on-measured-debate/> (last visited 3 March 2022).

⁵¹ J. O’Loughlin, ‘The Perils of Self-Censorship in Academic Research in a WikiLeaks World’ (2016) 1(4) *Journal of Global Security Studies* 337, 337.

censorship is ‘public’ when it is a reaction to an external censor and ‘private’ when it is instead merely internal regulation.⁵² The latter category arguably does not implicate free speech principles because it is non-coercive.⁵³ This distinction is important because it explains how in some instances, the intimidation of power that leads to self-censorship emanates not only from without but also, just as much or sometimes even more, from within. Horton conceptualizes self-censorship as a place between the extremes of self-restraint and ordinary censorship, in which the self is both the author of censorship and the instrument through which it is exercised. When we consider the self as more author than instrument, the self is more blameworthy; and when more instrument than author, the self is less blameworthy.⁵⁴ None of the people involved in the KL War Crimes Tribunal ever did anything to discourage me from criticising the Tribunal. In fact, they might even welcome it. This uncertainty can be maddening for those who self-censor. Is the chilling effect sometimes merely a shadow of one’s own insecurities? By Horton’s analysis, I feel very blameworthy.

Self-censorship causes clear detriment to the individual: distress, guilt or shame; and society: public ignorance, reduced flow of information and stunted change.⁵⁵ To be fair though, self-censorship, like chilling and warming effects, is not always negative. In academia, it can also be considered an acceptable aspect of ‘intellectual gatekeeping’ because in a world in which there is never enough time, money or attention, scholars must inevitably select among

⁵² P. Cook and C. Heilmann, ‘Two Types of Self-Censorship: Public and Private’ (2013) 61(1) *Political Studies* 178.

⁵³ *ibid* 180.

⁵⁴ J. Horton, ‘Self-Censorship’ (2011) 17(1) *Res Publica* 91, 99, 102.

⁵⁵ D. Bar-Tal, ‘Self-Censorship as a Socio-Political-Psychological Phenomenon: Conception and Research’ (2017) 38(S1) *Political Psychology* 37, 56.

numerous research topics and ideas.⁵⁶ Self-censorship can also increase solidarity and preserve a positive image of the group.⁵⁷ These less detrimental aspects muddy the water and should cause us to reflect and question the roots of our decisions. Was my decision to not pursue research about the tribunals, for instance, merely intellectual gatekeeping?

Malaysia's failed attempt to accede to the Rome Statute

Another example that illustrates how the chill seems to be affecting my work is my to-date failure to pursue research on the Malaysian government's 2019 withdrawal of its instrument of accession to the Rome Statute of the International Criminal Court (ICC). On 4 March 2019, Malaysia deposited the instrument; on 5 April, just one month later, it withdrew it.⁵⁸ If Malaysia had waited until 1 June, it formally would have become a State Party.⁵⁹ The Prime Minister at the time, Mahathir Mohamad, explained that 'the confusion the issue had created in the country' led to the withdrawal.⁶⁰ This confusion was apparently related to criticism that the accession would interfere with Malay privileges (Malays comprise the racial majority), the

⁵⁶ E. Chamlee-Wright, 'Governing Campus Speech: a Bottom-Up Approach' (2018) 55(5) *Society* 392, 395.

⁵⁷ Bar-Tal, n 55 above, 56.

⁵⁸ 'Rome Statute: Patriot Sees "Big Picture", Warns of Move to Undermine Gov't' (8 April 2019) *Malaysiakini*, at <https://www.malaysiakini.com/news/471335> (last visited 3 March 2022).

⁵⁹ *Rome Statute of the International Criminal Court 2002* (2187 UNTS 90) art. 126(2).

⁶⁰ A. Abas and H.K. Kannan, 'Dr M: Malaysia Withdraws from Rome Statute Due to Smear Campaigns' (5 April 2019) *New Straits Times*, at <https://www.nst.com.my/news/nation/2019/04/476540/dr-m-malaysia-withdraws-rome-statute-due-smear-campaigns> (last visited 3 March 2022).

sanctity of Islam (Malaysia's official religion) and the position and immunity of the country's monarch.⁶¹

Reportedly, four academics from Malaysian public universities (not my own) had presented to Malaysia's Conference of Rulers research supporting the withdrawal.⁶² A group of student activists later released an executive summary of the academic paper, claiming that the arguments 'were very biased as they only discussed why the Conference of Rulers should reject the Rome Statute.'⁶³ The students called for public academic debate over the issues and called out mistakes in the paper such as a claim that the alleged crimes against the Rohingya in Myanmar could not be brought before the ICC.⁶⁴

To my knowledge, the four academics have never discussed or defended their paper in public. I have not been able to find the full version online although the executive summary is available in Malaysian language on Facebook.⁶⁵ I considered having the summary translated and writing an article about it. The ICC is one of my main subjects of research. Several years

⁶¹ 'Malaysia Withdraws from the Rome Statute' (5 April 2019) *The Star*, at <https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute/> (last visited 3 March 2022).

⁶² T. Tan, 'Patriot Urges Four Academics to Debate Rome Statute in Upcoming Forum' (22 April 2019) *The Star*, at <https://www.thestar.com.my/news/nation/2019/04/22/patriot-urges-four-academics-to-debate-rome-statute-in-upcoming-forum/> (last visited 3 March 2022). The Conference of Rulers elects the monarch every five years.

⁶³ 'Academics Convinced Rulers with "Biased" Paper, Students Claim' (7 April 2019) *Malaysiakini*, at <https://www.malaysiakini.com/news/471287> (last visited 3 March 2022).

⁶⁴ *ibid.*

⁶⁵ A. Ali, 'PEMBENTANGAN KEPADA MAJLIS RAJA RAJA : AGENDA TERSEMBUNYI SESETENGAH PIHAK?' (7 April 2019), at <https://www.facebook.com/asheeq.ali.3/posts/2085893961447192> (last visited 3 March 2022).

ago, when I was a human rights practitioner, I attended conferences hosted by the Coalition for the International Criminal Court, a network of NGOs that, among other things, advocates for ratification of the Rome Statute. This issue seemed like one that I was in a good position to take on. But I never pursued it. Had the chill entered the room? Was this issue too explosive? Were the risks getting too close to home?⁶⁶

The psychology and sociology of self-censorship and academic risk-taking

Why do we self-censor? Bar-Tal explains that the psychological bases that underlie the process of getting information, understanding it and then deciding whether to reveal it are threefold. First, human beings have evolved with an inclination to share, communicate and disclose information they have gathered. This inclination discourages self-censorship. Second, people care about their group's image and understand how the group's identity impacts their self-identity, including their emotional attachment to the group, their feeling of belonging and their deference to group norms. This fear of harming the group usually encourages self-censorship. The third psychological basis is the dilemma that one feels knowing that information should be revealed but also seeing its potential for harm.⁶⁷ Thus, for both individuals and societies, the decision to self-censor ultimately involves weighing the benefits of disclosure against its

⁶⁶ Others have published on the matter. A.G. Hamid, 'Malaysia and the Rome Statute: The Issue of Sovereignty' (2019) 27(2) *IIUM Law Journal* 279; A.G. Hamid, M.H. Mohd Kamal, M.M Lallmahamood and A. Torla (2021) 'Superior Responsibility Under the Rome Statute and Its Applicability to Constitutional Monarchy: An Appraisal' (2021) 29(2) *IIUM Law Journal* 115.

⁶⁷ Bar-Tal, n 55 above, 45.

costs.⁶⁸ Different societies make this calculation differently depending on context and values. Deciding to write critically about one's own society, for example, may be more challenging than criticizing a foreign state. If the hearings on the Myanmar and Bush cases were held in faraway countries by people I did not know, would I have already done this research? Are there potential personal costs dissuading me?

The courage to challenge prevailing social structures is also highly influenced by institutional interests attempting to shape intellectual activities to enhance their social power.⁶⁹ Sjoberg argues that sociologists who have conceptualised academic risk-taking as largely individualistic underestimate the centrality of organizational structures in promoting academic freedom.⁷⁰ In line with this approach, spiral of silence theory attempts to explain self-censorship by observing that people are social beings motivated by the opinions and views of their community and, based on those views, determine whether their stance is in the minority. If it is, they will tend to be more reticent to speak. If the media then fail to depict the minority perspective, those in the majority will then fail to accurately perceive the minority view, making the minority even more reticent, leading to their spiralling into silence.⁷¹ In this way, the macro-sociological of mass opinion is linked to the micro-psychological of individual self-censorship.⁷²

⁶⁸ *ibid* 37; E. Ong, 'Online Repression and Self-Censorship: Evidence from Southeast Asia' (2021) 56(1) *Government and Opposition* 141.

⁶⁹ Sjoberg, n 28 above, 264.

⁷⁰ *ibid*.

⁷¹ A.F. Hayes and J. Matthes, 'Self-Censorship, the Spiral of Silence, and Contemporary Political Communication' in K. Kenski and K.H. Jamieson (eds), *The Oxford Handbook of Political Communication* (New York: OUP, 2017).

⁷² *ibid*.

What these arguments and theories make clear is that our community's potential reaction often impacts what research we choose to eventually publish. This connection helps explain why what we research at night out of pure curiosity, in the privacy of our internet browser window, may often be very different from what we research for later public consumption. This will not come as a surprise but nevertheless is useful to temper our inclination to think that we feel free to write about whatever we wish. In deciding whether to speak out, we must also necessarily consider the potential impact of increasingly invasive technologies and the 'international institutionalization of surveillance'.⁷³ Hills observes that as a result of technological transformation, in the U.S. and U.K. 'there is a blurring of public protest, crime and terrorism so that dissent, opposition and difference become suspicious'.⁷⁴ The nature of modern social media platforms and universities' concerns for their reputations have made academic activism – even when it is unrelated to one's job – riskier than in the past.⁷⁵

The employment contract

Some universities attempt to protect their reputations through clauses in employment contracts. Section 5 of my university appointment letter provides: 'The University reserves its right to withdraw or terminate this appointment with immediate effect in the following circumstances: (a) upon reasonable grounds to safeguard the interests and reputation of the University [...]'. This provision, though on its face perhaps understandable, is sometimes used by academics as

⁷³ J. Hills, 'What's New? War, Censorship and Global Transmission: From the Telegraph to the Internet' (2006) 68(3) *International Communication Gazette* 195, 196.

⁷⁴ *ibid.*

⁷⁵ G. Cox, 'Dear Professor, Be Careful with Those Tweets, OK? Academic Freedom and Social Media' (2020) 53(3) *PS: Political Science & Politics* 521.

an excuse to avoid speaking out. After all, given how virulent social media can be, an academic speaking publicly about a controversial issue will almost certainly attract criticism and thus indirectly affect the reputation of the academic institution. There must of course be ‘reasonable grounds’ but as we lawyers and legal scholars know, that is a broad term subject to differing interpretations. Shore and Wright share the story of a professor who was warned that he could be fired for bringing his employer into disrepute after he corrected the university’s claim that larger classes and reduced resources did not lower educational standards.⁷⁶

Section 2(3) of Appendix C (‘Terms of Service’) of my contract further provides: ‘The terms and conditions of this offer of appointment are subject to review by the University and/or Government from time to time.’ Here, similarly, the frightful prospect of the government scrutinizing one’s employment contract hovers overhead. In a university academic environment where everyone is disposable, is it worth sticking one’s neck out? The precarity of academic staff, particularly those on contract, is well-documented.⁷⁷ Power to influence behaviour through punishment and reward, exemplified by employment relations, is especially liable to exacerbate chilling effects.⁷⁸ These contract terms arguably undermine the duty of universities to ‘actively provide support for positions that conflict with their own, or even those

⁷⁶ C. Shore and S. Wright, ‘Coercive Accountability: The Rise of Audit Culture in Higher Education’ in M. Strathern (ed), *Audit Cultures: Anthropological Studies in Accountability, Ethics and the Academy* (London: Routledge, 2000) 73.

⁷⁷ A. Courtois and T. O’Keefe, ‘Precarity in the Ivorycage: Neoliberalism and Casualisation of Work in the Irish Higher Education Sector’ (2015) 13(1) *Journal for Critical Education Policy Studies* 43; T. Allmer, ‘Precarious, Always-On and Flexible: A Case Study of Academics as Information Workers’ (2018) 33(4) *European Journal of Communication* 381.

⁷⁸ Afifi and Olson, n 49 above, 195.

that call the legitimacy of their own official views into question'. Universities ideally should refuse government requests to fire or discipline academics who criticise the state.⁷⁹

The terms in my contract seem to innocuously reserve certain rights to the University and Government which likely are rarely invoked. But the power of the chilling effect lies in its overdeterrence. The threat is rarely overt. Instead, the chill plays on one's fears and insecurities. To discuss it with seriousness reveals one's cowardice. Conversations about these contract terms are held jokingly, often followed by a laugh. 'Yeah, I better not say anything bad about the university, ha ha ha.' But the 'ha ha ha' is accompanied, almost always, with a forced smile, a pallid look in the eyes and a quick change of topic. Although the contract terms are not expressly linked to the selection of research topics, the chilling effect inevitably extends to any scholarship that may impact 'the interests and reputation' of the University, which brings to mind critical scholarship on the legitimacy of the KL War Crimes Tribunal, the Permanent Peoples' Tribunal or the failed accession to the Rome Statute. Recall that the controversy over accession to the Rome Statute involved particularly sensitive issues including the sanctity of Islam, Malay privileges and the immunity of Malaysian Royalty.

Self-censorship and the chilling effect in academia

Self-censorship in academia is common and includes not only deciding to remain silent but also avoiding research topics.⁸⁰ O'Loughlin calls it the most insidious but also the most

⁷⁹ J. Butler, 'Academic Freedom and the Critical Task of the University' (2017) 14(6) *Globalizations* 857, 859.

⁸⁰ R. Nets-Zehngut and S. Fuxman, 'Self-Censorship of Narratives of Political Violence in Academia' in D. Bar-Tal, R. Nets-Zehngut and K. Sharvit (eds), *Self-Censorship in Contexts of Conflict: Theory and Research* (Switzerland: Springer International Publishing, 2017) 185, 190; E. Chamlee-Wright, 'Self-Censorship and Associational Life in the Liberal Academy' (2019) 56(6) *Society* 538.

effective kind of censorship because it leaves no footprints.⁸¹ How many, he wonders, have quietly abandoned their research projects? Resistance by tenured scholars to ‘the climate of (self-induced) fear and the spiral of silence’, he suggests, is crucial because they have the resources and ability to resist the chill.⁸² This call to arms, however, must take into account that over the past thirty years or so, institutional power shifts driven by government policies have made legal academics more vulnerable and less resilient.⁸³ Calls for them to resist corporatization,⁸⁴ as one example, have had mixed results.⁸⁵ Ceci, *et al* found the connection between tenure and the exercise of academic freedom weak, and all the academics they interviewed thought that others were more likely to engage in academic risk than they themselves were.⁸⁶ In the same vein, academic publishers have been experiencing an increase in author requests for anonymity or pseudonymity for political reasons.⁸⁷

Direct censorship is counterintuitively not the most common way to control researchers; instead, detractors raise questions about the legitimacy of research, make claims

⁸¹ O’Loughlin, n 51 above, 337.

⁸² *ibid* 344.

⁸³ G. Ferris, ‘Undermining Resilience: How the Modern UK University Manufactures Heightened Vulnerability in Legal Academics and What Is to Be Done’ (2021) 55(1) *The Law Teacher* 24.

⁸⁴ J.G. Andrews, ‘How We Can Resist Corporatization’ (2006) 92(3) *Academe* 16; N. Mills, ‘The Corporatization of Higher Education’ (Fall 2012) *Dissent*, at <https://www.dissentmagazine.org/article/the-corporatization-of-higher-education> (last visited 3 March 2022).

⁸⁵ S. Ross, L. Savage and J. Watson, ‘University Teachers and Resistance in the Neoliberal University’ (2020) 45(3) *Labor Studies Journal* 227.

⁸⁶ S.J. Ceci, W.M. Williams and K. Mueller-Johnson, ‘Is Tenure Justified? An Experimental Study of Faculty Beliefs about Tenure, Promotion, and Academic Freedom’ (2006) 29(6) *Behavioral and Brain Sciences* 553.

⁸⁷ J. Wright *et al*, ‘Supporting Academic Freedom as a Human Right: Challenges and Solutions in Academic Publishing’ (2022) *The International Journal of Human Rights* 4 (early online access).

of misconduct, refuse funding or hinder career opportunities or employment.⁸⁸ In response, researchers ‘remain silent in fear of the negative consequences of career, reputation, and coping’.⁸⁹ Fear is a frequent motivator – fear of powerful governments, of being fired, of ostracism by colleagues, of lowered employment status, of loss of funding and of damage to reputation.⁹⁰ Academic historians, for instance, are pressured during times of conflict to support war efforts and refrain from criticizing related government policy; those who refuse can be denied professional advancement or funding, and even be tried for treason.⁹¹ In 2016, after 1,128 Turkish academics signed a petition demanding that the government stop its violence against Kurds and after a failed coup attempt about six months later, over 1,000 university employees and students were detained and over 8,000 university employees were dismissed. Academicians who remained in their posts chose to not research controversial topics and instead decided to ‘reformulate’ their research questions or change the titles of their work.⁹² The chilling does not only occur in authoritarian contexts. After the 11 September 2001 attacks, a chill swept over U.S. research critical of the War on Terror.⁹³ Social scientists in Northern Ireland and Israeli-Jewish scholars, as other examples, were mostly silent about the Northern

⁸⁸ E. Väliverronen and S. Saikkonen, ‘Freedom of Expression Challenged: Scientists’ Perspectives on Hidden Forms of Suppression and Self-Censorship’ (2020) *Science, Technology, & Human Values* 1, 4.

⁸⁹ *ibid.*

⁹⁰ O’Loughlin, n 51 above, 338.

⁹¹ Nets-Zehngut and Fuxman, n 80 above, 187. Academics who approve of government policies also self-censor. O’Loughlin, n 51 above, 338.

⁹² V. Aktas, M. Nilsson and K. Borell, ‘Social Scientists Under Threat: Resistance and Self-Censorship in Turkish Academia’ (2019) 67(2) *British Journal of Educational Studies* 169, 180.

⁹³ L.A. Brand, ‘Middle East Studies and Academic Freedom: Challenges at Home and Abroad’ (2007) 8(4) *International Studies Perspectives* 384, 384.

Ireland conflict and the Palestinian exodus during the 1948 Palestine War, with scholarship flourishing only after the conflicts' end.⁹⁴

The context in which self-censorship occurs and its effect on the quality of academic discourse are important considerations in assessing its significance.⁹⁵ Chamlee-Wright explains that abrasion and civility are two principles in the academy that lead to self-censorship, with both positive and negative consequences. Abrasion – the confronting of diverse opinions and perspectives, sometimes with disapproval from others – allows us to view things from other perspectives and can develop intellect, resilience and character. But if used as punishment or, more importantly, if *perceived* as potential punishment, it can lead to self-censorship.⁹⁶ Civility, in contrast, implicates recognition of our shared humanity. It involves understanding and acquiring the skills to engage in social conversation and befriend colleagues. Sometimes this means holding one's tongue to avoid offending others.⁹⁷ This self-censorship can be healthy for the academic community but, when it extends to self-censoring unpopular views, can also degrade the quality of academic discourse. Holding in our frustrations and anger to be polite can wear us down and perpetuate inequality in the academy.⁹⁸

Yet there is also arguably something different between being civil and self-censoring. Horton distinguishes self-censorship from self-restraint by suggesting that the former potentially manifests undesirable qualities of character, such as cowardice, while the latter does

⁹⁴ Nets-Zehngut and Fuxman, n 80 above, 189.

⁹⁵ Chamlee-Wright, n 80 above, 543.

⁹⁶ *ibid* 541.

⁹⁷ *ibid* 542.

⁹⁸ S.K. Sowards, 'Constant Civility as Corrosion of the Soul: Surviving Through and Beyond the Politics of Politeness' (2020) 17(4) *Communication and Critical/Cultural Studies* 395.

not. With self-censorship, there is an illicit requirement or expectation to refrain from expressing something that would otherwise not be unreasonable to express, and that without too much hardship, we could express.⁹⁹ He describes a feeling of resentment or reluctance, but not coercion, that accompanies self-censorship.

The line between appropriately reining in one's impulses and passions, on one hand, and abandoning one's duty to contribute, on the other, is a fine one that is context-sensitive.¹⁰⁰ The dilemma for scholars, therefore, is to determine whether their self-censorship is borne of civility or cowardice.¹⁰¹ Chamlee-Wright advises that academics imagine an impartial and well-informed viewer who would judge their actions. Would the viewer approve that we have spoken out despite any social cost? Or are we letting our passions get the better of us to the detriment of the group? Would the viewer approve our silence as the necessary civil holding of our tongue? Or criticize it because it arises from fear of punishment or seeking of praise?

The chilling effect and self-censorship in academia are so important because they impact academic freedom – called ‘the cornerstone of democracy’¹⁰² – by affecting our ability to pursue ‘lines of research and modes of thought’ without interference from authorities.¹⁰³ Academic freedom includes the right to choose one's research topics and the right to be free from constraint on this choice.¹⁰⁴ It implies not only free inquiry but also an institutional

⁹⁹ Horton, n 54 above, 99.

¹⁰⁰ Chamlee-Wright, n 80 above, 542.

¹⁰¹ *ibid* 543.

¹⁰² Aktas, Nilsson and Borell, n 92 above, 169.

¹⁰³ Butler, n 79 above, 1.

¹⁰⁴ I. Berlin, *Four Essays on Liberty* (London: OUP, 1969); H. Karger, ‘How Ego, Greed, and Hubris (Almost) Destroyed a University: Implications for Academic Freedom’ (2020) 11 *AAUP Journal of Academic Freedom* 1, 11.

commitment to preserve itself as a place of free inquiry without censorship¹⁰⁵ and an implied assurance that scholars alone have the power to choose their topics and modes of research.¹⁰⁶ States and universities arguably even have an obligation to ensure the rights of others to criticize the states and universities themselves.¹⁰⁷

Academics have had comparatively greater freedom than, for example, judges or lawyers to choose the projects they pursue¹⁰⁸ but this freedom has increasingly been whittled away by ‘corporatization of the university, the march of the quantitative metrics, the rule of the rankings, and the triumph of administration over faculty’.¹⁰⁹ Researchers of course face pressure not only from governments or institutions but also from political activists, lobbyists and ordinary citizens,¹¹⁰ and not only in authoritarian regimes but also in liberal Western democracies.¹¹¹ Academics are particularly susceptible because many depend on the government for employment and funding.¹¹² Sjoberg suggests that entering the halls of academia is inevitably accompanied by constraints: ‘Limits are imposed, formally or informally, on which scholarly activities are deemed feasible. Many academics have been constrained in their intellectual risk taking as they seek to avoid a frontal challenge to power

¹⁰⁵ Butler, n 79 above, 857.

¹⁰⁶ O’Loughlin, n 51 above, 343.

¹⁰⁷ Butler, n 79 above, 858-859.

¹⁰⁸ Bianchi, n 26 above, 6.

¹⁰⁹ P. Schlag, ‘A Comment on Thomas Schultz’s Editorial’ (2014) 5(2) *Journal of International Dispute Settlement* 235, 235.

¹¹⁰ Väliverronen and Saikkonen, n 88 above, 2.

¹¹¹ Sjoberg, n 28 above, 252-255; Hayes and Matthes, n 71 above.

¹¹² J. Grimm and I. Saliba, ‘Free Research in Fearful Times: Conceptualizing an Index to Monitor Academic Freedom’ (2017) 3(1) *Interdisciplinary Political Studies* 41, 44; Nets-Zehngut and Fuxman, n 80 above, 194.

arrangements within the university and the society.’¹¹³ Given the implications of the chill, we should be particularly wary of its effect. We may believe that our employer allows us to research whatever we wish. Overtly, this may be true. No one in my university has ever told me that I cannot research a topic. But if we look beneath the surface, the chilling current may run stronger than we think.

The trial

The chilling effect may be at its strongest when one sees the oppressive exercise of power up close and personal. When I started my current post in 2015, one of the first things I did with my colleagues was attend Azmi Sharom’s sedition trial. Sharom was until recently an associate professor who taught among things human rights law and international environmental law. He was arrested for a comment he made to an online news outlet about a political crisis involving the planned removal of a state chief minister.¹¹⁴ His comment included a comparison to a 2009 transition of political power in the Malaysian state of Perak that involved the state’s sultan. Sharom reportedly said that this 2009 transition ‘had been done through a secret meeting and was legally wrong.’¹¹⁵ Under the Malaysia Sedition Act 1948, ‘seditious’ means speech or some other action having a ‘seditious tendency’, which in turn means a tendency that brings the administration of justice ‘into hatred or contempt or to excite dissatisfaction’, or it raises ‘discontent or disaffection’ among the people of Malaysia or it ‘promote[s] feelings of ill will

¹¹³ Sjoberg, n 28 above, 264.

¹¹⁴ ‘AG Drops Sedition Charges Against Law Prof Azmi Sharom’ (12 February 2016) *Malaysiakini*, at <https://www.malaysiakini.com/news/330117> (last visited 3 March 2022).

¹¹⁵ E. Au, ‘Court Ruling on Sedition Act Raises Fears about Free Speech’ (7 October 2015) *The Straits Times*, at <https://www.straitstimes.com/asia/se-asia/court-ruling-on-sedition-act-raises-fears-about-free-speech> (last visited 3 March 2022).

and hostility between different races or classes'.¹¹⁶ Sedition is a strict liability offence in which the intention of the speaker is irrelevant.¹¹⁷ The Sedition Act, at least at that time, was being selectively applied against government critics.¹¹⁸

My colleagues and I squeezed into the packed courtroom, eyeing several empty spaces in the spectator benches. This was before COVID-19, so everyone was shoulder to shoulder. I saw Sharom in the dock. The proceedings were mostly conducted in Malaysian language but fortunately my colleagues would from time to time whisper to me what was being said. One day when I arrived, there were four or five academics sitting in the front row. I knew they were academics because they were wearing bright academic robes. A colleague later told me that the bailiff had approached them and asked them to maintain courtroom decorum. They sat silently throughout the proceedings. The robes were enough. The judge could not avoid seeing it. Academic freedom was at stake.

How can one make sense of this type of experience in the context of the chilling effect? I felt a rush of exhilaration, sitting there in the middle of an important confrontation between the power of the law and the power of freedom. This was the tension between public order and individual rights that I talk so much about with my students. After his challenge to the Sedition Act had been rejected by the country's highest court, Sharom said, 'I hope it does not affect commentary in this country, I hope people [...] continue to express their point of view because

¹¹⁶ Global Freedom of Expression, 'Public Prosecutor v. Azmi Bin Sharom' (n.d.) Columbia University, sections 2, 3, at <https://globalfreedomofexpression.columbia.edu/cases/public-prosecutor-v-azmi-bin-sharom/> (last visited 3 March 2022); Sedition Act 1948 (Malaysia).

¹¹⁷ Global Freedom of Expression, n 116 above.

¹¹⁸ Au, n 115 above.

we must not allow bad laws to frighten us, we must continue to struggle, we must continue to try and make this country a true democracy.’¹¹⁹ He clearly understands the chilling effect.

Sharom was eventually released after the prosecutor’s office dropped the case but, if convicted, he could have faced up to a three-year jail sentence and a hefty fine.¹²⁰ Though the eventual result was somewhat of a victory, the fragility of principle was also on display. It could be so easily placed into handcuffs for what appeared to be such a slight offence, if one at all. What are the risks involved in taking public positions on transparency, truth and justice? Would an article criticizing the Malaysian government for retracting its instrument of accession to the Rome Statute ‘excite dissatisfaction’? I am an American, with high expectations about the freedom to say what I wish, yet I live in Malaysia, where this freedom is constrained by norms that I still struggle to understand. Self-censorship must be understood within its social, historical, cultural and political context but our personality traits also impact our willingness to self-censor.¹²¹ Are we patriotic, conservative, authoritarian? What are our motivations, attitudes, ideologies, emotions, values, worldviews?¹²² As scholars, what are we willing to risk? When are we willing to risk? How do we balance personal risk with upholding the principles that we write about? How has the Internet, with its ability to make things go viral, changed the risk calculus? Response to the chilling effect is often grounded in social exchange theory, which weighs reward against cost of action.¹²³ Is it even possible to calculate the risk of

¹¹⁹ *ibid.*

¹²⁰ M. Nazlina, ‘Prosecution Wraps Up Case in Azmi Sharom Sedition Trial’ (14 January 2016) *The Star*, at <https://www.thestar.com.my/news/nation/2016/01/14/azmi-sharom-trial-prosecution> (last visited 3 March 2022).

¹²¹ K. Adamska, ‘Self-Censorship in Organizations’ in D. Bar-Tal, R. Nets-Zehngut and K. Sharvit (eds), *Self-Censorship in Contexts of Conflict: Theory and Research* (Switzerland: Springer International Publishing, 2017).

¹²² *ibid.*

¹²³ Afifi and Olson, n 49, above.

academic expression and if it is, how can we make sense of what it means to even engage in such a calculation? This article reflects my unique experiences and the political and cultural environment in which I live and work but wherever we are in the world, I suggest that it is important to reflect on how unspoken norms and invisible pressures impact our choice of research, how we produce knowledge and the way we conduct the work we decide to do.

PART 2: THE WARMING EFFECT

Part 2 moves from those topics that we decline to those we pursue. While the chilling effect reveals the coward inside, the warming effect reveals the opportunist. The term ‘warming effect’ is primarily associated with environmental concepts like ‘global warming’ and the ‘greenhouse effect’ but it has also been applied more broadly to describe how a phenomenon may encourage behaviour. For instance, bans on affirmative action arguably have a warming effect on college applications from underrepresented minorities.¹²⁴ Lowering the bar to defamation claims may counterintuitively have a warming effect on speech that would not have otherwise been made.¹²⁵ In this article, I use the phrase to mean something that incentivizes us to select a particular research topic to the neglect of other, perhaps more insightful or meaningful, research.

¹²⁴ K.L. Antonovics and R.H. Sander, ‘Affirmative Action Bans and the “Chilling Effect”’ (2013) 15(1) *American Law and Economics Review* 252, 259. For a counter-view, see W.C. Kidder and A. Onwuachi-Willig, ‘Still Hazy after All These Years: The Data and Theory behind “Mismatch”’ (2013) 92 *Texas Law Review* 895.

¹²⁵ This arguable warming effect results from the increase of the credibility of those who do speak because, by making it more costly to defame, listeners will give greater credence to what they hear or read. Hemel and Porat, n 47 above, 49.

In my case, the main warming effect is the pressure from my employer to increase publication metrics – the number of scholarly outputs and the metrics derived from them – and the boost in reputation, career prospects and performance evaluation that accompanies the increase.¹²⁶ My research output, like at many other institutions of higher education, is measured quantitatively by the number of publications that I produce each year and qualitatively by the prestige of the journal (for articles) or publisher (for books and book chapters). This type of performance evaluation system is based on the beliefs that objective metrics can and should replace subjective judgment, that making metrics public ensures institutional accountability and that the best way to motivate people is through rewards and penalties tied to performance measured by metrics.¹²⁷ Though researchers seem to constantly complain about this mode of evaluation, reward systems in academia and the perception of them are undeniably a major source of extrinsic motivation and influence on behaviour.¹²⁸ The influence of this ‘audit culture’ that prizes publication output, income generation and measurable impact is not limited to developing countries.¹²⁹

¹²⁶ I limit my discussion to the impact of publishing incentives although there are many other promotion- and performance-related incentives that impact choice of topic. The most obvious may be funding, which often directly steers researchers to particular topics and research.

¹²⁷ J.Z. Muller, *The Tyranny of Metrics* (Princeton: Princeton University Press, 2015) 18. See also D.B. Deutz *et al*, ‘Quantitative Quality: A Study on How Performance-Based Measures May Change the Publication Patterns of Danish Researchers’ (2021) 126(4) *Scientometrics* 3303.

¹²⁸ K. O’Meara, ‘Inside the Panopticon: Studying Academic Reward Systems’ in J. Smart and M. Paulsen (eds), *Higher Education: Handbook of Theory and Research* (Heidelberg: Springer, 2011) vol 26, 161, 163; L. Butler, ‘Assessing University Research: A Plea for a Balanced Approach’ (2007) 34(8) *Science and Public Policy* 565, 571.

¹²⁹ D. Ruth *et al*, ‘Anxious Academics: Talking Back to the Audit Culture through Collegial, Critical and Creative Autoethnography’ (2018) 24(2) *Culture and Organization* 154.

In the university where I work, publishing decisions are dominated by the influence of two academic journal indices: Clarivate Analytics' Web of Science (WoS) and Elsevier's Scopus.¹³⁰ For performance assessment, the credit that a researcher receives for publishing an article is higher when it is in an indexed journal. In this way, assessment relies on the index. No one doing the assessing actually reads the article. This is not unusual and relieves evaluators of a great burden. University managers also know that increasing indexed publications directly impacts rankings. Times Higher Education and QS rankings use data from Scopus while the Shanghai Ranking (ARWU), Leiden Ranking and U.S. News & World Report rankings use data from WoS. For a researcher, the higher the journal's WoS Journal Impact Factor, the more the praise and admiration.¹³¹ If an article is placed in a journal in the top quartile of a WoS subject category like law, you have hit the jackpot.¹³² The WoS is generally considered the more rigorous and selective of the two, so an article placed in a Scopus-indexed journal that is not also indexed in WoS generally receives less credit.

This indirect measurement of the quality of legal scholarship has been the subject of much criticism.¹³³ Perez, *et al* argue that the JIF ranking of law journals is neither objective nor

¹³⁰ L.I. Meho and Y. Rogers, 'Citation Counting, Citation Ranking, and H-Index of Human-Computer Interaction Researchers: A Comparison of Scopus and Web of Science' (2008) 59(11) *Journal of the American Society for Information Science and Technology* 1711.

¹³¹ JIF measures the number of times an average paper in a journal is cited during a year.

¹³² The number of publications in high-impact journals and the number of citations to one's work often impacts promotion. See, eg, C.R. Carpenter, D.C. Cone and C.C. Sarli, 'Using Publication Metrics to Highlight Academic Productivity and Research Impact' (2014) 21(10) *Academic Emergency Medicine* 1160; M.D. Bould *et al*, 'H-Indices in a University Department of Anaesthesia: An Evaluation of Their Feasibility, Reliability, and Validity as an Assessment of Academic Performance' (2011) 106(3) *BJA: British Journal of Anaesthesia* 325.

¹³³ See, eg, R. van Gestel, 'Sense and Non-sense of a European Ranking of Law Schools and Law Journals' (2015) 35(1) *Legal Studies* 165, 170; A.T. Hayashi and G. Mitchell, 'Maintaining Scholarly Integrity in the Age of

neutral because of different citation practices between U.S. student-edited law journals and peer-reviewed law journals.¹³⁴ While researchers aiming to do rigorous, long-term, challenging work lament the fixation on metrics, it can be a boon for the less scrupulous, who have devised countless ways to take advantage of it: salami-slicing (dividing one's work into the thinnest possible publishable slices), gift authorship (authorship without actually contributing), citation cartels (joining a researcher gang that agrees to cite each other, with usually irrelevant citations), knowingly publishing in predatory journals (these low-quality journals charge a fee and say they use standard peer review but usually do not) and other tactics.¹³⁵ These behaviours all point to three overriding goals of metrics-mania: publish as much as possible, as fast as possible, in the venues most rewarded by one's employer.

There are tensions among the three objectives though. Publishing quickly may mean targeting less-prestigious venues within the same stratum. To illustrate, publishing in a journal near the bottom of a WoS Quartile 1 group may be, for performance and rewards purposes, just about as good as publishing at the top of the quartile. After all, they are both 'Q1' journals and thus likely indistinguishable to anyone who measures these things. Similarly, publishing in a

Bibliometrics' (2019) 69(1) *Journal of Legal Education* 138; M. Milanovic, 'Horrible Metrics' (24 August 2016) *EJIL:Talk!*, at <https://www.ejiltalk.org/horrible-metrics/> (last visited 3 March 2022). See also, C. Spence, "'Judgement" Versus "Metrics" in Higher Education Management' (2019) 77(5) *Higher Education* 761; Muller, n 127 above.

¹³⁴ O. Perez *et al*, 'The Network of Law Reviews: Citation Cartels, Scientific Communities, and Journal Rankings' (2019) 82(2) *MLR* 240.

¹³⁵ Even Weiler, co-editor-in-chief of the venerable *European Journal of International Law*, was encouraged to consider how the types of manuscripts published impact the journal's JIF. J. Weiler, 'Impact Factor – The Food Is Bad and What's More There Is Not Enough of It' (19 October 2012) *EJIL:Talk!*, at <https://www.ejiltalk.org/impact-factor-the-food-is-bad-and-whats-more-there-is-not-enough-of-it/> (last visited 3 March 2022).

Q1 journal in Area Studies, for instance, may be just about as good as publishing in a Q1 journal in Law so long as one's employer treats all Q1 social science journals the same. For researchers looking to maximize their chances of publishing quickly, these considerations are important given the different speeds with which journals review work and their different acceptance rates. As another example, if one's employer treats all Scopus-indexed journals the same (which mine did until recently), there is an incentive to publish in journals near the bottom of the index because their acceptance rates are presumably, though not always, higher. Is it any surprise that Malaysia's rate of publishing in alleged predatory journals that were also indexed in Scopus was from 2015-2017 the fifth-highest in the world?¹³⁶ A formerly Scopus-indexed engineering and technology journal even publishes law articles unrelated to engineering and technology.¹³⁷

Developing technologies have played a large role in enabling and promoting these evaluation systems. Without modern technology, it would not be possible to track researcher h-indices (a measurement of a researcher's most-cited publications), a journal's JIF, social media mentions and other metrics. Bigo argues that digitisation, datafication and evaluation, rather than leading to an egalitarian research environment, have resulted in the loss of academic freedom through regulation and citation practices that 'barely move beyond a small circle of scholars and create[] an impetus for academics to curb their ideas along the lines of the "most

¹³⁶ V. Macháček and M. Srholec, 'Predatory Publishing in Scopus: Evidence on Cross-Country Differences' (2022) 3(3) Quantitative Science Studies 859.

¹³⁷ See, eg, <https://www.sciencepubco.com/index.php/ijet/article/view/18224/8211> (last visited 3 March 2022). The publication patterns of this journal, which charges an author fee of US \$200, and others like it will raise eyebrows. The number of publications per year, according to Scopus, from 2016-2019 (the year it was added until the year it was discontinued in Scopus) were: 25 documents, 28 documents, 5,577 documents, 1 document. See <https://www.scopus.com/sourceid/21100805731#tabs=2> (last visited 1 July 2022) (click on the 'Scopus content coverage' tab near the bottom of the page).

important” journals of their disciplines’.¹³⁸ The use of online academic social networking sites like ResearchGate and Academia.edu, he adds, can similarly be viewed as branding tools to increase researcher and university visibility and are thus a manifestation of control over, rather than the liberation of, individual academics.

The impact of the publish or perish mentality on the search for knowledge and truth is hard to gauge but a 2013 interview with Peter Higgs, the Winner of the Nobel Prize in physics and predictor of the Higgs boson, is instructive. He suggested that in today’s academic environment, he would be unable to keep a university job because he would not be productive enough and he doubted that he would be able to make his breakthroughs because of the expectation that academics must keep churning out papers. He added that he was an embarrassment to his department; to the department’s requests for a list of recent publications, he would reply: ‘None’.¹³⁹ There is so much more research being published today, but are we missing out on deeper insights that could otherwise be developed?

Shifting to non-law publications

Not all behaviour seeking to increase publication metrics is unethical, and in this section I will, with a blush, discuss some of the ways that my own and some of my anonymous colleagues’ publishing behaviour appears to have been impacted by the metrics mentality that permeates our modern research world, and I attempt to show how this behaviour is connected to the selection of research topics.

¹³⁸ D. Bigo, ‘Digital Communication, Surveillance, and Academic Freedom in the Transnational Universes of Competing Homo Academicus(es) Institutions’ (2020) 21(1) *International Studies Perspectives* 12, 16.

¹³⁹ D. Aitkenhead, ‘Peter Higgs: I Wouldn’t Be Productive Enough for Today’s Academic System’ (6 December 2013) *The Guardian*, at <https://www.theguardian.com/science/2013/dec/06/peter-higgs-boson-academic-system> (last visited 1 July 2022).

After I learned how important publication metrics were to my job security, promotion and performance evaluation, I began to study the journals indexed in WoS and Scopus. I started with law journals but moved on to other areas of interest – education, library science, cultural studies, ethics, philosophy, literary journals. In truth, I was scouring journal websites to find places that might accept my writing. It became clear that there are many different types of manuscripts being published, with different levels of rigour, different requirements of novelty, different lengths and different styles. The quality of publications in some journals – at least to my eye – was clearly higher than in others, even though their JIF may have been lower or even when they had no JIF at all.

This led me to suspect that the warming effect of superficial but intense publication pressure pushes researchers to find ways to maximize their publications, not only in their primary area of research but in seemingly unrelated fields. I checked the publication history of my faculty to determine the five-year (2016-20) ratio between articles in WoS-indexed law journals versus WoS-indexed non-law journals. It was 37 per cent : 63 per cent (law journals to non-law journals). Interestingly, the ratio began gradually shifting towards non-law journals, perhaps as a result of intensifying pressures to produce: from 2016-2017, it was 52 per cent (law) : 48 per cent (non-law), whereas from 2018-2020 it was 22 per cent (law) : 86 per cent (non-law). These statistics include and reflect my own publications, which during the five-year period were 30 per cent (law) : 70 per cent (non-law).

Interestingly, a number of the articles in non-law journals were co-authored and were in science journals. Topics included particle swarm algorithms (*Applied Soft Computing*), hydroxyapatites (*Journal of the Australian Ceramic Society*), optical nano antennas (*Sensors*) and oral squamous cell carcinoma (*Sains Malaysiana*). To dispel any doubt, I am not suggesting that any of these authorships or collaborations are inappropriate. I applaud legal

scholars who can contribute to projects in other disciplines. In fact, educational institutions like mine encourage interdisciplinary work and collaboration across fields. I am suggesting, however, that we should not be surprised if increasing co-authorship and publication outside one's area of expertise are at least in part and at least in some instances motivated by the warming effect of the pressure to increase publication metrics.¹⁴⁰ I am not exempting myself: I published in non-law journals (sometimes on non-law topics) including *Learned Publishing*, the *Journal of Scholarly Publishing*, the *Bulletin of Hispanic Studies*, *English in Education* and *Inter-Asia Cultural Studies*. Upon reflection, I think I probably would have written these articles even if there were no pressure to increase publication metrics. I enjoyed writing them and I was interested in the topics. I cannot with confidence, however, say that I did not consider, when embarking upon these projects, the urgent need to add a publication to my CV or the comparative ease in publishing the law-related pieces in these particular journals instead of in law journals. I concede that at least in some instances, I probably would have targeted different venues if there were no incentive to publish in WoS-indexed journals.

My query here is whether institutional policies that push us to maximize our publishable outputs are pushing us away from our traditional areas of expertise and targeted journals. A not insignificant number of articles by colleagues have been published in energy-related WoS-indexed journals such as *Sustainability*, *Renewable Sustainable Energy Reviews* and *Energies*. I commend these colleagues; their contributions to this field are valuable and needed. It is difficult to ignore, nevertheless, how different these journals are from the law journals with which I am familiar and how the differences may influence journal and, consequently, topic choice. For instance, in 2021, they published 13,769 (*Sustainability*), 1,335 (*Renewable and*

¹⁴⁰ N.L.A. Kassim *et al*, 'Time-based Changes in Authorship Trend in Research-Intensive Universities in Malaysia' (2022) *Accountability in Research: Policies and Quality Assurance* (Early View).

Sustainable Energy Reviews) and 8,369 (*Energies*) citable items. Citable items include articles and reviews. Compare this to the top five law journals based on the 2021 JIF rankings: *The European Journal of Psychology Applied to Legal Context* (10 citable items), *Journal of Law and the Biosciences* (66), *Harvard Law Review* (73), *Stanford Law Review* (25) and *Yale Law Journal* (33). That's an eye-popping difference. Indeed, the total number of citable items published by all 155 journals indexed in the elite 2021 WoS Social Sciences Citation Index law category was 4,799 – just a little over one third of those in *Sustainability*, a single journal.¹⁴¹ It is not difficult to imagine how this difference could affect the chances of placing an article in these journals.

Some of the energy journals also levy mandatory article processing charges (APCs) for accepted papers, with *Sustainability*'s fee at 2,000 Swiss Francs (~U.S. \$2,030) and *Energies*' at 2,200 Swiss Francs (~U.S. \$2,233). There is a widespread assumption that the open access model funded by APCs leads to higher acceptance rates and lower article quality because more acceptances mean more revenue.¹⁴² The connection remains contested, however, especially when quality of a publication is equated with the number of citations to it.¹⁴³ I am unaware of any WoS-indexed law journals with mandatory APCs.

¹⁴¹ The number of citable items for five law journals was unavailable in the WoS database.

¹⁴² H. van Vlokhoven, 'The Effect of Open Access on Research Quality' (2019) 13(2) *Journal of Informetrics* 751; B.C. Björk, 'Acceptance Rates of Scholarly Peer-Reviewed Journals: A Literature Survey' (2018) 28(4) *El profesional de la información* 1.

¹⁴³ B.C. Björk and D. Solomon, 'Open Access Versus Subscription Journals: A Comparison of Scientific Impact' (2012) 10(1) *BMC Medicine* 73.

Publication turnaround time is another factor that can influence journal selection. Authors almost invariably prefer faster over slower turnaround times.¹⁴⁴ *Sustainability*'s is 18 days from submission to first decision and 4.1 days from acceptance to publication; *Energies*' is 16.35 days and 4 days, respectively;¹⁴⁵ and *Renewable and Sustainable Energy Reviews*' is 2.1 weeks from acceptance to online publication (decision times were unavailable).¹⁴⁶ In contrast, the *Modern Law Review* aims to complete the review process from submission to publication decision within 10-12 weeks.¹⁴⁷ The *European Journal of International Law* promises to notify authors within six weeks whether their manuscript has been sent to external review; the review process after that can take 16-20 weeks.¹⁴⁸ The student-edited *Stanford Law Review* is much faster, taking two weeks to perform a first review after the submission deadline and an additional week to make a final decision.¹⁴⁹ Surely, there is some point where the speed of review degrades its quality. I am not implying that authors know these statistics when

¹⁴⁴ J. Huisman and J. Smits, 'Duration and Quality of the Peer Review Process: The Author's Perspective' (2017) 113(1) *Scientometrics* 633.

¹⁴⁵ Sustainability, 'Sustainability Statistics', at <https://www.mdpi.com/journal/sustainability/stats>; Energies, 'Energies Statistics', <https://www.mdpi.com/journal/energies/stats> (last visited 9 November 2022).

¹⁴⁶ Renewable and Sustainable Energy Reviews, Homepage, at <https://www.sciencedirect.com/journal/renewable-and-sustainable-energy-reviews> (last visited 9 November 2022).

¹⁴⁷ Modern Law Review, 'Modern Law Review: Author Guidelines', at <https://onlinelibrary.wiley.com/page/journal/14682230/homepage/forauthors.html> (last visited 9 November 2022).

¹⁴⁸ European Journal of International Law, 'Submitting Manuscripts', at <http://www.ejil.org/about/manuscripts.php> (last visited 9 November 2022).

¹⁴⁹ Stanford Law Review, 'Article Submissions', at <https://www.stanfordlawreview.org/submissions/article-submissions/> (last visited 9 November 2022). I was unable to find turnaround times for *The European Journal of Psychology Applied to Legal Context*, *Journal of Law and the Biosciences*, *Harvard Law Review* and *Yale Law Journal*.

deciding what topics to write about or where to submit their manuscripts. Institutional leaders, however, should not ignore these differences when establishing publication incentives and evaluating how these incentives affect the production of scholarship.

Sitting atop the JIF rankings of law journals are U.S. student-edited journals like the *Harvard Law Review* and the *Yale Law Journal*. They dominate the WoS law category: by my count, 43 of the 155 journals in the Social Sciences Citation Index are U.S. student-edited, with 18 of them occupying the 38 slots in Quartile 1. Securing an acceptance to these journals must feel like a pipe dream and, for many researchers from developing countries, the hurdle probably seems insurmountable.¹⁵⁰ The *Georgetown Law Review*, as one example, receives over 2,000 submissions per year; but student-edited law reviews typically only publish between 4-20 unsolicited articles annually.¹⁵¹ A Malaysian legal academic must consider as well the length of typical law review articles,¹⁵² the fact that U.S. law reviews allow simultaneous submissions, which explodes the number of submissions, that law student editors often rely more on the name of the submitter's institution than the quality of the content,¹⁵³ that some spaces are reserved for law student notes and that generalist U.S. law reviews largely favour a connection

¹⁵⁰ B.D. Lund, 'Is Academic Research and Publishing Still Leaving Developing Countries Behind?' (2022) 29(4) *Accountability in Research: Policies and Quality Assurance* 224.

¹⁵¹ Scholastica, 'The Georgetown Law Review' (n.d.), at https://submissions.scholasticahq.com/law-review-submission?law_review_id=469 (last visited 3 March 2022); K.M. Yamamoto, 'What's in a Name: The Letterhead Impact Project' (2004) 22(1) *Journal of Legal Studies Education* 65.

¹⁵² The two *Harvard Law Review* articles published on 10 March 2021 were 74 and 76 pages long.

¹⁵³ J.P. Nance and D.J. Steinberg, 'The Law Review Article Selection Process: Results from a National Study' (2008) 71(2) *Albany Law Review* 565.

to U.S. law or at least a topic that appeals to a U.S. audience. Language challenges and differences in writing styles compound the hurdles.¹⁵⁴

There are other law journals indexed in WoS of course, but considering the number of legal scholars around the world, competition for slots in these journals is fierce and I have not come across any that publish thousands of articles per year like the energy journals. To date and despite several attempts, I have not yet been able to place an article in a WoS-indexed U.S. student-edited law review. Given these obstacles, we must look elsewhere. This does not mean that our sole or even primary reason for publishing in non-law journals is the pressure to increase publication metrics. But can we honestly deny that it is a factor?

The impact of publishing pressures on topic choice

The use of metrics to rate universities and the trickling down of those metrics to individual researchers ‘actively constrains choices about what to study’ and how to study it.¹⁵⁵ Researchers for instance change their publication strategies, such as by targeting non-law journals or, to increase prestige, international journals.¹⁵⁶ Additionally, they may focus more on short-term rather than long-term research, mainstream research topics rather than emerging ones,¹⁵⁷ research that is more likely to be cited, or even research that improves one’s hiring

¹⁵⁴ Emtseva, n 13 above.

¹⁵⁵ S. Turner and D. Chubin, ‘What’s Lost When Research Is Driven Primarily by Funding’ (2019) *Scientific American*.

¹⁵⁶ Butler, n 128 above, 572.

¹⁵⁷ *ibid.*; R. Müller and S. de Rijcke, ‘Thinking with Indicators. Exploring the Epistemic Impacts of Academic Performance Indicators in the Life Sciences’ (2017) 26(3) *Research Evaluation* 157, 159.

potential.¹⁵⁸ Focus has shifted to not only rapid publication but more specifically, publication before the next performance review date.¹⁵⁹ A colleague of mine once suggested strategically spacing out publications so that there would always be one for a performance review.

In one of the most illuminating studies on this topic, Müller and de Rijcke found that life science researchers from Australia and the Netherlands were increasingly considering the impact of metrics and that this consideration affected their research decisions. While initially fascinated with life science topics, the ‘puzzle of life itself’ and a desire to contribute to the good of society, the researchers later found that evaluation systems encouraged them to select research questions and plan research projects based mostly on ‘considerations about the likelihood that the topics will yield high-impact publications in the foreseeable future.’¹⁶⁰ As a result, they evaluated their research on ‘how much impact can be expected in how much time with which degree of certainty.’¹⁶¹ The authors summarize: ‘The question of how easy or difficult it is to achieve high-impact publications can quite fundamentally shape epistemic orientations and career trajectories. This might marginalize research areas where—for a variety of reasons—impact points per time are harder to gain.’¹⁶² Dwell on that for a second: impact points per time. The study’s authors further discovered that researchers who had funding for ground-breaking research were encouraged to switch to less ambitious projects to increase

¹⁵⁸ M. Lizotte, ‘If You Do Not Deign to Quantify, Someone Else Will Do It for You: In Support of a Balanced Approach to the Evaluation of Science’ (2021) 60(3) *Social Science Information* 363.

¹⁵⁹ H.J. Waitere *et al*, ‘Choosing Whether to Resist or Reinforce the New Managerialism: The Impact of Performance-Based Research Funding on Academic Identity’ (2011) 30(2) *Higher Education Research & Development* 205.

¹⁶⁰ Müller and de Rijcke, n 157 above, 161.

¹⁶¹ *ibid.*

¹⁶² *ibid* 163.

publication output.¹⁶³ Waitere, *et al* similarly found that early career academics are encouraged to submit unambitious and safer research projects to get their work published as quickly as possible.¹⁶⁴ They lament: ‘[W]e have forgotten reaching for the stars, we have begun ticking boxes and conforming to categories. The possibility of brilliance is likely to be extinguished or overlooked. People are not trying to achieve demanding, almost beyond-reach goals that make a singular contribution to society.’ In these complaints, one hears echoes of physicist Peter Higgs’ reflections.

Similarly in her study of mathematics, history and marketing academics in England, McCulloch found that research evaluation systems affect ‘the way disciplinary knowledge was conceptualised and the nature of the research that was made possible.’¹⁶⁵ A professor in marketing, for example, explained how most of the top-ranking marketing journals were U.S.-based and focused on quantitative modelling. As a result, ‘she, like other participants, saw these targets as unavoidable, and tried to shape her writing around them, even if this meant changing her research in ways that threatened her sense of identity as a scholar.’¹⁶⁶

Taking advantage of solicitations and shorter articles

I also discovered that some journals provide submission avenues that can affect one’s chances of acceptance or reduce the amount of work it takes to produce a publishable unit. Again, I say

¹⁶³ *ibid.*

¹⁶⁴ J. Smith, ‘Target-Setting, Early-Career Academic Identities and the Measurement Culture of UK Higher Education’ (2017) 36(3) *Higher Education Research & Development* 597, 607.

¹⁶⁵ S. McCulloch, ‘Hobson’s Choice: The Effects of Research Evaluation on Academics’ Writing Practices in England’ (2017) 69(5) *Aslib Journal of Information Management* 503, 509.

¹⁶⁶ *ibid* 510.

this with some embarrassment. The first and perhaps most obvious is the solicited article or book chapter. As an example, I initiated a communication with an editor to see whether the journal was interested in an article I was writing. It was but I ended up publishing the article elsewhere. Continued communications with the editor, however, led her to suggest writing about a related topic. Though the manuscript was peer-reviewed as usual, I have little doubt that the invitation made its path through the editorial process smoother. Importantly, this path clearly impacted the topic of the article because the topic was suggested by the editor.

Another factor is the type of manuscript submitted. Some journals welcome opinion pieces, brief communications, industry updates, commentary and other less research-intensive and less novelty-requiring manuscript types. Some of these do not even go through peer review, which has happened three times to me so far. I knew twice because of the status messages in the submission system and once because of the speed with which the article was accepted. Opinion pieces, industry updates, commentary and brief communications require different scholarship from regular articles and may also encourage different topics. A metrics-obsessed scholar trying to quickly publish in journals with high JIFs may be tempted to take advantage of these avenues.

Since reflexivity requires honesty, I will share that I recently submitted to a journal a ‘brief communication’ that analysed whether researchers use letters to the editor to boost publication metrics. The irony that I wrote a ‘brief communication’ about using short communications like letters to boost metrics was not lost on me. Although I was not actively looking for a way to submit a shorter article, I cannot say that I was disappointed when I saw this opportunity. Compare the standard length of a brief communication in this particular journal (1,000 to 2,000 words) to the implied expectations of an article prepared for the *Harvard Law Review* (‘The *Review* strongly prefers articles under 25,000 words in length

including text, footnotes, and appendices. Length in excess of 30,000 words will weigh significantly against selection. Only in rare cases will we unconditionally accept articles over 37,500 words.’)¹⁶⁷ or even the lower expectations of the *European Journal of International Law* (‘Manuscripts should normally range from 10,000 to 15,000 words in length, including footnotes.’).¹⁶⁸ The warming effect can be difficult to resist and its potential impact on topic selection difficult to ignore.

Conclusion: Aligning Research Decisions with Research Values

Our production of legal scholarship is impacted from within, from our values, and without, from others’ values. Inner motivations and exterior incentives differ from individual to individual. Reflecting deeply, slowly and honestly, I suggest, allows us to recognize these differences and better understand whether the compromises we make are acceptable given their context. Many PhD students make research choices based not on how easy it is to get published but on how interesting the topic is, its impact on humans and the research methods they will learn.¹⁶⁹ Does this remind you of a former you? And do you miss that person?

But let’s not be too hard on ourselves. To some extent, we must accept the chill and the warmth. By living in a complex society filled with such a variety of needs, desires, motivations,

¹⁶⁷ Harvard Law Review, ‘Submit’ (n.d.), at <https://harvardlawreview.org/submissions/> (last visited 3 March 2022).

¹⁶⁸ European Journal of International Law, ‘Information for Authors’ (n.d.), at https://academic.oup.com/ejil/pages/General_Instructions (last visited 3 March 2022).

¹⁶⁹ M. Fochler, U. Felt and R. Müller, ‘Unsustainable Growth, Hyper-Competition, and Worth in Life Science Research: Narrowing Evaluative Repertoires in Doctoral and Postdoctoral Scientists’ Work and Lives’ (2016) 54(2) *Minerva* 175.

fears and hopes, the chilling effect is inevitable. I suggest that our task is to understand it and decide how we let it affect us. Similarly, by entering academia, we have implicitly agreed to join a system that judges us. And it is fair to assume that those judges, the ones setting our publication requirements and evaluating our performance, are doing their best to establish objective, logical incentives that push us to achieve. If we don't like how they are doing it, we need to come up with a better system that is good enough to persuade them to change.

I recommend that we try to decide whether our choices align with our personal values and those of the scholarly enterprise. We should take some comfort if they do. Our individual values come from and are impacted by, among other things, religion, experience, family, the time period in which we live, our interactions with others, our environment, economic development, and our age and genetics.¹⁷⁰ Schwartz explains that the almost infinite number of values that humans have represent responses to three universal requirements: our individual biological needs, the requirements for social interaction and the requirements for the survival and functioning of groups.¹⁷¹ He derives ten motivationally distinct types of values from these

¹⁷⁰ D. Boer and K. Boehnke, 'What Are Values? Where Do They Come From? A Developmental Perspective' in T. Brosch and D. Sander (eds), *Handbook of Value: Perspectives from Economics, Neuroscience, Philosophy, Psychology and Sociology* (Oxford: OUP, 2015) 129; S.H. Schwartz, 'Basic Individual Values: Sources and Consequences' in T. Brosch and D. Sander (eds), *Handbook of Value: Perspectives from Economics, Neuroscience, Philosophy, Psychology and Sociology* (Oxford: OUP, 2015) 79; C. Elliot, 'Where Ethics Comes From and What to Do About It' (1992) 22(4) *The Hastings Center Report* 28, 32; R. Inglehart, M. Basanez and A. Moreno, *Human Values and Beliefs: A Cross-Cultural Sourcebook* (Ann Arbor: University of Michigan Press, 1998).

¹⁷¹ S.H. Schwartz, 'Are There Universal Aspects in the Structure and Contents of Human Values?' (1994) 50(4) *Journal of Social Issues* 19-21. See also S. Bok, *Common Values* (Columbia: University of Missouri Press, 1996) 13-15 (noting the fundamental values of basic forms of nurturing (which include support, loyalty and reciprocity), honouring and obeying parents (though these are so often violated in practice), the limiting of violence, deceit and

universal requirements: power, achievement, hedonism, stimulation (excitement and novelty), self-direction (independent thought), universalism (caring about the welfare of all people and nature), benevolence, tradition, conformity and security.¹⁷² One can easily imagine how some of these motivations – power, achievement, self-direction, conformity, security – impact our decisions to self-censor or to strive for as many publications as possible. Schwartz observes that the consequences that arise from the pursuit of values may conflict, and suggests that the nature of human values and their structure are universal but what differs is the importance that different people and groups place on the values.¹⁷³ These explanations are helpful to understanding that our internal research decisions are regularly being pushed and pulled in different directions by what Schwartz calls ‘exemplary specific values’ – e.g., humility, honesty, success, social power, freedom, obedience – that primarily represent the ten value types.¹⁷⁴ We each then decide how to prioritise them.

Turning to scholarly values, Feldman suggests that the seeking of knowledge through scholarship should be consistent with values that are integral to the search for truth, which include: ‘careful thought, choice of techniques and formulation of issues; honesty; detachment and reflective open-mindedness; clear and fair communication of ideas; co-operation and

betrayal (though these are not necessarily extended to outsiders), and rudimentary procedural justice and fairness in the face of conflict).

¹⁷² Schwartz, n 171 above 21-22.

¹⁷³ *ibid.* 23; Schwartz, n 170 above, 63-64.

¹⁷⁴ Schwartz describes the motivational value types and exemplary specific values in greater detail than I do here. For instance, ‘success’ exemplifies ‘[p]ersonal success through demonstrating competence according to social standards’. Humility exemplifies ‘[r]espect, commitment, and acceptance of the customs and ideas that traditional culture and religion provide.’

mutual assistance among scholars in a spirit of community.’¹⁷⁵ Hook similarly recognises the importance of being able to reach for the truth, free from controls or authority other than the rational methods by which truth is sought and established.¹⁷⁶ A number of scholars argue that the privilege of being an academic comes with a concomitant responsibility to preserve the university as a place of free inquiry, to expand knowledge and to seek truth and speak truth, ‘even when it is unpopular, risky or potentially unsafe for them’.¹⁷⁷

These are noble thoughts but I imagine that the difficult question for many of us is whether it is worth it. Is it worth it to seek truth, speak out and resist the chilling and warming effects that prod us to do what we would not otherwise want to do? Or is it asking too much? Let us also keep in mind that many values that determine what it means to ‘seek truth’, and how much effort and risk one needs to take to seek and speak that truth, are context-specific to culture, institution, project, discipline, group and individual.¹⁷⁸ In his study of self-censorship of online political speech in Southeast Asia, Ong found increased self-censorship by social media users with high incomes who lived in countries with aggressive policies that criminalized and prosecuted online critics. These users had more to lose and were at greater risk of getting caught and punished than lower-income users in countries pursuing low or moderate levels of

¹⁷⁵ D. Feldman, ‘The Nature of Legal Scholarship’ (1989) 52 *MLR* 498, 516.

¹⁷⁶ S. Hook, *Academic Freedom and Academic Anarchy* (New York: Dell, 1969) 34.

¹⁷⁷ J. Butler, ‘Academic Freedom and the Critical Task of the University’ (2007) 4(6) *Globalizations* 857; A. Gibbs, ‘A Responsibility to Seek the Truth: Revisiting Averroes’s Decisive Treatise for Academic Freedom’s Missing Imperative’ (2021) 3(1) *Philosophy and Theory in Higher Education* 21; P. Gibbs, ‘Why Academics Should Have a Duty of Truth Telling in an Epoch of Post-Truth?’ (2019) 78(3) *Higher Education* 501, 501.

¹⁷⁸ N. Agate *et al*, ‘The Transformative Power of Values-Enacted Scholarship’ (2020) 7(1) *Humanities and Social Sciences Communications* 165; M.S. Msoroka and D. Amundsen, ‘One Size Fits Not Quite All: Universal Research Ethics with Diversity’ (2017) 14(3) *Research Ethics* 1.

online repression.¹⁷⁹ It would not be surprising to see similar correlations in academic self-censorship; readers from countries with greater respect for academic freedom (e.g., the UK, Canada, Sweden) and with less to lose might well be bolder than readers from countries that score lower in the Academic Freedom Index (e.g., Brazil, Sudan, Myanmar) and who have more to lose.

The recent experience of a team of archaeologists from Flinders University illustrates how the warming effects of increased publication metrics can be aligned with values. A discouraging assessment of the team's work prompted them to change their research strategy. They increased submissions to journals that counted more (which for them meant top quartile Scopus publications) instead of edited books, book chapters, and community, vanity and local publications. They also moved away from individual authorship to co-authorship, which they found increased each researcher's output and tripled their articles. They increased their grant applications, which led to greater pressure and more requests for relief from teaching. The result: 'we are now seen by the university's senior management – and by ourselves – as a success story.'¹⁸⁰ When I read their account, I cringed. But they published their experience as a lesson for others to follow, not a cautionary tale, demonstrating how different people see the valuation of the scholarly undertaking differently. For them, their choices aligned with their values.

This article has focused on the impact of chilling and warming effects on our own production of legal scholarship, but in concluding I also raise the prospect of our complicity in spreading these effects to others. Shortly before finalizing this article, I encouraged a student

¹⁷⁹ Ong, n 68 above.

¹⁸⁰ C. Smith, H. Burke and M. Morrison, 'Fostering Research Excellence in an Uncertain Environment' (2022) *Nature* (Online), at <https://www.nature.com/articles/d41586-022-01383-x> (last visited 1 July 2022).

to try to publish the paper she had written in my class. She declined, suggesting that it was too controversial. What had I done? Had my frankness in class about potential risks scared my students? In that moment, I realised that we are not only targets of chilling and warming effects; we are also their transmitters. Yet I maintain that we should not refrain from discussing these pressures for fear of influencing others. Our students deserve to know about our experiences, including the less flattering ones. Some of them will become academics. Discussing the impact of chilling and warming effects can help them anticipate and manage future challenges. And perhaps more importantly, some of them will become judges, politicians, business leaders and university administrators. They need to understand how the reverberations of their future exercise of power, like ripples in a lake, rock even the boats far from their wake.