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**Chilling and warming effects on the
production of international law scholarship**

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European University Institute
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International Law Scholarship**

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Abstract

How do international law 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 swirl around us, chilling and warming our interest in research topics. We may not even be aware of these subtle threats, pressures and incentives, and even when we are, we may underestimate their impact. I reflect on how two aspects of my own research environment – the implicit intimidation of (usually political and institutional) power and the pressure to publish – quietly seep into my epistemological decisions. I never imagined that I could simultaneously be such a coward and opportunist. The piece also draws on insights from psychology, sociology and other academic literature to better understand how we respond to and can manage these influences. In the end though, 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 what research to pursue are at their foundation compatible with our personal values and those of the greater scholarly enterprise.

Keywords

reflexivity, chilling effect, epistemology, publication metrics, self-censorship, warming effects

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Introduction

Shortly after arriving in Malaysia in 2012 to teach law, I declined an 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. 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 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. An international peoples’ tribunal, I learned, 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.³ Some have called the tribunals a ‘farce’⁴ and insinuate that the verdicts are decided before the proceedings even commence.⁵ Others suggest that they should be viewed instead as ‘institutions that engage seriously with international legal norms’,⁶ ‘a space for healing and reconciliation’⁷ and a ‘valuable means of social activism’.⁸

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 tribunals impact 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. 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 it is the brain-child of the twice former (and even more powerful) Prime Minister of Malaysia?

¹ Patrick Winn, ‘Malaysia’s Hague Envy’ (2013) *The World* <<https://www.pri.org/stories/2013-05-28/malaysias-hague-envy>>.

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

³ Andrew Byrnes and Gabrielle Simm, ‘Introduction’ in Andrew Byrnes and Gabrielle Simm (eds), *Peoples’ Tribunals and International Law* (Cambridge University Press, 2018), 3-4; Regina Menachery Paulose, ‘Can You Hear the People Sing? Victim/Survivor Rights in People’s Tribunals’ in Regina Menachery Paulose (ed), *People’s Tribunals, Human Rights and the Law: Searching for Justice* (Routledge, 2020) 2, 2.

⁴ Param Kumaraswamy, ‘Dr Ms Proposed War Crimes Tribunal a Farce’ (2007) *Malaysiakini* <<https://www.malaysiakini.com/letters/63313>>; Richard 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.

⁵ Richard A. Falk, ‘Kuala Lumpur Tribunal: Bush and Blair Guilty’ (2011) *Aljazeera* <<https://www.aljazeera.com/opinions/2011/11/28/kuala-lumpur-tribunal-bush-and-blair-guilty>>; Gabrielle Simm and Andrew Byrnes, ‘International Peoples’ Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?’ (2014) 4(1) *Asian Journal of International Law* 103-124, 104.

⁶ Simm and Byrnes (n 5) at 104.

⁷ Paulose (n 3).

⁸ Byrnes and Simm (n 3) at 7.

I focus on two opposites: the chilling effect and the warming effect. The chilling effect – ‘the future deterrence of free activity and speech’⁹ – 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, so subtly) tempting me with reward. Ambitions wrap their arms around me as I strive to make a mark in international law scholarship – success, reputation, promotion. This Greek siren, in my context, is the never-ending race for increased publication metrics.

This piece is not, however, merely a compendium of stories and personal confessions. It also aims to use the reflections to illustrate the subtlety, the intangibility and the insidiousness of the chilling and warming effects in the hope that we may, at the very least, recognise them, call them by their names and consider how we might manage their effect on our scholarship. 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 so stubbornly embedded in our research decisions? Where do we draw the line and decide finally to resist?

Looking 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, international relations and other social science research can help us better understand why we make the epistemological decisions we do. 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.’¹⁰ Nouwen observed in 2014 that explicit reflexivity in international law was rare;¹¹ additional reflective pieces have been published in the intervening years¹² but they remain less common than in many other social sciences.

I use reflexivity to examine the context that I may, 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 the times, other associated or contrasting texts, or something else’.¹³ From a constructivist perspective that ‘acknowledges the historical and contextual contingencies of knowledge and meaning’,¹⁴ the con-text is

⁹ Judith Townend, ‘Freedom of Expression and the Chilling Effect’ in Howard Tumber and Silvio Waisbord (eds), *Routledge Companion to Media and Human Rights* (Routledge, 2017).

¹⁰ Inanna Hamati-Ataya, ‘Reflexivity and International Relations’ (2020) *Oxford Bibliographies*.

¹¹ Sarah 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* 227-260, 233.

¹² See, e.g., Michelle Burgis-Kasthala, ‘Researching Secret Spaces: A Reflexive Account on Negotiating Risk and Academic Integrity’ (2020) 33(2) *Leiden Journal of International Law* 269-287; Isabel Feichtner, ‘Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?’ (2016) 29(4) *Leiden Journal of International Law* 979-1000.

¹³ Dvora Yanow, ‘Thinking Interpretively: Philosophical Presuppositions and the Human Sciences’ in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (ME Sharpe, 2006), 15-16.

¹⁴ Keith H. Hirokawa, ‘Dealing with Uncommon Ground: The Place of Legal Constructivism in the Social Construction of Nature’ (2003) 21(3) *Virginia Environmental Law Journal* 387-423.

inseparable from the research process and results,¹⁵ and can shape our research questions¹⁶ and influence the very topics we choose.¹⁷ Underlying this relationship between research and con-text is the assumption that global politics, international relations and international law rest to a large degree on visible and invisible power.¹⁸ It is around these hidden streams of power that my reflexivity probes.

Reflexivity is messy and personal. It requires introspection,¹⁹ 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 reflexiveness and its potential benefits – accountability, trustworthiness, richness, clarity, ethics, support and personal growth – remain contested.²⁴ Indeed, merely identifying the subtle factors that shape our research encounters 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 personal emoting’,²⁷ and autobiographical accounts run the risk of exaggeration, vanity, and lack of candour and objectivity.²⁸

Given these traps, my aim for reflexivity is also both inward – in that I attempt to come to terms with snapshots from my own epistemological journey – and outward – in that my self-reflective stories might prompt other international law scholars to reflect on what impacts their production of knowledge. Many will not have the same political environment that I have in Malaysia and will have different types of publication pressures. But I suggest that we all encounter chilling and warming effects regardless of our location or field of research. Academics in countries known for their protection of free speech arguably face the ‘moral coercion of public opinion’²⁹ as much as anywhere.³⁰ If one digs enough, with sincerity and courage, one’s own chilling and warming effects will likely come to the surface.

¹⁵ Cecelia Lynch, ‘Reflexivity in Research on Civil Society: Constructivist Perspectives’ (2008) 10(4) *International Studies Review* 708-721, 708.

¹⁶ *Ibid* 710.

¹⁷ Barbara Probst, ‘The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research’ (2015) 39(1) *Social Work Research* 37-48.

¹⁸ Lynch (n 15) at 712; Brooke Ackerly and Jacqui True, ‘Reflexivity in Practice: Power and Ethics in Feminist Research on International Relations’ (2008) 10(4) *International Studies Review* 693-707, 693; Oscar Schachter, ‘The Role of Power in International Law’ (1999) 93 *Proceedings of the Annual Meeting (American Society of International Law)* 200-205.

¹⁹ Lynch (n 15) at 719.

²⁰ Jochen von Bernstorff, ‘International Legal Scholarship as a Cooling Medium in International Law and Politics’ (2015) 25(4) *European Journal of International Law* 977-990.

²¹ Jessica Soedirgo and Aarie Glas, ‘Toward Active Reflexivity: Positionality and Practice in the Production of Knowledge’ (2020) 53(3) *PS: Political Science & Politics* 527-531, 529.

²² Marco Gemignani, ‘Between Researcher and Researched: An Introduction to Countertransference in Qualitative Inquiry’ (2011) 17(8) *Qualitative Inquiry* 701-708, 702.

²³ Nouwen (n 11) at 237; Burgis-Kasthala (n 12) at 15-16. 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 17) at 39, 42.

²⁵ *Ibid* 38.

²⁶ Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016) 4-5.

²⁷ Linda Finlay, ‘Negotiating the Swamp: The Opportunity and Challenge of Reflexivity in Research Practice’ (2002) 2(2) *Qualitative Research* 209-230, 226.

²⁸ See, e.g., Gideon Sjoberg, ‘Intellectual Risk Taking, Organizations, and Academic Freedom and Tenure’ in Stephen Lyng (ed), *Edgework: The Sociology of Risk-Taking* (Routledge, 2005) 247-272.

²⁹ Gideon Elford, ‘Freedom of Expression and Social Coercion’ (2021) 27(2) *Legal Theory* 149-175, 152.

³⁰ Alexis de Tocqueville, *Democracy in America*, tr Harvey C. Mansfield and Delba Winthrop (University of Chicago Press, 2000).

The reflexive sections of this piece are interspersed with brief insights from a broad range of academic literature. In the first part on chilling effects, these sections first address self-censorship and chilling as general concepts, then narrow in on academic freedom and how self-censorship and chilling impact academia specifically. The academic literature presented in the second part, on warming effects, begins with an overview of publication incentives in academia and then, in a subsequent section, discusses the problem of how these incentives impact epistemological decisions.

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 provides 'the latest happenings and developments in constitutional politics and governance, geopolitics and international relations in Asia'. The 29 December 2020 issue includes pieces 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 sentenced to up to a year-and-a half in prison for their rhymes about social injustice and loss of sovereign territory, and a Vietnamese journalist detained for social media posts criticizing tollbooths.³¹

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,³² the region had been transitioning to more democratic forms of governance with increased respect for human rights.³³ The grip on the press, though, has again tightened.³⁴ In Malaysia, where I live, political speech that seriously challenges the government is often claimed to be a threat to national stability and racial harmony³⁵ and, in response, curtailed by laws³⁶ and defamation suits.³⁷

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 the world of Malaysian politics, social media and breaking news to get me

³¹ 'Asia in Review', (Online Newsletter, 29 December 2020) <<http://createsend.com/t/d-79F0B59B699D39D12540EF23F30FEDED>>.

³² See, e.g., Lee Morgenbesser, *The Rise of Sophisticated Authoritarianism in Southeast Asia* (Cambridge University Press, 2020).

³³ James Gomez and Robin Ramcharan, 'Democracy and Human Rights in Southeast Asia' (2014) 33(3) *Journal of Current Southeast Asian Affairs* 3-17, 3.

³⁴ Casey Quackenbush et al, 'Press Freedom Is Under Attack Across Southeast Asia. Meet the Journalists Fighting Back', *Time* (online, 21 June 2018) <<https://time.com/longform/press-freedom-southeast-asia/>>.

³⁵ Mohd Azizuddin Mohd Sani, 'Freedom of Speech and Democracy in Malaysia' (2008) 16(1) *Asian Journal of Political Science* 85-104, 86.

³⁶ International Commission of Jurists, 'Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia' (Report, <<https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf?fbclid=IwAR212EL732WYx5kbqH01WkP9XDoav3PrGNmydI2DXxtITqITpL2Boh7tOK0>>).

³⁷ Mong Palinto, 'Minister Sues Website for Libel', *The Diplomat* (online, 12 June 2014) <<https://thediplomat.com/2014/06/a-first-for-malaysia-prime-minister-sues-website-for-libel/>>; 'Court to Decide on Political Parties Suing Individuals for Defamation', *The Star* (online, 13 March 2020) <<https://www.thestar.com.my/news/nation/2020/03/13/court-to-decide-on-political-parties-suing-individuals-for-defamation>>.

into trouble. The topics I choose are about faraway European courts or remote African villages. The journals I publish in are 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 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.

The Chilling Effect and Self-Censorship Generally

The term 'chilling effect' 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.³⁸ A low threshold to sue for defamation, for instance, would cause some speakers of true information to refrain from speaking out of fear for being sued.³⁹ Surveillance has a particularly powerful chilling effect⁴⁰ and the effect's claws reach outside law and into society's most private corners, impacting for instance the relationship between the coercive power in families and the sharing of secrets,⁴¹ people's careful control of their social media profiles,⁴² a partner's aggressive potential and the airing of grievances in intimate relationships,⁴³ and – most relevantly for this piece – scientists' previous involvement in public controversy and their future self-censorship.⁴⁴ Those doing the chilling are not necessarily doing anything wrong.⁴⁵ In fact, in many 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'⁴⁶ – can be understood as a response to the chilling effect. The distinction between public and private self-censorship is important because it explains how in some instances, the intimidation of power that results in self-censorship emanates from within rather than from without. Self-censorship is 'public' when it is a reaction to an external censor and 'private' when it is instead merely internal regulation.⁴⁷ The latter category arguably does not implicate free speech principles because it is non-coercive.⁴⁸ None of the people involved in the KL War Crimes Tribunal ever did anything to discourage me from criticising the Tribunal.

³⁸ Michael N. Dolitch, 'Alleging a First Amendment Chilling Effect to Create a Plaintiff's Standing: A Practical Approach' (1994) 43 *Drake Law Review* 175, 176; Leslie Kendrick, 'Speech, Intent, and the Chilling Effect' (2012) 54 *William and Mary Law Review* 1633, 1649. (emphasis omitted)

³⁹ Daniel Hemel and Ariel Porat, 'Free Speech and Cheap Talk' (2019) 11 *Journal of Legal Analysis* 46-103, 49.

⁴⁰ Ben Marder et al, 'The Extended 'Chilling' Effect of Facebook: The Cold Reality of Ubiquitous Social Networking' (2016) 60 *Computers in Human Behavior* 582-592, 583; Neil M. Richards, 'The Dangers of Surveillance Symposium: Privacy and Technology' (2012) 126(7) *Harvard Law Review* 1934-1965, 1935.

⁴¹ Tamara D. Afifi and Loreen Olson, 'The Chilling Effect in Families and the Pressure to Conceal Secrets' (2005) 72(2) *Communication Monographs* 192-216.

⁴² Marder et al (n 40).

⁴³ Denise H. Cloven and Michael E. Roloff, 'The Chilling Effect of Aggressive Potential on the Expression of Complaints in Intimate Relationships' (1993) 60(3) *Communication Monographs* 199-219; Michael E. Roloff and Denise H. Cloven, 'The Chilling Effect in Interpersonal Relationships: The Reluctance to Speak One's Mind' in Dudley D. Cahn (ed), *Intimates in Conflict: A Communication Perspective* (Routledge, 1st ed, 1991).

⁴⁴ Joanna Kempner, 'The Chilling Effect: How Do Researchers React to Controversy?' (2008) 5(11) *PLOS Medicine* e222.

⁴⁵ Ruth Smeeth, 'The Chilling Effect of Polarisation on Measured Debate', *Index on Censorship* (Blog Post, 9 April 2021) <<https://www.indexoncensorship.org/2021/04/the-chilling-effect-of-polarisation-on-measured-debate/>>.

⁴⁶ John O'Loughlin, 'The Perils of Self-Censorship in Academic Research in a WikiLeaks World' (2016) 1(4) *Journal of Global Security Studies* 337-345, 337.

⁴⁷ Philip Cook and Conrad Heilmann, 'Two Types of Self-Censorship: Public and Private' (2013) 61(1) *Political Studies* 178-196.

⁴⁸ *Ibid* 180.

In fact, they might even welcome it. This uncertainty can be maddening for those who self-censor – is the chilling effect merely a shadow of one’s own insecurities?

Self-censorship causes clear detriment to the individual – distress, guilt or shame – and society – public ignorance, reduced flow of information and stunted change.⁴⁹ To be fair, however, self-censorship is not only harmful. 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, it is inevitable that scholars must select among numerous topics and ideas to research.⁵⁰ Self-censorship can also increase solidarity and preserve a positive image of the group.⁵¹ These less detrimental aspects muddy the water and should cause us to reflect and question the roots of our decisions. Was my decision not to 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.⁵² If Malaysia had waited until 1 June, it would have formally become a State Party.⁵³ The Prime Minister at the time, Mahathir Mohamad, explained that ‘the confusion the issue had created in the country’ led to the withdrawal.⁵⁴ Critics had argued that the accession would interfere with Malay privileges (Malays comprise the racial majority in the country), the sanctity of Islam (Malaysia’s official religion is Islam) and the position and immunity of the country’s monarch (Malaysia is a constitutional monarchy).⁵⁵

Reportedly, four academics from Malaysian public universities (not including my own) had presented research supporting the withdrawal to Malaysia’s Conference of Rulers (the Conference of Rulers elects the monarch every five years).⁵⁶ A group of student activists 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’.⁵⁷ The students called for public academic debate over the issues, including mistakes in the paper

⁴⁹ Daniel Bar-Tal, ‘Self-Censorship as a Socio-Political-Psychological Phenomenon: Conception and Research’ (2017) 38(S1) *Political Psychology* 37-65, 56.

⁵⁰ Emily Chamlee-Wright, ‘Governing Campus Speech: a Bottom-Up Approach’ (2018) 55(5) *Society* 392-402, 395.

⁵¹ Bar-Tal (n 49) at 56.

⁵² ‘Rome Statute: Patriot Sees ‘Big Picture’, Warns of Move to Undermine Gov’t’, *Malaysiakini* (online, 8 April 2019) <<https://www.malaysiakini.com/news/471335>>.

⁵³ *Rome Statute of the International Criminal Court 2002* (2187 UNTS 90) art. 126(2) (*‘Rome Statute of the International Criminal Court’*). Arguably, withdrawing the instrument before it became effective meant it had no legal consequence. Andreas Zimmerman and Nora Jauer, ‘To Be a Party or Not to Be a Party: Malaysia’s Envisaged “Withdrawal” from Its (Pending) Accession to the Rome Statute’, *EJIL:Talk!* (Blog Post) <<https://www.ejiltalk.org/to-be-a-party-or-not-to-be-a-party-malaysias-envisaged-withdrawal-from-its-pending-accession-to-the-rome-statute/>>.

⁵⁴ Azura Abas and Hashini Kavishtri Kannan, ‘Dr M: Malaysia Withdraws from Rome Statute Due to Smear Campaigns’, *New Straits Times* (online, 5 April 2019) <<https://www.nst.com.my/news/nation/2019/04/476540/dr-m-malaysia-withdraws-rome-statute-due-smear-campaigns>>.

⁵⁵ ‘Malaysia Withdraws from the Rome Statute’, *The Star* (online, 5 April 2019) <<https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute/>>.

⁵⁶ Tarrence Tan, ‘Patriot Urges Four Academics to Debate Rome Statute in Upcoming Forum’, *The Star* (online, 22 April 2019) <<https://www.thestar.com.my/news/nation/2019/04/22/patriot-urges-four-academics-to-debate-rome-statute-in-upcoming-forum/>>.

⁵⁷ ‘Academics Convinced Rulers with “Biased” Paper, Students Claim’, *Malaysiakini* (online, 7 April 2019) <<https://www.malaysiakini.com/news/471287>>.

such as a claim that the alleged crimes against the Rohingya in Myanmar could not be brought before the ICC (which we now know is incorrect).⁵⁸

To my knowledge, the four academics have never discussed or defended their paper. I have not been able to find the full version online although the executive summary is available in Malaysian language on Facebook.⁵⁹ I considered having the summary translated and writing an article about it. The ICC is one of my main subjects of research. Several years ago, when I was a human rights practitioner, I attended a couple of 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?

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.⁶⁰ Thus, for both individuals and societies, the decision to self-censor ultimately involves weighing the benefits of disclosure with its costs.⁶¹ Different societies make this calculation differently and it will naturally depend on context and an individual's own 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? Were there potential personal costs involved?

The courage to challenge prevailing social structures is highly influenced by institutional interests that attempt to shape intellectual activities to enhance their social power.⁶² Sjoberg argues that sociologists who have conceptualised academic risk-taking as largely individualistic underestimate the centrality of organizational structures in promoting academic freedom.⁶³ 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, in which case they will tend to be more reticent to speak. If the media fail to represent the minority perspective, those in the majority then fail to accurately perceive the minority view and make

⁵⁸ Ibid.

⁵⁹ Asheeq Ali (Asheeq Ali), 'PEMBENTANGAN KEPADA MAJLIS RAJA RAJA : AGENDA TERSEMBUNYI SESETENGAH PIHAK?' (Facebook, 7 April 2019) <<https://www.facebook.com/asheeq.ali.3/posts/2085893961447192>>.

⁶⁰ Bar-Tal (n 49) at 45.

⁶¹ Ibid 37; Elvin Ong, 'Online Repression and Self-Censorship: Evidence from Southeast Asia' (2021) 56(1) *Government and Opposition* 141-162.

⁶² Sjoberg (n 28) at 264.

⁶³ Ibid.

the minority even more reticent, spiralling into silence.⁶⁴ In this way, the macro-sociological of mass opinion is linked to the micro-psychological of individual self-censorship.⁶⁵

What these concepts make clear is that there is a strong link between our willingness to pursue research topics that we will publish and our community's potential reaction to it. This connection helps explain how what we research at night out of pure curiosity, in the privacy of our private 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 tempering our inclination to think that we feel free to write about whatever we wish.

The Employment Contract

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 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 many interpretations.

Section 2(3) of Appendix C ('Terms of Service') of the 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 prospect of the government reviewing one's employment contract hovers overhead. In the 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.⁶⁶ Power that can control behaviour through punishment and withhold rewards – such as in employment – is particularly capable of contributing to the chilling effect.⁶⁷ Indeed, 'universities must actively provide support for positions that conflict with their own, or even those that call the legitimacy of their own official views into question.'⁶⁸ Nor should they comply with government requests to fire or discipline academics who criticise the state⁶⁹ because without job security, 'academic freedom is starved of oxygen'.⁷⁰

The terms in my contract 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 seems to play on one's fears and insecurities, invisible but still there. 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,

⁶⁴ Andrew F. Hayes and Jörg Matthes, 'Self-censorship, the Spiral of Silence, and Contemporary Political Communication' in Kate Kenski and Kathleen Hall Jamieson (eds), *The Oxford Handbook of Political Communication* (Oxford University Press, 2017).

⁶⁵ Ibid.

⁶⁶ Aline Courtois and Theresa 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; Thomas Allmer, 'Precarious, Always-On and Flexible: A Case Study of Academics as Information Workers' (2018) 33(4) *European Journal of Communication* 381-395.

⁶⁷ Afifi and Olson (n 41) at 195.

⁶⁸ Judith Butler, 'Academic Freedom and the Critical Task of the University' (2017) 14(6) *Globalizations* 857-861, 859.

⁶⁹ Ibid.

⁷⁰ Howard Karger, 'How Ego, Greed, and Hubris (Almost) Destroyed a University: Implications for Academic Freedom' (2020) 11 *AAUP Journal of Academic Freedom*, 11.

with a forced smile, a pallid look in the eyes and a quick change of topic. Although these types of terms are not directly linked to the selection of research topics, a 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 failed accession to the Rome Statute or the Permanent Peoples’ Tribunal. Recall that the controversy over accession to the Rome Statute involved a particularly sensitive institution, the Malaysian Royalty.

The Chilling Effect and Self-Censorship in Academia

Self-censorship in academia is common⁷¹ and includes not only deciding to remain silent under pressure but also avoiding certain research topics.⁷² O’Loughlin calls it the most insidious but also the most effective kind of censorship because it leaves no footprints.⁷³ How many, he wonders, have quietly abandoned their research projects?⁷⁴ Resistance by scholars (particularly those with tenure) to ‘the climate of (self-induced) fear and the spiral of silence’, he suggests, is particularly crucial because they have the resources and ability to resist the chill.⁷⁵ This call to arms, however, must consider that over the past thirty years or so, institutional power shifts driven by government policies have made legal academics more vulnerable and less resilient.⁷⁶ Calls for them to resist corporatization,⁷⁷ as one example, have had mixed results.⁷⁸ Cici, *et al.* found the connection between tenure and the exercise of academic freedom weak, and all the academics they interviewed thought others were more likely to engage in academic risk than they themselves were.⁷⁹

Direct censorship is, perhaps counterintuitively, not the most common way to control researchers; instead, detractors raise questions about the legitimacy of research, make claims of misconduct, refuse funding or hinder career opportunities or employment.⁸⁰ In response, researchers ‘remain silent in fear of the negative consequences of career, reputation, and coping’.⁸¹ Fear is a frequent motivator – fear of powerful governments, of being fired, of ostracism from colleagues, of lowered status in employment, of loss of funding and of damage to reputation.⁸² 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.⁸³ In 2016, after

⁷¹ Rafi Nets-Zehngut and Shai Fuxman, ‘Self-Censorship of Narratives of Political Violence in Academia’ in Daniel Bar-Tal, Rafi Nets-Zehngut and Keren Sharvit (eds), *Self-Censorship in Contexts of Conflict: Theory and Research* (Springer International Publishing, 2017) 185-205, 190; Emily Chamlee-Wright, ‘Self-Censorship and Associational Life in the Liberal Academy’ (2019) 56(6) *Society* 538-549.

⁷² Nets-Zehngut and Fuxman (n 71).

⁷³ O’Loughlin (n 46) at 337.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* 344.

⁷⁶ Graham 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* 24-41.

⁷⁷ James G. Andrews, ‘How We Can Resist Corporatization’ (2006) 92(3) *Academe* 16-19; Nicolaus Mills, ‘The Corporatization of Higher Education’ (Fall 2012) *Dissent* < <https://www.dissentmagazine.org/article/the-corporatization-of-higher-education..>

⁷⁸ Stephanie Ross, Larry Savage and James Watson, ‘University Teachers and Resistance in the Neoliberal University’ (2020) 45(3) *Labor Studies Journal* 227-249.

⁷⁹ Stephen J. Ceci, Wendy M. Williams and Katrin Mueller-Johnson, ‘Is Tenure Justified? An Experimental Study of Faculty Beliefs about Tenure, Promotion, and Academic Freedom’ (2006) 29(6) *Behavioral and Brain Sciences* 553-569.

⁸⁰ Esa Väliaverronen and Sampsa Saikkonen, ‘Freedom of Expression Challenged: Scientists’ Perspectives on Hidden Forms of Suppression and Self-censorship’ (2020) *Science, Technology, & Human Values* 1, 4.

⁸¹ *Ibid.*

⁸² O’Loughlin (n 46) at 338.

⁸³ Nets-Zehngut and Fuxman (n 71) at 187. It is worth noting that academics who approve of government policies also self-censor. O’Loughlin (n 46) at 338.

1,128 Turkish academics signed a petition demanding the government stop its violence against Kurds in southeastern Turkey 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 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.⁸⁴ The chilling does not only occur in authoritarian contexts. After the 11 September 2001 attacks, in the U.S. a chill swept over research critical of the War on Terror.⁸⁵ The lack of research on the Northern Ireland conflict and the Palestinian exodus during the 1948 Palestine War also exemplifies academic self-censorship.⁸⁶

The context in which self-censorship occurs and its effect on the quality of academic discourse are important considerations in determining self-censorship's value.⁸⁷ Chamlee-Wright explains that abrasion (confronting diverse opinions and perspectives, sometimes with disapproval from others) and civility are two principles in the academy that lead to self-censorship, with both positive and negative consequences. Abrasion 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, can lead to self-censorship.⁸⁸ Civility, in contrast, implicates recognition of our shared humanity. It involves understanding and acquiring the skills to engage in social conversation and be friends with colleagues. Sometimes this means holding one's tongue to avoid offending others.⁸⁹ 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.⁹⁰

The line between appropriately reigning 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.⁹¹ The dilemma for scholars, therefore, is to determine whether their self-censorship is borne of civility or cowardice.⁹² 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'⁹³ – by affecting our ability to pursue 'lines of research and modes of thought' without interference from authorities.⁹⁴ Academic freedom includes the right to choose one's research topics and the right to be free from constraint on this choice.⁹⁵ It implies not only free inquiry but also an institutional obligation to

⁸⁴ Vezir Aktas, Marco Nilsson and Klas Borell, 'Social Scientists Under Threat: Resistance and Self-Censorship in Turkish Academia' (2019) 67(2) *British Journal of Educational Studies* 169-186, 180.

⁸⁵ Laurie A. Brand, 'Middle East Studies and Academic Freedom: Challenges at Home and Abroad' (2007) 8(4) *International Studies Perspectives* 384-395, 384.

⁸⁶ Nets-Zehngut and Fuxman (n 71) at 189.

⁸⁷ Chamlee-Wright, 'Self-Censorship and Associational Life in the Liberal Academy' (n 71) at 543.

⁸⁸ *Ibid* 541.

⁸⁹ *Ibid* 542.

⁹⁰ Stacey 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* 395-400.

⁹¹ Chamlee-Wright, 'Self-Censorship and Associational Life in the Liberal Academy' (n 71) at 542.

⁹² *Ibid* 543.

⁹³ Aktas, Nilsson and Borell (n 84) at 169.

⁹⁴ Butler (n 68) at 1.

⁹⁵ Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969); Karger (n 70) at 11.

preserve itself as a place of free inquiry without censorship⁹⁶ and an implied assurance that scholars alone have the power to choose their topics and modes of research.⁹⁷ States and universities arguably even have an obligation to ensure the rights of others to criticize the states and universities themselves.⁹⁸

Academics have had comparatively greater freedom than, for example, judges or lawyers to choose the projects they pursue⁹⁹ 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'.¹⁰⁰ Researchers of course face pressure not only from governments or institutions but also political activists, lobbyists and ordinary citizens,¹⁰¹ and not only in authoritarian regimes but in liberal Western democracies.¹⁰² Indeed, there is arguably no fundamental difference in the damage to freedom of speech caused by government restrictions, on one hand, and societal penalties, on the other.¹⁰³ Academics are particularly susceptible because many depend on the government for employment and funding.¹⁰⁴ 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 arrangements within the university and the society.'¹⁰⁵

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

When I started my current post at the Faculty of Law 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 human rights and environmental law (he has since moved on to a position with the Election Commission). 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.¹⁰⁶ His comment included a comparison to a 2009 transition of political power in Perak (a Malaysian state) that involved the state's sultan (this is where he treaded on sensitive ground). Sharom reportedly stated that this 2009 transition 'had been done through a secret meeting and was legally wrong.'¹⁰⁷

⁹⁶ Butler (n 68) at 857.

⁹⁷ O'Loughlin (n 46) at 343.

⁹⁸ Butler (n 68) at 858-859.

⁹⁹ Bianchi (n 26) at 6.

¹⁰⁰ Pierre Schlag, 'A Comment on Thomas Schultz's Editorial' (2014) 5(2) *Journal of International Dispute Settlement* 235-237, 235.

¹⁰¹ Välvirronen and Saikkonen (n 80) at 2.

¹⁰² Sjoberg (n 28) at 252-255; Hayes and Matthes (n 64).

¹⁰³ Elford (n 29).

¹⁰⁴ Jannis Grimm and Ilyas Saliba, 'Free Research in Fearful Times: Conceptualizing an Index to Monitor Academic Freedom' (2017) 3(1) *Interdisciplinary Political Studies* 41-75, 44.; Nets-Zehngut and Fuxman (n 71) at 194.

¹⁰⁵ Sjoberg (n 28) at 264.

¹⁰⁶ 'AG Drops Sedition Charges Against Law Prof Azmi Sharom', *Malaysiakini* (online, 12 February 2016) <<https://www.malaysiakini.com/news/330117>>.

¹⁰⁷ Eunice Au, 'Court Ruling on Sedition Act Raises Fears about Free Speech', *The Straits Times* (online, 7 October 2015) <<https://www.straitstimes.com/asia/se-asia/court-ruling-on-sedition-act-raises-fears-about-free-speech>>.

If convicted (he was eventually released after the Prosecutor's Office dropped the case), he could have faced up to a three-year jail sentence and a hefty fine.¹⁰⁸ Under the Sedition Act 1948 of Malaysia, '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 and hostility between different races or classes.'¹⁰⁹ Sedition is a strict liability offence in which the intention of the speaker is irrelevant.¹¹⁰ The Sedition Act, at least at that time, was being selectively applied against critics of the ruling government.¹¹¹

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. In Malaysian courtrooms, there is a special area in which defendants sit. I saw Sharom there. He was dressed professionally with his famous (at least in Malaysia) pony tail tied back. 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. My 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? On the one hand, 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 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.'¹¹² He clearly understands the chilling effect.

At the same time though, 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.¹¹³ Our personality traits also impact our willingness to self-censor and I am definitely no hero. Are we patriotic, conservative, authoritarian? What are our motivations, attitudes, ideologies, emotions, values, worldviews?¹¹⁴ As scholars of international law, what are we willing to risk? When are we willing to risk? How do we balance personal risk with upholding the principles

¹⁰⁸ Maizatul Nazlina, 'Prosecution Wraps Up Case in Azmi Sharom Sedition Trial', *The Star* (online, 14 January 2016) <<https://www.thestar.com.my/news/nation/2016/01/14/azmi-sharom-trial-prosecution>>.

¹⁰⁹ Global Freedom of Expression, 'Public Prosecutor v. Azmi Bin Sharom', Columbia University, sections 2, 3 <<https://globalfreedomofexpression.columbia.edu/cases/public-prosecutor-v-azmi-bin-sharom/>>; *Sedition Act 1948* (Malaysia).

¹¹⁰ Global Freedom of Expression (n 109).

¹¹¹ Au (n 107).

¹¹² Ibid.

¹¹³ Bar-Tal (n 49) at 52.

¹¹⁴ Ibid.

that we write about? How has the Internet – with its ability to make things viral – changed the risk calculus? Response to the chilling effect is often grounded in social exchange theory, which weighs reward against cost of action.¹¹⁵ Is it even possible to calculate the risk of academic expression and if it is, how can we make sense of what it means to even engage in such a calculation? This piece reflects my unique experiences and the political and cultural environment in which I live and work but wherever we 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 appeal or encourage behaviour. For instance, bans on affirmative action arguably have a warming effect on college applications from underrepresented minorities.¹¹⁶ Lowering the bar to defamation claims may counterintuitively have a warming effect on speech that would not have otherwise been made.¹¹⁷

In this article, I use the phrase to mean something that incentivizes us to select a particular research topic. In my case, the main warming effect is the pressure from my employer to increase publication metrics and the related boost in reputation, career prospects and performance evaluation that accompany it.¹¹⁸ Our research output, like at many other institutions of higher education, is measured quantitatively by the number of publications that we produce each year and qualitatively by the prestige of the journal (for articles) or publisher (for books and book chapters). Use of this type of performance evaluation system is based on the beliefs that metrics can and should replace 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.¹¹⁹ Though researchers seem to constantly complain about these modes of evaluation, reward systems in academia and the perception of them are undeniably a major source of extrinsic motivation and influence on behaviour.¹²⁰ Any research assessment system that affects money or prestige will likely affect researcher behaviour.¹²¹ One unfortunate result is that for many, scoring high in whatever measurement is established, rather than attaining worthwhile objectives, becomes the goal.¹²²

¹¹⁵ Affi and Olson (n 41).

¹¹⁶ Kate L. Antonovics and Richard H. Sander, ‘Affirmative Action Bans and the “Chilling Effect”’ (2013) 15(1) *American Law and Economics Review* 252-299, 259. For a counter-view, see William C. Onwuachi-Willig Kidder, Angela, ‘Still Hazy after All These Years: The Data and Theory behind “Mismatch”’ (2013) 92 *Texas Law Review* 895.

¹¹⁷ 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 39) at 49.

¹¹⁸ In this piece, 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. Grants directly steer researchers to particular topics and types of research. In this article though, my focus is on the more surreptitious influences.

¹¹⁹ Jerry Z. Muller, *The Tyranny of Metrics* (Princeton University Press, 2015) 18. See also Daniella Bayle Deutz et al, ‘Quantitative Quality: A Study on How Performance-Based Measures May Change the Publication Patterns of Danish Researchers’ (2021) 126(4) *Scientometrics* 3303-3320.

¹²⁰ KerryAnn O’Meara, ‘Inside the Panopticon: Studying Academic Reward Systems’ in J. Smart and M. Paulsen (eds), *Higher Education: Handbook of Theory and Research* (Springer, 2011) vol 26, 161, 163.

¹²¹ Linda Butler, ‘Assessing University Research: A Plea for a Balanced Approach’ (2007) 34(8) *Science and Public Policy* 565-574, 571.

¹²² *Ibid.*

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.¹²³ For performance measurement purposes, the credit that a researcher receives for publishing an article is measured by its inclusion in an indexed journal, not by anyone actually having evaluated the article by reading it. This is not unusual and relieves evaluators of a great burden. There is therefore a presumption of quality, not just of the journal but also of the articles within it.¹²⁴ It is not an accident that these indices are also tied to global university rankings.¹²⁵ University managers know that increasing indexed publications directly impacts rankings. For a researcher, the higher the journal's WoS Journal Impact Factor (JIF – a measure of the number of times an average paper in a journal is cited during a year), the more the praise. If an article is placed in a journal within the top quartile of a WoS subject category (like law), you have hit the jackpot. 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 receives less credit.¹²⁶ This type of superficial measuring of quality has been subjected to withering criticism, including in international law scholarship.¹²⁷

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 (securing 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.¹²⁸ These types of 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 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 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

¹²³ Lokman I. Meho and Yvonne 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* 1711-1726.

¹²⁴ Colin Steele, Linda Butler and Danny Kingsley, 'The Publishing Imperative: The Pervasive Influence of Publication Metrics' (2006) 19(4) *Learned Publishing* 277-290. Some have identified predatory journals in these databases. See, e.g., Nguyen Minh Duc et al, 'Predatory Open Access Journals are Indexed in Reputable Databases: a Revisiting Issue or an Unsolved Problem' (2020) 74(4) *Medical Archives (Sarajevo, Bosnia and Herzegovina)* 318-322.

¹²⁵ The 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 the Web of Science.

¹²⁶ The number of publications in high-impact journals and the number of citations to one's work often impacts promotion. See, e.g., Christopher R. Carpenter, David C. Cone and Cathy C. Sarli, 'Using Publication Metrics to Highlight Academic Productivity and Research Impact' (2014) 21(10) *Academic Emergency Medicine* 1160-1172; 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* 325-330.

¹²⁷ See, e.g., Marko Milanovic, 'Horrible Metrics', *EJIL:Talk!* (Blog Post, 24 August 2016) <<https://www.ejiltalk.org/horrible-metrics/>>; Crawford Spence, "'Judgement" Versus "Metrics" in Higher Education Management' (2019) 77(5) *Higher Education* 761-775; Muller (n 119).

¹²⁸ 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. Joseph Weiler, 'Impact Factor – The Food Is Bad and What's More There Is Not Enough of It', *EJIL:Talk!* (Blog Post, 19 October 2012) <<https://www.ejiltalk.org/impact-factor-the-food-is-bad-and-whats-more-there-is-not-enough-of-it/>>.

looking to maximize their chances of publishing quickly, these types of considerations are important and, importantly, may affect what one writes about. As another example, if one's employer treats all Scopus-indexed journals the same (which mine does), there is an incentive to publish in journals near the bottom of the index – after all, their acceptance rates are likely much higher. Is it any surprise that Malaysia was the fifth-highest nation in the number of articles published in alleged predatory journals that were also indexed in Scopus?¹²⁹ A (formerly Scopus-indexed) engineering and technology journal even publishes law articles unrelated to engineering!¹³⁰

Shifting to Non-Law Publications

Not all behaviour seeking to increase publication metrics is unethical, however, 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.

After I learned how important publication metrics are to my job security, promotion and performance evaluation (and before I became highly critical of them), 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. It became clear that there are many different types of manuscripts being published, with different levels of rigor, 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.

I suspected that the warming effect of publication metrics steers 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 (2016-2020) ratio between articles in WoS-indexed law journals versus non-law journals.¹³¹ It was 37% : 63% (law journals to non-law journals). Interestingly, the ratio began gradually shifting towards non-law journals: from 2016-2017, the ratio was 52% (law) : 48% (non-law), whereas from 2018-2020 it was 22% (law) : 78% (non-law). These numbers include and reflect my own publications, which during the five-year period were 30% (law) : 70% (non-law). These striking numbers indicate that the majority of the articles (some with a connection to law, others without) authored by law academicians, at least in my particular environment, are published in non-law journals.

Interestingly, many of the articles in non-law journals were in science journals, on topics such as particle swarm algorithms (*Applied Soft Computing*), hydroxyapatites (*Journal of the Australian Ceramic Society*), optical nano antennas (*Sensors*) and oral squamous cell carcinoma (*Sains Malaysiana*). It is unclear whether the collaborations that led to these publications were encouraged by the warming effect of the pressure to increase publication metrics but I would be surprised if they were not. 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*. As with the chilling effect, I have to ask myself why I selected these topics and these particular journals. How much control does the warming effect exert?

¹²⁹ Vít Macháček and Martin Srholec, 'Predatory Publishing in Scopus: Evidence on Cross-Country Differences' (2021) 126(3) *Scientometrics* 1897-1921.

¹³⁰ See, e.g., <https://www.sciencepubco.com/index.php/ijet/article/view/18224/8211>.

¹³¹ This information is publicly available at <https://umexpert.um.edu.my/>.

Where to publish is an individual decision that may be motivated by a whole host of reasons. My query here, though, is whether institutional policies that push us to maximize our publishable bits are also pushing us away from our traditional areas of expertise and target journals. One reason for seeking publication outside law is that, at least in some fields, acceptance rates may be higher. As an illustration, a significant number of articles co-authored by my faculty colleagues were in the energy-related journals *Sustainability*, *Renewable Sustainable Energy Reviews* and *Energies*. In 2020, these journals published 10,670 documents (*Sustainability*), 647 documents (*Renewable and Sustainable Energy Reviews*) and 5,574 documents (*Energies*). Compare this to the top three law journals (based on the most recent available 2019 JIF): *Harvard Law Review* (48 documents), *Yale Law Journal* (38 documents) and *European Journal of Psychology Applied to Legal Context* (10 documents). Though I do not know the acceptance rates of these venues, that's an eye-whopping difference. Indeed, the total number of articles published by all 155 journals indexed in the 2019 WOS law category was 4,246 – less than half of those in *Sustainability*, a single journal.

Indeed, U.S. student-edited law journals like the *Harvard Law Review* and the *Yale Law Journal* dominate the WoS law category: by my count, 44 of the 154 law journals indexed in 2019 were U.S. student-edited, with 20 of them occupying the 39 slots in Quartile 1. Securing an acceptance to these journals must seem like a pipe dream for many and, for researchers from developing countries, especially those for whom English is not their first language, the hurdle probably seems insurmountable.¹³² 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.¹³³ A Malaysian legal academic must consider as well the length of typical law review articles,¹³⁴ 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,¹³⁵ that some spaces are reserved for law student notes and that generalist U.S. law reviews largely favour a connection to U.S. law or at least a topic that appeals to a U.S. audience.

There are other types of law journals indexed in WoS of course, but their numbers are limited 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 this is not at all a factor?

The Impact of Publishing Pressures on Topic Choice

The use of metrics to rate universities and the filtering of those metrics down to individual researchers 'actively constrains choices about what to study' and how to study it.¹³⁶ The first and most obvious impact is a change in publication strategies (as I noted above), such as

¹³² Brady D. Lund, 'Is Academic Research and Publishing Still Leaving Developing Countries Behind?' (2021) *Accountability in Research* 1-9.

¹³³ Scholastica, 'The Georgetown Law Review' (n.d.) <https://submissions.scholasticahq.com/law-review-submission?law_review_id=469>; Kevin M. Yamamoto, 'What's in a Name: The Letterhead Impact Project' (2004) 22(1) *Journal of Legal Studies Education* 65.

¹³⁴ I checked the pages of the two *Harvard Law Review* articles published on 10 March 2021; they were 74 and 76 pages long.

¹³⁵ Jason P. Nance and Dylan J. Steinberg, 'The Law Review Article Selection Process: Results from a National Study' (2008) 71(2) *Albany Law Review* 565.

¹³⁶ Stephen Turner and Daryl Chubin, 'What's Lost When Research Is Driven Primarily by Funding' (2019) *Scientific American*.

targeting non-law journals or, to increase prestige, international journals.¹³⁷ Additionally, researchers may focus more on short-term rather than long-term research, mainstream research topics rather than emerging ones,¹³⁸ research that is more likely to be cited, or even research that improves one's hiring potential.¹³⁹ Focus has shifted to not only rapid publication but more specifically, publication before the next performance review date.¹⁴⁰

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 throughout their research and that this consideration affected their epistemological decisions. While initially fascinated with life science topics, the 'puzzle of life itself' and a desire to contribute to the good of society, they 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.'¹⁴¹ As a result, the researchers evaluated their research on 'how much impact can be expected in how much time with which degree of certainty.'¹⁴² The study's authors further found that researchers who had funding for ground-breaking research were encouraged to switch to less ambitious projects to increase publication output.¹⁴³ They 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.'¹⁴⁴

Similarly in her study of math, 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.'¹⁴⁵ 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.'¹⁴⁶

Publication pressures also impact the riskiness of topics. Early career academics are encouraged to submit unambitious and safer pieces in order to get their work published as quickly as possible.¹⁴⁷ In discussing the effect of a Performance Based Research Funding (PBRF) that pigeonholes academics into four categories, Waitere, *et al.* lament:

We are in mortal danger of actually believing that we are our category or that those words describing the brilliance of our article are, in some sense at least, true. We are forgetting that we are playing an elaborate game that has been forced upon us by a government agency. As soon as we are reduced to thinking only in terms of PBRF, we have forgotten reaching for the stars, we have begun ticking boxes and conforming to categories. The possibility of brilliance

¹³⁷ Butler (n 121) at 572.

¹³⁸ *Ibid.*; Ruth Müller and Sarah de Rijcke, 'Thinking with Indicators. Exploring the Epistemic Impacts of Academic Performance Indicators in the Life Sciences' (2017) 26(3) *Research Evaluation* 157-168, 159.

¹³⁹ Mathieu 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* 363-371.

¹⁴⁰ Hine Jane 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* 205-217.

¹⁴¹ Müller and de Rijcke (n 138) at 161.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.* 163.

¹⁴⁵ Sharon McCulloch, 'Hobson's Choice: The Effects of Research Evaluation on Academics' Writing Practices in England' (2017) 69(5) *Aslib Journal of Information Management* 503-515, 509.

¹⁴⁶ *Ibid.* 510.

¹⁴⁷ Jan Smith, 'Target-Setting, Early-Career Academic Identities and the Measurement Culture of UK Higher Education' (2017) 36(3) *Higher Education Research & Development* 597-611, 607.

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.

As Sjoberg reminds us, in modern society, intellectual risk-taking requires institutional support.¹⁴⁸

Taking Advantage of Solicitations and Shorter Pieces

My keen interest in academic publishing also led me to discover that some journals' submission processes provide various avenues that can affect one's chances of acceptance. The first and most obvious is the invited piece. As an example, I initiated a communication with an editor to see whether the journal was interested in a piece I was researching. 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. I have little doubt that, though the manuscript was peer-reviewed as usual, the invitation had smoothed its way through the editorial process. Importantly, this path clearly impacted the topic of the piece because it was suggested by the editor.

Another avenue 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 (this 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). Significantly, opinion pieces, industry updates, commentary and brief communications require different types of scholarship and may also encourage different types of 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 a 'brief communication' to a journal exploring whether researchers use letters to the editor (which are usually short and not peer-reviewed) to boost publication metrics. The irony that I wrote a piece about using short communications to boost metrics in a 'brief communication' was not lost on me. Although I was not actively looking for a way to submit a shorter piece, I cannot say that I was disappointed when I saw this opportunity. Compare the range of number of words 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.')149 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.').¹⁵⁰ The warming effect can be difficult to resist and its potential impact on topic selection difficult to ignore.

Conclusion

Some peer reviewers on a different article of mine recently suggested that I delete a personal anecdote that described my motivation to write the piece and asked me to remove other phrases that implied how I felt about the subject matter. I have not submitted the revisions yet

¹⁴⁸ Sjoberg (n 28) at 248.

¹⁴⁹ Harvard Law Review, 'Submit' (n.d.) <<https://harvardlawreview.org/submissions/>>.

¹⁵⁰ European Journal of International Law, 'Information for Authors' (n.d.) <https://academic.oup.com/ejil/pages/General_Instructions>.

but I suppose the reviewers are probably correct to separate the personal from the scholarly. Academia, if nothing else, strives to remain at a distance from its subject. Yet the constant reminders, especially in the field of law, to maintain objectivity and to keep our emotions out of our work ignores that the emotional and the academic are often intertwined. Reflexivity obliges us to recognise this connection. Fear, shame, greed, ego, pride – these feelings impact us in ways that are not always easy to see. I decided to write this article because it was an opportunity for me to allow these two worlds to collide.

Each of us, of course, resides within our own epistemological zone. The politics of our place matters. Our production of international law scholarship is impacted from within, from our values, and without, from others' values. Our inner motivations and exterior incentives differ. Reflecting deeply, slowly and honestly – I suggest – allows us to recognize these differences and better understand whether the compromises we make are acceptable. For international law scholars, reflecting can help us recalibrate our boundaries and reassess our research goals. Many PhD students make epistemic 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.¹⁵¹ Does this remind you of a former you? And do you miss that person?

But let's not be too hard on ourselves when we reflect on the epistemological compromises we make. 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, fears and hopes, the chilling and warming effects are inevitable. I suggest that our task is to understand them and decide how we let them affect us. By joining academia, we have implicitly agreed to enter 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 will persuade them to change.

I propose that, ultimately, we decide whether our choices align with our personal values and those of the scholarly enterprise. We should take some comfort if they do. Our personal values can only be accessed by our own hearts, but values of scholarship are easy to find. Where I work, the university administration recently developed a new set of core values called 'POISE': Passion, Oneness, Integrity, Sincerity, Empathy.¹⁵² These seem like values that we can all agree upon but let us also keep in mind that values are context-specific to institution, project, discipline, group and individual.¹⁵³ Feldman proposes another good starting point by suggesting that legal scholarship translates into action 'the attitudes born of a commitment to the inner morality of scholarship: careful thought, choice of techniques and formulation of issues; honesty; detachment and reflective open-mindedness; clear and fair communication of ideas; co-operation and mutual assistance among scholars in a spirit of community.'¹⁵⁴

To help us, we may do well to turn to Chamlee-Wright's suggestion to use an impartial and well-informed observer to judge our actions. Would the observer, knowing all the facts, approve? If I may suggest a slight modification – let's have two observers. One is our younger, more idealistic self and the second is our older probably more jaded self. We could ask these past and future selves whether we would do the same research project if the chill or warmth were not present. We could ask them whether we are making too much of the potential risks. Should we fight against the chilling and warming effects? Or should we accept them as part of

¹⁵¹ Maximilian Fochler, Ulrike Felt and Ruth 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* 175-200.

¹⁵² Universiti Malaya, 'Vision & Mission', <<https://www.um.edu.my/vision-amp-mission>>.

¹⁵³ Nicky Agate et al, 'The Transformative Power of Values-Enacted Scholarship' (2020) 7(1) *Humanities and Social Sciences Communications* 165.

¹⁵⁴ David Feldman, 'The Nature of Legal Scholarship' (1989) 52 *Modern Law Review* 498, 516.

living in a cooperative and civil society? What would they say? If they are inconsistent, which will we follow?

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