Defamation’s ‘chilling effect’
Mapping the social articulation of a legal concept

Legal origin
The concept of the ‘chilling effect’ was developed in First Amendment
cases in the US, but has spread to other jurisdictions to describe an
illegitimate threat to freedom of expression in defamation cases.
• Schauer (1978) writes how ‘deterred by the fear of punishment, some
individuals refrain from saying or publishing something that which
they lawfully could, and indeed, should’
• UK and European courts have also recognised there can be a ‘chilling
effect’ on legitimate expression (see, for example: Derbyshire County
Council v Times Newspapers Ltd [1993] A.C. 534, which established that
it was contrary to the public interest for a local authority to sue for
libel)
• Documented by legal scholars through case law and limited empirical
evidence

Social articulation
Used in a variety of contexts, but mainly in relation to defamation law.
• In 2009, launch report for Libel Reform campaign identified various
case studies where authors deemed there was an illegitimate threat to
freedom of expression through ‘unnecessary and disproportionate’
legal restrictions
• Subjectively defined: varying weight placed on competing rights,
depending on circumstances and an individual’s opinion
Recent usage
The Leveson Inquiry: ‘The big picture is that there is a chilling atmosphere
towards freedom of expression which emanates from the debate around
Leveson,’ Michael Gove MP
Press regulation: ‘If the state is given the power to oversee or limit our
work it could bring about a new ice age where the most important work
we do is gone forever,’ Brian Flynn, investigations editor, the Sun

Can the ‘chill’ be measured?
To measure - or map - the chilling effect we need to identify illegitimate
threats. The passage of the Defamation Bill in Parliament highlighted the
methodological difficulties.
• Parliamentary committee reports: Indicated an absence of data
• Court records: Not available for bulk analysis
• Media organisations: Do not disclose (or keep?) full records
• Law firms / chambers: Report some outcomes on own sites or
through media
• Claimants / Defendants: Some piecemeal reporting – on personal
blogs, in media, through representatives

Missing data
In 2012, the Ministry of Justice identified that:
• ‘There is no official collection of figures relating to the number of
defamation cases that reach full trial or on the number of pre-trial
hearings in defamation cases’
• ‘Data are not collated centrally on the outcomes of defamation claims
issued in court’
• ‘…no reliable data on the number or outcome of cases that do not reach
court, including damages and costs paid’
• It was not able to obtain information ‘on the amount spent by media
organisations and others on legal advice to help them make decisions
about whether to publish, challenge or defend a challenge’
This absence of data inhibits understanding of the chilling effect, and the
impact of defamation law on journalism and publishing.

Recommendations
In order to improve our understanding of the chilling effect, we need
better data collection
• Ofcom and the new press regulator could collect annual, anonymised
data from media organisations to help improve arbitration processes
and inform policy makers
• Ministry of Justice and Her Majesty’s Courts and Tribunals Service
(HMCTS) should make public court records more accessible to
researchers and journalists, and begin to categorise and aggregate data
at source
Illegitimate threats could be tracked with the help of a media legal
support network
• Academics and lawyers could develop a support service similar to the
Online Media Legal Network at Harvard University’s Berkman Center
for Internet and Society, which would monitor letters of claim and
informal threats of action

Relevance to socio-legal study
The absence of solid data about the chilling effect and defamation law is
indicative of scarce information about other areas of civil law – for
example, breach of confidence and privacy. This inhibits academic
analysis and the development of evidence-based legal policy. Socio-legal
research is weakened by a dearth of information about unreported cases,
out-of-court settlements and arbitral processes.

References
Ponsford, D. (2012) ‘Sun investigations chief: Bribery Act has forced us to turn away
whistleblowers’, Press Gazette, 13 November.

Judith Townsend, PhD candidate
Centre for Law, Justice & Journalism
City University London

Contact details
• Email: judith.townend.1@city.ac.uk
• Twitter: @jtownend