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Book review: *Chilling Effects: Repression, Conformity, and Power in the Digital Age*

Jonathon W. Penney

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*Reviewed by Te-Ying Chen**



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1. The Ubiquitous Chilling Effect

The traditional theory of chilling effects expects an Orwellian societal-level repression of speech and ideas. While that can be what chilling effects look like, it is not always the case. Imagine a scenario at a crowded bus stop, even though there is no designated queue, people naturally form a line. Although standing outside this queue is not illegal, those who try to cut in might be scolded. As a result, passengers will wait either in the queue or outside of it, resigning themselves to be the last ones to board. This situation is rarely recognised as a result of a chilling effect, but there is a similar theoretical framework underlying this behaviour.

Chilling Effects: Repression, Conformity, and Power in the Digital Age, written by Jonathon W. Penney, a legal scholar and social scientist at Osgoode Hall Law School, York University, Toronto, takes a relatively wide perspective to reshape the concept of chilling effects. Consequently, his theory helps us understand the far-reaching scale and scope of these effects, and how they are toxic and corrosive to democracy and civil society. This book is the culmination of his research; in addition to his insightful legal analysis, social science expertise is integrated throughout the text, making it rich, diverse, interdisciplinary, and accessible.

The chilling effect is an abstract idea that first gained prominence in US through a series of cases decided during the 1950s and 60s. During this period, the US Supreme Court invoked the concept to strike down overreaching legislation from the McCarthy Era, when the government focused on addressing public fear and hysteria regarding the supposed threat of communism.¹ The concept

¹ Jonathon W Penney, *Chilling Effects: Repression, Conformity, and Power in the Digital Age* (CUP, 2025), pp. 19-20

was also central to civil rights movements challenging laws that chilled freedom of speech and other expressive activities protected under the First Amendment.² Beginning with Frederick Schauer, prominent free speech scholars started theorising the idea of chilling effect, focusing on how legislation with uncertain provisions constrains citizens' free expression. However, a purely legalistic focus on chilling effects leaves a significant gap when compared to the results of empirical research. While the traditional understanding of chilling effects is based on deterrence theory, which assumes individuals make decisions based on rational cost-benefit calculations, results from empirical research do not seem to support this theory.³

2. Reconstructing the Chilling Effect Beyond Legal Contexts

This book aims to bridge the gap between the conventional, legalistic conceptualisation of chilling effects and the inconsistent empirical evidence in current scholarship. It is divided into three parts: Part I elaborates on and analyses chilling effect theory as built upon traditional viewpoints, specifically, those rooted in the fear of legal or privacy-related harms. Traditionally, the chilling effects is understood through a deterrence model involving rational choice. Individuals engage in self-censorship due to a calculated fear of consequence. Penney references Orwell's *Nineteen Eighty-Four* and Huxley's *Brave New World* to illustrate how totalitarian regimes deploy technology and mass surveillance to maintain total population control.

² Jonathon W Penney, 'Chilling Effects: Online Surveillance and Wikipedia Use' (2016) 31(1) *Berkeley Technology Law Journal* 117-182, pp. 125-127; Jonathon W Penney, 'Understanding Chilling Effects' (2022) 106(3) *Minnesota Law Review* 1451-1530, pp. 1464-1465; Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"' (1978) 58 *Boston University Law Review* 685-732, p. 685.

³ Penney (n 1), p. 25.

However, he highlights a substantial disconnect between this legacy theory and empirical findings. Drawing on social science and psychology, the author shows that people do not consistently engage in rational choice or possess the high level of legal awareness that deterrence theory assumes.⁴ Because humans are not entirely rational actors, they often make suboptimal decisions based on limited information, decisions they may regret only minutes later. In this section, Penney effectively exposes the limitations of the traditional chilling effect doctrine.

In Part II, Penney bridges chilling effects theory with interdisciplinary knowledge. Adopting a social science perspective, he discusses how social conditions shape individual behaviour. He explores the compelling case of how communal power affects behaviour in areas where formal law is difficult to enforce. Since law is often the greatest common denominator of social customs, evolving from local habits for dispute resolution, the community frequently exerts a more immediate influence on individuals than the law itself.

Subsequently, Penney introduces four core elements causing chilling effects: observation, uncertainty, personalisation, and power/authority. These align with research in biology and psychology to explain why the chilling effect is so potent. This foundation leads to his 'conformity theory of chilling effect', which he applies to various domains: information and data, legal frameworks, and social or infrastructural systems.

⁴ Robert Prentice, 'Chicago Man, K-T Man, and the Future of Behavioral Law and Economics' (2003) 56(6) *Vanderbilt Law Review* 1663-1777, pp. 1666-1667; Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2005), pp. 173-174, available at <https://papers.ssrn.com/abstract=660742>; Janice Nadler, 'Expressive Law, Social Norms, and Social Groups' (2017) 42(1) *Law & Social Inquiry* 60-75, pp. 62-63.

Part III provides a comprehensive discussion of the chilling effect's broader implications. Penney first examines its dangers. Drawing on Foucault,⁵ he argues that chilling effects are not merely repressive to stop individuals from being active, but also productive, creating entirely new social and cultural realities. These effects undermine individual autonomy and personal development while fostering societal polarisation and extremism.

These dangers are not merely theoretical. Penney uses Texas Senate Bill 8 (the Texas Heartbeat Act) as a case study to demonstrate how chilling effects can be weaponised. A narrow legal focus might fail to recognise how such provisions generate a 'chill', but such an approach underestimates the Act's profound extra-legal impacts and ignores the rights of the targeted minority.

To address cases where interests like data privacy and national security are difficult to balance, Penny proposes a framework to predict and evaluate these effects. By quantifying his four core elements causing chilling effects, he concludes that scenarios involving personalisation and personal threats produce the greatest chill.⁶ Finally, Penney advocates for a dual transformation of the chilling effects doctrine, operating at both microscopic and macroscopic levels. On the microscopic level, he argues that courts must expand their focus to account for diverse, multifaceted harms when assessing whether a legal provision includes a chill. Conversely, on the macroscopic level, he addresses structural threats. Here, he utilises China's AI-driven mass surveillance and automated law enforcement as a cautionary archetype of the future of technological control. To mitigate these systemic risks, Penney ultimately

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Random House, 1995) p. 194.

⁶ Penney (n 1), p. 137.

proposes a suite of comprehensive structural solutions: strictly regulating surveillance, reducing legal uncertainty, curtailing personalised threats, and placing meaningful constraints on institutional power.

3. Toward a New Theoretical Understanding of the Chilling Effect

As a PhD student researching freedom of expression, I initially expected a series of discussions focused on how chilling effects limit individual expression and behaviour. Naturally, I anticipated the discourse would stem from liberal theory to examine the impact on individual liberty. However, this book significantly broadened my perspective on the comprehensive nature and systemic impact of chilling effects.

The interdisciplinary approach is particularly compelling. For instance, while social polarisation is often attributed to ‘echo chamber’⁷ or ‘filter bubble’⁸ created by internet architecture, Penney explores polarisation as a result of chilling effects intertwined with fundamental human behaviour. He notes that conformity to the group is an evolutionary trait embedded within us.⁹ Social conformity activates

⁷ An ‘echo chamber’ is a metaphor used to describe a bounded, enclosed media space that has the potential to both magnify the messages delivered within it and insulate them from rebuttal: Kathleen Hall Jamieson and Joseph N Cappella, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment* (OUP, 2008) p. 76.

⁸ The term ‘filter bubble’ is often used interchangeably with ‘echo chamber’. However, unlike an echo chamber, which might be actively chosen by information receivers, the filter bubble emphasises how ranking algorithms engage in passive personalisation, curating information in certain ways that effectively lock users into their own echo chambers: Amy Ross Arguedas, Craig T. Robertson, Richard Fletcher and Rasmus Kleis Nielsen, ‘Echo chambers, filter bubbles, and polarisation: a literature review’ (*Reuters Institute for the Study of Journalism*, 19 January 2022) available at <https://reutersinstitute.politics.ox.ac.uk/echo-chambers-filter-bubbles-and-polarisation-literature-review>, accessed 25 May 2026 (DOI: 10.60625/risj-etxj-7k60). More details can be found in Eli Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (Penguin, 2012).

⁹ Ruthie Pliskin, Amit Goldenberg, Efrat Ambar and Daniel Bar-Tal, ‘Speaking Out and Breaking the Silence’ in Daniel Bar-Tal, Rafi Nets-Zehngut and Keren Sharvit (eds) *Self-Censorship in Contexts of Conflict: Theory and Research* (Springer, 2017); Penney (n 1), pp. 60-61.

the brain's reward systems, whereas social rejection and ostracism trigger the same neural pathways associated with physical pain.¹⁰ These biological predispositions have been weaponised by both public and private entities to marginalise 'minorities', whether they be women affected by the Texas Heartbeat Act, ethnic minorities in China, or any group categorised by specific 'tag'.

Ultimately, Penny asserts that chilling effects are not merely a legal concept, but a social fact. This phenomenon is generated not only by vague legislation that stifles speech but also by individual behavioural choices and the society those choices collectively form. Here, the chilling effect takes on a productive dimension. Some might argue that the society remains 'free' because mass surveillance has not physically stopped people from speaking, and online platforms continue to serve as the 'modern public square'.¹¹ However, the negative impact of chilling effects is not diminished by the normalisation of surveillance. On the contrary, it steadily erodes personal autonomy and identity development, eventually corroding the foundations of liberty and democracy. Over the long term, this process poses a devastating threat to democratic society.

If there is a minor drawback, it is perhaps the heavy focus on US case studies. While 'Big Tech' is primarily based in the US, the boundary-crossing nature of technology means that chilling effects are global, not local. While the book touches upon European online platform accountability and China's autocratic surveillance, a deeper exploration of how online chilling effect evolve through globalisation would have been a great critical evaluation and addition.

¹⁰ Pliskin *et al* (n 9), p. 250; SL Neuberg, DT Kernick and M Schaller, 'Evolutionary Social Psychology' in Susan T Fiske, Daniel T Gilbert and Gardner Lindzey (eds), *Handbook of Social Psychology* (Wiley, 2010) p. 778; Steven Fein, Hazel Markus and Saul Kassin, *Social Psychology* (10th edn, Wadsworth Publishing, 2016) pp. 271-272.

¹¹ *Packingham v North Carolina* 582 US 98 (2017).

Nevertheless, this does not diminish the profound contribution of this work. Penney employs an accessible writing style and a wealth of case studies to ground abstract theory. By bridging traditional legal perspectives with interdisciplinary research, he provides a clear 'silhouette' for a complex concept, successfully closing the gap between theory and reality. This book is an insightful commentary and an excellent introduction to the field. I strongly recommend it to anyone seeking to understand the chilling effect beyond a strictly legalistic definition.