

COMMENT

EVIDENCE-BASED LAW BY JEFFREY J. RACHLINSKI

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I would like to commence with some preliminary analytical reflections on Professor Rachlinski's fascinating essay. The issue he presents is whether and to what extent can and should empirical methods be used in the context of legal studies. In a way, this question touches upon the relationship between law and reality, or the relationship between the normative and the factual worlds—the *ought* and the *is*. Law generally determines what is right and what is wrong. Because values such as right and wrong cannot be measured by empirical methods, we might therefore conclude that empirical methods are not at all pertinent to legal studies. But as we know, this is not the case. Law is connected by an intricate network to reality and facts, to which empirical methods could very well apply. By definition, every legal norm relates to a certain set of circumstances to which it should be applied, and the role of the law is to shape behavior in the context of these circumstances.

Every legal norm has a goal or end that is supposed to be realized by obeying the rule either voluntarily or by coercion. In defining a rule, legislators intend a particular goal. That goal might be normative, being the end in itself (according to the Kantian approach), in which case the empirical method is irrelevant because values cannot be measured. But in most cases legislators have utilitarian considerations, and their aim is to establish a social fact—a mode of conduct to be encouraged or suppressed.¹ This causal connection between law and desirable behavior indeed can be measured by empirical methods.

As an example, let us consider the Law of the Good Samaritan, enacted in Israel about ten years ago.² It states that it is the duty of a passerby to assist another person in danger. What is the purpose of this law? In the unlikely event that Knesset Members are supporters of

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¹ See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 616–17 (2004).

² “Thou Shall Not Stand Idly by the Blood of Another” Law, 5758-1998, SH No. 1670 p. 245.

Kantian philosophy, they might have justified the enactment by arguing that it was the right way to behave and the right thing to do. One of the natural developments of this line of thought would be that a person who does not assist another should be punished out of retributive considerations. In this case, the law, the rule of conduct, and the resulting punishment cannot be approached or tested by empirical methods. But if the legislators were motivated by utilitarian considerations, then their purpose for the legislation may have been to shape society and induce people to help others, save lives, and thus improve society's general welfare. If this was indeed their motive, then the goal of punishment was not retribution but deterrence. These functions could and should be measured by empirical methods to determine whether the new law was effective and had a beneficial influence on public behavior. Furthermore, prelegislative empirical research might well have revealed that people tended to help each other even in the absence of legislation. In this case, the law would be redundant to start with and, therefore, inefficient.

Professor Rachlinski brings to our attention the somewhat puzzling paucity of the application of empirical methods in the legal sphere. He first describes the dramatic rise of the new religion of empiricism in legal studies in American law schools,³ (by the way, a trend very similar to that in Israel). But he points out that contrary to expectations and in contrast to business and medicine, legal empiricism remained in the scholarly academies and did not assume a similar presence in the field of legal practice or rulemaking (e.g., legislatures and courts).⁴ Professor Rachlinski convincingly demonstrates how legislators are inclined to rely on anecdotal evidence and common wisdom unsupported by scientific research.⁵ As an example, he points to former President Bush's speech supporting capital punishment as an effective deterrent, relying on common wisdom and ignoring the fact that it was scientifically contestable.⁶ Another example is the tort reform movement, where popular anecdotes influence the popular (but false) impression of exorbitant claims.⁷ Thus, we do have empiricism in theory, but no evidence-based law in practice.

It is worth mentioning that the Israeli context demonstrates a similar tendency of judges to base their rulings on common sense, as our colleague Professor Menachem Mautner discussed in his richly documented paper about judges as narrators.⁸ He showed how judges

³ Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 901–10 (2011).

⁴ *Id.* at 910–11, 922–23.

⁵ *See id.* at 912–17.

⁶ *Id.* at 912–13.

⁷ *Id.* at 913–17.

⁸ Menachem Mautner, *Common Sense, Legitimacy, Coercion: Judges as Narrators*, 7 PLILIM 11 (1998) (Hebrew).

create a world using common-sense assumptions and how this essentially virtual world influences their rulings. Sometimes, judges apply common sense to past events, constructing narratives of how a reasonable person would have understood or acted in a given situation; other times, they apply common sense to future events, making assumptions about the implications of their rulings on people's behavior in the future. In both cases, judges do not rely on empirical research but on speculation.

Rachlinski is mainly interested in identifying the basic difference between law on the one hand and medicine and business on the other: why doctors and businessmen navigate their affairs according to empirical findings without relying on common wisdom or on unproven economic theories, while law (both via legislation and administration) is slow to admit empirical evidence in its decision-making process. Indeed, it is surprising that business and medical practitioners are more critical of scientific theories than are legal practitioners, judges, and legislators, whose field of activity is the critical assessment of facts, events, and behavior.

I am not certain that the difference between evidence-based considerations in law and the two other fields is really so great, however. Perhaps we legal academics—as outsiders to the medical world—might have the wrong impression and attribute doctors with greater scientific inclinations than they really have. In medicine, we can also find contradictory results on treatment methods reminiscent of the dissent and debate regarding the deterrent effect of capital punishment.⁹ It is quite common for doctors to choose one method and not even mention an alternative treatment that, based on empirical evidence, might not be any less effective.

Furthermore, in recent years we have witnessed the rise of alternative medicine and its invasion into the strongholds of conventional medicine.¹⁰ Its success is built on anecdotes telling of miracles performed on patients who, following treatment using conventional medicine, were given up as dead.¹¹ This trend sometimes has a normative dimension as well, advocated by the new-age naturalists who created doctrines using intuition and moral considerations that con-

⁹ For example, there is an ongoing debate about hormones in menopausal women. See Susan E. Bell, *Changing Ideas: The Medicalization of Menopause*, 24 SOC. SCI. & MED. 535 (1987).

¹⁰ See SIMON SINGH & EDZARD ERNST, *Trick or Treatment?: The Undeniable Facts About Alternative Medicine I* (2008).

¹¹ See, e.g., *Testimonials*, CANHELP, <http://canhelp.com/successstories.htm> (last visited Mar. 12, 2011) (collecting personal testimonials of cancer survivors who received alternative cancer treatments). Another example is ketogenic diets for sufferers of epilepsy. See Fred Vogelstein, *A Big, Fat Miracle*, N.Y. TIMES, Nov. 21, 2010, § 6 (Magazine), at 51.

cerned the right and healthy way of life while ignoring empirical findings that seemed to contradict their world construct.

With regard to law, the picture also appears to be more complex. Legal professionals involved in the legislative process are more serious than politicians, and take empirical research into account while resisting illegitimate considerations. In the judicial process, it is the parties who draw the attention of judges to empirical information who are not dismissed out of hand.

Rachlinski's suggestion to reconcile the disparity between law and medicine and business is that the latter disciplines have clear goals: saving the patient and generating profits, respectively. Therefore, they are able to pose their research questions clearly, facilitating further research.¹² Law, on the other hand, has more than one goal and involves political and other interests, making it difficult to focus on a single research question—never mind to find an answer.¹³ The support for capital punishment may reflect the will of President Bush to project an image of fighting crime and increasing safety rather than an argument about the alleged deterrent effect on potential criminals; he simply wanted to be elected and knew that most potential voters were not sitting on death row. Similarly, on the issue of tort reform, Rachlinski shows that financial interests are promoted by stories about exaggerated payouts to tort plaintiffs, such as the case of the woman who suffered several severe burns from a cup of McDonald's coffee.¹⁴

Rachlinski's explanation actually reveals a prominent characteristic of law and legal thinking: the gap between the justifications and explanations for legal norms in public discourse, as compared to the *real* underlying goals of those norms. It is common that the legal discourse offers justification *X* for a rule where the true justification is *Y*. What can be the cause of this disparity? Rachlinski emphasizes the political interests of legislators. The legislator uses the law as a means to transmit messages to the public in order to enhance public trust in the government. Hence, the legislator will talk about the deterrent effect of capital punishment because it is popular in some circles, in spite of his knowledge of empirical research that says otherwise.

Now we can assume that the strategy of the politician will dramatically change if public opinion about the deterrent effect has changed, perhaps due to the very same empirical research were it to hit the headlines. And indeed, we all know that politicians initiate and heavily rely on opinion polls and shape their policies according to their scientific findings. So, in the analytical sense, they *do* create evidence-based law, but pose a different research question than the one Rach-

¹² See Rachlinski, *supra* note 3, at 917–18.

¹³ See *id.* at 918 (“Law, however, lacks such a unifying, organizing principle.”).

¹⁴ See *id.* at 919.

linski justifiably expects. Rachlinski assumes that the empirical question should be whether capital punishment deters crime. But the politician is interested in another question: whether people believe that it deters crime. Analogously to the businessman, the legislator is also interested in marketing the law. Just like Wal-Mart selling turkey during the summer because that is what consumers want—without giving attention to the question of whether turkey by itself is good or bad¹⁵—so too legislators are interested in the public response to the law rather than in the law's intrinsic effectiveness.

This may also be the underlying reason for hospitals opening clinics that offer alternative medicine. They do not necessarily believe in alternative medicine's therapeutic efficiency but offer it because they possess empirical data showing public demand for this type of medicine. This is a good example of business considerations invading the world of medicine.

The gap between the rhetorical and the real justification of the law can also emerge from more laudable considerations of public welfare. The legislator is indeed interested in popular beliefs about the deterrent effect of the death penalty—not because he wants to stay in office but rather to improve public safety. He does this by offering the package of deterrence, which really contains a placebo to enhance the sense of public safety. Again, it may be that this policy is backed by empirical research about the public sense of safety, just as the effectiveness of placebo is established by extensive research.

This point can be illustrated by the aftermath of 9/11. The boarding procedures required of airline travelers dramatically changed, with a greater presence of airport security personnel.¹⁶ Here too we can distinguish between two research questions: first, whether this security reform is effective in the prevention of the next act of terrorism and second, whether the reform instilled a sense of security in passengers who assume that these measures actually were effective in the prevention of terror. It is possible that the answer to the first question is negative while the answer to the second is affirmative. In this case, we can justify the reform, and if it had been affirmed by empirical research, we can actually have an evidence-based law.

It should be mentioned that I do not justify an active deception of the public by legislators. However, I do suggest that the legislator may take the public belief into consideration, especially when he has no power to change it.

Before concluding, I would like to briefly mention that Jewish legal thinking is also aware of the gap between rhetorical and real justi-

¹⁵ See *id.* at 903.

¹⁶ See Kate Zernike, *Slip-On Shoes, Long Waits: Airline Passengers Are Still Adjusting*, N.Y. TIMES, Sept. 11, 2003, at A19.

fications of law. The Talmud explicitly states that the sages sometimes deliberately withheld the real purpose of their enactments and, other times, even gave false reasons out of policy considerations.¹⁷

I think we can conclude that evidence-based law is present, but in a peculiar way suited to the particular characteristics of the law. Indeed, it may be problematic from a normative point of view, so we join in the hopes of realizing evidence-based law in the sense described by Professor Rachlinski.

¹⁷ See SAUL LIEBERMAN, *HELLENISM IN JEWISH PALESTINE* (1950). Lieberman writes: We must discriminate between the reasons openly given by the Rabbis in justification of a new enactment of theirs and the real motives which prompted it. TB records: “‘Ulla’ said: When an ordinance is issued in the West (i. e. Palestine) its reason is not disclosed for the first twelve months, lest there be some who may not agree with the reason and will slight the ordinance.” This offers explicit testimony that the Rabbis were sometimes reluctant to reveal the reasons which moved them to enact a new law. Moreover, in order to make the people accept a new ordinance the Rabbis occasionally substituted some formal legalistic grounds for the real motive.

Id. at 139 (footnotes omitted).