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James Gibson

University of Richmond, jgibson@richmond.edu

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The Feedback Loop

The effect of human behavior on the law

By Jim Gibson

Picture a speed limit that starts at 55 miles per hour; but then varies based on the speed of the cars that pass by. If the average speed is 60, the speed limit slowly adjusts toward 60. If the average speed is 50, the speed limit eventually becomes 50.

This is an example of how real-world behavior might feed back into the law and help form a legal standard. Of course, speed limits don't really work this way (although enforcement of speed limits is another question). Yet this kind of "feedback loop" exists in a great many areas of the law. The law frequently derives its content from the everyday practices of those it seeks to regulate.

Consider contract law. When a court can't figure out the meaning of an ambiguous term in a contract, it will often look to "custom" and "usage of trade"—that is, the usual meaning of the term to those in the industry. The result is that people's typical use of a term informs its legal meaning. Or think about trademark law. Whether one trademark infringes on another depends on whether "ordinary" consumers using "ordinary" care are likely to confuse the two. So the judge does not tell consumers what trademark infringement is; instead, consumers tell the judge.

Perhaps the best example of this reliance on real-world practice, this feedback loop, is that familiar legal fiction, "reasonableness," which invites us to use everyday behavior as a guide for legal decision-making. Tort law declares us negligent if we fail to provide "reasonable care" and conform to the conduct of a "reasonable person." The Fourth Amendment protects us from "unreasonable searches and seizures," a standard that has birthed such offspring as "reasonable expectations of privacy" and "reasonable suspicion." Jurors must be "reasonable" both in the doubts on which they rely in acquitting a criminal defendant and in the verdicts they render in civil court.

Employers must make "reasonable accommodations" for their disabled employees. The list is endless.

These sorts of references to real-world practice make a lot of sense at a gut level. Who can object to a law that merely asks us to act ordinary? What could be more reasonable than a reasonable care standard?

Yet within this familiar concept lurks a phenomenon that can lead the law astray. Consider again tort's "reasonable care" standard. Suppose a doctor is examining a swollen lymph node. After conducting a physical exam and taking X-rays, she is



nearly certain that the node is merely infected and that the patient should simply take some antibiotics.

But the doctor is concerned about malpractice liability and the inherent uncertainty of the tort system. She knows that there is a chance, however small, that the swelling is cancerous—and if it is, a jury might find her liable for a faulty diagnosis even though she rightfully believes that she is exercising reasonable care and that she has done everything that her peers would do. She therefore over complies. She does more than the law demands. She orders an ultrasound, despite reliable medical evidence that the procedure is unnecessary and wasteful.

As an isolated incident, this overcompliance would not be particularly troubling. But if most doctors react the same way to the specter of liability, wasteful practice will become common practice. And once it does, it will eventually cease to constitute more-than-reasonable care, because reasonable care draws its definition from the typical conduct of those it regulates. The ultrasound's ubiquity will accordingly make it part of the reasonable care standard, and doctors who fail to order an ultrasound will be judged negligent. In this way, overcautious practices feed back into doctrine, making negligence law more demanding and requiring doctors to use a medically unnecessary and wasteful diagnostic tool.

This feedback loop can then repeat itself. Now that the ultrasound represents mere compliance, rather than overcompliance, it no longer represents more care than the law demands. So the next time our overcautious doctor wants to give liability a wide berth, she may order not only an ultrasound, but a biopsy as well. And if her fellow doctors do the same, reasonable care ratchets upward once again, incorporating the use of a biopsy into the negligence standard. It's as if we have a self-adjusting speed limit, and no matter what it's set at, everyone exceeds it—so it keeps going up, and up, and up.

Unfortunately, this is not mere theory. There is considerable evidence that malpractice pressures force doctors to practice “defensive medicine”—order more procedures, perform more tests, make more referrals, and so forth. This over-compliance eventually works its way back into the malpractice standard.

Nor is evidence of the feedback effect limited to medical malpractice. The feedback loop in other areas of tort law may be harder to see, but inconspicuous does not mean immaterial. For example, feedback may be responsible for the increas-

ingly fatuous warnings displayed on consumer goods, as manufacturers seek to avoid products liability by staying one step more conservative than the norm. Why else would one see this label on a box of nails: “CAUTION! Do NOT swallow nails! May cause irritation!” (I wish I were making that up.)

We may also find feedback loops outside of tort law. Perhaps “reasonable accommodations” for disabled employees become progressively more accommodating, as risk-averse employers give federal disability law a wide berth. Or consider “reasonable expectations of privacy,” the touchstone for determining whether a search is constitutional. Police operating in the shadow of this vague standard may consistently undercomply—that is, conduct illegal searches—knowing that the upside is great (the discovery of incriminatory evidence) and the downside unlikely (the exclusion of that evidence). If so, then the public might eventually grow accustomed to such intrusions, which means that our reasonable expectations of privacy would diminish, and our constitutional rights would dutifully follow. Law enforcement would then have even more license to intrude on our privacy, and the cycle would begin anew.

So what might we do about these feedback loops? It would be impossible to get rid of all those legal standards that derive from real-world practice. Nor would we want to, even if we could. When the law incorporates what people actually do, it grounds itself in the friendly and familiar territory of shared experience, of conventional wisdom, of consensus. It's inherently democratic. Running away from reasonableness is no answer.

In the end, the best we can hope for is that policymakers temper their reliance on real-world practice when there's reason to believe that it departs from optimal behavior. In medical malpractice, for example, courts should make more use of evidence from randomized clinical trials and defer less to the practice in a given field. Reference to real-world practice may seem both sensible and defensible, but the real world is never as simple as theory would lead us to believe. We must recognize instead that the very doctrines that derive from practice can also distort it. ■

Jim Gibson is associate professor of law and director of the Law School's Intellectual Property Institute. This article was adapted from his recent publications "Doctrinal Feedback and (Un)Reasonable Care," 94 VA. L. REV. 1641 (2008).

