

The Catholic University of America, Columbus School of Law
CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1968

Jurimetrics, No!

Ralph J. Rohner

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Judges Commons](#)

Recommended Citation

Ralph J. Rohner, *Jurimetrics, No!*, 54 A.B.A. J. 896 (1968).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Jurimetrics, No!

by Ralph J. Rohner

As the twentieth century ends, we hear recounted the story of the law revolution that began in the 1960's and reached its fulfillment with the constitutional amendment that replaced the Supreme Court with nine outstanding JUDIVACs, who formed the High-Voltage Bench. Little-known details of these momentous events are explained.

September 6, 1968

THE A. P. dispatch was buried on page 14. An undiscerning eye might have missed it in the quick scan from national news to sports. In fact, I was digesting the details of the pennant races on page 17 before the latent import of the 8-point headline sprang upon my consciousness. COMPUTER EASES LAWYER'S LOAD, it said.

I read on, unaware of the obviously psychosomatic consequences: a New York research firm had successfully programmed a UNIVAC with the holdings of a million New York State appellate court decisions; by merely punching several key words onto an I.B.M. card, the technician could coerce the metal monster to intone accurately the applicable law, gleaned from as many as 120,000 cases per minute and spewed forth at the quite injudicious rate of 920 lines every sixty seconds. The anonymous A.P.er made so bold as to predict that the procedure could save a lawyer "several weeks of library research". Aghast at this prospect, I re-researched the article for some glimmer of realization (by the writer) of the potential Frankenstein's monster he had loosed upon the legal community.

Thinking back now, I can see I must have fallen asleep naturally. (It had been one of those weeks, and I was

tired.) But I still recall the eerie, haunting aura of doom that settled on my mind as the uses of this contrivance revealed themselves to me: a whirring, steel-grey, mechanical fear seized me while I watched an army of dial-faced, undigital jurists marching down the sunlight to my desk. . . .

September 6, 1998

The revolution in law during the last thirty years has been phenomenal. I hope this word tour adequately describes it.

We are in the office of the Chief Justice of the United States. The leather chair last occupied during 1988 is the only reminder of the Court of a decade ago. The rest of the office has been dedicated as a national memorial and contains the original 1968-UNIVAC (graciously donated by Sperry Rand Corporation before it merged with West Publishing Company in 1981). This precursor of our present-day legal system is more than an anachronism now—it is a rusting, antiquated reminder of the law's humble beginnings. It is noteworthy only because it marks the transition from such medieval concepts as Star Chamber, "wager of law" and "trial by jury" to our modern photosynthetic jurisprudence.

The years from 1968 to 1974 were

years of trial and error, testing, experimenting and programming. The entire case law of American jurisprudence was reduced to I.B.M. cards, which were then reproduced by the thousands and made available to those schools and law firms which had purchased (or contracted to purchase) a suitable "LEGIVAC". This name, incidentally, was chosen by national lottery and was submitted by an obscure Leavenworth parolee, who was subsequently programmed innocent by the machine he named. No one fully realized in those early years how great had been the impact of the New York Experiment in 1968. But the utility of the I.B.M. system quickly caught on across the nation after Law Day in 1975. Let me explain.

By New Year's Day, 1975, it had become apparent that LEGIVACs had made law books of all types unnecessary. Shepard's Citations had folded. West had cut its digest division to a skeleton crew of seven third-year law students who had had special prelaw training as I.B.M. technicians. Law books of all types were gathering dust in libraries everywhere (except, of course, in those smaller law schools that could not afford or accommodate a full-sized LEGIVAC). Court calendars were hopelessly backlogged because the judges could not keep pace with litigation whose paperwork was completed in minutes.

This last circumstance caused the Ohio legislature to react with fantastic foresight at its opening session in 1975. It authorized a small electronics firm in Cincinnati to design a "JUDIVAC" capable of analyzing the research of two or more LEGIVACs and resolving the controversy in the light of all the applicable precedent. The experiments were successful, and the legislature viewed a secret demonstration in early April, in which the JUDIVAC resolved an action brought under the state's "little Norris-LaGuardia Act" in two minutes and forty-seven seconds.

Braced by the electronics firm's thirty-year warranty, the Ohio legislature, on Law Day, 1975, summarily relieved all circuit court judges of their duties and ordered the installation of JUDIVACs throughout the state. Their operational efficiency was incredible.

Trial calendar backlog of up to twenty-seven months was reduced to the three hours it took to program the machine. Extremely well-written and well-reasoned opinions were simultaneously printed on bond (for the parties) and punched on I.B.M. cards (for the records).

As quickly as the states could appropriate the money, JUDIVACs became, almost exclusively, the decision-makers of our legal system. By 1981 every state in the union used JUDIVACs at least in its intermediate appellate system, and most had procured S-model JUDIVACs to replace the supreme bench of the state.

About this time more inexpensive LEGIVACs appeared on the market. Most were manufactured and programmed by Toshida, Ltd., a Japanese transistor firm which had accurately anticipated the need for more LEGIVACs. Every law office and general practitioner was able to own one, though partnerships often pooled their finances to purchase one that was capable not only of research but also of advocacy. By careful programming, these machines could argue law, facts and policy, could analogize and distinguish cases, could misread, misquote and at times even cite dicta.

Law school enrollments had begun a decline about 1976. The inevitability of "punch-card" law was becoming more and more apparent even then, and the bigger law firms no longer sought the top graduates from the "name" law schools. More and more they looked to M.I.T., Carnegie Tech and other technical schools for associates and junior partners.

Only the reluctance of the American Bar Association to accept defeat prevented the formation in 1983 of a huge jurisprudential cartel by I.B.M., Sperry-Rand, Minneapolis-Honeywell (all in the United States), Gerard, Ltd. (England), Telefunken, U.A. (Germany) and several smaller firms in the Near East. The American Bar Association originally filed suit in the federal district court for the Southern District of New York, claiming Sherman Act violations and unauthorized practice of law. Judge McGohey construed the problem as one of conflicts of law and dismissed under the doctrine of *forum*

non conveniens. The Association then sought to relitigate in the International Court of Justice but was confronted with the court JUDIVAC's preliminary finding that the matter was *res judicata*. Although the litigation was fruitless, it did result in a compromise between the machine-makers and the Association, the formers' concession being that they would take no "overt action" to prevent the latter's members from earning their livelihood.

Old Guard Refuses To Accept Progress

You can understand, I am sure, the tumultuous upheaval in the law during these years. What had previously been the core of the common law—mental research, verbal juggling, sociological and pragmatic fact-finding, idealistic and naturalistic conceptualization—was being pared away by the machinations of LEGIVACs and JUDIVACs of every variety. The theorists were understandably indignant: "Just as the foot soldier will never be eliminated from war, so the human intellect can never be stricken from the common law", harangued *The New York Times*. The logical error, of course, is obvious: War need not continue eternally confined to the stratagems of Moltke, Montgomery or McNamara; so too, the "law" of the classicists need not remain infinitely mired in the trenches of human advocacy and decision. But despite the objections of persons and groups, the trend to electronic *stare decisis* continued unabated.

It is not within my competence to describe precisely and definitively how these computers operate. Essentially, the problem is to translate legal vocabulary and "thought-segments" into geometric designs on punched I.B.M. cards. Facts and holdings are obviously the easiest to transcribe, but great advances have been made in the methods of hole-punching "innuendos", "alternatives", "rationalizations", "public policies" and "equities". Where human judges have been replaced by JUDIVACs, the "clerk-programmer" now assumes a more important role than in yesteryear. Previously, of course, a mere clerk could have little or no effect on the outcome of cases; but now a clerk-programmer actively feeds into

the machine's judicial consciousness only those possibilities that will not clog the "adjudicator's" mechanism, and hence its efficiency.

Wary of creating a *deus ex machina*, the states until 1980 had refrained from using JUDIVACs in equity cases in their courts; obviously, they felt that no legal system should be devoid of any possibility of human error. But in 1980 the work of a young professor of comparative law at the University of Southern California gained national prominence and the immediate attention of state solons. Professor Dubin had demonstrated that it was possible, in the confines of the English language, to distill the essence of equity jurisprudence from the written words of men now dead and courts long since defunct. His theory on the "maximum-minimum result-oriented precedent value syndrome" provided the key for programming the E- (for equity) model JUDIVAC, and states were quick to utilize the technique. The nub of the transition was in requiring both plaintiff and defendant in equity cases to submit to cerebral-electrode-analysis in the courtroom (vaguely similar to the antique "lie-detector" test). The simplicity of this method was overwhelming: It required only the minor change from the "clean-hands" doctrine to the "clean-minds" rationale.

Once proved, the E-JUDIVAC was assimilated by the states at a rapid rate. Different styles were available, depending on the social conscience factors in the intended jurisdiction. New England procured several of the "Lord Eldon" models; the Southern states usually requested the "Roger Taney" machines (except Louisiana, of course, which imported a "Napoleon", manufactured and coded in Renault's Vichy plant). The Western states acquired many later models, catalogued only as "New Frontier Justice".

Lawyers Find Employment in Other Places

You may wonder about the huge unemployment problems created by the adoption of these machines. True, there was some difficulty, but it reflects credit on the initiative and responsibil-



Steve Zweig Studio

Ralph J. Rohner was graduated from Catholic University of America (A.B. 1960, LL.B. 1963) and was a teaching fellow at Stanford in 1963-1964. After a year in the Department of Health, Education, and Welfare, he joined the faculty of the Columbus School of Law at Catholic University in 1965.

ity of our federal system that the states could absorb this excess manpower successfully. Many judges made the transition from courtroom to stage, screen and television effortlessly; many of the nation's top trial attorneys were employed happily in Hollywood as extras in an epic remake of *Gone With the Wind*. Less fortunate lawyers accepted Ford Foundation grants for manual retraining; the more dexterous became key-punch operators, while those with wavering hand but steady concentration became programmers. The Federal Government set up a special CCC program (Court Clerks Congress) in which clerks key-punched cards and cleaned the courthouse during the summer retooling period. These and similar efforts prevented any inequitable distribution of the unemployment burden.

Thus, you have a pretty good description of our state-level court system up until the early 1980's. There was in fact a leveling-off period at that time. Since the states had committed themselves to litigation by electronics, the only changes were minor ones, caused by scientific advances in computer programming, construction and mainte-

nance.

To keep the ledger in balance, I must add that a new form of American enterprise blossomed at this time—the “consultomat”. Since the bulk of our law was processed by machinery, neither the Canons of Professional Ethics nor the many state antibarratry statutes could be invoked to prevent private use of LEGIVACs or JUDIVACs for consultation purposes. In almost every community one or more merchants established a small emporium where the layman could present his legal problem to a bank of preprogrammed computers. Some shops had attendants, but most were coin-operated—the fee depending entirely on the amount of time the machine took to reach a conclusion. Though it was stipulated that the decisions of the consultomats were not binding, their opinions were prima facie evidence if the controversy was later taken to an official state court. The practical result was a happy one. Much unnecessary litigation was eliminated at a relatively small cost to the prospective litigant. (There was some trouble with vandals, however, who evolved a game of submitting obscene major and minor premises on punch cards, which would usually jam the mechanism.)

Administration Bill Puts JUDIVACs in the Saddle

The most important year in recent legal history was 1984. President Reagan, in January of that year, submitted to the Congress proposed legislation which in substance struck from the books the Judiciary Act of 1789 and all its progeny which in any way regulated the personnel of federal district and circuit courts. In their place the President called for the purchase of late-model JUDIVACs for the entire federal judiciary. Although the opposition of some members of the old Johnson administration was bitter, it was disorganized, and the bill was enacted in May of 1984. The repercussions were thunderous. The popular hue and cry was based on the historical debates of our nation's founders, who certainly (it was said) never envisioned a legal system comprised solely of intellectual robots.

President Reagan stood fast; he

cited in return that undebatable axiom of John Marshall's—“This is a government of laws and not of men”—and the average citizen nodded his head approvingly. “Too damn much politics in the federal courts anyway”, exclaimed several random interviewees in San Francisco. Opposition to the sweeping bill was sporadic, however, and not always of the highest caliber, since the best legal minds had long since deserted the profession for some other field offering employment security. The many federal district court judges hastily formed a collective bargaining unit, but this was labeled a “pseudo-union” by the NLRB (exempt, as an administrative body, from the proposed judicial reform) and struck down.

On a higher level, the federal circuit judges called for a national referendum on the question. But the electronics lobby prevented any enabling legislation from gaining a foothold in committee. The F-model JUDIVACs were installed simultaneously in every federal courthouse on July 4, 1984, amid patriotic reaffirmations of our colonial heritage and our constitutional form of government. The date also was conveniently in the midst of summer recess so the machines had several months to practice their motions, certificates and restraint.

There were, understandably, some tragic personal misfortunes resulting from the year 1984. The most noteworthy was probably that of Professor Moore, who had prepared a second series of his monumental treatise on federal practice. The publication date had been set to coincide with the opening of the October Term of the Supreme Court, which, of course, would have been a futile gesture in the light of developments. His life's work rendered nugatory, Professor Moore applied for federal job retraining under the Johnson plan but was rejected because of the instability of his political views.

Once operating, the F-JUDIVACs proved eminently practical and non-controversial. In fact, the Second Circuit machine injected a note of humor into the judicial arena by reversing a ruling of the General Accounting Office that had upheld the validity of the con-

tract under which the F-JUDIVACs were purchased. The staccato reasoning was that the procuring office (the Justice Department) had indeed let the contract to the lowest bidder but had failed to find it a "qualified" bidder.

As in most "preventive wars", tactics were limited by strategy, which, in turn, was limited by the competence of the strategists, and the battle against tin-can jurisprudence was lost. The last objectors conceded defeat in 1987, much to President Reagan's personal satisfaction. He retired to the Presidential retreat in Death Valley over Labor Day with a smug smile; when he returned to Washington, the smile had become a broad grin. And with good reason. His most cherished legislative crop was ripe for harvesting.

Supreme Court Suffers Electronic Eclipse

When he submitted the proposed constitutional amendment to Congress, there was scarcely a murmur of protest. Within six months every state (except New York and Illinois) had ratified the amendment calling for abolition of the offices of Chief Justice and Associate Justice of the United States Supreme Court. Instead, an elaborate procedure was established whereby the President was to "nominate" nine of the most outstanding JUDIVACs in the country for positions on the High-Voltage Bench. The Congress was then to

review the operational efficiency of these machines, their maintenance costs and their geographic origins, and to approve or reject the "appointees". When accepted by Congress, they were to be trundled to Washington and installed side by side in the old Supreme Court Building.

There were several controversial features of the amendment as first submitted. First, Reagan had suggested that the "nominee" machines must have previously served in either the state or federal court system. This clause was stricken by Congress, which felt that each machine should be judged on its own merits: Even if it had rendered conspicuous service only in a private law firm, or in a corner consultomat, it should still be eligible for promotion.

Second, Congress felt that the nine JUDIVACs should be electrically connected in *series*. The states were unwilling to accept the amendment in this form since they felt it would stifle the advantages inherent in using machines that had been programmed independently in varying years and jurisdictions. Thus, when the October Term began in 1987, there was for a time hopeless confusion among the nine behemoths. No two opinions could be reconciled with each other, let alone with a majority of the Court. But these inconsistent adjudications were then reanalyzed by an outstanding LEGI-

VAC, and a "synthesizing syndrome" was programmed into each of the nine SC-model JUDIVACs. More understandable results were soon forthcoming.

Strangely, despite these corrections, the Court continued to decide cases somewhat ambivalently. In some cases the machines would hum smoothly, in perfect synchronization, and produce a single, simple decision. But more often there was an audible gnashing of gears as one or more of the "justiciatons" found it physically and electronically impossible to agree with its fellows. Separate opinions were often returned, and there was even an occasional short circuit when a machine tried to outdo its adjudicating capacitors.

Science has been attacking this last weakness of our legal system, and the profession expects an answer shortly. The Bar does not seem to be disturbed by the apparent inconsistency of its own profession: On the human level it seeks continuously for greater individuality; but it is content to watch our jurisprudence settle into a morass of homogeneity, certainty and utter predictability.

Thus, you have it. From the first experiment in the 1960's the die apparently was cast, and now the machinery of the law, rid of its human millstone, purrs inscrutably and efficiently onward. Lord help us all!

President's Page

(Continued from page 873)

ment of the law against all violators, especially those who would destroy our institutions by violent action; and second to open to the restless and the deprived among our people full participation in the lawful procedures that are the only effective means of social change.

But let us not be frightened by manifestations of discontent. Discontent is not a scare word in America. It is a brave word. It is not a negative word. It is a positive word. This land was settled by the discontented. Its independence, its nationhood and, indeed, its Constitution were conceived and created in response to discontent. The

century-long westward pushing of the frontier was impelled by discontent. And almost every significant measure of social, economic and even juristic progress that we have achieved in the crowded years since has come about in an almost continuing response to discontent.

Let us who occupy positions of leadership in a powerful and disciplined calling use our formidable resources to turn in our time the discontent that wracks our society into yet another constructive chapter in the contribution of our profession to the progress of this nation. Let us respond to discontent—not ignore it. Let us direct it

into creative channels—not contest it.

We are living in a time of ordeal and of challenge. We cannot do business as usual. We must persuade, when many no longer want to listen. And we must act, when many have lost faith in our action. But the active belief in a society of laws that led us into this profession must reassert itself, whatever the odds.

For the only alternative to law and order is anarchy. And as James Madison, the chief architect of our Constitution, said nearly two centuries ago, "Anarchy ever has, and I fear ever will, produce despotism."