LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The term "jurimetrics" was introduced into the legal vocabulary by Lee Loevinger about fifteen years ago. It signifies the scientific investigation of legal problems. Although this field is presumably as vast as the law itself, jurimetric research has up to now mainly concentrated on three areas: electronic data storage and retrieval; behavioral analysis of decisions; and the use of symbolic logic. To some extent, each of these areas is independent of the others. Electronic data processing is a response to what might be termed the source material explosion—a proliferation of textual materials which has been said to present scholars with the choice between reading and writing. Behavioral research of the decision process reflects the growing self-confidence of American social scientism.[1] The use of modern, sophisticated logical methods in the analysis of legal problems can be traced to the spread of a formalistic new school of philosophy, commonly associated with Ludwig Wittgenstein.[2] Nevertheless, these three areas of jurimetric research are closely interconnected; they all are, at least for present practical purposes, products of the "computer revolution." Only the electronic computer, it seems, can cope with the continuing avalanche of relevant source materials; only the computer, again, can efficiently undertake the complicated calculations required for behavioral probability analysis. And the computer will not digest anything that cannot be dissected with logical consistency.

The following symposium discusses these three major areas of present jurimetric activity. Although all three are manifestly of substantial if not revolutionary potential significance to the legal profession, the hundred-odd American legal periodicals have at least up to now neglected the discussion of jurimetrics to such an extent that there is some temptation to think of a conspiracy of silence. This may be due to a feeling that the jurimetric approach to legal problems is intrinsically unsound or dangerous, or that this new science is not sufficiently advanced at the present to warrant general attention. This attitude appears to be particularly strong in the area of behavioral analysis of judicial decisions[3] where the acrimony of discussion poses an apt parallel to the veritably Manichaean chasm between theology and technology which currently

[1] See generally Dahl, *The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest*, 55 AM. POL. SCI. REV. 763 (1961).

[2] *Cf.* von Wright, *Ludwig Wittgenstein, A Biographical Sketch*, 64 PHILOSOPHICAL REV. 527 (1955).

[3] See especially Wiener, *Decision Prediction by Computers: Nonsense Cubed—and Worse*, 48 A.B.A.J. 1023 (1962). *Cf.* Lawlor, *What Computers Can Do: Analysis and Prediction of Legal Decisions*, 49 *id.* 337 (1963).

divides political scientists into two warring camps.[4] But as Spengler shows[5]—and, indeed, Max Weber and his critics have revealed for some time—even the efficient classification of materials and logical rigor are not generally regarded as unmixed blessings.[6]

The anti-jurimetric arguments may or may not be valid; in any case, they do not pre-empt the earnest discussion of a potentially important subject. It has therefore been the Editor's endeavor to present as many sides of the subject as possible, and to leave decisions as to the present or future utility of the various branches of jurimetrics to the informed judgment of the reader. Nevertheless, it seems appropriate to add a few brief remarks with respect to some matters which, it is felt, might deserve some additional attention.

First, even in seemingly as neutral an area as information storage and retrieval, an "open" system—*i.e.*, a system of total storage and complete search—might well result in a major readjustment of substantive law as presently applied. This applies particularly to those legal subjects which, like the conflict of laws, have for some reason or other not been satisfactorily covered in a systematic manner by presently available indexing procedures. Here, and in fields primarily regulated by substantially unlitigated and poorly codified or compiled statutes, a total search might well produce sources of indisputable authority which would unsettle (or, if a different jurisprudential analysis is preferred, correct) what theretofore were assumed to be firmly established rules of law. In the long run, of course, the effect of total search methods would be stabilizing rather than unsettling. The courts would no longer be able to evolve new rules of law merely by deliberately or accidentally overlooking inconvenient prior decisions.

Secondly, if the open search system is established and cemented by the use of a logically more consistent terminology, it almost inevitably will dictate the increasing use of more unambiguous terms to the legislatures and to the judiciary, thereby restricting and ultimately eliminating judicial legislation by distinction and re-interpretation.

[4] See, *e.g.*, Schaar & Wolin, *Essays on the Scientific Study of Politics: A Critique*, 57 AM. POL. SCI. REV. 125 (1963), and Storing, Strauss, Berns, Weinstein & Horowitz, *Replies to Schaar & Wolin, id.* at 150-60.

[5] Spengler, *Machine-Made Justice: Some Implications, infra*, p. 36.

[6] Max Weber was quite aware that streamlined categories employed for empirical analysis ("ideal types") could easily be misunderstood as exact descriptions of reality. Weber, *Die "Objektivität" sozialwissenschaftlicher und sozialpolitischer Erkenntnis*, 19 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 22, 77-78 (1904). For a criticism of Weber's insistence that personal "value judgments" be eliminated from empirical analysis, see especially LEO STRAUSS, NATURAL RIGHT AND HISTORY 34-80 (1953). The abstraction and refinement of Romanistic legal terminology has progressed so much in Germany towards the end of the last century that a leading pandectist could earnestly state that the decision of legal questions was the product of a calculation, with legal categories as the factors, and that only the complete—*i.e.*, the theoretical—comprehension of legal categories would reveal the true legal system while at the same time making for legal certainty. 1 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 111 (9th ed. Theodor Kipp, 1906). For a devastating satire of this approach, see Jhering, *Im Himmel der Begriffsjurisprudenz*, in RUDOLF VON JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ 245-333 (9th ed. 1904).

It might be that candid judicial legislation is to be preferred, or that law making by the courts should be restricted as much as possible. But given the basic facts of life of the American legal and political system, *i.e.*, the "deadlock of democracy" in Congress and the ephemeral and frequently amateur character of most state legislatures,[7] coupled with a basic political aversion against judicial legislation on dubious but nevertheless potent jurisprudential and philosophical grounds, the question remains whether camouflaged judicial legislation by creative forgetfulness[8] or ambiguity is dispensable.

Thirdly, in the field of behavioral analysis and especially prediction of judicial decisions, "feedback" and the "Heisenberg effect" would seem to merit more attention. Decision analysis in terms of significant facts and actual outcome rather than the language of judicial decisions was advocated more than three decades ago by Herman Oliphant as a "return" to stare decisis. But as Llewellyn has pointed out, this approach neglects those portions of the rhetoric of appellate opinions which are intended to guide the lower courts in analogous cases *not* yet decided.[9] This vital point was somewhat drastically illustrated when the present symposium was being edited.[10] Fred Kort and Reed Lawlor believed to have detected a measurable degree of consistency in *behavioral* terms in the Supreme Court's handling of right-to-counsel cases; most *legal* commentators thought that decisions in this area had become all but arbitrary.[11] The remedy generally felt appropriate was the overruling of *Betts v. Brady*,[12] an action recommended by no less than twenty-two state attorneys general and taken by a unanimous Supreme Court.[13] However, had the Supreme Court been impressed by the behavioral analysis of its decisions in the right-to-counsel area, it might have adopted the criteria of adjudication discovered by such research, and

[7] See JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY—FOUR-PARTY POLITICS IN AMERICA (1963); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963). Some almost ubiquitous obstacles to the clarity of statutory language are the necessity for political compromise which places a premium on the use of ambiguous language; the practice of political interest groups to "manufacture" evidence of legislative intent; and the legislative process itself, which permits additions and deletions by amendment without regard to terminological or systematic consistency. Few states can boast of the facilities described by MacDonald, *Legal Research Translated Into Legislative Action—The New York Law Revision Commission 1934-1963*, 48 CORNELL L.Q. 401 (1963). The obstacles to statutory clarity described *supra* also exist on the state level. Furthermore, North Carolina, for instance, does not even keep verbatim reports of legislative sessions.

[8] Cf. Schneider, *The Category of Ignorance in Sociological Theory*, 27 AM. SOC. REV. 492 (1962).

[9] Oliphant, *A Return to Stare Decisis*, 6 AM. LAW SCHOOL REV. 215 (1928); KARL N. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 14 n.9 (1960).

[10] It should be pointed out here that none of the predictions made in contributions to this symposium have been revised in the light of subsequent events. The manuscript of Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the Supreme Court*, *infra*, p. 100, was received on November 26, 1962, and has not been subsequently revised as to matters of substance.

[11] Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right-to-Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957) (the pioneering study); references to legal authors in Kort, *Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions*, *infra*, pp. 143, 159-60 n.13; Lawlor, *supra* note 3, at 342-44.

[12] 316 U.S. 455 (1942).

[13] Gideon v. Wainwright, 372 U.S. 335 (1963). *Cf.* Lawlor, *supra* note 3, at 344.

applied them from then on. The result would have been an ossification of that area of the law: behavioral observation would be "fed back" as the norm.

Finally, there remains the question whether in a judicial system not yet stratified by logically compelling terminology, total recall, and/or behavioral feedback, the behavioral analysis of appellate decisions will produce anything but ephemeral results (in a stratified system of adjudication, behavioral analysis would presumably be superfluous). The opponents of behavioral analysis and prediction in this area, curiously enough, engage in analysis which would in all probability measure up to sophisticated social science standard. But, as Ulmer observes, the Miracle of Rodell[14] depends on his own insights and did not produce "replicable" knowledge.[15] The same observations probably apply to Wiener's outstanding success as an appellate advocate.[16]

It might very well be that in a viable and flexible legal system, accurate behavioral analysis of appellate decisions will never become a transmissible art. The law might change too fast, or the records or the opinions (or both) might be too bare, to permit the exact recordation of anything but history. After all, this is neither so unusual nor necessarily conducive to uncertainty of the law. The parlements of the Ancien Regime prohibited the publication of their opinions; the Supreme Court of Denmark gives cryptic and all too brief explanations for its decisions; the Supreme Court of Turkey decides so many cases in so many panels by unpublished opinion that a formal analysis of its decisional law is all but impossible.[17] Yet it might be assumed with some degree of assurance that in all three instances the relatively small number of highly competent appellate counsel developed and maintained a high degree of predictive skill through constant practice and observation. And it might very well be that in any dynamic system of adjudication, this supreme skill of appellate advocacy is attainable but not transmissible.

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[14] Rodell, *For Every Justice, Judicial Deference is a Sometime Thing*, 50 GEO. L.J. 700, 707-08 (1962) accurately predicted the outcome as well as the votes of seven out of eight justices in Baker v. Carr, 369 U.S. 186 (1962). Unfortunately, a tragic accident in his family prevented Professor Rodell from participating in this symposium. The papers of Schubert, Kort, and Ulmer were intended in part as an anticipated response to his views.

[15] Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, *infra*, pp. 164, 165 n.4.

[16] See Wiener, *supra* note 3, at 1027-28. However, many skills of appellate advocacy other than a sound instinct for the prediction of results obviously can be transmitted; see generally FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1961), and Sobeloff, Book Review, 40 N.C.L. REV. 822 (1962). Nevertheless, a law-trained behavorist like Oliphant can also be victorious, as he was in Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N.Y. Supp. 258 (Sp'l Term N.Y. Co. 1928). See Carey & Oliphant, *The Present Status of the Hitchman Case*, 29 COLUM. L. REV. 441, 455-59 (1929), and LLEWELLYN, *op. cit. supra* note 9, at 391.

[17] Sauvel, *Histoire du jugement motivé*, [1955] REVUE DU DROIT PUBLIC 5, 30-43; Marcus, *Die Rechtsprechungsmethode des dänischen Obersten Gerichtshofs*, 21 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 243 (1956); DELMAR KARLEN & ILHAN ARSEL, CIVIL LITIGATION IN TURKEY 136-40 (1957).