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A Critique of Lee Loevinger's "Jurimetrics - The Next Step Forward"

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I. *The Scientific Method and The Laplacian Demon*

In my days as an undergraduate studying history at Mount Allison, a professor from one of the large American universities visited the campus and told us of "Operation Ben Franklin". A group of eminent historians were engaged in a project whose aim was to electronically re-create the great statesman using the scientific method.

Using primary sources such as diaries, letters and documents, and secondary sources such as printed books and journals, in short all available data, the group with the aid of computers was collecting and dissecting Franklin's writings. The goal was to produce each step his mind took in his many experimentations and piece together every fact connected with his diplomatic career. Not content with this, the historians were bent on producing a record of what he did during each and every day of his life. Moreover, they analyzed and recorded the contents of each book in the man's extensive Library along with the minutiae of the current events of Franklin's era, all in an effort to recreate his mind. Rigorous control methods were used to ensure the most accurate probabilities. The project, employing dozens of people and costing millions of dollars, was to last well into the next century and unless common sense has prevailed, it no doubt continues.

The knowledge of this horrendous experiment had a great effect on me at the time. I saw my career in history at an end if these were the tools and goals of the trade. The maxim that history is closer to literature than science was lost on these men.

Some of our neighbours to the South believed they could discover the true Ben Franklin by a method — the scientific method of gathering all available data, running controlled experiments and coming up with distilled statistical truth. The truth would evolve as an empirical quality. Facts fed by means of formulae through mathematical processes would recreate the most probable Ben

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Franklin. Intuitively, I feel that Franklin would fail to recognize his electronic self.

Jurimetrics, it appears, also seeks the truth in "true justice" — an empirical, tangible commodity. Empiricism is destroying the social sciences; not only history but political science and economics are being tortured with graphs and mathematical formulae. In the early part of this century economics was a literature; now it is almost completely "scientific", but to what effect? It is said of economists that they are never right but they always ride first class. Lawyers it appears want to join them. Lee Loevinger writes:

If we would increase our knowledge and have some chance at arriving at an intelligent solution to our problems, it is essential that we adopt scientific methods of inquiry.¹ [Also] The next step forward in the long path of man's progress must be from jurisprudence (which is mere speculation about law) to jurimetrics — which is the scientific investigation of legal problems.² [Also] . . . [T]he problems of jurisprudence are basically meaningless since they can only be debated but never decided nor even investigated, whereas the questions of jurimetrics are meaningful since they are capable of being investigated and ultimately answered . . .³

Using Loevinger's thesis, Reed Lawlor writes:

Modern logic can be employed to relate the output of a court to its input in a legal proceeding, a *pro* or *con* decision constitutes the output, and facts constitute the input. With modern logic, logical equations can express the decisions (output) as a function of fact patterns (input) . . .⁴

It is said scientific truths have a strange way of reflecting social prejudices and I suggest the scientific method is a prejudice, most at home in the United States, that reality must be predictable through and through. The figure of the Laplacian Demon is a striking symbol of this. Imagine, says Laplace, a being who knows the position and momentum of every particle in the universe, together with the laws of motion governing such particles. Such a being would be able to predict all subsequent states of the universe;

1. Loevinger, L., "Jurimetrics — The Next Step Forward" (1949), 33 *Minn. L.R.* 455.

2. *Id.*

3. *Id.*

4. Lawlor, R., "What Computers Can Do: Analysis and Prediction of Judicial Decisions" (1960), 49 *American Bar Association Journal* 337, reprinted in Schubert, *Judicial Behavior* (1964), at 492.

however, such a being will never exist. Kant attempted to show there were limits to reason in the nineteenth century but the Western mind could be expected to take such a conclusion seriously only when it showed up in the findings of science itself. Science has in this century, with the discoveries of Heisenberg in physics and Gödel in mathematics, at last caught up with Kant.

Heisenberg's principle of indeterminacy shows that there are essential limits to our ability to know and predict physical states of affairs, and opens up to us a glimpse of nature that may at bottom be irrational and chaotic. Mathematics from Plato onwards has been the very model of intelligibility and the central citadel of rationalism. Gödel has shown that mathematics contain insoluble problems that can be proven to be insoluble mathematically. Reality can never, as a result, be enclosed within a completely rational structure. We have to accept the fact that there are qualities forever unknown to us.⁵

I suggest that jurimetrics in its broad form, whose end is adjudication and not merely the provision of information, is an American ethno-centric belief now out of date. Present scientific knowledge makes a mockery of the words of Justice Holmes, who spoke of:

. . . an ultimate dependence [of law] upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends . . . [He continued] . . . very likely it may be that, with all the help that statistics and every modern appliance can bring us, there will be a commonwealth in which science is everywhere supreme.⁶

I assume he said this before he discovered that the life of the law was not in logic but experience.

II. *The Exception of Value — and The Value of Exception*

I suggest the reason why many people take offense at the concept of jurimetrics is not so much the fact that it is ethno-centric or now without a realistic scientific base, it is rather the philosophy upon which it is founded. Loevinger writes:

5. For more information on the ideas of Heisenberg and Gödel see Barrett, William, *Irrational Man* (New York: Doubleday, 1962).

6. Holmes, O.W., *Collected Legal Papers* (1920), 242 reprinted in Schubert, *supra*, note 4.

In the field of social control (which is law) we must at least begin to use the same approach and the same methods that have enabled us to progress toward greater knowledge and control in every other field.⁷ [Also, jurimetrics seeks to] . . . formulate meaningful problems, institute effective techniques, gather valid data, and finally not only enlarge our useful knowledge but increase our control over both the environment and ourselves.⁸ [Also] The greatest problem facing mankind at this mid-point of the twentieth century is the inadequacy of socio-legal methods inherited from primitive ancestors to control a society which, in all other respects is based upon the powerful techniques of a sophisticated science.⁹

I suggest this fetish with control and conformity is the philosophical base on which jurimetrics is founded and it is this factory which offends people more than any other. The scientific method is geared to large numbers, to systems, to common data. It is not geared to the individual, the exception or uncommon data. Loevinger has little time for the complaint that says jurimetrics, to use his own words, “. . . is immoral because it disregards values.” I think this complaint is a valid objection. Our Western civilization, through the Judeo-Christian heritage, is founded on the belief of the supreme worth of the individual. The goal of our society has not been a collective one, but rather the belief that the individual should have the opportunity to reach his full potential as a human being. Systems that are designed to control society and take account only of the mass and not the exception are an anathema to this Western tradition.

Reed Lawlor writes: “It has been calculated that courts cite prior decisions of their own jurisdictions approvingly 95 per cent of the time. Accordingly, it is reasonable to adopt the principles of *stare decisis* in programming a computer.”¹⁰ This I suggest reinforces the norm, is just to the mass of society and certainly exerts control, but what of the anomalous five per cent to whom judges do not apply precedent? These deviant statistics are the value judgments, the basis of our Western society. Benjamin Cardozo wrote:

Stare decisis is not in the constitution, but I should be half ready to put it there, and to add thereto the requirement of mechanical and literal reproduction, if only it were true that legislation is a

7. Loevinger, *supra*, note 1.

8. *Id.*

9. *Id.*

10. Lawlor, *supra*, note 4.

sufficient agency of growth. The centuries have proved the need of something more.¹¹

Jurimetrics makes us count, jurisprudence lets us think. I suggest it is the value judgment — the emotional component, that is, if not the key to the law, the key to justice.

III. *What is Needed now is not Methodology but Ideology*

What the law needs now is not so much a methodology but an ideology. Cardozo said:

The power of creation, if it is to be exercised with vision and understanding exacts a philosophy of law, a theory of its genesis and growth and aim. Only thus shall we be saved from the empiricism which finds in an opinion, not a prophecy to inspire but a command to obeyed. [Also, the lawyer if] . . . he locks an adequate philosophy . . . either goes astray altogether, or at least does not rise above the empiricism that pronounces judgment upon particulars.¹²

Curtis J. Berger describes the reality of today's young lawyer as a technocrat. “. . . [I]t is better to be smart than passionate, . . . people who feel too deeply tend not to think too clearly . . .” Thinking like a lawyer is “. . . an ability requiring a wholly analytical matrix for dealing with problems.”¹³ He writes:

. . . we should train our students to deal with other human beings, to begin to understand that the client who comes into a lawyer's office is usually a troubled person, to begin to appreciate that what surfaces as a legal problem very often has its roots in deep-seated social problems. [He adds] . . . unless lawyers value the compassionate in themselves, I think they will be incapable of caring about the human needs of others.¹⁴

Two facts occur to me. First, our present system is not fulfilling this task of cultivating an ideology of concern. Secondly, jurimetrics in its broadest sense would do so even less.

Allan Fotheringham satirises what technology has promised and what it has delivered. He writes:

One can recall post-1945 when it was predicted that the

11. Cardozo, B., *The Growth of the Law* (New Haven: Yale University Press, 1924) at 132.

12. Cardozo, *supra*, note 11 at 138 and 102.

13. Berger, C., “The Heart of the Law is the Heart of the Lawyer” editorial in *The New York Times*, July 6, 1976.

14. *Id.*

helicopter would revolutionize our lives. Jetting to the office in one-man copters, whirlybird pads on every office building — there was a nice Buck Rogers unreality to it all. The helicopters, as we know, became mainly useful for killing large clumps of people in Vietnam.¹⁵

Our ability to split the atom would ben another example. Jurimetrics would indeed be cheaper, faster and more efficient but the question is *for whom?* Again, the argument is between the collective and the individual. Jurimetrics would make life easier for society, but not for the accused who did not fall within the formula.

Jurimetrics in the narrow sense is and will increasingly become useful in the work of the solicitor, high speed searches, compact storage of large amount of information and accuracy cannot be debated. I believe that this use of jurimetrics in the wider sense as a substitute for advocacy or adjudication would be wrong.

To go some way to meeting the points raised by Professor Berger, we now need not a methodology, but an ideology. Lord Denning M.R. spoke of the difference last year while addressing the British Law Society's National Conference. He reminded his audience of a scene in Walter Scott's *Guy Mannering*. When Colonel Mannering visits a great Scots Lawyer's chambers in Edinburgh he finds the walls lined not with law books but with books of history and of literature. Pointing to these books the lawyer says, "These are my tools of trade." Denning concluded, "A lawyer without history or literature is a mere mechanic, a mere working mason. If he has some knowledge of these he may venture to call himself an architect. That is what we must strive to be in the law."¹⁶ Architects.

15. Allan Fotheringham, "The Exciting Adventures of Allan in Wonderland" in *MacLeans*, March 3, 1980.

16. *Guardian Gazette*, vol. 76, No. 38, October 31, 1979.