PREDICTING THE FUTURE OF EMPIRICAL LEGAL STUDIES

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INTRODUCTION

As participants in a symposium on "The Role of the Judge in the Twenty-First Century," our task was to look to the future, since the twenty-first century is only six years old. But an empiricist has trouble looking into the future without looking at the past. In this Essay, I will first raise some of the limitations of prediction, then ignore these concerns and hazard unsupported guesses about the future of empirical legal studies, next briefly discuss trends in public opinion about the U.S. Supreme Court, and last explore the burning empirical question of whether God is more like a judge or a lover. My discussion is intentionally structured in a nonlinear manner, so that my style mirrors my nonlinear argument.

I. THE DIFFICULTY OF PREDICTING THE FUTURE

As an empiricist I generally deal with the past, ranging from the recent past to some of our earliest recorded history. Indeed, one paper of mine examined the valuation of social classes in ancient legal codes and law collections, including the earliest Mesopotamian law collections predating Hammurabi.¹ These days most of my work uses data collected over the last three decades. So it might be tempting to say that empiricists (like me) study the past (including parts of the past so recent that we usually think of it as the present).

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¹ James Lindgren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.-KENT L. REV. 149 (1995).

Yet almost everything that empirical social scientists do involves prediction. The first scientist whose name is known is Thales of Miletus.² According to tradition, Thales predicted an eclipse of the sun in 585 B.C.E.,³ using a method of supporting a scientific theory that would be recognizable today. He made a hypothesis, and tested it in perhaps the best way possible: by prediction. A century later, the Older Sophists had a different (and more post-modern) view, most believing that science was radically subjective. As Protagoras put it, "Of all things the measure is man, of things that are, that they are, and of things that are not, that they are not."⁴

When a social scientist does a study, she is usually testing whether the data are consistent with a *prediction* of how people will act (a hypothesis). By using statistical techniques such as multiple regression or loglinear analysis, the scientist tries to estimate the effect of one variable on another. In effect, she *predicts* what would happen to the outcome variable if the level of a predictor variable were to change.⁵

In general terms, there are roughly two sorts of statistical social science research: (1) experiments involving random assignment of subjects, and (2) retrospective studies of behavior in the real world without random assignment of subjects. Each approach has its advantages and defects. Random experiments have the advantage that, if the experimental conditions are truly identical but for a change of treatment, one can be confident (to a computable degree of sampling error) that the experimental treatment caused the difference in outcomes. But the problem with almost all social science experiments is that the researchers are studying people not in the real world, but in the laboratory. People may act quite differently outside the lab, and indeed, experimental outcomes have been shown to be quite sensitive to experimenter manipulations.⁶

The advantage of the second type of empirical social science research is that it examines real behavior in a non-research setting. Subjects are acting with real incentives, motivations, and uncertainties. On the other hand, when studying behavior in the real world, one does not have random assignments of

² See JOHN BURNET, EARLY GREEK PHILOSOPHY 40 (4th ed. 1930).

³ P. Diamandopoulos, *Thales of Miletus, in* 8 THE ENCYCLOPEDIA OF PHILOSOPHY 97, 97 (Paul Edwards ed., 1967). Even if the story is true, which it may not be, Thales might have merely identified the year of the eclipse, not its exact day or time. Thales was also credited with a variety of other discoveries, including devising a method to measure the height of the Egyptian pyramids. *Id.*

⁴ See THE OLDER SOPHISTS 4 (Rosamond Kent Sprague ed., Michael J. O'Brien trans., 1972).

⁵ For example, with an outcome variable of income and a predictor variable of years of education, the scientist might estimate how much income would change on average when education increases from twelve years to sixteen years.

⁶ See generally GERD GIGERENZER, ADAPTIVE THINKING: RATIONALITY IN THE REAL WORLD (2000).

subjects to the treatment and control (placebo) groups. For example, if one is studying the effects of state gun control laws, one can't order Massachusetts to pass one set of gun laws and Vermont to pass a different set. Without the benefit of random assignment, one must rely on using "control" variables to try to make the treatment group look like the non-treatment group, except for the treatment being examined.

But one can never know whether one has measured all the relevant controls (or correlates of those controls). Unobserved variables not measured or included in our models may change the outcomes we report. We never know.

An additional shortcoming of both types of studies is the difficulty in determining whether their results are generalizable to times, places, and people other than those specifically studied. This decision involves ordinary reasoning,⁷ not empiricism. How much can we apply our results to periods we didn't study, such as the near future?

For example, if an empirical study shows that one kind of state welfare system has seemed to work better than other kinds of welfare systems for a decade starting in 1995, we still wouldn't know whether that kind of welfare system will continue to work better over the next decade. We can't know this. Even if I thought I had a good grasp of the very recent past, how reliably could I predict the future? I can use ordinary reasoning to make an informed guess, but the empirical study itself does not tell me about the near future.

Using the recent past to predict the near future would seem to be the best way to make predictions, but it also has its limitations, as George Orwell pointed out in his review of James Burnham's work.⁸ Orwell showed that Burnham's predictions in the early 1940s were almost always wrong, first predicting that Germany would defeat Britain, then that Germany had already defeated Russia, and then that Russia would join Japan in opposing the United States.⁹ Orwell argues:

[A]t each point Burnham is predicting *a continuation of the thing that is happening*. Now the tendency to do this is not simply a bad habit, like inaccuracy or exaggeration, which one can correct by taking thought. It is a major mental disease, and its roots lie partly in cowardice \dots ¹⁰

Being asked to project the future, I can say only that I'm not very good at it, and even projecting the recent past forward is problematic, as Orwell so vigorously argues.

⁷ See Charles E. Lindblom & David K. Cohen, Usable Knowledge: Social Science and Social Problem Solving 10 (1979).

⁸ George Orwell, *Second Thoughts on James Burnham*, POLEMIC, May 1946, *reprinted in* 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 160 (Sonia Orwell & Ian Angus eds., Harcourt, Brace & World 1968) (reprinted under the title *James Burnham and the Managerial Revolution*).

⁹ Id. at 172.

¹⁰ *Id.* at 172-73.

Further, the very idea of futurism has the stink of failure about it. I think of Filippo Marinetti's 1909 Futurist Manifesto, which includes these gems of insight:

1. We intend to sing the love of danger, the habit of energy and fearlessness.

2. Courage, audacity, and revolt will be essential elements of our poetry.

3. Up to now literature has exalted a pensive immobility, ecstasy, and sleep. We intend to exalt aggressive action, a feverish insomnia, the racer's stride, the mortal leap, the punch and the slap.

• • • •

7. Except in struggle, there is no more beauty. No work without an aggressive character can be a masterpiece. Poetry must be conceived as a violent attack on unknown forces, to reduce and prostrate them before man.

8. We stand on the last promontory of the centuries! . . . Why should we look back, when what we want is to break down the mysterious doors of the Impossible? Time and Space died yesterday. We already live in the absolute, because we have created eternal, omnipresent speed.

9. We will glorify war – the world's only hygiene – militarism, patriotism, the destructive gesture of freedom-bringers, beautiful ideas worth dying for, and scorn for woman.

10. We will destroy the museums, libraries, academies of every kind, will fight moralism, feminism, every opportunistic or utilitarian cowardice.

11. We will sing of great crowds excited by work, by pleasure, and by riot; we will sing of the multicoloured, polyphonic tides of revolution in the modern capitals; we will sing of the vibrant nightly fervour of arsenals and shipyards blazing with violent electric moons; greedy railway stations that devour smoke-plumed serpents; factories hung on clouds by the crooked lines of their smoke; bridges that stride the rivers like giant gymnasts, flashing in the sun with a glitter of knives; adventurous steamers that sniff the horizon; deep-chested locomotives whose wheels paw the tracks like the hooves of enormous steel horses bridled by tubing; and the sleek flight of planes whose propellers chatter in the wind like banners and seem to cheer like an enthusiastic crowd.¹¹

¹¹ F.T. Marinetti, *The Founding and Manifesto of Futurism 1909*, LE FIGARO, Feb. 20, 1909, *reprinted in* FUTURIST MANIFESTOS 19, 21-22 (Umbro Apollonio ed., R.W. Flint trans., MFA Publ'ns 2001) (1970).

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Recent history has not been kind to scientific predictions. In the early 1970s, some scientists feared a new ice age,¹² while others, such as Professor Paul Ehrlich, predicted that population increase would so outstrip the green revolution in growing food that there would be worldwide famine. In one article, written on the occasion of the first Earth Day in 1970, Ehrlich painted a doomsday scenario of a "Great Die-Off" in which famine would be "directly or indirectly responsible for sixty-five million American deaths in the decade 1980-1989," and "[t]he cost of inaction, apathy, and unwarranted opportunism [would be] the payment of nearly four billion human lives" before the year 2000.¹³ On another occasion, Ehrlich was so pessimistic about the future that he wrote: "If I were a gambler, I would take even money that England will not exist in the year 2000...."¹⁴

When economist Julian Simon published an article in *Science* in 1980, arguing that such claims of environmental doom were unfounded,¹⁵ Ehrlich was so enraged that he and his wife, Stanford ecologist Anne Ehrlich, published a response calling Simon a member of a "space-age cargo cult" of economists.¹⁶ They condescendingly asserted, "[t]o explain to one of them the inevitability of no growth in the material sector, or . . . that commodities *must* become expensive, would be like attempting to explain odd-day-even-day gas distribution to a cranberry."¹⁷ They used similar vitriol to excoriate the editors and peer reviewers at *Science*: "Could the editors have found someone to review Simon's manuscript who had to take off his shoes to count to 20?"¹⁸

Responding to Paul Ehrlich's extravagant claims, Simon offered a famous bet testing the prediction that commodities must become expensive.¹⁹ Ehrlich and two colleagues accepted the bet, with Ehrlich explaining that "the lure of

¹² See Ronald Bailey, Earth Day, Then and Now, REASON, May 2000, at 18, 26, available at http://www.reason.com/0005/fe.rb.earth.shtml (recounting the dispute in the 1970s between environmentalists who predicted global warming and those who predicted global cooling).

¹³ Paul R. Ehrlich, *Looking Backward from 2000 A.D.*, PROGRESSIVE, Apr. 1970, at 23, 23-25; *see also* Bailey, *supra* note 12, at 20.

¹⁴ Paul R. Ehrlich, *Population Control or Hobson's Choice, in* The Optimum Population for Britain: Proceedings of a Symposium Held at the Royal Geographical Society, London, on 25 and 26 September, 1969, at 151, 161 (L.R. Taylor ed., 1970); *see also* Julian L. Simon, The Ultimate Resource 2, at 35 (1996).

¹⁵ Julian L. Simon, *Resources, Population, Environment: An Oversupply of False Bad News*, 208 SCIENCE 1431 (1980).

¹⁶ See John Tierney, *Betting on the Planet*, N.Y. TIMES, Dec. 2, 1990, § 6 (Magazine), at 52.

¹⁷ See id.

¹⁸ See id. For the Ehrlichs to suggest that Simon was quantitatively illiterate was particularly ridiculous, because Simon was a pioneer of bootstrapping and Monte Carlo statistical techniques. *See* SIMON, *supra* note 14, at 652 n.50.

¹⁹ Tierney, *supra* note 16.

easy money can be irresistible."²⁰ The environmental pessimists selected five metals (copper, tin, chrome, tungsten, and nickel) and bet \$1000 that their prices would rise faster than inflation from 1980 to 1990.²¹ Each metal dropped in its inflation-adjusted price, with the basket overall dropping by more than half. Simon won the bet and received \$576.07.²² Using prediction, Simon had devised a good way to test the prevailing environmental orthodoxy of increasing scarcity leading to higher prices.

The most amazing thing is not that Simon was right and Ehrlich was wrong – predicting the future is difficult, after all – but rather that, despite Ehrlich's being consistently and spectacularly wrong, he had by far the more distinguished career by normal standards. While Simon was a professor of business administration and economics at the Universities of Illinois and Maryland, Ehrlich was (and is) a chaired professor at Stanford and a member of numerous honorary societies. Indeed, in 1990, the very year that Ehrlich lost his public bet, the MacArthur Foundation gave Ehrlich a \$345,000 so-called "genius grant."²³

II. THE FUTURE OF EMPIRICISM

After suggesting the limits of futurist prediction – and the danger of projecting the recent past into the future – I will nonetheless try to do both. What is happening in empirical legal studies that is relevant to judging in the twenty-first century? I will start with some seemingly obvious developments and then slide into the more speculative possibilities.

A. Conventional New Statistical Methods

New statistical methods are made available every year. Most of these changes are incremental, such as the addition of multinomial probit analysis and more clustering commands to the widely used statistical package Stata. Other trends that have been going on for over a decade have yet to penetrate law, though they will in the next few years, such as the rise of multi-level modeling techniques, such as Hierarchical Linear Modeling (HLM) for analyzing nested data.²⁴

²⁰ Paul R. Ehrlich, *That's Right – You Should Check It for Yourself*, 63 Soc. Sci. Q. 385, 386 (1982); *see also* BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST 137 (2001).

²¹ Tierney, *supra* note 16.

²² Id.

²³ Raj Kamal Jha, *The Gift of Genius: 2 Washingtonians Among MacArthur Fellows*, WASH. POST, July 17, 1990, at B1; Ed Regis, *The Doomslayer*, WIRED, Feb. 1997, *available at* http://www.wired.com/wired/archive/5.02/ffsimon_pr.html.

²⁴ Examples of nested data would be individual law students nested within law schools, or counties nested within states. For example, if one wants to examine the effects of differences between state legal regimes, then multi-level modeling might be appropriate.

B. Conventional Developments in Computing

With today's computing power, most statistical analyses are almost instantaneous. In 1968, a single multiple regression analysis took all summer to do on a calculator. Now the same analysis would usually take less than a second to do on an ordinary laptop.

C. Data and Data-Sharing

Data are more available than ever before, especially on the Internet, leading to an ability to recheck work. Replication is crucially important to the process of refining knowledge in both science and social science.²⁵ Yet this growing norm of data-sharing is threatened by a massive system of government-sponsored censorship: institutional review boards (human subjects committees).²⁶ Courts can provide a needed service by striking down (or at least restricting) federal regulation of university research.

D. Libraries and Books

Law libraries are almost empty today. On a Sunday night thirty years ago, the reading rooms at major law schools would be almost full, but today there are few patrons. Physical books are becoming less important as researchers rely increasingly on materials that are available on their virtual and physical desktops. Libraries will become less about books and more about computers, databases, and services. Fewer legal materials – cases, treatises, and law reviews – will be published on paper in book form. As more historical materials come online, scholars, litigants, and judges will find it easier to research the original public meaning of constitutional and statutory provisions, should they be interested in that sort of inquiry.²⁷

E. Blogs and Other Commentaries

With so much instant analysis occurring online, the published case note is dying. Now legal cases are analyzed in the first few hours and days on blogs and similar online journals. In the future, there will still be room for longer, deeper treatments of recent cases in law journals, but the more conventional factual and contextual reporting done in a traditional case note will occur mostly online. This may lead to faster but less authoritative analyses, though

²⁵ See generally James Lindgren & Justin L. Heather, Counting Guns in Early America, 43 WM. & MARY L. REV. 1777 (2002); James Lindgren, Fall from Grace: Arming America and the Bellesiles Scandal, 111 YALE L.J. 2195 (2002) (book review).

²⁶ See generally Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271.

²⁷ See, e.g., Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856 n.30 (2003) ("Until the advent of electronic searches, it was highly impractical to conduct comprehensive empirical surveys of the sort I . . . present here.").

the instant feedback of online discussions can correct many initial errors. As law blogs dedicated to practice fields grow in popularity, lawyers will turn to the blogs in their particular fields to keep up on recent developments. The potential readership for law blogs is much greater than for the 2000-3000 copies of most top law reviews that were sold to libraries in the past. The group blog where I post, the Volokh Conspiracy,²⁸ averages about 20,000 visits a day.29

Expertise in Using Statistics F.

Unfortunately, expertise in using statistics is growing much more slowly than the availability of data, computers, and statistical tools. Although judges should try to become more sophisticated about statistical reasoning, they will not usually be able to acquire enough knowledge to evaluate statistical arguments without the help of experts (who can be unreliable when paid by the parties).

G. Unconventional New Methods

So far I have merely projected that some fairly obvious empirical and technological trends will continue into the near future. Even if these predictions turn out to be right, some trends might slow down while others might accelerate. What about changes that are not so obvious - empirical and scientific developments that have the potential to change the practice of courts and law schools in potentially revolutionary ways?

Data-Mining 1.

We can anticipate dramatically improved computer-based programs of data-mining. These techniques for searching through existing databases of personal and public information are two-edged swords, holding the potential to make us safer from both ordinary criminals and terrorists, yet also having the significant downside of leading to greater losses of privacy.

Beyond current data-mining efforts, even today there are analogous uses of recorded information that legislatures or judges could allow to be used in court. Data recorded by the onboard computers in automobiles could be routinely introduced in tort suits arising from traffic accidents. Given that most drivers are speeding much of the time, if data on speeding from one's car were collected, saved, and introduced in courts, judges and juries might have to adjust their routine handling of contributory and comparative negligence. Similarly, cell phone company records could now be collected and used to support or impeach testimony by revealing where a witness might have been at any particular time.

²⁸ The Volokh Conspiracy, http://volokh.com (last visited Dec. 1, 2006).

²⁹ The Volokh Conspiracy: Site Summary, http://www.sitemeter.com/?a=stats&s= s13volokh (last visited Dec. 1, 2006).

2. Lie Detector Tests

By the end of the twenty-first century, *lie detector tests* might improve so substantially that they could revolutionize the giving and evaluation of testimony in investigations and in criminal and civil cases in courts. Unless courts prevent the use of such lie detector tests, people who want to testify in important cases might be compelled by statute to submit to brain scans or other lie detector tests before being allowed to take the stand. Although current lie detector tests have their defenders,³⁰ they are generally not considered by courts to be reliable enough to be routinely admitted as evidence. Over the next century, lie detectors might become so effective that they would be more probative than other evidence.

3. Artificial Intelligence (AI)

One of the chestnuts of the computer field is *Moore's Law*, which was first articulated in 1965 by Intel cofounder Gordon Moore.³¹ Among its many versions are ones that posit that computer processing power (or the number of transistors on a chip) doubles every eighteen to twenty-four months.³² In *The Law of Accelerating Returns*, Raymond Kurzweil, the great innovator in voice recognition software, generalized the exponential growth described by Moore's Law beyond even the physical limits of computer chips:

A specific paradigm (a method or approach to solving a problem, e.g., shrinking transistors on an integrated circuit as an approach to making more powerful computers) provides exponential growth until the method exhausts its potential. When this happens, a paradigm shift (i.e., a fundamental change in the approach) occurs, which enables exponential growth to continue.³³

For Kurzweil, the implications of exponential growth are stunning:

An analysis of the history of technology shows that technological change is exponential, contrary to the common-sense "intuitive linear" view. So we won't experience 100 years of progress in the 21st century – it will be more like 20,000 years of progress (at today's rate). The "returns," such as chip speed and cost-effectiveness, also increase exponentially. There's

³⁰ See, e.g., Charles Robert Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. REV. 987, 1015-17 (1995).

³¹ See Gordon E. Moore, Cramming More Components onto Integrated Circuits, ELECTRONICS, Apr. 19, 1965, available at http://download.intel.com/research/silicon/moorespaper.pdf.

³² See, e.g., Moore's Law, The Future – Technology & Research at Intel, http:// www.intel.com/technology/mooreslaw/index.htm (last visited Dec. 1, 2006). *But see* Manek Dubash, *Moore's Law Is Dead, Says Gordon Moore*, TECHWORLD, Apr. 13, 2005, http://www.techworld.com/opsys/news/index.cfm?NewsID=3477.

³³ Ray Kurzweil, *The Law of Accelerating Returns*, Mar. 7, 2001, http://www.kurzweilai.net/articles/art0134.html?printable=1.

even exponential growth in the rate of exponential growth. Within a few decades, machine intelligence will surpass human intelligence, leading to The Singularity – technological change so rapid and profound it represents a rupture in the fabric of human history. The implications include the merger of biological and nonbiological intelligence, immortal software-based humans, and ultra-high levels of intelligence that expand outward in the universe at the speed of light.³⁴

Okay, so that's a bit much for me. I can at least imagine what Kurzweil might mean by "immortal software-based humans." But I can't even conceive of what he could mean by "ultra-high levels of intelligence that expand outward in the universe at the speed of light."

But consider the changes in the world from 1900 through 2000. Kurzweil argues that with exponential growth, "the twenty-first century will see almost a thousand times greater technological change than its predecessor."³⁵ If the futurists in the Kurzweil camp are even partly right, then (taking Kurzweil's argument down a few notches) we might have ten or twenty or fifty times more technological change in the twenty-first century than we had in the twentieth.

III. THE PUBLIC'S VIEW OF JUDGES

Speculating about the future for too long can be overwhelming, so in this last section of this Essay, I will present some data on two questions involving what the public thinks of judges.

Since 1973 the National Opinion Research Center (NORC) at the University of Chicago, in its General Social Surveys (GSS), has been surveying the American public about its confidence in the U.S. Supreme Court. NORC's approach is to post the same question about a series of government institutions, including the Supreme Court: "As far as the people running these institutions are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?"³⁶

As Chart 1 and Table 1 show,³⁷ there are no sustained trends in levels of support for the Supreme Court. Indeed, the responses to the first survey asking the question in 1973 are less than one percent different than the responses to the most recent survey in 2004.

³⁴ Id.

³⁵ Id.

³⁶ 1 JAMES ALLAN DAVIS ET AL., GENERAL SOCIAL SURVEYS, 1972-2004: CUMULATIVE CODEBOOK, at 228, 231 (2005).

³⁷ The sample sizes (Ns) reported are unweighted, but the percentages and statistical tests reflect weighting to adjust for black oversampling and the number of adults in each household in years 1972-2002. Weights for 2004 reflect the GSS' own adjustments for nonresponse. 2 *id.* app. A at 1924-41.



The most interesting change in support for the Court occurred between 2000 and 2002. Although it was fashionable among law professors to claim that the U.S. Supreme Court lost respect,³⁸ legitimacy,³⁹ and support⁴⁰ in the wake of *Bush v. Gore*,⁴¹ the GSS shows a small but significant increase in support between the 1998-2000 mean and the 2002 mean (Spearman *rho* = -.039, *p* = .010). A breakdown of the results by political party shows that while Democratic support for the Court remained unchanged over the period, Republican support for the Court jumped substantially (Spearman *rho* = -.097,

³⁸ Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 110, 114 (Bruce Ackerman ed., 2002) (expecting the *Bush v. Gore* opinion to "embarrass the Court for the rest of its history").

³⁹ Jack M. Balkin, *Legitimacy and the 2000 Election, in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 38, at 210, 214 ("[P]rocedural legitimacy... is one reason why so many lawyers and law professors are disturbed by *Bush v. Gore.*").

⁴⁰ Mark Tushnet, *The Conservatism in* Bush v. Gore, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY, *supra* note 38, at 163, 172 (anticipating a decrease in support for the Supreme Court if polarization based on political party continued).

^{41 531} U.S. 98 (2000).

p = .001). In 1998-2000, for example, only thirty-two percent of Republicans expressed a "great deal" of support for the Court, compared to forty-three percent in 2002 (after *Bush v. Gore*).⁴²

Table 1: Confidence in the U.S. Supreme Court Over	Time
Data: NORC 1973-2004 General Social Surveys (n=31,23	31)

<u>Year</u>	<u>A Great Deal</u>	Only Some	<u>Hardly Any</u>
1973	31.9%	52.4%	15.7%
1974	34.5%	50.0%	15.6%
1975	31.7%	49.0%	19.2%
1976	36.1%	47.5%	16.4%
1977	37.2%	51.9%	10.9%
1978	29.5%	54.9%	15.6%
1980	25.4%	53.7%	20.9%
1982	31.6%	55.7%	12.7%
1983	28.3%	56.7%	15.1%
1984	34.6%	52.4%	13.0%
1986	31.4%	54.3%	14.3%
1987	38.9%	50.4%	10.7%
1988	36.6%	52.8%	10.5%
1989	36.3%	53.3%	10.4%
1990	36.0%	50.7%	13.3%
1991	39.0%	47.9%	13.1%
1993	31.4%	54.7%	13.9%
1994	32.2%	51.5%	16.3%
1996	29.8%	52.1%	18.2%
1998	32.6%	52.7%	14.6%
2000	34.4%	52.3%	13.3%
2002	37.4%	51.4%	11.2%
2004	31.8%	53.1%	15.1%

⁴² See James L. Gibson et al., *The Supreme Court and the US Presidential Election of* 2000: *Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 554 (2003) (comparing 1987 and early 2001 data and finding increased support for the Supreme Court among Republicans and Independents, with only an insignificant decline in support among Democrats).

A more light-hearted empirical finding concerning judges is a question asked in the GSS about "different ways of picturing God" and "the kinds of images you are most likely to associate with God":

Here is a card with sets of contrasting images. On a scale of 1-7 where would you place your image of God between the two contrasting images?...

... If you imagine God as a [Judge] you would place yourself at 1. If you imagine God as a [Lover], you would place yourself at 7. If you imagine God as somewhere between [a Judge] and [a Lover], you would place yourself at 2, 3, 4, 5, or $6^{.43}$

As Chart 2 shows, in 1998, although 30% of Americans placed themselves in the middle (thus refusing to lean toward either image), many more people thought of God as a judge (36%) than thought of God as a lover (8%). Overall, a majority of Americans (54%) view God more as a judge (categories 1-3) than as a lover.



⁴³ 1 DAVIS ET AL., *supra* note 36, at 185-86. The Ns reported are unweighted, but the percentages and statistical tests reflect weighting to adjust for the number of adults in each household in years 1996-2002. *See 2 id.* app. A at 1936.

CONCLUSION

After explaining why prediction is difficult and why, as an empiricist, I am particularly ill-suited to predicting the future, I nonetheless undertook my assigned task. Accordingly, I set my concerns aside and offered my guesses about the prospects for legal empiricism and their possible implications for judging in the twenty-first century.

I began with only the most obvious trends already well underway, such as the greater availability of data, the decline of printed books and physical libraries, and the rise of online reading. I then introduced some of the more bizarre suggestions of futurists such as Raymond Kurzweil. Because technological growth has been exponential, rather than linear, Kurzweil argues that eventually Artificial Intelligence (AI) will become smarter than humans and be able to improve the world at such a rapid speed that change will be almost instantaneous, leading to a break in human history.

For my own part, I believe that over the next century development in some areas – perhaps AI – will be staggering, indeed, almost unimaginable. But in other areas, there will be little development, or even deterioration. In short, I think that progress will be both extraordinary and extraordinarily uneven between fields, between social classes, and between countries. Humans know a lot more than they did in ancient Greece, but in native intelligence, are we any smarter? I doubt it.

Throughout this Essay, I employed a nonlinear style that would reflect my nonlinear argument. Thus, after reviewing recent trends in empiricism that might affect judging, I reported data on trends in the American public's view of judges. Although I found no general trend in support for the U.S. Supreme Court since 1973, I did point out that the Court experienced a rise in support after *Bush v. Gore*, not a drop, as many law professors had hypothesized.

Last, I ended with some unusual data on whether the American public views God as a lover or a judge. While only 16% of American adults picture God as more of a lover, a majority of adults, 54%, picture God as more of a judge. I confess that though I've met a few judges who acted as if they thought they were gods, I have yet to meet a god who thought he was a judge.