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Science and Technology v. Law, or a Plague on Both Your Houses: Comment

COMMENT

BY MELVIN KRANSBERG

IN a conference bearing on the implications of science and technology for the legal process, I believe it is somewhat unfortunate that the opening paper should pose a dichotomy between science and technology and law and, by interposing a versus between them, imply that they are pitted against one another. I do not believe that science and technology and the legal process *are* competing against one another. Further, I am not very sympathetic with Dr. Moore's subtitle *A Plague on Both Your Houses*.

In the first place, cursing both science-technology and law strikes me as an exercise in futility similar to King Canute's attempt to command the tide. Second, although the title does justice to Dr. Moore's unific knowledge of literature as well as his broad knowledge of social forces, nothing in the text of his paper would seem to justify such a castigation. On the contrary, Dr. Moore's paper proves, perhaps unwittingly, the opposite — that science-technology and law do interact peaceably — and I infer from many of the things he said that they are interdependent rather than competitive.

This result is not surprising, since science-technology and law represent cangeries of human activities, social institutions, value systems, and methodologies. And Dr. Moore gives us several examples of intersection, but unfortunately not interaction, between these aspects of both. He goes to a lot of trouble to prove that neither science and technology nor legal systems are completely autonomous, although each views itself as being independent from external elements. I would like to know not only how they impinge upon one another's autonomy, but also how they both affect and are affected by the social currents and values of such external factors as economic systems and democratic political institutions. Being a historian of science and technology, I am perhaps hypersensitive to the ways in which science and technology help to change society and are themselves products of the society which they change. My view of history tells me that science and technology are powerful agents of social change affecting values, institutions, property rights, and, above all, individual lives.

One of the questions which emerges from this historical perspective is the degree of flexibility of our legal institutions and processes in taking cognizance of the changes which science and technology help bring about. Dr. Moore has given us an example of clogged court dockets arising from traffic accidents. I regard the situation described by Dr. Moore as one created by the inability of the legal process, in

the form either of legislation or of the practices of litigation, to respond with imagination or with any degree of alacrity to the increase in scale of the ownership and use of the automobile. The lawyers proved remarkably adept at extending the laws and practices of the horse and buggy to the automobile; and this simple extension from the law of one technology now obsolete to a modern technology worked when there were only a small number of automobiles and hence fewer accidents. But, when that technology grew in scale and application the legal process as constituted was unresponsive. The lawyers and legislators met the increase in the scale of technology by an increase in scale of their own: the law schools added courses in tort liability and turned out more lawyers specializing in personal injury suits; the courts added more judges; and the legislators passed more laws. The increase in scale of the legal effort did not work, so finally some people had to come forward, as in the Commonwealth of Massachusetts, with an entirely new concept of damage liability in the hope of getting the jams of the legal process unstuck.

What I am suggesting here is that our present legal process is neither imaginative nor adaptive enough to cope with the implications of scientific and technological change; that a simple increase in scale or adaptation of past laws might not be adequate to deal with technological changes; and that perhaps the legal process must begin to take a look at the nature, mechanisms, and social consequences of technological change and respond in a more innovative manner in the future — perhaps even foreseeing the social implications and taking measures to cope with these beforehand, instead of merely reacting. In a sense I am suggesting that what we call technology assessment might include a component of legal assessment.

What particularly interested me regarding Dr. Moore's presentation is how science, technology, and law would fit into the *four* sociological views of the social order which he described so succinctly. Would, for example, the interpretation of the interaction of science-technology and the legal process differ among the functionalist, neo-functional, dynamic and neodynamic views? If so, what are the implications for the legal process? In brief, I am asking what contemporary sociological theories and methodologies have to contribute to our discussion of the implications of science and technology for the legal process. Dr. Moore has tantalized us by implying that question, and he arouses our interest still further by stating that we can alter the course of events; but he ends at that very point — just where we would like him to begin.

Finally, I must assume that the goals and processes of technology assessment fit into the neodynamic view described by Dr. Moore. Since technology assessment represents an area of activity and institutional

growth for science and technology, it obviously has implications for legal processes in the future. I should like to know what sociological theory can tell us about the validity of the concept of technology assessment and what it can tell us about the merits and defects of the various institutional arrangements and approaches to technology assessment which are now being advanced. Now I should imagine also that lawyers should be interested in such matters as they affect the legal process. I hope that Dr. Moore can help us find answers to some of these questions which his stimulating paper has raised.