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

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COMMENT

BY HAROLD P. GREEN

I AGREE with Dr. Moore that some of his statements are cryptic and despite the fact that I have sometimes fancied myself as being pretty good at cryptography, I do not understand some of the statements which he made. I do not particularly say this is his fault, for, although I regard myself as a social scientist with some knowledge of economics and political science, I am abysmally ignorant of Dr. Moore's field of sociology. In any event, I do want to confess very candidly that I lost Dr. Moore about half way through his paper. I lost him when he began talking about substantive and procedural intersections of the law with technological and scientific concerns. But in that part of the paper which I understood there is considerable substance on which I can comment.

To begin at the beginning, the title of Dr. Moore's paper is "Science and Technology v. the Law, or a Plague on Both Your Houses." I think there may be areas of confrontation and opposition between science and the law, but I think at the same time there are also areas of cooperation, perhaps even symbiosis, between the two. I am not sure, and certainly Dr. Moore did not make the case, that the area of confrontation exceeds the area of cooperation. Moreover, I am not sure why we are visited with a plague on both our houses. It seems to me that if there is something wrong with either science or technology on the one hand or law on the other hand, instead of saying a plague on both your houses, it might be more appropriate to say a therapy on both your houses.

In Dr. Moore's exposition of the clash between science and technology and law, he bases his concept of the clash on the notion that science and technology are innovative and that law is conservative, although he says that the case is not untainted. I think this point is worth discussing and perhaps defining. To begin with, it is perfectly clear that science and technology are intrinsically subordinate to law. Law is the accumulation of all the enforceable rules governing the conduct of individuals and individual entities in our society. Accordingly, the law must control and does control scientific and technological activities. Science and technology can flourish only to the extent which is permitted by the law, that is, by the legal system.

Now it sometimes happens, and indeed very frequently, that science and technology do result in innovation. I do not think however, that the law necessarily resists innovation, although in some cases it may have this effect. For example, the present scientific and techno-

logical developments in the area of amniocentesis may not be fully exploited for the good of mankind because of the laws of the various states pertaining to abortion. But, I think this kind of thing is relatively rare. I think it is more accurate to say that scientific and technological developments tend to disrupt the judicial order. They have this disrupting effect because they pose new kinds of problems which do not neatly fit within existing legal principles. When the law is confronted with such disruptive influences, I think it is true in this sense that the law may be conservative. It tends to look backward to find precedents which it can use to deal with new problems.

On the other hand, I think it is very important to point out that the fact that the law looks backward for precedents to deal with new problems does not mean that the law resists the introduction of new scientific and technological developments. Rather, I think it is more usually the case that the fact that the law looks backward permits new scientific and technological developments to flourish for a time before effective social controls are imposed. Parenthetically, I might add that Dr. Moore seems to talk about the possibility that in some instances the law may not be conservative. I really do not think law which is made by legislatures or law which is made by administrative bodies is any less conservative than law which is made by courts. I think that legislatures as well as courts tend to look backward or at least tend to look for experience to justify new legal developments.

Another of Dr. Moore's points which I do not fully understand is his discussion of the autonomy of science and law. I do not understand this point because it seems to me that law at least is not autonomous; law exists for the purpose of being applied to other areas. The application of law to specific problems results in the growth and change of the law as a result of the feedback which the legal system receives from other areas of our society. Further, with respect to science and technology as autonomous processes, it is clear, as Dr. Moore points out, that science and technology are largely dependent on the provision of resources from external sources. These resources are in fact available from external sources only when those controlling these sources believe that the scientific and technological developments which are being supported will be in some degree useful.

I think a fundamental problem which we have to face up to and which I do not think Dr. Moore touches upon is the relationship between the benefits of science and technology and the risks these benefits entail. It is very difficult to conceive of a beneficial technology which does not involve some risk to the values which our society regards as important. These values may lie in the area of health and safety, in the area of privacy, in the area of human dignity, and perhaps in other areas as well.

Another fundamental problem is that it is possible to produce almost any desired level of technological accomplishments merely by pushing the button on the money machine to provide the necessary resources to carry out what you want to carry out. When you push the button on the money machine and produce a given level of scientific and technological response, you are creating new problems for society and new problems with which the law has to deal. But, I do not know of any button which one can push on the money machine or any other machine which will produce the requisite social wisdom or the requisite change in law or the legal system.

Dean Yegge in his introductory remarks said, and I think this is a direct quote, "[t]he law must be responsive to social change." You cannot make the law responsive to social change merely by wishing it to be responsive or merely by having the National Science Foundation, the American Bar Foundation, or any other well-heeled organization provide funds to produce this result. There are some very difficult questions which are involved in this process of making the law responsive. Dean Yegge also said it is not his desire that this conference deal with the ordinary techniques of lawyering. We are to be concerned more with the role that the law schools and the legal profession can play in finding new ways to formulate policies to deal with the revolutionary rate of technological progress which we are now experiencing.