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The Law School as a Center for Policy Analysis: Comment

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COMMENT

BY JOHN GILMORE

I SHARE with Ray Bowers his disappointment and distress at the first half of Mr. Miller's paper, and I also very much agree with Professor Bowers' views of the threats and opportunities that science and technology present our society. I am much more in accord with Bowers' perspective and with the detail which he offers. I think I have rather little to offer in a way of informed comment of Professor Miller's varied suggestions to law schools, except his suggestion that they should seek to become centers for policy analysis. So, my comment will be entirely devoted to his title *The Law School as a Center for Policy Analysis*.

I will talk a little bit about an approach to policy analysis. God knows it is not the only one, but at least it springs from the systems analysis — the systems approach — which Joe Coates and others talked about this morning. I will talk briefly, then, about the nuts and bolts of such a policy analysis project, which we are carrying out at the moment. I will list a few randomly chosen needs for resources and characteristics of environment, which I think you need in order to do this sort of policy analysis. Then I will ask you if the law school can furnish these resources and these environmental characteristics. It seems to me, that is the important question which is implied in the title of the paper, *The Law School as a Center for Policy Analysis*.

Well, so what is policy analysis? Harold Green asked me that question about five weeks ago in his office. And suspecting Harold Green's capability of cross examination, I timidly said a very few words which I hoped were safe; "policy analysis is the intellectual activity whether its intuitive or systematic, leading up to the choice of a policy." Well, I am not going to chicken out quite that much here, in spite of the fact that Harold Green is once again facing me.

More specifically, we are talking about the analysis of complex policy problems dealing with risk, uncertainty, and technological change, as well as with social and political forces. Carter Bales talks about three components of this sort of analysis; the combination of the identification and/or the setting of objectives, the identification of the possible means of achieving them, and the selection of one of these alternatives.¹

The grand old man of the systems analysis business, Ed Quade,²

¹ C. Bales & M. Falvey, *A Guide to Issue Analysis* (unpublished manuscript, 1969). Mr. Bales is presently the Director, New York office, McKenzie Company (research & consulting).

² E. S. Quade; B.S., University of Florida, 1930; Ph.D. (Mathematics), Brown, 1936. Division Head, Mathematics, RAND Corp. Editor of *SYSTEM ANALYSIS & POLICY PLANNING APPLICATION IN DEFENSE*, 1968 (with W. I. Boucher).

talks about the policy sciences as evolving from the mix of the decision sciences, operations research, systems analysis, gaming, simulation, and PPB. He mixes these with the social and political sciences in his introductory article, in the initial issue of a journal called *Policy Sciences*,³ which I think is stimulating as far as his thinking in this direction goes.

The leading article in that first issue was written by Harold Lasswell.⁴ He says there are five areas for emphasis: goal clarification, which I suppose is this objective identification or setting business, the trend, the trend historic, trend projective, and future oriented trends. He thinks there is a substantial scientific area to be concerned about — the sense of science and technology — in the sense of science as a disciplining agent; and then he finally emphasizes invention, evaluation, and selection of alternative objectives and strategies.

So we are back to what Lou Mayo was talking about last night, the imperative to be concerned with alternatives. Well, as an example of how this imperative works, I would refer to this morning when we were talking about the need to inject the transfused systems analysis into our school curriculum. It would be most unfortunate if we oversold to law students the concept of systems analysis, as it has been oversold to so many other audiences, and then leave them disappointed that this is not a panacea. I think the concept of systems analysis and systems approach can only be offered. As an evolving tool, it has an awfully long way to go. Hopefully, it would be a challenge to people in the law schools to participate in this evolutionary process. But I would pray that they do not buy the same bill of goods that was picked up by various governmental agencies, mostly to be used by some of the defense firms in recent years, and end up having only disillusionment, and, in some places, more confusion than when they started.

One tentative probe into this sort of approach to policy analysis is a project I have with the title, "Public Policy Intervention in Inter-Industries Flows of Goods and Services to Reduce Pollution." What we are doing is taking the petroleum refining industry in this country as a prototype, proceeding to identify the flow of petroleum refinery products through the economy, from extraction to manufacturing, to use, to disposal. We are doing this based on the Department of Commerce's input-output tables, which, of course, just express value flows. We have fairly well completed translating these into flows of physical quantities. Our chemical engineering people are then working from this statement of flows to identify the pollution potential, or the pollution problems that are inherent in this flow, including the processing and use of these petroleum refinery products. And they are also contributing by looking at less polluting substitute processes, to be intro-

³ Quade, *Why Policy Science?*, 1 POLICY SCIENCE 1 (1969).

⁴ Lasswell, *The Emerging Conception of the Policy Science*, 1 POLICY SCIENCE 3 (1969).

duced and interchanged for high polluting processes, both for the process of the material and also for its use.

Our colleagues in the law school are inventorying the public policy responses to these technological threats and opportunities, which are presently in the stock of regulatory mechanisms. We are also seeking, by analogy, by synthesis, by whatever process we can come up with, to build on this stock of alternative means of public policy intervention to do something about the pollution problems, which we are identifying through this flow of material across the economy. Well, this is pretty much of our data base, and this is the part, of course, that is fairly easy to speak of precisely. I can take two approaches to our next phase after we generate this data base, this model of petroleum products.

I am optimistic as I talk about what would be the creative things of the project, but that really means I do not get into quite what we are going to do. But that is where the payoff is, because what we have to develop is a somewhat disciplined means of comparing alternative public policy, means of intervention to see how pollution can be reduced by modifying some of the decisions that are made, both public and private, about the use of petroleum refinery products.

Now we have got to do more than just array all these alternative modes of public policy intervention, we have got to compare them. We have got to go beyond the traditional cost benefit, or cost effectiveness comparison, because cost pretty much just relates to the economics. We have also got to deal with the social disruption that may result from new applications of public policy. We have got to deal with the political obstacles to the new modes, or different applications of modes of public policy intervention. So, I think, instead of working with something which is cost science benefit, we are working with something that is burden science benefit, because we have got to be working not only with the economic burden, but also with the social and political burdens that will result from changes in the rules of the game by public policy intervention. Well, after we go through that creative process, we have to test this methodology not only against our model, but against the real world critics.

One further data base that we are now generating that I think is a very important part, which I do not think I mentioned, is data on who is the audience for this sort of research. In some detail, we think this is at least as crucial a piece of the data base as the actual flow of the petroleum refinery product, and this is detailed down to the point of what man on the *Fortune* magazine staff should we create a relationship with, both as an informed person in this field, as well as a potential recipient of our information — also who at McGraw-Hill, who on the Senate Air and Water Pollution Subcommittee or the Senate Public

Works Committee? This is a very important part of the data base research policy analysis that we are undertaking.

After we test our methodology with this petroleum industry prototype against people in the industry, against people in government, presumably people out there in the real world, we hope we do not stray too far from their thinking. We then have to present this in understandable form to people who are in the policy business. Probably, in some form that tends more toward scenarios as examples, and away from "academic obscurafication," of which social scientists, and I am one I guess, are so often guilty.

Another forum of presentation for our output is through communication with our students. And I think this may end up being an argument, for the location of this sort of activity in a university, since we have a platform which our college of engineering bravely offers me, to give me a captive audience of some of their graduate students. Our law school, of course, is involved with faculty and the students who have a good deal of interest, and we occasionally warrant a few social science graduate students, although not as many as I will admit I expected to see. So, those who are the policy makers and the people who are hopefully recipients of education are the audience we have to keep in mind.

Well, how to do this sort of thing, what sort of background, what sort of milieu is going to get us the best odds of getting a good job from our people, what sort of resources do we need, what sort of working environment do we need? And this gets down to the gut question of the law school: Is it a good place, can we furnish this kind of working environment?

At this point, I thought it would be good to list comprehensively all the environmental resource characteristics that would be desirable. Well, this list is not the least comprehensive, so I assume that some of you, in reaction and commentary, can come up with others that would be obviously more crucial than these half dozen that I have. However, I think that an environmental characteristic that you have got to have in the setting for useful policy analysis of this sort is an extremely flexible, organizational structure, because it has to be able to accommodate different problems; and obviously, and even more difficult, it has to be able to accommodate different types of people.

You have to have something I think I will call an "inducement system," that will encourage good people to participate in the project. These probably have to be people both inside and outside. And I do not know if I am talking about inside and outside the law school, inside and outside the university or whatever the boundaries of this setting should be. But in any case, you are going to have to induce good people to want to work together instead of doing their own thing individually, and

I do not think universities have much of a tradition of working in this direction. You must decide whether you are going to do this through reward, whether you are going to do it through authority, those authoritarian forces that are most implicitly present in a hierarchical structure. I am not sure about how it can be done, but you have to have a good inducement system to attract both the insiders and the outsiders. I have an intuitive feeling that it requires particular emphasis on the care and feeding of the insiders, because you are pretty sure that if you bring insiders that you are going to be paying them.

I think another environmental characteristic that you have to have is proximity among the people from these different organizational entities that are inevitably going to have to participate in almost any sort of policy analysis; but particularly, policy analysis which concerns scientific and technological problems. How do you get these productive patterns of collegueship without overburdening the people who will be spending a good time together? I guess a corollary of this, it is a truism of course, is that communication among these people is vital, and it takes a good deal of time to develop the proximity and acquaintance that I think are important. But, one particular thing that the interdisciplinary policy analysis group is going to need for a long time is someone to interpret among the different, somewhat distinct, classes of people who are participating. And, I think, the best place for this somewhat interpreting function to lie is with the person who is also responsible for trying to integrate this work done in these different groups. Whatever he is considered to be, his main function is integration of various efforts from among other disciplines, people of different world views, people who may often be from different inducement systems. It is quite an undertaking! But, this is the person who is going to be responsible for delivering good output to the right audience on time. He will need some entrepreneurial talent along the way too, because somebody is going to have to raise the money for this stuff. He is a needed resource in this effort.

There are a couple of less tangible environmental factors that I think are particularly crucial and much harder to define. I think environment has got to go beyond acceptance of a concept of examining and comparing alternatives. I think it needs to encourage what is almost an obsession, an obsession of alternatives, which create almost for their own sake for quite awhile. The status quo can only be one of those alternatives, and I think it generally should be a pretty suspect one for quite awhile. I am not sure what sort of environment creates this, but without it I do not believe this approach to policy analysis can be very fruitful.

Related to this, but worth separating, is the fact that you need an environment which encourages skepticism about the givens. Particular

attention must be paid to the inclusion of the givens of the establishment and of the sponsor of the work, because, I think, in policy oriented work, the customer is very rarely right in his perception of what the problem is, or any of those things that are often given. And you can not solely limit yourself to the values of the establishment or the sponsor, because these are what end up being translated into criteria when you start comparing and considering these alternatives.

Along with the skepticism and the necessary force to be able to maintain it, there is a considerable degree of independence and of continuity of independence. Now, I think this fact may be terribly crucial. Mike Baram was touching on this this morning, I think, when he quoted Hugh Faulk on the problem of people having to look forward to going back into the pool, going back into industry, going back into government, going back into academia. If that is what you have to look forward to, instead of continuity of independence, I question the quality of the policy analysis that will result.

Well, I did my summary except to say that I think these specifications, that of the nature of the environment that is needed, while not inclusive, raised some useful questions which any organization, including the law school, needs to face if it is really going to deal with the law school as a center for policy analysis. Thank you.