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Saving Us From Ourselves: The Interaction of Law and Science-Technology: Comment

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COMMENT

BY ERNEST M. JONES

ALLOW me to preface my remarks with the observation that a commentator invariably singles out for comment those portions of a paper which are open to question or with which he disagrees. Therefore, if what follows appears to be overly critical, this should not be construed as a blanket indictment of Dr. Curlin's ideas.

In his introductory remarks, Dr. Curlin refers to three social institutions which presently serve ad hoc roles in technology assessment, namely, the market, the courts, and the legislatures. After a brief discussion of each of these, he concludes that they have failed as science-technology assessors. While Dr. Curlin's observation is merely introductory to the main thrust of his paper, I find it unfortunate that he would discuss the worth of these institutions as assessment mechanisms in terms of failure. Admittedly, there are weaknesses in each, but each also has some very important advantages.

Thus, while I would agree with Dr. Curlin's main point that there is a need to explore the possibility of devising new assessment mechanisms, I would argue that there is also a need to enhance the effectiveness of institutions already engaged in technology assessment.

Along with his general proposal for new institutions, Dr. Curlin identifies three characteristics which he believes an effective assessment mechanism should have. In his opinion, assessment mechanisms must be broadly multi-disciplinary, structured to maximize the interaction among specialists and equipped with a significant research component. While I agree that there is a need for these elements, I would question Dr. Curlin's recommendation that the research component "be staffed heavily with natural scientists and engineers, and have a significant compliment of social scientists." I must take issue with his emphasis on the need for natural scientists and engineers as expressed in the phrase "heavily staffed." I find myself rather suspicious of technology assessment which is largely performed by natural scientists, or engineers, or anyone else whose formal professional background is more concerned with things, than with people, emotions, values, and institutions. In other words, I would suggest that the research component be "heavily staffed" with social scientists rather than with natural scientists and engineers.

Having dealt with the general characteristics of the proposed institution, Dr. Curlin turns to a discussion of the roles various groups and processes will or should play in technology assessment. Turning next to the role of the legal process as an assessment institution, Dr.

Curlin suggests that the lawyer can make an important contribution to the assessment process by employing the traditional techniques of the adversary procedure. Clearly, the assessment process would benefit from a clear explication of the negative, as well as the positive, factors of technology, but I would submit that it is *advocacy*, rather than the adversary procedure, that is most apt to produce this result.

Broadly conceived, advocacy is more than the tactics of claimants and the procedures of formal dispute-settlement; it embraces all value-oriented behavior. Hence, it may refer to a process which is open, not merely to lawyers, but to anyone engaged in value-oriented behavior. It follows, therefore, that the role of the lawyer, trained as he is in the techniques of the adversary procedure, should not be our primary concern. Rather, our focus should be on the roles of the legal process in technology assessment, with particular reference to the contributions of advocacy.

As to the interrelationship of the legal process and scientists, Dr. Curlin seems to believe that scientists have such an aversion to advocacy that the successful organization of any new technology assessment institution will be impeded. If scientists do have an aversion to advocacy, I must say I find it very difficult to understand. I am told that scientists pay homage to the tenets of the scientific method, and that scientific colleagues who offend these norms can anticipate that the worst kind of informal sanctions will be applied to them. If that is the case, the scientific method turns out to be an informal legal system, complete with norms and sanctions, and invokers and impliers, or, if you would prefer, prosecutors and judges; and all this activity is heavily infused with advocacy. Therefore I fail to see why scientists would cringe at such a notion. Perhaps it would be more accurate to say that scientists have an aversion, not to all forms and styles of advocacy, but only to some. I also suspect that aversion is predicated on a stereotype of advocacy which is equated with what a lawyer does in trial courts and particularly before juries.

I believe that attitudes toward advocacy can operate as impediments to effective collaboration in technology assessment between lawyers and scientists. This is more likely to be true of "lawyer-behavioral scientist" collaboration than of "lawyer-engineer" collaboration. The reason for this is that both the practicing lawyer and the engineer, as I understand the engineer's training, are trained in applied problem solving techniques. On the other hand, the training of the behavioral scientists, like that of the pure physical scientist, is more theoretical, and less applied. Thus, the behavioral scientist and the lawyer do not have a common basis around which to build communication and understanding.

The fact that lawyers and engineers, rather than lawyers and scientists, share a common basis on which to build successful communications emphasizes the need for an improved flow of communication between those trained in law and those trained in the other relevant disciplines which may have to be assembled in technology assessment institutions. Dr. Curlin offers the thesis that effective communication among disciplines, for collaborating on assessment, is "the key to an effective assessment institution." I would like to take issue with this statement. Although I would be willing to say that effective communication is a necessary condition for effective assessment institutions, I would not say that it is a sufficient condition for effective assessment. Hence, I do not think I would call it the key. In fact, I do not know of any variable which might be at work in effective assessment that can justifiably be called the key. I think effective assessment is something that arises out of the operation of a multitude of variables, and there may be, not one, but a variety of sufficient conditions.

Finally, I would suggest that we distinguish the general problem of more effective interdisciplinary collaboration in technology assessment from the role of universities and the role of law schools with respect to interdisciplinary collaboration. We can make some suggestions for changes, and Dr. Curlin's paper does so with regard to the pattern of educational practices of the universities as a whole. However, it is a different problem, it seems, to come up with constructive suggestions for possible changes in educational patterns in law schools with the objectives of improving collaboration between graduates of law schools and those of other disciplines. It is this latter problem that interests me, and, hopefully, it is by addressing and solving this problem that we will be able to overcome many of the impediments to the creation of an effective multidisciplinary technology assessment institution.