Denver Law Review

Volume 47 | Issue 4 Article 57

April 2021

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

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COMMENT

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SINCE Professor Jones has sufficiently dealt with the latter portion of Dr. Curlin's paper, covering the craft aspects of implementing his various proposals, I will limit the scope of my remarks to the first part of the paper, which in my estimation contains most of the dubious and questionable assumptions.

In my opinion, Dr. Curlin's entire argument concerning assessment and the disruptive role technology plays in social change cannot only be handled without the intrusion of values, but insofar as this is done, the result will be a cleaner and more precise analysis. In other words, moral tone, as a force behind analysis, ought to be diligently and totally expunged. Thus, if one is to perform a professional job of analysis, he must be, in a very real sense, antiseptic — he must be free of the adversary position.

An example of the disruptive effect of technology *vis-a-vis* social change was noted in Curlin's reference to the automobile. The resulting disruption, he suggests, may be seen in the development of the suburbs and the corresponding death of the core-city. Indeed, we do have suburbs, and we have had a decline of downtown areas, but the main cause has not been technology; instead, it is a rather perverse set of tax incentives which has caused this phenomena. Thus, the issue is not primarily technological; rather, it is a traditional issue of manipulating fiscal agencies by means of public policy. Simply because technology is one of several components which comprise the system with which one happens to be distressed, it does not necessarily follow that technology, rather than some traditional component, is the thing to be manipulated.

Perhaps it is equally fallacious to assume that when our present institutions, the market, the courts, and the legislatures, engage in technology assessment, they are ineffective.

I suspect that the common beliefs about these institutions as effective technology assessors are irrelevant due to the failure to utilize the institutions for that purpose. Moreover, even where there has been utilization of the institutions, it has not been accompanied by an effective evaluation of the derivative benefits. Therefore I would contend that one has to look past the question of whether it is actually technology which is at fault in order to develop new insights as to where to probe in the manipulation of public policy. To support this hypothesis, I will address my comments to two of Curlin's "traditional actors," the market and the legislature.

Curlin concludes that the market has failed as a viable assessment agency; however, the important question is not whether the market has indeed failed, but has it ever been tried?

I would suggest a two part answer: First, certain aspects of the market institution have not been tried, and second, the parts that have been tried have not been properly evaluated. An example of this improper evaluation, which results in an improper assessment, can be noted in the area of liability insurance.

Looking at the insurance industry, one can see that it is the leading advocate of unsafety. The entire operation of the insurance industry depends on the establishment of an investment pool. That investment pool, in turn, is extremely elastic due to its dependence upon rates. The only method by which that pool can be increased is to have people who need insurance. Clearly, one needs insurance because he has a real or perceived risk. Therefore, in a simple economic analysis, the insurance industry is the major public advocate of unsafety. If you accept this notion, the question is, what are the tools that could be used to manipulate the insurance industry, and in turn, to manipulate technology. The main sources that should be checked for an answer may be social institutions, social invention, and social technology, not hard physical technology alone.

The second of Curlin's "traditional actors" which I wish to comment on is the legislatures. Curlin suggests that due to the adaptability of the legislative process, the legislatures are the most effective vehicle of technology assessment presently available. I cannot agree. We live in a crisis-susceptible society. The crises of the fifties established the public policies that today are routine. Similarly, the crises of the sixties are already embedded in our political system. Therefore, I submit that our legislatures respond to the crisis of the moment. They do not respond to opportunity, nor do they anticipate crises, except in a rather narrow way. Thus, it is a serious error to suggest that the legislatures are effective technology assessors. Even though that may be one of their legitimate roles, they have not performed that function in the past.

Having briefly voiced my doubts as to the efficacy of the market and the legislatures as viable assessment agencies, I would like to turn now to the more specific issue of the components of an assessment agency, in whatever form.

While it is generally agreed that an assessment institution must have a significant research component at its disposal, I must stand with the minority and question this assumption. I do not think that there should be a committment to one kind of institution, or one kind of organization. Rather, since technology assessment can come in so many forms, during such a long span of time, with variable durations, we

ought to encourage various types of institutions to field assessments. I do not mean to imply that one needs a physical facility to do physical research, in order to conduct technology assessment; rather, I think that, as a preliminary notion, one ought to look at technology assessment as essentially a paper and pencil enterprise in which the paper and pencil serve as conduits for the mind's communications concerning the future. Assessment is primarily analytical — synthetic, not experimental.

Since assessment is essentially an anticipatory activity, we should always try to keep the beneficiary of the activity in mind; otherwise the characteristics of the assessment will not be quite right. More precisely, there may be serious differences between the temper, the scope, and the intensity of the assessment, depending upon whether it is directed toward legislative or regulatory action. On one hand, regulatory action seems to imply a need for a more intense awareness of the details of technological alternatives and practical consequences. On the other hand, if one is doing an assessment at the legislative level, it may require a different kind of assessment, since the objective may be the formulation, rather than the execution, of a given policy.

I would suggest that we should be concerned with three basic issues. The first is the influence technology has upon environment and behavior. The second involves issues focusing upon the prevalence of people — criminal aspects, privacy issues, and so on. The third, which follows from the other two, and toward which I think there is strong avoidance behavior, is the fact that central planning is the order of the future. Unless the legal system is restructured, and fundamental cognizance is taken of the drive toward central planning, I think that the legal structure will remain inchoate in its dealings with science and technology.

My conclusion is that in any social dislocation, insofar as there is an apparent, highly technological component, one ought to automatically ask the question: Is there a complementary social-technological component, which either is a main component, or which could be a main component in the manipulation of the problem? I would argue, for example, that lawyers ought to be aggressively exploring new measures of manipulating the insurance industry, which may indirectly manipulate technology. The point of my emphasis, and the implication that there is a growing need for a determination of how to explore for society, is that social technology may be a dominant factor in our corrective enterprises. The subsidiary implication for law schools is and proliferate new social technology. Given the fact that there is a fundamental dislocation between the structure of society and the structure of law, I suggest that the solution may lie in a total transformation of the law. If we accept the fact that a transformation is needed and

we do not inform our law schools and student lawyers of this impending revolution, we will be doing them, and society, a disservice.

Basically then, in regard to technology assessment, I believe Curlin is wrong. He says that the object of technology assessment is to increase the desirable second order consequences and reduce to a minimum those second order consequences which are unintended, unanticipated and undesirable. I question whether that is really the intention of technology assessment. It seems to me that it is not. Technology assessment is the instrument by which one explicates alternatives, and the obstacle that must be overcome is the development of suitable and incisive methods for bringing about analysis and exploration of alternatives. Assessment is something which has to be carried on continually, as the unanticipated second and third order consequences of technological exploitation become apparent. As such, technology assessment is a tool for the policy maker; it is not *the* policy maker. It should be viewed by the policy maker as a conceptual enterprise, not a scientific enterprise, to probe the future.