

Stories of Human Autonomy, Law and Technology

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Edward Castronova, well known researcher on ‘synthetic’ worlds has argued that scripted virtual online games, like Blizzard’s *World of Warcraft* will ultimately prove more lasting than unscripted worlds like Linden Lab’s *Second Life*. His claim is based on a belief that narrative and questing means something more to humans than avatars just hanging out (Castronova, 2006). It is possible to see from Castronova’s pontificating that for humans meaning and value has something to do with storytelling.

This paper builds upon the realisation that humans possess a narrational being. It is argued that thinking about law and technology tends to be scripted by stories that articulate a fundamental relationship between human autonomy, technology and law. Three of these stories, the ‘technology’ story, the ‘legal’ story and the ‘autonomy’ story are examined. It is suggested that the autonomy story allows greater clarity for thinking about law and technology

The Technology Story

The technology story of human autonomy, technology and law begins with the populist definition of human as tool user. The specific origin of this story lies in paleoanthropological theorising of the nineteenth and early twentieth centuries. It tells that the evolution of humanity, the specific chance relationship that accelerated natural selection, was tool use by distant apelike ancestors. It was claimed that the chipping of flint and the domestication of fire set the cortex alight. Tool use facilitated greater resource utilisation which in turn gave stimulus to brain development which in turn led to greater creativity and experimentation in tool use; and very rapidly (in evolutionary time), our hairy ancestors moved from skins and stones to not so hairy modern humans in Armani with BlackBerries. In this story what distinguished modern humans was this tool use. The sub-narrative was autonomy. Tools and brain freed humans from nature. In Stiegler’s phrase technology allowed ‘...the pursuit of the evolution of the living by other means than life.’ (Stiegler, 1998). In this story technology fundamentally relates to human autonomy. What this story does not tell is law. Indeed, law’s absence is telling. As a fundamental myth, the tool-using free human is before law. Law emerged later, as a second order consequence, a supplement laid over the top of humanity’s essential nature.

In contemporary paleoanthropology this story, as a scientifically acceptable account of the evolution of *Homo Sapiens*, is problematic and simplistic. Further, deep ecologists have been keen to point out that humans share the planet with other tool using species and a claim of superiority on the basis of tool use is simply anthropocentric (Fox, 1990). But it is a good story, a modern version of the myth of ‘Epimetheus, Prometheus

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and the Gifts of Traits' (Plato, 1976) and is an often repeated narrative within Western culture.

One place where it is repeated is techno-determinism. The technology story is the meta-form that underlies the enthusiastic embrace of technological change as a good in itself. It is also the narrative that animates the legal mind when it turns causally to the question of technology and thinks that law must 'catch-up' or that law is 'marching behind and limping' (Bennett Moses, 2007). In these phrases technology is placed at the core of what it means to be human, while law is located at the periphery. Its influence can also be seen in the 'can't' or 'shouldn't' regulate technological change arguments. Being technological is regarded as the essence of humanity and artificial attempts to regulate the ever flowering of this being will either fail (can't) or end in debasement and corruption (shouldn't).

The Legal Story

The legal story mixes the relationship of human autonomy, technology and law according to a different recipe. This story comes down to us from the social contract tradition and in it the roles of law and technology are reversed. The story goes that humans lived wretched lives in the state of nature; living by passions with only the spark of reason to distinguish humans from animals (Hobbes, 2008). This state was the state of complete freedom. However, the spark of reason eventually led to the realisation that a compact between humans could secure a more peaceful (Hobbes) or propertied (Locke) existence. The social contract was formed and government, law, economy and society followed. In the social contract some freedoms were sacrificed to preserve others. Law was fundamentally tied to human freedom at two levels; first it was the legal form of a contract that bound the natural human and second, freedom, reason and covenant combined to provide a justification for the posited legal system.

One of the benefits of the 'sovereign's peace' was technology. As humans were no-longer in the 'war of all against all' they could get on with learning about the world and making use of that knowledge. Technology emerged as a second order consequence.

Like the technology story, this story permeates the West. It remains law's formal story of origin and so ingrained is it in the modern jurisprudence that explanations of legal orders that do not include such concepts as nature, reason, freedom, sovereign, contract and rights, seem irrelevant. It shows its influence in law and technology scholarship. Fukuyama's clarion call for law to 'save' humanity from biotechnology is an example. Driving Fukuyama's argument is the social contract vision of the human as a reasoning being who is biologically vulnerable and this combination of reason and vulnerability, on which the Western apparatuses for the expression of freedom (government and market) has been constructed, is under threat by technology (Fukuyama, 2002). The core needs to, and it is legitimate for it to, secure itself against change. In this account technology as a second order consequence is a threat, but also a threat that can be met (Kirby, 1982; Tribe, 1973). There is a fundamental confidence in legal mastery of technology that is absent in the technology story.

The technology story and the legal story are symmetrical. The technology story articulates human autonomy and technology as essential, with law a second order consequence; in the alternative the legal story narrates human autonomy and law as essential, with technology a second order consequence. My argument has been that much of the scholarship on law and technology emanates from either of these narratives. What has happened in my telling of these stories has been an obscuring of ‘autonomy.’ I moved from autonomy to freedom, and as treating these two words as synonyms is common it can seem an acceptable substitution. However, it is possible to define autonomy and freedom differently, and in doing so this opens to the autonomy story.

The Autonomy Story

Freedom has exercised particular attraction to the modern imagination. The technology story saw the tool as freeing humanity from the constraints of a fickle and oppressive nature. The legal story saw contract and government as freeing human from too much freedom in the state of nature. In both freedom was defined in relation as a freedom *from*. Freedom from has a tinge of irresponsibility about it; as first year law students demonstrate when they are allowed to play, under close supervision, with negative rights in tutorials. Autonomy can suggest something else; and that something else can be seen in the autonomy story of human autonomy, technology and law.

The autonomy story emerges from critiques of both the technology and the legal story. One of the first disciplines to question the technological vision of humanity as “freed beings of brain and tool” was technology studies. Mumford (1966), drawing upon the breadth of human diversity as catalogued by mid-twentieth century cultural anthropology, argued that it was not tool use that defined humans, but language and culture, and the evolution of humanity’s mental hardware was stimulated by increasing sophistication in usage of signs and symbols. Human freedom from nature was not because of tools but because of culture that allowed more effective domination. Technology was the material manifestation of culture; not the substratum on which the superstructure of culture was erected.

For Mumford, culture – law, morals, myths and technology – was what liberated humans. Unlike the other stories there are no second order consequences. Law and technology as culture are tied to human freedom. In Mumford’s project, accounts of technology that placed technology as outside of human control were false and ‘placed our whole civilisation in a state of perilous unbalance: all the more because we have cast away at this critical moment, as an affront to our rationality, man’s earliest forms of moral discipline and self-control’ (Mumford, 1966). Mumford regarded law (moral discipline and self-control) and technology as elements from a cultural whole. The need for law – for discipline and control – of technology was self-evident.

There was the spectre of the noble savage that haunted Mumford’s work and negative ethnocentrism in his favouring of indigenous societies against the ‘unbalanced’ West. However, this extremism was not core to the story that Mumford tells. Indeed,

what this cultural re-reading of the technology story told was a relation between law and technology that did not reify technology as either essentially human, and by location 'good' (as in the technology story), nor unessentially secondary and by location 'bad' (as in the legal story). What Mumford's story allowed is a freedom to choose, but in that freedom hid responsibility. Humans, through culture are the creators of their own destiny, and law and technology are equal partners in this self-creation.

This still talks about freedom, but it is a qualified freedom. Not a freedom *from* but a freedom *to*. It seems that a vision of humans in the world that involves culture and self-creation also includes a concept of responsibility. It is this freedom to and normative demand of responsibility that is captured by autonomy. This can be glimpsed in the critique of the legal story.

A fundamental challenge to the legal story of autonomy, technology and law comes, like Mumford's critique of the technology story, from the social sciences. As early as Max Weber's cataloguing of legal systems it became increasingly clear that social contract narratives failed to account for what it meant to live with a fully rationalised legal system, modern executive government and industrial capitalism (Weber, 1968). In this mass urban context of the machine, concepts like nature, reason, freedom, sovereign, contract and rights had difficulty being recognized in identifiable 'things.' The United States realists of the 1920s and 1930s tried to grasp this, but were hampered by their common law training, law school context and remained, in the main, fixated on judicial decision-making (Kalman, 1986). It was the work of Michel Foucault that fundamentally challenged the legal story of autonomy, technology and law. Instead, of postulating a natural human and a state of nature, Foucault presented a plastic human constructed by techniques (Foucault, 1977). Human subjectivity (that place where one feels free or otherwise) was not a private zone of autonomy that survived and was to be guaranteed by the social contract, but a product of context. Foucault talks about the cultural processes in modernity through which humans are made: the processes that Mumford glosses with his broad brush strokes. These processes are the discourses of the self (medical, sexual, legal) and the mundane training, through routine, reports and discipline by panoptic institutions (the family, schools, hospitals, army, prisons, churches, universities) that construct the 'I' of modern life (Foucault, 1973, 1977). There was not the binary sovereign-subject but ever-changing and ever-to-be negotiated networks of power relations. Here 'law' was more properly experienced as mores, authority, disciplines and punishments, and 'technology' was more properly experienced as techniques for self control and for power over others. Talk of autonomy was a relative and negotiated affair that can be represented spatially as zones where the reflective possibility of choice is possible. However, that is not freedom from; the range of choices are always limited and circumscribed.

In Foucault's story the emphasis was on how the individual as a self negotiates the everyday through using techniques and in being subjected to techniques, and in so doing changes. I am suggesting that, notwithstanding their obvious differences, Foucault fits within Mumford's grand account. Mumford on the primacy of culture, and with that, humankind's responsibility for self-creation, while Foucault explained the processes, at

the level of the individual, through which an individual is made to be responsible for the self.

Now this autonomy story might seem quite removed from the mainstream of law and technology scholarship. However, I would submit that the more complex assessments of technology that are being voiced in this collection owe their formative moment to a realisation that it is human doing with technology – the cultural registry – that is the frame from which law and technology needs to be considered. Further this forum, with all these signs and symbols directed to reflecting on our freedom to, is performative of this responsibility for the world that we make through technology and law.

More Stories

In short, like the addicted player in *World of Warcraft* we inhabit stories (Lastowka, 2008). I continually and on purpose used the noun ‘story’ and verbs like ‘talk’ and ‘telling’ throughout. What I have endeavoured to show has been how law and technology thinking replicates and transmits fundamental narratives about human autonomy, technology and law. What I also have suggested in the conclusion with the autonomy story is a realisation that these stories, embedded and persuasive as they are, are cultural and we have responsibility for them. This is why my research continues to circle back to science fiction (Tranter, 2002, 2003, 2007; Tranter & Statham, 2007). Putting aside anxieties concerning the scholarly value of a “juvenile literature”, (Delany 1989) within the opus of science fiction there are some grains - concepts, characters, plots, narratives - that are resources to write alternative stories about the relation between humans, technology and law.

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