Law 2.0, Web 2.0, Why Not Legal Sociology 2.0?

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Introduction

Throughout our history as a species humanity has enjoyed a love affair with technology. We mark our evolution through the use of increasingly complex tools. Until recently we actually defined ourselves as a species by the use and creation of tools. The creation of what is known as the Oldowan flaked type of stone chip is traditionally said to mark the first clear evidence of early man (*Homo habilis*). We are so proud of our technological skills that it is even reflected in our classification for ourselves as *homo sapiens sapiens* (the doubly wise or thoughtful man). A third *sapiens* has been mooted for the current incarnation of mankind. This has been suggested because our technological ability to communicate has made us aware of what we as a species collectively do and do not know, which has never been possible before,[1] and also because our history of cultural and technological advances has made us evolve into a distinctly genetically different creature to early *homo sapiens sapiens*.[2] However, this relationship between mankind and technology has been challenged and theorists are now reconsidering the assumption of man as tool maker in light of our growing understanding of other primates.

> "If the Oldowan tool-maker was *Homo habilis,* our conclusion that it had an ape grade adaptation may seem counter-intuitive. After all, the brain of *Homo habilis* falls between that of living apes and humans in terms of its size and shape. This need not mean, however, that *Homo habilis* must have had a *culture* that was equally intermediate…We do not question the evidence for brains but instead think that scholars must not reconcile the 'inconsistency' by promoting the Oldowan to insupportable cultural levels. The evolutionary pressures for encephalisation may have

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[1] See P., Quéau, "Growing The Global Good" http://www.unesco.org/webworld/points_of_views/queau_7.html

[2] D., Biello, "Culture Speeds Up Human Evolution: Analysis of common patterns of genetic variation reveals that humans have been evolving faster in recent history" *Scientific American* 10th December (2007) available online at http://www.sciam.com/article.cfm?id=culture-speeds-up-human-evolution&page=1

been unrelated to culture. If one uses archaeological evidence, it must speak for itself, and the Oldowan argues for an ape adaptive grade."[3]

Similarly, early sociology of law reflects this love affair with technology. Durkheim's early explorations into the field produced classifications based around ideas of "primitive" and "advanced" cultures. This paper argues that implicitly included within these classifications are assumptions about technological advancement. Of course Durkheim's basic classifications have now been thoroughly challenged (and full version of this paper will explore some of this alternative theory) but still theory linking technology and the development of law has remained somewhat undeveloped in legal sociological terms. We do not as yet possess schemata for adequately exploring and interpreting communities and cultures arising across national boundaries inside discreet virtual worlds, nor have we fully explored how "mainstream" law is shaped by interactions with these virtual worlds. As Anthony Smith put it:

> "…our repertoire of working mental images does not seem at the present time to contain an apt metaphor or convenient cliché that sums up the flow of influence between a fresh technology and human society…really nothing that provides a convincing and transposable conceptualization of the causal influences that pass between a new form of equipment and the organized minds and bodies of people living in society."[4]

This paper hopes to open this area up for discussion and also to tentatively posit some criteria for sociology of law in the digital age.

Sociology of Law in the Digital Age

The second main portion of this paper shall consider some features of law's relationship with internet technology which have been under explored or ignored in our current theory of law and technology. Then we shall move on to consider factors which must be accounted for by any sociological theory

The first of these underexplored themes concerns the nature of the internet itself. As a result of our understanding of servers and service providers working from a centralized computer system we have come to see the internet as a series of interconnected nodes. This has been reflected in our approach to regulation by causing us to legislate primarily to control the actions of central modes (ISPs and software providers). (Of course in terms of civil wrongs this tendency may have been exacerbated by the need to have an identifiable and financially worthwhile respondent but other models are possible for example plaintiffs could be paid from a social insurance scheme funded by higher tax on computer equipment rather than seeking to make ISPs liable.) This focus on

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[3] T. Wynn; W. C. McGrew "An Ape's View of the Oldowan" *Man*, Volume 24, No. 3. (1989), pp. 383-398
[4] A., Smith, "The Influence of Television" *Daedelus* Volume 114, No, 4. (1985), pp. 1-16

nodes has prevented the development of a balanced approach which also dealt with the ends and connective tissues of the network or in other words we have not focused on the actual behaviour of users which might suggest different methods of regulation and control or even that a rethinking of the fundamental norms underpinning regimes may need to be reconsidered.

The second theme has to do with the proliferation of the influence of social and economic factors in our relations with technology. Feminist and critical race scholars have long made it clear that technological factors which can affect access tends to mean that social inequalities in the real world are reflected and retrenched by the virtual world. In addition to this however this paper asks us to question the extent to which our legislative decisions are influenced and penetrated by financial ones in the field of internet law and the extent to which this is appropriate.

The final underexplored theme concerns the rush to engage and be seen to engage with any new technological advance. We need to consider how much this is a response to a developing regulatory need and how much this is as part of the self sustaining nature of the legal enterprise and the need to emphasize the relevance and contemporary importance of our theoretical and practical efforts.

With these caveats and points for consideration in place it becomes necessary to address the special features of the internet which must be addressed by any theory of legal sociology for the digital era. The first essential feature which must be accounted for is the public nature of the internet it acts in many ways like a global agora, users can conduct private conversations and transactions of course in out of the way corners and private snugs but they can also speak directly to a broad public, form communities and engage in all forms of social interaction from the economic to the political. Thus, any theory must be grounded in some understanding of the complex inter-relations facilitated by networked space. Secondly, from a legal perspective this complexity has been mapped in terms of recognizing the multiplicity of legal jurisdictions involved in much online behavior. The problem with this approach however is as with the nodal approach it builds on structures and concepts conceived for law in general rather than tailored for the virtual domain we have ample evidence of the dangers of this approach from the world of copyright. Finally, then it became apparent that what is required is a more sophisticated model that takes accounts of movement from public to private and through jurisdictions. I have called this notion of making a more complex model taking account of intersections of user action. It was the need to begin to develop a more nuanced model which began my thinking on how such modeling could be made. It was working on this problem which gave rise to both a potential mapping solution and a further explanatory image for explaining the proposed shift in legal sociology for the internet age.

No More Firewalls

In thinking about how to map user behavior I thought about system security and logging issues generally. It occurred to me that the "rings of trust" model currently used to design firewalls is very similar to the compartmentalized approach adopted by legal thinking in this area. However, the "rings of trust" approach is rapidly being overtaken by the de-perimeterisation model where what is considered is the nature of the data held and how to secure it in a variety of contexts thus the approach is responsive to but not dependent upon the context of the data. Many of the of the commandments of de-perimeterised security seem to have application in this field and one in particular also struck a chord in this context "assume context at your peril". Why not apply this to our discourse and cease to assume the behavior of users or to limit our regulation to particular zones or types of interaction why not attempt to focus on user behavior in a holistic way?

The problem of course at this stage of development is the dearth of data and so I began to consider means of making such a map. Cookies were considered and indeed the general data gained by advertising companies may be helpful in profiling broad types and styles of user for further study but ultimately the simplicity and elegance of the logging proxy as a solution won through in terms of method. This would allow full mapping of user behaviour, is easy to install and along with user interviews can give us a complete picture of digital context.

Conclusions

At this stage these are only hypothetical observations albeit supported by theoretical work and practical observation in this field. It is hoped that opportunities will present themselves to put these ideas into practice and begin to form an empirically based body of theory which can inform regulatory behavior and make it more specifically tailored to the digital domain a true legal sociology for Web 2.0.

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