Book Reviews

Roger Brownsword, *Rights, Regulation and the Technological Revolution*,
Oxford, Oxford University Press, 2008.

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This monography provides an excellent synthesis of Roger Brownsword's pioneering scholarship at the interface of bio-technologies and regulation over the past decade (see, among many others, 'What the World needs now: TechnoRegulation, Human Rights, and Human Dignity', in R. Brownsword [ed], *Human Rights* [Oxford, Hart, 2004] 203; 'Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance' 17 *University of Notre Dame Journal of Law, Ethics & Public Policy* 15, 2003; 'Red Lights and Rogues: Regulating Human Genetics', in H. Somsen [ed], *The Regulatory Challenge of BioTechnology* [Cheltenham: Edward Elgar, 2007] 39). Although it is hardly in need of introduction in the English-speaking world, the editors of this Review have thought it important that attention should be drawn to this work, published in 2008, in continental European private law circles, where the prevalence of legal formalism means lesser familiarity with – and greater resistance to – the very concept of regulation and the various strategies by means of which human behavior can be channeled, including through the appropriate design of tools which may or may not be recognizable as 'law'. Moreover, for similar reasons, issues of political philosophy rarely find their way through the mesh of legal technique, even in fields which engage issues of democracy, human dignity or the status of scientific knowledge to the extent that genetical engineering obviously does, particularly in a global market of ever-available technology. In this remarkable book, Roger Brownsword uses the lens of regulation to address the dilemma facing our complex societies as articulated by Habermas (*The Future of Human Nature* [Cambridge, Polity Press, 2003] 92): should normative foundations be dropped, in favour of biogenetic steering mechanisms?

In terms of ideal regulatory regimes, standard (public or private) law definitely fits an 'East coast' rather than a 'West coast' model (see 13). The former, which largely corresponds to the rule-of-law tradition, rests upon the principle that regulation engages with the practical reason of the regulatees, who will consent as a community to the various restrictions and controls they may suffer individually, in the light of various legitimizing arguments articulated as the public interest. On the other hand, the 'West coast' model – presented as an Orwellian thought experiment, with a realistic prospect of becoming reality in view of the astounding growth of nanotechnologies, neuroscience, biometrics –

uses the resources of a 'designed environment', in which patterns of human conduct are induced directly by architecture or technology, by-passing the commands and conditions of the law. While the point made here is – easier said than done – that optimal regulation would make use of the full range of available regulatory strategies from East to West, the distinction between the two ideal regulatory modes serves importantly to explain the plan of the book, which in turn emphasizes Roger Brownsword's own, highly original, contribution to the bio-technologies debate.

Thus, the book first explores the various challenges raised by bio-technologies as targets of regulation: the 'East coast' regulator will be called to account essentially in terms of moral or ethical legitimacy of purpose and means of regulation, but also in the light of the effectiveness of regulatory measures, their connectedness (to the target of regulation), and their responsiveness to the demands of cosmopolitanism, where different regulatory policies and strategies may conflict over issues such as market access in various supra or transnational sites or fora. However, the book then goes on to consider the prospect that direct recourse to technological design will be used increasingly, under a 'West coast' regulatory approach, to steer behavior in the place of more traditional legal tools (whether these be command-and-control legislation, or other more contemporary participative normativities). It seeks therefore to brings out the 'West coast' regulatory potential of the very technologies – beginning with databases – that are the targets of 'East coast' regulation, considered here, excitingly, as 'regulatory opportunity'.

But of course, the complex challenges already identified as facing the East coast regulator, notably in the form of legitimacy requirements, reappear inexorably on the West coast, and go to the very feasibility of a regulatory mix. In other words, how can the East coast regulator take advantage of technological steering devices without sacrificing the moral community on which the (East coast) rule-of-law model rests? As Roger Brownsword puts it (262), '...once East-coast regulators start to head West, is there any stopping point short of the West coast itself'? There follows (Chapter 10: Code and the Corrosion of Moral Community) a fascinating thought experiment, in which two proposals for regulatory hybridity are examined. The first, predominantly East coast project limits assistance from technology to detect non-compliance, identify offenders and bring them before the courts. In this scheme, at least in theory, the offender remains free to choose a life of crime, even if she has a criminal record or shows some sort of criminal predisposition, but the court system will be able to carry out its traditional task of punishment more effectively. However, even so restricted, panopticon surveillance technologies may actually remove any realistic margin for free choice, which the East-coast model promotes as a foundational virtue. If detection is

certain, will regulatees really be encouraged do the right thing *for the right reason,* or merely from fear of punishment, with the correlative loss of learning capacity?

This objection of course reappears against the second proposal, which allows technology to design-out unacceptable conduct *ex ante* – for example, by removing predisposition towards (the most threatening forms of) violence through genetical engineering. The regulatory priority here is to secure an environment in which each member of the community may pursue and fulfill her life project freely, without interference in, or from, others. At the heart of the model lies support for agency or self-regulation – the moral requirement of the opportunity for self-fulfillment is to act in fellow-agent-respecting ways. However, under this proposal, the possibility of free choice – choosing to do the right thing, for the right reason – is once again clearly diminished, or, rather, relegated to the (grey) zone of less threatening offenses. The whole context of wrongdoing is thereby fundamentally altered. Now, the virtue of doing the right thing may have a value that lies deeper than the purely instrumental purpose of allowing the flowering of individual and co-operative life projects, which can be obtained through technological design. Perhaps doing the right thing speaks more profoundly to what it is to be human? In another vocabulary, perhaps it is irrational for an agent to deny being bound by other-regarding principles?

The quest for a regulatory hybrid appears therefore to lead to stale-mate: 'There is no obvious mid-West regulatory model' (272). This is because the essential divide between the two follows the inclusiveness of regulatory dialogue. The West coast model supposes a divided community, in which a regulatory elite design-in the behavioural patterns to which the regulatees have no choice but to conform. The East coast model, in the other hand, allows dialogue between regulators and regulatees through participatory democracy and moral community. While West coast regulatees could of course claim inclusion in the regulatory processes, there is no way that regulators could open their moral deliberation without taking a step back to the East coast. Does this mean that the East coast model, which rests on the dignitarian argument that human is to be able to do the right thing for the right reason, have more going for it than all the technologically sophisticated West coast regulatory opportunities? While its dignitarian commitment, seen as a pre-condition to moral community, can easily navigate the possible hurdle of human rights (as articulated by a certain 'South coast conservatism': does commitment to human dignity necessarily condemn a whole raft of practices and pursuits, such as sad-masochism? Of course not...), it may have more trouble with the far rockier philosophical territory of free will. If human genetics, neuroscience, or indeed psychoanalysis, demonstrate that there is no such thing as a free choice, the East coast model is in serious danger of flounder-

ing entirely. Indeed (280), 'what would it take for brain science to close the doors on moral community'?

At the end of the book, we are left with this carefully explored uncertainty, but above all, with a bright line of which we should on no account lose sight. If indeed future regulators were to decide that 'what the world needs now is hi-tech social control', it must always be remembered that neither regulatory effectiveness nor even informed regulatee consent are enough to ensure compatibility of regulatory modes with a moral community of rights. 'The fundamental question is whether technology threatens to change the cultural environment in a way that no aspirant moral community can live with' (316). If so, a sort of regulator's precautionary principle commands to go no further in the use of bio and neuro-technologies. Clearly, our 'posthuman future' still requires a massive research agenda. We read, with relief and admiration, that Roger Brownword's 'underlying project is only just underway'!