



# Lost in Translation: Legality, Regulatory Margins, and Technological Management

Roger Brownsword

Centre for Technology, Ethics, Law & Society (TELOS)  
School of Law, King's College London



University of London



# Questions

1. When there is a movement from law (as a normative regulatory modality) to techno-regulation (non-normative “code”, “design”, “architecture”, and so on), are the values of legality lost in translation?
2. What does this movement signify for prudential decisions and moral community?



# Outline

1. The nature of the “regulatory environment”: three key registers.
2. First movement: the amplification of the prudential register.
3. Second movement: the loss of the normative registers.
4. Sustaining legality (lessons from Lon Fuller).



# 1 The Regulatory Environment

- Regulators seek to channel/direct conduct by engaging the practical reason of their regulatees using three registers or signals
- The moral register (normative relative to the legitimate interests of others)
- The prudential register (normative relative to one's own self-interest)
- The register of practicability/possibility (non-normative: the signal is what can or cannot be done, not what ought or ought not to be done).



## 2 The First Movement: Prudential Signals Amplified

- Technological applications (eg CCTV, DNA profiling, tracking and monitoring devices, no-lie MRI, etc) that signal an increased likelihood of detection and conviction.
- Prudential signals are amplified.
- Regulators, as stewards for moral community, should ask whether this is corrosive.



# Regulatee Responses

- Act only on moral reasons [prudential amplification irrelevant to reasons for action or conduct]
- Act only on prudential reasons [prudential amplification might alter conduct but not reasons for conduct]
- Act on mixed reasons [prudential amplification might alter both reasons and conduct---but unclear how much difference it makes]
- Act on moral reasons sometimes, prudential reasons sometimes, and mixed reasons sometimes [prudential amplification might have some effect on both reasons and actions---but, again, unclear that it makes a material difference].



# Moral Community: the Bigger Picture

- Much more to moral community than isolated acts inspired by moral reason.
- Members of community participate in debates that lead to public rules and standards.
- Imperative that amplification of prudential signals does not impede development of moral capacity.
- Need for “Regulatory Margin”.



# Marginal Considerations

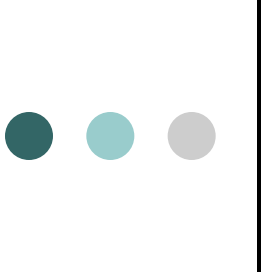
- No impediment of moral development
- The breadth of interference with the exercise of moral reason and moral action. Are those who would act on moral reason now acting on prudential reason?
- The residual scope for moral action.
- The protective effect relative to the moral interests of “victims”.
- A completely different take on the *Marper* case (and its application of a proportionality test)





# 3 The Second Movement: Normative Signals Replaced

- Non-normative regulation can be incorporated in products, places, or persons (as well as in complex transport systems).
- It accentuates concerns about the loss of moral community but also raises concerns about the scope for regulatees to exercise and act on their own prudential reasons.



# Prudential Reason I (self-regulating)

Suppose that the regulating technology is self-imposed (user-centric). The options could be:

- No assistance
- “Regulative” (amber light): e.g., car with sensors that cautions against driving under the influence of drink or drugs.
- “Constitutive” (red light): car that is immobilised.

No problem, it seems, so long as background choice is free expression of prudential preference.



# Prudential Reason II (other regulated, imposed)

- Some imposed technological limitations are simply market power plays (DRM, gene restriction); no loss of prudential reason as such.
- Some imposed technologies are assumed to be in line with public choice. Public participation essential.
- Technological paternalism: infrastructural stewardship, and the “nudge”
- “In-person” technological fixes (Whose prudential preferences are these? Is the technology reversible? Plus, many moral issues).



# The Prudential Margin

- Is the technology self-imposed or imposed by others?
- Avoid imposed in-person regulating technologies
- Maintain reversibility in imposed technologies.
- Make sure that imposition is in line with general prudential preferences.



# Moral Reason

1. The intuitive concern is that non-normative ordering makes it impossible for a would-be moral agent to do the right thing for the right reason. You cannot do right unless it is possible to do wrong.
2. If the technological fix is self-imposed, there might be some loss of moral authenticity or human dignity but, where there is a moral gain, this might be acceptable in a moral community.
3. But, what if the technology is imposed by others? Once again, there needs to be a regulatory margin (a moral margin).



# Marginal Considerations I

- No impediment (or enhancement?) of moral development [now, not by the amplification of prudential signals, but by non-normative technological regulation]
- Compare US President's Council on Bioethics (report on human enhancement) on drugs administered to children diagnosed as ADHD.
- The seriousness of interference with the exercise of moral reason.
- The extent of interference with moral action (where the technology, exceptionally, prevents doing good)



# Marginal Considerations II

- The residual scope for moral action.
- The protective effect relative to the moral interests of “victims”
- Is it better (for the purposes of moral community) to design out the capacity for harm or design in protection?
- Is it better to tune up restraint or tune down aggression?
- Should we recognise a doctrine of technological double-effect where an intervention to prevent unintentionally harmful acts also blocks intentionally harmful acts? (Compare safe systems).



# Some Regulatory Pointers

- Avoid interfering with the capacity for moral development
- Facilitate public participation both in agreeing regulatory purposes and selecting the regulatory instruments.
- Maintain the possibility of reviewing and reversing all aspects of the regulatory environment (including reverting to normative signals).





# 4 Sustaining Legality I

- Legality is a regulatory ideal, crafted in a context of normative ordering.
- Possibly, some dimensions of legality cannot be reproduced in non-normative orders.
- But, the spirit of Fullerian legality is understanding that law involves a reciprocal enterprise. Law is NOT to be seen as purely managerial, it is NOT a one-way projection of authority. Even on a non-moral (prudential) account of law, regulatee participation is essential.



# Sustaining Legality II

- My view: Legality presupposes an aspirant moral community but not necessarily a normative regulatory environment
- Regulators are stewards for the conditions that are essential for the staging of moral community
- Regulatees should have the opportunity to participate fully in the determination of (i) the purposes that shape the community's public order as well as (ii) the regulatory registers and particular technologies employed.