

SCRIPT-ed

Volume3, Issue1, Mach 2006

Neither East Nor West, Is Mid-West Best?

*Roger Brownsword**

Abstract

This article is a follow-up on the paper entitled “Code, Control, and Choice: Why East is East and West is West”, published in Legal Studies in 2005. The current article was first presented at the School of Law, University of Edinburgh, in February 2006.

DOI: 10.2966/scrip.030106.15

© Roger Brownsword 2006. All Rights Reserved.

* Professor of Law, King’s College London and Honorary Professor in Law at the University of Sheffield. I am doubly grateful to Graeme Laurie: first, for a conversation in Tokyo in September 2004 that prompted me to consider the possibility of a mid-West regulatory model; and, secondly, for his invitation to try out these ideas in a lecture organised by the AHRC Research Centre for Studies in Intellectual Property and Technology Law, at the University of Edinburgh in February 2006. I am also grateful for the penetrating questions posed by those who attended the lecture. Needless to say, the usual disclaimers apply.

1. Introduction

In Anthony Burgess' remarkable novel, *A Clockwork Orange*,¹ it is not altogether clear who is to be regarded as the principal villain of the piece. Is it Alex, the teenage thug? Or, is it Dr Brodsky who pioneers the use of Ludovico's Technique (a programme of aversion therapy) at the State Institute for the Reclamation of Criminal Types? The chaplain has little doubt that it is the latter who represents the real danger to society. Observing the successful results of Alex's treatment, the chaplain laments:

*He has no real choice, has he? Self-interest, fear of physical pain, drove him to that grotesque act of self-abasement. Its insincerity was clearly to be seen. He ceases to be a wrongdoer. He ceases also to be a creature capable of moral choice.*²

To which Dr Brodsky responds:

*These are subtleties...We are not concerned with motive, with the higher ethics. We are concerned only with cutting down crime....*³

However, for the chaplain, the higher ethics really do matter. In his assessment, the principal objection to Ludovico's Technique is not that it might misfire, but that it works; and that, when it works, it succeeds in depriving the reclaimed person of the capacity for moral choice. Indeed, the chaplain would go as far as to say that it is better that a person should choose to do wrong than that they should be conditioned to do right.

Whilst, broadly speaking, I am with the chaplain rather than Dr Brodsky, it surely is ultra-provocative to suggest that it is better that a person should choose to do wrong than that they should be conditioned to do right. For, this ranks the interest in having the opportunity to lead an authentic moral life above the interest in having any kind of life. Alex's interest in having the capacity to be an authentic moral person, freely to choose to do the right thing, is extremely important; but it is not obviously more important than Alex's interest (like the interests of his victims) in having a level of basic well-being. Before there can be a moral life, there has to be life. Accordingly, to be less provocative, what the chaplain should say is *not* that it is better that a person should choose to do *wrong* than that they should be conditioned to do *right*, but that it is better that a person should choose to do *right* (for the right reason) than that they should be conditioned to do *right*. From the chaplain's perspective, so modified, we certainly want people to do the right thing rather than the wrong thing; however, it matters not only that they choose to do the right thing but also that they so choose for the right reason—for the chaplain, it is not sufficient that a person chooses to act in line with moral requirements where this is motivated by considerations of self-interest or fear, or the like; characteristically, a person with the capacity for moral choice chooses to act in line with moral requirements because, quite simply, it is accepted that one's actions should conform to one's moral judgments.

¹ (London: William Heinemann Ltd, 1962). My page references are to the Penguin Classics edition, 2000.

² At 94.

³ Ibid.

Even this modified version of the chaplain's view, however, might seem too high-minded. After all, if a person is to have the opportunity to choose to do right, this implies that the choice to do wrong must also be available. If we cannot be good without also having the opportunity to be bad, there must be a risk that harm will be done to others. Why, then, should we value the opportunity to choose between good and bad (the opportunity, that is, to lead an authentic moral life) over a series of conditioned responses that eliminate the risk of harming one another? And, even if we say, as I am inclined to say, that this very matter of having the opportunity to lead an authentic moral life take us right to the essence of human dignity, it is not clear why we should prioritise this value over values such as physical well-being or respect for property and the like.

What do these remarks have to do with the development and application of new technologies? Quite simply, as technologies—whether biotechnology, ICT, the technologies associated with the new brain sciences, nanotechnology, or whatever—bring on stream enhanced mechanisms for social control, regulators will have increasingly sophisticated tools for managing the risk of crime. If, like Dr Brodsky, regulators are interested, not in higher ethics but only in what succeeds in controlling or reducing crime, then the imperative to turn to technological interventions will be strong. My question is not whether the chaplain's view will prevail against the Brodskys of a high-tech future but whether there is a point at which regulators should, for the sake of a higher ethics, draw back from total control.

The paper is in four parts. In the first part, I rehearse the contrast that I have drawn elsewhere between a regime of total control (the West coast) and a standard criminal justice regime (the East coast).⁴ If neither option looks wholly attractive, we might be tempted either to allow some technological intervention on the East coast or to reduce the degree of technological control exercised on the West coast; we might be tempted, in other words, to develop a mid-West kind of regime. In the second part, taking the East coast as my starting point, I consider the temptation to move some way to the West, to make use of regulating technologies. The question is how far we could take such a regime before we prompted the chaplain's objection. In the third part, I consider a revised contrast in which the West coast model is compared not with the typically ineffective East coast model⁵ but an East coast community that fulfils the chaplain's aspirations, citizens doing the right thing for the right reason. If the East coast environment is every bit as safe and secure as the West coast, is there any reason to prefer one regulatory model over the other? Finally, I ask whether the chaplain's view is compatible, first, with an East coast commitment to human rights and individual freedom—a commitment that rejects the kind of cultural conservatism that is often articulated in the name of respect for human dignity⁶—and, secondly,

⁴ Roger Brownsword, "Code, Control, and Choice: Why East is East and West is West" (2005) 25 *Legal Studies* 1.

⁵ For a classic critique of traditional criminal justice systems, see Richard Danzig, "Towards the Creation of a Complementary Decentralised System of Criminal Justice" (1973) 26 *Stanford Law Review* 1.

⁶ Compare Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001); and Roger Brownsword, "Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the 'Dignitarian Alliance'" (2003) 17 *Notre Dame Journal of Law, Ethics and Public Policy* 15.

with scientific developments that cast doubt on the very idea of Alex or anyone else having a “real choice”.

By way of introduction, it remains only to say that this follow-up paper is no more successful than the first in reaching a decisive conclusion. The basic choice between the East coast and the West coast continues to be puzzling; the possibility of articulating a plausible regulatory model in the middle—even if the mid-West is where we are destined to go⁷—is elusive; and, once again, there seem to be more questions than answers.

2. Two Regulatory Models: the East and the West

In “Code, Control, and Choice: Why East is East and West is West”,⁸ I sketched two regulatory models. One, the East coast model, is an approximation of the way in which regulators operate in modern societies; the other, the West coast model, is a thought-experiment, purely ideal-typical. In the former, regulators rely on a mix of regulatory strategies—traditional legal command and control techniques, informal social and peer pressure, market adjustment, and so on⁹; in the latter, regulation is of an entirely technological kind—risk-management is handled exclusively by technological design of one kind or another. Whereas, in the East coast community, Alex and his friends would not be out of place, in the West coast community, there would be no place for people like Alex. Not only would the West coast regulators either design-out people like Alex or design-in a control mechanism that eliminates the risk that Alex otherwise would present, they also would design-out the characteristic East coast choice between doing right and doing wrong. By coding for only certain kinds of (approved) conduct, the regulators on the West coast make theirs a safe community; but, as Lawrence Lessig has perceptively pointed out, the perfect technology of safety has its price. Thus:

Between [a] norm and the behaviour sought is a human being, mediating whether to conform or not. Lots of times, for lots of laws, the choice is not to conform. Regardless of what the law says, it is an individual who decides whether to conform.

Regulation in cyberspace is, or can be, different. If the regulator wants to induce a certain behaviour, she need not threaten or cajole, to inspire the change. She need only change the code—the software that defines the terms upon which the individual gains access to the system, or uses assets on the system. If she wants to limit trespass on a system, she need not rely simply on a law against trespass; she can implement a system of passwords....

Code is an efficient means of regulation. But its perfection makes it something different. One obeys these laws as code not because one should; one obeys these laws as code because one can do nothing

⁷ Compare, e.g., David Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001).

⁸ Note 4 above.

⁹ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) at 53-54; and “The Law of the Horse: What Cyberlaw Might Teach” (1999) 113 *Harvard Law Review* 501, 533-534.

*else. There is no choice about whether to yield to the demand for a password; one complies if one wants to enter the system. In the well implemented system, there is no civil disobedience. Law as code is a start to the perfect technology of justice.*¹⁰

Add to cybertechnology, biotechnology, nanotechnology, neurotechnology and whatever technologies compound the opportunities for effective West coast regulation and the contrast between the two regulatory models becomes even clearer. In sum, whereas, on the East Coast, regulators speak to their regulatees, reasoning with them more or less successfully, on the West Coast, regulators by-pass practical reason to design-in a solution to a problem of which regulatees might not even be aware.¹¹

In “Code, Control, and Choice: Why East is East and West is West”, I stipulated that the regulators on the West coast would always act in a morally well-intentioned way. Indeed, I even proposed that, for the purposes of making a choice between the two regulatory models, we should assume that the West coast regulators would design-in compliance with whatever moral code the choosing party specified. Even with the benefit of that assumption, I was unable to commit myself to the West coast. My concluding remarks, indicate the extent of my uncertainty:¹²

So, which regulatory approach is it to be, the East Coast or the West Coast? Do we prefer the safe and secure environment of the West or the social environment of the East? It is a remarkably difficult call because the choice reflects a tension between two larger visions of progressive human development. On the one hand, there is the celebration of instrumental rationality where “rational individuals...build a reasonable society thanks to the resources created by science and technology” coupled with a confidence in the “parallelism between scientific and technological achievements on the one hand, and abundance, freedom and happiness on the other”. On the other hand, there is the Kantian view of the cultivation of moral agency, of moral will yielding authentic freedom and responsibility. While the West Coast approach is in line with the (former) technocratic view that we can make things better by working on (and minimising) the natural and social adversities that present us with problems of justice (scarcity of resources) and social order, the East Coast approach is in line with the (latter) view that what ultimately matters is how we, as humans, address these adversities. In the former, the anthem “we shall overcome” signals technological ingenuity, in the latter it enjoins moral resolution and the virtue of human dignity. To eschew the technological solution seems perverse; how can we, with a clear conscience, turn our backs on a regulatory regime that guarantees full compliance with whatever pattern of conduct is judged to be

¹⁰ Lawrence Lessig, “The Zones of Cyberspace” (1996) 48 *Stanford Law Review* 1403 at 1408 (emphasis added).

¹¹ A point made forcefully by Lee Tien, “Architectural Regulation and the Evolution of Social Norms” (2004) 9 *International Journal of Communications Law and Policy* 1.

¹² Note 4 above at 20-21, footnotes omitted.

properly other-regarding? And yet...and yet, there is a sense that the West Coast is a place to avoid. Is there more to this than the lawyer's or the moralist's instinct for self-preservation? Perhaps, not; but perhaps that is enough.

Why should there be this reluctance to embrace the West coast model? Possibly, I could not quite believe my own assumption that regulators on the West coast could be trusted in perpetuity to act like moral saints. Even now, trying my level best to make just that assumption, I still find a resistance to abandoning the East coast model.¹³

Yet, is this not perverse? Anyone who encounters Alex and his friends on the East coast is unlikely to see much attraction in a style of regulation that prohibits without being able to prevent their brand of thuggery. What is the use of civilising influences such as libraries, one might think, if gangs of young Alexes simply take it into their heads to rough up elderly library-users and destroy their books? So, what is it that the East coast has going for it?

Essentially, there are two positive features to the East coast model of regulation (that is to say, over and above the commitment to respect for human rights and fundamental freedoms that I am assuming as a feature of East coast regulation).¹⁴ First, if we assume that the East coast is committed to such modern public law virtues as those of transparency, accountability and participation, then citizens have an opportunity to contribute to the discourse and debate of public regulation. Depending upon how effectively such public law ideals are translated into practice, citizens have a real role to play in the formation of the regulatory positions that govern their community. Secondly, where the regulatory positions that are adopted on the East coast prohibit certain actions or require citizens to behave in certain ways, citizens again exercise a choice as to compliance or non-compliance. In other words, citizens have two relevant chances to contribute to the moral character of their community, first by having a say as to what the rules are to be and, secondly, by electing to act in line with those rules. On the West coast, by contrast, these chances and choices are denied.

The spectre of Alex persists, however. Is there no way of combining the best of both worlds? In a world of third-ways, is there not a mid-West option—a regulatory model that is either Alex-free or at least one in which potential victims are Alex-proof but where the essential features of moral community are retained? Even if regulators on the East coast should not adopt a full-scale West coast approach, should they not at least move some way in that direction? This question, this invitation to head West, takes us to the second part of the paper.

¹³ Compare the reservations of Castle, the sceptical philosopher, in B.F. Skinner, *Walden Two* (Upper Saddle River, NJ: Prentice Hall, 1948, 1976) esp at 161 and 227.

¹⁴ This assumption is made to bring the East coast model even closer to those regulatory regimes with which we are familiar; and, in the final part of the paper, the East coast commitment to human rights is deployed to provoke a question concerning the consistency of the East coast credo—a question that arises purely by way of immanent critique. I am conscious, however, that the East coast commitment to human rights might be turned, too, on the West coast model. Arguably, there is a serial violation of human rights on the West coast insofar as regulatee citizens are systematically excluded from participation in public governance. However, this is not an issue that I intend to pursue in this paper.

3. Neither East, nor West

In this part of the paper, I want to consider how East coast regulators might take advantage of technological channelling devices without sacrificing the essential features of moral community that they prize. The question is whether a middle-way approach is feasible, either in principle or in practice. Or, to put this another way, the question is whether, once East coast regulators start to head West, there is any stopping point short of the West coast itself.

Let me sketch two proposals that might be put forward on the East coast with a view to enabling the community to introduce a degree of techno-enhancement into its traditional regulatory repertoire. To assist with getting a fix on these proposals, perhaps we can imagine that regulators consider three points for technological intervention: (i) *ex ante*, to eliminate the possibility of wrongdoing; (ii) at the point of wrongdoing, to detect the offence and to identify and apprehend the wrongdoer; and (iii) *ex post*, at the stage of correction. If the technical fix is adopted *ex ante*, agents can do no wrong; if the fix is adopted at the second stage, agents can do wrong but they cannot get away with it; and if the technical fix is adopted *ex post*, agents will be disabled from doing wrong again. It goes without saying that each proposal adopts a minimalist approach because of East coast nervousness about diminishing the role of moral choice.

3.1 Two proposals

The first proposal is that technology should be focussed on detecting non-compliance, identifying offenders and bringing such persons before the courts. Moreover, this proposal explicitly limits techno-assistance to this one segment of the regulatory process. It follows that regulators should never rely *ex ante* on technology in order to design-out conduct that is not acceptable or to design-in the required conduct—and this restriction applies equally to persons who have not yet committed a crime as to those who have a record of criminality. Accordingly, if it were possible, say, to genetically engineer individuals so that any predisposition towards violence would be removed,¹⁵ this is not a step that regulators should take (neither *ex ante* nor *ex post* the commission of an offence). However, provided that the regulatory standard is set in the usual way, it is legitimate for regulators to make use of technology in monitoring compliance and in enforcing against non-compliance.¹⁶ Under this proposal, the good news for Alex and his gang is that they are born free to choose a life of crime and, even after committing offences, they will not be subjected to any kind of technological regime that seeks to eliminate future criminality—there will be no use of Ludovico's technique or the like. However, the bad news is that, provided that the technology is up to the job, each of Alex's infractions will be detected, he will be identified as the offender, he will be brought before a court, and he will be punished.

¹⁵ For a valuable discussion, see the Nuffield Council on Bioethics, *Genetics and Human Behaviour: the Ethical Context* (October, 2002).

¹⁶ For reflections on just how smart and successful intelligent environments might be, see "Dark Scenarios in Ambient Intelligence" <http://swami.jrc.es>.

The second proposal does not balk at the use of technology in any segment of the regulatory process. However, it sets a threefold limit to technological assistance. First, although there is no veto on *ex ante* designing-out conduct as such, the limit is that technology should be used only to design-out conduct that presents the most serious kind of threat to the basic interests of citizens. This allows East coast regulators to code against the most dangerous class of acts; and, provided that the community is convinced that there is really no room for debate about the wrongfulness of such acts, the design-out might even be of a permanent and irreversible (e.g., biotechnological) nature. Secondly, where technology is used to monitor compliance and identify offenders, it should not be unduly intrusive. Thirdly, if offenders are to be subjected to regimes of treatment, of the kind suggested by Ludovico's technique, then this should be only on the basis of the offender's informed consent. Under this proposal, the good news for Alex and his gang is that they will have the opportunity to lead a life of minor mischief-making; but the bad news is that they will not have the option of inflicting serious harm on fellow citizens.

What might we expect the citizens of the East coast to make of these proposals? Would they be persuaded that either of these invitations to go West makes sense? Or, if not, is there some way of stitching these proposals together that has more appeal without adopting the full-blown West coast model?

3.2 Evaluating the first proposal

In relation to the first proposal, East coasters will appreciate the determined effort that is made, first, to maintain the processes of participatory democracy (of open and inclusive regulatory dialogue) and, secondly, to present individuals with the option of doing the right thing. Even repeat offenders are given repeated opportunities to mend their ways. However, there seem to be three deficits with this proposal.

First, if the technology of surveillance and detection approaches anything like the level of reliability and effectiveness to which regulators aspire, then this seriously distorts the choice between compliance and non-compliance. The idea on the East coast is that citizens make a virtuous decision to do the right thing, that they elect compliance because they understand the moral case for compliance. However, if citizens are complying only because they fear certain detection and punishment, there is little promotion of the desired virtue. To be sure, it might be said that much East coast compliance is already to be accounted for in just these terms. For many East coasters, it is precisely the background threat of penal sanctions that deters the commission of crime. On this view, East coasters rarely do the right thing for the right reason and the proposal to convert a low-risk threat of punishment into a high-risk threat of punishment simply extends the logic of the existing arrangements—this is no real change in kind, simply a change in degree. Even in a morally disposed community, there has to be some sanction to compensate for weakness of the will. Against this point, though, those who hope for a morally progressive evolution on the East coast protest that the first proposal makes it much more difficult—in fact, nigh impossible—for that evolution to take place. For, when the threat of detection and punishment is relatively low, there is still space for moral reason to play a part in influencing the decision to comply or not. Indeed, in the Platonic fable of the Ring of Gyges,¹⁷ it was precisely where there was no risk of detection and punishment that

¹⁷ Plato, *The Republic*, Book II.

moral reason came into its own. If, by extreme contrast, the threat of detection and punishment is overwhelming, this prudential consideration will dominate practical reason—inevitably, in most cases, the right thing will be done but not for the right reason.

Secondly, by restricting any technological assistance to detection and enforcement, the first proposal invites Alex and his friends to obey or (certainly) pay in respect of every provision of the criminal code. Whether Alex is out for an evening of minor mischief-making or gang rape or murder, the first proposal presents Alex with the same option: obey or pay. This, critics of the first proposal maintain, leaves East coasters exposed to too many serious risks. To take the most serious risk, the loss of life, no payment by Alex can ever fully redeem the loss of the innocent victim's life; and, more generally, a community that lives in fear of Alex and his ilk is seriously disabled.¹⁸ To present Alex with the obey or pay option, in the hope that this will cultivate the virtue of his doing the right thing for the right reasons, is not a cost-free exercise; and, where serious crime is involved, particularly involving the loss of life or personal injury, the price is simply too high. Just imagine, say critics, how the Alex reformers would feel if, having finally set Alex on the right road, some other unreformed young Turk promptly chose Alex as his first victim. No, the East coast should use technology to control the worst kind of vice before questing after virtue.

Thirdly, the first proposal does not seem to have any learning capacity. If Alex and company are to be invited to obey or pay, why repeat the invitation when it is quite clear that they do not take the option of compliance seriously? East coast regulators do not view the penal sanction as a tax on permissible conduct, or as something akin to pay per view; they clearly prefer citizens to obey. However, the East coast culture prizes compliance for the right reason and so the option is presented. Even so, when it becomes apparent that an individual is a hopeless repeat offender, the preference for obedience should be hardened up. If, at that stage, it is possible to use a technological fix that disables future offending (a technology that removes the previous obey or pay option) by that particular individual, it surely makes sense to use it. At that stage, the disabled party has had his chance, several times over, and he has persistently abused it.

In sum, then, this evaluation of the first proposal judges that while too much use of technology is proposed in relation to monitoring, detection, and enforcement, too little use is made in relation to eliminating more serious crime and disabling recidivists.

3.3 Evaluating the second proposal

The second proposal has a rather different scale of priorities. It starts from the need for a relatively secure environment. East coasters value their freedom, the opportunity to pursue their own life plans and projects in their own way, compatible with like freedom for others. While there is plenty of room for debate about the details of East coast regulation, it is absolutely plain that a core of essential conditions must be secured before any kind of freedom can be productively utilised. So long as Alex and his mates lurk round the corner, East coasters will find their plans and projects prematurely terminated or frustrated, and they will be diverted into a defensive counter-culture. If something can be done to fix this problem, if the essential

¹⁸ Compare Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974).

conditions can be technologically secured, then the second proposal advocates taking such measures. No doubt, there will be debate about where precisely the line is to be drawn between serious and less serious crime, between what is dangerous (or too dangerous not to attract a technological response) and what is not; but, by and large, this second proposal responds to what seems to be the most troublesome deficit in the first proposal.

The remaining features of the second proposal represent significant attempts to address the other deficits identified in the first proposal. It is now proposed that the use of technology in relation to monitoring, detecting and enforcing against non-compliance should draw back from the panopticon strategy of the first proposal. But, of course, with dangerous crimes to be designed-out under the second proposal, the limit on surveillance will operate only in relation to less serious offences. In these less serious regions of the criminal code, Alex and his friends will be invited to obey or pay in a setting in which there is some chance of non-compliers avoiding payment. It is also proposed that repeat offenders should be given the chance to consent to a technological intervention that will terminate their career in crime. Critics might complain that, for a proposal that purports to be security-sensitive, this is far too indulgent towards the criminal classes. Again, though, provided that the technology employed in the background design-out strategy is effective, the only career in crime to be terminated or continued will be one of, relatively speaking, petty criminality.

No doubt, critics of the second proposal will snipe at it by complaining that, as its proponents might concede, there is a grey area dividing the class of dangerous acts from those acts that are not to be subjected to a design-out technology; and that the practice of obtaining informed consent from repeat offenders will fall short of its promise. It might also be objected that the second proposal no longer seems committed to the chaplain's credo. There are restrictions on the use of technology but it is not wholly clear what drives the limitations. Such objections, however, either rely on or pale by comparison with the principal objection to the second proposal, an objection that goes right to the heart of this proposal.

What is distinctive of the second proposal is that it bites the bullet, judging that the security of East coasters comes first. The risks presented by young Alex and his mob have to be controlled. Alex and company are not denied all opportunity to do the right thing for the right reason—when it comes to doing less significant right things, they may still choose to do so for the right reason; but what is not to be tolerated is that they have the chance to do significantly wrong things in the hope that they might one day see the light and do right for the right reason. Is this not plausible? Is this not the basis for a coherent mid-West regulatory position?

Those who are not persuaded by this second proposal might articulate their fundamental objection in something like the following terms. For members of the East coast community, it is plain that there needs to be mutual recognition and respect for the most basic conditions of agency, of purposeful action. Generally speaking, as a member of the community, Alex is not required to assist fellow members in pursuing their plans or contribute in any way to their projects. Other things being equal, Alex is not required to share the passion of those who use the local library to cultivate their interest in literature any more than they are required to share Alex's passion for Beethoven's music. Each to his own. However, it is a precondition of agents being able to do their own thing in their own way that they respect one another's basic interests. Agency needs a protective and supportive regulatory setting within which

individuals may confidently build their own projects; but this will only be possible where each agent recognises the importance of acting in ways that are compatible with respect for the agency-realising framework conditions. The attraction of the second proposal is that it targets these very conditions for technological support. Yet, this, the objectors complain, is also its fatal weakness. The point is that doing the right thing for the right reason is not an empty virtue. To do the right thing alone leaves the agency infrastructure intact; but to do the right thing for the right reason is to understand that it is the protection of the agency infrastructure that drives the argument for mutual respect. If the second proposal carries the day, the exhortation to do the right thing for the right reason is weakened because it is taken away from its paradigmatic context, from the context in which it is most rationally compelling.

By articulating the objection in these terms, however, the defenders of the East coast put their case in a seemingly instrumental way. The reason why we should each do the right thing is that this enhances the opportunities for the flowering of individual and co-operative projects; it is a win-win formula. But, if this is the bottom line defence of the East coast regulatory model, it challenges the West coast technological model purely on instrumental grounds. The question becomes whether the East coast or the West coast style of regulation has better prospects of delivering an environment that is supportive of agency. This seems like a very dangerous gambit for the East coast, where the sense is that the virtue of doing the right thing for the right reason has more to it than instrumental value. Is there, then, a better way of articulating this objection?

The spirit of the chaplain's view that informs the East coast approach is that the doing of the right thing for the right reason speaks to what it is to be human. As Terry Eagleton puts this way of thinking:

*Being human is something you have to get good at, like playing snooker or avoiding the rent collector. The virtuous are those who are successful at being human, as a butcher or jazz pianist are successful at their jobs. Some human beings are even virtuosi of virtue. Virtue in this sense is a worldly affair; but it is unworldly in the sense that success is its own reward.*¹⁹

But, if East coasters defend their regulatory style by reference to what it is to be essentially human, or by asserting that the moral life is its own reward, this is liable to be rejected as mystical, or metaphysical, or just plain puzzling. The danger with arguing that the virtue of doing the right thing has an expressive value is that we reduce what East coasters prize to little more than a *modus vivendi*, leaving advocates of this way of life simply to preach to the converted.

To try one more time—perhaps, this third time, we will be lucky—East coasters are committed to the idea that their regulatory framework should present agents with the option of doing the right thing for the right reason. In turn, agents should learn to act in other-regarding (fellow agent-respecting) ways because they understand that this is morally required. In a sense, agents who do the right thing for the right reason self-regulate. Now, there is a very important argument that suggests that it is irrational for an agent to deny being bound by other-regarding principles; that it is irrational for an agent to deny a responsibility to respect fellow agents.²⁰ If this is correct, it follows

¹⁹ Terry Eagleton, *After Theory* (London: Allen Lane, 2003) 125.

²⁰ Seminally, see Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978).

that the East coast commitment to doing the right thing is far more than a *modus vivendi*; doing the right thing is rationally required. However, although this argument develops the idea of an infrastructure for agency, East coasters may legitimately reject the claim that the reason for doing the right thing is instrumental. To the contrary, the reason for doing the right thing is not that this is in the longer-term interest of all agents (even though it might well be)²¹ but that it is, so to speak, in the agent's own interests as a rational being—an agent who does the right thing for the right reason maintains its own integrity as a rational being.

Where does this leave us? First, there is an argument for the proposition that agents are rationally bound to accept, and act on, principles that reflect mutual respect for the essential conditions of agency. To be sure, it is a complex and contested argument.²² Secondly, if this argument holds, then East coasters can reject the idea that their way of life is merely a *modus vivendi*. Thirdly, again if this argument holds, they can also reject the idea that the case for doing the right thing is simply instrumental. Fourthly, however, there is surely more work to be done in thinking through whether it matters that agents simply conform to moral requirements (satisfying “act morality”) or whether agents must also strive to do the right thing (satisfying “agent morality”).²³ Given that, on the East coast at any rate, the requirements of act morality are contested, no one is morally omniscient, it looks plausible to suggest that, in practice, agent morality is all that we have. If so, extreme caution needs to be exercised before a technical fix is used to deprive an agent of doing x, where x is what that agent in good faith judges to be morally required. In other words, the principal objection to the second proposal is that its *ex ante* interventions might encroach too severely on the functioning of agent morality.

Viewing the main objection to the second proposal in this way, if there is any room for technological design-out, perhaps it should be focused on less serious rather than more serious crime (on less serious rather than more serious matters of agent morality). For example, the kind of annoying conduct targeted by Anti Social Behaviour Orders (ASBOs),²⁴ or their equivalents, might be countered by technological innovation of one kind or another, leaving more serious crime to set the stage for cultivating the doing of the right thing for the right reason. Such an inversion of the second proposal is worthy of further consideration; but, on the face of it, it is unlikely to appeal to East coasters as the sensible step to take in the direction of the West coast.

²¹ Compare the strategy in David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986).

²² For systematic defence, see Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the PGC* (Chicago: University of Chicago Press, 1991).

²³ This distinction is elaborated in Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (London: Sweet and Maxwell, 1986; reprinted Sheffield: Sheffield Academic Press, 1994).

²⁴ For a very helpful review and critique of the use made of ASBOs, see Stuart Macdonald, “A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO's Definition of ‘Anti Social Behaviour’” (2006) *MLR* (forthcoming)

3.4 Design-out and design-in

We seem to have a stalemate. On the one hand, East coasters are attracted by the prospect of a technologically secured safe environment (as per the second proposal); but, on the other hand, the case for educating each agent to appreciate the vulnerability of each and every fellow agent and to understand the need to respect the basic conditions of agency is fundamental to East coast philosophy (as per the first proposal). Is it possible to break the stalemate by discriminating between technologies that design-out the option of offending and those that design-in protection for a potential victim? If it were possible, so to speak, either to take out Alex's sword or to equip his targets with a shield, would this be a choice that mattered?

Let us suppose that the second proposal contemplates the use of a technology that gives East coasters an immunity against actions that are life-threatening or physically harmful. Perhaps nanotechnology facilitates the development of a lightweight non-removable flak-jacket, or the like; and let us suppose that, if Alex or his mates attempt to assault a person who is nano-protected, they will feel like they have struck into a brick wall. On this assumption, Alex and his friends are left free to elect between doing right or doing wrong, at all points on the criminal scale; but where they elect to do wrong, it will be harmless (or, the only harm done will be to potential wrongdoers). The thought is that this strategy is more attractive than a technological design-out that gives Alex no choice, that simply disables him from making what would be the wrong choice. To be sure, this assumption presupposes a very high level of technological sophistication; but then, whichever way we look at it, the assumption is of an extraordinarily high-tech future.

This fine-tuning of the second proposal certainly merits further consideration. However, it is probably susceptible to the objection that by rendering Alex's "wrongful" acts as harmless, the context of wrongdoing is fundamentally altered. If Alex cannot occasion any real harm to his victims, the sense in which his act is one of wrongdoing is attenuated. To have any chance of cultivating the required virtue in Alex, there has to be a real opportunity to inflict real harm on fellow agents. In short, it will be argued, agents will not learn to do right for the right reasons unless they can also do real wrong.

4. "East or West?" *Revised and Revisited*

If there is no obvious mid-West regulatory model, perhaps we should return to the original choice between the East coast and the West coast regulatory models. However, if we are to do this, we should take steps to even up the odds. In specifying the West coast model, it will be recalled, I insisted that the regulators would faithfully apply whatever moral script was stipulated. Clearly, if different choosers were to stipulate different moral codes (as they might well do), the West coast specification would fail. To overcome this objection, therefore, let us make the weaker assumption that the regulators on the West coast will always try to regulate in accordance with their best understanding of moral requirements. Even with this weakening, the West coast model is painted in a very favourable light.

By contrast, the original East coast specification is much less generous. On the East coast, regulators struggle to combat crime, little seems to work, and any audit of the criminal justice system makes for depressing reading. Let us, however, paint the model in a more favourable light. Let us suppose that, on the East coast, by and large,

the community is self-regulating: East coasters do the right thing and they do it for the right reason. Occasionally, offences are committed by one or two rogue Alexes; but, this is exceptional and the resources of the criminal justice system are so understretched that an effective response is usually made. In other words, let us suppose that the East coast is a safe harbour and that its environment can pretty well match that on the West coast for its security.

On these assumptions, what is the essential difference between the East coast and the West coast? Both communities are highly developed technological societies. However, there are two obvious differences. First, whereas the West coast is a divided community, the regulatory elite debating and setting the required pattern of conduct, regulatees simply acting in whichever ways are designed-in, on the East coast there continues to be an inclusive and open dialogue between regulators and regulatees. Secondly, East coasters understand and know what it is to do wrong; and they see in themselves the developed capacity to do right for the right reason. If we want participatory democracy and moral community on top of technological sophistication, the East coast must be the choice. Moreover, if we want a response to those who complain that, in the present day, our moral faculties are not developing at the same pace as our technological capacities, then the East coast, not the West, seems to be the way to go.

Is there any way in which we might modify the West coast specification to respond to these apparent deficits when it is compared with the now crime-free East? Is there any reason, for example, why the regulatory class must keep its technological secrets to itself? If East coasters are genetically engineered in certain ways that assure a secure environment, why not make this an open secret? Why not tell regulatees that the environment is technologically managed? Rather obviously, if regulators on the West coast let regulatees into their secret, there is a risk that regulatees will “rebel”, or want to be included in the regulatory processes. Having said this, the level of technological sophistication that we are crediting to the West coast might allow regulators to design round such risks. In other words, in principle, we can imagine that West coast regulators will be able to let regulatees know the regulatory score without this disrupting their peaceful pattern of conduct. Even so, there is no way that West coast regulators can genuinely include regulatees in their moral deliberations without taking the community a step back towards the East coast. The most that West coast regulators can do is disclose to their regulatees that they do not have any say; if regulatees, as on the East coast, are to be given a genuine voice, this is no longer the West coast.

There is also the question of moral virtue that distinguishes the East from the West. If regulatees on the West coast, upon learning about the regulatory reality, demand the opportunity to cultivate the virtue of freely doing the right thing, regulators cannot accede to that demand without, again, moving away from the West coast. Regulators might offer regulatees the opportunity of experiencing, in a virtual environment, the conditions that put moral virtue to the test. However, *ex hypothesi*, it can never match the East coast for the genuine article. And, even allowing for some future blurring of the virtual and the real,²⁵ we might assume that, in order to develop the moral virtue, regulatees really must have the opportunity to do the wrong thing.

²⁵ Susan Greenfield, *Tomorrow's People* (London: Allen Lane, 2003).

On this analysis, it looks as though the East coast model has more going for it than the West coast model. Having said this, in both these perfectly realised safe and secure communities, where agents no longer need to worry about the risks presented by fellow agents (there is no need to fear that an agent will act in a way that is wholly self-regarding and gives no consideration to the legitimate interests of fellow agents) agents will be primarily concerned with “getting a life” rather than heroically struggling to lead a moral life. In this sense, morality rather slips into the background. This does not mean that the choice between the East coast and the West should be treated with indifference. The East coast preserves a visible and inclusive public moral discourse—the importance of which should not be understated, for a flourishing community of rights is a community that engages in a reflective and ongoing way on the best interpretation of its commitments.²⁶ However, on both coasts, the communities have, in their different ways, rather grown out of celebrating displays of moral virtue.

Such remarks, though, might seem altogether too futuristic. It is all very well to say that there is little to choose between the perfectly realised versions of the West and East coast. However, what are the chances of such realisation? The fact of the matter is that, at the moment, our only option is the East coast; and the only choice that matters is whether we try to make the East coast a safer place by adopting techno-assistance or by working on moral virtue. Is it sensible to prefer morality to mortality? In the final part of the paper, therefore, we must return to the present tense: is the East coast taking a coherent approach by sticking with the chaplain’s view?

5. Human Dignity and the Virtue of Doing the Right Thing for the Right Reason

If the East coast is judged to have better credentials than the West purely because it takes the chaplain’s view seriously, there are two final objections to consider. One is the objection that the East coast obsession with the dignity of humans doing the right thing for the right reason is not compatible with the respect for human rights and fundamental freedoms that I am taking to be characteristic of East coast morality generally. The other is the objection that the East coast obsession with “real choice”, with agents making authentic moral choices, is based on bad science. If the very idea of an agent having a real choice is rejected by the findings of, say, human genetics or neuroscience, then the regulatory model on the East coast is based on flawed premises.

(i) The commitment to human rights

On the East coast, let us suppose that there is a commitment to human rights and fundamental freedoms. Nevertheless, as modelled, the East coast is first and foremost a moral community and it is deeply conscious that a moral community will survive only if certain characteristic conditions are protected. Although East coasters value the right to make their own individual choices (particularly in matters of life-style and

²⁶ See Roger Brownsword, “Genetic Engineering, Free Trade, and Human Rights: Global Standards and Local Ethics” in Thomas Cottier (ed), *Genetic Engineering: Challenges Posed by a New Technology to the World’s Trading System* (Oxford: OUP, 2006) (forthcoming); and Deryck Beyleveld and Roger Brownsword, “Principle, Proceduralism, and Precaution in a Community of Rights” (2006) *Ratio Juris* (forthcoming).

life-plans)—echoing Mill, East coasters believe that the majority should not be allowed to dictate how the minority live their lives, nor vice versa—the range of legitimate choice has to be regulated and, in the final analysis, it is not the capacity for choice that matters so much as the capacity for moral choice. The choices involved in living the moral life, however, are layered. First, one chooses to aspire to the moral life. Secondly, one participates in setting standards, in choosing the appropriate regulative principles. Thirdly, one chooses to follow those standards rather than to act on other practical considerations. If one is not able to choose at any one of these levels—and, it is worth emphasising that, on the West coast, regulatees are not given the relevant choice at all three levels—one is denied some opportunity to participate in and experience the moral life. If we are looking for a striking way of registering this kind of deficit, this is where we might say that there is a denial of human dignity. Accordingly, on this analysis, East coasters are deeply committed to the idea that, above all, human dignity should not be compromised. For East coasters, the expression of human dignity is precisely in doing the right thing for the right reason.

Is there not a contradiction, then, in East coasters holding that, while they are fundamentally committed to the principle that human dignity should not be compromised, they reject the dignitarian claim that a whole raft of particular practices and pursuits (for example, prostitution, sado-masochism, surrogacy, abortion, euthanasia, embryo selection, reproductive and therapeutic cloning, dwarf-throwing, “killing games”, reality television shows, and so on) should be prohibited as compromising human dignity?²⁷ Not at all. The East coast commitment to human dignity is as a pre-condition for any kind of moral community; but its particular vision of a moral community is one that is governed by respect for individual autonomy, human rights and fundamental freedoms. By contrast, a different moral community—let us call it the South coast model—might have a vision that employs the notion of human dignity as a constraint on freedom of action, emphasising the duties of its members rather than their rights. Whether the moral vision of the South coast is more defensible than that of the East coast is another matter.²⁸ The point here is that there is no contradiction in either community developing its moral vision in its own way. What would be contradictory would be if either community, claiming to be a moral community, acted in ways that corroded the dignity pre-conditions for the existence of any kind of moral community.

To put this slightly differently, there is a difference between simple cultural conservatism (of the South coast dignitarian variety) and conservation of the generic

²⁷ For a general commentary, see Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001) Chs 1-2. For a discussion of the particular question of embryo selection, see Roger Brownsword, “Happy Families, Consenting Couples, and Children with Dignity: Sex Selection and Saviour Siblings” (2005) 17 *CFLQ* 435. And, for the particular instances of (i) “dwarf throwing” and (ii) “killing games”, see: (i) *Ville d’Aix-en-Provence*, 1996 Dalloz 177 (Conseil d’Etat) req. nos. 143-578; *Cne de Morsang-sur-Orge*, 1995 Dalloz 257 (Conseil d’Etat) req. nos. 136-727; and (ii) *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (Case C-36/02) (14 October, 2004); OJ C 300, 04.12.2004 p.3.

²⁸ Compare, e.g., Roger Brownsword, “Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the ‘Dignitarian Alliance’” (2003) 17 *Notre Dame Journal of Law, Ethics and Public Policy* 15; and “Stem Cells and Cloning: Where the Regulatory Consensus Fails” (2005) 39 *New England Law Review* 535.

conditions of moral community.²⁹ The East coast, as an aspirant moral community, is necessarily dignitarian in the latter sense; but not in the former sense; and there is no contradiction in this position.³⁰

Nevertheless, even if there is no contradiction between insisting that human dignity should not be compromised at the level of the possibility of any kind of moral community and, at the same time, rejecting certain dignitarian articulations of moral community, is there not still a certain cultural conservatism on the East coast? Is the East coast attachment to the concept of the moral life (albeit a contested concept) not indicative of a deep cultural conservatism? This, it seems, is another way of suggesting that the East coast way of life is simply a *modus vivendi* which, for no good reason other than their preference for it, East coasters want to cling on to. However, to hark back to our earlier discussion, if the moral life is *rationally* compelling in a community of agents, if it would; be irrational to espouse amorality—and, it is perhaps worth interjecting that, relative to agent morality, regulatees on the West coast are amorality—then East coasters are only culturally conservative to the extent that reason dictates that they should be so. And, even if culturally conservative, the East coast need not apologise for this.

(ii) The belief in the possibility of real choice

Let us suppose that scientific orthodoxy has it that all human action is caused. Whether an East coaster is blown over by a high wind or seeks shelter from the storm, her actions are caused. In the former case, she does not choose to be blown over; it just happens to her. In the latter case, she chooses to seek shelter. Where she makes such a choice, it might be simply for prudential reasons or she might act on moral reasons—for example, where she sacrifices her own interests to allow a child to have the benefit of the shelter. However, even if the agent's experience is different from one case to another, the scientists insist that each action is caused. Do East coasters need to deny this to maintain their notion of a “real choice”?

We are moving into difficult territory. Still, one thing at least is clear: for East coasters to suggest that some actions might not be caused, that instead they might simply occur in a random sort of way, is no help at all. For, whatever East coasters mean by “real choice”, they do not equate it with random events. The whole point of making a “real choice” is that it is one's own choice, a choice and an action that is under one's control. Hence, the East coast notion of a real choice is one that is controlled by the agent and made for moral reasons. Is this a sustainable view?

In principle, there seem to be two ways in which the East coast view might be challenged. First, it might be rejected on the ground that reasons, including moral reasons, cannot function as causes of action. Secondly, it might be contended that the

²⁹ See, further, in the context of international free trade, Roger Brownsword, “Genetic Engineering, Free Trade, and Human Rights: Global Standards and Local Ethics” in Thomas Cottier (ed), *Genetic Engineering: Challenges Posed by a New Technology to the World's Trading System* (Oxford: OUP, 2006) (forthcoming).

³⁰ See, too, Roger Brownsword, “Human Rights—What Hope? Human Dignity—What Scope?” in Jennifer Gunning and Søren Holm (eds), *Ethics, Law and Society: Volume I* (Aldershot: Ashgate, 2005) 189.

idea of being in control of one's actions is a primitive fallacy. How might these arguments go?

It is not immediately obvious why reasons should not be regarded as causes of action.³¹ A great deal of human experience suggests that the mental state associated with having a reason for doing *x* precedes the actual doing of *x*; and, intuitively, we sense that the mental state is causally connected to the doing of *x*. In other words, we doubt that the giving of reasons as an explanation of our actions is entirely a process of rationalisation; and, similarly, we are not inclined to view our mental experiences as epi-phenomenal. But, then, we might be wrong. Perhaps scientists will demonstrate one day that there is a chain of material causes which, in effect, reduces our mental experiences to a sideshow. In the same way, we are not disposed to accept that we are never in control. Yet, if scientists showed that humans are akin to clockwork toys, wound up and then left to run and run until they run down, this would cast our situation in a different light.

If I were able to resolve these philosophical puzzles, I would; and the reason that I will not attempt to do so is not because I do not have the space in this paper to do so, but simply because I do not know the answers. However, so far as the choice between the East coast and the West is concerned, the attack on the East coast ends up doing no favours to the West coast either. For, if reasons are not causes and if humans are never in control, this is as true on the West coast as it is on the East. If regulatees on the East coast cling on to the idea of a real choice being made (and, concomitantly, of right choices being made for the right reasons), then regulators on the West coast seem equally wedded to the notion that, in setting the pattern of West coast regulation, they exercise real choice, freely choosing to do the right thing. Accordingly, for the critics of the East coast to attack it in this way is a nuclear option.

6. Conclusion

If nothing else, this quest for a mid-West regulatory compromise has thrown up the fundamental question of whether we think that moral virtue has both expressive and instrumental value. Do we think that the reason why a moral community is a good thing is because it sets the stage for agents to increase their utility? Or, is there more to moral virtue and moral community than this? Is it a way of life that has intrinsic or expressive value? The chaplain, like the East coast denizens, believe that morality is not just instrumental—morality truly expresses the good life; it is not simply a vehicle for enjoying the good life. However, this leaves the East coast on the horns of a dilemma.

If East coasters think that the moral life is not an end in itself, if they think that it is merely an instrument for establishing a safe context for agent interactions, there is no reason to stick with the East coast regulatory style if a more effective strategy is available. On this analysis, smart regulators might well argue in favour of a more intrusive technological strategy that performs better than any alternative strategies.³²

³¹ Compare, Martin Hollis, *Models of Man* (Cambridge: Cambridge University Press, 1977).

³² For the essentials of smart regulatory theory, see Neil Gunningham and Peter Grabosky, *Smart Regulation* (Oxford: Clarendon Press, 1998).

However, if East coasters think that moral community is something to be valued for its own sake, as the ultimate expression of human dignity, the East coast project is one that we must persist with and the struggle to integrate technology in a way that does not compromise human dignity will continue. On such an analysis, however, the East coast preference for the moral life looks very much like a deeper version of the dignitarian cultural conservatism that it otherwise condemns.

To get off these various hooks, the East coast model needs to be grounded in a line of thinking that teases out, purely by logically underwritten steps, the normative implications of agency. If, as a matter of rational necessity, agents must accept other-regarding responsibilities, then they have good reasons for espousing the moral life. Where that moral life is predominantly a matter of agent morality—a matter of each agent making its own sincere and good faith judgment as to moral requirements and then acting on those judgments—technological channelling is problematic. On the other hand, if regulators were morally omniscient, would it matter that agents were simply coded for conformity with the requirements of act morality?

The immature Alex, we can be sure, would advise us to lighten up and spend more time at the Korova Milkbar or the Duke of New York, where we could ease our burdens with a cocktail of some kind or another. But what, we might wonder, would the mature Alex have to say? Would he agree with the chaplain? What would the mature Alex make of our regulatory dilemma? Would he head East or would he head West?