



4th S.NET CONFERENCE 2012

REGULATION NEW TECHNOLOGIES

FOSTERING INNOVATION BY REGULATORY REGIME DESIGN: BEYOND INDIFFERENCE

- WORK IN PROGRESS -



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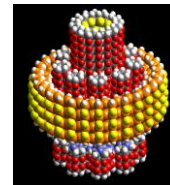
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POINT OF DEPARTURE NEW ACT-TYPES

Pace of technological innovation presents a historically unique challenge of many new/novel act-types, i.e. ...

- acts, which such were never before performed or foreseen as performable (e.g. cloning; nano-farmaceuticals)
- Acts, which (may well) require normative channelling...



'A CASE OF NORMATIVE OPENNESS'

Compare The Garden of Eden

- how to perform the first sin?



Lack of prior....

- **description:** no factual analogies with existing act-types
- **prescription:** no predetermined obligations or permissions

Need for a method of legal design!

- **Provide 'from scratch' description of new act-type**
- **Normative balance: foster opportunities/curb risk**



BROWNSWORD'S TYPES OF CHANNELLING



'First norm-to-act encounter'

3 basic types of regulatory channelling

Say: new act type 'X' ('Y' = norm addressee)



Red light negative channelling: 'X is **prohibited to** Y

Amber light neutral channelling: '(Not) X is **permitted for** Y'

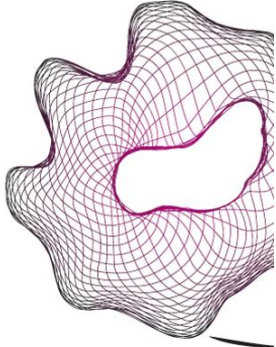
Green light positive channelling: 'X is **commanded of** Y'

Prohibition

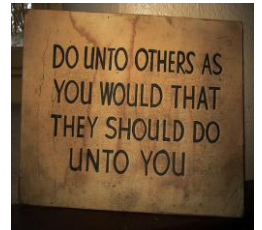
Permission

Command

NOTE 1st ENCOUNTER: CHANNELLING ACT-TYPES BY NORMS OF CONDUCT



- **Subject: norm addressees**
general public – individual person
- **Object: mode of conduct**
perform act / refrain from acting
- **Operative mode: ‘direction of ought’**
obligatory (shall) or permissive (may)
- **Norm condition: hypothetical bindingness**
abstract case(s) – concrete/unique case



TYPES OF NORMS AS A REGULATORY SPECTRUM

Negative	Neutral	Positive
Shall not do X	May do/not do X	Shall do X
Prohibition	Permission	Command

Greater complexity – intermediary positions...

Regulatory variables:



- **sanctions** penal, tort, revoke permit
- **reservations & facilities** conditions & extra's
- **strategic mixtures** public/private law instruments
- **tilt** interpret 'gaps' pro-prohibition/pro-permission

DESIGN FROM CHANNELLING

Proposition

- first elaborate on channelling (Brownword)
- focus on (norm operator) x (norm object)



Elements

- Operator – Obligation (O)
 - Permission (P)
- Object – act (a)
 - not act ($\sim a$)



Combinations

Oa or O $\sim a$, and Pa or P $\sim a$

NOTE CONSIDER CONTEXT: SQUARE OF NORMATIVE OPPOSITES

Combine **Operator** (shall/may) and **Object** (do/not do)

Square of 4 types of norms				
Operat or ↓	object →	Do 'Perform act'	↔	Not do 'Omit act'
Shall 'Ordered'		1. Command Oa	<->	2. Prohibition O~a
	↔	<+>	>-<	<+>
May 'Permitted'		3. Permission Pa	</>	4. Dispensation P~a

Contradictory (>-<); Contrary (<->); Subaltern (<+>); Subcontrary (</>)

APPLIED SQ^{RE} (NEW ACT TYPE)

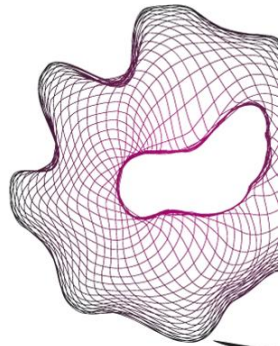


Consider the possibility of a (future) drug ('Z') to remedy, if used early in pregnancy, occurrence of a handicap.

The Sq^{re} positions depict four types of (from scratch) normative channelling:

1. **Command**: pregnant women shall take Z.
2. **Prohibition**: pregnant women shall *not* take Z.
3. **Permission**: pregnant women may take Z.
4. **Dispensation**: pregnant women may *refrain from* taking Z.

ELABORATION AND POSITIONING OF NORMATIVE OPPOSITES



Positions with
(negated)
equivalents

Square of 4 types of norms	
1. Command $Oa = \sim P \sim a$ (Negated Dispensation)	2. Prohibition $O \sim a = \sim Pa$ (negated Permission)
3. Permission $Pa = \sim O \sim a$ (Negated Prohibition)	4. Dispensation $P \sim a = \sim Oa$ (Negated Command)

Apply the Square to Brownsword's modes of channelling...

Positive channelling: 1. Command - $Oa = \sim P \sim a$

Negative channelling: 2. Prohibition - $O \sim a = \sim Pa$

Neutral channeling: 3. Permission and 4. Dispensation
together - $(Pa \wedge P \sim a) = (\sim O \sim a \wedge \sim Oa)$



TO CHANNEL OR NOT TO CHANNEL...

Every new act-type appears as unchannelled....

Take 'cloning':

No obligation to clone ($\sim Oa = P\sim a$)

No obligation *not* to clone ($\sim O\sim a = Pa$)



Together this makes: $P\sim a \wedge Pa$

Also known as “INDIFFERENCE”

Positioned outside of the sq^{re} (opposite $Oa \wedge O\sim a$)

... but neutral channelling also reads as: $P\sim a \wedge Pa$

WEAK & STRONG PERMISSIONS

Von Wright: '*Norm and Action*' (1963):

Weak permission = absence of obligation to perform or refrain from performing an act

Strong permission = a permission following an authoritatively considered normative status of an act...

$P \sim a \wedge Pa$	Unchannelled	Weak Perm.	Pre- nor proscribed	Absence of obligation
	Channelled	Strong Perm.	Considered norm. status	Expression of tolerance



RECONSIDER FARMACEUTICAL Z

Society can take 3 approaches (Brownsword)

1. Negative	2. Neutral	3. Positive
Prohibitive ($O\sim a$)	Permissive ($Pa \wedge P\sim a$)	Command (Oa)

If option 2 is preferred; regulators must choose:

2. as channelled/strong permission

2. as unchannelled/weak permission

And the differences (relevant to design) are.....

THE DIFFERENCE... 1

STRONG PERMISSION

(Weak permission = absence of obligation)



A strong permission

- implies an opposite: legal promise - non interference
.... a toleration ('by authority')

but (generally) also comes with:

- a right: relative to others being Prohibited to hinder or prevent the holder of permission (e.g. keep protesters out);
- a claim:



THE DIFFERENCE... 2

STRONG PERMISSION

A strong permission ... (generally) comes with:

- **A right:**(Prohibition).
- **a claim:** relative to others being under Command to (also) enable the holder of permission (e.g. provide assistance)

Rights&claims: no tolerance regarding 'others'



S.Permission as a right	S. Permission as a claim
Corr. Prohibition	Corr. Command

NOTE IMPLICATED NORMATIVE POSITIONS

Strong Permissions **possibly** implicate Prohibition and Command....

In turn Prohibition and Command **always** implicate Dispensation and Permission respectively.

Prohibition ($O\sim a$)

Command (Oa)

Dispensation ($P\sim a$)

Permission (Pa)

Unilateral Permissions ($P\sim a \vee Pa$)

as opposed to

Bilateral permissions ($P\sim a \wedge Pa$)... as in:

- strong permission (neutral channelling) or
- weak permission (absence of a norm)

THE DIFFERENCE ... 3

WEAK PERMISSION

Absence of obligations: $\sim O\sim a \wedge \sim Oa$

Reads as: $Pa \wedge P\sim a$... as a matter of 'logic'



In 'practice' legal systems often have 'norms of closure': response to absence/legal gaps/new act-types

E.g. the 'principle of prohibition':

"Any act which is not prohibited is permitted"



E.g. the 'legality principle':

"Government may act only upon explicit legislative power."



BEYOND CHANNELLING: ISSUE REGULATORY DEFAULT – ‘TILT’

3 Ideal type (?) societal responses to drug Z



Society 1 – Prohibitive

- Prohibitive, but with exceptions of Permission or Command
- Negative tilt in similar but not excepted cases (O~a)

Society 2 – Commanding

- Commanding but with exceptions by Dispensation or Prohibition
- Positive tilt in similar but not excepted cases (Oa)



REGULATORY TILT

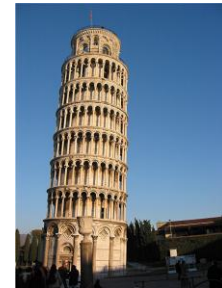
Society 3 – Permissive

- Permissive, but with exceptions upon Command or Prohibition
- Neutral Tilt in similar but not excepted cases
($P_a \wedge P_{\sim a}$; ‘the pregnant woman decides’)

Note: basic rule/type of channelling does not determine the tilt!

E.g. Licencing

- Basic rule reads $O_{\sim a}$
- Tilt may read: neutral only with reservations!



3 STEP DESIGN PROCESS

**legal/regulatory design sequence,
upon an emerging new act-type:**

1. Recognition and legal specification

- act type (who. what, how, where, when...)

2. Choice of form of basic rule (type of channelling)

- when permissive consider weak vs strong

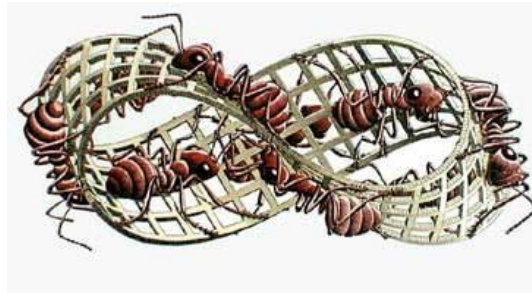
3. Determination of regulatory tilt

- consider objective behind basic rules



DESIGN BY REGULATORY CHANNELLING OF NEW ACT-TYPES

Discussion



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PM - IN PREPARATION: HOW TO CHANNEL FOSTERING INNOVATION 1

Negative	Neutral	Positive
Shall not do X	May do/not do X	Shall do X
Prohibition ($O\sim a$)	Permission ($Pa \wedge P\sim a$)	Command (Oa)



Prohibition ($O\sim a$) implicates (and requires) Dispensation ($P\sim a$), but is silent on (Pb)

– proscribing action ('a') in favor of (weakly) permitted action ('b')

When 'b' is more innovative than 'a': e.g. fuel a v. b

PM - IN PREPARATION: HOW TO CHANNEL FOSTERING INNOVATION 2

Negative	Neutral	Positive
Shall not do X	May do/not do X	Shall do X
Prohibition ($O\sim a$)	Permission ($Pa \wedge P\sim a$)	Command (Oa)

Command (Oa) implicates (and requires) Permission (Pa), and is opposite to ($D\sim a$)

– prescribing action ‘a’, while proscribing action ‘b’ in favor of innovative action (‘b’)

When ‘b’ is more innovative than ‘a’: e.g. fuel a vs b



PM - IN PREPARATION: HOW TO CHANNEL FOSTERING INNOVATION 3

Negative	Neutral	Positive
Shall not do X	May do/not do X	Shall do X
Prohibition (O-a)	Permission (Pa \wedge P-a)	Command (Oa)



Permission (Pa \wedge P~a) presents freedom in (not) pursuing action a or action b

- as strong permission as a right or claim – facilitating and fostering action ‘a’

- as weak permission, action ‘a’ dependent on other than normative incentives (unless norm of closure)

When ‘b’ is more innovative than ‘a’: e.g. fuel a v. b



NOTE IMPLICATED NORMATIVE POSITIONS [POST S15]

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