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WHY CAN'T A DUCK SIGN A CONTRACT? THE FAILURE OF INTELLECTUAL PROPERTY TO PROTECT THE ENVIRONMENT

“Human relations and the relations to other beings in our age.” There are three components to this theme: human-to-human relationships, human-to-other being relationships, and the temporal focus of our age. In the following, I will both discuss theoretical concerns among these components as well as present case studies to illustrate my points. In asking why a duck cannot sign a contract, I hope to demonstrate inherent insufficiencies in relations between humans and other beings in our age when they are characterized as legal property relations.

Among the possible forms that could relate humans to other humans and other beings, global society often resorts to law. Relationships in other, more culturally-dependent arenas, are more difficult to navigate when the cultures speak different languages, follow different religions, and build different family structures. Indeed we are not globalized in these cultural areas. We are globalized economically. And insofar as law facilitates globalization, the economic norms it uses become the common denominator among the cultures and even the relationship between humans and other beings.

Exigency: The Temporal Focus of Our Age

Among the three components of this theme, let me begin with the temporal focus of our age. The well-chosen topics of current pressing issues—globalization, ecology and economy--in some ways converge, if we reflect a bit on European history. For example, Marx opens his essay “The Eighteenth Brumaire” with the famous line that history repeats itself, with people and events occurring first as tragedy and then returning as farce.¹ Environmental lawyer and scholar, Michael Gerard, has compared our inability to do anything about climate change to the unheeded drumbeats in the months before August in the year 1914. One hundred years later, the drumbeats warn of irreversible changes to nature, but we do nothing. In fact, we have already had the first battle of the new war—literally—when in 2005, the Sudanese erupted in a civil war over water, not oil. The United Nations declared it the first water war. As history repeats, apparently we have learned at least this: World War I was called the “Great War” until World War II erupted. Now, at least with the Sudanese water war, we *immediately* see that it will only be the *first* in a series.

The Great War is not just a helpful metaphor. The socio-economic conditions of that time have returned as well. Just before the Great War, Europe and the United

1. Karl Marx, “The Eighteenth Brumaire of Louis Bonaparte” in *Die Revolution*, New York, 1852.

States had just gone through thirty years of industrial boom. As John Maynard Keynes reminds us, “the internationalization [of social and economic life at that time] was nearly complete in practice.”² To invoke a term not then yet in use—the world seemed to be flat. This precedent should make us cautious today.

The first age of globalization came to a shuddering halt. Thanks to the Great War and its aftermath, economic growth in Europe did not recover its 1913 levels until well into the 1950s. The apparently unstoppable logic of economics was in fact trumped by the rise of new antagonistic states. Great empires—the Russian, the Austrian, the Turkish, the German and eventually the British—all collapsed. Only the United States stood to gain from this international cataclysm: and even the US did not profit . . . until nearly thirty years after the end of the war that brought it all about . . .³

All that destruction was history as tragedy.

And now comes history as farce. “Today, it is as though the 20th century never happened. We have been swept up [again by the same] master narrative of ‘integrated global capitalism’, economic growth and indefinite productivity gains...[Historian Tony Judt tells us that] ‘Globalization’ is an updating of the [same] high modernist faith in technology and rational management which marked the enthusiasms of the decades leading to the Great War.”⁴

The Theory: Law as a Function of Globalized Economics—Human Relations

Having located the temporal concerns of our age as such, I shift my focus to the relations among humans. Our farcical return to the socio-economic conditions that preceded the Great War finds the puppeteering of our relations to other humans and other beings by economics through law. The hand inside the puppet is economic greed. The puppet is the law as handled by the economy to keep us in the audience entertained and maybe even leading us to believe in the reality of puppets.

Thus, in the present era when the state has been vilified, the role of law is seen not as the creation and implementation of public order for the many, but as the instrument to create and maintain the wealth of the few. There is no rational basis for a legal system that uses public money to bail out J. P. Morgan, so that J. P. Morgan can turn around and pay massive bonuses to its executives and then do things like lose 9 billion dollars more, still playing with economic toys like derivatives just a few months later.⁵ So at the same time that the globalization puppeteers tell us the world is

2. John Maynard Keynes, “The Economic Consequences of Peace” in *The End of Laissez-Faire and the Economic Consequences of Peace* (Amherst, NY: Prometheus Books, 2004) p. 62, as edited by Tony Judt in *Ill Fares the State*, pp. 191-92.

3. Judt, 192.

4. Id., 193.

5. Jessical Silver-Greenberg and Susanne Craig, “J. P. Morgan Trading Loss May Reach US\$ 9 Billion”

flat and we are all best identified as units in a market, they ask law to be the common denominator of its global economic order. The other part of the return of history as farce is that as technology discovers new ways to invent products—even living products—and manage them, law, under the control of economics, facilitates this. So if we ask law in the 21st century to be the common denominator of a global flat world of market economies, we are going to get a world in which our relations to human and other life is not only legal, but is legal when law is seen as a function of economics.⁶

The Case Study: From Dolly to Delhi

Having presented my concerns of the temporal aspects of our age and human relations, I now turn to human relations to other beings. In general, I am concerned with the legal relations of humans to humans and the other. In specific, I am concerned with the legal relations of humans to humans and other beings as property.

There are several examples of ways in which we relate ourselves to other humans as property. For example, we assign a monetary value to a person's life wrongfully killed or injured in an accident, or when we write insurance contracts in which we, as legal beings, agree in advance the monetary value of a lost eye or leg. But right now I want to focus on other beings as property, with property being understood as the law does—a bundle of rights. Humans buy and sell other living animals and plants. States claim sovereign control rights over any living thing in their territory. Sport killing is accepted so long as it is protected by a license to hunt. Animals may be caged, tied or involuntarily fed, so long as it is within legal limits. But I want to narrow my focus even further to one type of legal relationship of humans to humans and to other beings—the patent.

Since states began recognizing the right of individuals to own the products of their intellect and not just the products of their hands, money-makers push for the expansion of those rights through broad interpretations of the laws that enable them. Lawyers refer to this as “the expansion of statutory subject matter.”⁷ At the time of the Enlightenment, when the United States established independence from Britain, it borrowed a distinction made by Aristotle when it wrote in its constitution that Congress shall have the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁸ As written, one would expect that such a constitutional provision was a legal response to a perceived problem—the time, energy, effort, intellect and resources invested by one person could simply

New York Times on-line, June 28, 2012

6. Judt, 200.

7. Robert Greene Sterne and Lawrence B. Bugaisky, “The Expansion of Statutory Subject Matter under the 1952 Patent Act”, 37 *Akron Law Review* 217 (2004).

8. U.S Constitution, Art. I, § 8 cl. 8.

be copied or stolen by another. It was no different than stealing material property. So we needed to protect intellectual property from theft just as we would protect material property from theft. In current practice, however, the ability to make legal claim on ideas and patterns becomes the goal itself of industries, facilitated by the law, and these industries include the idea of making legal claim to life forms created for the sole purpose of making money, not to promote the sciences and useful arts. Notice too that the language allows patents to protect property rights for inventions in sciences and the useful arts—not in necessities. So one can well imagine patenting industrial machinery that provides commercial advantage, but not food that is necessary for human life.

Congress quickly exercised that power just four years later when in 1793 it passed the Patent Act that Thomas Jefferson had written. The Patent Act defined the four classes of statutory subject matter as “art, machine, manufacture or composition of matter.” Jefferson believed that “ingenuity should receive a liberal encouragement.”⁹ Subsequent patent statutes in 1836, 1870, and 1874 all used this same language.

In 1889 during the first great wave of industrialism, a patent claim for fiber found in the needle of a coniferous tree was rejected by the U.S. patent office. The patent commissioner wrote that allowing such a patent would permit “patents [to] be obtained upon the trees of the forest and the plants of the earth, which of course would be unreasonable and impossible.”¹⁰ In his book-length study of permanence and change, rhetorical theorist Kenneth Burke concluded in the middle of the 20th century that that which is biological is permanent, and that which is social is changeable.¹¹ In 1940, a federal court concluded that bacteria were not patentable.¹²

In 1948, the U.S. Supreme Court wrote that discoveries concerning “manifestations of nature [are] free to all men and reserved exclusively to no one.”¹³

In 1952 the “statutory subject matter” was expanded for the first time by replacing the word “art” with “process,” thus resulting in the current language protecting process, machine, manufacture or composition.¹⁴ Machine and manufacture are clearly industrial terms that do not seem to line up very tightly with the constitution’s protection of useful arts and sciences. Kenneth Burke may have had it wrong when he concluded that the biological was permanent, but he seems to have had keen insight when he concluded that the American constitution is an occasion of “business in a mood of mild self-criticism.”¹⁵ The Congressional Committee Reports accompanying the 1952 Act state that Congress intended statutory subject

9. 5 *Writings of Thomas Jefferson* 75-76 (Washington ed. 1871).

10. *Ex Parte Latimer*, 1889 Dec.Com.Pat. 123.

11. Kenneth Burke, *Permanence and Change*, University of California Press, 1963.

12. *In re Arzberger*, 27 C.C.P.A. (Pt.) 1315, 112 F.2d 834 (1940).

13. *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948) at 130.

14. The 1952 Patent Act, 35 U.S.C. §101.

15. Kenneth Burke, *A Grammar of Motives*, University of California, 1966.

matter to “include anything under the sun that is made by man.”¹⁶ According to the United States Supreme Court, that does not mean that the U.S. statute has no limits. The laws of nature, physical phenomena, and abstract ideas continued to be held by U.S. courts to be not patentable.

As recently as 1980, in an effort to show that legal protection for property has limits, that same Supreme Court cited cases in its own history to support the notion that “The laws of nature, physical phenomena, and abstract ideas have been held not patentable.”¹⁷ The Court went on: “A new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise Einstein could not patent his celebrated law $E = mc^2$; nor could Newton have patented the law of gravity.”¹⁸ But the year was 1980 and despite this language acknowledging limitations for private property rights over nature, the U.S. Supreme Court went on to grant a patent for bacteria to microbiologist Anand M. Chakrabarty, finding it to be “a thing under the sun made by man.”¹⁹ Specifically, that 1980 Supreme Court said that the “relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions.”²⁰ Shortly thereafter, in 1985, the U.S. Patent and Trademark office granted a patent for multicellular plants.²¹ As the legal wall of limitations quickly tumbled, in 1987 the “Harvard Mouse” became the first patented mammal. It was still the 1980s, and as historian Tony Judt points out, the cycle of history had returned us to the 1880s’ intoxication with industry.²² As the Soviet Union collapsed, it was Happy Hour for bartenders Thatcher and Reagan, serving industrial cocktails to the public, getting lawyers and their clients to line up for the opportunity to gain private property rights over everything, including living plants and animals.

Near the end of the 20th century, biologist-turned-sociologist Nikolas Rose once made a striking observation at the annual meeting of the British Sociological Association. Contrary to Kenneth Burke’s conclusions, Rose noted that the social sciences *historically* had proceeded based upon the notion that if we could understand the social world of the human, we could change them for the better, and the natural sciences had proceeded based upon the notion that we cannot change

16. S.Rep.No. 1979 82d Cong., 2d Sess., 5 (1952); H.R.Rep.No. 1923, 82d Cong., 2dSess., 6 (1952)

17. Le Roy. *Tatham*, 14 How. 156, 14 L.Ed. 367s. 127 (1948), (1853); *O’Reilly v. Morse* 15 How. 62, 14 L.Ed. 601 (1854), *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948); *Gottschalk v. Benson*, 409 U.S. 63 (1972), 333 *U.Parker v. Flook*, 437 U.S. 584 (1978).

18. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

19. *Chakrabarty*, at 309.

20. *Chakrabarty* at 313.

21. *Ex Parte Hibbard*, 227 U.S.P.Q 443 (B.P.A.I. 1985); and in 2000 a US federal appeals court confirmed the idea in a different case decision. *Pioneer Hi Bred. Inc. v. J.E.M. Agric. Supply, Inc.*, 200 F.3d 1374 (Fed. Cir. 2000).

22. Judt, *passim*.

the physical world. But when Dolly the sheep was cloned, Rose reflected on our apparent inability to change destructive social behavior, and concluded that it might well be the case that the *physical* is changeable and the *social* is not changeable.²³

Where has that history and this legal standard left us in our relations to the world of other living beings? Patents are now already obtained on life forms that are characterized not as products of nature, but as “commodities.” It is now possible to patent entire species of microorganisms. Genetically-engineered mice have been patented as “inventions.” Patents have been granted on human genes, cell lines and body tissues.

The legal right to private intellectual property is usually referred to as protection of one’s right. Yet, concerning the right, one would be hard pressed to find a case in which an individual has taken a legal action to protect his right, if he could not prove that he had lost money due to another person’s having made money. The industrialized nature of research means that corporations hold intellectual property rights and they do so of course for profit, not because of some social desire to respect and promote rights. Furthermore, the right is styled as one in need of protection; that is, of defending. To investigate how our legal relationship to other beings works, let us ask the question whether intellectual property rights are exercised defensively, to foster the arts and sciences by protecting the rights of inventors, or are they exercised offensively, as economic weapons in the hands of artificial legal persons, such as corporations. The answer is the latter—they even have names like bioprospecting, biopiracy and biocolonialism. Case studies will illustrate.

The first case is the celebrated case of Canadian farmer Percy Schmeiser, who has grown rapeseed on his farm in Saskatchewan for nearly fifty years, usually sowing each crop of plants with seeds saved from the previous harvest, just as his father and grandfather did before him. He has never purchased seed from the American agricultural and biotechnology Monsanto Corporation. Even so, more than 320 hectares of Schmeiser’s land became contaminated by Monsanto’s rapeseed, a man-made variety produced by genetic engineering to resist Monsanto’s own herbicide, known by the brand name “Roundup.” According to the rhetorical position in the law given to patent holders, they are to be “protected” from persons who would benefit from the research and labor put into the patent without having paid money for that benefit. In practice however it is Monsanto that has gone on the offense, taking hundreds of North American farmers to court, claiming they illegally planted Monsanto’s rapeseed without paying a \$37-per-hectare fee for the privilege. Most of these hundreds of farmers do not have the economic resources to fight a legal battle against Monsanto, so whether they intentionally used Monsanto’s patent-protected genetically-modified

23. Nikolas Rose, *British Sociological Association Annual Meeting*, Edinburgh, April 1998. Notes on file with author. Rose was then with Goldsmith’s College and at the time of this writing, is with the London School of Economics.

rapeseed, or the birds, bees, wind and perhaps even Monsanto itself put the rapeseed on their land, the farmers settle the legal claims by paying Monsanto. According to Schmeiser, Monsanto's "seed could easily have blown on to his soil from passing canola-laden trucks. "I never put those plants on my land," insists Schmeiser.²⁴

But unlike the other farmers, Schmeiser was so enraged by the legal aggression of Monsanto, he decided the best defense was offense. He filed his own legal actions against Monsanto, because Monsanto's investigators trespassed on his land. "The question is, where do Monsanto's rights end and mine begin?"²⁵ (As an aside Schmeiser notes that the promise of genetically-modified, patented food has been greater yield, better quality and fewer herbicides and pesticides. After more than ten years of use, farmers in North America report lower yield, lower quality and the use of more herbicides and pesticides. And so Schmeiser concludes that we should be very clear about something—biotechnology and biopatenting are market products for profit. They are not curing cancer and feeding the world.) Yet as John Maynard Keynes once remarked, "We are capable of shutting off the sun and the stars because they do not pay a dividend."²⁶

Were this any other product on the market, given the product's failure to perform as promised, it should theoretically have been abandoned by choice by now. But because Monsanto's business model is to force farmers to sign exclusivity agreements for seed supply, after contaminating fields with their patented plants, the fairy tale market solution is inapplicable. Of course, this business model is made all the more effective because of the 1998 patent owned by Monsanto for the "Control of Plant Gene Expression," better known as the terminator patent. This genetic modification sterilizes the seed of the plants so that each year, one must buy a completely new batch of seeds from Monsanto, rather than use the seeds from the previous year's harvest, as is done in traditional farming. Monsanto obtained 89 new patents in the first six months of 2012 alone on soybeans, as well as tomatoes, corn, cucumbers, and rice. And it is not just Monsanto and is not limited to these foods.

Other results of commercial gain from biopatenting are the fact that the world's "biodiversity is down thirty percent since the 1970s . . . with tropical species taking the biggest hit. . . . Humanity is outstripping the Earth's resources by 50 percent—essentially using the resources of one and a half Earths every year, . . ."²⁷ according to the World Wildlife Fund in its 2012 Living Planet Report. Biopatenting has contributed to that life-threatening trend as well. We should take note of the

24. Mark Nichols, "Tampering with the Natural Order," *Macleans Magazine* May 17, 1999.

25. *Id.*

26. John Maynard Keynes, as quoted in Judt, 156.

27. Stephanie Pappas, "Report: Global Biodiversity Down 30 Percent in 40 Years," *LiveScience*, May 14, 2012, <http://www.livescience.com/20307-biodiversity-natural-resources.html>, accessed May 16, 2012

benchmark years in which events converge—the Reagan-Thatcher economy was the background during which the legal system reversed itself from not allowing patents on life to allowing patents on life. And what have been the results in that time? A thirty percent drop in biodiversity, lower crop yield, lower quality crops and more herbicides and pesticides. But of course, more profit for the patent owners.

The globalized nature of the Enlightenment legal idea of patent, even as it extends to life forms, finds its way into the luggage of pharmaceutical and agricultural companies wherever they travel. Biopiracy cases typically involve a North American or European biotechnology corporation seeking to “acquire,” genetically copy, and alter agricultural and medicinal plants grown in biodiversity hotspots like Brazil, Peru and India. Before it legislated its own anti-biopiracy statute in 2002, India had prosecuted biopiracy cases in India involving turmeric, rice and neem under international law in international courts.

The neem tree, a native of the Indian subcontinent, has had many applications in traditional Indian Ayurvedic and Tibetan medicine, agriculture, and household use, as well as being symbolic as “Gandhi’s favorite tree.” The Latin name, *Azadirachta indica*, is derived from the Persian for “free tree,” as even the poorest families have access to its beneficial properties. However, Indian citizens would have been required to pay royalties on the products of the neem after a U.S. patent had been granted to the W.R. Grace Company on a compound in the tree (azadirachtin), which Grace used for the production of a biopesticide. However, like Percy Schmeiser, the Indian government was not content with this use of the law, and took its own legal action.

In 1995, the United States Department of Agriculture and the multinational company W. R. Grace obtained a patent in the United States on a neem-based fungicide. India appealed the granting of the patent by proving that the neem’s use has been part of the traditional knowledge of Indian farmers and the scientific community for centuries. As a result, in 2000 the United States revoked the patent. However, the patent application in Europe lived on. Then, on March 8, 2005, India won the battle against the granting of the patent for the neem-based fungicide by the European Patent Office (EPO). W. R. Grace’s appeal against the revocation was rejected by the EPO office after several Indian and international groups presented evidence to support the claim that the use of neem in varied forms was part of traditional Indian knowledge and that it was not a novel product. “It was pure and simple piracy. The oil from neem has been used traditionally by farmers to prevent fungus. It was neither a novel idea nor was it invented,” said Vandana Shiva of the Research Foundation for Science, Technology and Ecology and one of the country’s foremost agricultural experts.”²⁸

Then in February 2010, the Environmental Support Group, an NGO, filed a

28. *Indo-Asian News Service*, March 9, 2005, www.bbcnews.com, March 9, 2005, and *The Hindu*, March 9, 2005, all accessed November 11, 2014 through <http://infochangeindia.org/trade-a-development/news-scan/india-wins-landmark-neem-patent-battle-in-europe.html>

complaint with the Karnataka state biodiversity board in India, against Monsanto, its Indian subsidiary Mahyco, and University of Agricultural Sciences, Dharwad, for having taken six varieties of Indian brinjal (eggplant), which they then modified to become Bt Brinjal, “for commercial purposes.”²⁹ “This modification is similar to Monsanto’s other transgenic crops, including the infamous Bt cotton, the use of which has resulted in the loss of jobs for thousands of Indian farmers.”³⁰ And when the traditional farmers lose their jobs, they migrate to the cities adding further crowding to already over-crowded cities.³¹

In January, 2012, the Indian National Biodiversity Authority (NBA) decided to file a legal action against Monsanto and the Maharashtra Hybrid Seeds Company (Mahyco) for failing to acquire proper licenses before conducting field trials in six genetically-modified varieties of brinjal before growing the plant. This would have been the first time the NBA had prosecuted firms for violating the 2002 Biodiversity Act. The Act requires anyone who desires to use Indian-produced biological goods for commercial purposes to seek permission from the NBA. That permission is required, even if, as in Monsanto’s case, the material has been modified by Indian universities.³² Importantly, the NBA’s decision to initiate legal proceedings was prompted by a complaint filed in 2010 by the Bangalore-based Environmental Support Group (ESG). Bhargavi Rao, of ESG, says the Genetic Engineering Approval Committee (GEAC) which is India’s official regulatory agency for GM organisms, considers only the biochemistry of a proposed biotech crop and not input from the farmers. The Indian biodiversity act, says Rao, obligates commercial developers of GM crops to negotiate with farmers for the intellectual rights to breeds and traits developed by indigenous farmers and their ancestors.³³ But then on January 20, 2012, the Karnataka State Biodiversity Board voted not to prosecute Monsanto, Mahyco and the University of Agricultural Sciences, Dharwad which support them due to lack of staff and technical expertise to pursue the case. “The Act is new and our officers are not well versed with it. We don’t have the powers to prosecute anybody, it can be done only through the wildlife wing.”³⁴ After the

29. Id.

30. Anne Sewell, “Bt brinjal row: India to now sue Monsanto/Mahyco,” *Digital Journal*, April 23, 2012, accessed through <http://digitaljournal.com/article/323168> on May 23, 2012.

31. Bharachua, Erach, Shamita Kumar and Kranti Yardi of Bharati Vidyapeeth Institute for Environment Education and Research, Pune India. Personal interview. 16 March 2012.

32. Ranjit Devral, “Biodiversity or Biopiracy?” *India Together*, December 2002, <http://indiatogether.org/environment/articles/biodiv02.htm>, accessed May 23, 2012,

33. Lucas Laursen, “Monsanto to face biopiracy charges in India,” *Nature Biotechnology*, vol. 30, no. 1, January “BT brinjal row: National Biodiversity Authority decides to prosecute Monsanto,” *India Today*, April 17, 2012, on-line access of <http://indiatodaz.intoday.in/story/bt-brinjal-row-monsanto-to-pay-for-biodiversity-violation/184824.html> on May 23, 2012.

34. KSBB Member Secretary KS Sugara, interviewed by Imran Khan in *Tehelka, India’s Independent*

Karnatka State Biodiversity Board took this decision, the National Biodiversity Authority was forced to take up the claim. In April 2012, India filed suit against Monsanto for violation of India's Biodiversity Act.

The cases are limited to agriculture, however. "A most alarming aspect of patenting life is the patenting of human genes, cell lines and tissues. Corporate patent attorneys have lobbied the Patent office that these "products of nature" are patentable once they have been isolated to produce a form not found outside of a laboratory. For example, in 1976 a leukemia patient named John Moore had surgery at the University of California to remove his cancerous spleen. The University was later granted a patent for a cell line that had been removed from the spleen, and which could be used for producing valuable proteins. The long term commercial value of the cell line was estimated at over one billion dollars. Moore demanded the return of the cells and control over his body parts, but the California Supreme Court decided that he was not entitled to any rights to his own cells after they had been removed from his body."³⁵

Law NOT in the Service of Economics. Aristotle's Implementation of Plato's *Republic*

So what does Greek philosophy have to do with these 21st century problems in the legal relationship of humans to humans and other beings? Within the Western tradition, Greek philosophy provides two viable counter-conceptions of law: first, it describes the role of law without being a subset of economics and second it describes the role of law without relying upon it as the global equalizer. If we have gone so far as to buy into the globalized nature of western legal thinking in our relations to non-legal beings, we need to consider whether within western legal thinking there is potential for change. What does Aristotle see for the role of law? It is not a globalizing equalizer. Aristotle bases his role for law on the position of his teacher, Plato, as Plato set it forth in *Protagoras*, *Republic* and *Laws*.³⁶ "Laws should in the first place stimulate men to virtue and urge them forward by the motive of the noble; in other words the first function of the law is persuasive. Where this persuasive power of the laws does not suffice punishments and penalties are needed. This deterrent and corrective function of the laws applies to those who can be made better, who are "curable." As for the incurably bad the law should exclude them, banish them from the state community. 'A good man, since he lives with his mind fixed on what is noble, will submit to argument, while a bad man,

Weekly News Magazine, vol. 9, issue 8, February 25, 2012, accessed on-line May 23, 2012 at www.tehelka.com/story_main51.asp?filename=Ne250212.

35. . *Moore v. Regents of the University of California*, 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479 (1990).

36. *Protagoras*, 325a, *Republic* 409e, 410a, *Laws* 941d, as synthesized by Max Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (New Haven: Yale University Press) 1951, p 177.

whose desire is for pleasure, is corrected by pain.³⁷

However, while Aristotle would focus upon what a person would learn from the actual concrete laws of his or her culture, my question is what one learns of the world from the very notion of having a legal relationship to it at all? And it is in this framework, that positive law, as pronounced by reason, can be a conscious tool in the hands of the powerful and an unwitting participatory ideology for those of lesser power. Aristotle's faith in the reason of the individual is an insufficient explanation or justification for law as it functions synergistically among groups and even less sufficient when it attempts to mediate between cultures.

It would be too easy to say that in the *Republic* Plato advises that the ideal community is "a city which would be established in accordance with nature,"³⁸ and that therefore the corrective for all that is wrong in the world is to get our societies back in accordance with nature. First of all, when environmentalists ask this of society, industrialists threaten that "tree-huggers want us to go back to the caves!" Second, we need a far more sophisticated understanding of what nature meant for the Athenians twenty-four centuries ago, if we are going to lift this phrase and apply it today. This second point is illustrated by the fact that if the products of human reason ought to be considered natural, then atomic weapons and pesticides are natural—but that result would hardly seem to comport with the relationship that Plato and Aristotle so thoroughly considered between "nature" (*physis*, φύσις) on the one hand and „law," „custom," or „convention" (*nomos*, νόμος) on the other.

The real question is whether the sense of natural law that thinkers like Aquinas delivered to the west under the pedigree of Aristotle, can really guide us through issues concerning our legal relationship to nature such as patenting living organisms and selling human body parts. The spectrum of possible human legal relationships to the non-human world offers several possibilities. At one end are the private property protectionists who will assert that without legal protection, there is no incentive to explore the arts and sciences. In other words, without making money, there is no incentive to explore the arts and sciences. This argument sounds defensible, perhaps even reasonable, given the current capital market *Zeitgeist*. But it also permits aggressive use of the property rights in ways that shocks most persons' consciences.

With the ancient alternative idea of western legal relationships in mind, what hope might we find in legal relations? In his questions concerning technology, Martin Heidegger reminds us that "where danger is, grows the saving power also."³⁹ Thus,

37. *Nicomachean Ethics*, X.9.10.1180a5 ff.

38. *Republic*, 428e9

39. Martin Heidegger, "The Question Concerning Technology" (Originally: "Die Frage nach der Technik" in *Vorträge und Aufsätze*, 1954). Heidegger once again quotes the poet Friedrich Hölderlin, finding in these lines from the poem „Patmos" a formulation of the paradox he wants to describe: within the „supreme danger" of humanity's enframing orientation to the world lies the potential of a rescue from that very danger.

the Canadian farmer, Percy Schmeiser, after being appalled at the legal rulings against him, took his own legal action against Monsanto. “In an out of court settlement finalized on March 19, 2008, Percy Schmeiser settled his lawsuit with Monsanto. Monsanto agreed to pay all the clean-up costs of the Roundup Ready rapeseed that contaminated Schmeiser’s fields. Also part of the agreement was that there was no gag-order on the settlement and that Monsanto could be sued again if further contamination occurred. Schmeiser believes this precedent setting agreement ensures that farmers will be entitled to reimbursement when their fields become contaminated with unwanted Roundup Ready canola or any other unwanted GMO plants.”⁴⁰

Another example of attempting to go to the source of the problem for the saving power might be the Nagoya Protocol to the Biodiversity Treaty. The Nagoya Protocol requires signatory states to conduct something called benefit-sharing, which had been an objective of the Treaty on Biodiversity signed in Rio in 1992, but was unfulfilled still fifteen years later. The objective of the Nagoya Protocol is the “equitable sharing of benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies.”⁴¹

Conclusions

Why can’t a duck sign a contract? Not because it has no hands, but because it has no legal standing or legal rights. Given that the human is in fact an animal, and the rapacious expansion of private rights over other living things through the expansion of statutory subject matter, do we expect to wait long before it will be legally possible for legally-protected property rights to extend to owning entire human beings?

In an effort to consider this rhetorical question concretely, rather than abstractly, let us review the history of legal rights over other lives and then consider the catalogue of current ownership. The Enlightenment basis had its greatest impact in Europe and North America. Thus it comes as no surprise that the European idea of state-protected legal private property, as developed in North America, would be the globalized norm today. The alternative norm, in which the state owns all property, has seen a history of relatively short experiments ending in failure—the Soviet Union being the largest example. Even today, the globalization of China is facilitated through western property relations.

Recalling those dangerous days of bad choices and weak voices nearly one hundred years ago, Michael Gerrard concluded his 2007 keynote address to the Georgetown Environmental Law and Policy Institute with the following words that challenged us not to fail in legal choices today:

In some ways, today feels like the summer of 1914. Today, as then, the nations of the world know that something catastrophic may be about to happen.

40. <http://www.percyschmeiser.com/> accessed June 18, 2012.

41. Article 1, Nagoya Protocol.

Today, as then, the nations also know that they might be able to prevent further negative effects, and efforts are underway to stop it. However, in 1914, those efforts failed and the leaders who could have made a difference were unwilling to make the compromises and sacrifices that would be required. Thus, an unnecessary catastrophe did happen. We may be at another such historical moment right now. The decisions that are being made this year, and the decisions that will be made next year, will have lasting consequences for the globe. The importance of concerted effort and wise choices by the legal profession cannot be overstated.⁴²

What can philosophers do?

In late-18th century France, as the old regime tottered, the most significant developments on the political scene came not in the movements of protest or the institutions of the state which sought to head them off. They came, rather, in the very language itself. Journalists and pamphleteers, together with the occasional dissenting administrator or priest, were forging out of an older language of justice and popular rights a new rhetoric of public action.

Unable to confront the monarchy head-on, they set about depriving it of legitimacy by imagining and expressing objections to the way things were and positing alternative sources of authority in whom ‘the people’ could believe. In effect, they invented modern politics: and in so doing quite literally discredited everything that had gone before. By the time the Revolution itself broke out, this new language of politics was thoroughly in place: indeed, had it not been, the revolutionaries themselves would have had no way to describe what they were doing. In the beginning was the word.⁴³

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42. Michael Gerrard, ‘What the law and lawyers can and cannot do about climate change’, 16 *Southeastern Envtl. L. J.* 33, 53-54 (Fall 2007) citing Barbara W. Tuchman, *The Guns of August* (1962) (recounting the events that took place during the first month of World War I) and Luigi Albertini, *Origins of the war of 1914*, 189-371 (Isabella M. Massey trans. & ed., Oxford Univ. Press, 1953). Keynote address delivered on Sept. 21, 2007 at the conference, ‘Balancing private & public rights in the coastal zone in the era of climate change’ at the University of South Carolina School of Law.

43. Judt, 171.