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## The Only Legitimate Rule: A Reply to MacLean's Critique of Ecolawgic

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Bruce Pardy\*

The Only Legitimate Rule: A Reply to  
MacLean's Critique of *Ecolawgic*

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*Is autonomy "natural"? In Ecolawgic: The Logic of Ecosystems and the Rule of Law, I argue that a legal system of intrinsic neutrality is one over which no political office or branch of government has control and in which individuals have the autonomy to pursue their own interests. In "Autonomy in the Anthropocene," the preceding article in this issue, Jason MacLean challenges the thesis of Ecolawgic. MacLean argues that autonomy is not a feature of neutral legal systems but a product of cultural norms and regulation. He maintains that Ecolawgic's prescription provides neither optimal economic outcomes nor effective environmental protection. The purpose of this article is to reply to MacLean's critique and to argue that there is only one legitimate rule to govern legal relations between competent adults.*

*L'autonomie est-elle un phénomène « naturel »? Dans Ecolawgic: The Logic of Ecosystems and the Rule of Law, j'avance qu'un système juridique de neutralité intrinsèque est un système juridique sur lequel aucune fonction politique ni aucune branche de gouvernement n'exerce de contrôle et dans lequel les particuliers ont l'autonomie de poursuivre leurs propres intérêts. Dans « Autonomy in the Anthropocene, » article précédent de la présente édition, Jason MacLean conteste la thèse d'Ecolawgic. Il allègue que l'autonomie n'est pas une caractéristique d'un système juridique mais plutôt un produit des normes culturelles et de la réglementation. Il soutient que la prescription d'Ecolawgic n'amène ni des résultats économiques optimaux ni une protection efficace de l'environnement. Dans cet article, l'auteur entend répondre à la critique de Jason MacLean et faire valoir le point qu'il n'existe qu'une règle légitime pour régir les rapports juridiques entre adultes compétents.*

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*Introduction*

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*Introduction*

In *Ecolawgic: The Logic of Ecosystems and the Rule of Law*,<sup>1</sup> I argue that law should reflect the logic of ecosystems and markets. A legal system of intrinsic neutrality is one over which no political office or branch of government has control, and in which individuals are at liberty to pursue their own interests. “Such a system treats its participants dispassionately and equally, subjecting all to the same rules. Systems do not play favourites.”<sup>2</sup> I maintain that the law of modern administrative welfare states, and in particular contemporary environmental law, is not a neutral system but instrumentalist and incoherent.

In “Autonomy in the Anthropocene: Libertarianism, Liberalism, and the Legal Theory of Environmental Regulation,”<sup>3</sup> Jason MacLean challenges the thesis of *Ecolawgic*. MacLean argues that autonomy is not a feature of neutral legal systems but a product of cultural norms and

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1. (Kingston, Ont: Fifth Forum Press, 2015) [*Ecolawgic*]. A copy in PDF may be downloaded at no charge at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2663505](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663505)>.

2. *Ibid* at 37.

3. The preceding article in this issue of the Dalhousie Law Journal [MacLean].

regulation. He maintains that *Ecolawgic*'s prescription provides neither optimal economic outcomes nor effective environmental protection.<sup>4</sup>

The purpose of this piece is to reply to MacLean's analysis and to further elucidate the implications of *Ecolawgic*. Before I address MacLean's objections, I will turn first to a matter on which we appear to agree.

I. *Turtles all the way down*

In *Rapanos v. United States*, Justice Antonin Scalia offered a version of the traditional tale of how the Earth is carried on the backs of animals. In this version of the story,

an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies "Ah, after that it is turtles all the way down."<sup>5</sup>

Arguments about legal norms and standards are arguments about legitimacy. In ecosystems, there are no legal norms or standards. Everybody eats somebody else. In evolutionary terms, success means surviving to reproduce. No other rules govern behaviour. The law of the jungle does not require legitimacy. In ecosystems, we might say, anything goes and might is right.

In human societies, does might make right? Legal philosophers seek to legitimize laws on other grounds. They say that laws are inherently right not when they are enacted and enforced by the powerful but when they reflect some other value that has inherent validity. For some, legitimacy derives from the law's consistency with moral standards. For others, legitimacy depends upon the law's effectiveness at achieving desirable social outcomes, such as aggregate economic welfare, equality, environmental protection or other objectives.

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4. Despite his objections, MacLean sifts through the hard-edged positions in *Ecolawgic* to find common ground where he can. With an intellectual openness and generosity of spirit, he suggests that there are ideas in *Ecolawgic* that can be applied within the prevailing paradigm of environmental managerialism and executive discretion. His gentle condemnation reflects the best traditions of pragmatic legal pluralism, but it obscures the incompatibility between *Ecolawgic* and the modern administrative welfare state. One of *Ecolawgic*'s targets is legal instrumentalism, the use of law as a tool in the pursuit of social and political goals. Its argument is not that technocratic supervision of society should be improved but rather condemned as incoherent, ad-hoc and inconsistent with the rule of law.

5. *Rapanos v United States*, 126 S Ct 2208 (2006) at 2233.

In *Ecolawgic*, I argue that these values are merely competing preferences. They are turtles all the way down. The proposition that the law should reflect that which is good, moral, or desirable is a fiction.

Good, moral and desirable are matters about which people disagree and no view can be proven to be correct. In a pluralistic society, entrenching a particular view about what is good does not reflect the predilections of all members of the community to which it is applied. Law becomes a vacuum that can be filled by whatever interest gains access to state power to achieve subjective preferences.<sup>6</sup>

One need not be a moral relativist or subjectivist to make this objection. It is one thing to believe in a moral code, and quite another to impose that code on other people who do not agree. Moral reasoning is harmless if it is personal, theoretical and unenforced. People can decide for themselves if they agree, and if not, no sanctions follow. In contrast, what is at stake in legal theories of moral justification is not truth but power. The search is for standards with which to coerce.<sup>7</sup> If those standards cannot be proven to be objectively valid, they are mere preferences and opinions, and have no legitimacy as a basis for coercive legal norms.

This claim, of course, is not new or novel.<sup>8</sup> For example, Richard Posner dismisses the work of legal philosophers when he writes:

[I]t would be a disaster if moral theorists succeeded in their implied aim of imposing a uniform morality on society. Of course, these theorists, in our society anyway, do not agree on what that morality should be.<sup>9</sup> ... [E]ven if I am wrong in thinking that there are no interesting moral universals, they would be unusable in moral argument if we could not determine what they are.<sup>10</sup>

6. *Ecolawgic*, *supra* note 1 at 109.

7. If you wish to develop legal norms with which I am not required to comply, that is no concern of mine.

8. “Even if one concedes that there are objective answers to the questions about the identification of the law, one could still maintain that objectivity about the content of the law is highly suspect. We may know for sure what the law is on a given issue, but whether it is right or wrong is something that we cannot objectively determine. Now, is this just the age-old worry about the objectivity of moral values? Not necessarily. There is a jurisprudential issue that has to be settled first. The issue is whether legal norms’ appraisals in terms of right or wrong necessarily reduce to moral worth. Can we simply avoid this question just by talking about the objectivity of values in general? After all, legal discourse, even if not reducible to moral values, is part of a larger frame of evaluative discourse in general; why not, then, simply discuss the objectivity of values?” Andrei Marmor, “An Essay on the Objectivity of Law” in Brian Bix, ed, *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998) 3 at 15 (reference omitted).

9. Richard Posner, “The Problematics of Moral and Legal Theory” (1998) 111 Harv L Rev 1637 at 1642.

10. *Ibid* at 1645.

MacLean appears to agree that instrumentalist policy choices and moral reasoning are, indeed, turtles all the way down. He suggests that the attempt to develop abstract principles “necessarily proceeds from unexamined presumptions about what is good, just, normal, and natural.”<sup>11</sup> He invokes the view of Stanley Fish that “neutral” principles reflect unacknowledged values and historical circumstances.<sup>12</sup>

## II. *Turtles all the way down, except for my turtle at the bottom*

It is easy to be blind to one's own preferences. While Posner dismisses legal theory as a source of universal morality, he has notoriously argued that legal rules and judgments should seek to achieve economic efficiency and maximize aggregate welfare.<sup>13</sup> However, economic efficiency and aggregate welfare are preferences too. In so doing, he assumes that his own normative preferences have inherent validity and ignores the value judgments inherent in them.

MacLean accuses me of an equivalent error, and further below I will accuse him likewise. In *Ecolawgic*, after I dismiss natural law and instrumentalist policy goals as inherently subjective and illegitimate, I then argue that the law should reflect the immutable features of ecosystems and markets, in which individuals are independent from the moral and instrumentalist preferences of their governments. In doing so, says MacLean, I am simply substituting my own version of good, moral or desirable. “[I]ndividual autonomy is not natural but rather historically contingent and normative.”<sup>14</sup> In other words, MacLean says, autonomy is a turtle too.

## III. *Two versions of autonomy*

### 1. *Autonomy in ecosystems*

An ecosystem is not a thing. It does not exist as a concrete entity. “Ecosystem” is a label for the dynamics that result when organisms interact with each other and their environment. Those dynamics occur in infinite variation, but always reflect the same logic:

[C]ompetition for scarce resources leads to natural selection, where those organisms better adapted to ecosystem conditions survive and reproduce, leading to evolutionary change. All participants are equally subject to their forces; systems do not play favourites.<sup>15</sup>

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11. MacLean, *supra* note 3 at 228.

12. Stanley Fish, *The Trouble With Principle* (Cambridge: Harvard University Press, 2001) at 6, quoted by MacLean, *ibid*.

13. See, e.g., Richard Posner, *Economic Analysis of Law*, 7th ed (New York: Wolters Kluwer, 2007).

14. MacLean, *supra* note 3 at 282.

15. *Ecolawgic*, *supra* note 1 at 18 [references omitted].

In ecosystems, the use of the word “autonomy” does not mean legally enforced liberty but the reverse: no externally imposed rules govern behaviour. In ecosystems unmanaged by people, organisms can succeed or fail, live or die, as their genetically determined physiology and behaviour allow. Every life feeds on the death of others, whether animal or plant, and those better adapted to their circumstances survive to reproduce. Organisms can do anything that their genes dictate, and their success or failure is the consequence that fuels evolution.

The behaviour and survival of individuals are the engines of natural selection. Individuals survive to reproduce or they die. Their aggregate success or failure determines the fate of species, but species do not compete collectively. Genetic mutation occurs within individual offspring and individual behaviour determines survival or death.<sup>16</sup> When an antelope is chased by a lion and plunges into a river to escape, that action allows the antelope to survive and thus to reproduce. The offspring may carry a genetic disposition to run into water when chased by predators. There are no committees of either antelopes or humans deciding how antelopes will behave. Autonomy in ecosystems is not a human creation. It is not based upon human history or culture and is not a human preference.

## 2. *Autonomy in markets*

A market is not a thing either. Nor is it a place. Markets, like ecosystems, do not exist as concrete entities. “Market” is a label for the dynamics that result when people exchange with each other. Bargains may be commercial in nature, where things are bought and sold, but they also occur in other facets of life. For example, in *Ecolawgic* I suggested that marriage is a kind of exchange that is made when people perceive themselves better off to enter into the bargain than not to.

MacLean says my claim that markets, like ecosystems, arise spontaneously is manifestly inaccurate.<sup>17</sup> He cites the Western Carbon cap-and-trade initiative as a market created by government, and thus concludes that markets are created by governments. This logic is faulty. That one can find a market created by a state does not lead to the conclusion that

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16. “To say that organisms compete for scarce resources is not to suggest that they are always engaged in direct physical struggle. Conflict between organisms can indeed be direct, violent and deadly, such as when predators consume prey. However, there are many ways to compete, and competition in ecosystems encompasses a diverse array of adaptations and strategies. Survival does not necessarily depend on being the largest, fastest or most ferocious, but on being effectively adapted to the requirements of the environment in which the organism lives. Relationships between organisms cover the spectrum between conflict and coexistence: predation, parasitism, symbiosis, mutual dependence and cooperation.” *Ecolawgic*, *supra* note 1 at 18-19 (references omitted).

17. MacLean, *supra* note 3 at 295.

markets must be created by states. Whether governments can indeed create<sup>18</sup> or facilitate markets does not answer the question whether markets arise without them.

MacLean says that state initiatives make modern economies complex. I do not doubt that laws and regulations facilitate and affect modern economies in many ways. Money, credit, executory contracts and so on no doubt affect the form of commercial transactions. States may create the infrastructure within which market transactions occur. As I said in *Ecolawgic*, "Laws and governments can make markets more stable and efficient, such as by enforcing contracts and creating a supply of money, but they create neither the activity of trading nor the market dynamics that the transactions create."<sup>19</sup> These matters do not speak to the question of whether people transact without governments. MacLean conceives of a market as something that is created first within which people then transact. However, a market is not a place or a legal structure but the dynamics of a collection of transactions. It does not exist before or independently of the transactions within it. The transactions make the market. Transactions are not created by governments but by the parties who enter into them.

Modern commercial markets reflect formalized systems of commerce. However, to see that markets arise spontaneously, imagine a small population of isolated people. To get what they want, they will trade with each other. They may barter, use a form of money or some other store of value. Their self-interest will motivate them to exchange things for other things, or for services from other people.

A hunter kills a deer. A woodworker makes a set of chairs. The hunter already has meat for the winter, and the woodworker already has chairs in her house. The result: a trade.<sup>20</sup>

In a different vein, consider the "market" for friends, tennis partners, or mates. Like any other scarce good, partners are subject to the dynamics of supply and demand. When people enter into a romantic relationship, an exchange takes place.<sup>21</sup> Romantic relationships are not commercial transactions but they are bargains in which people give things in exchange

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18. I will leave aside the question whether a cap-and-trade system really deserves to be called a market rather than a tax.

19. *Ecolawgic*, *supra* note 1 at 22.

20. *Ibid* at 21.

21. Show me unconditional love between two rational adults who have only recently met, and I will show you two people who are lying either to you or to themselves.

for what they get back.<sup>22</sup> The features and benefits that are exchanged (looks, personality, status, wealth, stability, belonging, security, emotional support and so on) are no less subject to supply and demand than the other myriad wants that people seek to satisfy in commercial transactions. Like markets for goods, the market for mates does not depend upon the state.

People transact whether they are facilitated by governments or not. The evidence is everywhere. If it were not so, human beings would not have bartered long before there were governments to create money and enforce contracts.<sup>23</sup> During Prohibition, no alcohol would have been produced and sold.<sup>24</sup> Citizens of the Soviet Union would not have exchanged goods.<sup>25</sup> Today there would be no drug trade, no black market and no smuggling. Cigarettes would not be used as currency inside jails.<sup>26</sup> People would not date, hold garage sales or trade hockey cards. There would be no Bitcoin or barter. Try prohibiting people from transacting and see that they will transact anyway. They will do so because they perceive themselves as better off. Sometimes the benefit is concrete and sometimes it is ethereal. The perception of benefit is personal and subjective.

Ecosystems and markets share many features<sup>27</sup> but they differ in one important respect. Violence plays an important role in ecosystems but is not a part of voluntary market exchange. Ecosystems are arenas for mortal

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22. For a taste of the literature in this area, see Gilles Saint-Paul, "Genes, Legitimacy and Hypergamy: Another Look at the Economics of Marriage" (2009) IZA Discussion Paper No 4456, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1489279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1489279)>.

23. See, e.g., Peter Temin, "Mediterranean Trade in Biblical Times" (2003) MIT Department of Economics Working Paper No 03-12, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=386960](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=386960)>.

24. Clark Warburton, *The Economic Results of Prohibition* (New York: Columbia University Press, 1932).

25. "While the Soviet Union's legislators and theorists ponder the vistas of a revolutionary economic-reform program, the people of this country live like hunter-gatherers in a real-world economy that is half desert, half medieval bazaar. The official structures of the Bolshevik experiment are collapsing with such finality, the state-run shops are so barren, that nearly everyone now must participate in the immense 'shadow economy' of speculation and petty bribery, barter deals and black-marketeers. President Mikhail Gorbachev has proposed sweeping economic change to a form of market economy—a measure the Supreme Soviet is scheduled to vote on Monday. But that's the future; for today, life for the average Soviet citizen is a struggle for survival. The demands of the 'shadow economy' trace a Soviet lifetime. A child comes into the world with the mother paying a 200-ruble bribe to the maternity nurse for a sterile needle and an anesthetic. When a Soviet citizen dies, relatives are overcome not only with grief but with the knowledge that they must pay thousands of rubles in bribes to the mortician, the coffin maker and the gravedigger." David Remnick, "Soviet Union's 'Shadow Economy'—Bribery, Barter, Black-Market Deals are the Facts of Life," *Washington Post* (22 September 1990).

26. Keri Blakinger, "Ramen is surpassing cigarettes as the hottest prison currency," *New York Daily News* (23 August 2016).

27. *Ecolawgic*, *supra* note 1 at 25-35.

combat.<sup>28</sup> Lions eat antelopes if they can catch them. Nothing prevents taking a dead antelope from a lion except the lion's response. There are no restrictions on survival strategies, and organisms do not respect the interests, habitats or lives of other organisms. Markets, in contrast, proceed upon the judgment of the transacting parties that they are better off to trade than to fight. The hunter did not shoot the woodworker to get chairs, and the woodworker traded for meat instead of stealing it. They chose to trade because it made them better off than fighting. The reasons are their own. Perhaps they were friends, colleagues or allies. Perhaps they believed that harming other people is wrong. Perhaps they hoped to have an ongoing trading relationship. Perhaps fighting carried risks that were too high and they feared injury or retribution. Perhaps trading was less work than fighting. For whatever reason, they chose to trade. This choice is not universal. People have traded throughout human history, but they have also fought. I do not maintain that trading is any more "natural" or inbred than fighting, but neither is it less so. When people choose to fight, they are no longer part of a market. Markets are like ecosystems with the violence removed.<sup>29</sup> They are the kinder, gentler version of ecosystems.

In both ecosystems and markets, participants are "autonomous" but in different respects. In ecosystems, organisms follow their genetic dispositions. If they are adapted to eat antelopes, they are free to catch them if they can. If they are fleet-footed antelopes, they are free to run away. But antelopes have no right not to be caught and eaten. In markets, human beings pursue their interests without coercion. They decide to buy or sell which goods or services and at what quantity and price. Taking goods by force is not a market transaction. Markets arise spontaneously when people voluntarily agree to trade without the threat of force and to honour bargains. No doubt this cooperation can be precarious because it depends

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28. "The forest, as usual, is quiet apart from the muted sounds of rustling leaves, buzzing insects, and a few chirping birds. Suddenly, pandemonium breaks out as three chimpanzees tear through the trees high above the forest floor, leaping spectacularly from branch to branch, hair bristling, screaming wildly as they chase a group of colobus monkeys at breakneck speed. In less than a minute, an experienced older chimp makes a magnificent jump, catches a terrified monkey that was heading his way, and dashes its brains out against a tree. The hunt is over as suddenly as it started. As the victor rips his prey into pieces and starts to consume the flesh, other chimps hoot with excitement. Any humans watching, however, are likely to be shocked. Observing chimps can be disturbing, not just because of the violence, but also because we prefer to think of them as gentle, intelligent cousins. Sometimes they seem mirrors of our better selves, but when hunting, chimps reflect humanity's darker tendencies in their craving for flesh, their capacity for violence, and even their lethal use of teamwork and strategy." Daniel Lieberman, *The Story of the Human Body: Evolution, Health and Disease* (New York: Pantheon Books, 2013) at 25-26.

29. "Serious sport...is war minus the shooting." George Orwell, "The Sporting Spirit" in *Shooting an Elephant and Other Essays* (New York: Harcourt, Brace & World, 1945) at 153. Markets are ecosystems minus the violence.

on continuing restraint from both parties and their ongoing judgment that they are better off with voluntary trades in the absence of coercion. Laws can protect the voluntariness of market transactions by prohibiting the use of force. In essence, both groups of participants are autonomous within the rules of the system in which they are participating.

#### IV. *MacLean's turtles*

Before I address MacLean's claim that the neutral path I describe in *Ecolawgic* is itself a turtle, I will first get MacLean's own turtles out of the way.

##### 1. *Beneficial markets, just outcomes, market failures*

MacLean's first turtle is a preference for particular kinds of economic results. He dismisses the appropriateness of "free markets" because he perceives them to be inferior vehicles to a just world. He suggests that the notion of an unencumbered market obscures government's ability to regulate markets to achieve desirable distributions and optimal results.<sup>30</sup> He cites a propensity for "catastrophic market failures"<sup>31</sup> and the failure of markets to deliver their "core promise of increasing economic growth."<sup>32</sup>

If I were a market economist, I would respond to these claims by challenging his facts and conclusions. I would point out that the markets he is assessing are hardly "free" but instead heavily regulated. Truly competitive markets are rare in the real world. Whether catastrophic market failures arise as a result of not enough or too much regulation is a matter of dispute. For example, research has attributed the 2008 mortgage crisis in the United States in part to regulation that incentivized banks to extend loans to poorly qualified buyers.<sup>33</sup> I would also cite numerous economic studies that show that unregulated markets do indeed maximize the size of the economic pie.<sup>34</sup> Even when the fortunes of those at the top and the bottom diverge, a rising tide lifts all boats. If I were an economist, I would advocate for free markets because of the benefits they bring.

However, I am neither an economist nor an instrumentalist. Unlike many economists, my rationale for markets is not the benefits that they provide. Markets do not have a purpose. They are merely the dynamics of a collection of voluntary transactions. Whatever results they produce is what

30. MacLean, *supra* note 3 at 297.

31. *Ibid* at 299.

32. *Ibid*.

33. For example, see Sumit Agarwal et al, "Did the Community Reinvestment Act (CRA) Lead to Risky Lending?" (2012) National Bureau of Economic Research Working Paper No 18609, online: <<http://www.nber.org/papers/w18609>>.

34. I will not attempt to resolve this dispute about economic theory in a few lines of a law review article.

you get. Those results may be advantageous or detrimental to the financial interests of certain players but they are not incorrect. “Catastrophic market failure” is a label for an outcome that you do not like. For example, over time in a tight market with limited supply, buyers may pay increasingly higher prices for homes and create a bubble that eventually bursts when prices fall precipitously. Homeowners then may hold property that is worth less than the mortgage debt they owe. That may be a bad outcome for many of the people but it is not a market failure. It is the systemic result of many transactions for homes over a period of time. Prices go up and down, sometimes gradually and sometimes suddenly. The supply of housing changes and so does demand, sometimes in lockstep and sometimes in opposite directions. Interest rates and inflation reflect economic conditions. MacLean wants markets that are stable, growing modestly and producing economic gains across a broad social spectrum, but that is not always the state that they are in. His interest in “distributive consequences and the justice of resulting outcomes” is a subjective preference for a social order in which economic gains are distributed in accordance with a particular set of ideological sensibilities. Markets reflect aggregate results of multiple transactions, and each of those transactions expresses the individual choices of their participants. The aggregate results are what they are. A desire to fashion other results is just a preference.

## 2. *Environmental management*

MacLean's other turtle is a preference for a system of environmental management in which decisions can be made one situation at a time, so that regulators can weigh costs and benefits and pursue indeterminate and variable policy objectives.<sup>35</sup> Such objectives are the height of discretionary value judgments.<sup>36</sup> The preferences embedded in such decisions are rarely identified or acknowledged much less justified. As I write in *Ecolawgic*, modern environmental management is the archetype of instrumentalist governance.<sup>37</sup> MacLean asserts that environmental law must be indeterminate and discretionary but does not provide any legitimate reasons why it must be so.

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35. MacLean, *supra* note 3 at 305.

36. MacLean complains that in *Ecolawgic* I do not address political rent-seeking (*ibid* at 308 note 166). Political rent-seeking, also known as regulatory capture, occurs when companies influence regulatory action in their favour. Discretionary regulatory action makes regulatory capture possible. In a system where the state does not have the role of making discretionary value judgments, there is nothing to capture. Where a legal system treats all participants equally, subjecting all to the same rules, there is no opportunity for regulatory capture and no reason to pursue it.

37. *Ecolawgic*, *supra* note 1 at 77.

V. *Only two choices, only one legitimate rule*

There are only two models for legal governance and only one legitimate rule. The logic is as follows:

1. In the wild, organisms compete for scarce resources. Those organisms better adapted to conditions survive and reproduce. Their interactions constitute ecosystems. No legal rules govern behaviour and might is right.
2. Human beings trade spontaneously. Parties enter into transactions when they perceive themselves as better off to trade than to fight. Their transactions constitute markets.
3. Moral values and policy goals are preferences whose inherent validity cannot be established. They are turtles all the way down. Therefore laws based upon those preferences lack legitimacy.
4. When governments use might to impose laws and policies that are illegitimate, they unintentionally imitate ecosystems, where might is right. Political constituencies use whatever means necessary to impose their preferences, and their opponents use whatever means necessary to resist. They are “autonomous” in the ecosystem sense: there are no inherently valid restrictions on behaviour. The result is a social order of division and conflict.
5. The alternative is to model human governance on the other system that exists independently of state preference: markets. If the model for human governance is markets, interactions between people are voluntary. People are “autonomous” in the market sense: they may pursue their own interests without coercion. Instead of imposing illegitimate rules and policies, the state uses force only to prohibit people from imposing force on each other. A plethora of sub-rules follow as corollaries of the rule against coercion: property, consent, criminal offences that punish violence and so on.
6. There is no third choice. Coercion is not right or wrong depending upon the goals being pursued since those goals are merely preferences. Their advocates cannot establish that their goals have inherent validity to those who do not agree. Therefore, giving priority to those objectives is to assert that might is right. If might is right, we are back to ecosystems, where any and all actions are legitimate.
7. If might is right, anything goes, and the model is ecosystems. If might is not right, force is prohibited, and the model is markets. Choose one and all else follows.

VI. *The only legitimate rule and the other rules that follow*

If the model is markets, other substantive rules follow as corollaries of the rule that force between people is prohibited. I will not here attempt to exhaustively identify the legal regime that results<sup>38</sup> but merely provide some examples of rules that necessarily arise if people are autonomous in the market sense. For what this kind of autonomy might mean in the context of environmental protection and market competitiveness, I refer you to the pages of *Ecolawgic*.<sup>39</sup>

When I claim that a prohibition on force is the only legitimate rule, I mean the only substantive rule to govern relations between competent adults. No doubt the administration of a legal system, even a minimalist one, would require other kinds of laws to function. Constitutional rules, court administration, the conduct of elections and procedures to bring legal proceedings are a few of the other categories that would be necessary in order to give effect to the general rule.

1. *Property*

MacLean maintains that property is a product of history and law.<sup>40</sup> He quotes Bentham, who wrote, "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases."<sup>41</sup> No doubt the state of property in the law as it presently exists is indeed a product of history and legal evolution. But if the model is markets, the concept of property must also exist as a matter of logic. If force between people is prohibited then property is inevitable.

A monkey has a banana. If he is lucky, he will eat the banana before a bigger monkey takes it away. The jungle has no prohibitions on the use of force, so the monkey with the banana holds it for only as long as he can resist the encroachments of other hungry beasts. The monkey has a banana but he has no property. The story changes if the monkey is a person and coercion is prohibited. Taking the banana by force then constitutes a

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38. I observe in *Ecolawgic* that this rule happens to be consistent with much of the common law. "The right to personal autonomy has a long and rich history in common law jurisdictions. Self-ownership is the conceptual foundation of negative legal rights that are found at the core of the common law system. Many existing common law causes of action reflect the principle of autonomy and self-ownership, including tort causes of action in battery, false imprisonment, trespass, nuisance and negligence; the rules of contract; rights of due process in criminal law; and so on." *Ecolawgic*, *supra* note 1 at 55. However, the legitimacy of the rule is not based upon its status in the common law.

39. Perhaps it will also feature in a future part of this dialogue.

40. MacLean, *supra* note 3 at 296.

41. Jeremy Bentham, *Theory of Legislation* (Boston: Weeks, Jordan & Company, 1840), quoted in Joseph William Singer, *No Freedom Without Regulation: The Hidden Lessons of the Subprime Crisis* (London: Yale University Press, 2015) at 15, quoted by MacLean, *ibid*.

wrong. Therefore, the holder of the banana must have the right to exclude others from it. That right is called property.

There is nothing particularly distinctive about property as a right, except that it relates to things and land. The right not to be touched, for example, operates much the same way as a property right, except that it applies to one's own body instead of to a thing. Both provide the ability to prevent others from imposing their will. The minutiae of property law setting out tests for when property will be recognized and enforced may not be self-evident and thus need to be worked out within each legal regime. I do not maintain that the rule against perpetuities and statutory provisions about intestate succession are "natural." These details are indeed products of legal culture. But the existence of property rights must follow from a general rule prohibiting coercion. If it does not, the general rule is not what it purports to be.

When people trade, they recognize the property interest held by the other party. It is that interest that they wish to obtain. When the woodworker trades chairs for the hunter's meat, she trades "her" chairs for "his" meat. The trade would not occur without a mutual understanding of the possession that both hold over their respective stuff. Sometimes those interests are recognized and protected by the law, which according to Bentham created the property. However, since markets arise even where no property is legally recognized, the notion of property must be prior to the law. Above I gave examples of markets that have arisen where no legal regime has protected property rights: prehistorical trade, alcohol sales during Prohibition, black markets in the Soviet Union, the modern day drug trade, smuggling of illicit goods, and the internal markets of prisons. Since trading occurs even in the absence of an approving legal regime, the notion of property must exist independently as well.

Property rights do not depend on the argument that they are inherently good or morally righteous. They are not legitimate because they maximize economic welfare, create incentives for self-interested stewardship or democratize wealth. These are preferences. I do not seek to defend the particularities of the law of property as it presently exists in any particular jurisdiction. The case is merely that property is a feature of market systems that arise independently of state design.

If the model for human governance is ecosystems, might is right, anything goes and property is no more legitimate than any other notion. If the model is markets, people are autonomous in the market sense. Markets consist of trades and trades exchange property. Property protects people from the force of other people and the state. If coercion is prohibited, then property must exist.

## 2. *Consent*

Autonomy in the market sense means to be able to pursue your own interests and control your own choices without coercion. Consent is part and parcel of autonomy. Without the ability to consent, no trades can be made. Without trades, no markets exist. If one cannot consent to be touched, to give up property, to make bargains, to mate, to arm wrestle, to trade chairs for meat, to sell labour for money, and so on, then one is not autonomous.

[C]onsent is not an example of a normative power at all. What is fundamental to my autonomy rights is that I have control over who interacts with my body in certain ways. It isn't accurate to think of the right as a prohibition on boundary crossing to which we add a desirable normative power of consent. The ability to consent is part and parcel of what it is to be free; I get to decide, within various limits, what happens to my body. And remember, I can always change my mind; I always remain in control.<sup>42</sup>

An exchange can be pursuant to an agreement that is less formal than a "contract" but the terms of the consent matter. They demarcate the boundary between voluntary action and coercion. If two people agree to wrestle but one punches the other in the face, the consent does not apply. If two people agree to trade meat for chairs but one takes the other's horse instead, the taking is coercive.

## 3. *Other corollaries*

If force is prohibited, then corollaries are laws that protect people from having force imposed upon them. Laws apply the force of the state to prevent or punish the application of force. A criminal law that prohibits assault is an extension of the general rule. A tax to finance the police department is legitimate if its purpose is to investigate and prosecute violent crimes. Traffic laws prevent people from running each other over. Civil liability compensates for physical injuries caused by the force of others.

Illegitimate laws use state coercion to seek other ends such as enforcing moral standards, pursuing social goals or saving people from themselves. A criminal law that prohibits the use of drugs uses state force to prevent an activity in which there is no coercion. A tax to fund the armed forces

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42. Liam Murphy, "Private Law and Public Illusion, Part 1: Artificial Morality" (Frankfurt Lectures delivered at Goethe University, Frankfurt, 2 May 2016) at 21, online: <<http://www.normativeorders.net/en/events/frankfurt-lectures/48-veranstaltungen/frankfurt-lectures/4662-private-law-and-public-illusion-eng>> and <[http://www.law.nyu.edu/sites/default/files/upload\\_documents/LectureOneArtificialMorality\\_%20Murphy.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/LectureOneArtificialMorality_%20Murphy.pdf)>.

to protect the peace may be legitimate, but one to take wealth from Peter to give to Paul is not. The legal regimes of modern administrative states consist largely of instrumentalist laws and policies that are inconsistent with the general rule, including tax laws, economic development programs, bankruptcy, patent regimes, mandatory government-run pension plans and MacLean's version of environmental regulation, in which each decision turns on a political determination of the values to be applied.

*Conclusion: Ecosystems or markets all the way down*

It is either ecosystems or markets. Either might is right or it is not. If it is, then human society is subject to the law of the jungle where people are at liberty to fight like animals if they choose to do so. If it is not, then human society is a marketplace where people may enter into transactions voluntarily and the state may justifiably use force only to prevent or punish the application of force.

There is no third choice. Some might insist that coercion is not categorically wrong but that it can be right or wrong depending upon the other goals to be pursued. Those goals are merely preferences. They are turtles all the way down. I do not maintain that other rules will not be passed and enforced using the established machinery of government but only that they have no claim to legitimacy, any more than other rules that might have been chosen instead. If force is used to pursue those preferences, why would others not use force to resist? Such a choice results in a free-for-all. If state force is right only because it cannot be resisted, that means that might is right. The administrative welfare state prevails not because it is justified morally or socially but because it has managed to secure a monopoly on violence. The imposition of government preferences is an invitation to those opposed to an arbitrary policy agenda to take up force against it.

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