PROPERTY, PATENTS AND ETHICS: A COMMENT ON WENDY ADAMS’ “THE MYTH OF ETHICAL NEUTRALITY”

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Professor Adams’ article addresses the relation between ethics and patents — the nexus, one might say, between the ethics of patentability and the legality of patentability. She explores that relation through the problem of the patentability of higher life forms. The question she raises is whether specifically legal conclusions about the patentability of higher life forms, such as the mouse in the Harvard College case, are — or can be — ethically neutral.

Adams answers with a resounding “No.” Her article is a challenge to what she calls the fallacy of the line of demarcation between ethics and patents in relation to biotechnology. In essence, her view is that the Patent Act is not ethically neutral, and that this absence of neutrality is a compelling reason to address those ethical issues not outside the patent system through collateral legislation, as a matter of the regulation of our treatment of animals, but rather within the patent system itself, as a matter of the criteria for patentability. In other words, the proposition that the Patent Act is not ethically neutral gives rise to the proposition that ethical review should be an additional threshold criterion of patentability under the Patent Act.

Strictly speaking, for the purposes of her article, Adams declines to take issue with the result reached by either the majority or the dissent in Harvard College. She in fact fundamentally disagrees with both as regards the proper way in which the question of the patentability of higher life forms should be addressed. This is

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because her article challenges the position, which in her view is shared by both majority and dissent, that ethical concerns pertinent to the patenting of life are beyond the scope of the narrowly legal issue of patentability.

In Adams' view, this so-called “narrow” issue is not nearly as narrow as it appears. Her point is that one can insist that the specifically legal or juridical question of patentability is a narrow one only if one adheres to the view that there is a clear demarcation between ethics and law, between the ethics of patentability and the legality of patentability. And it is precisely this stubborn illusion of a clear demarcation between ethics and patents that Adams takes as her target. Her point is that once we see that illusion for what it is, we will no longer be able to deceive ourselves that decisions about patentability are exclusively or narrowly legal. Instead of making effectively ethical decisions without acknowledging what we are doing, we should integrate the unacknowledged ethical dimensions of patentability into our reasoning.

I accept the proposition that the patent system is not ethically neutral. I have more difficulty, however, with the conclusion that the proposition that the patent system is not neutral tells us anything either about whether we should include ethical review as a threshold criterion of patentability under the Patent Act, or about whether higher life forms should be patentable. It is possible to acknowledge the ethics of patentability, and yet to deny both that ethical review should be a criterion of patentability, and that such review, were it to be undertaken, would reach the conclusion that higher life forms should not be patentable.

Permit me to elaborate that view in the following manner. The concept of property necessarily entails a distinction between subjects and objects of ownership, persons and things, owning and owned entities. Once we locate ourselves within the basic structure framed by this fundamental distinction, we can, of course, ask all kinds of questions. We can ask questions, for example, about whether any given person owns any given thing. Assume, for example, that a person has been chasing a wild fox for quite some time, and that having tired out the fox, she is about to capture it. Assume, however, that just as she is about to capture the fox, just as, that is, she has placed herself within a reasonable prospect of capture, another person — call him a “saucy intruder” — takes advantage of the situation and himself captures the already tired
An ensuing dispute between pursuer and intruder is not at all difficult to imagine. The original pursuer would seek to recover the fox from the intruder, and in order to determine whether the pursuer would succeed in her claim, we would have to raise and respond to a question about the point at which a person in pursuit of a wild animal has managed to create a property right in respect of that animal. The law of first possession would, in this instance, provide us with answers, even if the concept of possession is not always transparent. But regardless of what the answer is or who we decide is entitled to the fox, the fact is that we have posed a question about who owns a thing, in a context that takes for granted that the original pursuer and the saucy intruder are both persons, and that the object of their dispute, the fox, is a thing. Our question, that is, falls squarely within the fundamental structure of the distinction between persons and things.

Questions about whether any given person owns any given thing are not the only kind of questions we can ask. We can also ask questions, for example, about whether any given entity is a person or a thing (or perhaps neither). More precisely, we can ask questions about whether any given entity is the kind of entity that owns, the kind of entity that can be owned, or perhaps even the kind of entity that is neither. Here the question is not “who owns that thing?” but rather “is that a thing — or, more precisely, is that entity the kind of entity that can be — or ought to be — owned?” In International News Service v. Associated Press, for example, Justice Brandeis held (dissenting) that news is not the kind of thing that is subject to ownership at common law, and that the legislature is best placed to decide whether news should be eligible for proprietary protection of any kind.

Professor Adams is raising a question not about ownership itself, but about the legitimate objects of ownership. She is in fact saying that decisions about what we put into the category of persons, and what we put into the category of things, are not ethically neutral. More specifically, she is arguing that decisions about patentability under the aegis of the Patent Act are not ethically neutral. They only appear neutral because we are accustomed to think of the Patent Act as a set of rules narrowly concerned with technological

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4. Those are the facts in the classic first possession case of Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). I have added the detail that the fox is a tired fox. The phrase "saucy intruder" is from Livingston J.'s dissent.

5. 248 U.S. 215 (1918).
innovation. Patentability thus appears solely as a matter of inventiveness, and not as an ethical matter. In my view, Adams is absolutely correct in her insistence that considerations outside the pure logic of innovation are determinative of patentability. Persons, for example, are not patentable. But persons would indeed be patentable if the logic of innovation were all there is to the question of patentability. So the Patent Act, though largely determined by the logic of innovation, is not exclusively determined by that logic. The fact that persons are not patentable regardless of inventiveness is sufficient reason to conclude that the Patent Act is not about innovation per se but about — if I may put it this way — innovation subject to the requirements of Right; that is, innovation subject to respect for persons as persons, as unownable, as entities not legitimately subject to ownership.

There can be no doubt that the decision to exclude persons from the ambit of patentability and the decision whether to include animals within that ambit are both ethical decisions, at least where "ethical" — to follow Adams’ usage — means determined in accordance with considerations external to the pure logic of innovation. Nothing in the logic of innovation tells us that persons are not patentable, and nothing in the logic of innovation tells us that animals are not persons. Yet precisely because both decisions are external to the logic of innovation, it seems only natural to suggest, contrary to Adams’ view, that they should be left outside the Patent Act, which is an Act about innovation. Of course, it is equally possible to suggest, as does Adams, that the decisions should indeed form part of the Patent Act, which is an Act about innovation, yet subject to “ethical” boundaries about the kinds of things that may be legitimately subject to that logic. Regardless of which is the superior arrangement, however, it is clear that to observe that the Patent Act is an Act about innovation subject to the requirements of Right is by no means to argue the quite different proposition that ethical review should be a threshold criterion of patentability under the Patent Act. The basic proposition that decisions about patentability have ethical dimensions tells us absolutely nothing about where and how those dimensions should be dealt with.

The exclusion of persons from the ambit of patentability as a matter of ethics may be grasped in terms of the normative presuppositions embedded in s. 7 of the Charter. Persons are not patentable because patenting them would be inconsistent with their
dignity as persons. Similarly, the inclusion of animals within the ambit of patentability as a matter of ethics may be grasped in terms of the normative presuppositions embedded in the fact that animals are property. Animals are things, legally devoid of the dignity that would exclude them from the purview of ownership. Thus, just as the non-patentability of persons as an ethical matter is presupposed in s. 7 of the Charter, so is the patentability of higher life forms as an ethical matter presupposed in the fact that animals are property. To be sure, this does not mean that either presupposition is unchallengeable. But it does mean that ethical review of those presuppositions — whatever such review may entail — necessitates a mode of inquiry that far transcends the narrow confines of patentability under the Patent Act. The root of the problem — if indeed we find ourselves with a problem at all — is that animals are property. Patenting them is a symptom, not a cause, a surface phenomenon that manifests, rather than defines, the issues of which Adams elegantly reminds us. My own view is that nothing is to be gained by placing these questions and issues within the Patent Act. In fact, my sense is that acknowledgement of the difference between animals and mere objects is likely to develop most clearly and forcefully outside the confines of that statute.

6. Of course, the majority's judgment in Harvard College holds that higher life forms are not patentable in Canada. As Adams correctly points out, however, the reasoning here is not that animals are not things but rather that animals are not a "composition of matter" under the Patent Act. That is, the majority's decision is narrowly legal. The decision does not exclude animals from the ambit of patentability on "ethical" grounds.
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