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—Preamble, NLG Constitution

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NOTES

1. In using the term "lawyer" in this essay, I also mean to include other types of legal advocates such as paralegals and policy analysts. I use the term lawyer as shorthand for legal advocate, partially because it is shorter and simpler and partially because I myself am a lawyer and address the issues in the essay from my own perspective.
2. WALT WHITMAN, LEAVES OF GRASS vi, viii (1855).
3. There have also been law review articles written about Reznikoff's poetry, *e.g.* Benjamin Watson, *Reznikoff's* Testimony, 29 LEGAL STUDIES FORUM 1 (2005).
4. MARTÍN ESPADA, *DSS Dream*, in CITY OF COUGHING AND DEAD RADIATORS(New York: WW. Norton and Co., 1993).
5. MARTÍN ESPADA, *Zapata's Disciple and Perfect Brie*, in ZAPATA'S DISCIPLE 8 (Cambridge, MA: South End Press, 1998).
6. Martín Espada, E-mail to the author, March 27, 2008.
7. *Id.*
8. *Id.*
9. MARTÍN ESPADA, *Heart of Hunger*, in THE IMMIGRANT ICEBOY'S BOLERO (1982)
10. MARTÍN ESPADA, *Trumpets from the Islands of Their Eviction*, in TRUMPETS FROM THE ISLANDS OF THEIR EVICTION (1987)
11. MARTÍN ESPADA, *Federico's Ghost*, in REBELLION IS THE CIRCLE OF A LOVER'S HANDS (1990)
12. MARTÍN ESPADA, *Poetry Like Bread*, in ZAPATA'S DISCIPLE 105 (1998).
13. Martín Espada, E-mail to the author, March 27, 2008.
14. CHARLES REZNIKOFF, TESTIMONY (New York: New Directions, 1965) 33.
15. Martín Espada, *Poetry Like Bread*, in ZAPATA'S DISCIPLE 104-5 (Cambridge, MA: South End Press, 1998).
16. Martín Espada, E-mail to the author, March 27, 2008.
17. *Id.*
18. *Id.*
19. MARTÍN ESPADA, *supra* note 12, at 101.
20. MARTÍN ESPADA, *Mi Vida: Wings of Fright,* in CITY OF COUGHING AND DEAD RADIATORS (New York: WW. Norton and Co., 1993).
21. MARTÍN ESPADA, *City of Coughing and Dead Radiators*, in CITY OF COUGHING AND DEAD RADIATORS (New York: WW. Norton and Co., 1993).
22. CHARLES REZNIKOFF, *supra* note 14, at 13.
23. Martín Espada, E-mail to the author, March 27, 2008.
24. MARTÍN ESPADA, *The Community College Revises its Curriculum in Response to Changing Demographics*, in A MAYAN ASTRONOMER IN HELL'S KITCHEN (New York: WW. Norton and Co., 2000).
25. My use of the term "almost found poems" is inspired by a comment in Maureen Bloomfield's contributor notes in BEST AMERICAN POETRY 2005, (David Lehman, ed ., 2005), in which she refers to her poem "The Catholic Encyclopedia" as "almost a found poem" because it was so heavily based on a book by the same title.
26. JACOB A. RIIS, HOW THE OTHER HALF LIVES (1890).

STEVEN A. REISLER

TEACHING THE COMMONS

It has been a long time since the days of the 17th Century True Levelers and Diggers.[1] Three and a half centuries later, "the commons" has made a comeback as an alternative to current social, political and economic systems. A quick web search of "the commons" produces several million hits world-wide.

Nevertheless, the modern notion of the commons is fractured. It has split into movements and theories ranging from issues of energy resource allocation to organic farming to economic and political localism to computer software. Superficially, the various commons movements seem to have little in common, and the movements' leaders have even less intercourse with each other.

Within the legal domain, the notion of the commons runs mostly underground, although it is a notion that bubbles up more and more frequently in mainstream intellectual property litigation. The commons is otherwise practically invisible in the civil law courts, especially in that collection of jurisprudence that we know, perhaps ironically, as "the common law." Judging from what is presented to lawyers (and judges) at most law-and-technology seminars oriented toward members of the bar, one would have to assume that there simply are no viable alternatives to the status quo and that the proprietary rights of acquisition and ownership are the *sine qua non* of all human intercourse. The dominant concept of American civil law is that everything is based on property rights, everything can be bought, and it is the job of the legal system to exalt and protect these basic property rights.[2] Indeed, it was no accident that *individual rights and liberties* had to be appended to the U.S. Constitution as the first ten amendments years after *property and commercial rights,* including that of institutional slavery, had been enshrined in the original document.[3]

Although the primary function of the court system is to apply and interpret the law, most attorneys recognize that judicial interpretation—particularly at the level of the state supreme courts and the federal courts (the so-called "courts of record")—is as much about making the law as it is about applying it. When it comes to fundamental questions of property rights versus the rights of the commons, the very nature of the judicial system favors the former and disfavors the latter. The reasons for this are three.

First, judges who are appointed to office are usually vetted to insure that they subscribe to judicial orthodoxy and "mainstream" judicial thinking. Candidates for judicial office are typically "screened" by committees of the

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state bar associations or the American Bar Association which organizations are themselves comprised of attorneys who, in the main, have strong interests in maintaining the status quo.[4] During the Bush administration, the Federalist Society, a quasi-political/legal organization with a distinctly reactionary bent, has also played a major role in the recruiting, vetting and selection of federal judges.[5]

Second, except for the specialized judges of the patent and tax courts and certain administrative law courts, judges are usually generalists who rely on the lawyers who appear before them to "educate" the courts about the facts and the issues. Especially at the level of the highest "law making" courts of record, simple economic factors dictate that major property and commercial interests employ the majority of the lawyers who appear in these courts. Thus, the reality of the judges' "education" about property rights versus the rights of the commons is that their education lies in the hands of those who own the most and who would least want to consider the concept of the commons. This is a self-reinforcing system.

Third, federal judges are always political appointments; and higher level state judges (although they usually stand for election) are (at least initially) frequently appointed to the bench. Appointment to significant judicial office being thus essentially political, it is natural that all the forces of property and influence bear as heavily on the selection of the judiciary as on the selection of political office holders. This tendency has been the historical rule and, if anything, the tendency is strengthening in modern times.

Nevertheless, compared to the lobbyist-encumbered executive and legislative branches of federal and state government of recent times, the court system still offers *a reasonable opportunity* to press rational arguments on behalf of community interests rather than just arguments of political or economic expediency on behalf of the privileged few.

Although lawyers typically think of "cases" as the vehicle for bringing forward new ideas to be tested by the judiciary (such as happened with the civil rights litigation of the 1950s and '60s), good case decisions can only grow where there is a predisposition, a pre-litigation preparation and fertilization of the soil, if you will, so that otherwise novel concepts have something to take root in. Today, commons movements outside the legal system are making some headway in creating a new social consciousness of their causes. But if lawyers and judges are not also educated—that is, if they are not fundamentally grounded in the concepts of true "common law" —then the extra-legal commons movements will get short shrift in one of the forums that matters the most, the courts, in which case the commons projects will inevitably founder.

What is needed, therefore, is a program for teaching the commons to the lawyers at the level of the law schools themselves. Teaching the commons at

the law school level will encompass the practicing attorneys and, as a subset, those who eventually become judges.

There already are individual classes offered at different law schools in the US that deal with specific aspects of the commons. For example, at Stanford University, Professor Lawrence Lessig teaches classes about common culture and copyright and has founded the Center for Internet and Society. The purpose of the CIS is to bring together "scholars, academics, legislators, students, programmers, security researchers, and scientists to study the interaction of new technologies and the law and to examine how the synergy between the two can either promote or harm public goods like free speech, privacy, public commons, diversity, and scientific inquiry." Stanford's Center for Law and the Biosciences "promotes research and public discourse on the ethical, legal, scientific, economic, and social implications of accelerated technological change."

Columbia University's Eben Moglen teaches law students about law and the internet and, in affiliation with the Software Freedom Law Foundation, provides "legal representation and other law-related services to protect and advance Free and Open Source Software (FOSS)."

At Duke University Law School, the Center for the Study of the Public Domain has created a program designed to "promote research and scholarship on the contributions of the public domain to speech, culture, science and innovation."

Many university law schools host similar courses and centers. Some, to a greater or lesser degree, are programs more similar to the Shidler Center for Law Commerce & Technology at the University of Washington in Seattle. The Shidler Center, "in collaboration with local leaders," focuses on identifying and analyzing "the impact of technological change on law, and examines the roles of innovation, incentives and competition in transforming *domestic and global markets and legal institutions*."[6]

There are many such programs in American law schools and more are on the way because there is bubbling up from the bottom, if not from the courts or the established bar, a renascent interest in "commons" legal issues. What is lacking, however, is an overarching system of instruction, a *curriculum* that integrates the concept of the commons as a coherent system that encompasses all of its facets.

What might such a curriculum look like?

An overview of social, economic and political history would be the logical starting point. The history would briefly review early conflict between migratory pastoral and static agrarian societies with their respective needs for open grazing lands or fenced farmland. The historical overview would then

stream through the advent of feudalism to early industrialization and capitalism, the enclosure of the agricultural commons and the True Levelers and Diggers mentioned at the beginning of this article. The foundational studies need not be Euro-centric because the history of the commons reaches across the continents, including the Iroquois nations in the Americas[7] and the Mongol pastoral culture that expanded into and, for a period of time, dominated the more agrarian Chinese and Central Asian cultures of the 13th Century. To some extent, the Boxer Rebellion in China also manifested strains of "the commons" as the population rebelled against the oppression of western colonization.[8] Eventually, an historical introduction to the commons would present students with fresh, unadulterated perspectives about the truly revolutionary and communal aspects of the French Revolution, the revolutions of 1848,[9] the global experiments in socialism and communism that spanned the globe in the 20th Century,[10] central and northern Europe's experiments with social democracy (as capitalism's bulwark against the spread of post-WWII communism), and the hybridized revolutions of South America in the first decade of our own century.

The point of this historical excursion is to identify popular impulses toward "common" stewardship of resources in reaction to political/economic stresses that resulted from pressure to enclose, privatize or commercialize the commons.

Common Resources

The history of the commons has been the history of access to farmland, game animals and fish. That is still true in large parts of Asia, the Pacific Islands, Africa, South and Central America. In the capital-oriented nations of North America and Europe, where both farming and animal stock-breeding first became industrialized, the impulse toward common resources focuses more on museum-ecology movements,[11] atavistic sustainability[12] and alternative energy. The concept of common resources also includes the atmosphere, that invisible wrapper that enables and protects life on earth. There is a public right to *keep out* noxious pollutants and the green house gases that would spoil the commons of the atmosphere and initiate climate chaos.

To the extent that un-enclosed common resources still exist in the West, the lines are drawn between the economic exploiters and the preservationists. The contest is most evident in the issue between the Sea Shepherd Conservation Society[13] and whaling interests in Japan and Europe; People for the Ethical Treatment of Animals (PETA)[14] versus the animal-growing and meatpacking industry; and the Animal Liberation Movement[15] versus the species-centrism of animal testing and exploitation. The Northwest fishing industry and sport-fishing were roiled in 1974 by the federal court's Boldt Indian Fishing Right decision[16] that essentially upheld indigenous people's right to their fair share

of the salmon in their historical fishing territories. Similar fishing rights battles are now playing out in the Bering Sea, Thailand, Indonesia and Central America, where factory shrimp farms, beach-side tourist hotels, deep sea drag-net fishing and ocean-going fish factories have simultaneously limited fishers' access to the sea, decimated stocks of sea life and polluted traditional spawning grounds.

On a more prosaic level, the battle over common resources hits locally when private property interests seek to build and sell high rise buildings that monopolize "views" of scenic water and landscapes, or when developers attempt to acquire exclusive beach front where once the public could reach the sea. Tourism, usually seen as a "clean" industry for developing countries, can be seen as just another form of enclosing the commons of indigenous peoples whose non-proprietary cultures of food, land, water and animal life are sacrificed for the amusement of those who, for the sake of profit, sold off their own commons.

Basic necessities of life other than food are also the subject of competition between commons and more squirrel-like philosophies of human existence: water as a basic public utility versus water as the quintessential for-profit commodity;[17] the private, for-profit extraction of minerals versus the protection of habitat for the people;[18] and the simple right of affordable housing versus inner city gentrification.[19]

Cheap hydrocarbon fuels drive modern capitalist societies. As energy resources become depleted, so have the tensions between the commons and private property become sharper.[20] In Canada, massive quantities of fresh water are consumed in the extraction and processing of shale oil,[21] and throughout the grain belts of the world, agriculture is being diverted from the production of food to the production of "biofuels" to burn in internal combustion engines.[22] Nuclear power— once a dying (literally) and economically non-viable industry —has been rejuvenated with direct and indirect government subsidies at the expense of the communities where the nuclear power plants will be located and where the toxic radioactive waste will be dumped.[23] Eventually, large scale, privately owned and operated solar energy collectors and wind farms will cover large swaths of land, encroaching once again on the basic common resources of land, wind and sun.

Artistic and Creative Rights

The Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) are the sword-bearers in big business's war against the artistic and creative commons. As most college-age students understand, file-sharing and peer-to-peer file exchanges are the new frontier of culture. The RIAA, one of the most aggressive of various corporate

litigants that tries to enforce "creativity rights," has brought thousands of lawsuits against young people whom it has accused of downloading songs without paying royalties.

The aggressive legal strategy of the RIAA—which the Electronic Frontier Foundation has likened to intimidation by litigation[24]—draws strength from several federal lawsuits which either shut down or severely curtailed the file sharing or peer-to-peer ("P2P") or "fair use" activities of entities like Grokster,[25] Napster[26] and Kazaa.[27] The pro-property, anti-commons slant of the current litigation was enabled in 1998 when, under the Clinton administration, Congress enacted the Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 512, 1201–1205. The DMCA criminalized the circumvention of electronic copyright technology and increased penalties for copyright infringements using the Internet.

The original intention of the Constitution's framers with respect to "intellectual property" was fairly limited. Article I, Section 8 enumerates as one of the powers of Congress "[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." There are three noteworthy aspects to the government's power to grant these rights. First, the purpose of the grant of an "exclusive right" was to promote *the progress of science and the useful arts*. The purpose of granting a patent or a copyright, therefore, was specifically to enhance the public good through the progress of science and the useful arts, i.e., *the commons*. Second, the exclusive rights that the government could grant were to last only for *a limited time*. And third, the exclusive rights were intended to be granted to "authors and inventors."

Thus, it is clear that (1) only "authors and inventors," that is, *the actual human creators*, rather than employers or corporations were intended to be the beneficiaries of "exclusive rights" in the arts and science; (2) that the grant of the exclusive right was supposed to be *limited in duration*; and (3) the underlying purpose was *to promote the common good*. This has radically changed since the adoption of the Constitution in 1789. Especially in the last quarter century, the Congress, in response to aggressive lobbying by major business interests, has distorted the original scope and concept of patent and copyright law. Examples of this distortion are the Digital Millennium Copyright Act referred to above and the Copyright Term Extension Act of 1988 (CTEA), 17 U.S.C. §§ 302, 304. The CTEA (colloquially known as the *Sonny Bono Copyright Term Extension Act* or, disparagingly, as the *Mickey Mouse Copyright Protection Act*) extended exclusive copyrights to the life of the author plus 70 years, or 95 years after first publication of a "work for hire," (that is, a creative work done by an employee for a third-party corporation). The time extensions of the CETA added a few decades

to the "copyright creep" that Congress had been legislating for years, thus favoring the "locking up" of the creative commons and substantially diminishing the public domain of art and science. One wonders how a copyright, lasting *a lifetime plus 70 years,* or *95 years* in the case of "work for hire," fits the Constitution's original concept that such exclusive rights should be only for "limited times."

The purpose of studying patent and "copyright creep" from the perspective of the commons is to understand what *has been lost* and what *will be lost* to the "progress of science and the useful arts" (as the Constitution puts it). When culture becomes the private domain of corporations, creativity itself becomes more slavish, less daring and more pedestrian.[28] Indeed, that is the nature of 21st Century global television, radio, print and film media; and perhaps, in light of the accelerating trend toward consolidation and monopolization in digital information services, it may also be the future of the Web and Internet.

Culturally, the Web is the cutting edge of the commons, not because of games, gambling and pornography, but because of its power to facilitate power. As in no time preceding ours, human beings now have the ability and the inclination not just to passively absorb information, but *to share and post content*. Effortlessly. Globally. Accessibly. It is precisely because the Web is the most democratic of cultural commons that the efforts to enclose and control it have been so massive, so determined and so dangerous.

Community Property

Community property is more than just the real and personal property owned or acquired by a married couple, and the law schools should teach it as more than that. Since the dawn of civilization, people have jousted over property ownership. The contest primeval may have looked like hyenas fighting over an antelope carcass, or the staking out of a fresh spring of water, a stand of maize or a particularly rich hunting or fishing location. Indeed, the concept of community ownership of these "properties" may well have evolved precisely because a larger group of humans can always live better if these types of resources are shared in common than if they are owned by one individual who has to battle to exclude everyone else. Early humans must have quickly learned that community management of a precious resource usually yields the greatest good for the greatest number of people. Thus, purely from an aboriginal game theory perspective, community resource management was superior to privatization.

Nevertheless, through to the present century, the battle over community property has been typified by those who seek to gather in everything to the exclusion of everyone else. Personal "land grabs," such as have been made

in the United States by cattle ranchers, mining companies, industrial farmers and logging companies, are typical. Through effective lobbying of Congress, these entities have gained access to federal lands, tribal lands, minerals and resources through federal legislation designed to benefit the few at the cost of the many. If law students are introduced at all to these types of common property-exploitations, it is as a statutory framework that a "natural resources" lawyer must work within, rather than as a theft of commonly held property.

The United States Code includes the 1872 Mining Act, 30 U.S.C. § 22. Signed into law during the Grant administration, it is an example of the mineral land grabs that one usually associates with the pillaging of Africa's mineral resources. In effect, the 1872 Mining Act gave hard rock mining companies a free pass to explore for and stake out claims to precious minerals—e.g., gold, silver, uranium—on most public lands. Astonishingly, more than a century after it was enacted, mining companies still have the right under this law to extract precious minerals without paying any royalties to the public under whose land they are found. Not only does the 1872 Mining Act deprive the commons of its royalties, it also deprives the people of any right to *deny* mining companies access to the common wealth. Worse, the wastes generated by the mining of public lands is "externalized" such that the resulting pollution catastrophes fall squarely on the common shoulders of those who benefit least from the ore extraction.[29]

In the 21st Century, the "grab" for the common property has extended into the ether. The new wealth is invisible, and incredibly valuable. Especially since the Telecommunications Act of 1996,[30] radio, telecommunication and television bandwidth—all originally in the public domain—have become the object of a rush of corporate gold-diggers. The auctioning off of the public air waves has, in turn, contributed to an increasing consolidation in news and entertainment media to the extent that news and entertainment have totally blurred and the whole spectrum has fallen into only a few hands.[31] With FCC blessings, radio behemoths like Clear Channel Communications have swallowed AM and FM markets whole. A newspaper mogul like Rupert Murdoch has cobbled together an empire of news and entertainment media including, to name a few, nearly every newspaper in Australia, Fox Television, Dow Jones and the *Wall Street Journal*. Cable television, along with access to the Internet and local wi-fi connectivity, have become plum monopolies that revenue-starved municipalities now routinely sell off like Esau selling his birthright for a mess of porridge. Indeed, even the Internet itself, originally developed on the public dime, has been sold off to the telecommunication companies who now treat it as private rather than public property.

The task for the law schools is to teach these rapacious trends in business and the law as they really are: massive privatizations of the commons. The

selling off of the bandwidth, the consolidation of the media, the monopolization of the biggest Internet "pipes," the disparate treatment of Internet content and speed of information delivery, all of these should be treated, discussed and *taught* in the law schools as just another phase in the enclosure of the commons as land was enclosed in the age of feudalism.

Specific cases might provide the ideal vehicles for the teaching. *Prometheus Radio Project v. FCC*,[32] for example, is an instance (and a very rare one at that) of a low power FM community broadcasting project facing down and beating in the courts the money, legal and political power of a host of entrenched media profiteers. A more recent teaching model involving the "ownership" of information versus the public right to know is the case of *Bank Julius Baer & Co., Ltd. v. Wikileaks.Org*,[33] in which a Cayman Islands bank temporarily succeeded in shutting down an on-line "whistle blower" website that had posted documents that purported to show that the bank was involved in a money-laundering scheme. Thus, from the specific instance of Wikileaks to the general circumstance of the intellectual anesthesia induced by pop media culture, the battle lines are drawn between the public right to know versus the private desire to prevent the public from knowing. This is a momentous war that affects all issues of human and civil rights.

Intellectual Property: The Ownership of Life, Thought and Software

One of the greatest commons is also the least tangible: the commons of life itself.

It had been long assumed and understood (at least, since the beginning of US patent law), that life itself was simply not patentable. Then, in 1980, the US Supreme Court decided *Diamond v. Chakrabarty*.[34] By a 5-4 decision, the Supreme Court in this case permitted a patent on a genetically designed bacterium intended to consume oil slicks. Thus was the door opened to one of the greatest land rushes of the industrial age—except that the land rush was for life, not acreage. Putting the most charitable interpretation possible on the *Chakrabarty* case, permitting certain forms of "novel life forms" to be patented allowed the indubitably creative juices of capitalism to spawn new technologies beneficial to humankind.[35] Viewed less charitably, *Chakrabarty* was a legal battering ram that permitted entry into and enclosure of one of the last domains of the commons: Life.

Not surprisingly, in the years following *Chakrabarty*, the United States Patent Office started granting patents for genetically modified plants (1985), laboratory mice (1988), methods for cloning livestock and transgenic organisms.[36] In 2007, the Nobel Prize for Medicine was awarded to the creator of a genetically modified laboratory mouse.[37] Today, companies can patent genetically modified trees that grow faster and can be more readily pulped into paper; seeds that are resistant to herbicides; and vegetables that have extended shelf

lives. Some companies that have obtained patents on their genetically modified seeds have aggressively sued farmers for infringing their rights even when wind-blown 'patented seeds' have contaminated the farmers' crops or when farmers have merely saved their crops' seeds to replant in next year's fields.[38]

It is inevitable that genetic engineering will eventually produce what was once just the nightmare of science fiction novelists: designer human beings who are born brainless so that their organs can be harvested for implanting in others; human beings bred to breed other human beings; intellectually limited human beings designed to "work" undesirable jobs; "warriors" who are genetically engineered for their courage, their strength, their tenacity and their unthinking devotion to authority and orders.

Indeed, evolution itself is the domain of the commons; and if Nazi eugenics was an attempt to control and monopolize evolution, what then of the current trend in engineering and patenting life?

The "commons" that got everything going in human history was the common ownership or stewardship of that most tangible form of property—real estate. Today, however, the biggest action in defending or encroaching upon the commons is the intangible realm of mathematics, logic and algorithms—the intellectual domain of both the computer hardware and the software that animates it. Insofar as computer *hardware* must be designed using *software*, it is *all* software, i.e., it is all pure math and creativity. The tangible "computer stuff" is, thus, nothing but the implementation of mind. In essence, the fight over the software commons is not about "things," but about whether intellectual creativity itself can be appropriated.

Without software, your personal computer is just a paperweight, or a brick.[39] With software, you have more computational and communications power sitting on your desktop than any emperor, king or president from the dawn of civilization until the late 20th Century. But software is not like a work of fiction or a song that one could copyright nor is it like a machine that one should be able to patent. Software is not even a process or a method. It is unlike anything that the Founders had in mind when they contemplated Article I, Section 8 of the United States Constitution. Although the U.S. Patent and Trademark Office granted its first software patent in 1981,[40] the issue is far from settled. The European Patent Convention, for example, excludes many computer programs from patentability. Software can be patented in Japan, but not in India.

Obviously, in a global economy that depends on computer software, there are on-going battles over patent standards as well as software standards. At stake is no less than whether a few individuals or the global programming commons will control (or, better put, have access to) how everything works in the world.[41]

Computer software is power, however, because everything in the 21st Century depends on the processing of digital information. Indeed, modern war is as dependent on computer software as it is on petroleum, perhaps more so. World commerce and banking function only because people can exchange digits with their software. Manufacturing utterly depends on it. Telecommunications is nothing without it. Business cannot function without it.

Precisely because software has become the stuff that makes the world go around, there are powerful, determined interests who want to own it. Arrayed against those interests is a globally disbursed, very large but very amorphous community of programmers (and some lawyers) who are equally determined to keep software free and open as, say, trigonometry or plane geometry. In the United States, the conflict plays out in the trenches of the web. In the courts, it shows up in oblique ways. In *SCO v. IBM*,[42] the plaintiff corporation sought, through contractual acquisition rather than through innovation, to claim rights in the ancestor UNIX code that might entitle it to seek licensing fees and penalties from millions of users of OS or FOSS software around the world.[43] In the business world, some corporations seek software hegemony by strictly licensing their proprietary "closed" programs to users while trying to create virtual market monopolies. The Free and Open Source Software (FOSS) community, by contrast, insists on the creative "freedom" to "pop the hood' of its software, tinker with it, soup it up, modify it, improve it or use it to springboard to a better program, without legal or technical obstructions. Bad ideas flame out in the free and open software commons, while good ideas propagate for the good of the whole. From each according to his or her ability, to each according to his or her needs. This is a pure intellectual commons, something like the "open" systems of jurisprudence that no one "owns" but which hold all societies together with the glue of the law.[44]

The most well known type of free and open software is GNU-Linux, an operating system that combined essential core software systems developed by American programmer Richard Stallman and Finnish programmer Linus Torvalds. Lawyers need to understand that the world's information systems, the Internet and the World Wide Web, many telecommunications systems and many of the Pentagon's military programs now run using free and open source software. Businesses use it because it has lower initial costs. . . that is, none; but programmers prefer to use it because, due to the communal nature of FOSS software itself, the process of "fixing" a problem is as participatory as the community "ownership" of the software itself: a problem is identified, posted and then from all corners of the earth the community of programmers contribute to the solution. It organizes itself spontaneously. It functions leaderlessly. It works.

Conclusion

The purpose of this article was to make four points. First, the commons, though it no longer resembles the world of England's Diggers and Levelers, is alive and well. Second, the tension between those who seek to enclose the commons and those who would preserve it is no less strong today than three hundred years ago. Indeed, the stakes are higher now than ever before. Third, the various commons movements all have a lot "in common" and, undoubtedly, a lot to learn from each other. Fourth, the law of the commons is everywhere and everything, which makes it absolutely imperative that new lawyers and new judges, yes even old lawyers and old judges, make the effort to comprehend the parallel world of the commons that throbs all around them.

In short, there is more to the law than just enforcing property rights.

This has been a parade of ideas. Like all parades, it could only pass quickly by the reviewing stand. Each of the commons and each of the themes described above are much more complicated, more interesting and deserving much more than the slight attention that one can give them here.

The purpose of this article was to give a possible framework for teaching the commons in schools of law such that students, and ultimately lawyers and judges, may become more conscious of their whole world and how to play their role within it.

APPENDIX A - Virginia Declaration of Rights

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.
3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.
4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.
5. That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.
6. That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.
7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.
8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers.
9. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.
11. That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.
12. That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.
13. That a well regulated militia, composed of the body of the people,

trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

NOTES

1. These movements date from the mid-18th Century in England, although they had antecedents that reached back to the peasant rebellions of the 14th Century. Led by Gerrard Winstanley, the True Levelers advocated that the toiling classes of Englishmen form themselves into self-sufficient communes. The True Levelers believed that by depriving them of the laboring class and their rent, the aristocracy would be forced to either join the communes or starve to death. At a time of inflationary food prices, the diggers appropriated common land (land that had been enclosed during the growth of feudalism) and began to cultivate it for public use.
2. The religion of free-market capitalism usually points to its "efficiency" and "successes" as proof of its superiority while the circumstances of resource exploitation, slavery, colonialism, and cheap hydrocarbon fuels are dismissed as mere cultish quibbles with the revealed truths of the dominant economic dogma.
3. The Constitution, (barely) ratified in 1789, replaced the original Articles of Confederation, and was itself amended by the Bill of Rights in 1791. As envisioned by Jefferson, the original Bill of Rights also would have explicitly prohibited a standing army and inveighed against corporate monopolies in commerce. As ultimately adopted, the Bill of Rights was probably heavily influenced by George Mason's Virginia Declaration of Rights that Virginia's Convention of Delegates adopted unanimously in 1776. The similarities (and differences) between the Bill of Rights and the Virginia Declaration of Rights are remarkable. See Appendix A.
4. That only lawyers who think in the "mainstream" should be considered for appointment as judges is consistent with the concept of stare decisis which, depending on one's politics, is either the methodical, careful evolution of law from its legacy, or (in computer jargon), the fossilization of "legacy code" that no one understands any more but which continues to run everything because no one knows how, or is too afraid, to get rid of it.

5. Federalist Society for Law and Public Policy Studies, note at People for the American Way, *at* http://www.pfaw.org/pfaw/general/default.aspx?oid=3149.
6. Whether domestic and global markets constitute a "commons" in the sense of this article is a subject for another day.
7. The Iroquois Confederacy of the 17th and 18th Centuries was a remarkably democratic society that may have influenced many constitutional themes that emerged during and after the American Revolutionary War. *See*, Cynthia & Susan Feathers, *The Iroquois Influence on American Democracy*, 63 GUILD PRACT. 28 (Winter 2006).
8. The Boxer Rebellion, 1899–1901, bears the curious name of a "rebellion" because that is what China's 19th and 20th Century colonizers called it. The Boxers were as much a peasant uprising against a remote and ineffective central Chinese government and repressive top-down culture as an uprising against the indignities visited upon China by western occupiers and Christian proselytizers.
9. The middle 19th Century through the early 20th Century was marked by failed revolutions and outbursts of anarchist activity in the United States, France, Germany, Italy, Russia and the Balkans, culminating in (1) the Bolshevik Revolution of 1917; (2) the Spanish Civil War between fascism, communism and anarchism; and (3) the home-grown revolutions in China and Cuba. In the United States, the IWW managed a general strike and worker-run government in Seattle that lasted for five days in 1919. Many of these revolutions—whether socialist, anarchist or revolutionary in nature—eventually failed, were crushed militarily or became corrupted.
10. It is not my intention to turn the "legal" study of the commons into a gallop through history. Nevertheless, the more thorough the historical context, the better the legal issues can be understood. Indeed, nothing stands in a vacuum and everything historical relates to everything else. Curious law students could delve still deeper into "commons" philosophy, including that which manifested itself in the religious and ascetic communities of Cathars (11th –14th Centuries), the anti-clerical tenants of John Wycliffe and Lollardy (14th Century) and the American Shaker communities of the 18th Century.
11. There is mild hypocrisy inherent in many of the West's preservationist movements that results from trying to impose an ecological discipline on undeveloped parts of the world when the West has practiced no such discipline itself. Having eliminated almost all of its own old forests in the march toward "progress," decimated its own indigenous fauna and turned most remnants of "nature" into artificially defined "parks" and "wildlife preserves," many western NGOs (although generally well-intentioned) seek to salvage scattered stubs of old growth forest, minuscule and genetically unhealthy populations of "wild-life' and pockets of "primitive" human culture. This is a museum or zoo-like orientation. Like imperial colonialism, it sometimes ignores the dictates of nature and, perhaps, the wishes of indigenous people themselves who may or may not want to pickle their cultures in formaldehyde for the entertainment of western eco-tourists.
12. Two countervailing extremes vie for the leadership to the future: the cornucopian technophiles, who expect science and technology to magically bail our human hindquarters out of every conceivable mess, and the return-to-nature reactionaries who seek salvation in a return to Stone Age subsistence farming, hunting and gathering. It is this author's unabashed bias that neither the technology zealots nor the Stone Agers paint a future that any rational person would seriously want to live in. The

most viable systems tend not to be rigidly doctrinaire, focus on sustainability, adopt the best and eliminate the worst elements of technophilia and primitivism.

13. http://www.seashepherd.org/
14. http://www.peta.org/
15. The recently enacted Animal Enterprise Terrorism Act, 18 U.S.C. § 43, is an example of vested property interests using the legal system to criminalize opposition to use of animals in medical and psychological research, testing and product development. Nevertheless, the student generation's interest in the issue is manifest in the approximately 100 law school courses available in American law schools, according to the Animal Legal Defense Fund. http://www.aldf.org/content/index.php?pid=83.
16. U.S. v. Washington, 384 F. Supp. 312 (1974), *aff'd sub. nom Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979)
17. In 1999, the multinational corporation Bechtel "bought" the water rights of Cochabamba, Bolivia, including the right to charge for the collection of rain water. Half a year later, rioting Bolivians staged a water rights revolution and effectively terminated Bechtel's "contract rights."
18. The continent of Africa was, and continues to be severely exploited for its mineral wealth. Belgium, France, Germany and Great Britain all staked out their mineral rights during the period of classical colonialism followed by today's neo-colonial economic exploitation of South Africa, the Congo, the Sudan, Namibia, Mauritania, Zambia and Uganda, among other African countries. The spoils are Africa's petroleum, copper, diamonds, gold, bauxite, phosphate, uranium and coltan. Coltan, when refined into heat-resistant powdered tantalum, is essential to the telecommunications industry in the manufacture of cell phones and lightweight electronic devices.
19. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations in 1966. Included among these rights (which were enunciated in the 1948 United Nations Universal Declaration of Human Rights) are: the right to work, paid vacations, paid holidays and decent wages; the right to welfare, social security, and social insurance; the right to food, housing, and clothing, and the right to health care. It is noteworthy that the United States has not formally ratified ICESCR nor has any Democratic or Republican Party president pressed for Senate ratification. Whether as a "common right" or a "human right," the contest over affordable housing has reached acute levels in the United States where real estate profiteering, combined with economic recession, has boosted homelessness to epidemic levels.
20. Oil production in the United States topped out in 1970, during the depths of the Vietnam War. The decline of US domestic oil production and the concomitant increase in oil imports set the stage for the rise of OPEC and the oil embargo in 1973. The combination of military spending during the Vietnam War and the increase in oil prices after 1973 was a likely factor for a decade of economic "stagflation."
21. The massive amounts of water spoiled in the process of extracting usable petroleum from shale, the environmental waste it produces, the energy consumed in extracting the petroleum, and cost of government subsidies make shale oil, like nuclear power, one of the many chimeras of private-sector dogma versus the commons approach to energy conservation.
22. There is a hint of the obscene when, in a hungry world, grain would be diverted from food to fuel so that Americans can use less oil while driving to their suburban shopping malls.

23. Where to dump spent nuclear fuel is only part of the cost of this very dirty industry. Mining and extracting uranium—whether in Central Africa or the Southwest United States—has a history of destroying lives and cultures. The waste of nuclear power, the so-called "depleted uranium" is used for armor penetrating cannon shot. The generation of nuclear power not only spoils large volumes of water but also is a necessary step in the production of weapons grade plutonium. It is no accident that nations with nuclear power reactors also have nuclear weapons capability. The United States and its European satellites seek to contain the proliferation of nuclear power generation precisely because, in an amoral world, nuclear weapons are the ultimate game-leveler in global politics and economics.
24. http://www.eff.org/cgi/search-proxy.py?hl=en&ie=ISO-8859-1&q=intimidation+riaa&btnG=Search.
25. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
26. A&M RECORDS, Inc. v. NAPSTER, INC., 239 F.3d 1004 (9th Cir. 2001).
27. Universal Music Australia Pty, Ltd. v. Sharman License Holdings, Ltd, FCA 1242 (5 September 2005) [Federal Court of Australia].
28. A useful "textbook" for studying the legal ramifications of enclosing the artistic commons is Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (2004).
29. "Earthworks" is a non-profit organization dedicated to protecting communities from the effects of mineral development in the United States and elsewhere. Its highly informative website is located at http://www.earthworksaction.org
30. 47 U.S.C. § 251 *et. seq.*
31. As of 2004, six conglomerates owned the lion's share of the American news and entertainment media: Disney, Time Warner, Newscorp, Bertelsmann, General Electric and Viacom.
32. 373 F.3d 372 (3rd Cir. 2004)
33. 535 F. Supp. 2nd 980 (N.D. Cal. 2008)
34. 447 U.S. 303 (1980)
35. I hold the opinion that regardless of the law or *stare decisis* cited in any Supreme Court decision, it always comes down to a matter of policy clothed in whatever legal precedents work to achieve the desired objective.
36. A transgenic organism is one in which a gene from one life form (like a cold water fish) is forcibly implanted into the genome of another life form (like a tomato) in order to create a vegetable that can survive a spring frost. Of course, gene splicing is an extremely crude technology and no one knows the long term ramifications of this kind of meddling with nature.
37. We will pass, for the moment, commenting on the true nature of the Nobel Prizes and the organization that awards them. It suffices to betray the author's bias when I note that, in the past (a) the Nobel Peace Prize has been awarded to such men as Henry Kissinger (who hardly can be classified as a peacemaker) and Muhammed Yunus (who showed the world of capital how to make a lot of money lending small amounts of cash to exceptionally poor people at extraordinarily high rates of interest), (b) the Nobel Prize for Economics has been awarded to Milton Friedman (the dean of what author Naomi Klein describes as "disaster capitalism"), and (c) the

Nobel Prize for Chemistry was once awarded to Fritz Haber (the "father' of poison gas warfare).

38. *See e.g.*, Monsanto Canada, Inc. v. Schmeiser, [2004] 1 S.C.R. 902, 2004 SCC 34 (rapeseed), Monsanto Company v. Scruggs, 459 F.3d 1328 (C.A. Fed 2006) (soy bean and cotton), Monsanto Company v. McFarling, 488 F.3d 973 (C.A. Fed 2007) (soy bean).
39. Computer geeks have coined the verb "to brick" to refer to the process of rendering an expensive computer inoperative via various hidden and proprietary software tripwires.
40. Diamond v. Diehr, 450 U.S. 175 (1981) (patent granted for computer program for molding rubber).
41. Young lawyers need to know that there is a whole other universe out there beyond the traditional one of suits and courtrooms. Computer geeks and hackers constitute a world wide community of millions of software developers. They have their own common language, web etiquette, dress codes (or anti-dress codes), interests and concerns; yet most of them live in different countries or cultures, speak different native languages and will never meet face to face. It is the most non-hierarchical, the most self-organizing and the most purely intellectual commons that has heretofore existed.
42. There is actually a suite of lawsuits dealing with parallel or related issues, including *SCO v. DaimlerChrysler*, *SCO v. Novell*, *Red Hat v. SCO*, and *SCO v. AutoZone*. In a demonstration of how important the software community views this suite of litigation, the cases have spawned websites such as Groklaw (http://www.groklaw.net/) which, blow by blow, keeps programmers abreast of the minutiae of the litigation while also giving them the opportunity for instantaneous analysis, feedback and screed. Websites like Groklaw have immersed the programming community in the law which begs the question why the community of lawyers have not yet immersed themselves in the world of computer software.
43. There are fine distinctions between those who subscribe to OS (Open Source) or FOSS (Free and Open Source) software. There are also different types of FOSS or OS licenses available, most of which derive from the General Public License developed primarily by MIT computer software guru Richard Stallman, founder of the GNU Project and the Free Software Foundation.
44. Indeed, software programmers have more in common with lawyers (that is, "law programmers") than one might think. Both work with pure intellectual endeavors and both sell their expertise in manipulating "code." No one owns the law, and it is inconceivable that the civil or criminal code could not be accessed or changed except by paying a licensing fee. So, too, do adherents of FOSS argue that no one should literally own software algorithms, deny access to computer source code or require a fee to use or change it.

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MICHAEL AVERY

BOOK REVIEW: *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*

***The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, by Steven M. Teles, Princeton University Press, 2008. 358 pp.**

It might be tempting for political liberals, who would like to rely upon the United States Supreme Court to defend individual liberties and to sustain progressive legislation, to conclude that the sky has fallen. It started falling, of course, even before the tenure of William Rehnquist as Chief Justice. But with the appointment of John Roberts as Chief Justice and Samuel Alito as an Associate Justice, the transformation of the Court is accelerating. And the sky? Well, one can almost touch it. The modern Court can now be relied upon to strive to protect business interests against legislation designed to protect workers, consumers and the environment; to halt the judicial expansion of personal liberty interests while expanding judicial protection of property interests; to interpret a "colorblind" Constitution by rolling back affirmative action and school desegregation plans; to restrict access to courts by upping the ante on pleading requirements and statutes of limitation; and to weaken the boundaries between church and state. On these and many other issues, the Roberts Court's advancement of the conservative political agenda is well underway.

A few examples suffice to illustrate the ideological content of the Roberts Court's jurisprudence. Professor Jeffrey Rosen describes the current direction of the Court as "exceptionally good for American business."[1] In Chief Justice Roberts's first two terms, the Court heard seven antitrust cases, compared to less than one per year during the Rehnquist Court.[2] The Court resolved them all in favor of the corporate defendants and in the process overruled an almost 100-year-old precedent holding minimum price restraints to be per se anti-competitive.[3] Consumers lost when the Court held that regulatory action by a federal agency pre-empted a state tort action against an allegedly defective medical product in one case, and in another when the Court afforded insurance companies a good faith defense for a mistaken reading of a regulatory statute.[4] The Court has continued to protect corporate defendants against large punitive damage awards.[5] Environmental claims have had mixed success, with parties

Michael Avery is a professor at Suffolk University Law School and former president of the NLG. This book review is part of a longer article to be published soon in the *Suffolk University Law Review*, Volume 42, No. 1. Mr. Avery would like to express his appreciation to his research assistants, Suffolk law students Danielle McLaughlin and Margaret Hagen, for their invaluable assistance. He can be reached at mavery@suffolk.edu.