THE GREAT JURISPRUDENCE

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> This abstraction called Law is a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been![2]

If the western idea of law could be represented as a person, what would it look like? What physical and intellectual characteristics would it embody? To begin, the person would be old to reflect the great lineage of our jurisprudence. Like the vast majority of its authors and interpreters it would be white, male and upper class. Further, our imaginary person would embody traditional western values found in humanist philosophy, Christianity and modern liberal political philosophy. The intention of this thought experiment is to highlight that western law is a reflection of our culture and the values and perceptions it embodies. Certainly, law is a significant description of the way in which a society analyses itself and projects its image to the world. It is a major articulation of a culture's self-concept, and represents the theory of society within that culture. Given the relationship between law and culture, it is not surprising that our jurisprudence reflects the characteristics cited above. Indeed, from the ancient Greeks to present scholarship, the cannon of western legal thought has been dominated by individuals who fit that description.

While these scholars have made great advances in legal thought and reasoning, in the last thirty years there has been a growing chorus of voices who contend that their unique perspective has been excluded or marginalised from orthodox legal theory. For ease of communication I will categorise these voices under the heading 'critical theory'. Representatives of 'critical theory' include critical legal studies, feminist jurisprudence critical race theory Marxist theory and queer theory. While critical theory is a house with many rooms, what unites theorists is a belief that society, and necessarily legal order, constructs and maintains a particular injustice. Further, critical theorists look at the ways in which the injustice can be undermined and ultimately eliminated. In some instances they also advocate an alternative direction for jurisprudence which responds to the critique presented.

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2 O W Holmes, *The Speeches of Oliver Wendell Holmes* (Nabu Press, 2010) 17.

The legal philosophy of Earth Jurisprudence represents an emerging branch of critical theory. Consistent with the widely accepted critique advanced in environmental philosophy, it contends that western law and jurisprudence reflects an anthropocentric worldview. That is, a worldview which perceives human beings as the central and most important element of the Universe. In this paper, I will demonstrate this point through a critique of legal theory, property law and legal rights. Following this discussion, I will note that anthropocentrism no longer has any credibility in modern science and that human beings exist as one equal part of a broader Earth community. Given this shift in human understanding, Earth Jurisprudence seeks to articulate legal concepts that properly reflect our relationship and place in the Earth. This is a shift from 'anthropocentric' to an earth-centred or 'ecocentric' theory of law. Further, Earth Jurisprudence recognises that both human beings and nature are relevant and necessary to the operation of law.

From these basic principles, Earth Jurisprudence advocates the existence of two types of law which exist in hierarchical relationship. On top is the Great Law which represents the rules or principles of nature, which are discoverable by human beings and relevant to human-earth interaction. Underneath the Great Law is Human Law, which represents rules articulated by human authorities, which are consistent with the Great law and enacted for the common good of the comprehensive Earth Community. Regarding the interrelation between legal categories, two points are critical. First, Human Law derives its legal quality from the Great Law. Further, any law that ignores and transgresses the Great Law is considered a corruption of law and not morally binding on a population. This paper will extrapolate further these concepts to articulate theory of law that responds and accommodates the ecological imperative of the present age.

I Anthropocentrism and the Law

Albert Einstein defined anthropocentrism as 'an optical delusion of human consciousness' where we come to regard 'humanity as the centre of existence'. The Macquarie dictionary provides more detail on the individual elements of anthropocentrism defining it as an adjective that '[r]egards man as the central fact of the universe'; '[a]ssumes man to be the final aim and end of the universe'; and '[v]iews and interprets everything in terms of human experience and values'.[3]

3 *The Macquarie Dictionary: Revised Edition* (Macquarie Library, 1985) 113.

While anthropocentrism has been thoroughly discredited by modern science, it is a perspective which has been promoted throughout the majority of western history. For example, Aristotle noted: 'Plants exist for the sake of animals, the brute beasts for the sake of man – domestic animals for his use and food, wild ones (or at any rate most of them) for food and others accessories of life, such as clothing and various tools. Since nature makes nothing purposeless or in vain, it is undeniably true that she has made all animals for the sake of man'.[4] Similarly, the Hebrew Bible notes in Genesis 1:27–31: 'Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground.'[5] Both classical philosophy and Christian theology are of central importance to the worldview of western culture. Further, because law is a reflection of culture it also reflects these ideas. Phillip Allot notes:

> Society cannot be better than its idea of itself. Law cannot be better than societies idea of itself. Given the central role of law in the self-ordering of society, society cannot be better than its idea of law.[6]

For this reason it is no surprise that many of our laws most fundamental concepts and ideas imitate an anthropocentric worldview. This section will illustrate this point through a brief discussion of legal theory, property law and legal rights.

A *Legal Theory*

Legal philosophy provides the foundation and intellectual base for positive law. As Karl Llewellyn notes, legal theory 'is as big as law – and bigger'.[7] Yet, despite their enormous variation and diversity, theories of law and justice in western jurisprudence are predominately anthropocentric. Mainstream theories such as natural law and legal positivism are concerned ultimately with human beings and human relationships. The concept of 'relationship' is extended from human beings, to communities, states, nations and elementary groupings operating within these categories.[8] However, only in rare circumstances is the concept extended to include nature or non-human animals. Further, when law is constructed as purposive and reference is made to the 'common good', as is common in natural law theory, the term is expressly limited to human good. Certainly, the hierarchical ordering of the human and non-human world is the unquestioned starting point for most theories of law.

4 Aristotle, *The Politics* (University of Chicago Press, 1985) 1256b.
5 For a classic critique of the relationship between Christianity and the environmental crisis see L White Jnr, 'The Historical Roots of Our Ecologic Crisis'(1967) 155 *Science* 1203.
6 P Allot, *Eunomia: New Order for a New World* (Oxford University Press, 1990) 298.
7 K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Transaction Publishers, 1962) 372.
8 N Graham, *Lawscape: Property, Environment & Law* (Routledge, 2010) 15.

Today, the dominant theory of law is legal positivism. Stated plainly; legal positivism asserts that it is both possible and valuable to produce a purely conceptual or purely descriptive theory of law, free from moral evaluation or external influence. Legal positivism claims that law is a science and like other scientific discourses, attempts to describe law from an objective perspective.[9] Positivism identifies and defines law through 'abstract' categories or doctrines, which it posits as authoritative rules applicable to the resolution of legal disputes. This legal philosophy expressly considers the influence of the non-human world as 'remote, inappropriate and unnecessary to the operation of law'.[10]

Further, legal positivism reflects the notion that human beings are self-validating and it is appropriate (and valid) for human beings to enact law in ignorance or even contrary to the needs of place and ecological principles. Cultural historian Thomas Berry comments on the self-validating nature of legal positivism noting that law is 'framed for the advancement of the human with no significant referent to any other power in heaven or on Earth'.[11] As a result, Berry comments that '[h]umans have finally become self-validating, both as individuals and as a political community'.[12] Cormac Cullinan supports this point in his book *Wild Law*:

> Our secular legal philosophies almost universally deny that our jurisprudence needs to take account of any rules, norms or considerations that lie outside human society. Laws are generated entirely within our glass 'homosphere'. Our laws are understood literally, as laws unto themselves. All that matters are the legal convictions of the human community at the relevant time and the content of the written law.[13]

The conscious separation of human law from external factors has important consequences for the environment. For example, it enables sophisticated governance bodies such as the European Union to allocate greater fishing quotas than the fish stocks can sustain.[14] In Australia, despite recent regulatory measures, irrigators are still able to draw unsustainable amounts of water from the Murray Darling System to grow ecologically insensitive crops such as rice and cotton on arid land.[15] Perhaps most visibly, despite overwhelming evidence supporting anthropogenic climate change, it is perfectly legal for

9 J W Harris, *Legal Philosophies* (Oxford University Press, 2002) 12.
10 Graham, above n 8, 20.
11 Ibid, 13.
12 Ibid.
13 C Cullinan, *Wild Law: A Manifesto For Earth Justice* (Green Books, 2003) 74.
14 See the Murray Darling Basin Authority <www.mdba.gov.au/>.
15 Australian Conservation Foundation, Facts and Figures: Murray-Darling Basin, 2009, <http://www.acfonline.org.au/articles/news.asp?news_id=122> accessed 2 December 2009.

corporate bodies to pollute increasing amounts of carbon into the atmosphere.[16] Certainly, our legal philosophies provide no reason or mechanism for human laws to consider the role of place, space and nature in the creation of law. Law is considered a separate, higher authority and orthodox legal theorists 'do not see the need for any connection or continuity between our legal system and the Earth system'.[17]

B *Nature as Human Property*

A second pertinent example of how our law reflects anthropocentric values is that our law defines nature as human property, which by definition can be used and exploited for human benefit. Eric T. Freyfogle notes:

> When lawyers refer to the physical world, to this field and that forest and the next-door city lot, they think and talk in terms of property and ownership. To the legal mind, the physical world is something that can be owned.[18]

While it is perhaps impossible for lawyers and legal scholars to regard nature as anything but property, the cultural nature of this view must be highlighted. In making this point, I am not suggesting that other cultures did not have concepts and rules regarding land use and access. The critical point is what ownership means and how property, as a legal concept and organising element, influences our relationship to the land. To begin this discussion it is instructive to note that the first sophisticated definition of property in western legal history was the Roman concept *dominium*.[19] In defining this concept, 11th century jurists noted that it was akin to 'lordship' and further noted that it was a sovereign, ultimate or an absolute right to claim title and thus possess and enjoy an item. While the institution of private property has never reflected such absolute language, the idea of dominion has been maintained in cultural narratives and 'lay' understandings of property.

The themes of control and possession are commonplace in our cultural narratives on property. Here the laws main message is that people are distinct from the land and its component parts. People are subjects and the land is merely an object, possessing little moral or legal worth. As Freyfogle notes, 'there is at work here a strict dichotomy of subject and object, legally worthy and legally worthless…people are the ones who own and dominate

16 See further <www.un.org/climatechange/ & http://climate.nasa.gov/>.

17 Cullinan, above n 13, 79.

18 E T Freyfogle, *Justice & The Earth: Images for out Planetary Survival* (Free Press, 1993) 49.

19 R Pipes, *Property & Freedom* (Vintage, 2000) xv. This early conception is important because as Joshua Getzler notes, 'Roman ideas about private and public property provide a kind of DNA of legal ownership, the intellectual structure within which most later legal thought has developed', J Getzler, 'Roman Ideas of Land Ownership' in S Bright and J Dewer (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 81.

and the land is the thing that is owned and dominated'.[20] In the last century, cultural narratives concerning property have been influenced heavily by the popularisation of liberal political theory. The principles most commonly associated with liberal theory include freedom, toleration, autonomy, justice and individual rights. Of these ideals Jeremy Waldron notes, 'the deepest commitment of liberal political philosophy is to individualism' and providing freedom to fulfil individual potential.[21] Indeed, liberals hold that individual human persons are the most important factor in social and political matters. One may have an interest (and indeed many liberals do) in community, the environment and non-human animals but for a liberal, such interest is always secondary or derivative.

Under the influence of liberalism the 'idea' that nature was human property strengthened in pursuit of individual preferences and choices. Thus, from a property perspective, human beings are not only separate from nature – they are separate from each other.

C *Legal Rights*

The implications of the proceeding points are exacerbated further by the fact that our law places all value and rights in human beings. Berry notes:

> All rights have been bestowed on human beings. The other than human modes of being are seen as having no rights. They have reality and value only through their use by the human. In this context the other than human becomes totally vulnerable to exploitation by the human.[22]

Following from the first two points, nature and the non-human world are 'things' or 'objects' which exist for human benefit. While protective legislation does exist, this is the exception rather than the rule and only applies in circumstances of peril or danger. Further, protective legislation is often justified with reference to a human right to a clean environment or a non-right to be cruel or kill a particular species. One obvious consequence of ignoring the intrinsic value and legal rights of nature is that when environmental damage occurs on privately owned land, the law treats the problem as a property offence. Damage is measured and distributed for the benefit of the owner and not the land itself. In other circumstances where a property owner has not been directly harmed or perhaps does not wish to sue for damage to their property, it is very difficult to gain standing to sue for environmental protection.

20 E T Freyfogle, 'Ownership & Ecology' (1993) 43 *Case Western Law Review* 1272.

21 Jeremy Waldron, 'Liberalism' in E Craig (ed), *The Shorter Routledge Encyclopaedia of Philosophy* (Routledge, 2005) 570.

22 T Berry, *The Great Work: Our Way Into the Future* (Bell Tower, 1999) 72.

In response to the anthropocentric focus of legal rights, some jurisdictions are beginning to legislate in favour of the rights of nature. However, the lack of uniform and consistent legislation on this issue leaves the natural world profoundly vulnerable to the needs of a growing industrial economy.

II Earth Jurisprudence

In the previous section it was contended that western law reflects an anthropocentric human-earth relationship. The key question for this section is – how can law as an evolving cultural institution, shift to reflect the relatively modern revelation that human beings are interconnected and dependant upon a comprehensive Earth community?

Earth Jurisprudence is an emerging philosophy of law, first proposed by Thomas Berry in 2001. Berry was a pervasive critic of the anthropocentric paradigm and the myth of progress expounded by modern civilisation. In his important analysis 'Legal Conditions for Earth Survival' he argues that the present legal system 'is supporting exploitation rather than protecting the natural world from destruction by a relentless industrial economy'.[23] In 1987 Berry set about describing how human society could shift both its idea of law and its legal system toward an earth-centred perspective. Most of his remarks are in outline to this shift, as witnessed in his early paper 'The Viable Human'. Berry notes:

> The basic orientation of the common law tradition is toward personal rights and toward the natural world as existing for human use. There is no provision for recognition of nonhuman beings as subjects having legal rights…the naïve assumption that the natural world exists solely to be possessed and used by humans for their unlimited advantage cannot be accepted…To achieve a viable human-earth community, a new legal system must take as its primary task to articulate the conditions for the integral functioning of the earth process, with special reference to a mutually enhancing human-earth relationship.[24]

The idea of 'mutual-enhancement' is fundamental to Earth Jurisprudence and is informed further by the concept of Earth community. That is, human beings exist as one part of a community of life, which incorporates non-human animals and innate living systems. In regard to legal philosophy, the goal of mutual-enhancement necessitates that nature is not only relevant, but also appropriate and necessary to our idea of law.

23 T Berry, *Evening Thoughts: Reflections on Earth as Sacred Community* (Sierra Club Books, 2006) 107.

24 T Berry, 'The Viable Human' in G Sessions (ed), *Deep Ecology for the 21st Century* (Shambhala, 1995) 5–6.

To make this transition Berry and subsequent proponents of Earth Jurisprudence have posited the existence of two kinds of law, which exist in hierarchical relationship. On top is the Great Law, which represent the principles of nature which are discoverable by human beings through scientific method and relevant to human-earth relationships. Below the Great Law is Human Law, which represents binding prescriptions, articulated by human authorities, which are consistent with the Great law and enacted for the common good of the comprehensive Earth Community. Regarding the interrelation between these two types of law, two points are critical. First, Human Law derives its legal quality and power to bind in conscience, from the Great Law. Further, because human beings exist as one part of an interconnected and mutually dependant community, a prescription, which is directed to the comprehensive common good, has the quality of law. In some instances, the content of law can be framed with reference to first principles of Great Law; for the rest, the legislator has the freedom of architect. Secondly, any law which ignores or transgresses the Great law, is considered a corruption of law and not morally binding on a population.

It will be clear to anyone familiar with legal philosophy that the basic structure and relationship between these different types of law share resemblance to the Thomist and neo-Thomist natural law tradition. Theorists from within both Earth jurisprudence and natural law have noted the broad conceptual relationship between the two theories. However, to date neither discipline has investigated this relationship further. For Earth jurisprudence to develop conceptually it is critical that this analysis occurs. Further, the absence of such analysis has been lamented by advocates of natural law theory. For example, Jane Holder writers that the 'absence of matters of 'physical nature (as opposed to human nature) is striking' causing her to reiterate (albeit in a different context) Lloyd Weinreb's denunciation of 'natural law without nature.'[25]

A *Legal Categories*

It was noted above that the goal of legal positivism is the creation, implementation and study of law, free from external factors. According to this theory, 'there is no law but positive law' and if one wants to discover what the law is, it can be readily found in statutes, codes and cases. Further, statements of law are necessarily kept separate from questions regarding what the law ought to be, its relationship to morality or ecological principles. In contrast to this orthodox position, Earth Jurisprudence advocates the existence of two

25 J Holder, 'New Age: Rediscovering Natural Law' in M D A Freeman (ed), *Current Legal Problems* (Oxford University Press) 172.

types of law. This is similar to natural law philosophy, which has advocated as many as four kinds of law existing in hierarchical relationship.[26] Prior to examining the two concepts promoted in Earth Jurisprudence it should be noted that in this context the term *law* has analogous meaning. From a linguistic and logical perspective, Human Law is law properly speaking. Ontologically, however, the Great Law is the measure of human law and by analogy is termed 'law'.

B *The Great Law*

The first category of law advanced in Earth Jurisprudence is the Great Law. Berry introduces this concept, noting that human society should recognise the 'supremacy of the already existing Earth governance of the planet as a single, yet differentiated, community'.[27] He notes further that an orientation toward the natural world 'should be understood in relation to all human activities'[28] and that 'Earth is our primary teacher as well as the primary lawgiver'.[29] Drawing on these comments, Cormac Cullinan coined the term 'Great Jurisprudence' or 'Great Law' to help make sense of this re-characterisation. Cullinan defines this term as 'laws or principles that govern how the universe functions' and notes that they are 'timeless and unified in the sense that they all have the same source'.[30] This Law is manifest in the universe itself and the examples provided by Cullinan include the 'phenomenon of gravity', 'the alignment of the planets', the 'growth of planets' and the 'cycles of night and day'.[31]

It is important to pause and consider in more detail Cullinan's description of the Great Law as representing the laws of nature. In particular, we need to discern precisely what is a law of nature and in what sense they have meaning or relevance for human law. In introduction to the first question, it must first be noted that 'laws' play a central role in scientific thinking. Martin Curd notes that 'some philosophers of science think that using laws to explain things is an essential part of what it means to be genuinely scientific' and 'support for the view that scientific explanation must involve laws is widespread'.[32] Many also believe they are justified in trusting or relying on scientific inferences, because these predictions are based on established laws. In this view, our

26 Aquinas for example advocated the existence of eternal law, natural law, divine law and human law.

27 T Berry, 'Forward' in Cullinan, above n 13, 20.

28 T Berry, above n 22, 64.

29 Ibid.

30 Cullinan, above n 13, 84.

31 Ibid.

32 M Curd, 'The Laws of Nature' in M Curd and J A Cover (ed), *Philosophy of Science, The Central Issues* (Norton & Company, 1998) 805.

expectations regarding the behaviour of systems, materials and instruments is considered reasonable, to the extent that they are drawn from a correct understanding of the rules which govern them.

Yet, despite the critical importance laws have in science, there is little general agreement about the kind of things laws are that can do justice to all the attributes we commonly ascribe to them.[33] The existence of this dissonance presents a major challenge to Cullinan's description of the Great Law. Indeed, how can the law of nature influence human law if we are unable to provide an intellectually satisfying description of the former? Compounding this problem is apparent lack of relevance many 'established' laws of nature have for human law. Indeed, it is difficult to imagine what specific application Newton's law or motion of Boyle's law of mass/pressure would have in human legal institutions. To be plain, I regard reference to the 'laws of nature' as too general and overwhelmingly broad to have relevance in Earth Jurisprudence. Indeed, consistent with other authors on Earth Jurisprudence, I contend that the Great Law should be defined with reference to 'first principles' uncovered in the scientific discipline of ecology.[34] This approach is also consistent with the current direction of environmental law[35] and helps distinguish between principles that are relevant to the regulation of human behaviour and ones that describe other phenomena in the universe.

The term ecology is derived from the Greek root *oikos* meaning 'house' or 'place to live'.[36] Thus, literally, ecology is the study of 'houses' or more broadly, 'environments'. It is the study of organisms 'at home'.[37] Eugene Odum notes further that because ecology is concerned especially with the make-up of groups of organisms, and with the functional processes on the lands, ocean and fresh waters, 'it is more in keeping with modern emphasis to define ecology as the study of the structure and function of nature, *it being understood that mankind is a part of nature*'.[38]

Focusing our discussion on ecology correlates in a substantial reduction of the range of potential disciplines and principles applicable to our theory. However, within ecology itself, there remain a considerable number of principles relating to ecosystems, energy transfer, biochemical cycles, species

33 Ibid.

34 A Kimbrell, 'Recovery of Natural Law as a Paradigm for a New Jurisprudence' at Center for Earth Jurisprudence Symposium, *Framing an Earth Jurisprudence for a Planet in Peril*, 28–29 February 2008 <http://earthjuris.org/events_/02-08symposium/02-08symposium.html> accessed 23 March 2009.

35 See R O Brooks, *Law and Ecology: The Rise of the Ecosystem Regime* (Ashgate, 2002).

36 C Krebs, *The Ecological Worldview* (University of California Press, 2008) 2.

37 E Odum, *Fundamentals of Ecology* (Saunders Company, 1971) 3.

38 E Odum, *Ecology* (Thomson Learning, 1966) 3.

distribution, carrying capacity, community organisation, development and evolution. While I acknowledge the necessity of doing so, I will not attempt to provide an exhaustive list of the ecological principles that might be relevant to Earth Jurisprudence in this paper. However, one principle favoured by Berry and recognised in ecology as fundamental is interconnectedness. Odum describes interconnectedness as follows:

> Living organisms and their nonliving (abiotic) environment are inseparably interrelated and interact upon each other. Any unit that includes all of the organisms (i.e. the community) in a given area interacting with the physical environment so that a flow of energy leads to clearly defined trophic structure, biotic diversity, and material cycles…within the system is an ecological system or ecosystem.[39]

This principle is fundamental to human-earth relationships and one that we transgress at our own peril. For these reasons it is regarded in Earth Jurisprudence as ontologically prior to human law and a principles which human beings can choose to conform too. This last point is critical – the hierarchy of legal categories described in Earth Jurisprudence does not represent a progression of logical necessities to which human beings must conform. Instead, the interaction of legal categories depends on human beings consciously choosing to alter our law to confirm with the greater community that sustains and makes human life possible. Because of the role rational choice plays in Earth Jurisprudence, it is not subject to criticism under the banners 'noncognitivism' or what G.E. Moore termed the 'naturalistic fallacy'.[40]

C *Human Law*

In Earth Jurisprudence, 'human law' is the essence of what is meant by the term law. It's meaning is largely consistent with that articulated in orthodox theory. That is, human law is a rule or prescription, promulgated by the lawmaking authority of a community. To this basic definition, Earth Jurisprudence links human law to the 'common good' of the comprehensive Earth community and holds that human law must be supported by the Great Law. Acknowledging these standards in constructing human law is regarded as reasonable behaviour. Thus, an approximate definition of human law in Earth Jurisprudence could be expressed as follows – 'rules, supported by the Great Law, which are articulated by human authorities for the common good of the comprehensive whole.'

Importantly, this definition shares many similarities with legal positivism.

39 Ibid.

40 G E Moore, *Principia Ethics* (Dover Publications, 2004).

Key areas of relationship include the recognition of human authority to make binding prescriptions for the community and the advancement of human law as a subject of separate consideration and a topic readily identifiable prior to any questions about its relation to external factors i.e. the Great Law. Further Earth Jurisprudence does not contest the known benefit of positive law in achieving social/common goods that require the deployment of state power or the co-ordination of public behaviour.

The dividing line between the two theories rests on several fine distinctions, which nonetheless carry theoretical significance. The most obvious difference is the appeal to 'higher law'. Further, Earth Jurisprudence views human law, not as an object or entity to be studied dispassionately under a microscope. Instead, consistent with the writing of secular natural law theorist Lon Fuller, it views human law as a project, with a purpose.[41] Among other things, this includes to allow human beings to co-exist and flourish within society and the broader environment. This teleological understanding of law was first described by Aquinas in question 90, article two of his *Summa Theologica*. In answer to the question *whether law is always directed to the common good?* Aquinas answers:

> Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness... consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole...and since one man is a part of the prefect community, the law must needs regard properly the relationship to universal happiness.[42]

On this account, law cannot truly be understood without understanding the ideal or 'common good' towards which it is striving. Further, as Fuller notes, to exclude the ideal from a theory of law on the basis of a 'separation of description and evaluation' is to miss the point entirely. The social practice and institution of law, 'is by its nature a striving towards' ideals such as common good. To support this argument, Fuller contrasted laws from other forms of governance such as managerial direction. Law is a particular 'means to an end' or a kind of tool. With this in mind, one can better understand the claim that rules must meet certain criteria connecting the means to the function, if they are to be accorded legal authority.[43]

Another way to understand this proposition is that legal authorities are not entirely free to create law. Instead, they must have knowledge and respond

41 L Fuller, *The Morality of Law* (Yale University Press, 1964) 53.
42 L Fuller, 'Human Purpose and Natural Law' (1956) 53 *Journal of Philosophy* 697.
43 L Fuller, above n 41, 207.

to factors which in orthodox legal philosophy are considered external to law i.e. the Great Law. It should also be noted that in suggesting that laws are enacted for the common good of the comprehensive Earth Community, Earth Jurisprudence is introducing a moral component. Natural law writers such as Aquinas, Finnis and Fuller accept either implicitly or explicitly the relationship between purpose and morality in their respective theories. This recognition is maintained in Earth Jurisprudence. Importantly, this does not mean that human law is a conclusion from moral premises. Rather, following Berry, a lawmaker will be guided in promulgated law from the principles of ecology. In other words, the principles of nature and the moral idea of comprehensive common good are important for determining what the positive law should be. This is a fundamentally different claim from the contention that one ought to use naturalism to determine or describe what the positive law of a particular society currently is.

III The Function of the Great Law

The Great Law has been described as ontologically prior and the measure of Human Law. Thus, for Human Law to attain legal quality and the power to bind a community in conscious, it must be consistent with the Great Law. Further, any purported law which is in conflict with the Great Law is regarded as a mere corruption of law and not binding by virtue of its own legal quality. In this situation, Earth Jurisprudence upholds the moral right citizens have to disobedience and protest.

A *Legal Quality*

In regard to the question of legal quality, Cullinan notes that ecological first principles such as interconnectedness should not be applied literally, as a rule or principle might. Instead, he notes that they can be understood as 'the design parameters within which those of us engaged in developing Earth Jurisprudence for the human species must operate'.[44] To understand whether a legislator has transgressed a principle such as interconnectedness, one must analyse the likely future consequence of a purported law. In some instances, such as the logging of old-growth forest, it will be relatively easy to establish that a 'first principle' such as interconnectedness has bee breached. In other cases, which involve some level of forecasting or there is little information on the practice, process or perhaps ecosystem, the decision-making process will be more difficult. If it is determined that the purported law breaches this ecological first principle, it is a corruption of law and does not bind in conscience. First principles derived from ecology are also necessarily

44 Cullinan, above n 13, 84–85.

connected to the purpose of law, which is directed at the common good of the complete community.

While this reasoning may appear abstract, one can witness many similar statements in environmental philosophy & politics. For example, in 2007 former vice president of the United States Al Gore noted 'I can't understand why there aren't rings of young people blocking bulldozers, and preventing them from constructing coal-fired power plants'.[45] These comments were followed in a 2008 address to the Clinton Global Initiative:

> If you're a young person looking at the future of this planet and looking at what is being done right now, and not done, I believe we have reached the state where it is time for civil disobedience to prevent the construction of new coal plants that do not have carbon capture and sequestration.[46]

In this example, we can presume that the proponent has applied for and received the relevant legal permits and licenses to carry out construction of a coal plant. Consistent with other large-scale projects there has likely been community consultation, opportunity for public comment and negotiation with stakeholders. However, in-spite of these measures, because of the known ecological dangers caused by coal-fired power plants, and the risk it poses to the long-term common good, Gore questions its legal validity. More than this, he expresses his dismay that individuals are not positively breaking the law to stop the project. Certainly, we must we must question the value and legitimacy of any law that surpasses the ecological limits of the environment to satisfy the needs of one species. In this notion we witness the interrelation between the Great Law and Human Law.

To further make sense of this interrelation, it is useful to draw from the Thomist natural law tradition and this time, to the writing of John Finnis. Finnis distinguishes what he calls the 'focal' meaning of law from its secondary meaning.[47] Here the focal meaning of law refers to its ideal form and that actual law is a mere striving or approximation toward this form. Finnis argues that the central focus of law is the 'complete community', which he defines as 'an all-round association' that includes the 'initiatives and activities of individuals, of families and of the vast network of intermediate associations'.[48] Its purpose or point is to 'secure a whole ensemble of material

45 M Leanard, 'Al Gore Calling for Direct Action Against Coal', *The Understory*, 2007, <http://understory.ran.org/2007/08/16/al-gore-calling-for-direct-action-against-coal/> accessed 1 February 2010.

46 M Nichols, 'Gore Urges Civil Disobedience to Stop Coal Plants', *Reuters*, 2010, <http://uk.reuters.com/article/idUKTRE48N7AA20080924> accessed 1 February 2010.

47 J Finnis, *Natural Law & Natural Rights* (Oxford University Press, 1980) 9.

48 Ibid 147.

and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development'.[49] Thus, the focal meaning of law is to secure the common good of human beings by co-ordinating the different goods of individuals within the complete community. For Finnis, this is the true purpose of law and it follows that any law, which conflicts with this goal, is not a law in the focal sense of the term. They are not true laws 'in the fullest sense of the term' and 'less legal than laws that are just'.[50]

The argument advocated by Finnis regarding the focal and secondary meaning of law is conceptually very useful for advancing a theory of Earth Jurisprudence. However, one should have misgivings about how 'complete' Finnis's notion of community is. His is a human community and centres on important social relations and the sharing of a common aim. In this construction, Finnis forgets the ground on which he stands, the air he breathes and the material his *opus* was printed on. More than this, by limiting his central case to the human community, he places in great jeopardy his notion of law's purpose. Indeed, individual and community goods are entirely dependant on a healthy and productive environment. If this comprehensive community flourishes we all flourish; if it falls we all fall. Importantly, Finnis does provide for the extension of his definition of complete community. Looking to the future he notes, '[i]f it appears that the good of individuals can only be fully secured and realised in the context of the international community, we must conclude that the claim of the national state to be a complete community is unwarranted'.[51] Following this thinking one step further, if the good of individuals and communities can only be secured by further extension to the comprehensive Earth Community, there is no reason why his reasoning could not similarly be extended.

The central case of law advanced in Earth Jurisprudence is truly a 'complete community'. Its point, or common good is to secure the safety and future flourishing of this community. This is the true purpose of law, in the focal sense of the term and the only point of reference worth considering in pursuit of common good. It follows from this that laws, which transgress the design parameters derived from ecological first principles and place in jeopardy the purpose of law, are not laws in the focal sense of the term. They lack legal quality. I will turn now to consider the consequence of this status.

49 Ibid 154.
50 Ibid 279.
51 Ibid 150.

B *Corruption and Civil Disobedience*

Consistent with the interrelation of legal categories proposed in natural law, Earth Jurisprudence holds that a law, which transgress first principles of nature and jeopardises the purpose of law, is not a law in the focal sense of the term. To be clear, Earth Jurisprudence does not invalidate human law in this manner. Instead, it provides a set of fundamental principles for a legal system that serves the true purpose of law and seeks to provide 'a rational basis for the activities of legislators, judges and citizens'.[52] Further to these functions, it also provides criteria for deciding whether citizens are morally bound to follow the law in so far as positive law may diverge from the ideal standards proposed in the Great Law. This function is connected with ideas on legal authority, obligation to obey the law and civil disobedience.

To begin, Earth Jurisprudence affirms the presumption of laws obligatory force. That is, individuals have a general obligation to obey the law as a result of the benefit they receive from it, including protection and material wealth. On this point, the modern social contract theory articulated by John Rawls remains influential. Briefly summarised, Rawls argued that a society is just if it is governed by principles which citizens would have agreed to in a state of ignorance of their individual position in society. Where a society is just or close to just, there is, he says a 'natural duty' for citizens to support its institutions.[53] Further, so long as the basic structure of society is reasonably just, Rawls argued that the duty to obey the law extends to obeying particular unjust laws – so long as they do not exceed certain thresholds of injustice. Rawls regarded the denial of basic liberties to cross this threshold and noted that if this occurred, ones *prima facia* duty to the law could be 'overridden and replaced with 'other more stringent obligations'.[54] Here, conscientious refusal to obey the particular laws is justified and in the case of blatant injustice, civil disobedience may be justified.

Consistent with the basic framework of this theory, Earth Jurisprudence upholds the right to conscientious refusal and civil disobedience when a purported law contravenes first principles derived from ecology or places in jeopardy the comprehensive common good. While justified on a different basis, such a corruption of law sits alongside other violations such as the denial of civil liberties or discrimination on the basis of race or gender. Consistent with other investigations into legal authority, Earth Jurisprudence is a response to its times and the unique challenges it faces. Indeed, Just as Rawls was informed by the growing civil rights movement in the United

52 Ibid 290.
53 J Rawls, *A Theory of Justice* (Harvard University Press, 1964) 3.
54 Ibid 350.

States, advocates of Earth Jurisprudence are informed by the increasing rate and intensity of environmental activism around the world. At present, our law and jurisprudence maintains an antagonistic stance toward these efforts. In response, Earth Jurisprudence seeks to establish an intellectual framework through which to understand this movement and advocates a legal philosophy that explicitly recognises the moral right we all have protest laws which places the Earth community in peril.[55]

IV Conclusion: Re-thinking Law for the Ecological Age

In his fascinating study of the rise and fall of civilisations, biogeographer Jared Diamond suggests that one key reason past cultures have collapsed is 'a failure to respond adequately to a perceived problem, because of a reluctance to abandon deeply held values'.[56] Certainly, one central factor contributing to the present environmental crisis is our failure to understand and behave as members of the Earth community. Our law has been developed to facilitate a one-way exchange with the Earth and feed our ever-growing extractive industrial economy. Today, there is a great need to develop a jurisprudence that seeks to develop a mutually enhancing and beneficial human-earth relationship. As Berry notes, '[t]o be viable, the human community must move from its present anthropocentric norm to a geocentric norm of reality and value'.[57] Consistent with the philosophy expressed in Earth Jurisprudence, this is simply the recognition that the human community is a sub-system of a broader and primary earth system. As integral members of the Earth community, human beings need to act from within this comprehensive context, adapting Human Law to respect the Great law and learning once more to inhabit the Earth.

The classic German poet, Rainer Maria Rilke, expressed this simple message in his poem 'Wenn etwas mir vom Fenster fällt':

How surely gravity's law,

strong as an ocean current,

takes hold of the smallest thing

and pulls it toward the heart of the world.

55 Natural Resource Defense Council, 'Hostile Environment: How Activist Judges Threaten Our Air, Water, and Land', 2001, <http://www.nrdc.org/legislation/hostile/hostinx.asp> accessed 1 February 2010.

56 The collapse of Easter Island is an obvious example, where the community deforested the land so that the timber could be used for transporting stones. The stones were being built to construct a giant statute for worship. See further J Diamond, *Collapse: How Societies Choose to Fall or Succeed* (Penguin Books, 2006) 79–119.

57 Berry, above n 24, 8.

Each thing-
each stone, blossom, child-
is held in place.
Only we, in our arrogance,
push out beyond what we each belong to
for some empty freedom.

If we surrendered
to earth's intelligence
we could rise up rooted, like trees.

Instead we entangle ourselves
in knots of our own making
and struggle, lonely and confused.

So like children, we begin again
to learn from the things,
because they are in God's heart;
they have never left him.

This is what the things can teach us:
to fall,
patiently to trust our heaviness.
Even a bird has to do that
before he can fly.[58]

58 Rainer Maria Rilke, 'Wenn Etwas mir vom Fenster Fällt' in Anita Barrows and Joanna Macy, *Rilke's Book of Hours* (Riverhead Books, 1996) 116.