

# MAPPING THE TERRAIN OF EARTH JURISPRUDENCE: *LANDSCAPE, THRESHOLDS AND HORIZONS*

*Anne Schillmoller\* and Alessandro Pelizzon\**

## ABSTRACT

*This paper investigates central ideas in the emergent field of Earth Jurisprudence. It suggests that development of conceptual and practical frameworks for an earth justice system predicated on rights of nature is currently at a nascent stage, but such 'creative uncertainty' provides scholars and practitioners with opportunities to identify and articulate new conceptual frameworks which avoid some of the hazards of human exceptionalism.*

*Part I suggests that the concept of 'rights of nature' rests upon contestable epistemological and ontological claims and that an effective Earth Jurisprudence will require a continual negotiation of interpretative disagreements and frameworks for action.*

*Part II explores the 'promiscuous concept' of nature and argues that the ways in which biophysical reality is articulated and represented in some Earth Jurisprudence scholarship requires further investigation.*

*With reference to the concept of 'rights', parts III and IV investigate the relationship between the idea of a non-anthropocentric earth justice system and the pragmatic imperatives of human juridical systems. It suggests that the incommensurability between a theory of earth justice and practice of an earth justice system will continue to involve exponents of Earth Jurisprudence in a host of scientific, legal,*

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\* Anne Schillmoller, Adjunct Fellow, School of Law and Justice, Southern Cross University. Anne's teaching and research interests include Legal Philosophy, Animal Law and Earth Jurisprudence. She is especially interested in posthumanist perspectives on human/non human animal relationships.

\* Dr Alessandro Pelizzon, Associate Lecturer, School of Law and Justice, Southern Cross University. Alessandro's areas of research and expertise are legal Anthropology, Comparative Law, Legal Theory, Indigenous Rights and Earth Jurisprudence.

*political and ethical tensions, ones demanding an ongoing negotiation of conceptual frameworks together with a pragmatic willingness to concede to the normative anthropocentrism of juridical frameworks.*

## INTRODUCTION

*‘The hunt for any natural resting point is as unrealistic as to reach out for the horizon.’<sup>1</sup>*

Earth jurisprudence is an emerging area of law in which the integrity and health of ecosystems become a central concern of human legal and political institutions. In recent years, several countries have proposed constitutional reforms which mandate legal recognition of ecosystems’ ‘right to exist’. In September 2008 Ecuador became the first country in the world to declare constitutional ‘rights of nature’ and to codify a new system of environmental governance.<sup>2</sup> The new laws grant citizens the right to sue on behalf of an ecosystem, even if not injured themselves.<sup>3</sup>

At this stage in its development, both the practice and theory of this emergent jurisprudence occupy indeterminate terrain, but one already inscribed by humanist precepts of what ‘rights’ and ‘nature’ might consist of. Mindful that nature and rights are contested concepts with negotiable meanings; this paper identifies and investigates central epistemological and ontological thresholds with a view to contributing to the development of conceptual terrain for earth jurisprudence which avoid the hazards of human exceptionalism.

This exploration is informed by emergent scholarship in the fields of ecological realism, speculative realism and object oriented ontology. What these movements offer are conceptual frameworks which seek to uphold the autonomy of reality against the depredations of anthropocentrism, ones within which humans have no particularly privileged place<sup>4</sup>.

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<sup>1</sup>. Arne Naess, *Reflections about Total Views*, 51(1) *PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH* 16, 25 (1964).

<sup>2</sup>. KENNETH J MIJESKI & SCOTT H BECK, *PACHAKUTIK AND THE RISE AND DECLINE OF THE ECUADORIAN INDIGENOUS MOVEMENT* 114-115 (2011).

<sup>3</sup>. Clare Kendall, *A new law of nature*, *THE GUARDIAN*, Sept. 24, 2008, available at <http://www.guardian.co.uk/environment/2008/sep/24/ecuador.conservation>. As one of the architects of this new legal framework observed, Ecuador has taken a step into the ‘legal unknown’ and ‘a lot of people will be watching what happens’.

<sup>4</sup>. LEVI BRYANT, *THE DEMOCRACY OF OBJECTS* 40 (2011).

While recognizing a tension between the pragmatic imperatives of normative systems of human governance and the conceptual terrain of metaphysical realism, this paper enters a ‘realm of creative uncertainty’ with a view to the identification of possibilities for dialogue between emergent speculative fields, one which may inform the development of a hybrid philosophical and juridical framework capable of responding to urgent ecological crises.

### I. *LANDSCAPE: AN ECOLOGY OF IDEAS*

*‘We gain knowledge but only to lose the world.’<sup>5</sup>*

Mike Bell observes that the search for an earth jurisprudence is ‘much like setting out on a journey in unfamiliar territory without an adequate map’.<sup>6</sup> It is a journey which requires an interrogation of our reasons for embarking upon it, an articulation of the conceptual frameworks which inform it, and an identification of what is hoped will be achieved. Unavoidably, perhaps, the journey is one tainted by anthropocentrism and inscribed by deeply embedded notions of human exceptionalism. Whether it is one which may circumvent contamination by humanist frames of reference will, in all likelihood, remain an area of contention.

Thomas Berry first proposed earth jurisprudence as an emerging framework for law in 2001.<sup>7</sup> As a legal philosophy, earth jurisprudence is predicated upon the idea that humans are part of an interrelated community of beings and that the welfare of each member of this community is directly connected to, and dependent upon, the welfare of the earth community as a whole.<sup>8</sup> Some proponents of earth

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<sup>5</sup>. Cary Wolfe, *Introduction* to STANLEY CAVELL, CORA DIAMOND, JOHN McDOWELL, IAN HACKING & CARY WOLFE, *PHILOSOPHY AND ANIMAL LIFE*, at 5 (2008).

<sup>6</sup>. Mike Bell, *Thomas Berry and an Earth Jurisprudence: An Exploratory Essay*, 19(1) *THE TRUMPETER* 69 (2003).

<sup>7</sup>. *Id.*

<sup>8</sup>. CORMAC CULLINAN, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* (Peter Burdon ed., 2011). Because, it is reasonably safe to assume, the universe is not *terra nullius*, the notion of ‘earth community’, is itself problematic. It may be that limiting earth jurisprudence to

jurisprudence advocate the recognition of ‘rights of nature’, a system of governance which extends the protection of laws beyond humans to the entire ‘earth community’.<sup>9</sup> These authors assert that such laws may function as regulatory systems in a way that is consistent with ‘fundamental laws’, or the ‘Great Jurisprudence’.<sup>10</sup>

During the last decade there have been a number of legislative initiatives which enshrine rights for nature in domestic legal systems. In 2008 Ecuador was the first country to introduce constitutional recognition of rights for nature.<sup>11</sup> On 30 March 2011, the first successful legal challenge recognizing such rights under Article 71 of the Ecuadorian Constitution was heard in the Provincial Justice Court of Loja.<sup>12</sup> In the case, the Court issued a constitutional injunction against the Provincial Government of Loja in favor of the Vilcabamba River. It held that a project to widen the Vilcabamba-Quinara road, which had

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‘planetary’ thinking is another form of anthropocentrism in which humans are privileging their specific ecology. The notion that we are all members of a complex and diverse community of life on Earth and that we (humans) have ethical obligations to defend and strengthen the integrity of the Earth community for the sake of its current and future members, might arguably exclude the indivisible inclusion of this community in a complex and diverse cosmos. An inclusive ecocentric sensibility would suggest that ecological perspectives encompass the much larger cosmological context of life, including physical ‘laws’, which have developed in response to a complex series of extra planetary conditions. The writers wish to acknowledge the contributions of their colleague, Aidan Ricketts, for his succinct articulation of these ideas. *See also* QUENTIN MEILLASSOUX, *AFTER FINITUDE: AN ESSAY ON THE NECESSITY OF CONTINGENCY* (2008), (suggesting that ‘the cosmos compels us to face the contingency of thought and to rethink the priority of human access.’), EDGAR MORIN, *INTRODUCTION TO A HUMAN POLITICS* (1999), (arguing that ‘all entities in the universe are enfolded within the ecology of the cosmos.’

<sup>9</sup>. CULLINAN, *supra* note 8.

<sup>10</sup>. *See* THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* (1999).

<sup>11</sup>. MIJESKI & BECK, *supra* note 2.

<sup>12</sup>. Ecuador’s *Constitutional Rights for Nature* provides that ‘Nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes’ and ‘a right to an integral restoration’. Importantly, it identifies juridical mechanisms for the recognition, regulation and enforcement of these rights. *See* The Pachamama Alliance, *First Successful Case Enforcing Rights of Nature in Ecuador*, July 29, 2011, available at <http://www.pachamama.org/news/first-successful-case-enforcing-rights-of-nature-in-ecuador> (last visited May 25, 2013).

been underway for three years without studies on its environmental impact, directly violated the rights of nature by increasing the river flow, provoking a risk of disaster from floods and adversely affecting the riverside populations that utilize the river's resources. The Court declared that the defendant had 'violated the right that nature has to be fully respected in its existence and maintenance of its vital cycles, structure, functions, and evolutionary processes'.<sup>13</sup>

In the United States, local ordinances have been passed that partially recognize rights of nature within local communities,<sup>14</sup> and Bolivia is currently set to legislate the 'Law of Mother Earth' which identifies eleven specific rights for nature.<sup>15</sup> In 2010 Bolivian President

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<sup>13</sup>. Provincial Court of Justice of Loja, sentence No. 11121-2011-0010, March 30, 2011. The Constitutional Injunction established:

- The suitability and efficacy of the Constitutional injunction as the only way to remedy in an immediate manner the environmental damage focusing on the undeniable, elemental, and essential importance of nature, and taking into account the evident process of degradation;
- That, based on the precautionary principle, until it is objectively demonstrated that the probability of certain danger that a project undertaken in an established area does not produce contamination or lead to environmental damage, it is the responsibility of the constitutional judges to incline towards the immediate protection and the legal tutelage of the rights of nature, doing what is necessary to prevent contamination or call for remedy;
- The recognition that damages to nature are generational damages, defined as such for their magnitude that impact not only the present generation but also future ones;
- That the plaintiffs should not have to prove the existence of damages but that the Provincial Government of Loja, as the entity that administers the activity, had to have provide certain evidence that the widening the road would *not* affect the environment;
- That the defendant's argument that the population needs roads does not apply since there is no sacrifice of constitutional rights because the case did not question the widening of the road, but the respect for the constitutional rights of nature. <http://therightsofnature.org/first-ron-case-ecuador>

<sup>14</sup>. *See generally* Community Environmental Legal Defense Fund, Ordinance Archive, September 24, 2011, available at <http://celdf.org/ordinance-archive?preview=1&cache=0> (last visited May 25, 2013).

<sup>15</sup>. These rights include: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; and the right to not have cellular structure modified or genetically altered. It will also enshrine the right of nature 'to not

Evo Morales convened a World Conference of Peoples on Climate Change and Mother Earth's Rights in Cochabamba. A significant outcome of that conference was the drafting of a *Universal Declaration on the Rights of Mother Earth*, a document which 'demands a paradigm shift and a conscious effort on the part of man [*sic*] to own up to our errors and settles on amending our patterns of production and consumption.'<sup>16</sup> This Declaration was presented by Ecuadorian ambassador Pablo Solon to the United Nations Climate Change Conference in June 2011.

Mindful of these initiatives, the development of conceptual and practical frameworks for an earth justice system predicated on rights of nature remains at a nascent stage. The emergent discourse and practice of earth jurisprudence will require decisions to be made relating to the ways in which biophysical reality (including 'nature'), and juridical concepts (including 'rights') are articulated and represented. But because the content of such epistemological and ontological claims rest on contestable assumptions, it is to be supposed that the determination of these frameworks will be the subject of continuing negotiation among both scholars and practitioners of emergent earth governance systems.

As a transdisciplinary endeavor, the development of frameworks for earth jurisprudence will be informed by a range of disciplinary paradigms including those of law, philosophy and the social, natural and biological sciences. But because each discipline employs different historically and culturally specific methods of knowledge production, any attempt to arrive at a coherent and unified framework for Earth jurisprudence would risk misrepresenting the richness and complexity of its conceptual terrain.<sup>17</sup> Consequently, recognition that knowledge

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be affected by mega-infrastructure and development projects that affect the balance of ecosystems and the local inhabitant communities'. See John Vidal, *Law of Mother Earth expected to prompt radical new conservation and social measures in South American nation*, INFINITE UNKNOWN (August 12, 2011), <http://www.infiniteunknown.net/2011/04/12/bolivias-law-of-mother-earth-establishes-11-new-rights-for-nature/>.

<sup>16</sup> Nnimmo Bassey, *Vision: The Declaration of the Rights of Mother Earth is our roadmap to a livable future*, in THE RIGHTS OF NATURE, THE CASE FOR A UNIVERSAL DECLARATION ON THE RIGHTS OF MOTHER EARTH (Council of Canadians, Global Exchange & Fundacion Pachamama eds., 2011).

<sup>17</sup> Edgar Morin suggests that human beings are open to possession by their own ideologies and systems of belief. As a result, he argues, knowledge production is variable across paradigmatic divides which renders problematic the idea of positive or

production is variable across paradigmatic divides renders problematic the identification of a stable and non negotiable landscape for an earth justice system.

Edgar Morin recognizes that thinking of knowledge as the product of disciplinary paradigms necessarily gives rise to a 'realm of creative uncertainty'.<sup>18</sup> Because human beings are open to possession by their ideologies and systems of belief, the 'ecology of ideas', Morin asserts, has a significant impact on the lived perceptions and practices of *homo sapiens* and on everything that may be affected by them. For this reason, it is not just knowledge that is of central importance in the solving of problems, but rather a 'knowledge of knowledge.'<sup>19</sup> It may be supposed that the identification and articulation of this 'knowledge of knowledge', will engender areas of disagreement among scholars, practitioners and activists and will be the subject of continuing negotiation for the development of the theory and practice of earth jurisprudence.

Nearly half a century ago, Norwegian philosopher Arne Næss observed that the conceptual frameworks informing ecological thinking consisted of a 'wide variety of fundamentally different and even incompatible philosophies.'<sup>20</sup> Næss neither proposed nor advocated a single ecophilosophy but emphasized that his version represented only one account. His extensive corpus of work on 'ecosophy' reflects a range of views concerning the meaning of nature and of 'reality'. In it, what began as a metaphysical account of a single form of reality or 'unified science' was gradually replaced with a pluralistic approach which recognized the possibility of a number of competing and scientific theories, any of which, Næss observed, could be said to be compatible with 'reality'.<sup>21</sup>

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stable knowledge. EDGAR MORIN, *JOURNAL DE PLOZEVET* (2001). For a detailed investigation of the concept of knowledge production and disciplinary paradigms, see e.g. MICHEL FOUCAULT, *THE ORDER OF THINGS* (1970); THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3<sup>rd</sup> ed. 1996).

<sup>18</sup>. MORIN, *supra* note 8.

<sup>19</sup>. *Id.*

<sup>20</sup>. NAESS, *supra* note 1.

<sup>21</sup>. ARNE NAESS, *THE PLURALIST AND POSSIBILIST ASPECT OF THE SCIENTIFIC ENTERPRISE* (1972).

While Næss acknowledged that contemplation of the ‘vast plurality of possible worlds’ can undermine the capacity to respond to serious problems that we encounter,<sup>22</sup> Catriona Sandilands suggests that a ‘strategy of healthy multiplicity’ for environmental politics can provide us with an opportunity to be actively engaged citizens whose role it is to help to ‘clarify, refine and develop the ‘truthfulness’ of various perspectives’. If we don’t know in advance of the conversation what environmental justice will look like, Sandilands argues, then we have to pay very close attention to how the world appears to the others with whom we share responsibility for its construction:

‘Environmental justice politics invites the appearance of a variety of different claims to know nature and to know justice. Without a clear sense of what an ecological rationality might look like before processes of debate and politicization occur, environmental justice requires a ‘necessary but critically interacting multiplicity of views on nature’.<sup>23</sup>

The views articulated here suggest that a recognition of the contingency of meaning will oblige scholars and practitioners of earth jurisprudence to continually negotiate interpretative disagreements and frameworks for action. They also suggest that the tension between skepticism about knowledge and the pragmatic imperatives of effective strategic interventions provide opportunities for the development of inclusive dialogues which ‘avoid the manifold dangers to democratic societies of totalizing moral schemes’.<sup>24</sup>

In the discussion which follows, this paper identifies a number of threshold epistemological and ontological claims which, it is suggested, will require investigation and negotiation with a view to the identification of frameworks to inform the theoretical terrain of, and pragmatic strategies for, an effective earth justice system.

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<sup>22</sup>. Arne Næss, *The Shallow and the Deep, Long Range Ecology Movement: A Summary*, 16 *INQUIRY* 95 (1973).

<sup>23</sup>. Catriona Sandilands, *Opinionated Natures: Toward a Green Public Culture*, in *DEMOCRACY AND THE CLAIMS OF NATURE: CRITICAL PERSPECTIVES FOR A NEW CENTURY* 149-150 (Ben A. Minter & Bob Pepperman Taylor eds., 2002).

<sup>24</sup>. Cary Wolfe, *Old Orders for New: Ecology Animal Rights, and The Poverty of Humanism*, in *AMERICAN CULTURE, THE DISCOURSE OF SPECIES AND POSTHUMANIST THEORY*, 22 (2003).

## II. THRESHOLD: THE MEANING OF NATURE AND ‘NATURE’S MEANING’

*‘To philosophize about nature is to produce it.’<sup>25</sup>*

Kate Soper observes that nature is a ‘promiscuous concept’.<sup>26</sup> And as Michael Carolan notes, the term ‘nature’ is used to speak of any number of things: from the ‘not natural,’ such as the urban landscape; to the nature of unspoiled wilderness; to the forces of nature, such as gravity and natural selection; to the nature of the universe, of dark matter and galaxies; and finally, to human nature. Is there any hope, Carolan asks, of ‘unsnarling this terminological quagmire’, or will we be forced to abandon the concept in its quest for conceptual and analytic specificity?<sup>27</sup>

Structural anthropologists have suggested that the binary of nature and culture is one by which human societies organize their conceptual world<sup>28</sup> and poststructuralist thinkers have demonstrated that the meaning of this dualism is a shifting one which is ‘co-implicated with power, desire, and other such forces’.<sup>29</sup> Whether represented as an artifact of human consciousness (*nomos*) or the result of biophysical

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<sup>25</sup>. FRIEDRICH WILHELM JOSEPH VON SCHELLING, *IDEAS FOR A PHILOSOPHY OF NATURE* (IV, 3) (EE Harris & P Health [trans], Cambridge Univ Press, 1988) (1797).

<sup>26</sup>. KATE SOPER, *WHAT IS NATURE?* 15-20 (1995). Soper argues that nature exists in both a *realist* sense, thereby making room for very real biophysical limits, and in a sociocultural sense, so as to provide conceptual space for social critique and the ever-important analysis of power. She identifies three ‘kinds’ of nature: external nature (the assumption that nature is external to, and different from, society); intrinsic nature (nature as ‘an inherent and essential quality’ of something) and universal nature (nature as a global ecological system).

<sup>27</sup>. Michael Carolan, *Society, Biology, and Ecology: Bringing Nature Back Into Sociology’s Disciplinary Narrative Through Critical Realism*, 18 *ORGANIZATION & ENVIRONMENT* 393 (2005).

<sup>28</sup>. CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (Rodney Needham [trans], Beacon Press, 1969) (1949).

<sup>29</sup>. Adrian Ivakhiv, *Social Nature: Collapsing Dichotomies Without Unraveling The Fabric Of Things* (August 18, 2011), <http://www.archivefire.net/2011/05/ivakhiv-on-nature-and-collapsing.html>.

processes (*physis*), what nature ‘is’ and what nature ‘means’ are likely to remain contested areas.<sup>30</sup>

The consequences of such contestation for an earth justice system predicated on rights for nature is a problematic tension between the requirement of a concept of nature upon which to ground action, and an awareness of the impossibility of settling upon a definitive version of what nature ‘is’.<sup>31</sup> As a result, those concerned to develop an earth jurisprudence may be obliged to base their praxis on accounts of nature which they know to be contestable and contingent. They may be assisted however, by the work of contemporary political ecologists who are concerned not only to interrogate the interdependence of human and nonhuman realms, but also to question the assumptions which support the division of the natural from the cultural. The aim of political ecology is not to protect ‘nature’ but to problematize the social and scientific processes that constitute our understanding of the world. By bringing questions of nature and culture into the processes of politics, political ecology gestures towards new possibilities for political theory which move beyond a paralyzing denial of nature and which involve the nonhuman world as actors in democratic political processes.

Peter Knudtson and David Suzuki have suggested that ‘ecosystems are human constructs to which nature is blind’.<sup>32</sup> While Bruno Latour agrees that ideas of nature are historically situated constructions of human consciousness, he offers what he claims is a non anthropocentric account of nature in which ‘reality’ emerges independently of human interpretation. We should not, he contends, aim to marry culture and nature, but to dissolve the distinction all together.<sup>33</sup> Latour posits a world of highly complex relations between humans and ‘non-humans’ (things, animals), in which the latter are granted the same ‘amount’ of

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<sup>30</sup>. K W Junker, *Reading Nature Through Culture in Plato and Aristotle’s works on Law*, 7(1) *PHRONIMON* 61, 63 (1999). Junker argues that the binary trap of *physis* and *nomos* lies in believing that an understanding of nature can be achieved by creating a hierarchy of derivation. Once we allow our understanding of nature to be framed by this hierarchy, Junker says, scientific empiricism almost inevitably leads to the contestable conclusion that nature is primary and culture is derivative.

<sup>31</sup>. See also CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2003).

<sup>32</sup>. PETER KNUDTSON & DAVID SUZUKI, *WISDOM OF THE ELDERS* 44 (1992).

<sup>33</sup>. BRUNO LATOUR, *POLITICS OF NATURE* (Catherine Porter [trans], 2004).

agency as humans, resulting in a symmetrical, non-hierarchical structure. His political ecology is one in which animate and inanimate entities are ‘actants’ in networks or ‘assemblages’. Because all entities have equal ontological status, modes of classification predicated upon a subject/object dualism are avoided.<sup>34</sup>

In his rejection of the basic distinction between nature and culture, Latour claims that the development of modern (western) society has rested on ‘a collective self-delusion’ and that the processes of setting the natural world against culture as either a chaotic force that needs to be controlled or as a ‘mother nature’ in balance, is unique to the western philosophical tradition.<sup>35</sup> Within this tradition, nature is regarded as outside the realm of politics which is seen as an exclusively human affair. Latour contends, however, that nature is not a particular sphere of reality but the result of a political division. In a world where nature has become one of widespread political concern, a view of politics as an exclusively human affair, he argues, ‘leaves nature to the scientists’. Although we should subject science’s claims of a faithful representation of nature to the same criticism as that leveled at our political representatives, Latour claims the scientist to be a ‘highly useful representative’ of the nonhuman realm.<sup>36</sup>

While he acknowledges that the politics of nature is ‘a rather troublesome one,’ Latour claims that a ‘parliament of things’ offers possibilities for a non-anthropocentric participatory democracy in which nonhuman voices are taken into account. Arguing that representative democracy requires representation for non-humans as well as humans, Latour advocates a ‘global parliament’ for non-humans as well as for

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<sup>34</sup>. *Id.*; See also MANUEL DE LANDA, A NEW PHILOSOPHY OF SOCIETY: ASSEMBLAGE THEORY AND SOCIAL COMPLEXITY (2006); De Landa also proposes an approach to social ontology which asserts the autonomous nature of social entities, but one which takes Gilles Deleuze’s theory of assemblages as its main framework.

<sup>35</sup>. BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 10-11 (Catherine Porter [trans], 1993). (Identifying two demarcations that he sees as crucial to the formation of modernity: the first demarcation is between the domain of nature and the domain of culture, and the second between the processes of purification and the processes of translation. The work of purification refers to the attempt to separate nature and culture into ‘two entirely distinct ontological zones: that of humans on the one hand; that of nonhumans on the other’.)

<sup>36</sup>. *Id.*

humans, each ‘representing their constituencies’ and no one being able to claim to represent the general will.’<sup>37</sup>

While Latour acknowledges that the process of representing nonhumans is not simple, for him it is little different from the process of representing humans. In Latourian democratic politics scientific spokespersons play an important role because it is through them that non human entities acquire a ‘voice’. The divide, he says, is not between science and politics but between ‘trusted and not trusted representatives’.<sup>38</sup>

While the efficacy of Latour’s parliament of things requires confidence in ‘trusted’ representatives, his model pays scant regard to asymmetries of power between spokespersons and nonhuman entities and the difficulties of recovering the voices and determining the interests of these entities. While Foucault did not extend his concept of biopolitical power to non human entities, it is suggested that discourses of human exceptionalism remain integral to processes of biopolitical normalization.<sup>39</sup> So while Latour’s work is motivated by a democratic impulse to include a multiplicity of voices, if it hopes to offer a proper democratic politics, it will have to find ways to deal with hierarchies of interest and differentials of power.<sup>40</sup>

Because it will be humans who represent and/or ‘speak’ for non human entities in an earth justice system, these are also significant issues for earth jurisprudence. How and by whom will non human

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<sup>37</sup>. Bruno Latour, *Politics of Nature: East and West Perspectives*, 4(1) *ETHICS & GLOBAL POLITICS* 71 (2011).

<sup>38</sup>. *Id.* at 144.

<sup>39</sup>. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL 1: THE WILL TO KNOWLEDGE* (1998). Biopolitics for Foucault is political power exercised on whole populations in every aspect of human life. Through power saturated discourses and knowledge, the exercise of biopower produces and makes possible permissible modes of being and thinking while disqualifying and/or making others impossible.

<sup>40</sup>. See Srikanth Mallavarapu and Amit Prasad, *Facts, Fetishes, and the Parliament of Things: Is There any Space for Critique?*, (20)2 *SOCIAL EPISTEMOLOGY* 185, 193 (2006). See also Donna Haraway, *MODEST WITNESS@SECOND\_MILLENIUM. FEMALEMAN MEETS ONCOMOUSE: FEMINISM AND TECHNOSCIENCE* 280 (1997), (suggesting that it is ‘less epistemologically, politically, and emotionally powerful to see that there are ...hybrids of the human and non-human ... than to ask for whom and how these hybrids work.’)

voices be represented and by what processes will the interests of nonhuman entities be determined? These are normative concerns that an earth justice system predicated on rights for nature will be compelled to negotiate.

Adam Robbert agrees that the idea of nature can get us into some ‘grave conceptual cul-de-sacs’ and seeks to reframe the conversation by ‘sliding the idea of nature out of the vice-grip of nature-culture dualism.’ While it is arguable that his model of ecological domains is, like Latour’s, one which remains trapped in a realm of ideas, it offers a non humanist and multiplicitous account of nature which avoids the polarization of biocentrism and anthropocentrism. Robbert identifies three ontologically concrete ecological domains: natural ecology, media ecology and knowledge ecology. These domains are not bounded systems but co-emergent ‘ecologies of objects’ which he claims are capable of accounting for the ontological and epistemological circumstances of all organisms:

‘Different organisms, cultures, or species literally enact, abstract, and construct, distinct ontological domains which have ongoing recursive effects.’<sup>41</sup>

Because nonhumans contain and participate in each of these ecologies, Robbert’s model both avoids biocentric notions of organism and environment and provides a non anthropocentric ‘principle of relationships’ not situated relative to human experience.<sup>42</sup>

Edgar Morin agrees that there is no a stable boundary between ‘humans’ and ‘nature.’ Attentive to how the meaning of being human is tied up with our constructions of nature, he contends that what nature ‘is’, shifts in relation to epistemological, social and political-ethical changes. Nature, for Morin, is ‘inextricably confounded with humanity’s

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<sup>41</sup>. Adam Robbert, *Three Ecologies and the Composition of Space* (May 30, 2011), available at <http://knowledge-ecology.com/2011/05/13/three-ecologies-and-the-composition-of-space/>.

<sup>42</sup>. See Adam Robbert, *Three Ecologies and the Composition of Space*, KNOWLEDGE ECOLOGY BLOG (May 13, 2011), <http://knowledge-ecology.com/2011/05/13/three-ecologies-and-the-composition-of-space/>. Robbert argues that a horseshoe crab, for example, would have its own natural, media, and knowledge ecologies and that the three ecologies make a step towards accounting for the ontological and epistemological circumstances of all organisms, and not just humans.

projects and self-understandings.<sup>43</sup> He embraces an ecological approach to understand not only environmental systems but also systems of knowledge, identity and perception. Human perception, Morin claims, is in a dynamic, ecological relationship to ideas and paradigms that re-frame perception itself in an ongoing evolutionary process:

‘What we need is an ecologized thinking that considers the vital link of every living, human, or social system to its environment’.<sup>44</sup>

Morin describes his approach as a ‘fundamental anthropology’, one which incorporates elements of biology, psychology, anthropology, ecology and systems theory into a ‘non-centered systems approach’. This anthropology asserts the inadequacy of both pan-biologisms and pan-culturalisms, in favor of more complex representations of truth that are neither biological nor cultural, but which reveal nature as a multiple objective reality disclosed by multiple empirical sciences.<sup>45</sup> To this extent, unlike Latour, Morin’s anthropological approach is perhaps better equipped to embrace an ontological pluralism capable of acknowledging cultural specificities associated with the concept of nature.<sup>46</sup>

Morin contends that every entity in the universe, (be it a thought, a mythos, a political movement or a thermodynamic energy gradient) are enfolded within the ecology of the cosmos. This complex movement of nature, culture, and thought, for Morin, is leading towards what he calls the ‘Planetary Era,’ one which reveals relational and multidimensional processes of influence that link the Earth into a planetary whole.<sup>47</sup>

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<sup>43</sup>. EDGAR MORIN, ON COMPLEXITY: ADVANCES IN SYSTEMS THEORY, COMPLEXITY, AND THE HUMANS SCIENCES 138 (2008).

<sup>44</sup>. MORIN, *supra* note 8, at 52.

<sup>45</sup>. MORIN, *supra* note 43.

<sup>46</sup>. MALLAVARAPU & PRASAD, *supra* note 40, at 191. Mallavarapu and Prasad note that while Latour advocates anthropology as a model for interaction between cultures, he fails to mention how anthropology as a discipline was implicated in the colonial project. In addition, he often deploys categories such as the division between the West and non-West without sufficient sensitivity to complex layers of historical engagement, resulting sometimes in a Eurocentric analysis.

<sup>47</sup>. MORIN, *supra* note 8

Morin's aim is not to reduce the concreteness of 'reality' to a single paradigm, but to reveal the mutually implicative character of perception and world that constitutes the ecology of experience:

'[I] think we construct our perception of the world, but with the help of the world itself which, as it were, 'lends us a hand'. What we know is not the world itself, but the world along with our knowledge of it. We cannot isolate the world from our structures of knowing. Mind and world are inseparable.'<sup>48</sup>

Alf Hornborg's relational epistemology also recognizes that human cognition is a mutually constellating act that 'designates simultaneously the knower as a subject and the known as an object of knowledge'. Hornborg's analysis of power suggests that it is important to avoid naturalizing ecological processes that background political and economic practices of marginalization in the name of science. To this extent, he identifies a tension between the view that an objective biophysical environment exists and one which insists upon constructed discourses of history and culture:

'All ecosystems carry the imprints of human activity. In other words, human social phenomena such as culture, language, and power are really components of ecosystems.'<sup>49</sup>

Hornborg argues, however, that notions of nature as culturally constructed projections of a historically embedded society are not sufficient to understand contemporary ecological problems, nor are they accurately descriptive of ontological spaces designated as 'nature.' He contends that essentialist views that depict nature as existing 'out there' in a 'pure' state separate from human activity, also point to an insufficient understanding of ecological processes:

'If natural landscapes virtually everywhere carry traces of human activity, then the conclusion must be that 'nature' is imbued with human culture and that language intervenes in ecological processes.'<sup>50</sup>

Hornborg's view is suggestive of a number of contemporary frameworks which suggest that traditional conceptions of nature are inimical to ecological thinking and which advocate an 'end' to nature.

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<sup>48</sup>. MORIN, *supra* note 43, at 91.

<sup>49</sup>. ALF HORNBERG, THE POWER OF THE MACHINE: GLOBAL INEQUITIES OF ECONOMY, TECHNOLOGY AND ENVIRONMENT 192 (2001).

<sup>50</sup>. *Id.*

For example, scholars in the emergent field of speculative realism have advocated the development of an ecologically inspired ‘object-oriented’ philosophy that seeks to describe the nature of all relations as ecological. As a new form of metaphysics which takes place in what Gironi has called a ‘scientifico-philosophical hybrid field’,<sup>51</sup> speculative realism has developed as a response both to the epistemological prestige and popular appeal of the natural sciences and to the failure of continental philosophy to comprehensively respond to this science. With reference to Quentin Meillassoux’s *After Finitude*, Gironi argues that the last forty years of the physical sciences has powerfully presented to humankind the disconcerting vastness of the ‘great outdoors’ and that in their response to these developments, the speculative realists represent ‘a return to the true meaning of the Copernican Revolution’. Speculative realism he says is not a doctrine, but an umbrella term for a variety of programs which protest the rigid ideological categories of culture/nature and are ‘committed to upholding the autonomy of reality against the depredations of anthropocentrism’.<sup>52</sup> Meillassoux’s speculative metaphysics asserts that the sense of desolation and abandonment which modern science instills in humanity’s conception of itself and of the cosmos compels us to face the contingency of thought and to rethink the priority of human access:

‘[I]t could be that contemporary philosophers have lost the great outdoors, the absolute outside of pre-critical thinkers: that outside which was not relative to us, and which was given as indifferent to its own givenness to be what it is, existing in itself regardless of whether we are thinking of it or not; that outside which thought could explore with the legitimate feeling of being on foreign territory—of being entirely elsewhere.’<sup>53</sup>

Levi Bryant’s response to this sense of bereavement is the notion of a ‘wilderness ontology’, a cosmos within which humans are not sovereigns of being and have no particularly privileged place. Within

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<sup>51</sup>. Fabio Gironi, *Science-Laden Theory: Outlines of an Unsettled Alliance*, in *SPECULATIONS I* (Paul Ennis ed., 2010), available at <http://www.publicpraxis.com/speculations/wp-content/uploads/2010/07/Speculations-I-Standard-Version.pdf>.

<sup>52</sup>. *Id.*

<sup>53</sup>. MEILASSOUX, *supra* note 8, at 7.

such a wilderness there is no distinction between the natural and the cultural, the human and the natural, but only a flat field in which humans are simply ‘beings amongst beings’. Bryant’s wilderness ontology is not conceived in terms of the *absence* of humans, but rather in terms of a flat ontology in which humans are *among* beings without enjoying any unilateral, sovereign role:

‘The most insignificant quark on the other side of the universe makes its difference(s) without any relation to our consciousness or knowledge of that quark. Difference is thus a matter of the ‘things themselves’, not *our relationship* to things. In this regard, the Principle of the Inhuman is formulated not so as to *exclude* the human—humans and human artifacts, after all, make differences too—but rather to underline the point that humans are beings *among* the swarm of differences and hold no special or privileged place with respect to these differences.’<sup>54</sup>

To this extent, Bryant’s speculative approach stands in stark contrast with Neill Evernden’s suggestion that ‘through our conceptual domestication of nature, we extinguish wild otherness even in the imagination.’<sup>55</sup> Bryant argues that Enlightenment thought was premised on an ‘infantile and narcissistic fantasy’ of the world as a screen for human intentions; one which enabled us to enjoy an imagined dominion over the forces of nature itself. This ‘continuing immaturity’, he states, fails to recognize the manner in which humankind is heteronomously determined. Humans, Bryant suggests, only ever act in assemblages that ‘exceed our intentions and expectations’ and that unless we acknowledge our entanglements, we will be unable to attend to the ‘strange strangers.’<sup>56</sup> Together with Timothy Morton, Bryant uses the

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<sup>54</sup>. Levi Bryant, *The Ontic Principle: Outline of an Object-Oriented Ontology*, in LEVI BRYANT, NICK SMICEK & GRAHAM HARMAN, *THE SPECULATIVE TURN: CONTINENTAL MATERIALISM AND REALISM* 267 (Levi Bryant, Nick Smicek and Graham Harman eds., 2011).

<sup>55</sup>. NEIL EVERNDEN, *THE SOCIAL CREATION OF NATURE* 116 (1992).

<sup>56</sup>. See also TIMOTHY MORTON, *ECOLOGY WITHOUT NATURE: RETHINKING ENVIRONMENTAL AESTHETICS* 49 (2009). (Morton argues that ecological coexistence consists of *strange strangers*, beings that are ‘ineradicably, irreducibly strange, strange in their strangeness ... surprisingly surprising’. These beings cannot be referred to as *animal*, nonhuman nor as life forms since, Morton opines, if a virus is alive in any meaningful sense, then so is a computer virus. The more we know about strange

notion of ‘dark ecology’, one focused on mystery and the impossibility of a human mind big enough to encompass the universe. Dark ecology is predicated upon an awareness that objects and entities are never fully present nor ever fully manifest themselves. What dark ecology investigates is not the entities themselves, nor the environment which contains them, but the shifting and changing relations among them.<sup>57</sup> Bryant suggests that a ‘dark’ ecological politics invites us to ‘hang out in the muck and muddiness of uncertainty’ and obliges us to constantly reframe our view of the ecological.<sup>58</sup>

Timothy Morton’s agrees with Robbert that the major stumbling block to ecological thinking is the image of nature itself. While many ecological writers propose a new worldview, Morton suggests that their passion to preserve the natural world leads them away from the ‘nature’ they revere. We should, Morton argues, avoid romantic and holistic conceptions of nature which ‘avoid the challenge of radical coexistence.’<sup>59</sup> He then articulates an apparent paradox: to have a properly ecological view, ‘we must relinquish the idea of nature once and for all.’<sup>60</sup>

Morton suggests that the naïve empiricism of the positivist philosopher and the equally impoverished idea of the social construction of nature is, in the context of a twenty-first century ecological science, inadequate. Rather, Morton argues that nature, culture and biophysical

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strangers, Morton says, the stranger they become: ‘Are they alive? *What is life?* Are they intelligent? *What is intelligence?* Are they people? *Are we people?*’).

<sup>57</sup>. Levi Bryant, *Black Ecology and the Ethical Real* (June 29, 2011), <http://larvalsubjects.wordpress.com/2011/06/29/black-ecology-and-the-ethical-real/>.

<sup>58</sup>. Levi Bryant, *Beautiful Soul Syndrome, Dark Ecology, and Onticology* (July 29, 2010), <http://larvalsubjects.wordpress.com/2010/07/29/beautiful-soul-syndrome-dark-ecology-and-onticology/>.

<sup>59</sup>. TIMOTHY MORTON, *THE ECOLOGICAL THOUGHT* (2010). Morton’s views appear in tension with those of Bill McKibben who argues in *The End of Nature*, that the idea of nature *requires* the existence of non-human nature, a separate and wild province *apart* from humankind. McKibben argues that ‘true’ nature is independent of human influence and that human domestication of the planet has jeopardized the idea and meaning of nature. Because of anthropogenesis, independent nature has ceased to exist and has been replaced by an ‘artificial’ nature in whose processes human beings play a part. *See also* BILL MCKIBBEN, *THE END OF NATURE* (1989).

<sup>60</sup>. TIMOTHY MORTON, *ECOLOGY WITHOUT NATURE: RETHINKING ENVIRONMENTAL AESTHETICS* (2007).

knowledge are collectively assembled elements of a complex and shifting mosaic of historical and ecological contingencies. His integral approach to ecology is one in which these elements are conceived in terms of ‘assemblages’ rather than as ‘systems’. Intrinsically relative, they are mutually enacting and inseparable. Consequently, ‘nature’ can only ever be an abstract construction, ‘a horizon upon which cultural-scientific modes of knowledge organize highly specific elements of a more complex reality’.<sup>61</sup> In *Ecology without Nature*, Morton introduces the idea of the ‘mesh’ as a way of understanding connections and separations among the objects of the world, while denying that there is some basic substance hovering in the background of all things. To think the ‘mesh’, Morton says, is to think connections and blank spaces; the latter the (no)thing that connects all things.<sup>62</sup>

What these approaches to nature have in common is an acknowledgement that the idea of nature is inscribed by philosophical and paradigmatic assumptions and by political, economic and historical practices. While the approaches of Latour, Morin, Hornborg and the speculative realists offer compelling theoretical challenges to the hegemony of anthropocentrism and ontological dualism, they are perhaps lacking in guidance as to how (and indeed whether) this hegemony might be avoided in practice. As Andrew Pickering observes:

‘Philosophical critiques of dualism in its many guises are ten-a-penny. We all know several versions. But they tend to remain toothless and trapped in the realm of ideas. Why might that be? It might be because non-dualist ideas find so little purchase in the made-world of our culture, the culture we have already assembled and find ourselves plunged into. We live in a world of objects and projects that continually echo back to us the truth of asymmetric dualism.’<sup>63</sup>

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<sup>61</sup>. *Id.*

<sup>62</sup>. Timothy Morton, NaughtThought (June 20, 2008), <http://naughtthought.wordpress.com/2008/06/20/heaps-of-slime-or-towards-a-speculative-realist-politics/>.

<sup>63</sup>. Andrew Pickering, Producing Another World, ‘Assembling Culture’ Workshop, University of Melbourne, Australia, 10-11 December 2007, 11, *available at* <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Flifeboat.com%2Fboard%2Fandrew.pickering.doc&ei=kyuhUc75O5Pm9gT00oGIBw&usq=AFQjCNEtPCaxPG3foOT7xr531lbLp144Q&sig2=ESRovWOLyeoUNoWO43jOaw&bvm=bv.47008514,d.eWU>.

Pickering suggests that in the cultural assemblage we now inhabit, perhaps asymmetric dualism has become the ‘natural ontological attitude’, one which informs our grasp of the world we are living in and how we might imagine transforming it.

So where does this discussion leave ‘nature’ other than as a confounded and problematic concept and what are the implications of these frameworks for an earth justice system predicated on rights for nature? For pragmatic and strategic purposes, will scholars and practitioners of earth jurisprudence be compelled to agree on a ‘working’ definition of nature, while acknowledging its limitations?

Certainly, the ‘promiscuous concept’ of nature requires a more comprehensive investigation. While its emergent discourse continues to problematize the human-nature dualism, earth jurisprudence has yet to comprehensively investigate the ontological and epistemological issues associated with the *idea* of nature. What can be said about earth jurisprudence is that it is informed by largely unproblematized notions of nature predicated on biological ‘systems’ characterized by interrelationships between constituent parts.<sup>64</sup>

In proposing a closer relationship between nature and humankind, for example, Thomas Berry famously opined that ‘nature is a subject and not a collection of objects’.<sup>65</sup> Aldo Leopold’s *Land Ethic* identified a holistic natural community of which humans and other beings are a part.<sup>66</sup> Similarly, Arne Næss argued that human beings are constituent parts of one single natural system and are interdependent with the other components.<sup>67</sup> More recently, James Lovelock’s Gaia hypothesis

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<sup>64</sup>. See The United Nations Economic and Social Council, *Permanent Forum on Indigenous Issues*, ‘Study on the need to recognize and respect the rights of Mother Earth’, Ninth Session, New York, 19-30 April 2010 Item 7 of the provisional agenda, United Nations E/C.19/2010/4. Such ‘system’ approaches are, of course, not novel ones. Indigenous conceptions of nature, such as the Andean concept of *Pachamama* (‘Mother Earth’) and of *Suma Qamaña* or ‘living well’ are predicated upon symbiosis between humankind and nature and regard the relationship of the human political community with the Earth as one of intimate belonging. For a detailed consideration of historical and cultural frameworks informing the notion of *Pachamama*,

<sup>65</sup>. THOMAS BERRY, *THE SACRED UNIVERSE: EARTH, SPIRITUALITY AND RELIGION IN THE TWENTY-FIRST CENTURY* 103 (Mary Evelyn Tucker ed., 2009).

<sup>66</sup>. See generally ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949).

<sup>67</sup>. See generally ARNE NAESS, *ECOLOGY, COMMUNITY AND LIFESTYLE: OUTLINE OF AN ECOSOPHY* (David Rothenberg trans., 1989).

envisages the Earth as a single organism in which all parts are as interrelated and as interdependent as the cells of the human body.<sup>68</sup> Fritjof Capra proposes an integrating vision of the universe as a network of relations,<sup>69</sup> while Peter Burdon remarks that ‘nature consists of networks, operating within networks’.<sup>70</sup> Finally, the integral ecology movement is based on the idea that there is no single environment or macroecological unity to which multiple species and populations belong, but an interconnected multiplicity of eco-evolutionary processes.<sup>71</sup>

Speculative realism may provide to earth jurisprudence some frameworks by which ideas of nature and natural systems may be more comprehensively investigated and articulated. Although there is an apparent tension between an ‘ecology of objects’ and Thomas Berry’s ‘communion of subjects’, both approaches envisage non-hierarchical relationships between entities. Perhaps the major points of difference are generational and semantic, the result of the ‘natural ontological attitude’ suggested by Pickering. Whatever their differences, it might be supposed that Berry’s suggestion that ‘biosystems deserve the opportunity to be themselves and to express their own inner qualities’ is one which resonates with the ‘strange strangers’ of speculative realism.

Commonalities can also be identified among speculative realism and views expressed by Alfred North Whitehead over seven decades ago. Whitehead argued that the abstractions of linguistic expression ‘lead...away from the realities of the immediate world’, and regarded all questions concerning the ‘essence’ of nature as ‘speculative approximations’.<sup>72</sup> Although he didn’t refer to it as such, his relational

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<sup>68</sup>. See generally JAMES LOVELOCK, *THE REVENGE OF GAIA: EARTH’S CLIMATE CRISIS AND THE FATE OF HUMANITY* (2006).

<sup>69</sup>. See generally FRITJOF CAPRA, *THE TAO OF PHYSICS: AN EXPLORATION OF THE PARALLELS BETWEEN MODERN PHYSICS AND EASTERN MYSTICISM* (1975).

<sup>70</sup>. Peter Burdon, *The Philosophy of Earth Jurisprudence*, 35 (2) *ALTERNATIVE LAW JOURNAL* 62 (2010).

<sup>71</sup>. See generally SEAN ESBJORN-HARGENS & MICHAEL ZIMMERMAN, *INTEGRAL ECOLOGY: UNITING MULTIPLE PERSPECTIVES ON THE NATURAL WORLD* (2009).

<sup>72</sup>. ALFRED NORTH WHITEHEAD, *MODES OF THOUGHT* 39 (1938).

perspective allowed for the emergence of a ‘flat ontology’ which the position of everything in nature is given only in terms of the relations it bears to other things.<sup>73</sup> As Jeremy Dunham notes, Whitehead’s approach does not enable humans to stand condescendingly higher than nature, as in anthropocentric humanism, nor does it allow nature to be regarded as higher than human life, as in the biocentrism of radical anti-humanist ecogism. Dunham argues that Whitehead’s philosophy ‘remains the most convincing theory regarding the laws of nature’ and that while subsequent philosophical arguments may have become more sophisticated, the central arguments remain almost the same.<sup>74</sup>

### III. *THRESHOLD: THE LAWS OF NATURE AND HUMAN GOVERNANCE*

*‘To shift from ...a lofty fancy as the planetarization of consciousness to the operation of our municipal legal system is to come down to earth hard.’<sup>75</sup>*

While there are some who suggest otherwise, it is argued here that the concept of rights is a juridical one and not a quality which inheres in nature. For this reason, it is suggested that a concept of rights *for* nature better reflects the normative quality of anthropocentric interventions than does a concept of rights *of* nature. Thomas Berry’s assertion that rights are ‘primordial’ and originate where existence originates, and that rights are structured by the nature of that existence, is one conceived in what Christopher Stone refers to as ‘socio-psychic’ terms as opposed to ‘legal operational’ ones.<sup>76</sup> To this extent, rights have both ontological and normative qualities. While it is beyond the scope of this paper to enter into a discussion of the positivism-natural law debate, it is argued that any suggestion that juridical concepts have their origin in nature should be approached with caution. This is because implicit in

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<sup>73</sup>. See STEPHEN MUMFORD, *LAWS IN NATURE* 186 (2004).

<sup>74</sup>. Dunham Jeremy, *Whitehead on the Contingency of Nature’s Laws*, 10 *CONCRECENCE: THE AUSTRALIAN JOURNAL OF PROCESS THOUGHT* 35 (2009).

<sup>75</sup>. CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?:LAW, MORALITY, AND THE ENVIRONMENT* 30 (2010).

<sup>76</sup>. Thomas Berry, *The Origin, Differentiation and Role of Rights* (Paper presented at the Earth Jurisprudence Conference, Airlie Centre, Warrenton, Virginia, 21–24 April 2001). See also Mike Bell, *Thomas Berry and an Earth Jurisprudence: An Exploratory Essay*, 19(1) *THE TRUMPETER* 69 (2003).

primordial conceptions of rights is both a problematic conceptual separation of the 'natural' from the 'not natural' and a reiteration of a contestable natural law doctrine in which nature and its laws are regarded as a transcendent authority.<sup>77</sup> As Whitehead opined, 'there are no natural laws but only temporary habits of nature'.<sup>78</sup> And because the idea of nature itself is tainted by human exceptionalism, it follows that a concept of 'natural' rights is inherently problematic:

'Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature.'<sup>79</sup>

Although he fails to clearly explain the relationship between a non anthropocentric earth justice system and a human justice system, Mike Bell asserts that 'we cannot conceive of the rights of Earth through anthropocentric conceptions of human rights' because 'trying to use a human jurisprudence system to recognize and protect the rights of other species is a bit like sending the fox to guard the chickens'.<sup>80</sup> He suggests that 'because a human jurisprudence is a system of laws designed to recognize the pre-eminence of the human species, it is unlikely that a human jurisprudence can serve as a suitable framework for an earth jurisprudence'.<sup>81</sup> With reference to Thomas Berry, Bell contends that an earth jurisprudence is not a human creation but 'something that already exists in nature':

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<sup>77</sup>. The Greeks thought of the world as being a fight between the forces of rationalism and chaos; between law and nature. These forces were known as *nomos* (law and order and rationalism), and *physis* (nature). In the 5th and 4th centuries BCE possibly one of the first ethical debates in Western philosophy arose centred on the tension between *physis* and *nomos*: Is justice a matter of normative law or does it have a basis in nature? See also *Isaiah* 24:4-6 (circa 740-680 BCE): 'The earth mourns and withers...The earth lies polluted under its inhabitants for they have transgressed the laws... broken the everlasting covenant. Therefore a curse devours the earth, and its inhabitants suffer for their guilt.'

<sup>78</sup>. WHITEHEAD, *supra* note 72, at 39.

<sup>79</sup>. ALF ROSS, ON LAW AND JUSTICE 261 (1<sup>st</sup> ed. 1958).

<sup>80</sup>. Bell, *supra* note 6.

<sup>81</sup>. *Id.*

‘And just as we do not create the laws of nature but, rather, seek to recognize them understand their implications, so it is with an earth jurisprudence.’<sup>82</sup>

Bell’s suggestion causes us to wonder how we might ‘recognise and understand’ the implications of nature’s laws for the purposes of their incorporation in human juridical processes. And as cultural geographer, Daniel Demerit argues, if nature simply ‘is’ then it becomes very difficult to talk about the power/knowledge relations enabled by the material and discursive preservation of nature’s essential reality.’<sup>83</sup>

Some assistance may be derived from Christopher Stone’s pragmatic recognition of both the normative and ontological aspects of rights. As Stone notes, an entity cannot be said to hold a legal right unless and until some public authoritative body is prepared to provide some ‘amount’ of review to actions that are inconsistent with that right.<sup>84</sup>

In addition to the question of whether an entity can be said to ‘possess’ rights, any attempt to identify the juridical *content* of rights for nature will also raises a host of questions.<sup>85</sup>

Judith Koons asks:

‘Should such rights extend to include all living beings or the entire Earth community (including rocks, rivers, and mountains). For example, what about weeds? Are gardeners morally prohibited from killing weeds? Is a mosquito the moral equal of a human being, triggering a no killing, positive-regard rule?...How should a line of sugar ants in the kitchen be treated? Since a swarm of termites

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<sup>82</sup>. *Id.* at.71

<sup>83</sup>. David Demerit, *The Nature of Metaphors in Cultural Geography and Environmental History*, 18(2) *PROGRESS IN HUMAN GEOGRAPHY* 163 (1994).

<sup>84</sup>. STONE, *supra* note 75.

<sup>85</sup>. See Susan Emmenegger and Axel Tschentscher, *Taking Nature’s Rights Seriously: The Long Road to Biocentricism in Environmental Law*, 6 *GEO. INT’L ENVTL. L. REV.* 545 (1993-94); Kenneth Baynes, *Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights*, 28(4) *POLITICAL THEORY* 451 (2000), in which Bayne argues that liberal conceptions of rights have been criticized for introducing false abstractions and for presupposing as well as reinforcing artificial divisions; between the social and the political, the public and the private and thus for obscuring the real bases of inequality

outnumber people in a building, should it be allowed to destroy the building? How is a river or a mountain to be counted, under a broader utilitarian assessment?'<sup>86</sup>

Koons notes that in many accounts, nonliving natural objects are denied moral standing because they are considered to lack interests that are capable of being harmed or benefitted. She argues, however, that even if an entity is held to lack 'interests,' that should not foreclose the entity from moral consideration. In this regard, she agrees with Berry that things in nature have interests 'in being'.<sup>87</sup>

The consensus definition of Earth Jurisprudence recently endorsed by the Centre for Earth Jurisprudence at Barry Law School, Florida recognizes both the 'is' and the 'ought' implicit in an earth justice system:

'Earth Jurisprudence seeks Earth-centered approaches to law and governance. As an integral part of the broader Earth community, humanity has responsibility to act for the well-being of the planet and future generations. Earth Jurisprudence draws forth Earth-centered comprehensive solutions from *within* as well as *beyond* existing law.'<sup>88</sup>

The tension between a theory of earth justice and the practice of an earth justice system will involve the exponents of earth jurisprudence in a host of scientific, legal, political and ethical challenges. It will require of its scholars and practitioners a negotiation of the official philosophy of ecologism and its burgeoning political practice. Whether rights are conceptualized and represented in moral, ethico-political and/or juridical terms, transforming systems of environmental governance from ones in which nature is regarded as a resource for human exploitation, to one based on the recognition of natural ecosystems' 'primordial' right to

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<sup>86</sup>. Judith E Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVIRONMENTAL LAW REVIEW 263, 284 (2008).

<sup>87</sup>. BERRY, *supra* note 76. Berry suggested that 'All rights are species specific and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference of rights is qualitative not quantitative. The rights of an insect would be of no use to a tree or fish.'

<sup>88</sup>. CENTRE FOR EARTH JURISPRUDENCE, *Voices of Earth Jurisprudence: An Introduction to Earth Jurisprudence: Guiding Principles and Wild Law Possibilities* 32 (2011) <http://earthjuris.org/wp-content/uploads/2011/08/Intro-to-Earth-Jurisprudence-7-28-111.pdf>.

exist and flourish, will demand radical paradigmatic shifts with significant implications for normative legal frameworks and processes. Although what these implications are have yet to be determined.

Cormac Cullinan suggests that earth jurisprudence requires the ‘re-alignment of human governance systems with the fundamental principles of how the universe functions’.<sup>89</sup> In order to change completely the purpose of our governance systems, he argues, we must develop coherent new theories or philosophies of governance to supplant the old. Even if we were able to ascertain such ‘fundamental principles’, all human governance systems, and the theories which inform them, Cullinan asserts, will raise normative questions relating to their political and ethical legitimacy.<sup>90</sup>

Perhaps, as Christopher Stone observes:

‘[A]t the level of praxis, an earth justice system will be unavoidably anthropocentric.’<sup>91</sup>

#### **IV. THRESHOLD: (RE)PRESENTING EARTH**

While the legitimacy of democratic human centered governance depends upon appeals to the presence of members of different groups, they often do so without clear sources of authorization and accountability from those represented. The representation of nonhumans in deliberative institutions, John O’Neill observes, ‘is still more problematic’. In the necessary absence of their authorization, accountability, and presence, a claim to speak on behalf of non human nature ‘relies on epistemic claims, coupled with care’.<sup>92</sup>

This paper has suggested that the culture-nature distinction is built on power relations, discursively constituted through ‘technologies of truth’ which function as a dividing practice. Because epistemic claims are inextricably linked with processes of power and of biopolitical normalization, any account of nature which purports to stand apart from

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<sup>89</sup>. CULLINAN, *supra* note 8.

<sup>90</sup>. *Id.*

<sup>91</sup>. STONE, *supra* note 75, at 4.

<sup>92</sup>. John O’Neill, *Representing people, representing nature, representing the world*, 19(4) ENVIRONMENT AND PLANNING: GOVERNMENT AND POLICY 483 (2001) available at <http://www.envplan.com/contents.cgi?journal=C&volume=19&issue=4>.

humanist history and its relations of knowledge and power becomes 'profoundly suspicious'.<sup>93</sup>

Consequently, it is incumbent upon those concerned to develop an earth centered system of governance to establish the epistemic conditions of knowledge, including what sorts of information is meaningful, who is recognized as speaking with accuracy and authority, and who decides these questions. If one accepts Foucault's premise that the exercise of biopower produces and makes possible permissible modes of being and thinking while disqualifying and/or making others impossible, what epistemic claims should properly inform an earth justice system and by what processes might such claims be determined?

It has been suggested that any earth justice system needs to be cognizant of the asymmetrical power relations that persist in the world. As Donald Turner argues, calculations of interests and consequences may be inappropriate in the context of relationships which are 'structurally non-contractual, asymmetrical and rooted in ontological difference'.<sup>94</sup> The discourse of earth jurisprudence needs to acknowledge that 'human' and 'nature' do not encounter one another in a symmetrical relationship, and that power and knowledge relations both produce and enable the material and discursive conditions of nature's reality. It needs to acknowledge that both the biocentric language of science and the anthropocentric concerns of humanism can function to deflect consideration away from the processes of power by which nature is determined and represented. For these reasons, holistic representations of nature predicated upon reciprocity between human and non human biophysical communities should be approached with caution.

Holistic notions of biological egalitarianism such as 'mutually enhancing relations', 'reciprocity' and 'creative cooperation' appear as central tenets in much earth jurisprudence discourse. For example, Linda Warren describes earth jurisprudence as 'the philosophy of laws and regulations that gives formal recognition to the *reciprocal relationship*

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<sup>93</sup>. DANA VILLA, POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT 153 (1999).

<sup>94</sup>. Donald Turner, *The Animal Other: Civility and Animality in and Beyond Heidegger, Levinas, and Derrida*, 12 DISCLOSURE 1, 6 (2002).

between humans and the rest of nature'.<sup>95</sup> Thomas Berry suggested that an earth justice system is one that recognizes, honors and protects the rights of all species, 'to exist and fulfill *mutual self-supporting destinies*.'<sup>96</sup> Fritjof Capra's notion of an ecological community is one of 'an assemblage of organisms, bound into a functional whole by their *mutual relationships*'.<sup>97</sup>

While some holistic approaches to nature accept the conflict and violence of predator relationships and extreme atmospheric and geological events as elements of Earth's 'unity', others are unproblematically grounded in notions of affinity.<sup>98</sup> Holistic representations of nature include those that regard nature as a beneficent source of liberation and healing, and at their most extreme, as a utopian paradisiacal refuge. Susan Emmenegger and Axel Tschentscher suggest that in this form of holism, there is only one interested entity with one unitary interest. As a result, 'situations of conflicting interests are impossible.'<sup>99</sup> Jozef Keulartz has suggested that 'people who see nature as a divine text will be more likely to adopt a passive rather than an active attitude towards nature.'<sup>100</sup> And as Arne Næss acknowledged, biospherical egalitarianism can be affirmed only in principle since 'any realistic praxis necessitates some killing, exploitation, and suppression.'<sup>101</sup>

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<sup>95</sup>. UK Environmental Law Association and the Gaia Foundation, Linda Warren, *Wild Law: Is there any evidence of Earth Jurisprudence in existing law and practice? An International Research Project* (2009) <http://www.ukela.org/content/page/1090/Wild%20Law%20Research%20Report%20published%20March%202009.pdf>.

<sup>96</sup>. BERRY, *supra* note 10.

<sup>97</sup>. FRITJOF CAPRA, *THE WEB OF LIFE: A NEW SCIENTIFIC UNDERSTANDING OF LIVING SYSTEMS* 33-34 (1996).

<sup>98</sup>. See BERRY, *supra* note 10 at 161.

<sup>99</sup>. Susan Emmenegger & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Road to Biocentricism in Environmental Law*, 6 *GEO. INT'L ENVTL. L. REV.* 545, 577-8 (1993-94).

<sup>100</sup>. Jozef Keulartz, *Using Metaphors in Restoring Nature*, 2(1) *NATURE AND CULTURE* 27, 28 (2007).

<sup>101</sup>. NÆSS, *supra* note 22, at 95.

Nonholistic approaches to nature range from those which regard nature as a site of danger and a force for negation, destruction and threat, to those which regard nature as an uncontrollable chaotic force:

‘Where has there ever been this Wisdom of Nature that regulates things ... No doubt, at this very moment, there are planets with rich ecosystems being devoured by black holes. And indeed, there are galaxies colliding, destroying the delicate balance of solar systems where life is dependent on being a certain distance from their stars. There are even rogue planets that travel their aleatory journey throughout galaxies, destroying gravitational balances of solar systems that harbor life.’<sup>102</sup>

The various perspectives outlined here demonstrate that the ways in which nature is understood and represented are the subject of significant philosophical contestation. They suggest that the notion of a ‘mutually supporting’ Earth Community may be confounded by largely unarticulated premises.

Frederick Ferre states that he finds it ‘impossibly grotesque’ to think of humanity as ‘just another species’. He argues that ‘perspectival anthropocentrism’ is inevitable and ‘perfectly licit’.<sup>103</sup> Although humans are right to be anguished and outraged about what we have done to harm earth, Ferre argues ‘there is no point in feigning that we are not distinctly human’. Ferre contends that because perspectival anthropocentrism is unavoidable, it cannot be regarded as anthropocentric in ‘any objectionable’ way. Rather, he suggests, humans need to explore a relational ethic that is ‘healthily polycentric’:

‘Many environmental thinkers are torn in two opposing directions at once. For good reasons we are appalled by the damage that has been done to the earth by the ethos of heedless anthropocentric individualism...But also for good reasons we are repelled, at the other extreme, by environmentally correct images of mindless biocentric collectivism in which precious personal values are overridden for the good of some healthy beehive ‘whole’.’<sup>104</sup>

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<sup>102</sup>. BRYANT, *supra* note 57.

<sup>103</sup>. Frederick Ferre, *Personalistic Organicism: Paradox or Paradigm?* in Robin Attfield & Andrew Belsey (eds) *Philosophy and the Natural Environment*, 36 ROYAL INSTITUTE OF PHILOSOPHY SUPPLEMENT 59 (1994).

<sup>104</sup>. *Id.*

Whether or not one agrees with Ferre's perspectival anthropocentrism, a threshold issue for an earth justice system is whether its effectiveness as a conceptual and juridical system requires an abandonment of arguably unavoidable anthropocentric frames of reference. Can an earth justice system be conceptualized and function as a form of 'strategic' or 'normative' anthropocentrism or does its efficacy depend upon, as Leopold and other deep ecologists seem to suggest, a 'subversive non-anthropocentric humanism'? While we may imagine a sensibility which extends ethical responsibility from a humanistic centre to a multiplicity of ontologically marginalized others, do the pragmatic imperatives of normative juridical interventions compel us to '*think the mountain*' like a human?<sup>105</sup>

#### V. *HORIZON: ASSEMBLAGES*

*'Understanding our ontological condition as a performative dance of agency with human and nonhuman others is precisely not to dwell on our specialness-it is to step outside the moralized space of human exceptionalism'.<sup>106</sup>*

This paper has identified a range of issues relating to 'nature, 'rights' and representation that exponents of an earth justice system predicated on rights for nature will be required to negotiate. It has identified the fraught relationship between human systems of governance and 'natural' entities, and has suggested that the ways in which humans see themselves in relation to nature will impact upon political and ecological practice. It suggests that if nature can be comprehended only as an abstract construction upon which cultural, political and scientific modes of knowledge are inscribed, that the identification of the subject and content of juridical rights for nature will be a matter of contestation and negotiation.

Kerry Whiteside observes that 'nature has long served as one of political theory's most significant Others' but that the distinction between nature and politics is not as neat as most political theorists imagine.<sup>107</sup> While the anthropocentrism intrinsic to the western

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<sup>105</sup>. LEOPOLD, *supra* note 66.

<sup>106</sup>. PICKERING, *supra* note 63.

<sup>107</sup>. Whiteside, Kerry H., *A Representative Politics of Nature? Pursuing Bruno Latour's 'Collective'*. Western Political Science Association 2011 Annual Meeting

philosophical tradition continues to obstruct responses to ecological crises, this paper suggests that emergent challenges to human exceptionalism such as those provided by speculative realism are valuable to the development of earth justice systems predicated on rights for nature. It is also recognized that, at this stage in its development, the theory and practice of earth jurisprudence occupies both unruly and creative territory, one which requires scholars and practitioners to negotiate a heterogeneous terrain.