A Theory of Earth Jurisprudence

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I. Introduction

Although we are integral with the complex of life communities, we have never been willing to recognise this in law, economics, morality, education or in other areas of the human endeavour.[1]

Despite great variation, Western theories of law are predominately anthropocentric. This is specifically true for both natural law and legal positivism, which are concerned ultimately with human beings and human good. More specifically, legal theory is concerned with 'relations between individuals, between communities, between states and between elementary groupings themselves.'[2] Only in rare circumstances does legal theory consider the influence of nature, non-human animals, and place as relevant to human law.[3] The anthropocentric tenor or western law is expressed further by legal concepts such as private property[4] and the restriction of legal rights to human beings.[5] Indeed, the separation and hierarchical

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1 Thomas Berry, *The Dream of the Earth* (1982) 21.

2 Nicole Graham, *Lawscape: Property, Environment, Law* (2011) 15.

3 Alongside Earth Jurisprudence note the emerging discipline of law and geography. Law and geography analyses the role of place, space and nature in law. See further Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); 'Landscapes of Property' (1998) 32(3) *Law and Society Review* 567; Nicholas Blomley, D Delaney and R Ford, *The Legal Geographies Reader: Law, Power and Space* (2001). See also, Tim Bonyhady, *Words for Country: Landscape and Language* (2002); and Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719.

4 See Peter Burdon, 'What is Good Land Use? From Rights to Responsibilities' (2010) 34(3) *University of Melbourne Law Review* 708.

5 See Prue Taylor, 'The Imperative of Responsibility in a Legal Context: Reconciling Responsibilities and Rights' in J Ronald Engel, Laura Westra, and Klaus Bosselmann (eds), *Democracy, Ecological Integrity and*

ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins. Legal theorist Nicole Graham advances this point further, arguing: '[b]y imagining and juxtaposing objective and subjective thought, abstract rules and particular contexts and then by privileging objectivity and abstraction, legal positivism epitomises anthropocentric logic.'[6]

In response, this article introduces an emerging legal philosophy termed Earth Jurisprudence. In contrast to anthropocentric legal philosophies, Earth Jurisprudence represents an ecological theory of law. Central to Earth Jurisprudence is the principle of Earth community. This term refers specifically to two ideas. First that human beings exist as one interconnected part of a broader community that includes both living and nonliving entities. Further, the Earth is a subject and not a collection of objects that exist for human use and exploitation.[7] This principle does not deny the moral status of human beings or claim that all forms of non-human nature have moral equivalence with humanity.[8] Instead, it seeks to shift our focus away from hierarchies and asserts that all components of the environment have value. It takes the wellbeing or common good of this comprehensive whole as the starting point for human ethics.

The article proceeds in three parts. Part I details the origin and philosophical structure of Earth Jurisprudence. Part II offers an original interpretation of Earth Jurisprudence that situates the theory within the broad structure of natural law philosophy. It argues for the recognition of two kinds of 'law' organised in a hierarchy. At the apex is the Great Law, which represents the principles of Earth community and is measured with reference to the scientific concept of ecological integrity. Beneath the Great Law is Human Law. Human Law is defined as rules articulated by human authorities, which are consistent with the Great Law and enacted for the comprehensive common good. The interrelationship between the Great Law

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International Law (2010) 203.

6 Graham, above n 2, 15.

7 This concept is informed by Thomas Berry, *The Great Work* (1999); Aldo Leopold, *A Sand County Almanac* (1986); Nicholas Agar, *Life's Intrinsic Value* (2001); and Lawrence E Johnson, *A Morally Deep World: An Essay on Moral Significance and Environmental Ethics* (1991).

8 See further, Nicholas Low and Brendan Gleeson, *Justice, Society and Nature* (1998) 97 and Konrad Ott, 'A Modest Proposal about How to Proceed in Order to Solve the Problem of Inherent Moral Value in Nature' in Laura Westra, Klaus Bosselmann and Richard Westra (eds), *Reconciling Human Existence with Ecological Integrity* (2008) 48. Ott argues that the division of the moral community into subclasses is necessary 'since any environmental ethics needs a basic conception for conflict resolution which can meet different types of conflicts.'

and Human Law is discussed in Part III. Drawing on natural law philosophy, Earth Jurisprudence contends that Human Law derives its legal quality and authority from the Great Law. In this function, the Great Law acts as a bedrock standard or measure for Human Law. Laws that contravene the Great Law and risk the health and future flourishing of the Earth community are considered defective or a corruption of law. A defective law is not morally binding on a population and citizens have a moral justification for civil disobedience aimed at reforming the law.

II. What is Earth Jurisprudence?

Earth Jurisprudence is an emerging philosophy of law, proposed by Thomas Berry in 2001.[9] Its origin can be explained in a number of ways. One account explains it as a response to the present environmental crisis.[10] It can also be considered a form of critical legal theory. In this regard, advocates of Earth Jurisprudence would subscribe to the early principles of critical legal studies, in particular, its critique of law in legitimising particular social relations and illegitimate hierarchies.[11] Earth Jurisprudence is also a development from the environmental movement and environmental philosophy more generally.[12] What unites its proponents is a belief that society and the legal order reflect a harmful and outdated anthropocentric worldview. Earth Jurisprudence analyses the contribution of law in constructing, maintaining and perpetuating anthropocentrism and looks at ways in which this orientation can be undermined and ultimately eliminated.

As progenitor, Berry is primary amongst advocates for Earth Jurisprudence. Berry was a persistent critic of the anthropocentric paradigm and its prevalence in western law. In his important essay, *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

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9 For a brief history, see Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) 12.

10 For updated statistics see the World Watch Institute <http://www.worldwatch.org> and the Earth Policy Institute <http://www.Earth-policy.org/>.

11 It is acknowledged that advocates of Critical Legal Studies said very little about the environment.

12 See also Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995). Bosselmann presents a formidable analysis of the intersection between law and environmental philosophy. Developing this intersection has also been the primary goal of the Global Ecological Integrity Group <http://www.globalecointegrity.net/>.

relentless industrial economy.'[13] Berry also critiques Legal positivism on the basis that it posits 'abstract' categories or doctrines as the highest authority in human society.[14] He notes: 'humans [have] become self-validating, both as individuals and as a political community' and no longer act with reference to a higher power 'either in heaven or on [E]arth.'[15] He also critiques contemporary notions of private property as a mechanism that authorises human exploitation of nature[16] and the non-recognition of rights outside of the human community.[17]

In 1987 Berry set about describing how human society could shift both its idea of law and its legal system in response to the principle of Earth community. Most of his remarks are broad, as witnessed in his early paper *The Viable Human*:

> 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.[18]

The idea of 'mutual-enhancement' is fundamental to Earth Jurisprudence. As demonstrated in ecological science, human beings are deeply connected and dependent on nature.[19] The idea that human good can be achieved at the

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13 Thomas Berry, 'Legal Conditions for Earth's Survival' in Mary Evelyn Tucker (ed), Evening Thoughts: Reflecting on Earth as a Sacred Community (2006) 107.

14 Thomas Berry, 'Foreword' in Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2003) 13.

15 Ibid.

16 Berry, above n 7 (1999), 61-62.

17 Thomas Berry, 'Rights of the Earth' (2002) 214 *Resurgence Magazine* 45. The idea that nature has rights is a key platform of Earth Jurisprudence. For further discussion see Peter Burdon, 'Rights of Nature: Reconsidered' (2010) 49 *Australian Humanities Review* 69 and Peter Burdon, 'Rights of Nature: The Theory' (2011) 1 *IUCN Environmental Law Journal* <http://www.iucnael.org/en/component/docman/doc_download/660-earth-rights-the-theory.html>.

18 Berry, above n 1, 5-6.

19 Eugene Odum, *Fundamentals of Ecology* (1971) 3. Because ecology is

expense of the larger Earth community is an illusion. Instead, the health and flourishing of the comprehensive Earth community is a prerequisite for human existence. This necessitates a shift from the anthropocentric notion that nature exists for human use and toward the facilitation of 'mutually enhancing' human-Earth interactions.[20] Further, it considers the principle of Earth community as both relevant and necessary to our idea of law.

While not explicit, it is possible to discern from the writings of Berry an argument for the existence of two types of 'law' that are organised in a hierarchical relationship. The first order of law is Great Law, which refers to the principle of Earth community.[21] The second order of 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. Two matters typify the interrelation between the Great Law and Human Law. First, Human Law derives its legal quality and power to bind in conscience from the Great Law. Because human beings exist as one part of an interconnected and mutually dependant community, only a prescription directed to the comprehensive common good has the quality of law.[22] In decisions concerning the environment or human-Earth interactions, it is appropriate to construct Human Law with reference to the Great Law. For other matters, the legislator has broad freedom and lawmaking authority. Second, any law that transgresses the Great Law can be 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

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concerned especially with the biology of groups of organisms and with functional processes on and in land, oceans and fresh water, it is also proper to define ecology as 'the study of the structure and function of nature, it being understood that mankind is a part of nature.'

20 Berry, above n 7 (1999), 3.

21 Note that Berry highlights three principles as being critical to the new story. They are interconnectedness (communion), differentiation and autopoiesis. See Thomas Berry and Brian Swimme, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era* (1992) 71-79. Of these three principles, Berry considers interconnectedness to be primary, see Anne Marie Dalton, *A Theology for the Earth: The Contributions of Thomas Berry and Bernard Lonergan* (1999) 129. For a sketch of how all three of these principles can be applied in law, see Judith E Koons, 'Key Principles to Transform Law for the Health of the Planet' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) 45.

22 This statement is deliberately contrary to contemporary statements on legal positivism.

resemblance to the Thomist and neo-Thomist natural law traditions. Lynda Warren comments on this resemblance:

> At first sight, the similarities seem obvious. The classical doctrine of natural law is based on the existence of a body of law – natural law – that is universal and immutable. It has been described as a higher law against which the morality of 'ordinary' laws can be judged. This higher law is discoverable by humans through a process of reason.[23]

Despite these similarities, many advocates of Earth Jurisprudence are dismissive of natural law philosophy and contend that its inherently anthropocentric tenor makes it a poor and potentially confusing point of comparison for explaining an Earth-centred legal philosophy.[24] Klaus Bosselmann for example contends:

> Structurally the ecocentric orientation of values is a turning towards the ideas of natural law. In this context some authors point towards understanding in a natural-law sense. I do not believe that it is necessary to revert in this way, nor that it could be of any help – considering the unproductive rivalry between positivism and natural law.[25]

In regard to this concern, it is recognised that one major barrier to those engaged with articulating Earth Jurisprudence is language. Concepts such as 'nature' and 'natural law' carry the baggage of over two thousand years of largely anthropocentric use and development. Further, the construction of Earth Jurisprudence as a branch of natural law has the potential to become focused on an unproductive conflict with legal positivism. [26]

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23 Lynda Warren, 'Wild Law – the Theory' (2006) 18 *Environmental Law and Management* 11: 13.

24 See Cullinan, above n 14, 77.

25 Bosselmann, above n 12, 236.

26 Note that the differences between contemporary Natural law theories and Legal Positivism are only slight. See Brian H Bix, 'On the Dividing Line Between Natural law Theory and Legal Positivism' (1999-2000) 75 *Notre Dame Law Review* 1613. Following this analysis – if (1) Earth Jurisprudence is reduced to the claim that objective scientific evidence regarding our interconnectedness with nature should be used to evaluate our political and legal institutions and (2) legal positivism reduces to the claim that there is a possibility of, and value to, a descriptive or conceptual theory of law separated from any such scientific date, then there would seem no reason why one could not support or advocate both positions.

Still, this article maintains that Earth Jurisprudence can correctly be described as a theory of natural law.[27] Following the reasoning of feminist theologian Carol Christ, it argues that we should not simply abandon a negative word or concept. Rather, we should attempt to find new meaning in the term or else the 'the mind will revert back to familiar structures at times of crisis, bafflement or defeat.'[28] Thus, while natural law has traditionally been interpreted in an anthropocentric fashion, this article will employ its broad framework for ecocentric goals. Further, as explained in more detail below, the description of Earth Jurisprudence offered in this article is arguably more defensible than traditional Thomist and neo-Thomist natural law philosophy. The broad relationship between Earth Jurisprudence, natural law and Legal positivism is articulated in Table 1 below. The table is structured with reference to the key arguments of Earth Jurisprudence presented in this article.

Table 1: Earth Jurisprudence, Natural Law and Legal Positivism

Issue	Earth Jurisprudence	Natural Law	Legal Positivism
There is a 'higher law' to human law.	The Great Law is a higher law. It is interpreted by human beings through reason based on scientific understanding. The Great Law is not a purely objective truth. Science provides approximate descriptions that are interpreted and applied by human lawmakers.	The natural law is a higher law. It is interpreted by human beings through reason based on self-reflection and conscience. The natural law is considered objective and universal.	Human law is the only thing termed law.

27 Warren, above n 23, 13.

28 Carol Christ, 'Why Women Need the Goddess' in Carol Christ & Judith Plaskow (eds), *Women Rising: A Feminist Reader in Religion* (1979) 275.

Human Law	The prima facia authority of human law is contingent on consistency with the Great Law. Human Law is purposive and directed toward the comprehensive common good of the Earth community Earth jurisprudence focuses on human-Earth interactions. It may not be relevant to every law that is passed by a legislature. It provides lawmakers freedom in this regard.	The prima facia authority of human law is contingent on consistency with the natural law. Human Law is purposive and directed toward the common good of human beings. Natural law advocates a necessary connection between law and morality. It considers itself relevant to all moral or ethical issues in law.	Law is whatever is contained in legislation enacted by lawmakers. Lawmakers have prima facia authority.[29] All laws are binding, though a person may choose not to follow it as a matter of conscience and suffer the legal consequences.
Legal Quality and Authority	Where relevant, Human Law receives its legal quality from the Great law. A purported law that does not attain legal quality is not morally binding.	Human Law receives its legal quality from the natural law. A purported law that does not attain legal quality is not morally binding.[30]	Human law is self-validating with reference to a basic norm or union of primary and secondary rules.[31]

The relationship between these three descriptions of law is explained further below. Part III begins by outlining the legal categories advanced in Earth Jurisprudence. As noted in Table 1, Earth Jurisprudence advocates for a 'higher law' or Great Law that serves as a standard for Human Law. Further, it defines Human Law as purposive and directed toward the common good of the comprehensive Earth community. These points represent structural and operative correlations between Earth Jurisprudence and natural law philosophy. Part IV explores these correlations further and argues that Berry's writing on law was deeply influenced by the natural law writing of Thomas Aquinas. For this reason, it explores the legal categories proposed in Earth Jurisprudence alongside the analogous legal categories proposed by Aquinas. This section contends that a comparative approach provides deep insight into Earth Jurisprudence and the writing of Berry.

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29 Exclusive legal positivist, Joseph Raz, maintains that law does not have prima facia authority. See Joseph Raz, *The Authority of Law* (1979).

30 This is consistent with the modern interpretation of natural law. See John Finnis, *Natural Law and Natural Rights* (1980) 290.

31 Regarding reference to a basic norm, see Hans Kelsen, *Pure Theory of Law* (1967). For union or primary and secondary rules, see H L A Hart, *The Concept of Law* (1994).

III. The legal categories of Earth Jurisprudence

In 1934 William Nathan Berry entered a Catholic monastery of the Passionist order. Upon being ordained as a priest in 1942 he chose the name Thomas in honour of the Catholic Priest of the Dominican Order, Thomas Aquinas. Berry acknowledges that Aquinas exerted a considerable influence over aspects of his theological and philosophical writing. He states:

> From Thomas I learned that the universe entire is the primary purpose of both creation and redemption, the more comprehensive purpose is the entire ordering of things. Such indeed is what he says in His *Summa Contra Gentiles* where he tells us that 'The order of the universe is the ultimate and noblest perfection of things' (SCG,II,46). Also in the *Summa Theologica*, he says, 'the whole universe together participates in and manifests the divine more than any single being whatsoever' (ST,1,47,1).[32]

While not explicitly acknowledged, this influence is also evident from a careful reading of Berry's writing on Jurisprudence – in particular Berry's regard for 'higher laws'. The natural law tradition represents the most significant jurisprudential legacy left by Aquinas and has inspired generations of neo-Thomist theorists.[33] Aquinas's treatment of law is found in the second part of his *Summa Theologica* beginning with question 90 and continuing through to question 108. The often-named 'Treatise on Law' has enjoyed an autonomous life outside of the comprehensive *Summa.* However, as John Finnis suggests, 'an adequate understanding of it must depend on what has preceded it and what follows it.'[34] Thus, although this section focuses on questions 90-108, where necessary, it also draws from the comprehensive work.

For Aquinas, the term 'law' is analogous and does not have consistent meaning with each use.[35] His legal theory encompasses four

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32 Thomas Berry, 'Foreword' in Dalton, above n 21, vii. See also Matthew Fox, 'Matthew Fox Tribute to Thomas Berry' (2002) <http://www.Earth-community.org/images/FoxTribute.pdf>. See also Matthew Fox, 'Some Thoughts on Thomas Berry's Contributions to the Western Spiritual Tradition' in Ervin Laszlo and Allan Combs (eds), *Thomas Berry Dreamer of the Earth: The Spiritual Ecology of the Father of Environmentalism* (2011) 16.

33 For a history see Brian H Bix, 'The Natural Law Tradition' in Joel Fienberg and Jules Coleman (eds), *Philosophy of Law* (2004) 9.

34 Finnis, above n 30, 301.

35 Ralph McInerny, 'Foreword' in Thomas Aquinas, *Treatise on Law: Summa*

types of law, organised in a hierarchy. At the apex is Eternal Law, which comprises of God-given rules or divine providence, which govern all of nature.[36] The second order is natural law, which is that portion of Eternal Law that one can discover through a special process of reasoning, involving intuition and deduction, outlined by Greek authors.[37] Divine Law refers to the law of God as revealed in scripture.[38] Human Law sits at the bottom of this ordering and consists of rules, supported by reason and articulated by lawmakers for the common good of human society. Speaking to this ordering, McInerny comments that '[t]o speak of God's governance of the universe as a "law" and of the guidelines we can discern in our nature as to what we ought to do as "laws" can puzzle us because what the term "law" principally means is a directive of our acts issued by someone in authority.'[39] Nonetheless, it is clear from Aquinas' discussion in question 90 on the 'essence of law'[40] that human positive law is at the forefront of his mind when using the term 'law'.[41] Indeed, in question 90, article 4, Aquinas defines law as 'nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'[42]

The basic relationship between Aquinas's hierarchy and that proposed by Earth Jurisprudence is outlined in Table 2 below:

Table 2: Natural law and Earth Jurisprudence

Natural law	**Earth Jurisprudence**
Eternal Law (providence)	N/A
Natural law	The Great Law
Divine Law	N/A
Human Law	Human Law

This table illustrates in a very basic way the structural relationship between Earth Jurisprudence and Aquinas's theory of natural law. Both adopt a higher view of law[43] and describe the consequences of contradicting

Theologica, Questions 90-97 (1956) vi. McInerny notes further that law is a term 'with an ordered set of meanings, one of which is regulative of the others.'

36 McInerny, above n 35, ix.

37 J W Harris, *Legal Philosophies* (2004) 7.

38 Ibid.

39 McInerny, above n 35, vi.

40 Note that the title 'essence of law' was not used by Aquinas and was provided by later editors, ibid viii.

41 Ralph McInerny, *Thomas Aquinas: Selected Writings* (1998) 611.

42 Aquinas, above n 35, 10-11.

43 Harris, above n 37, 145.

their unique focus. The categories of Eternal Law and Divine Law are absent from this discussion. Aquinas describes Divine Law as revelation revealed in Christian scripture.[44] As such, it has no corresponding category in a secular description of Earth Jurisprudence. For Aquinas, Eternal Law represents the source and foundation for the other types of law. Aquinas describes eternal law in question 93, article 4, as 'the very Idea of the government of things in God the Ruler of the Universe.'[45] Put otherwise, it is the divine system of government,[46] providence,[47] the divine plan and the timeless universal order, which act as the measure for all other laws.[48] As a Catholic priest, one might reasonably ask whether Berry would have included reference to Eternal Law in a more detailed study of Earth Jurisprudence.[49] Answering this question, however, is beyond the scope of the article.

We turn now to consider the first category of law proposed in Earth Jurisprudence, termed the Great law. This category is explored by comparison with the corresponding legal category of natural law advanced by Aquinas. This comparative approach provides greater insight into, and understanding of, the nature of the Great Law. It also provides an opportunity to state explicitly the differences between the two categories of law and how Earth Jurisprudence answers some of the pertinent criticisms levelled against natural law philosophy. This section also considers those aspects of the Great Law that are compatible with Legal positivism.

1. NATURAL LAW AND THE GREAT LAW

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44 Aquinas, above n 35, 29.

45 Ibid 46.

46 Ibid.

47 Aquinas makes several references to divine providence in *Summa Theologica*. Most importantly, in question 104, article 4 he notes: 'God in his providence directs all things in the world to their ultimate good, that is, to himself.'

48 McInerny, above n 41, 611.

49 Evidence for this possibility can be noted in Berry's argument for recognising and acting in accord with the Universal Logos which he regarded as 'the ultimate form of human wisdom', Berry, above n 1, 20. The term Logos can be traced back to ancient Greece and the philosophy of Heraclitus (535-475 BC). Heraclitus introduced the term *Logos* to describe a similar immanent conception of divine intelligence and the rational principles governing the universe, Raghuveer Singh, 'Herakleitos and the Law of Nature' 24 (1963) *Journal of the History of Ideas* 457. Logos is relevant to the present discussion, because as Lloyd Weinreb notes in *Natural Law and Justice* (1987) 56: 'Eternal Law is little more than a Christianised version of Logos and the Platonic vision of a universe ordered with a view to the excellence and preservation of the whole.'

A. *Aquinas and Natural Law*

Natural law is at the heart of Aquinas' writing on law. His first description is found in question 91. He notes that natural law represents that aspect of the Eternal Law that is knowable by finite human minds and applicable to human beings.[50] Appropriately, Germain Grisez describes natural law as 'an intellect size bite of reality.'[51] Because of our capacity for self-government, human beings are considered a measured measure.[52] Our nature provides clues as to how we should behave in order to achieve fulfilment. Put another way, Aquinas argues that human beings have a 'natural inclination'[53] or *telos*, and reason accordingly to act willingly toward it.[54] When these ends are discerned by reason they take on precepts and thus are analogous to law in the primary sense of the term.[55] This argument depends on an ontological premise, made earlier by Plato, that everything in nature has an essence and a tendency to fulfil it. Aquinas argued that reason constitutes the essence of human beings. We fulfil our natural inclination by using reason consciously to direct our action toward particular ends.[56] Weinreb comments 'it would make no sense and would contradict the perfect order of the created universe for human beings to have the capacity to reason and to lack the opportunity to exercise the capacity practically.'[57] Thus, our moral freedom is not in conflict with the Eternal Law, but fulfils it in a manner consistent with our rational nature.

In question 91 Aquinas describes this process as a specifically human participation in the Eternal Law. In question 94, article 2, he maintains that natural law consists of 'first principles to matters of demonstration.'[58] These are starting points and first principles of practical reasoning. Aquinas notes that a principle is self-evident in two ways.[59] First, a proposition is self-evident in-itself if its 'predicate is contained in the notion of the subject.'[60]

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50 David Novak, 'Natural Law in a Theological Context' in John Goyette, Mark Latkovic and Richard S Myers, *St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004) 44.

51 Germain Grisez, 'The First Principle of Practical Reason: A commentary on the *Summa Theologica,* 1-2, Question 94, Article 2' (1965) 10 *Natural Law Forum* 174.

52 Aquinas, above n 35, xii. Human beings are subject to the natural law and able to discern it.

53 Ibid 15.

54 Lloyd L Weinreb, *Natural Law and Justice* (1987) 57.

55 McInerny in Aquinas, above n 35, xii.

56 Aquinas, above n 35, 16.

57 Weinreb, above n 24, 57.

58 Aquinas, above n 35, 58.

59 Ibid.

60 Ibid.

For example, the 'proposition, *Man is a rational being*, is, in its very nature, self evident, since who says *man*, says *a rational being*.'[61] For Aquinas, it was unthinkable that such a proposition be considered false. However, 'some propositions are self-evident only to the wise'[62] who have received instruction of the meaning of terms inherent to a proposition.[63] Thus, Aquinas remarks, 'to one who understands that an angel is not a body, it is self-evident that an angel is not circumscriptively in a place.'[64]

Aquinas's conception of natural law focuses on human reason. As Harris states, 'herein lies the 'natural' quality of natural law.'[65] A proposition is natural if one can derive it through reason, intuition and deductions drawn therefrom. Aquinas states repeatedly that first principles of natural law are known to human beings directly and immediately. Indeed, he argues that God has 'instilled it into man's mind so as to be known by him naturally.'[66] Aquinas establishes a means of discovering the first principles of practical reason, rather than an exhaustive list.[67] While his methodology is beyond the scope of this article, some examples include that 'good is to be done and pursued and evil is to be avoided' and that 'since... good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.'[68] Aquinas also holds that there are natural inclinations common to all animals, relating to sexual intercourse[69] and education of offspring.[70] The fulfilment of these inclinations belongs to the natural law.

We turn now to consider the influence of natural law philosophy on the Great Law. This section also considers points of distinction between the two theories and argues that the Great Law is more defensible than Aquinas's description of natural law.

B. *The Great Law*

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61 Ibid.
62 Ibid 59.
63 Ibid.
64 Ibid.
65 Harris, above n 37, 7.
66 Aquinas, above n 35, 11.
67 Ibid. In contrast Finnis claims that his seven forms of human good represent an exhaustive list. See Finnis, above n 30, 90-91.
68 Aquinas, above n 35, 60.
69 James Rachels, *The Elements of Moral Philosophy* (1998) 55-56.
70 Weinreb, above n 24, 58. See also The Vatican, 'Declaration on Euthanasia' in Peter Singer (ed), *Ethics* (1994) 253-256.

The Great Law and natural law differ on the meaning to be attributed to the term 'nature'. For Aquinas, 'nature' means 'reason' and not the physical environment or principles deduced from its study.[71] Certainly, the absence of matters pertaining to the physical environment in natural law philosophy is striking, causing Jane Holder to reiterate (albeit in a different context) Lloyd Weinreb's denunciation of 'natural law without nature.'[72] Indeed, while natural law theorists have considered the effect of biological and physical laws on the realisation of human happiness,[73] and a natural law conception of ownership has been attempted,[74] this does not amount to a 'developed treatment of the physical environment and human/nature relations' in natural law literature.[75]

In contrast to the legal category of natural law, the Great Law is concerned with the physical environment and in particular the concept of Earth community. Berry argues that human society should broaden its present focus from human beings to recognise the 'supremacy of the already existing Earth governance of the planet as a single, interconnected community.'[76] For Berry, this orientation toward the natural world 'should be understood in relation to all human activities'[77] and that 'Earth is our primary teacher as well as the primary lawgiver.'[78] Former president of the Czech Republic, Václav Havel, echoed a similar sentiment in a 1984 address to the University of Toulouse:

> We must draw our standards from the natural world. We must honor with the humility of the wise the bounds of that natural world and the mystery which lies beyond them, admitting that there is some thing in the

71 James Harris, *Legal Philosophies* (2005) 6.

72 Jane Holder, 'New Age: Rediscovering Natural Law' in MDA Freeman (ed), *Current Legal Problems* (2000) 172.

73 Finnis, above n 30, 380.

74 J Boyle, 'Natural Law, Ownership and the World's Natural Resources' (1989) 23 *Journal of Value Inquiry* 191. Boyle concludes at 191: 'the category of natural resources might not be particularly useful framework for moral analysis. Certainly this category does not, on natural law grounds, mark out an area where any special moral considerations apply.' See also Murray Raff who investigates the natural law roots of private property, Murray Raff, *Private Property and Environmental Responsibility* (2003) 121-159. Raff puts forward a compelling argument that registered title is the globalising land title system and ought to be re-attached it to its jurisprudential routes, which involve religion and natural law.

75 Holder, above n 72, 172.

76 Berry, above n 13 (2006), 20.

77 Berry, above n 7 (1999), 64.

78 Ibid. See also Thomas Berry, *The Sacred Universe* (2009) 96.

> order of being which evidently exceeds all our competence.[79]

In his book *Wild Law,* Cormac Cullinan adopts the term the Great Jurisprudence (the Great Law in this article[80]) to help make sense of the re-characterisation envisioned by Berry.[81] 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.'[82] As described by Cullinan, this law is manifest in the universe itself and can be witnessed in the 'phenomenon of gravity', 'the alignment of the planets', the 'growth of planets' and the 'cycles of night and day'.[83] Consistent with natural law philosophy, human beings are limited in the extent that they can understand the Great Law. Indeed, the Great Law represents those aspects of nature that scientific analysis is able to interpret and provide approximate description of. What distinguishes human beings from the rest of nature is not greater participation in the Eternal Law, but the capacity to describe approximately the Great Law and alter our behaviour to consciously act in accordance with or indeed contrary to it.[84]

Before continuing, 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 what is a law of nature and in what sense they have meaning or relevance for human law. In response to the first question, it must first be noted that laws of nature 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 (though not unanimous).'[85] Many also believe they are justified in trusting or relying on scientific

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79 Václav Havel, quoted in Janine M Benyus, *Biomimicry: Innovation Inspired by Nature* (2002) 1. See also David Orr, 'Love It or Lose It: The Coming Biophilia Revolution' in Edward O Wilson (ed), *The Biophilia Hypothesis* (1993).

80 Because of confusion resulting from the use of the term 'jurisprudence' in this concept, the term 'Great Law' will be preferenced in this article.

81 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (2003) 84. It has been brought to the author's attention via private correspondence that the term Great Jurisprudence was used for the first time by Thomas Berry at a meeting at Airlie House in Washington, 2001.

82 Ibid.

83 Ibid.

84 See also Brian Swimme, *The Universe is a Green Dragon* (2001) 32.

85 Martin Curd, 'The Laws of Nature' in Martin Curd and JA Cover (eds), *Philosophy of Science, The Central Issues* (1998) 805. See also David Armstrong, *What is a Law of Nature?* (1983).

inferences, because these predictions are based on established laws. In this view, our expectations regarding the behaviour of systems, materials and instruments are considered reasonable, to the extent that they are drawn from a correct understanding of the rules that govern them. Much energy is devoted to the discovery of laws and 'one of the most cherished forms of scientific immortality is to join the ranks of Boyle, Newton and Maxwell by having a law (equation of functional relation) linked to one's name.'[86]

However, despite the status of laws in science, there is no general agreement on how to define a law of nature. This presents a significant challenge to Cullinan's description of the Great Law. Indeed, how can human lawmakers consider the laws of nature when creating certain types of human law, if there is no consensus on what a law of nature is? In response to this problem two mutually opposed philosophical accounts have been developed. The first, termed necessitarian, contends that there are real necessities in nature, over and above the regularities that they allegedly produce and law-statements are descriptions of these necessities.[87] The second account, regularists, posit that there are no necessities but only regularities – that is, correlations and patterns – and laws are descriptions of regularities.[88] Both philosophical accounts address four interrelated issues: (i) semantics of the meaning of law statements; (ii) metaphysical questions concerning the 'fact', to which law statements refer; (iii) epistemological questions pertaining to the basis to which claims of knowledge of a law are justified; and (iv) explanations of the various role of scientific laws.[89] In answering these questions, both philosophical accounts encounter distinct difficulties. CA Hooker provides a pertinent example:

> [I]f there are necessities in nature, as the first account claims, how exactly do we identify them: how can we tell which of the inductively confirmed regularities are laws? On the other hand, if there are only regularities, as the second account claims, does this mean that our intuitions and scientific practices are awry and that there really is no distinction between laws and accidental generalizations?[90]

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86 Curd, above n 85, 805.

87 Ibid.

88 Ibid. This is a general statement on each school, there are significantly different variants of each account and also positions that altogether deny the existence of general laws, or deny that science should aim to describe them.

89 CA Hooker, 'Laws, Natural' in Edward Craig (ed), *The Shorter Routledge Encyclopedia of Philosophy* (2005) 550.

90 Ibid.

Compounding this comment is the wide variety of laws supplied by current science and the complexity of the relationship between those laws, regularities and causes.[91] Beyond this is a nagging uncertainty about the relevance of such laws to human law. How, for instance, can Newton's law of motion or Boyle's law of mass and pressure meaningfully assist in the drafting of law? Of what possible importance are they to an institution that seeks to govern human relationships and behaviour? Through what mechanism are certain laws prioritised over others? In response, this article argues that even if agreement can be reached on what constitutes a law of nature, it is difficult to see how such a broad focus can assist human lawmakers.[92]

Rather than describing the Great Law with reference to universal laws of nature, I contend that the focus of Earth Jurisprudence should be on the ecological integrity of the Earth community.[93] This connection retains a strong connection between law and science, and focuses our attention on a verifiable standard that is directly relevant to human-Earth relationships. Ecological integrity originated as an ethical concept as part of Aldo Leopold's classic 'land ethic'[94] and has been recognised in legislative instruments such as the *Clean Water Act US* (1972).[95] As described the Laura Westra, the generic concept of integrity 'connotes a valuable whole, the state of being whole or undiminished, unimpaired, or in perfect condition.'[96] Because of the extent of human exploitation of the environment, wild nature provides the paradigmatic example of ecological integrity.

Among the most important aspects of ecological integrity are first the autopoietic capacities of life to regenerate and evolve over time at a specific location. Thus, integrity provides a place-based analysis of the evolutionary and biogeographical process of an ecosystem.[97] A second aspect is the

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91 Ibid.

92 Ecology has been criticised on the basis that it presents no laws and is thus a lesser science than physics. For a contrary argument see Mark Colyvan, 'Laws of Nature and Laws of Ecology' (2003) 101(3) *Oikos* 649.

93 The concept 'ecological integrity' has been developed principally by the Global Ecological Integrity Group <http://www.globalecointegrity.net/>.

94 Aldo Leopold, *A Sand County Almanac: Essays on Conservation from Round River* (1966): 'a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community' and 'wrong when it tends to do otherwise.'

95 Section 101(a) has its objective 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'

96 Laura Westra, 'Ecological Integrity' in Carl Mitcham (ed), *Encyclopedia of Science, Technology and Ethics* (2005) 574.

97 Paul Angermeier & James Karr 'Protecting Biotic Resources: Biological

requirements that are needed to maintain native ecosystems.[98] Climatic conditions and other biophysical phenomena can also be analysed as interconnected ecological systems.[99] A third aspect is that ecological integrity is both 'valued and valuable as it bridges the concerns of science and public policy.'[100] To bridge this chasm, models such as the multimetric Index of Biological Integrity allows scientists to measure the extent to which systems deviate from verifiable integrity levels that are calibrated from a baseline condition of wild nature.[101] Degradation or loss of integrity is thus any human-induced positive or negative divergence from this baseline standard.[102] Finally, if given appropriate legal status, 'ecological integrity' recognises the intrinsic value of ecosystems and can help curve the excess of human development and exploitation of nature.

As should be evident from this overview, defining the Great Law with reference to ecological integrity does not purport to be static or able to render consistent application across jurisdiction. Instead, the role of ecological science in Earth Jurisprudence is to provide approximate descriptions of ecosystem data in such a way that can be interpreted and applied by human lawmakers. Put otherwise – Earth Jurisprudence retains the lawmaking authority of human beings. It seeks to provide 'reasons for action' and compel them to consciously align human law with the Great Law and ensure that ecological integrity is respected and ultimately protected.

Recognition of human agency and choice is critical and enables Earth Jurisprudence to avoid the traps of David Hume's well-rehearsed argument of noncognitivism.[103] Briefly, Hume argued that one cannot derive an 'ought' from an 'is' and no amount of information about the facts of the world or of human nature provides proof that anything ought to be done or

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Integrity versus Biological Diversity as Policy Directives' (1994) 44(10) *BioScience* 690.

98 For studies on water, see James Karr & Ellen W Chu, *Restoring Life in Running Waters* (1999). For terrestrial systems, see Reed Noss, 'The Wildlands Project: Land Conservation Strategy' (1992) *The Wildlife Project* 10.

99 Westra, above n 96, 575.

100 Laura Westra, 'Ecological Integrity and the Aims of the Global Ecological Integrity Project' in David Pimentel, Laura Westra, and Reed F. Noss (eds), *Ecological Integrity: Integrating Environment, Conservation and Health* (2000) 20.

101 James Karr, 'Ecological Integrity and Ecological Health are not the Same' in Peter Schulze (ed), *Engineering Within Ecological Constraints* (1996) 96

102 Westra, above n 96, 575.

103 David Hume, *A Treatise of Human Nature* (2002) [first published 1740] 302.

not done.[104] This is a logical point – an assertion about the relationship between propositions. Hume's intention is to deprive natural law philosophers of that 'most revered philosophical weapon'[105] the deductive syllogism. Indeed, since Hume, few would defend the following syllogism: (i) All of nature is interconnected; (ii) humans are part of nature; (iii) therefore humans *ought* to behave in a manner that recognises this interconnection. Here the conclusion contains a copula not contained in the premises, namely, 'ought'. While there might be hundreds of reasons for recognising and responding to this interconnection, logical deduction is not one of them.[106] To avoid the pitfalls of this argument, Earth jurisprudence seeks to take the first steps toward normative conclusions and rely on human will and rationality to bridge what GE More termed the 'naturalistic fallacy'.[107]

2. HUMAN LAW

In question 90, article 4, Aquinas defines Human Law as 'an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'[108] The description of Human Law advanced in Earth Jurisprudence shares many of these elements. However, three points of refinement need to be established from the outset: (i) in Earth Jurisprudence the 'common good' is understood with reference to the wellbeing of the Earth community and not simply its human component; (ii) in Earth Jurisprudence the 'common good' is not defined in utilitarian terms as pertaining to the greatest good for the greatest number.[109] Instead, it refers to the securing of conditions that tend to favour the health and future flourishing of the Earth community.[110] While this view encourages human

104 Ibid.

105 Harris, above n 37, 13.

106 See Peter Singer, *The Expanding Circle: Ethics and Sociobiology* (1981) 79. Singer contends: '[T]he fact that the bull is charging does not, by itself entail the recommendation: "Run!" It is only against the background of my presumed desire to live that the recommendation follows. If I intend to commit suicide in a manner that my insurance company will think is an accident, no such recommendation applies.'

107 George Edward Moore, *Principia Ethics* (1903).

108 Aquinas, above n 35, 10-11.

109 This is true also for neo-Thomist interpretations of natural law. See for example Finnis, above n 30, 154 Finnis defines the common good in terms of conditions that 'tend to favour the realization, by each individual in the community, of his or her personal development.'

110 Berry, above n 13 (2006), 149. On this point, Berry notes that 'every component of the Earth community, both living and nonliving' has the right to 'habitat or a place to be and the right to fulfil its role in the ever-renewing processes of the Earth community.' See also Arne Naess, 'The Shallow and

flourishing, it also limits liberty to actions that are consistent with the flourishing of the Earth community. In this sense, Earth Jurisprudence is intimately concerned with ecological integrity and the flourishing of the environment;[111] and (iii) Aquinas' appeal to reason is supplemented by the use of scientific description. As articulated in Earth Jurisprudence, acknowledging these standards in one's deliberations is part of what it means to be reasonable.

Drawing on these points, this article defines Human Law as *rules, supported by the Great Law, which are articulated by human authorities for the common good of the comprehensive whole.* Importantly, this definition shares similarities with Legal positivism. This is perhaps not surprising; especially when one considers that Aquinas is also considered an important contributor to positivist thought.[112] Key areas of relationship include the presumptive authority of human beings to make binding prescriptions for the community. Further, Earth Jurisprudence does not contest the 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 Earth Jurisprudence and Legal positivism rests on several fine distinctions, which nonetheless carry theoretical significance.

The most obvious difference between Earth Jurisprudence and Legal positivism is the appeal to 'higher law' considered above. Further to this point, this article argues that Human Law ought to be described as a project with a purpose. This is consistent with the description of law offered by Aquinas and secular natural law theorist Lon Fuller.[113] Aquinas for example comments in question 90, article 2:

> [S]ince the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so

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the Deep, Long Range Ecology Movement: A Summary' 16 *Inquiry* 95. At 96 Naess notes that each part of nature has the capacity for 'happiness', 'flourishing' and 'self-realization'.

111 On ecological integrity see Laura Westra, Ecological Integrity (2005) <http://www.globalecointegrity.net/pdf/Westra%20on%20Ecological%20Integrity.pdf>. See also James Karr, 'Health, Integrity and Biological Assessment: The Importance of While Things' in David Pimentel, Laura Westra and Reed Noss, *Ecological Integrity: Integrating Environment, Conservation and Health* (2000).

112 See John Finnis, 'The Truth in Legal Positivism' in Robert P George (ed), *The Autonomy of Law: Essays in Legal Positivism* (1996) 195.

113 Lon Fuller, *The Morality of Law* (1964) 53. As Fuller notes, law is the 'enterprise of subjecting human conduct to the governance of rules.'

> far as it regards the common good. Therefore every law is ordained to the common good.[114]

This statement is supported by Fuller, who argues that the central purpose of law is human flourishing and for people to coexist and cooperate within society.[115] On this account, human law cannot truly be understood without understanding the ideal or 'common good' towards which it is striving.[116] However, while natural law philosophy defines the parameters of community with exclusive reference to human beings,[117] the focus of Earth Jurisprudence is on the comprehensive Earth community. This accords with ecological insights into the interconnectedness of nature and recognition that human good cannot be isolated and measured independent of the good of this comprehensive community.[118]

It is not clear that the purposive interpretation of law advanced in Earth Jurisprudence contradicts Legal positivism in any way that positivists would wish to deny. Indeed, if notions of purpose and common good form an important element of legal development, as is often admitted,[119] then it is difficult to see the justification for taking an exclusive attitude. As argued by Fuller, 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.[120] From this perspective, legal authorities are not entirely free to create law. They must acknowledge and respond to factors that have consequence for law's purpose – the attainment of the comprehensive common good.[121]

To be clear, not every Human Law will be affected by this standard. This selective approach is consistent with the description of natural law offered by Cicero. Cicero argued that there are some matters for which the

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114 Aquinas, above n 35, 6.

115 Fuller, above n 113, 123. Fuller notes further that legal philosophy *should* deliberately define law so as to assist good legal enterprises.

116 Brian H Bix provides a helpful example in *A Dictionary of Legal Theory* (2004) 72. He notes 'there are many human activities, from painting to jogging, to boxing, that are hard to understand unless one knows the objective or ideal toward which the participants are striving.'

117 For example Finnis, above n 30, 134-161.

118 Odum, above n 19.

119 MDA Freeman, *Lloyds Introduction to Jurisprudence* (2008) 50.

120 Lon Fuller, 'Human Purpose and Natural Law' 53 (1956) *Journal of Philosophy* 697. Note that Fuller described the purpose of law in terms of 'order', 'good order' and 'justice'.

121 See Kenneth Winston, 'The Ideal Element in a Definition of Law' (1986) 5 *Law and Philosophy* 89: 98.

'Gods' have no concern and over which human lawmakers have legitimate authority to decide.[122] Following this reasoning, Earth Jurisprudence does not have an obvious or direct relationship to the law of assault or contract law. Further, unlike natural law philosophy, it does not seek to enter broad ethical discourse and advance opinion on sexual preference or matters concerning life and death.[123] Instead, Earth Jurisprudence is concerned specifically with matters concerning human interaction and modification of the environment. It has obvious implications for property law, environmental law, planning law, natural resource management, and conservation heritage, to name a few.

Once one takes a purposive or functional approach to law, important consequences follow regarding laws that contravene this standard. Part IV argues that Great Law acts as a standard for Human Law and a measure for legal quality. Further, purported laws that are inconsistent with the Great Law are considered defective and not morally binding on a population. In this regard, Earth Jurisprudence provides a legal justification for challenging the authority of law and engaging in civil disobedience.

IV. The interaction between the Great Law and Human Law

This article has outlined the legal categories Great Law and Human Law. It described Great Law with reference to the ecocentric principle of Earth community. Human Law was described as rules passed by human authorities that are consistent with the Great Law and are enacted for the good of the Earth community as a whole. Regarding the interaction between these two categories of law, two points are discussed and analysed in this section. First, only prescriptions that are consistent with the Great Law and directed toward the comprehensive common good have the quality of law. Second, any purported law that is in conflict with the Great Law is defective or a mere corruption of law and not morally binding on a populace. In this instance, Earth Jurisprudence provides a justification for civil disobedience. We consider these points in turn.

1. LEGAL QUALITY

Earth Jurisprudence requires Human Law to be articulated with reference to the principle of Earth community. Cullinan supports this interpretation, holding that the Great Law should be understood as the 'design parameters within which those ... engaged in developing Earth Jurisprudence for the

122 Cicero, *The Republic and the Laws* (1998) 134

123 See for example Finnis, above n 30, 90-91.

human species must operate.'[124] This approach requires lawmakers to interpret the Great Law and translate their conclusions in a way that recognises nature's integrity as a bedrock value or limit for Human Law.[125] Because the Great Law requires interpretation, there are likely to be a range of rules that are consistent with the Great Law rather than one correct application. The rules actually chosen by lawmakers need not coincide with the rules that specific individuals within that community would have chosen.[126] They need not even regard them as sensible or desirable.[127] However, by advocating a necessary connection between law and the environment, Earth Jurisprudence ensures that environmental ideas are not imposed from the outside in an ad hoc or limited way.[128] Instead, they are central to our idea of law and an immediate measure of legal quality.

Shortly before dying in 2009, Berry commented on how the Great Law could set the design parameters for Human Law. He wrote:

> It would be appropriate if the prologue of any founding Constitution enacted by humans would state in its opening lines a clear recognition that our own human existence and well-being are dependent on the well-being of the larger Earth community...this statement might be followed by a statement that care of this larger Earth community is a primary obligation of the nation being founded.

Such a statement would be particularly appropriate in the assembly of nations known as the United Nations. As things are at present, each of the nations identifies itself as a 'sovereign' nation, that is, a people bounded together by a national covenant whereby it declares itself as self-referent, that is, subject to no other Earthly power in the conduct of its affairs... there is no mention of any relationship with the natural world or with any other

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124 Cullinan, above n 14, 84-85.

125 Earth Jurisprudence does not seek to take control of the lawmaking process. Nor do principles, such as Earth community, represent normative statements that can be applied directly as law. In regard to this concern, see Eric T Freyfogle, *Bounded People, Boundless Lands: Envisioning a New Land Ethic* (1998) 108.

126 Finnis, above n 30, 289.

127 Ibid 290. Reference to desirability is particularly important in the context of large corporations who may wish to continue the 'business as usual' mentality.

128 For example, division six of the *Environmental Protection and Biodiversity Act 1999* (Cth), which provides for the production of an environmental impact statement.

mode of being, not even of the planet we live on and out of which comes all that we are and all that we have.[129]

These comments recognise the critical role of positive law in implementing the broad changes required by Earth Jurisprudence. They are also consistent with other proposals for an Eco-Constitutional State,[130] the recognition of the rights of nature in national Constitutions[131] and attempts in international law to formulate a covenant for ecological governance.[132] The essence of this work is captured in the Project for Earth Democracy.[133] Bosselmann explains that Earth democracy 'requires a shift from economics to ecology realizing their common ground ie the Earth our home.'[134] Existing forms of governance were designed and exist to promote human well-being.[135] Under this anthropocentric framework, environmental governance is a small concern. It is an 'add-on or a minimalist, shallow program ... the poor cousin of economic governance.'[136] However if principles such as Earth community were recognised at the Constitutional level, legislators would be required to have appropriate regard of them when articulating Human Law. A purported law that was inconsistent with the principles of Earth democracy would be open to legal challenge and under current principles of Constitutional law could be rendered invalid.[137]

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129 Berry in Cullinan, above n 14, 13-14.

130 See for example, Bosselmann, above n 12, 222-264. See also Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (2004).

131 For an overview of recent developments, see Burdon above n 17.

132 Important examples include the 1983 World Charter for Nature; 1991 Caring for the Earth; 1992 Declaration of the Parliament of World Religions; 1996 Earth Covenant; 1997 Declaration on the Responsibilities of the Present Generations Towards Future Generations; 2000 Earth Charter; 2000 A Manifesto for Earth; and 2002 A Manifesto for Life. For an overview and discussion of their application to Earth Jurisprudence, see J Ronald Engel and Brendan Mackey, 'The Earth Charter, Covenants, and Earth Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law The Philosophy of Earth Jurisprudence* (2011) 313.

133 Klaus Bosselmann, 'Earth Democracy: Institutionalizing Sustainability and Ecological Integrity' in J Ronald Engel, Laura Westra and Klaus Bosselmann (eds), *Democracy, Ecological Integrity and International Law* (2010) 91 and Vandana Shiva, *Earth Democracy: Justice, Sustainability, and Peace* (2005). At 107 Bosselmann defines Earth democracy as a type of democracy that 'promotes decision-making that is reflective of the relationship between human and non-human spheres and their ecological balancing.'

134 Bosselmann, above n 136, 103.

135 Ibid. See also Berry in Cullinan, above n 14, 14.

136 Bosselmann, above n 136, 103.

137 Tony Blackshield and George Williams, *Australian Constitutional Law and*

While proponents of Earth Jurisprudence advocate a relationship with positive law, they also recognise that the Great Law is prior to Human Law and is not something created by lawmakers.[138] Rather, it should be considered analogous to other fundamental principles such as liberty, equality and justice. If these principles are considered the three pillars of civilisation, the Great Law provides their foundation. As such, it provides a standard through which to judge the moral authority of existing laws.

One visible example of the relationship between the Great Law and Human Law can be noted in 2007 when former vice president of the United States, Al Gore stated: 'I can't understand why there aren't rings of young people blocking bulldozers, and preventing them from constructing coal-fired power plants.'[139] 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.'[140] In the example raised by Gore, we can presume that the proponent in question 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 some form of community consultation, opportunity for public comment and negotiation with stakeholders. However, because of the known ecological damage caused by coal-fired power plants and the risk they pose to the long-term common good, Gore questions the legitimacy of the project. More than this, he expresses his dismay that individuals are not positively 'breaking the law' to stop the project.

To understand these comments it is useful to refer once more to the natural law tradition. From this perspective, it is possible to interpret Gore's

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Theory (2002) 11.

138 On the primacy of the Great Law, see Cullinan, above n 14, 74: 'So it is that even the sophisticated governance structures of the European Union allocate greater fishing quotas than the fish stocks can bear, year after year. They have many scientists who advise them against doing so, but at the heart of it they do not accept (or do not care) that human governance systems are subservient to the unyielding rules of nature. No directive from Brussels can overrule the principle that continued over exploitation will reduce the fish population until it reaches levels that are so low that commercial fishing is not viable.'

139 Matthew Leonard, *Al Gore Calling for Direct Action Against Coal* (2007) <http://understory.ran.org/2007/08/16/al-gore-calling-for-direct-action-against-coal/>.

140 Michelle Nichols, 'Gore Urges Civil Disobedience to Stop Coal Plants' (2008) <http://uk.reuters.com/article/idUKTRE48N7AA20080924>.

statements in (at least) three different ways. First, as saying that the law authorising the construction of a coal-fired power plant has the potential to cause such great harm to the Earth community that there is no *moral* obligation to obey that law.[141] Second, that the law in question is not *legally valid* or that there is no law at all.[142] Finally, that the law is legally valid but that it is not law in the *true* sense of the word.[143] That is – because the law is strongly contrary to environmental health, it is *defective as law*.[144] Mark C Murphy elaborates on the use of the term defective:

> To say that something is defective is to say that it belongs to a certain kind and there are certain standards of perfection that are internal to it (that are intrinsic to it, that necessarily belong to) members of that kind. To be an alarm clock just is, in part, to be the sort of thing that if it cannot sound an alarm when one wishes to be awakened, it is defective. But something can be an alarm clock even if it cannot sound an alarm: it might be broken, or poorly constructed, or whatever.[145]

According to the third interpretation of Gore's statement, law has certain standards that are internal to it and a failure to meet these standards renders a purported law defective. Consistent with the purposive description of Human Law detailed above, it is the third interpretation that will be advanced in this article. From this perspective, Earth Jurisprudence advocates a particular methodological approach. It suggests that theorising about law should not be a neutral exercise[146] that is divorced from the

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141 While this is a legitimate interpretation of Gore's statement, it says nothing about the nature of law. It is thus contrary to the ecological and purposive description of Human Law presented in this article. Other adherents to natural law philosophy would similarly reject this 'moral reading', on the basis that it trivialises the natural law article. As Murphy observes, interpreting natural law as a claim about the justifiability of disobeying unjust laws, 'is excruciatingly uninteresting, a claim that almost everyone in the history of moral and political philosophy has accepted, and thus is not much worth discussing', Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) 10.

142 This position is similar to the 'strong natural law article'. For arguments in favour of this position, see G Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 *Oxford Journal of Legal Studies* 7 and R Alexy, *The Argument for Injustice: A Reply to Legal Positivism* (2002) 54.

143 For an examination of legal validity in natural law philosophy, see Murphy, above n 144, 9-12.

144 Ibid 12.

145 Mark C Murphy, *Philosophies of Law* (2007) 44.

146 This point is also central to the critical legal studies movement.

broader context of our existence and fails to have appropriate regard for the common good of the comprehensive Earth community.

This contextual interpretation of Earth Jurisprudence is supported further by the notion of 'central case' advanced by Finnis.[147] Briefly, the 'central case' is an approach within social theory that seeks to describe an institution whose interpretation varies substantially between different theorists. Rather than discussing what all interpretations have in common, a central case methodology chooses characteristics that may appear fully only in the most developed or sophisticated instantiation of the thing.[148] Finnis uses this methodology to draw a distinction between the 'focal' and 'secondary' meanings of law.[149] The focal meaning of law refers to its ideal form, a form to which actual law is a mere striving or approximation.[150] In contrast, the 'secondary' meaning of law refers to instances of law that are 'undeveloped, primitive, deviant or other "qualified sense" or "extended sense" instances of the subject matter.'[151] When we are concerned with law in the secondary sense – prescriptions that are merely 'in a sense law' – there is no point in asserting that they lack legal validity. Rather, they are valid and enforceable laws that fall short of the ideals that are contained in the concept of law in its fullest sense. Here the positivist argument that any standard which meets the predetermined criteria for validity in a particular legal system is valid, sits alongside and can co-exist with the ecocentric account of law, on which 'true' law aims at securing the comprehensive common good.

Following Aquinas, Finnis describes the central case of law to be the 'complete community', defined as 'an all-round association' that includes the 'initiatives and activities of individuals, of families and of the vast network of intermediate associations.'[152] Its purpose or point is to secure the common good or – the 'ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development.'[153] Thus, as described by Finnis, the focal meaning of law is to secure the common good of human beings by co-ordinating the different goods of individuals within the community. Finnis contends that this is the true purpose of law and any law that conflicts with this goal is not

147 Finnis, above n 30, 10. For a critique of Finnis's attempt to identify the central case of law with morality, see Hart, above n 31, 12.

148 Brian H Bix, above n 116, 30-31.

149 Finnis, above n 30, 9-10.

150 Ibid 11.

151 Finnis, above n 30, 9-10. This argument can be traced back to Aristotle's 'Nicomachean Ethics' and 'Politics'. See Jonathan Barnes, *The Complete Works of Aristotle* vol II (1984) 1157a30-33 and 1:1275a33-1276b4.

152 Finnis, above n 30, 147.

153 Ibid 154.

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.'[154]

The notion of 'central case' has the potential to be useful for supporting the theory of law advanced in Earth Jurisprudence. It also avoids unnecessary criticism that would attach to the argument that a law that was inconsistent with the Great law was not a law at all.[155] However, to be consistent with the principle of Earth community, the 'complete community' described by Finnis would need to be extended from human beings[156] to include the comprehensive Earth community.[157] Interestingly, Finnis recognises that ecological interconnectedness is a form of relationship.[158] He also provides for the extension of his definition of the 'complete community'. Looking to the future he contends '[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.'[159] Following this logic further, if the good of individuals and communities can only be secured by extending the central case of law to the Earth community, then this comprehensive community should be the reference from which to judge legal quality. This would mark a shift from an anthropocentric interpretation of law and toward an ecocentric interpretation.

2. CORRUPTIONS AND CIVIL DISOBEDIENCE

Human Laws that are inconsistent with the Great Law are not laws in the focal sense of the term. They are defective and judged from the perspective of law's focal meaning, not morally binding by virtue of their own legal quality. This gives rise to issues concerning the authority of law and civil disobedience.[160] Due to space constraints, this section cannot engage with

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154 Ibid 279.

155 For an example of his, this argument has been made in the context of natural law philosophy, see Finnis, above n 30, 34. Finnis argues that the true classical doctrine never purported to derive 'ought' from 'is'.

156 Finnis, above n 30, 152.

157 Cullinan, above n 14, 77-78. Cullinan critiques Finnis on his limited understanding of community. Cullinan argues further that 'if we shift our point of reference from what we consider to be good for the individual in (Western) societies to what is good for Earth, the conclusions are likely to be very different. From an Earth jurisprudence perspective, the inherently anthropocentric flavour of current concepts of natural law makes the debates that have raged around these ideas seem rather artificial.'

158 Finnis, above n 30, 150.

159 Ibid.

160 For a broad overview of these topics, see Hugo Adam Bedau (ed), *Civil Disobedience: In Focus* (1991) and Christopher Heath Wellmann and

the broad complexities of this topic. In particular it does not consider the intricacies of how civil disobedience should be defined,[161] whether citizens in a contemporary Western democracy are ever justified in engaging in civil disobedience[162] and whether such democracies are capable of responding to the present environmental crisis.[163] The aim is the modest one of outlining the consequence for a law that contravenes the Great Law and is rendered defective or contrary to law's focal meaning.

The article defines Human Law so as to retain presumptive authority of human beings to make binding prescriptions for the community. While this presumption is subject to debate,[164] this section does not attempt a resolution. Instead, for present purposes, it is sufficient to say that the law necessarily *claims* moral authority and not that it necessarily *has* moral authority.[165] Rather than becoming entangled in this discourse, proponents of Earth Jurisprudence focus on describing law in a way that removes the self-validating nature of legal positivism and considers Human Law in the context of the Great Law. From this perspective the authority of laws

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Anthony John Simmons, *Is There A Duty to Obey the Law?* (2005).

161 See for example, John Rawls in *A Theory of Justice* (1999) 320: 'civil disobedience [is] a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government.'

162 This article maintains that there are legitimate grounds for civil disobedience. For a discussion against this position see T H Green, *Lectures on the Principles of Political Obligation* (1907) 111. The alternative position is well represented by Peter Singer, *Democracy and Disobedience* (1973) 105-132.

163 See Freya Matthews, *Ecology and Democracy* (1996).

164 The most influential modern argument in favour of law's presumptive authority is the modern social contract theory articulated by Rawls, above n 164. Rawls argues at 3 that such a proposition 'required no argument' and that 'at least in a society such as ours' (the United States) there was a moral obligation to obey the law. For an argument against laws presumptive authority, see Raz, above n 29.

165 Denise Meyerson, *Jurisprudence* (2011) 18. Note that our ultimate obligation to obey the law is a moral obligation and not a legal obligation. See further Singer, above n 165, 3. Singer argues that our obligation to obey the law cannot be legal since this 'would lead to an infinite regress – since legal obligations derive from laws, there would have to be a law that says we must obey the law. What obligation would there then be to obey this law? If legal obligation, then there would have to be another law ... and so on. If there is any obligation to obey the law, it must, ultimately be a moral obligation.'

promulgated by human authorities are *contingent* on their consistency with the Great Law and the attainment of the comprehensive common good.[166]

Arguments pertaining to the contingent nature of legal authority are commonplace in political philosophy.[167] What makes Earth Jurisprudence unique within this discourse is the method it advocates for determining legal quality. Through the principle of Earth community, it provides a rational basis for the activities of legislators and furnishes a guide to decide whether citizens have a moral obligation to obey the law. This method does not purport to be purely objective and provide a certain test for determining when civil disobedience is justified.[168] Indeed, whether in a particular case our presumed obligation to obey the law can be outweighed is not something that can be determined in the abstract.[169] Its application to 'hard cases'[170] is likely to be subject to as much debate and disagreement as other moral justifications for civil disobedience.

Amongst the objections to describing legal authority as contingent are appeals to avoiding bad example, civil disturbance or the weakening of

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166 A similar focus is taken in natural law philosophy. See Finnis, above n 30, 360. Finnis contends that if lawmakers use their 'authority to make stipulations against the common good ... those stipulations altogether lack the authority they would otherwise have *by virtue of being his*. This reasoning is influenced by Aquinas who in question 96, article 4, emphasised the relationship between obligation and common good and recognises the existence of first principles of natural law, which are immutable, Aquinas, above n 35, 96. An example of an immutable first principle is 'Do harm to no man'.

167 See for example M B E Smith, 'Do We Have a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950 and Heidi Hurd, *Moral Combat* (2008).

168 In critique of 'higher law' justifications for civil-disobedience Carl Cohen notes in 'Militant Morality: Civil Disobedience and Bioethics' 19(6) *Hastings Center Report* 23 that such approaches: 'encounter perennial difficulties: the source, authority and content – and even the meaning – of such laws....are matters of unending dispute.' Recent debates over climate change provide a pertinent illustration of the complexities of reaching agreement on scientific issues. For an overview of this debate, see Andrew Dessler and Edward A Parson, *The Science and Politics of Global Climate Change: A Guide to the Debate* (2010).

169 Commenting on this point, Singer notes at above n 165, 64: 'to expect any work of theory to give answers to such questions is to expect more than theory alone can give.'

170 Term is borrowed from Ronald Dworkin, *Taking Rights Seriously* (1978). Hard cases refer to those instances where competently trained and thoughtful people might come to different conclusions about the result.

an otherwise just legal system.[171] This objection can also be stated in consequentialist terms whereby one is asked to consider the potentially negative consequences that may follow for a society in which people disobey the law. Thomas Hobbes represents the classical source for this proposition, arguing that 'perpetual war of every man against his neighbour'[172] was the condition of a lawless society. Finnis makes this argument in terms of 'collateral obligation'. He contends:

> It may be the case, for example, that if I am seen by fellow citizens to be disobeying or disregarding this 'law', the effectiveness of other laws, and/or the general respect of citizens for the authority of a generally desirable ruler or Constitution, will probably be weakened, with probable bad consequences for the common good. Does not this collateral fact create a moral obligation?[173]

Such arguments of principle tend to ignore empirical evidence, which suggests that actual examples of concerted civil disobedience do not produce a weakening of bonds to comply with other legislation.[174] Instead, civil disobedience tends to be targeted and focused rather than indiscriminate and violent.[175] Far from weakening a democratic state, civil disobedience is justified by the role it plays in bringing publicity to, or perhaps a fair hearing of,[176] a particular issue. Civil disobedience may also provide a method for compelling lawmakers to reconsider a purported law.[177] In the context of Earth Jurisprudence, it may be the case that a lawmaker may act or fail to act with regard to the consequences that a purported law might have for the common good of the Earth community. In this circumstance, civil disobedience that aims to make lawmakers reconsider their actions is a potential method for settling the issue and realigning Human Law with the Great Law. Further, in jurisdictions that provide discretion for prosecutors, the test of legal quality advocated by Earth Jurisprudence may be used to guide those responsible for

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171 For a comprehensive overview, see M B E Smith, 'The Duty to Obey the Law?' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (1996) 465.

172 Thomas Hobbes, *Leviathan* (1996) [first published 1651] 143.

173 Ibid.

174 Singer, above n 60, 136-147. See also Ronald Dworkin, 'On Not Prosecuting Civil Disobedience' (1968) 10(11) *New York Review of Books* 14.

175 Singer, above n 160, 136-147.

176 See Bertrant Russell, 'On Civil Disobedience' in *The Autobiography of Bertrand Russel* (1969) 141-142.

177 Singer, above n 160, 84.

implementing the law about when protests ought to be tolerated (both morally and pragmatically).[178]

A purported law that is inconsistent with the Great Law may, depending on the specific circumstances, be so serious that civil disobedience is justified regardless of the consequences to government.[179] The justification for this position is tied to the primacy of the Earth community and the recognition that human beings are interconnected and dependant on nature. If a purported law is so insensitive to the Great Law that it places the lives of human beings and other components of the Earth community in jeopardy, it is difficult to see the rationale for preferencing the maintenance of a human political institution. It is not difficult to take this abstract statement and apply it to instances of the present environmental crisis outlined in the introduction to this article. If governments fail to take necessary action to prevent dangerous climate change or continue to approve industrial practices that degrade ecosystem or species biodiversity, then on what grounds is their own authority assured? Further, could the actions of protesters who resist government action/inaction be considered morally legitimate and not deserving of punishment? Certainly, these are complex questions and deserving of more attention than can be allocated in this article. However, at a basic level Earth Jurisprudence maintains that 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. Such an action is unsustainable and risks the common good and future flourishing of the interconnected Earth community.[180]

V. Conclusion

This article presents an interpretation of Earth Jurisprudence as a legal philosophy. It has sought to outline the legal categories proposed in Earth Jurisprudence and consider how they interact with each other. It began by describing Earth Jurisprudence as a theory of natural law. It posited the existence of two kinds of 'law', organised in a hierarchy. At the apex is

178 N Fairweather, 'The Future of Environmental Direct Action: A Case for Tolerating Disobedience' in N Fairweather, Sue Elworthy, Matt Stroh and Piers Stephens (eds), *Environmental Futures* (1999) 108-112 lists seven additional criteria for justifying environmental disobedience.

179 This is contrary to other statements justifying civil disobedience. For example, Singer notes at above n 160, 85; 'Once it becomes apparent that the majority are not willing to reconsider [their position]...disobedience must be abandoned.' It is difficult to accept this position in the context of serious threats to the Earth community brought about by government action/inaction over environmental issues.

180 See also Cullinan, above n 14, 74.

Great Law, which represents the principle of Earth community. Below the Great Law is Human Law, which represents rules articulated by human authorities that are consistent with the Great Law and enacted for the common good of the comprehensive Earth community. Human Law was also described as purposive rather than neutral or value free. The stated purpose of human law is to secure conditions that favour the health and future flourishing of the Earth community. On this account, Human Law cannot truly be understood without reference to the ideal or common good toward which it is striving.

Regarding the interaction between legal categories, this article argued that Human Law derives its legal quality from the Great Law. Further, that a purported law that is in conflict with the Great Law is defective and not morally binding on a populace. Defective laws, while still enforceable by the state, are considered not 'true' laws or law 'in the fullest sense'. Earth Jurisprudence does not seek to invalidate human law. Rather, it provides a rational basis for the activities of legislators and a guide to deciding whether one has a moral obligation to obey. Purported laws that neglect or contravene this standard can (in theory) provide a justification for civil disobedience. Civil disobedience can further be justified because of the role it can play in bringing publicity or a fair hearing to an issue and also as a means of encouraging lawmakers to amend a defective law.