

# Posthuman Legal Subjectivity in the Anthropocene: Introducing the Cosmic Person

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Dedicated to CG Norman, Jr (1935–2005):  
you always knew what a PhD meant;  
to FLN, mother and friend; and  
to MT and PT, my universe.

We might describe the challenge before us by the following sentence. The historical mission of our times is to reinvent the human — at the species level, with critical reflection, within the community of life-systems, in a time-developmental context, by means of story and shared dream experience.<sup>1</sup>

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<sup>1</sup> Thomas Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999) 159.

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## Abstract

The legal philosophy known as Earth Jurisprudence sets a countercultural objective for Western law and legal theory by valuing the establishment of a mutually beneficial human–earth relationship over the satisfaction of exclusively human interests. I propose a novel strategy for meeting this objective: reimagining the human in the human–earth relationship. The original contribution of this thesis is the reconceptualisation of the human legal subject based on the non-dualised construct of human identity suggested by combining insights into the nature of reality from a variety of contemporary fields of scientific and critical inquiry.

The project begins with an analysis of the traditional Western construct of human identity, which is structured as a dualism. In this view, humans are understood to be of a separate and superior order to nature. The thesis dissects the set of assumptions that conspire to form, in the first instance, a primary reason/nature dualism from which branch not only the singular human/nature dualism, but also an interlocking set of dualisms relegating non-human and some human Others to the underside of the hierarchy. A dynamic of radical discontinuity in the human–earth relationship is established by this complex, which precludes mutuality.

I characterise thinking within and about Western law and legal theory as anthropocentric, given the anthropocentrism of Western culture. The extent to which this is true is examined in this thesis, first in a discussion of an emblematic case in which the fate of particular non-human subjects is decided without regard for the needs and interests of the same, then in a critique of Earth Jurisprudence in which I conclude that the philosophy is insufficiently disruptive of the foundational reason/nature dualism.

The crux of this thesis is the contention that systems can be transformed by strategic intervention at key points at which the system is upheld or perpetuated. I argue that the legal subject is one such point in the Western social imaginary of mastery and control. More specifically, I argue that a construct of human identity, the master identity, to which the prevailing concept of the human legal subject (the rational, autonomous individual) corresponds, keeps the anthropocentrism of this system in play.

Each of the contemporary concepts-in-use of the human legal subject has an origin story and various disciplines from which it draws its supporting ontological, epistemological and ethical commitments. The thesis draws from new cosmology, Big History, new materialisms and posthuman critical theory to tell the origin story for the proposed alternative legal subject, the Cosmic Person. By accounting for the earthliness of human existence, by which I mean the normative materiality of being embodied, embedded and entangled in a single plane of existence comprising a natureculture continuum, the Cosmic Person as legal subject takes into direct account the needs and interests of the whole community of life on Earth.

Finally, the thesis examines the *Waimea River Watershed Mediation Agreement* as a case study in which the Cosmic Person is prefigured in a performance of posthuman normativity.

## Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of The University of Adelaide and, where applicable, any partner institution responsible for the joint award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge the support I have received for my research through the provision of the Australian Government Research Training Program Scholarship. I also acknowledge the generous support of the Zelling Gray Scholarship, of which I was a recipient during my candidature. It was an honour to have had the opportunity to meet the gracious and inspiring Honourable Tom Gray and Mrs Dianne Gray.

Signed

Date

19.9.19

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# Chapter One

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## Introduction

# Introduction

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## Thesis

Framed by the objective of Earth Jurisprudence to secure ‘conditions that tend to favour the health and future flourishing of the Earth community’,<sup>1</sup> this thesis is an endeavour in the arena Margaret Davies demarcates as ‘the theoretical reconfiguring of the place of humanity in relation to other beings and the earth’s resources’.<sup>2</sup> I argue that a reconceptualisation of the human legal subject that takes the earthliness, which I define as the *normative* materiality, of the human being into account shifts the focus of law away from the liberal agenda of the pursuit of the individual life project to the project of life itself.<sup>3</sup> This shift in consciousness, I contend, underpins restructuring the human–earth relationship in terms of cohabitation (as opposed to exploitation).

The late cultural historian Thomas Berry, one of the founding thinkers of Earth Jurisprudence, argued that meeting the Earth Jurisprudence objective would require a fundamental shift in Western consciousness: from human beings exploiting the planet to human beings learning ‘to be present to the planet in a

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<sup>1</sup> Peter D Burdon, ‘A Theory of Earth Jurisprudence’ (2012) 37 *Australian Journal of Legal Philosophy* 28, 46.

<sup>2</sup> Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) 173.

<sup>3</sup> See Paul Babie, ‘Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change’ (2011) 22(3) *Colorado Journal of International Environmental Law & Policy* 323 for a concise theorisation of what Babie calls the ‘climate change relationship’ arising from the historical and contemporary liberal moral order which revolves around ‘a “life project” (the values and ends of a preferred way of life) by a political society which emerges to protect the individual’s rights’: at 332. With regard to the explication of the life project, Babie cites Michael J Sandel, ‘Introduction’, in Michael J Sandel (ed), *Liberalism and its Critics* (New York University Press, 1984) 1; JW Harris, *Legal Philosophies* (Oxford University Press, 2nd ed, 2004) 277–300; Jeremy Waldron, ‘Liberalism’, in Edward Craig (ed), *The Shorter Routledge Encyclopedia of Philosophy* (Routledge, 2nd ed, 2005). See also Paul Babie, ‘Climate Change and the Concept of Private Property’, in Rosemary Lyster (ed), *In the Wilds of Climate Law* (Australian Academic Press, 2010) 11: ‘Self-seeking, preference-satisfying, self-interested choice is the hallmark of private property’. With regard to the comment on the protection of the rights of the individual, Babie indicates in note 28: ‘This is a highly condensed summary of Charles Taylor, *A Secular Age* (Belknap Press, 2007), 159–71’: at 332.

mutually beneficial manner'.<sup>4</sup> Being a cultural historian, Berry thought in epochs or eras, leading him to envision a time he called the Ecozoic Era in which this new mode of consciousness would take hold. A large part of Berry's contribution to the development of Earth Jurisprudence was to advocate for the recognition of the rights of nature as a means of inaugurating this era. Berry imagined law and legal theory playing a particular part in facilitating this shift in consciousness by advocating for the recognition of the rights of nature:

Every component of the Earth community, both living and nonliving, has three rights: the right to be, the right to habitat or place to be, and the right to fulfill its role in the ever-renewing processes of the Earth community.<sup>5</sup>

Expanding the community of legal subjects to include 'every component of the Earth community' has the potential to transform the structure of the human–earth relationship from that of subject/object to the 'communion of subjects' Berry envisioned.<sup>6</sup> The latter is a structure geared to promote mutuality and intimacy within the human–earth relationship, potentially enabling what Lorraine Code describes as (in terms drawn from Patrick Hayden) 'modes of existence that exemplify appropriate, sustainable, and beneficial relationships between human and nonhuman beings and their environments'.<sup>7</sup>

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<sup>4</sup> Thomas Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999) 3.

<sup>5</sup> See Thomas Berry, 'Appendix', in Mary Evelyn Tucker (ed), *Evening Thoughts: Reflecting on Earth as a Sacred Community* (Sierra Club, 2006), for Berry's 10-point treatise on the rights of nature.

<sup>6</sup> See Berry, *The Great Work* (n 4) 4: 'In reality there is a single integral community of the Earth that includes all its component members whether human or other than human. In this community every being has its own role to fulfil, its own dignity, its own inner spontaneity. Every being has its own voice. Every being declares itself to the entire universe. Every being enters into communion with other beings'. See also Berry, 'Appendix' (n 5) 149: 'The universe is composed of subjects to be communed with, not primarily of objects to be used. As a subject, each component of the universe is capable of having rights'.

<sup>7</sup> Lorraine Code, *Ecological Thinking: The Politics of Epistemic Location* (Oxford University Press, 2006) 28, n 14, citing Patrick Hayden, 'Gilles Deleuze and Naturalism: A Convergence with Ecological Theory and Practice' (1997) 19 *Environmental Ethics* 185, 197–8.

Efforts to recognise the rights of nature and to expand the community of legal subjects to include non-human beings have not been the exclusive purview of Earth Jurisprudence. Legal inclusion of or accounting for non-human entities and life worlds has long been a feature of environmental law and ethics. Carolyn Merchant surveys a number of these efforts, including such highlights as the work of Peter Singer and Tom Regan to ‘extend the pleasure–pain principle of Bentham and Mill to animals’;<sup>8</sup> Aldo Leopold’s ‘land ethic’, which ‘enlarges the bounds of the community to include “soils, waters, plants, and animals, or collectively, the land”’;<sup>9</sup> and Roderick Nash’s elaboration on the land ethic to advocate that rocks be assigned interests, arguing that ‘rocks, just like people, do have rights in and of themselves’.<sup>10</sup> Christopher Stone’s influential query as to whether trees should have standing<sup>11</sup> continues to be invoked over 40 years later as a key moment of juridical grappling with the notion of the rights of nature.

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<sup>8</sup> Carolyn Merchant, *Radical Ecology: The Search for a Livable World* (Routledge, 2<sup>nd</sup> ed, 2005) 75, discussing Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (Avon, 1975) and Tom Regan, *All That Dwells Therein — Essays on Animal Rights and Environmental Ethics* (University of California Press, 1982).

<sup>9</sup> Merchant, *Radical Ecology* (n 8) 76, discussing Aldo Leopold, *A Sand County Almanac* (Oxford University Press, 1949).

<sup>10</sup> Merchant, *Radical Ecology* (n 8) 76–7, discussing Roderick Nash, ‘Do Rocks Have Rights?’ (1977) 10 *The Center Magazine* 1.

<sup>11</sup> Christopher Stone’s article, ‘Should Trees Have Standing? — Toward Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450, was cited in a dissenting opinion in *Sierra Club v Morton*, 405 US 727 (1972). See Christopher D Stone, *Should Trees Have Standing: Law, Morality, and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2010) for a description of this strategic move to insert the question into public discourse.

These efforts have borne some good fruit<sup>12</sup> but the community of legal subjects has not expanded significantly beyond the human.<sup>13</sup> Neither has the human–earth relationship been transformed to promote greater intimacy and mutuality. Nor have the conditions for whole Earth flourishing been secured (as evidenced by the scientifically confirmed reality of anthropogenic climate change<sup>14</sup> with all of its devastating species, ecosystem and whole Earth system effects<sup>15</sup>).

To meet its objectives, Earth Jurisprudence needs new and complementary strategies, one of which I propose in this thesis. In keeping with the axiom that ‘change in relationship begins with change in the self’, I argue for redirecting

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<sup>12</sup> See Abigail Hutchison, ‘The Whanganui River As a Legal Person’ (2014) 39(3) *Alternative Law Journal* 179 for a discussion of the recent groundbreaking case granting legal personhood to the Whanganui River in New Zealand: The Office of Treaty Settlements, *Ruruku Whakatupua Te Mana O Te Awa Tupua* (2002) Office of Treaty Settlements <<http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CI40805RurukaWhakatupua-TeManaOTeAwaTupua.pdf>>. See also the timeline of legal actions related to the rights of nature maintained by the Community Environmental Legal Defense Fund: ‘Advancing Legal Rights of Nature Timeline’, *International Center for the Rights of Nature* (Web Page, 19 April 2019) <<https://celdf.org/rights/rights-of-nature/rights-nature-timeline/>>. See also Mihnea Tanasescu, *Environment, Political Representation, and the Challenge of Rights* (Palgrave, 2016) for a detailed and timely overview of rights of nature cases globally. See also Cristy Clark et al, ‘Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance’ (2019) 45(4) *Ecology Law Quarterly* 787: ‘In 2017, multiple claims and declarations under legislation and case law from around the world appeared to signal a tipping point in the global acceptance of a new and evolving legal status for nature’.

<sup>13</sup> Ngaire Naffine observes that ‘[i]n the common law world, the human still sets the limit of the thinkable natural person in law’, in ‘Legal Personality and the Natural World: On the Persistence of the Human Measure of Value’ (2012) 3(Special Edition) *Journal of Human Rights and the Environment* 68, 73. See also Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009) 56–7 for commentary on legal resistance to giving rights to animals; and Stone (n 11, 2010).

<sup>14</sup> See Dana Nuccitelli, ‘It’s Settled: 90–100% of Climate Experts Agree on Human-Cause Global Warming’, *The Guardian* (online, 13 April 2016) <<https://www.theguardian.com/environment/climate-consensus-97-per-cent/2016/apr/13/its-settled-90100-of-climate-experts-agree-on-human-caused-global-warming>>.

<sup>15</sup> See IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Report, 2014) 8 <<http://ar5-syr.ipcc.ch/>>.



attention away from the ‘other’ (ecocentric expansion of the community of legal subjects) to the ‘self’ (ecological<sup>16</sup> expansion of the human legal subject).

The notion of expansion implies something already in existence that can be expanded and, in the case of my project, this ‘something’ is the most prevalent concept-in-use of the legal subject: the rational, autonomous individual. There are other concepts of the legal subject in play within the Western legal milieu, but as Ngaire Naffine indicates, orthodoxy favours the concept of the rational adult ‘imagined as self-created, pre-social individuals’.<sup>17</sup> In Naffine’s analysis, the ‘rational, adult actor possesses the biggest bundle of rights and also the greatest bundle of duties, producing a richness of legal personality’.<sup>18</sup> Naffine discusses this rich legal personality as a thick concept of the legal subject.

I argue that, whilst the rational, autonomous individual is a thick bundle of rights and duties, the idea of the human being behind the concept is thin, taking no account of the relational, affective and embodied complexity of human existence.

These are the terms of Jennifer Nedelsky’s multidimensional self who she believes ‘serves law better than the traditional “rational agent”’.<sup>19</sup> It is beyond the scope of this thesis to analyse Nedelsky’s relational theory of law to which this concept corresponds. It is worth noting, however, that Nedelsky sees her work in this area as a ‘step in the direction’ towards Berry’s call for a ‘complete

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<sup>16</sup> By ‘ecological’ I refer to the situatedness of the human being within a constituting (though not determinative) socio-material reality. The term is elucidated within the body of the thesis as the human being ‘embodied, embedded and entangled’, with each of these terms given particular definition arising from contemporary theories about the nature of material existence and human identity.

<sup>17</sup> See Naffine, *Law’s Meaning of Life* (n 13) 29.

<sup>18</sup> *Ibid* 47.

<sup>19</sup> Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011) 15.

reorientation in how we see the world and our place in it'.<sup>20</sup> Nedelsky indicates how her work may be expanded upon for further movement in this direction:

Even though [the] focus is on relations among human beings, it invites the kind of relational thinking that will promote a respectful relation to earth and her [sic] many life forms.<sup>21</sup>

In this thesis, I take up this invitation of expanded relational thinking by arguing for a full awareness of human interconnection with other life forms and systems of Earth and even the universe as a whole. Rosi Braidotti places 'the critical posthuman subject within an ecophilosophy of multiple belongings ... a relational subject constituted in and by multiplicity'.<sup>22</sup> In adopting this framework, I place my posthuman legal subject within multiple belongings: universe, Earth and community. I call this super-thick legal subject, constructed out of empirical and philosophical theories about the nature of reality and their implications for human subjectivity emerging from fields such as new materialism and posthuman critical theory, the Cosmic Person.

Why 'Cosmic Person'? I argue that this terminology evokes the multiple belongings of material, posthuman subjectivity: as material human beings, we belong to the universe — we are made of stardust — and we belong to the earth because we are part of, rather than superior to or apart from, the whole community of life on this planet. Furthermore, as social entities, we belong to our communities (the socio-cultural constructs in which we are embedded), whether in

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<sup>20</sup> Ibid 12. Nedelsky makes reference to Berry on this point: 'Environmentalist Thomas Berry suggests at the end of *The Dream of the Earth* that an understanding of the human–earth relationship must be prior to any understanding (or at least the best understanding) of human–earth relations' (citation omitted).

<sup>21</sup> Ibid. It is beyond the scope of this thesis to survey the large body of work that deals with social relations in the law. See generally these items cited in the bibliography: Stephen R Munzer, 'Property as Social Relations', in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 36; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000).

<sup>22</sup> Rosi Braidotti, *The Posthuman* (Polity Press, 2013) 49.

correspondent conformity or defiant opposition or a complex mixture thereof. I conclude that the implication of all of this belonging along the continuum that Donna Haraway calls natureculture<sup>23</sup> is a normalisation of radical accountability to the ‘Other’ because there is in fact no ‘Other’ in any absolute sense. Ultimately, this thesis proposes operationalising accountability to Others/non-Others with material effect by defining the actor at law according to it: the Cosmic Person as human legal subject embodied, embedded and entangled within the natureculture continuum acts with interest in the project of life itself rather than the individual life project.

This thesis assumes the importance of securing the conditions for the health and future flourishing of the whole community of life on Earth and proposes the posthuman legal subject as a strategy for meeting this objective. My goal is to break into an area of ‘fuzzy thinking’<sup>24</sup> in the law — in this case, the background assumptions about the constructed identity of human legal subjects — with a clear message: it matters what ideas about material-social human being we think with in law and legal theory.<sup>25</sup>

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<sup>23</sup> With reference to Agustín Fuentes, ‘Naturalcultural Encounters in Bali: Monkeys, Temples, Tourists, and Ethno-primatology’ (2010) 25 *Cultural Anthropology* 600 and Donna J Haraway, *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (Prickly Paradigm Press, 2003), Malone and Overden define natureculture as ‘a synthesis of nature and culture that recognizes their inseparability in ecological relationships that are both biophysically and socially formed’: Nicholas Malone and Kathryn Overden, ‘Natureculture’, in Agustín Fuentes (ed), *The International Encyclopedia of Primatology* (John Wiley & Sons, 2017) 1.

<sup>24</sup> Naffine, *Law’s Meaning of Life* (n 13) 9.

<sup>25</sup> This phraseology belongs to Marilyn Strathern, *Reproducing the Future* (Manchester University Press, 1992) 10: ‘It matters what ideas we use to think other ideas’, cited in Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press, 2016) 34. I borrow it for the way it succinctly conveys the notion that all thinking is political.

## The Inquiry

The deepest cause of the present devastation is found in a mode of consciousness that has established a radical discontinuity between the human and other modes of being and the bestowal of all rights on the humans.<sup>26</sup>

That the planet's climate is changing with devastating consequences for the whole community of life on Earth, and that these changes result from increasing atmospheric concentrations of greenhouse gases (carbon dioxide, methane, nitrous oxide) due to emissions from human activity, is indisputable. Climate change is happening and its 'dominant cause', according to reports from the International Panel on Climate Change (IPCC), is anthropogenic greenhouse gas emissions, together with 'other anthropogenic drivers'.<sup>27</sup>

A simple and overarching way to frame this project is as an inquiry into what's driving the drivers. I start where Berry starts when puzzling over how to interpret these times of global environmental disaster of anthropogenic<sup>28</sup> origin: with the assertion that 'a mode of consciousness that establishes radical discontinuity between the human and other modes of being'<sup>29</sup> is a root cause of where we (that is, the whole community of life on Earth) find ourselves now. The first step in this inquiry is to analyse this mode of consciousness. As critical

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<sup>26</sup> Berry, *The Great Work* (n 4) 4.

<sup>27</sup> IPCC, *Climate Change 2014: Synthesis Report* (n 15) 4: 'Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are *extremely likely* to have been the dominant cause of the observed warming since the mid-20<sup>th</sup> century' (emphasis in original).

<sup>28</sup> This thesis contests the implied universalism of terms that include the word-forming element 'anthropo', such as 'anthropocentrism', 'Anthropocene', and 'anthropogenic'. I contend, based on readings in critical ecological feminism featured in this project, that these terms do not apply universally to all human beings, due to socially constructed inequalities across differentials of race, gender, class and culture in the distribution of the powers associated with the effects of the realities to which these terms refer. This intersectional qualification is signalled in the project by this convention: (certain) humans.

<sup>29</sup> Berry, *The Great Work* (n 4) 4.

ecological feminist philosopher Val Plumwood, whose work plays a key role in this step of the inquiry, indicates: ‘But if we do not understand the development and the defects in the Western story ... we may remain trapped within it or settle for one of its new versions’.<sup>30</sup> This initial step in the inquiry aims to tell the story of radical discontinuity as the defining dynamic of the Western construct of the human–earth relationship.

Cultural stories have their keepers, the institutions through which people keep the stories alive. The project mounted in this thesis is an interrogation of one such cultural keeper: the Western legal system. Harold J Berman uses the term ‘Western legal system’ as a way of signifying the whole of law as it developed in the West from the 12<sup>th</sup> century, referring to ‘an independent, integrated, developing body of principles and procedures, clearly differentiated from other processes of social organization, and consciously cultivated by a corps of persons specially trained for that task’.<sup>31</sup> This definition and the very idea of ‘the law’ as a unified and discrete field is contestable, and I include a brief discussion on this point in this inquiry. The primary focus of the inquiry, however, narrows down onto a condensation point within the dynamic and pluralistic conceptual field of law and legal theory. In concepts of the legal subject, Western law and legal theory collects and concentrates the attitudes it draws from and projects back into culture. These concepts are the power points of the system because they direct, to varying degrees of consciousness on the part of the system, decision-making and policy-setting. One of the key aspects of the inquiry, therefore, is an examination of the role of

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<sup>30</sup> Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 6.

<sup>31</sup> Harold J Berman, ‘The Origins of Western Legal Science’ (1976–1977) 90 *Harvard Law Review* 894, 895.

concepts of the legal subject, both in general and, more specifically, in terms of the way law and legal theory structures the human–earth relationship.

In the remainder of this section, I discuss in some detail the stages of the inquiry that lead from mode of consciousness, to law and legal theory, to concepts of the legal subject. The first stages of the inquiry characterise the Western worldview as one of radical discontinuity between humans and nature, structured as a dualism or hierarchical relation in which the human capacity for reason differentiates the species from ‘the rest’ of nature. The dualism associated with reason/nature is shown to encompass a range of inter- and intra-species hierarchies of being<sup>32</sup> such that one very specific and narrow demographic of human being is associated with the upperside of the hierarchy: the white male elite.

This part of the inquiry explores how an interlocking network of dualisms connected to the reason/nature distortion of difference sets out a whole system of oppressions that attach to other distortions of difference (race, gender, class). The inquiry identifies the characteristics of dualism that uphold this complex structure, principally the denial of dependency. This primary characteristic of dualism is

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<sup>32</sup> See Anna Grear, ‘Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ (2015) 26 *Law Critique* 225, 230: ‘Human hierarchies of being are imposed upon human beings (intra-species hierarchies) and upon non-human animals and ecosystems (inter-species hierarchies)’. Grear argues for an understanding of ‘the climate crisis (and the Anthropocene itself) as being a *crisis of human hierarchy* — and — as relevantly — a crisis of *human hierarchies of being*’ (emphases in original). In Grear’s analysis, these hierarchies are established and maintained by the tendency in mainstream Anthropocene narratives to universally ascribe responsibility to all humans when, in fact, ‘the actors at the heart of Anthropocene origins and the origins of the international legal order were an identifiable, highly selective, group of dominant humans’: at 230. Grear contends that ‘the genesis of the Anthropocene predicament and the tilted foundations of international law can be related to a shared construct of a paradigmatic “rational human subject”, and that it is precisely the complex combination of the material influence of an identifiable historical elite and of the ideological closures still enacted by this construct — including (and especially for the purposes of a critical legal reflection) the “human” juridical subject — that brings the anthropos into full view as an important critical target’: at 230. This argument and its implications for the development of a non-anthropos-centric human legal subject are foundational to this thesis project.

addressed in the reconceptualisation of the human legal subject proposed in this thesis: I argue that centralising the fact of absolute human dependency on the systems and entities of the whole community of life on Earth within the concept of the human legal subject necessarily shifts the objectives and priorities ascribed to this subject in law and legal theory. Outcomes of legal decision-making correspond to views about what matters: what matters to a human earthling is material flourishing within the community of life that sustains it.

What matters in the social imaginary of human mastery and control over nature, the topic of examination in this initial inquiry, is maintaining the structure of human beings on top. To continue the inquiry into this social imaginary, I shift the frame from what matters to what counts. As what matters is human beings on top, so what counts is human beings at the centre, a conclusion I reach by examining the expanding concentric circles of concern that comprise an abridged genealogy of Western environmental ethics. The purpose of this inquiry into what matters and counts in the Western cultural consciousness of the human–earth relationship is to substantiate Berry’s claim that in Western culture this mode of consciousness is characterised by radical discontinuity. The inquiry establishes the project of this thesis as a hunt for an imaginative counterpossibility that helps instigate an instituting social imaginary of ideal cohabitation. I am inspired by Berry’s image of the Ecozoic Era: a time when humans beings will learn to be present to the planet in a mutually beneficial manner.

A second step of the inquiry focuses on the role of law in operationalising the worldview of radical discontinuity between humans and nature. How do assumptions about human exceptionalism play out in law and legal theory? The inquiry interrogates law’s anthropocentrism in two directions: I argue that law’s

subject matter is anthropocentric, and that the matter of the subject of law is, too. In Western culture, to speak of ‘law’ is to assume that the discussion will be about inter-human relations, even when the subject matter includes the environment: law structures relations between people rather than between humans and non-human Others. (In addition, as I assert throughout these discussions, law is fixed on the idealised human.) Law does not adequately account for human and non-human Others. Thinking about the law as a subject is quite limited, too. Thinking about the law as a rarefied, unified subject does not match the reality of the lawscape and this way of thinking limits the responsiveness of law to urgent matters.<sup>33</sup> More open, dynamic modes of understanding law and legal theory create new possibilities for structuring not only human relations, but also human–earth relations, and some of these as proposed by Margaret Davies are explored in this inquiry.

Part of this section of the inquiry is dedicated to analysing the ethos and basic tenets of Earth Jurisprudence. Since the thesis is directed by an interest in meeting the objective of this philosophy to secure the health and future flourishing of the whole community of life on Earth, it is appropriate to investigate to what extent and in what ways this philosophy does or does not create new possibilities for structuring human–earth relations. I conclude that the philosophy is constrained by certain assumptions that it fails to challenge sufficiently with regard to legal theory and constructs of human subjectivity: a residue of radical discontinuity remains attached to these assumptions. This aspect of the inquiry also illuminates,

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<sup>33</sup> See Davies, *Law Unlimited* (n 2) 158: ‘Despite the medium-term horizon of change envisaged by theory, there are clearly very urgent matters needing attention. Most obviously, the degradation of the earth consequential upon industrialisation, human exceptionalism, and the false presumption of infinite resources is becoming an immediate rather than a future problem’.



however, one of the great gifts of Earth Jurisprudence to the struggle to transform the way in which law structures the human–earth relationship: the commitment on the part of many working within the philosophy to express the normative power of affect. Implied in espousing the importance and meaningfulness of caring about the earth is an image of human subjectivity that is different from the singularly rational ideal. I observe that a fully articulated alternative concept of the human legal subject has not yet emerged from within the philosophy.

Following the first two, quite broad, steps of the inquiry profiling big, overarching theoretical systems, I narrow the focus of the project down onto the legal subject as a potential point of systemic intervention. Concepts of the legal subject are often unconscious or semi-conscious aspects of legal decision-making and, therefore, of norm establishment.<sup>34</sup> The heart of this inquiry is to wonder what becomes normal within the human–earth relationship and its functional structuring via legal decisions and directives if the human legal subject is conceptualised in terms opposite to the current radical discontinuity between humans and nature. What concept of the human legal subject operationalises radical *intimacy* as the fundamental characteristic of the human–earth relationship and prioritises mutual enhancement within this relationship? Working with theories about the nature of existence emerging from contemporary science and philosophy, I propose a posthuman legal subject based on the non-dualised construct of human identity that these new theories make imaginable.

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<sup>34</sup> Naffine, *Law's Meaning of Life* (n 13) 45: 'Always there is a decision to be made about who and what is to count for any particular legal purpose and this decision is normative, not just a factual decision'.

This part of the inquiry includes a case study. I argue that the *Waimea River Watershed Management Agreement* ('*Waimea*') offers a glimpse of the new posthuman legal subjectivity and prefigures a legal pathway to meeting the objective of Earth Jurisprudence. Assumptions about the character of the human legal subject in the case study correspond to the concepts put forward in this thesis and suggest that imaginative counterpossibilities which can shift the social imaginary of mastery and control to a much more mutual, interdependent mode of understanding the human–earth relationship are not only possible but also already present, if in nascent form.

The final stage of the inquiry is to wonder how a mutually beneficial human–earth relationship can be further developed within the context of law and legal theory. Accordingly, I discuss a number of possible directions for future research in the concluding chapter.

## Literature Review

Discussions and theories which have influenced legal practice have, with respect to the concept of ‘person,’ introduced and depended upon a mass of non-legal considerations.<sup>35</sup>

This thesis is mainly a work of theoretical research and the critical analysis of primary and secondary sources, including a case study. The instigating idea for the thesis is Thomas Berry’s assertion that the genesis of the global environmental crisis can be located in a mode of consciousness in Western culture that establishes radical discontinuity as the defining characteristic or operating principle of the human–earth relationship. Berry’s consideration of this mode of consciousness is not very layered, and so I explore various critical social theories to gain deeper perspective into the effects of Western cultural consciousness on the human–earth relationship.

Taking another cue from Berry, that cultural institutions such as law uphold culturally constructed modes of consciousness with material effect on the human–earth relationship, I analyse a range of sources defining, critiquing and reimagining law and legal theory. This line of analysis includes reviewing literature about Earth Jurisprudence, a reimagining of legal philosophy with the intent of transforming the way in which law structures the human–earth relationship. Earth Jurisprudence is closely associated with Berry.<sup>36</sup> A further point of contact with Berry’s work

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<sup>35</sup> John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) XXXV(6) *Yale Law Journal* 655, 655.

<sup>36</sup> Mike Bell recalls a small international gathering that included community development consultants such as himself, environmental lawyers and educators, and university professors, Berry amongst them, in Northern Virginia in April 2001: ‘As a group we shared Berry’s conviction that the devastation of our planet is currently being protected and fostered by a legal and political establishment that exalts the human community while offering almost no protection for the non-human modes of being. ... As so, beginning with Berry’s reflections on the rights of the Earth, we tried to picture and describe an Earth jurisprudence’ (Mike Bell, ‘Thomas Berry and an Earth Jurisprudence: An Exploratory Essay (2003) 19(1) *The Trumpeter* 71, 71). See also Cormac Cullinan, ‘A History of Wild Law’, in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield, 2011) 12, 15, who describes the same meeting in April 2001,

sparks a layer of review related to the unique contribution of this thesis: Berry suggests that the key to transforming the human–earth relationship to one of mutual benefit or enhancement is to ‘reinvent the human at the species level’.<sup>37</sup> Taking this to suggest a project of reimagining the dominant Western cultural construct of human identity, or what it means to be a human being, I explore theories about constructs of human identity and subjectivity arising out of emerging fields in philosophy such as new materialism and critical posthumanism.

My original vision for this thesis project also included, in addition to theoretical review, a qualitative research component in the form of semi-structured interviews, inspired by Berry’s remarks about an experience he had in nature when he was a child. Berry credits the experience as being normative for him:

Whatever preserves and enhances this meadow in the natural cycles of transformation is good; whatever opposes this meadow or negates it is not good. My life orientation is that simple. It is also that pervasive.<sup>38</sup>

The inference in this perspective is that the meadow — a figurative term that stands for that specific place in Berry’s childhood and also the whole community of life on Earth — becomes for Berry a source of normativity, much as I argue in this thesis that the Waimea River becomes a source of normativity for the development of a waterflow management agreement in the case study explored in Chapter Five. To be oriented to the health and vitality of the meadow, the river and the whole

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when he met Berry; the meeting was co-convened by Liz Hosken and Ed Posey of the Gaia Foundation ‘in response to Thomas’s call for the development of a new jurisprudence that took account of the fact that we are members of the Earth Community’; and Liz Hosken, ‘Reflections on an Inter-Cultural Journey into Earth Jurisprudence’, in Burdon (ed), *Exploring Wild Law* 24, 26–7: ‘Already at this first meeting some core principles [of Earth Jurisprudence] began to emerge ... [Berry] drew up the Airlie Principles, to encourage us to go back to first principles and reach beyond our comfort zones’.

<sup>37</sup> Berry, *The Great Work* (n 4) 59.

<sup>38</sup> *Ibid* 13.

community of life on Earth is to express the non-dualised human identity that I argue is fundamental to transforming the human–earth relationship.

My intention for the interview-based research was to elicit similar ‘meadow across the creek’ stories in other people’s experiences. I wondered if people would articulate ways in which meaningful experiences with nature or the more than human world shaped their values and concerns: their life orientations. There is a promising line of inquiry for the future signalled by one interview participant about what it means that ‘we all kind of weave together’,<sup>39</sup> referring to the human and non-human life worlds in which we find ourselves. A brief discussion of this future direction for research is included in the Conclusion to this thesis.

In this section of the introduction to the thesis, I review the literature examined in the course of the theoretical research involved in this project. This section is divided into the three primary topic areas I address in the research: Western cultural consciousness; legal theory and, in particular, concepts of the legal subject; and multidisciplinary approaches to human identity and subjectivity encompassing Big History, new cosmology, critical posthumanism and new materialism. In this section I also acknowledge how this thesis draws on a different, non-literary source in keeping with the intent of the project: the Book of Nature. These fields, briefly surveyed in the context of this limited project, comprise what Dewey would describe as the ‘mass of non-legal considerations’<sup>40</sup> that I wish to apply to reconceptualising the legal subject.

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<sup>39</sup> Interview with Research Participant PIL07 (Jana Norman, Judson Memorial Church, New York, New York, 5 May 2017). (Human Research Ethics Committee, The University of Adelaide, Approval Number: H-2016-064).

<sup>40</sup> Dewey (n 35).

*The Human–Earth Relationship*

I note, at the head of this section (p 10), how influential Berry's work is on the inquiry of this thesis, particularly his articulation of the 'root cause' of the contemporary environmental crisis as a 'mode of consciousness' of 'radical discontinuity' in the human–earth relationship in Western culture and his identification of law as an institution which substantiates this mode of consciousness by 'the bestowal of all rights on the humans'.<sup>41</sup> Berry makes these observations as a cultural historian, which fixes his scale of inquiry at the level of 'overarching movements that give shape and meaning to life by relating human venture to the larger destinies of the universe'.<sup>42</sup> As a feminist scholar, I am aware of the need for a more fine-grained analysis, because 'overarching movements' offer profoundly different 'shape and meaning to life' for those on history's socially constructed, so-called under- and uppersides. In this line of inquiry, I rely heavily on the critical ecological feminism of Val Plumwood.

Significantly, Plumwood renders the relationship dynamic Berry names 'radical discontinuity' in structural terms, indicating that a framework of dualism defines not only the human–earth relationship in Western culture, but also relations between socially constructed categories of human beings. Such structural analysis takes Berry's observation of the root cause of planetary devastation to a deeper level of inquiry: to the philosophical underpinnings of the structural forms, or the roots of the root causes. It is Plumwood's thesis that the human–earth relationship is caught in an interlocking network of dualisms that rests on what is perceived by the upperside of the hierarchical structure as the hyperseparation (read: radical

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<sup>41</sup> Berry, *The Great Work* (n 4) 4.

<sup>42</sup> *Ibid* 1.

discontinuity) between reason and nature. Plumwood details certain supporting patterns of thought that establish this perception of hyperseparation: the denial by the upperside of any dependency on the underside, despite the absolute dependency of the same; the distortion of difference such that any commonalities between upper- and undersides is ignored and any differences are understood to be defining and determinative; the defining of the underside in the negative or in terms of lack; the homogenisation of the underside rendering inert (from the perspective of the upperside) any differentiation within the underside populations; and the objectification of the underside, which defines it in terms of usefulness to the upperside rather than in terms of inherent worth.

Plumwood's critical ecological feminism, consisting of in-depth analysis of the structure of dualism and its genealogy in Western philosophy, provides this thesis with specific conceptual targets to address in the process of critiquing the current concepts-in-use of the legal subject and reimagining the human legal subject so as to be disruptive to the radical discontinuity with which the human–earth relationship is imbued in Western culture. In this project, I aim to develop an ecological alternative human legal subject that transcends dualism by acknowledging human material dependency on the earth, its systems and its species; affirming inter-species human–non-human continuity as well as differentiation; and recognising complexity and diversity as endemic to existence at every scale (within individuals as well as groups).

A second framework employed in this thesis for examining the Berry concept of 'mode of consciousness' of radical discontinuity is feminist epistemologist Lorraine Code's analysis of Western culture's instituted social imaginary of mastery and control. The concept of the instituted social imaginary

makes clear that a mode of *cultural* consciousness such as radical discontinuity between humans and Earth Others is an imbuelement, a totalising permeation with socio-material effect, and is not merely, therefore, a discursive tendency. Western culture is marked by radical discontinuity between humans and nature *all the way down*. The naturalisation of human mastery and control over nature is achieved and sustained in the processes and through the structures of socialisation:

A social imaginary is social in the broadest sense: it is not merely about principles of conduct, although it is about those too; but it is about how such principles claim and maintain salience; about the scope and limits of human knowledge and the place of knowledge in the world; about the structural ordering of institutions of knowledge production; about intellectual and moral character ideals, subjectivity, and agency; about the kinds of habitat and living conditions that are within reach and/or worth striving for; about socio-political-economic organization and just distributions of goods, privileges, power, and authority.<sup>43</sup>

Code's work is illuminating not only in terms of generating a multidimensional map of the Western mode of consciousness that is human mastery and control over nature, but also in terms of identifying the process by which this 'habitus and ethos'<sup>44</sup> as a totalising package is transformed. Code discusses the Cornelius Castoriadis theory of the instituting social imaginary, or the 'critical-creative activity of a society that exhibits its autonomy in its capacity to put itself into question'.<sup>45</sup> This capacity is realised in 'imaginatively initiated counterpossibilities [that] interrogate the social structure to destabilise its pretensions to naturalness and wholeness, to initiate a new making'.<sup>46</sup> The framework of the instituting social imaginary offers a productive definition for the project of this thesis: proposing a posthuman concept of the human legal subject

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<sup>43</sup> Code (n 7) 31.

<sup>44</sup> Code (n 7) 30, discussing the social imaginary theory of Cornelius Castoriadis in David Ames (ed), *Philosophy, Politics, Autonomy: Essays in Political Philosophy* (Oxford University Press, 1991) through the lens of Gilles Deleuze (ethos) and Pierre Bourdieu. See generally, Code (n 7) 25–32.

<sup>45</sup> Ibid 31.

<sup>46</sup> Ibid.



in this frame becomes an ‘imaginatively initiated counterpossibility’. This counterpossibility has the potential to ‘destablise ... [the] pretensions to naturalness and wholeness’ of what Plumwood defines as the ‘master identity’ (which forms the basis for the prevailing concept of the human legal subject). A new concept of the human legal subject is, I contend, a productive point of breaking into the social imaginary of mastery and control.

The following section identifies the primary sources reviewed in the process of identifying how law and legal theory generally, and concepts of the legal subject specifically, function as part of the social imaginary and, therefore, why the legal subject is a promising location for the emergence of imaginative counterpossibilities for co-flourishing in the human–earth relationship.

#### *Law and Legal Theory, and the Legal Subject*

Law does not *do* anything or *say* anything itself, and it is not even an identifiable thing — all of these are shorthands for the actions of human beings enmeshed in material contexts who use an imaginary of law to relate and engage.<sup>47</sup>

One of the questions this thesis explores within the project of identifying the legal subject as a point of intervention into the human–earth relationship in Western culture is: ‘What is the imaginary of law by which human beings in the Western material-social context relate and engage?’ There are two layers to my examination of this topic: thinking *about* the law and thinking *within* the law. As to the former, my question involves examining whether or not the way law is understood in Western culture commends it as a site of intervention into the human–earth relationship. With regard to the latter, I wish to examine what legal decisions can tell us about the Western cultural understanding of the human–earth relationship.

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<sup>47</sup> Davies, *Law Unlimited* (n 2) 30 (emphasis in original).

In this section, I first review the literature related to thinking about the law and then discuss the primary sources consulted for exploring thinking within the law about this relationship.

In fact, the traditional mode of understanding law in Western culture does *not* commend it for the task of intervening in the social imaginary of human mastery and control. Law is traditionally understood to be a rarefied thing unto itself: it takes ‘the form of identifiable abstract norms ... [and] exists outside the self, and ... is part of human culture and is not of the physical world’.<sup>48</sup> In this view, law is a closed system; and closed systems, by definition, have no access points. Recent decades of socio-legal critique and critical theory, however, have contested this traditional understanding, effecting a sort of double exposure: exposing the socially constructed nature of this understanding of law *and* the socially constructed nature of every constituent part of law as a category. There is no ‘law’: there are only legislations, legal decisions, legal theories, legal structures, legal professions and professionals, and so on, and each of these is a viable point of both critique and intervention at which ‘imaginative counterpossibilities’ that challenge the social imaginary can be conjured.

Legal theorist Margaret Davies analyses the ways in which thinking about law (the what, where, how, when and who of it)<sup>49</sup> has been constrained by ‘distinctions ingrained in Western philosophy between mind and matter, culture and nature, and subject and object’, and she works to imagine ‘what can be made of an unlimited law in light of renewed critique and rethinking of these

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<sup>48</sup> Davies, *Law Unlimited* (n 2) viii.

<sup>49</sup> See *ibid.*

distinctions'.<sup>50</sup> Davies suggests the possibility of finding 'an appropriate and adaptable posthuman normativity — a normative world where humans are understood as situated in a natureculture continuum rather than merely in human culture, which speaks to the material, ecological situation of humans in the world'.<sup>51</sup> While this thesis project is not primarily concerned with examining modalities of understanding law, the possibility of posthuman normativity, as suggested by Davies, is productive. It is a useful guide for identifying a suitable case study for the project, as discussed in Chapter Five, for example. Also, since the culture's imaginary of law and its social imaginary are necessarily conjoined and co-constituting (the former perhaps a subset of the latter?), then an examination of the modes of understanding law is illuminating for understanding the general mode of consciousness of the culture.

It is not only thinking *about* law but thinking *within* law that interests me in this thesis — specifically, thinking within the law about the human–earth relationship. I contend that law is anthropocentric, taking exclusive account of the needs, interests, capacities and inherent worth of humans. (In addition, as must always be noted, due to intra-species hierarchical structuring related to dualism, this accounting is pitched at an idealised raced, gendered, classed, heteronormative human rather than at all humans.) It is beyond the scope of this project to survey individual cases for evidence to support this thesis, but there is one very widely cited case that is seen to exemplify legal opinion in this regard. I examine *Sierra v Morton*, 405 US 727 (1972) ('*Sierra*') and discuss commentary by Christopher D Stone on the state of the human–earth relationship at law 40 years on from that

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid 53.

case. Stone, famous for having brought into the *Sierra* deliberations the idea of standing for trees, concludes that legal decision-making remains overwhelmingly homocentric.

The number of contemporary legal decisions in which non-human entities have been granted legal personhood is growing, thereby disrupting the homocentric field of view in various locations around the world. As my focus in this thesis is on the human in the human–earth relationship and reimagining the human as a strategy for disrupting the myopic, anthropocentric focus of Western law and legal theory, I do not delve into the rationale behind these important efforts to recognise and account for the rights of nature. I limit discussion on the topic of rights to critical reflection on the place of this legal construct in Earth Jurisprudence.

Literature reviewed for this thesis to gain an understanding of Earth Jurisprudence indicates that as early as 1988 Berry articulated an *institutionally normative* ecocentric vision for humanity. In *The Dream of the Earth*, Berry focuses on the urgency for education to ‘[guide] the course of human affairs through the perilous course of the future ... by discovering our role [as a species] in this larger evolutionary process’.<sup>52</sup> Later in *The Great Work: Our Way into the Future*, Berry discusses the role of ‘four fundamental establishments that control the human realm’ in bringing to full human consciousness the reality that ‘there is a single integral community of the Earth that includes all its component members whether human or other than human’.<sup>53</sup> Berry describes a ‘Great Work’ for this

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<sup>52</sup> Thomas Berry, ‘The New Story’, in *The Dream of the Earth* (Counterpoint, 2015) 123, 136.

<sup>53</sup> Berry, *The Great Work* (n 4) 4. The four ‘fundamental establishments’ are: governments, corporations, universities and religions.

time in human history: to facilitate a radical shift in consciousness based on an integral understanding of the earth so that human beings will participate in the systems and relationships of the planet with conscious awareness of the interdependency they entail. As Mike Bell notes, Berry considers a ‘dynamic and functional cosmological ecology’<sup>54</sup> to be key in this process of shifting human consciousness.<sup>55</sup> Although Berry helped to inaugurate the concept of Earth Jurisprudence, and although he outlined what has been called a ‘Bill of Rights for the Planet Earth’,<sup>56</sup> Berry did not describe a complete or systematic philosophy of Earth Jurisprudence. This field is still emerging, advanced by a number of the movement’s early scholars.

Peter Burdon has compiled the most comprehensive collection of essays to date on Earth Jurisprudence in *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, a book dedicated to Thomas Berry.<sup>57</sup> The volume surveys the principles and characteristics of Earth Jurisprudence; other disciplines that have inspired Earth Jurisprudence such as science and nature, theology and philosophy; customary law; noteworthy examples of Earth Jurisprudence in practice as ‘ecocentric law’ and with regard to the rights of nature and conceptions of property; and an ecocentric view of international law and governance. It is an extensive overview and an important introduction to the core content of the field, useful to this project in that it gives some indication of the ways in which an ecocentric

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<sup>54</sup> This summary of Berry’s thinking in *The Great Work* (n 4) comes from Bell (n 36) 78.

<sup>55</sup> The following commentaries elucidate Berry’s worldviews: Heather Eaton, *The Intellectual Journey of Thomas Berry: Imagining the Earth Community* (Lexington Books, 2015); Ervin Laszlo and Allan Combs (eds), *Thomas Berry, Dreamer of the Earth: The Spiritual Ecology of the Father of Environmentalism* (Inner Traditions, 2001); and Anne Lonergan and Caroline Richard (eds), *Thomas Berry and the New Cosmology* (Twenty-Third Publications, 1987).

<sup>56</sup> See Bell (n 36) 74–5.

<sup>57</sup> Burdon (ed), *Exploring Wild Law* (n 36) ix. The book is also dedicated to ‘barefoot lawyer and inspirational orator of Earth Jurisprudence, Ng’ang’a Thiong’o’, who died shortly before the book was published.

worldview within the law can be transformative with regard to meeting the challenges of the global environmental crisis.

The book does not include any specific exploration of the legal person with regard to Earth Jurisprudence, which is not uncommon within the field of legal theory generally, as ‘the law of persons is not a discrete field of study’.<sup>58</sup> In a chapter in another volume edited by Peter Burdon (together with Michelle Maloney) called *Wild Law — In Practice*, the topic of legal personhood is engaged, but only indirectly through a critique of the idea of the rights of nature. Erin Fitz-Henry argues that rights of nature (such as those assigned in the 2008 Constitution of the Republic of Ecuador<sup>59</sup>), whilst generally supported by the public, are ‘consistently either over-ridden by the state’s strategic development priorities or forced to compete with other sovereign rights that many experience as far more pressing’.<sup>60</sup> The article is not focused on the reasons behind the assignment of rights to nature, or any metaphysical theories that contribute to such, but rather on the ineffectuality of said designation in practice.

At present, there are only two single-author systematic treatments of Earth Jurisprudence: Peter Burdon’s *Earth Jurisprudence: Private Property and the Environment* and the more general work by Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*. Cullinan’s argument that ‘environmentally and

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<sup>58</sup> Ngaire Naffine indicates how this affected her work on the legal subject in *Law’s Meaning of Life* (n 13) 15: ‘A problem I face at the outset is that the law of persons is not a discrete field of study in the common law world, such as torts, or contract or criminal law, but is a pervasive underlying concept ... I therefore have to discover the nature of law’s person by surveying many parts of law, and then often deriving its meaning only by inference. ... Some detective work is involved’.

<sup>59</sup> ‘The Constitution of the Republic of Ecuador’, *Political Database of the Americas* (Web Page, 31 January 2011) <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>.

<sup>60</sup> Erin Fitz-Henry, ‘Decolonizing Personhood’, in Michelle Maloney and Peter Burdon (eds), *Wild Law — In Practice* (Routledge, 2014) 133, 146.

socially destructive behaviour' is 'encourage[d] and legitimize[d]' by the 'illusion of separation and independence' entrenched within 'governance structures, legal philosophies [jurisprudence], and laws'<sup>61</sup> is central to the argument of this thesis. Other themes explored by Cullinan include the delusion of the 'homosphere';<sup>62</sup> the expansion of the concept of rights to include the other-than-human and the earth itself; and the holistic idea of the earth community. With regard to the concept of property, Cullinan calls for 'moving away from relating to land on the basis of ownership', and suggests 'the human roles as land carer and guardian'<sup>63</sup> as a framework for a new relationship between humans and land.

This thesis argues that rethinking human identity, rather than human roles, within the context of law and legal theory is a more robust and potentially effective strategy for effecting change in the human–earth relationship. The legal subject is quite easily defined: 'any unit that is treated by a legal system as being capable of bearing rights, duties, and other relations'.<sup>64</sup> What complicates the topic of legal personhood is everything in and around that simple definition: 'the justification for the grant of formal recognition as a legal subject, the processes by which recognition is achieved, allocation of responsibility, and theoretical and practical problems arising as a result of such a recognition'.<sup>65</sup>

Ngaire Naffine argues that a 'poverty of thought and fuzzy thinking'<sup>66</sup> exists with regard to who is granted legal personhood and why. Naffine

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<sup>61</sup> Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2<sup>nd</sup> ed, 2011) 26.

<sup>62</sup> See *ibid* 51: Cullinan describes the 'homosphere' as a contrivance based on separation of the human world from the 'real universe'. It is as if human beings are 'entranced' by a mental model of a 'hermetically sealed 'humans only' world'.

<sup>63</sup> *Ibid* 138–45.

<sup>64</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 2.

<sup>65</sup> *Ibid*.

<sup>66</sup> Naffine, *Law's Meaning of Life* (n 13) 9.

endeavours, in her book *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, 'to work out how law creates its subject, its person, and, more particularly, under what moral and intellectual influences'.<sup>67</sup> This is important, Naffine argues, because the 'nature of law's person ... is utterly fundamental to legal thought'.<sup>68</sup> Decisions in law about 'who should count'<sup>69</sup> (no matter how consciously or unconsciously deduced)<sup>70</sup> give law its power to 'define the moral and the political community, for to be a legal person is to have political and moral as well as legal standing', which has the effect of enabling law to 'powerfully [assist] in the determination of the normal and the abnormal, the intrinsically valuable and that which is mainly for use, as in the case of animals'.<sup>71</sup> This thesis is an attempt to focus the power of the legal subject onto the project of normalising in Western culture a mutually beneficial human–earth relationship.

To meet this objective, the thesis follows the logic of one of the two broad approaches to conceptualising the human legal subject described by Naffine — not the Legalist approach in which 'the one whom law is for, is imagined as pure abstraction, the basic conceptual unit of legal analysis',<sup>72</sup> but the Realist, or Metaphysical Realist, approach in which 'the law finds its subject beyond the legal realm and that law is to be judged by its success at finding and rendering its subject faithfully'.<sup>73</sup> This choice is not because the Legalist view is not intriguing: as Naffine notes, 'this is where ... we find the most intellectual and moral promise

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid 11.

<sup>70</sup> Ibid. As Naffine describes it: 'Judges seem to use a variety of terms and meanings, often without any awareness that they are doing so — that they are drifting from one meaning of the person to another, driven by an implicit metaphysics'.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 1.

<sup>73</sup> Ibid 22.



and also the greatest intellectual and moral frustration'.<sup>74</sup> It is intriguing to consider how the Legalist approach might be usefully deployed as a tactic for effecting change in the human–earth relationship: if, as Legalists assert, even a corporation can be a legal person, then why not the whole earth community as 'corporate' entity? The corporation as a legal person is a legal fiction, one of the 'conceits of the legal imagination'.<sup>75</sup> According to Joel Bakan, 'by the end of the nineteenth century, through a bizarre legal alchemy, courts had fully transformed the corporation into a "person," with its own identity'.<sup>76</sup> Bakan traces the history of this 'bizarre legal alchemy' and, as the subtitle of his book suggests, how it serves the 'pathological pursuit of power and profit'. Could it not be reasonably argued that applying some legal alchemy to the earth community as 'an entity "not imaginary or fictitious, but real, not artificial but natural"'<sup>77</sup> serves the pursuit of securing the conditions for the health and future flourishing of the planet?

As productive a course of inquiry as the Legalist concept of the legal subject might be in terms of transforming the human–earth relationship, I turn from it to the contrasting approach to the legal subject: Realism.<sup>78</sup> Naffine identifies three categories of Realists: Rationalists, Religionists and Naturalists. I target the Rationalist conception of the legal subject because of its correspondence to the master identity that Plumwood depicts as perpetrator of radical discontinuity

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<sup>74</sup> Ibid 31.

<sup>75</sup> Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 1.

<sup>76</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Power and Profit* (Free Press, 2004) 16.

<sup>77</sup> Ibid. Bakan is quoting the 1911 description of the corporation by University of Chicago law professor Arthur W Machen, quoted in Morton J Horowitz, 'Santa Clara Revisited: The Development of Corporate Theory', in Warren Samuels and Arthur Miller (eds), *Corporations and Society: Power and Responsibility* (Greenwood Press, 1987).

<sup>78</sup> I resonate with this statement by Margaret Davies: 'It has always seemed necessary to me to develop an understanding of law that connects it to human beings, to our social relationships, and to our material environments': Davies, *Law Unlimited* (n 2) xi.

within the Western social imaginary of the human–earth relationship. My logic with this approach is simple: change that identity, change the imaginary. When I say I ‘target’ the concept of the legal subject as a rational, autonomous individual, I mean that I scrutinise each of these constituent foundational assumptions and espoused values in light of contemporary insights arising from within Western culture into the nature of reality (hence, Realism).

The relational theory of law proposed by Jennifer Nedelsky is a productive source of both critical reflection on various foundational assumptions and espoused values in Western cultural consciousness. It is also a pathway to follow in reconceptualising a more ‘realistic’ Realist human legal subject.<sup>79</sup> In *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*, Nedelsky argues against the liberal understanding of autonomy as synonymous with independence, a principal characteristic of liberalism’s ideal legal subject,<sup>80</sup> reframing this value as the capacity for creative interaction.<sup>81</sup> Likewise, Nedelsky asserts the importance of accounting for affect and embodiment in constructs of human identity engaged by law and legal theory. Her thesis is that what is ‘real’ about human beings is that they are relational, affective and embodied, as opposed to abstract, purely rational and autonomous (constitutive characteristics of the dualised construct of human identity). Nedelsky’s depiction of the relational, affective and embodied legal subject as productive for transforming human

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<sup>79</sup> That is, the measure of realism being the level of perceived correspondence to those characteristics deemed most essential or intrinsic to human nature. See Naffine, *Law’s Meaning of Life* (n 13) 22: ‘[The Metaphysical Realists] believe that law finds its subject beyond the legal realm and that law is to be judged by its success at finding and rendering this subject faithfully’. Also: ‘For such thinkers, law’s task is to find the intrinsic properties of being and to ensure a legal correspondence with them’: at 22.

<sup>80</sup> See Nedelsky (n 19) 52: ‘[O]ne is autonomous when one is free of the constraints of others’.

<sup>81</sup> Ibid 13.

relations at law is, in these ways, a base template for the alternative legal subject proposed in this thesis for the purpose of transforming human–non-human relations at law. I zero in on what new theories of material existence mean for being an ‘embodied’ human being.

Another engagement in this project with Nedelsky’s relational theory of law revolves around her contention that ‘[w]hat rights and law actually *do*, right now, is structure relations, which, in turn, promote or undermine core values, such as autonomy’.<sup>82</sup> This insight offers a key lens by which to examine the case study included in this project. I read the *Waimea River Watershed Mediation Agreement* for the way it structures the human–earth relationship and the values it promotes, concluding that it prefigures the transformed human–earth relationship by which the objective of Earth Jurisprudence might be met.

### *Massive Non-Legal Considerations*

No single position on human significance has appeared to replace that of otherworldly religion; rather there are a number of sons contending for the mantle of the Father, the power to confer meaning and identity. The sites of contest include science, progress, technological conquest, the economy. These offer different solutions to the problem of identity and continuity, but they are usually ones as hostile to the natural world as the old identity based in denial of human connection to nature.<sup>83</sup>

The organising principle guiding the literature review in this aspect of the project is to identify ‘solutions to the problem of [human] identity and continuity’ which are not ‘hostile to the natural world’. Since Val Plumwood published her assessment, above, that Western culture lacks earth-friendly, non-religious positions ‘on human significance’, in 1993, new theories along these lines have been emerging from within both the sciences and the humanities (and from a new

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<sup>82</sup> Nedelsky (n 19) 65 (emphasis in original).

<sup>83</sup> Plumwood (n 30) 101.

era of generative conversation between these disciplines). In this section of the literature review, I identify the bodies of work in these fields from which I draw insights to apply to the task of reconceptualising the human legal subject.

As with the other two areas of inquiry in this thesis — Western culture's mode of consciousness about the human–earth relationship and how this mode of consciousness presents itself in law and legal theory — I trace the impetus to investigate contemporary sources of existential reflection on the nature of human identity which might revolutionise concepts of the human legal subject to the work of Thomas Berry. Berry, together with theoretical mathematician and professor of evolutionary cosmology Brian Swimme, argues in *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era — A Celebration of the Unfolding of the Cosmos* that the psychic resources needed to shift Western culture from an anthropocentric to an ecocentric worldview are found in what they call the new universe story. The power of this story, Berry and Swimme contend, lies in giving human beings a sense that 'we belong to this community of Earth and share in its spectacular self-expression'.<sup>84</sup> This sense of belonging arises naturally, Berry and Swimme suggest, when a line of continuity is drawn between the emergence of the universe and all material reality in existence today at the time of the Big Bang, the line of continuity being the evolutionary process.

There is a poetry to the way Berry and Swimme, Berry and Mary Evelyn Tucker, co-founder of the Forum on Religion and Ecology at Yale University, and Swimme and Tucker draw this line in their book, documentary film and online

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<sup>84</sup> Brian Swimme and Thomas Berry, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era — A Celebration of the Unfolding of the Cosmos* (Harper Collins, 1992) 264.

course retellings of the ‘journey of the universe’.<sup>85</sup> There is also something akin to religious sentimentality about the assumption that appears to shape the form and content of these resources: that the experience of a good story well told is sufficient to provoke moral transformation. I do not remark on the veracity of this orientation, but I do rely more heavily on what I consider to be more critically reflective sources. Curiously, spirituality pops up in some of these more explicitly secular sources, too. I am reminded of a recent commentary by Rebecca Solnit:

Climate change is based on science. But if you delve into it deeply enough it is a kind of mysticism without mystification, a recognition of the beautiful interconnection of all life and the systems — weather, water, soil, seasons, ocean pH — on which that life depends.<sup>86</sup>

As I intend in this project to participate in the work of overcoming a dualised construct of human identity (an aspect of which pits reason against affectivity), I am open to engaging with the ‘mysticism without mystification’ that runs through many of the sources reviewed. No less an empiricist than Albert Einstein appears to lend his imprimatur to this inclination:

The most beautiful thing we can experience is the mysterious. It is the source of all true art and science. He [sic] to whom the emotion is a stranger, who can no longer pause to wonder and stand wrapped in awe, is as good as dead — his eyes are closed. The insight into the mystery of life, coupled though it be with fear, has also given rise to religion. To know what is impenetrable to us really exists, manifesting itself as the highest wisdom and the most radiant beauty, which our dull faculties can comprehend only in their most primitive forms — this knowledge, this feeling is at the center of true religiousness.<sup>87</sup>

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<sup>85</sup> This phrase is the title of a book by Brian Thomas Swimme and Mary Evelyn Tucker, *Journey of the Universe* (Yale University Press, 2011); a documentary film, *Journey of the Universe* (Northcutt Productions, 2011); a video series called *Journey of the Universe Conversation Series* (Web Page) <<https://www.journeyoftheuniverse.org/conversations>>; and an online course offered by Yale University, ‘Journey of the Universe: A Story for Our Times’, *Journey of the Universe: A Story for Our Times Specialization*, (Web Page) <<https://www.coursera.org/specializations/journey-of-the-universe>>.

<sup>86</sup> Rebecca Solnit, ‘Why Climate Action is the Antithesis of Grey Ascendancy’, *The Guardian* (online, 7 April 2019) <<https://www.highheatkillsbedbugs.com/2019/04/07/why-climate-action-is-the-antithesis-of-white-supremacy-rebecca-solnit-2/>>.

<sup>87</sup> Albert Einstein, in Albert Einstein (ed), *Living Philosophies* (AMS Press, 1931), also attributed to a work of the same name published by Simon and Schuster in 1931. Located at *Science and Philosophy* (Web Page) <[https://sciphilos.info/docs\\_pages/docs\\_Einstein\\_fulltext\\_css.html](https://sciphilos.info/docs_pages/docs_Einstein_fulltext_css.html)>.

To reiterate the framework for this section of the literature review: this project entails cobbling together a multidimensional but singularly focused story of the place or position of the human being in the ‘grand scheme’ of things, based on human connectivity or continuity with nature, the idea being that such a position establishes the human–earth relationship in terms of mutuality as opposed to instrumentality. The position is this: human beings are part of the whole community of life on Earth rather than apart from and superior to it. There are a number of ways to discuss the multidimensionality of this position. It is socio-material. It is micro and macro. It is empirical and philosophical. It is situated and universal, whilst resisting a totalising effect. This section identifies the literature reviewed in the process of engaging with these dimensions in this project.

### Big History

The interdisciplinary field known as Big History emphasises the continuity of natural and cultural history, interpreting the combination of evolutionary theory and empirical and social sciences related to the study of the origins and history of human cultures as a ‘modern origin story for a modern age’.<sup>88</sup> Big History organises theories about the origin and evolution of the universe and the human species into a series of ‘eight thresholds of increasing complexity’.<sup>89</sup> These stages, according to this field of theorisation, are ‘profoundly’ connected, and they demonstrate ‘how matter and information in the Universe grow denser and more complex in various pockets of cosmic order’.<sup>90</sup> Of interest to me for this project is

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<sup>88</sup> Elise Bohan, ‘Introduction’, in *Big History* (Dorling Kindersly, 2016) 10, 10. As Cynthia Stokes Brown explains in *Big History: From the Big Bang to the Present* (The New Press, 2007) 1: ‘By the late twentieth century scientists had invented the instruments that could begin to view the macroscopic heavens and the microscopic domain. Knowledge about these worlds has recently expanded exponentially’.

<sup>89</sup> Bohan (n 88) 13.

<sup>90</sup> *Ibid.*

the ascription, in narratives associated with this field, of significance to the material facts of human existence. This is a direct corrective response to what is problematic about traditional Western positions on human significance based on transcendence of materiality. Is it meaningful to be made of stardust? It is, in the sense that such a position disrupts the notion of hyperseparation between humans and nature which forms a key component of the structure of dualism by which the instrumental use of ‘nature’ is rationalised in Western culture.

### New Materialism and Posthumanism

Two of the most productive fields of inquiry for the purposes of this project, in terms of drawing out dimensions of an earthbound<sup>91</sup> position on human significance (that is, a non-dualised construct of human identity), are new materialism and posthumanism. These fields of inquiry issue significant challenges to the story of radical discontinuity between the human and the ‘rest’ of nature. Together, they describe human being as a co-constituting process of material-social relations within a single plane of existence along a natureculture continuum.

In their introduction to a project relating new materialism to sociology, Nick J Fox and Pam Alldred distil the ‘radical claims of new materialist theorists’<sup>92</sup> into three propositions. I reproduce Fox and Alldred’s list of propositions here for the sake of brevity and clarity:

- the material world and its contents are not fixed, stable entities, but relational, uneven, and in constant flux;

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<sup>91</sup> See Bruno Latour, ‘War of the Worlds: Human Against Earthbound’, *The Gifford Lectures* (Web Page) <<http://www.giffordlectures.org/file/prof-bruno-latour-war-worlds-humans-against-earthbound>>.

<sup>92</sup> Nick J Fox and Pam Alldred, *Sociology and the New Materialism: Theory, Research, Action* (SAGE, 2016) 4.

- ‘nature’ and ‘culture’ should not be treated as distinct realms, but as parts of a continuum of materiality. The physical and the social both have material effects in an ever-changing world;
- a capacity for ‘agency’ — the actions that produce the social world — extends beyond human actors to the non-human and inanimate.<sup>93</sup>

New materialism, comprised of these themes, is thus a new ontology: ‘a monological account of emergent, generative material being’.<sup>94</sup> Indeed, new materialism takes the view ‘that the whole edifice of modern ontology regarding notions of change, causality, agency, time, and space needs rethinking’.<sup>95</sup> This view ‘draws inspiration from exploring alternative ontologies, such as that of Spinoza’, and is reinforced by interpretations in the nature sciences of matter as ‘considerably more indeterminate and complex ... than early modern technology and practice allowed’.<sup>96</sup> As Diana Coole and Samantha Frost point out, ‘the new physics and biology make it impossible to understand matter any longer in ways that were inspired by classical science’.<sup>97</sup> Very briefly put, new theories about ‘forces, charges, waves, virtual particles, and empty space suggest an ontology that is very different from the substantialist Cartesian or mechanistic Newtonian accounts of matter’<sup>98</sup> and ‘[i]n the life sciences as well as in physics, material phenomena are increasingly being conceptualized not as discrete entities or closed systems but rather as open, complex systems with porous boundaries’.<sup>99</sup> In the new materialist ontologies, matter is no longer considered ‘an inert substance subject to predictable causal forces’, and materiality is ‘always something more than “mere”

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<sup>93</sup> Ibid (citations omitted).

<sup>94</sup> Diana Coole and Samantha Frost, ‘Introducing the New Materialisms’, in Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press, 2010) 1, 8.

<sup>95</sup> Ibid 9.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 5.

<sup>98</sup> Ibid 12–13. See *ibid* 10–13 for a brief outline of the progress of scientific theorisation on the nature of matter from Newton to particle physics.

<sup>99</sup> Ibid 15 (citation omitted).



matter: an excess, force, vitality, relationality, or difference that renders matter active, self-creative, productive, unpredictable'.<sup>100</sup>

One substantial theme that the new materialist ontologies bring to this project is a disruption to a key assumption underlying the Western dualistic construct of human identity: the assumption that only (certain) humans have agency. This assumption is linked to yet another assumption — namely, that agency is the criteria for inherent, as opposed to instrumental, worth. The presumed lack of agency is what defines the Other in terms of instrumental worth in the traditional Western worldview. If, however, as suggested by new materialism, agency is a function of materiality rather than of reason, then a basis for inherent worth is distributed throughout material existence. This is useful in repositioning human significance *as part of* nature rather than *apart from* nature. It can be argued that an ethic of mutuality is suggested by this flat ontology.

Such an ethic is indeed argued by quantum physicist and philosopher of science Karen Barad. Barad's work is invaluable to this thesis both because, as a quantum physicist, Barad is experimenting and theorising at the most fundamental level of material reality, the precise location of the nature of existence, *and* because she is articulate about the metaphysical implications of this work.<sup>101</sup> Barad describes her work as ethico-onto-epistemology, flagging the possibility of a multidimensional new story of human significance. Barad concludes from her

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<sup>100</sup> Ibid 9.

<sup>101</sup> See Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 35: 'During the past decade, technological progress in experimental physics has opened up an entirely new empirical domain: the world of "experimental metaphysics". That is, questions previously thought to be a matter solely for philosophical debate have been brought into the orbit of empirical inquiry. This is a striking development because it allows scientists to explore meta-physical issues in the laboratory (so much for the category "metaphysical")'.

experiments at the quantum level that ‘matter does not refer to a fixed substance’ but is ‘substance in its intra-active becoming’.<sup>102</sup> It is ‘not a thing but a doing’.<sup>103</sup>

Summarising her findings in this regard, Barad writes:

‘Matter’ does not refer to an inherent, fixed property of abstract, independently existing objects; rather, ‘matter’ refers to phenomena in their ongoing materialisation.<sup>104</sup>

The ontological implication of this finding, according to Barad, is that phenomena are the primary ontological units, ‘rather than independent objects with inherent boundaries and properties’.<sup>105</sup> Based on this understanding, ‘the world is an open process of mattering’ and ‘the universe is agential intra-activity in its becoming’.<sup>106</sup> Also, individuals ‘do not pre-exist their interactions; rather, individuals emerge through and as part of their entangled intra-relating’.<sup>107</sup> This way of understanding the world, the universe and the individual has implications for epistemology and ethics: reality is not knowable as a thing ‘out there’ to which human beings relate, but, rather, it is a becoming of which human beings are always already implicated:

The possibilities for what the world may become call out in the pause that precedes each breath before a moment comes into being and the world is remade again, because the becoming of the world is a deeply ethical matter.<sup>108</sup>

In this thesis, I argue that to speak of ‘always already’ implicated-ness signals the shift from a mode of consciousness that establishes radical discontinuity in the human–earth relationship to a mode of consciousness or a position of human

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<sup>102</sup> Ibid 151.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 333.

<sup>106</sup> Ibid 141.

<sup>107</sup> Ibid ix.

<sup>108</sup> Ibid 185.

signification that establishes radical intimacy as constitutive of the human–earth relationship.

Margaret Davies is one of just a handful of legal theorists beginning to engage with new materialisms, enquiring in *Law Unlimited: Materialism, Pluralism, and Legal Theory* about how these ideas work ‘to suspend law’s conventional conceptual, doctrinal, and institutional boundaries in an effort to imagine different modalities for understanding law’.<sup>109</sup> What intrigues me about Davies’s treatment of new materialism is her focus on its generative disruption of the subject–object distinction that is so foundational to the structure of Western ideology and, therefore, to Western law and legal theory.

Davies begins her exploration of selected theories in new materialism with an examination of Michel Serres’s idea of the ‘quasi-object’. As Davies reproduces and discusses the following illustration, I follow her lead, in order to give a full flavour of how this theory disrupts the subject–object distinction.

A ball is not an ordinary object, for it is what it is only if a subject holds it. Over there, on the ground, it is nothing; it is stupid; it has no meaning, no function, and no value. Ball isn’t played alone. Those who do, those who hog the ball, are bad players and are soon excluded from the game. They are said to be selfish [*personnels*]. The collective game doesn’t need persons, people out for themselves. Let us consider the one who holds it. If he [sic] makes it move around him, he is awkward, a bad player. The ball isn’t there for the body; the exact contrary is true: the body is the object of the ball: the subject moves around this sun. Skill with the ball is recognized as the player who follows the ball and serves it instead of making it follow him and using it. It is the subject of the body, subject of bodies, and like a subject of subjects. Playing is nothing else but making oneself the attribute of the ball as a substance. The laws are written for it, defined relative to it, and we bend to these laws. Skill with the ball supposes a Ptolemaic revolution of which few theoreticians are capable, since they are accustomed to being subjects in a Copernican world where objects are slaves.<sup>110</sup>

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<sup>109</sup> Davies, *Law Unlimited* (n 2) viii.

<sup>110</sup> *Ibid*, quoting Michel Serres, *The Parasite*, tr Lawrence R Schehr (University of Minnesota Press, 2007) 225–6.

In discussing Serres's illustration, Davies notes that prior to the game, 'the ball represents matter as radical exteriority' in that it is 'inert, without function, without value, nothing and stupid'.<sup>111</sup> Within the game, however, 'the ball becomes something'.<sup>112</sup> In fact, it becomes, in Serres's words, 'the sun' around which the players move. The players serve the ball, thereby 'acknowledging that *it* is the subject'.<sup>113</sup> The positions of 'subject' and 'object' are not fixed: 'through the movement of the ball none [neither balls nor players] occupy their position [as subjects or objects] permanently'.<sup>114</sup> Whereas '[l]iberal thought tends to individualise and naturalise the distinction between subjects and objects', what is suggested in the ball game illustration is 'a flow between the subjective and objective worlds and, despite efforts to hold them apart, they collapse spectacularly at times'.<sup>115</sup>

The interaction of living and non-living things is central to a theory inspired by Serres, Actor Network Theory. Actor Network Theory 'posits flat networks of inter-actions between "actants", entities that include human subjects, non-human animals, and inanimate things'.<sup>116</sup> For Davies, 'the most interesting of such assemblage thinking down-plays any thought of stable relation, and emphasises the movement that constantly creates and recreates situations'.<sup>117</sup>

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<sup>111</sup> Davies, *Law Unlimited* (n 2) 61 (emphasis in original).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid* 62 (emphasis in original).

<sup>114</sup> *Ibid* 63.

<sup>115</sup> Margaret Davies, 'Material Subjects and Vital Objects: Prefiguring Property and Rights for an Entangled World' (2016) 22(2) *Australian Journal of Human Rights* 37, 42.

<sup>116</sup> Davies, *Law Unlimited* (n 2) 63, citing Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Blackwell, 2010).

<sup>117</sup> Davies, *Law Unlimited* (n 2) 63, referring to the work of Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge, 2015) and Olivia Barr, *Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016).

Davies also engages with the agential realism introduced by Karen Barad, noting that, like the previous theorists, Barad focuses on movement, but argues that meaning and matter emerge together. In Barad's 'agential realism', there are no pre-existing entities that interact meaningfully, but 'rather the entities emerge from relation'.<sup>118</sup> Meaning and mattering are functions of what Barad calls 'intra-action', with phenomena being ontologically prior to existence. What Davies finds appealing in this quantum-based theory is its emphasis on the idea 'that the world is formed through action and therefore there can never be any sense in which a human being is not enmeshed in it; we are necessarily part of existence, not outside'.<sup>119</sup> The implication is that 'humans and other entities emerge from actions in the world, not from actions of their own creating'.<sup>120</sup>

Additionally, Davies touches on theory that 'concerns things as things, in themselves'.<sup>121</sup> Noting that some object-oriented ontology and thing theory 'may reinstate the ontology–epistemology and subject–object distinctions, by insisting on the prior reality of objects as such, rather than [as Barad argues] seeing objects and meanings as co-emergent from dynamic relations', Davies highlights the way in which these theories 'nonetheless serve to reorient attention away from faith in human subjectivity as the focal point of existence and, importantly, challenge the Cartesian preconception that matter is inert and passive'.<sup>122</sup> According to object-oriented theories, 'objects can have their own "vitality" and capacity for activity, relationality, and resistance'.<sup>123</sup>

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<sup>118</sup> Davies, *Law Unlimited* (n 2) 64, discussing Barad (n 101).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.* 65.

<sup>121</sup> *Ibid.*, referring to the work of Bill Brown, 'Thing Theory' (2001) 28 *Critical Inquiry* 1.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, citing Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press, 2010).

To summarise what Davies surveys in terms of new materialism disrupting the stability of human objectivity (rational distance) upon which the concept of human subjectivity has been based in the West: ‘subject’ and ‘object’ are positions to be occupied in the midst of fluid relations and are not fixed ontological locations; the focus of subjectivity is movement and relations rather than fixity and separation; agency is not a human quality but a characteristic of matter; and phenomena are ontologically prior to existence.

I conclude, from what necessarily (given the scope of this thesis) amounts to a brief foray into new materialisms (and Davies’s helpful exploration of these in relation to legal theory), that theories in this field suggest radical continuity as a characteristic of existence upon which to base a position of human significance, as opposed to the radical discontinuity that characterises traditional Western ontology, epistemology and ethics. This is not a continuity in the sense of human beings following on from ‘other’ materiality in seamless linear progression, but rather a continuity in the sense that human beings are ‘always already’ implicated in the continuous co-becoming of existence. This is the continuity of a single plane of existence described by biologist and philosopher Donna Haraway as ‘natureculture’.<sup>124</sup> In a single plane of existence, humans are subject to ‘cosmic forces assembling and disintegrating’<sup>125</sup> rather than subjects of our own making.

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<sup>124</sup> See Haraway, *The Companion Species Manifesto* (n 23) 8.

<sup>125</sup> Davies, *Law Unlimited* (n 2) 64 points out that this ‘does not mean that we are not, in some of our iterations, separated from the world, and that we cannot construct a human-centred existence. The Western philosophy of separation has participated in the production of such a sphere, in which the belief in human exceptionalism, and conceptual distinctions revolving around this belief, have produced a style of social existence in which (we believe) humans can control the world. Despite this, ontologically we are materially integrated and always emergent’.

This single plane of existence is fundamentally post-humanistic insofar as it removes ‘the privilege from humans, human cultures and human endeavours’.<sup>126</sup>

In this project I review the posthumanist theory of Rosi Braidotti. I interpret Braidotti’s theory of radical immanence<sup>127</sup> as complementary to the radical continuity of new materialism. Braidotti asserts that the ‘posthuman subjectivity I advocate is ... materialist and vitalist, embodied and embedded’.<sup>128</sup> For Braidotti, in new materialism the ‘classical emphasis on the unity of all matter, which is central to Spinoza, is reinforced by an updated scientific understanding of the self-organising or “smart” structure of living matter’, and this monism is directly connected to post-anthropocentrism ‘as a general frame of reference for contemporary subjectivity’.<sup>129</sup>

Braidotti asks, ‘What comes after the anthropocentric subject?’<sup>130</sup> Her answer centres around actualising the ‘virtual possibilities of an expanded, relational self that functions in a nature–culture continuum and is technologically mediated’.<sup>131</sup> This is the ‘idea of subjectivity as an assemblage that includes non-human agents’, which implies that ‘subjectivity is not the exclusive prerogative of anthropos ... It is not linked to transcendental reason ... It is unhinged from the dialectics of recognition ... and it is based on the immanence of relations’.<sup>132</sup>

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<sup>126</sup> Fox and Alldred (n 92) 42.

<sup>127</sup> Braidotti (n 22) 56.

<sup>128</sup> Ibid 51.

<sup>129</sup> Ibid 57.

<sup>130</sup> Ibid 58.

<sup>131</sup> Ibid 61. This thesis does not engage with the other ‘Other’ of posthumanist critical theory: technology. My focus is on the human–earth relationship rather than the technologically mediated human existential reality. Cf Braidotti (n 22) 89: ‘The relationship between the human and the technological other has shifted in the contemporary context, to reach unprecedented degrees of intimacy and intrusion’. For an incisive posthumanist grappling with the issue of human–technology relations from the perspective of critical feminist theory, see Donna Haraway, *The Cyborg Manifesto: Science, Technology and Socialist-Feminism in the Late Twentieth Century* (University of Minnesota Press, 2016).

<sup>132</sup> Braidotti (n 22) 82.

Braidotti uses the term ‘nomadic subjectivity’ to describe her ‘post-individualistic notion of the subject, which is marked by a monistic, relational structure ... [y]et is not undifferentiated in terms of the social coordinates of class, gender, sexuality, ethnicity, and race’.<sup>133</sup>

If there is a point of differentiation between new materialism and critical posthumanism, it is the emphasis in posthumanism on post-structuralist critical theory. As Braidotti indicates, the ‘current of thought that has gone further in unfolding the productive potential of the posthuman predicament can be genealogically traced back to the post-structuralists, the anti-universalism of feminism and the anti-colonial phenomenology’.<sup>134</sup> For Braidotti, an ‘altogether different and powerful source of inspiration for contemporary reconfigurations of critical posthumanism is ecology and environmentalism ... which rest on an enlarged sense of inter-connection between self and others, including the non-human or “earth” others’ and ‘requires and is enhanced by the rejection of self-centred individualism’.<sup>135</sup>

In her major text on the subject of critical posthumanism, *The Posthumanm*, Braidotti organises her thinking about posthuman subjectivity in three categories (and their corresponding chapters): The Posthuman as Becoming-animal, The Posthuman as Becoming-earth, and The Posthuman as Becoming-machine. Speaking of posthuman subjectivity in these ways foregrounds the constitutive nature of interaction (amongst all matter — organic and inorganic, natural, and technological) and is a way of ‘acknowledging the ties that bind us to the multiple

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<sup>133</sup> Ibid 87.

<sup>134</sup> Ibid 46.

<sup>135</sup> Ibid 47–8.



“others” in a vital web of complex interrelations’.<sup>136</sup> For Braidotti, the critical posthuman subject is defined ‘within an eco-philosophy of multiple belongings, as a relational subject constituted in and by multiplicity, that is to say a subject that works across differences and is also internally differentiated, but still grounded and accountable’.<sup>137</sup> This theme of accountable, connected differentiation is sounded in the non-dualised construct of human identity that forms the basis of the alternative concept of the legal subject I develop in this project.

#### Another Source: The Book of the Universe

We read books written with a strangely contrived alphabet. We no longer read the book of the universe.<sup>138</sup>

This project is positioned as a corrective to a mode of consciousness in Western culture that establishes radical discontinuity as the primary dynamic of the human–earth relationship. In the epistemology of this dynamic, nature is a source of neither knowledge nor normativity, nor even relationship in the sense of mutual connection. In the ethic of this dynamic, nature has only instrumental rather than inherent worth. The other-than-human world is studied, measured, manipulated and used as object, rather than being encountered as subject.

By contrast, Berry and other scholars affiliated with Earth Jurisprudence privilege affective encounter with nature as generative of normativity. The dynamic for the human–earth relationship envisioned within this legal philosophy is radical intimacy, defined by Berry as a communion of subjects encompassing the whole community of life on Earth.<sup>139</sup> In Chapter Three of this thesis I remark

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<sup>136</sup> Ibid 100.

<sup>137</sup> Ibid 49.

<sup>138</sup> Berry, *The Great Work* (n 4) 15.

<sup>139</sup> See e.g. Berry, *The Great Work* (n 4) and Berry, ‘Appendix’ (n 5). See also n 6, above.

on the primary role that affective encounter with nature — genuine relationship expressed as love and defined by the vulnerability that openness to being moved and shaped by the Other engenders — plays in the development of this legal philosophy. For Berry, this commitment is a matter of coordinating ‘our human world of meaning with the meaning of our surroundings’.<sup>140</sup>

This project assumes that meaningfulness arises not as a function of mind over matter but as a cacophonous phenomenon of sensation, emotion and reason. I make room in my working out of this project for reviewing literatures other than the written word: for the stories of direct connection with nature relayed by the people I interview; for the impact on the process of forging agreement of the two-day field trip to the Waimea River undertaken by the parties of interest in the case study featured in Chapter Five (what difference does it make that they bring their bodies to the river?); for the exhilaration that wafts up from the new sciences and their attendant philosophies. It may not be normal in a thesis project to be explicit about these types of sources, but since the norm of denying embodiment and affect lies at the heart of the problem I attempt to address — being a central plank in reason/nature dualism — this expansiveness is not a wayward indulgence but a necessary and justifiable methodological commitment.

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<sup>140</sup> Berry, *The Great Work* (n 4) 15.

## Structure and Overview of the Study

This thesis is structured to correspond to its instigating premise, derived from Berry's observation that the root cause of the present devastation of the planet lies in a 'mode of consciousness' characterised by radical discontinuity between human and other modes of being. The thesis begins with an examination of the structures and characteristic features of this 'mode of consciousness', and then, in two subsequent steps, traces its material effect through the normalisation of instrumentalism as the dominant motif of the human–earth relationship in Western culture via the theory and practice of law generally and the imaginary of the human legal subject specifically. Finally, the thesis attempts to respond creatively to these layers of critical reflection by proposing something disruptive to the social imaginary of human mastery and control over nature in the form of a human legal subject reconceptualised from within the natureculture continuum.

### *Chapter Two: The Human–Earth Relationship*

The aim of the first substantive chapter in this thesis is to uncover patterns of radical discontinuity in the Western cultural interpretation of the human–earth relationship. The chapter relies quite heavily on the critical ecological feminism of Val Plumwood. As Plumwood's depiction of the network of dualisms within the Western worldview indicates, patterns of exclusion and oppression link and interlock in inter- and intra-species hierarchies of being,<sup>141</sup> making any resetting of the terms of the human–earth relationship a matter of disrupting a whole system rather than simply reworking a single strand. A consideration of Lorraine Code's analysis of Western ideology as a social imaginary of human mastery and control

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<sup>141</sup> See Plumwood (n 30) and Gear (n 32).

of nature as the ‘habitus and ethos’<sup>142</sup> of the West (in all of its reaches beyond the physical location of its genesis in the northern and Western hemispheres) develops this point. Thus, insofar as this thesis proposes ‘imaginative counterpossibilities’<sup>143</sup> to this social imaginary, it is positioned as a project of participating in the emergence of an instituting social imaginary<sup>144</sup> of ‘ideal cohabitation’.<sup>145</sup>

Framing the first half of the chapter, entitled ‘The Human—Earth Relationship as Dualism’, as a discussion of (qualified) anthropocentrism as a structure in which (certain) humans are on top, the final discussion of the chapter, entitled ‘Ecocentrism and Beyond’, shifts to interrogating a correlative spatial metaphor associated with the social imaginary of mastery and control: humans at the centre. I briefly analyse efforts in environmental ethics to expand the circle of moral concern beyond the (attenuated) human and speculate about the impact on moral theory of emerging philosophies that contest the validity of meaningful boundaries by which to establish even the most inclusive circle of concern. The purpose of this discussion is to set a general pattern for inquiry applied throughout this project: to move from close-in analysis to opened-out speculation, and from restricted theories to their un-limiting. The pattern matches the medium to the message: seeking liberation from a restrictive and destructive human—earth relationship.

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<sup>142</sup> Code (n 7) 30, discussing the social imaginary theory of Cornelius Castoriadis in David Ames (ed), *Philosophy, Politics, Autonomy: Essays in Political Philosophy* (Oxford University Press, 1991) through the lens of Gilles Deleuze (ethos) and Pierre Bourdieu. See generally, 25–32 (as per note 44).

<sup>143</sup> See *ibid* 31: ‘Imaginatively initiated counterpossibilities interrogate the social structure to destabilise its pretensions to naturalness and wholeness, to initiate a new making’.

<sup>144</sup> *Ibid*: ‘To the instituted imaginary, Castoriadis opposes the *instituting* imaginary: the critical-creative activity of a society that exhibits its autonomy in its capacity to put itself in question, in the ability of (some of) its members to act from a “collective for some collectivity” recognition that the society is incongruous with itself, with scant reason for self-satisfaction’ (emphasis in original) (citation omitted).

<sup>145</sup> *Ibid* 28; see Code (n 7).

*Chapter Three: Law's Role in the Human–Earth Relationship*

Positioning the thesis as a project of participating in the emergence of an instituting social imaginary of ideal cohabitation undergirds the focus of the thesis on law and legal theory: the key role of law as institution — as apparatus — of the social imaginary is discussed in Chapter Three, including law's potential to be co-opted into the process of instituting a new, ecological social imaginary.

In this chapter I argue that anthropocentrism is the visible framework not only of law's subject matter, but also of the matter of law as a subject. In the first discussion in the chapter, in a section entitled 'Law's Anthropocentrism: All the Objects in the Room are Red', I make the point that law and legal theory in Western culture revolves, with few notable exceptions, around human subjectivity and human interests and concerns. The subject matter of law is homocentric, a conclusion argued by Christopher D Stone in his commentary on the history of legal decisions in cases involving non-human plaintiffs since the landmark case with which Stone played an influential role in shaping the dissenting opinion of one of the justices, *Sierra*. As it would not be possible in the current project to comprehensively survey case law in this regard, I rely on Stone's commentary to support my argument that Western law and legal theory is anthropocentric in orientation and effect: for Western law, only (certain) human beings count as subjects.<sup>146</sup>

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<sup>146</sup> This is qualified by those assignments of legal personhood to corporations and idols, for example. However, it is argued that these assignments of legal personhood trace back to the capacities of the human beings who manage either. The standard of accountability is human (that is, set at the idealised human described in this thesis). It is beyond the scope of this thesis to survey the many works of legal theory which contest the anthropocentrism of Western law and legal theory. Amongst those cited in the bibliography of this thesis are Klaus Bosselmann, 'From Reductionist Environmental Law to Sustainability Law', in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 204; Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015); Nicole Graham, *Landscape: Property, Environment, Law* (Routledge, 2011); Anna Gear, 'Deconstructing

In the second section of this chapter, entitled ‘Earth Jurisprudence’, I examine the ways in which Earth Jurisprudence both challenges and conforms to patterns of anthropocentrism with which Western law and legal theory are drawn. I am concerned in this section to examine barriers within this ecocentric philosophy itself which hinder its progress towards meeting its overall objective. I conclude that Earth Jurisprudence does not, at this stage of its development as a legal philosophy, sufficiently disrupt some of the more foundational layers of assumptions that comprise a conventional mode of understanding the law as subject.

This leads to an examination of very recent work by Margaret Davies in the area of suggesting alternative modes of understanding law arising from the past several decades of ‘theoretical disruption’<sup>147</sup> to what had been considered constants, not variables, in the traditional mode of understanding law and legal theory in Western culture. These disruptions, taken together with emerging understandings of the nature of reality, such as new materialism and posthumanism, suggest for Davies more open modes of understanding law. In this final section of the chapter, entitled ‘Looking Beyond Law’s Limits’, I identify in Davies’s argument for unlimiting law some productive pathways for overcoming assumptions related to dualistic, anthropocentric thinking about the law that act as a barrier to meeting the objective of Earth Jurisprudence.

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Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity” (2015) 26 *Law Critique* 225; Alessandro Pelizzon and Aidan Ricketts, ‘Beyond Anthropocentrism and Back Again: From Ontological to Normative Anthropocentrism’ (2015) 18(2) *The Australian Journal of Natural Resources Law and Policy* 105

<sup>147</sup> Davies, *Law Unlimited* (n 2) 1.

The aim of Chapter Three is to establish the problem that this thesis is meant to address: that Western law and legal theory is monolithically anthropocentric, a disposition which systemically precludes the full consideration of non-human Others and keeps the human–earth relationship locked into a dualist structure that privileges the needs of humans at the expense of non-human earth Others, thus blocking the objective of Earth Jurisprudence regarding the flourishing of all life on Earth. It is my contention that systemic change is a function of key disruptions at strategic points of intervention. Thus, in order to break into the monolithic anthropocentrism of Western law and legal theory, I identify one such point of intervention: concepts of the legal subject.

#### *Chapter Four: The Legal Subject*

Despite a stimulating, if limited, array of available discourse on the topic of ‘what we talk about when we talk about [legal] persons’<sup>148</sup> — ranging from such classics as arose around the turn of the last century in debates about corporate legal personality,<sup>149</sup> to a much more contemporary grappling with potential sites of contestation about the granting of legal personhood to non-human entities,<sup>150</sup> to scatterings of inquiry about how the ‘burgeoning complexity’ of ‘the landscapes of law’s operation’ can be seen as ‘impinging upon reflections concerning legal personhood’<sup>151</sup> — this thesis focuses not on the general theory of the law of persons

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<sup>148</sup> This is the title of a ‘Note’ in the *Harvard Law Review*: Dave Fugendes, ‘Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction’ (2001) 114(6) *Harvard Law Review* 1745, 1745.

<sup>149</sup> See, for example, Bryant Smith, ‘Legal Personality’ (1928) XXXVII(3) *Yale Law Journal* 283.

<sup>150</sup> See Visa AJ Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn — Law and Philosophy Library* (Springer, 2017) vol 119.

<sup>151</sup> Anna Gear, ‘Law’s Entities: Complexity, Plasticity and Justice’ (2013) 4(1) *Jurisprudence* 76, 76.

but rather on the range of contemporary concepts-in-use of human legal subjectivity.

As this project is driving towards the proposal of an alternative concept for the human legal subject, focusing the exploration in this way establishes a field of direct comparison. I remark upon but do not debate the role and function of the legal subject as a subject of the thesis; this project takes for granted that concepts of the legal subject have material effect within the law. As Ngaire Naffine points out,

ideas about human nature play out in law and result in real determinations about what we can do with ourselves and how we can live. These issues cut right to the bone. Most dramatically, they determine whether we have a right to live and a right to die.<sup>152</sup>

Naffine is talking about how ideas about human nature play out in issues such as abortion and euthanasia. My contention is that we might just as well be talking about anthropogenic climate change. I argue that ideas about human nature that inform the conventional legal subject are foreclosing the right to life for the entire community of life on Earth, human beings included.

The fourth chapter of the thesis begins, in a section entitled ‘A Brief Catalogue of Law’s Contesting Subjects’, with a survey of the various contemporary concepts-in-use of the human legal subject, drawn from Naffine’s work (which is singular in cataloguing these concepts). Following this survey, in a section entitled ‘Analysis: Features of Dualism’, I analyse the concepts according to the extent and manner in which each expresses Plumwood’s features of dualism outlined in Chapter Two. Naffine’s analysis indicates that one concept

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<sup>152</sup> Naffine, *Law’s Meaning of Life* (n 13) 14.



predominates: the rational, autonomous individual. In this section, I establish that the Rationalist concept of the legal subject corresponds very neatly with the master identity endemic to the Western worldview of radical discontinuity between humans and nature. This is not surprising, given the discussion in Chapter Two about the dominance of this construct of human identity in the Western social imaginary and the discussion in Chapter Three about the role of law and legal theory as an institution of the instituted social imaginary. The novel result of this analysis is the map it generates of points at which to contest the dominance of this construct of human identity and its correspondent Realist legal subject. Proposing an alternative, non-dualised concept of the legal subject becomes a matter of addressing each of these points with an imaginative creation story.<sup>153</sup>

#### *Chapter Five: Introducing the Cosmic Person*

Following a pattern similar to the survey and analysis of concepts-in-use of the legal subject undertaken in Chapter Four, the fifth and final substantive chapter of the thesis introduces the unique contribution of this project: an alternative concept of the legal subject. The chapter begins, in a section entitled ‘The New Creation Story’, by telling the creation story of the new concept and indicating the disciplines from which it is drawn. The creation story of the new legal subject emerges from contemporary scientific and philosophical insights into the nature of existence, which indicate that matter is both lively and meaningful — in direct contrast to the story long told about matter in Western culture (as inert and to be transcended by the superior power of reason). I develop the implications of these

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<sup>153</sup> In cataloguing the current concepts-in-use of the legal subject, Naffine indicates that each has a creation story or master narrative by which they are construed: Naffine, *Law's Meaning of Life* (n 13).

insights into what I call ‘normative materiality’, by which I mean that these insights collapse the Western tradition of assuming a divide between ‘is’ and ‘ought’. Normative materiality blurs, flattens and extends the story of human being such that each of the features of dualism in the construct of human identity associated with the Rationalist legal subject is inverted and the embodiment associated with the Relationship legal subject is defined in terms of material constitutionality.

Consequently, in the next section of Chapter Five, entitled ‘Introducing the Cosmic Person’, the legal subject I propose on the basis of new materialism and posthumanism transforms the dynamic of the human–earth relationship: radical discontinuity and transcendence, associated with the master identity/Rationalist legal subject, is replaced with radical intimacy and immanence of the Cosmic Person. After explicating this nomenclature, I employ Plumwood’s rubric of non-dualism to analyse the embodied, embedded and entangled construct of human identity to which it refers. The Cosmic Person is, I contend, a route of escaping the dualism<sup>154</sup> that plagues the human–earth relationship in Western culture.

This chapter finishes with a section entitled ‘Posthuman Normativity and The Cosmic Person: A Case Study.’ In this case study, I argue, the Cosmic Person is prefigured and the posthuman normativity discussed in this project is performed. In presenting the *Waimea River Watershed Mediation Agreement*, a groundbreaking approach to water rights issues in Hawai’i, I indicate that the agreement helps to shift the human–earth relationship in that place out of the mode of mastery and control and assists in opening up the situation to a dynamic of ideal cohabitation. I conclude that, in engaging in this process and in setting the

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<sup>154</sup> See generally Plumwood (n 30) for discussion of ‘escape routes’ from dualism.

particular terms of the agreement which position the river as a source of law/agreement, the human parties of interest to the agreement signal key features of a non-dualised construct of human identity which I associate with the posthuman legal subject.

### *Chapter Six: Conclusion*

In addition to summarising the arguments presented in this thesis, the concluding chapter signals a number of directions in which this research might be extended and expanded. One of the most enticing of these is the potential for dialogue between non-dualised constructs of human identity emerging from within the Western cultural milieu with contemporary articulations of traditional and emerging constructs of human identity associated with non-Western cultures, some of which may be characterised as non-dualistic, especially with regard to the human–earth relationship.

I see this project as a first step, establishing some necessary foundations for intercultural dialogue for me as a researcher situated, myself, within the Western cultural milieu. The first foundation is the denaturalisation of the array of ‘lethal binaries’<sup>155</sup> upon which rests the historical and ongoing colonisation of other cultures under the rubric of Western imperialism. This is the intent behind engaging with critical ecological feminism in Chapter Two. The second foundation I seek to establish in this project is more positive, in the sense that finding material within my own culture out of which to construct non-dualised human identity eliminates the temptation to appropriate material from other cultures for this effort (appropriation being the privilege of the dominant culture). In this, I contend that

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<sup>155</sup> Braidotti (n 22) 37.

this project goes some way towards establishing a measure of equal footing in which theorisations reached through the epistemological commitments of Western culture meet and mingle with similar but also different theorisations reached through different epistemological commitments of another culture. This is the intent behind engaging with emergent ontologies arising within empirical sciences and Western philosophies in Chapter Five: to prepare for these conversations.

Another direction for future research that I propose in the Conclusion relates to the case study. I contend that the situation at Waimea sets a particular pathway towards transforming the dynamic of the human–earth relationship from radical discontinuity and exploitation to radical intimacy and ideal cohabitation, and that this pathway offers insights that may prove useful in other places and circumstances. I propose accompanying the unfolding of the agreement at Waimea and being present to the people and the place there with an eye towards transferable insights about instituting posthuman normativity and the further development of the profile of the Cosmic Person.

In addition to these two primary directions for future research, I also mention projects related to (a) exploring the implications for ideas about private property suggested by the ideas about personhood raised in this project, and (b) continuing to collect stories of people’s relationships with nature and how these relationships influence or shape their lives. I am curious to explore and exploit, for the sake of transformation in the human–earth relationship, what I suspect is a gap between people’s lived experience of this relationship and its traditional construct in Western culture. Driving this line of research is my interest in how the human–earth relationship as constitutive of the person at law becomes part of legal discourse.

We are still, as I conclude in my final remarks, in the very early days, in terms of living with the new story of human significance suggested by the sources consulted in this thesis. However, the new story appears promising in terms of instituting a legal and social imaginary which supports the health and future flourishing of the whole community of life on Earth.

## Chapter Two

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### The Human–Earth Relationship

## Chapter Two

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### The Human–Earth Relationship

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## Introduction: Getting at the Root

I argue that Western culture has treated the human/nature relation as a dualism and that this explains many of the problematic features of the West's treatment of nature which underlie the environmental crisis, especially the Western construction of human identity as 'outside' nature.<sup>1</sup>

As noted in the introductory chapter, the inquiry of this thesis begins with an observation by Thomas Berry, cultural historian and one of the initiators of the Earth Jurisprudence movement. It was Berry's contention that the roots of the troubling symptoms of a dysfunctional human–earth relationship attendant to the sphere of influence of the globally dominant Western-based culture — anthropogenic climate change, epidemic species extinctions, mass human migrations linked to environmental degradation, and natural resource pressures — lie in ways of thinking endemic to this culture. Berry is not alone in this view. Ralph Metzner, for example, notes that '[t]here is a growing chorus of agreement that the deepest roots of the ecological crisis must lie in the attitudes, values, perceptions, and basic worldview that we humans of the global industrial society have come to hold'.<sup>2</sup> However, in this thesis, which is oriented towards finding ways to meet the objective of Earth Jurisprudence, it is pertinent to take up Berry's specific terminology as a starting point. Berry characterises the mindset by which the human–earth relationship in Western culture is construed as 'radical discontinuity'.<sup>3</sup>

This thesis argues that the mode of consciousness of radical discontinuity is a significant barrier to the realisation of the Earth Jurisprudence objective of 'the

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<sup>1</sup> Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 2.

<sup>2</sup> Ralph Metzner in *Green Psychology* (Park Street Press, 1999) 99, quoted in Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015) 3.

<sup>3</sup> Thomas Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999) 4.



securing of conditions that tend to favour the health and future flourishing of Earth Community'.<sup>4</sup> In terms of this inquiry, therefore, the concept 'radical discontinuity' is provocative: what are the key features and structures that mark this dynamic? What is its genealogy and its logic? Why is it so 'sticky': so pervasive and tenacious? What makes it so pernicious as a presence within the earth life community? And, finally and most importantly from the standpoint of this project, how can it be disrupted?

Because these are not questions Berry engages at a deep level of critical analysis, this prompts a turn to other sources, in order to profile the pathology of the human–earth relationship in Western culture. This chapter begins with ontology, delving into the culture's philosophical assumptions about the nature of the human–earth relationship and the parties to it. The opening section is a close reading of Val Plumwood's critical ecological feminism, a program of analysis which illuminates 'the development and the defects in the Western story of reason and nature'.<sup>5</sup> Plumwood categorises the structural dynamic of the human–earth relationship in Western culture as dualism, or 'a way of construing difference in terms of the logic of hierarchy'.<sup>6</sup>

The first part of this chapter, entitled 'The Human–Earth Relationship as Dualism', investigates key features of dualism as a socially constructed and socially contingent relationship structure, indicating how these features can be collected under the descriptive rubric of radical discontinuity. This is followed by a focus on the role that reason is seen to play in establishing the human–earth

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<sup>4</sup> Peter D Burdon, 'A Theory of Earth Jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28, 46 (citations omitted).

<sup>5</sup> Plumwood (n 1) 6.

<sup>6</sup> Ibid 32, citing Jacques Derrida, *Positions*, tr Alan Bass (Athlone Press, 1981) 9.

relationship as a dualism, including a brief recapitulation of Plumwood's genealogy of the dualism of reason/nature which is foundational in Western philosophy. Next, Plumwood's primary thesis within her theorisation of critical ecological feminism is considered: the presence (omnipresence?) of a complex and multiple dominator identity within the Western cultural construct, which Plumwood calls the master identity. I conclude from Plumwood's analysis that the master identity works like a lynch pin holding together the multiple oppressions associated with gender, race, class and nature, and that the basis of this power centre is the dualistic interpretation of reason and nature central to Western philosophical tradition and logic, infused with the power inherent to the dualistic construction. Later in the thesis, in the section of Chapter Four entitled 'A Brief Catalogue of Law's Contesting Subjects', this master identity is exposed as the template for the prevailing concept of the legal subject, and it is this correspondence which is challenged in this project by the proposal of an alternative, non-dualised concept of the legal subject. At this early point in the argument, however, Plumwood's illumination of a network of dualisms, of which the human–earth relationship is one node, is useful for analysing the tenacity of the dynamic of radical discontinuity within this relationship as constructed in Western culture.

This section of the chapter finishes with the introduction of a framework for understanding the ubiquity of this dynamic in Western culture. What Berry calls a mode of consciousness is elaborated by the theory of the instituted social imaginary, or the 'background sense-making operations that make the idea of

society and its practical reality possible'.<sup>7</sup> I correlate epistemologist Lorraine Code's depiction of the Western, instituted social imaginary of human mastery and control over nature to Berry's observation that radical discontinuity characterises the human–earth relationship.

In the first section of this chapter, I discuss what matters in the Western cultural consciousness of the human–earth relationship. The social imaginary of mastery and control places (certain)<sup>8</sup> humans on top, naturalising a hierarchy of being. Just as the concept of the Great Chain of Being — a philosophical architecture attributed to Plato and Aristotle as *scala naturae*, in which everything, living and non-living, earthly and divine, is assigned a place in a hierarchical arrangement of existence according to its perceived level of complexity — evolved from a 'dimension of existence in general' to a 'dimension of morality',<sup>9</sup> so I move in the second section of this chapter, entitled 'Ecocentrism and Beyond', from ontology to ethicality. From a consideration of what matters in the Western cultural consciousness (humans on top), I move to a consideration of what counts (humans at the centre) — by which I mean that human beings form the core of moral concern. What counts, what is of concern, are (certain) humans: the (idealised)

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<sup>7</sup> Graeme Kirkpatrick, *Computer Games and the Social Imaginary* (Polity, 2013) 2. See Charles Taylor, 'Modern Social Imaginaries' (2002) 14(1) *Public Culture* 91, 91: 'The social imaginary is not a set of ideas; rather it is what enables, through making sense of, the practices of a society'. It is well beyond the scope of this thesis to fully define the concept of the social imaginary as per Cornelius Castoriadis; I am dependent upon secondary uses of the term in sources more suited to the topic of this thesis or, as in the case of this note, on other sources which provide a succinct and highly useable summary of the term. For the primary source on the concept, see generally Cornelius Castoriadis, *The Imaginary Institution of Society*, tr Kathleen Blamey (Polity, 1975).

<sup>8</sup> The qualifier 'certain' is used without further annotation throughout the remainder of the thesis and signifies the intersectionality of dualism in Western culture. See the introduction of this point in Chapter One in The Inquiry section and in the section of the Literature Review entitled 'The Human–Earth Relationship'; further discussion on this point to follow in this chapter.

<sup>9</sup> Mark J Brandt and Christine Reyna, 'The Chain of Being: A Hierarchy of Morality' (2011) 6(5) *Perspectives on Psychological Science* 428, 428, citing JB Russell, *The Prince of Darkness: Radical Evil and the Power of Good in History* (Cornell University Press, 1998). See generally AO Lovejoy, *The Great Chain of Being* (Harvard University Press, 1936) for what is referred to as the definitive modern history of the concept.

human forms the standard of moral worth. This has been contested in various ways within the field of environmental ethics, and in this section I survey very briefly some of the efforts to expand the circle of moral concern. I argue that such moves accomplish only half of the necessary corrective to the dynamic of radical discontinuity which marks the human–earth relationship in Western culture: Plumwood asserts that escaping dualism is a matter of reimagining both the upper- and the undersides of the hierarchical structure. The schools of thought in environmental ethics I survey confine themselves to reimagining the underside; I conclude that these approaches are insufficient to effect transformation in the human–earth relationship.

Before taking up the focus of this project on reimagining the upperside of the hierarchy as a corrective to this insufficiency, I end this chapter by briefly entertaining certain contemporary philosophical contestations of the notion of ‘sides’. This completes the spatial configuration and movement of this section of the chapter: from a centre point of anthropocentrism, out across increasingly expansive concentric circles of concern, into a great unravelling. I contend that this journey is productive in its opening up and out: the intransigence of dualism invites a measure of blasting through sediment and encrustation (something of which a couple of theories I tangle with at the end of this section are capable).

It is well beyond the scope of this project to comprehensively profile the dynamic of radical discontinuity which characterises the human–earth relationship in Western culture, but, with the discussions in this chapter about dualism and the social imaginary of mastery and control, I attempt to say something multidimensional about the pathology of this mode of consciousness. The second discussion marks out the territory I enter more fully in the apex of this project:

applying cutting-edge scientific findings, and philosophical insights arising from them, to the work of shifting this mode of consciousness and reimagining the human–earth relationship beyond the confines of dualism.

## The Human–Earth Relationship as Dualism

0 Lord, our Lord, how excellent is thy name in all the earth! who hast set thy glory above the heavens.

2 Out of the mouth of babes and sucklings hast thou ordained strength because of thine enemies, that thou mightest still the enemy and the avenger.

3 When I consider thy heavens, the work of thy fingers, the moon and the stars, which thou hast ordained;

4 What is man, that thou art mindful of him? and the son of man, that thou visitest him?

5 For thou hast made him a little lower than the angels, and hast crowned him with glory and honour.

6 Thou madest him to have dominion over the works of thy hands; thou hast put all things under his feet:

7 All sheep and oxen, yea, and the beasts of the field;

8 The fowl of the air, and the fish of the sea, and whatsoever passeth through the paths of the seas.

9 O Lord our Lord, how excellent is thy name in all the earth!<sup>10</sup>

The song-poems, or psalms, of the Judeo-Christian tradition are not, in a secular age,<sup>11</sup> widely or explicitly referenced in the Western culture they helped to shape historically. Their role in shaping this culture, however, gives them currency in discussions of themes and attitudes extant in the Western worldview. Psalm 8,

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<sup>10</sup> *The Holy Bible: King James Version*. BibleGateway (Web Page) <<https://www.biblegateway.com/passage/?search=Psalm+8&version=KJV>>. The choice to use the King James Version is deliberate; the non-inclusive and archaic language of this version befits my argument, to follow: that is, the Bible is an icon of the persistently dualistic and patriarchal culture in which it resides. Although more inclusive versions of the Bible are widely available, ‘[e]ven now, more than four centuries after its publication, the King James Bible (a.k.a. the King James Version, or simply the Authorized Version) remains the most famous Bible translation in history—and one of the most printed books ever’, according to Sarah Pruitt, ‘Why the Why the King James Bible of 1611 Remains the Most Popular Translation in History’ *History* (Web Page, 22 March 2019) <<https://www.history.com/news/king-james-bible-most-popular>>. In this brief exegesis of a passage from the Bible, I retain exclusive use of the male pronoun from this original source, in keeping with my point about the persistence of dualism and patriarchy and the continuing popularity of this source.

<sup>11</sup> See Charles Taylor, *A Secular Age* (Belknap Press, 2007) for what reviewer Colin May indicates is a comprehensive theorisation and genealogy of the evolution of ‘the conditions by which westerners [sic] can simply go about their lives indifferent to the religious’: Colin May, ‘Charles Taylor: *A Secular Age*’ (2009) 46(2) *Society* 199, 199.

above, usefully sounds the defining attitude of the human–earth relationship in Western culture under scrutiny in this inquiry: radical discontinuity, or the attitude that human beings are separate from, and superior to, nature. I begin this section with a brief close reading of this psalm for the impressions it conveys.

*‘All Things Under His Feet’*

As works of art as well as theology, psalms convey meaning through both form and content. Psalm 8 is an ode to an ordered and hierarchical universe. In the psalm, order is established along a horizontal axis. Accordingly, the psalm begins with God on top: on top of the poem structurally and on top of the universe metaphysically. The psalm begins:

O Lord, our Lord, how excellent is thy name in all the earth! who hast set thy glory above the heavens.<sup>12</sup>

Immediately, with the next verse, the focus is drawn abruptly back down to Earth. The rapidity of the shift serves to emphasise the contrast between the heavenly and the human realms. Here, down below, is vulnerability and struggle, an inglorious fray so different to the glory above.

‘Look up!’, the psalmist enjoins the believer in the very next stanza. The stars above provoke the awe and wonder worthy of God; God, therefore, is located above and beyond. Then, in a next breath, ‘Look at yourself!’, snaps the psalmist. ‘What is man that thou art mindful of him?’<sup>13</sup> So unworthy. So inferior. (Whiplash becomes a distinct possibility as the focus jerks up and down.)

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<sup>12</sup> *The Holy Bible*, n 10.

<sup>13</sup> *Ibid.*

Calm begins to settle over the piece at the pivotal point of verse 5. In the very centre of the psalm, ‘man’ is placed into the order of things at the very centre of the universe. Not so inferior, after all, seems to be the message:

For thou hast made him a little lower than the angels, and hast crowned him with glory and honour.<sup>14</sup>

Under this verse in the architecture of the poem and, in a mirroring effect, under the feet of man in the architecture of the universe, are placed all other living things of Earth. This is a stable place; from here man can survey the world that lies under his feet. The believer can stand firm in his dominion, assures the psalmist, by finally drawing the gaze resolutely one last time back ‘up’ to God in a repetition of the first or ‘top’ verse. The civilised and civilising movement of the final verse, so different in tone from the up-and-down jerkiness of the early verses, settles the order of things once and for all as divinely ordained and, true to the source, excellent.

‘Excellent for whom?’ is a key question to put to this worldview. It can be argued — and observed — that hierarchical structures are only excellent for the ones on top. It is never any good to be underfoot. In the hierarchical human–earth relationship constructed by Western culture and celebrated in cultural icons like Psalm 8, (certain) humans come out on top. Interrogating the relationship structure of dualism projected through this piece of art/cultural artefact yields important insights about this problematic conception of the human–earth relationship in the culture to which this work belongs.

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<sup>14</sup> Ibid.



*The Human/Nature Dualism*

In work on critical ecological feminism,<sup>15</sup> Val Plumwood argues that the human–earth relationship in the West is a particularly complex type of hierarchy called a dualism. Plumwood defines dualism as

a relation of separation and domination inscribed and naturalised in culture and characterised by radical exclusion, distancing and opposition between orders constructed as systematically higher and lower, as inferior and superior, as ruler and ruled, which treats the division as part of the natures being construed not merely as different but as belonging to radically different orders or kinds, and hence as not open to change.<sup>16</sup>

This definition encompasses a host of interrelated features identified by Plumwood as endemic to the structure and dynamics of dualism. This section briefly reviews these features as constitutive of the radical discontinuity between humans and nature inscribed in Western culture.

## Feature One: Radical Exclusion

The key indicator of dualism, according to Plumwood, is a feature she calls radical exclusion or hyperseparation:

Because the other is to be treated as not merely different but inferior, part of a lower, different order of being, differentiation from it demands not merely distinctness but radical exclusion, not merely separation but hyperseparation.<sup>17</sup>

How is radical exclusion/radical discontinuity/hyperseparation accomplished as a framework of understanding the human–earth relationship? The essential ingredient is denial. This level of discontinuity is ‘obtained via an account of human identity and virtue which eliminates [conceptually, via denial] overlap with

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<sup>15</sup> Plumwood identifies her project as an effort to ‘greatly increase the critical and analytical force of ecological feminism and make it a far more powerful political tool’ by developing ‘a common, integrated framework for the critique of both human domination and the domination of nature — integrating nature as a fourth category of analysis into the framework of an extended feminist theory which employs a race, class and gender analysis’: Plumwood (n 1) 1–2.

<sup>16</sup> Ibid 47–8.

<sup>17</sup> Ibid 49.

the “animal within”<sup>18</sup>. Humans are, according to this scheme, ‘completely different from everything else in nature’<sup>19</sup>.

Except that they are not. But, ‘in a situation of both similarities and dissimilarities or discontinuities between humans and non-humans, it is discontinuity which is characteristically stressed in Western thought’<sup>20</sup>. In this sense, denial is a form of misdirection of attention, away from characteristics of each sphere within a dyad that could spark a more mutual framework of relationship, such as kinship or communion, towards that which alienates one from the other (the Other). This alienated stance, when also conceived of as elevated position, that is, in terms of superiority/inferiority, ‘naturalises domination, making it appear to be part of the nature of each [of the two spheres] and in the nature of things’<sup>21</sup>. With or without the imprimatur of divine ordinance of a religious worldview as suggested by the discussion of Psalm 8, the separation between dyadic spheres is seen to be absolute and irreconcilable and, quite simply (though accomplished through complicated mental gymnastics of denial), the ‘way things are’.

#### Feature Two: Backgrounding

A second feature of dualism which relies on denial is backgrounding, or viewing the contributions of the inferior sphere to the existence of the superior sphere as inessential (when, in fact, the dominant sphere depends on these contributions). This feature is characterised by the denial of dependency: the dominant component of the conceptual pair must deny any dependency on the subordinate component.

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<sup>18</sup> Ibid 71.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 51.

This level of denial seems especially hard to maintain in the context of the human–earth relationship, since human beings depend on the ‘contributions’ of the earth to human material, social and spiritual existence in an absolute way.

Backgrounding is a systemic feature of the human–earth relationship, ‘involving systemic not noticing, not seeing’<sup>22</sup> human dependency on the other beings and systems of Earth. Plumwood notes that the ‘way in which we background nature is evident in our treatment of it in a range of areas’, citing history and economics as examples. As for economics, this feature is evident in the way in which ‘no value is given to anything natural or to resources as they stand before they are given use-value or before human labour is applied, where no account is taken of natural limits, and ecological factors are treated as “externalities”’.<sup>23</sup> In historical accounts of the development of human cultures, for example, any accounting for the role of natural systems, non-human species and environments remains in the background, whereas in reality nature is always a player, not simply the stage upon which human history is set.<sup>24</sup>

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<sup>22</sup> Ibid 69.

<sup>23</sup> Ibid 70 (citation omitted).

<sup>24</sup> I grew up in a place where a hurricane meant the difference between success and failure of an early Spanish colony, which ‘brings home’ for me the idea that nature is not background but fellow player on the stage of history. The archeology department of the local university in my home town has made significant finds in the past several years which help to tell the story. See John Worth, ‘September 19, 1559: A Hurricane That Changed History’, *WUWF* (Web Page, 19 September 2017) <<https://www.wuwf.org/post/september-19-1559-hurricane-changed-history>>. Beyond the anecdotal, I think of Mark Kurlansky’s *Salt: A World History* (Penguin Books, 2003), about which Chris Lavers writes: ‘With infectious enthusiasm, Kurlansky leads the reader on a 5,000-year sodium chloride odyssey through China, India, Egypt, Japan, Morocco, Israel, Africa, Italy, Spain, Germany, Austria, England, Scandinavia, France and the US, highlighting the multifarious ways in which this unassuming chemical compound has profoundly influenced people’s lives. Time and again, salt emerges as a pivotal player in the drama of human history, defining and structuring the relationships between the have-salts and the have-nots, and occasionally even shaping the geography of whole nations’: Chris Lavers, ‘Rock of Ages’, *The Guardian* (online, 16 February 2002) <<https://www.theguardian.com/books/2002/feb/16/historybooks.highereducation>>. See also Jeffrey Jerome Cohen, *Stone: An Ecology of the Inhuman* (University of Minnesota Press, 2015) for a lyrical depiction of the efficacy of stone in shaping human lives and perspectives.

Big History, a relatively new field of multidisciplinary inquiry encompassing physical sciences as well as cultural studies, is intriguing for the way it effectively dissolves the heretofore seemingly intractable division between pre-history and history by attending to the whole span of knowable time, space and activity of existence within one woven tapestry. (This positions the new field well as a resource for telling a story of radical continuity at a later point in the thesis, in juxtaposition to the story of radical discontinuity between nature and culture under scrutiny here.)

#### Features Three and Four: Homogenisation and Incorporation

The two features of homogenisation and incorporation play a supporting role in maintaining the backgrounding of nature. (The features of dualism are interlocking and mutually supportive, making the structure that much more complex and difficult to unpick.) Homogenisation is the tendency on the part of the superior group to disregard any points of differentiation within the constituents of the inferior group. This imagined lack of interior complexity corresponds to limiting the complexity of dealing with the group: ‘they’ can all be dismissed more readily since ‘they’ are all ‘alike’. Incorporation involves defining the underside in relation to the upperside ‘as a lack, a negativity’.<sup>25</sup> This has the effect of obscuring or denying any unassimilated ‘qualities or activities’, making it impossible for members of the inferior group to be ‘encountered fully as an independent other’.<sup>26</sup>

These two features conspire to keep nature (itself a problematic term for these reasons) in the background as ‘the environment’.<sup>27</sup> Nature is not a vast array

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<sup>25</sup> Plumwood (n 1) 52.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* 70.

of individual entities and particular systems to be encountered in their uniqueness and on their own terms; it is, rather, a singular indiscriminate ‘not-human’ to be dealt with in a ‘one size fits all’ way: to be used to meet the needs of humans. Instrumentalism translates these ways of *perceiving* nature as Other into ways of *treating* nature as Other, defined as lacking any intrinsic value.

#### Feature Five: Instrumentalism

As the feature which operationalises the other features that comprise dualism, instrumentalism is the locus of material effect for this relationship structure. Once something is defined in the negative and as essentially lacking value; once differences *within* are denied and differences *between* are accentuated to the point of denial of continuity; once dependency is denied, then the oppression and exploitation of the Other appears justified, naturalised by the closed logic of the system. It becomes only ‘fitting and natural that the lower side serves the upper as a means to his [sic] ends’.<sup>28</sup> This is the pointy end of the perniciousness of the dynamic of the human/nature dualism: this is where ecosystems fail and species go extinct, silently and off the radar of the ‘upperside’.

From the perspective of human flourishing and, indeed, survival, maintaining the dualistic structure of the human–earth relationship which appears locked into Western consciousness seems so unreasonable. To keep using nature to serve human needs without regard to any limits set by the needs of the species and systems involved is ludicrous. Weirdly, reason is the crux of the problem (an argument for the point that reason does not equate to reasonableness). In the next section, I investigate the key role of the (mis)interpretation of the human capacity

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<sup>28</sup> Ibid 53. The gender-exclusive language is original and presumably intentional, given the thesis of critical ecological feminism in which the upperside is identified with male, the underside female.

for reason in establishing the human–earth relationship in the West as a self-destructive human/nature dualism.<sup>29</sup>

### *The Key Role of Reason*

The line of fracture between reason and nature runs deeply through the key concepts of Western culture. In the contrast set, virtually everything on the ‘superior’ side can be represented as forms of reason, and virtually everything on the underside can be represented as forms of nature.<sup>30</sup>

In the above discussion of the features of dualism, hyperseparation is identified as the primary indicator of this form of relationship. As has been noted, hyperseparation depends on minimising or denying similarities or points of continuity or connection between the two conceptual sides of the relationship, with the effect of interpreting particular points of distinction as absolute and definitive. In the human–earth relationship constructed as a dualism in Western culture, the human capacity for reason is assumed to invoke hyperseparation between humans and nature. In the logic of dualism, reason is the defining characteristic of being human, while the lack of reason is the defining characteristic of being *not* human (given that the inferior sphere is defined in the negative in relation to the superior, or as a lack, which corresponds to the feature of dualism known as incorporation).

The presence/absence of reason is used as justification for several instances of intra-human hyperseparation as well as for the fundamental human/nature hyperseparation. Some categories<sup>31</sup> of human beings are determined, from the perspective of the single, deemed ‘superior’, category of human, to be lacking in

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<sup>29</sup> See *ibid*, ‘Conclusion: Changing the Master Story’ 190, for a discussion of the self-destructive character of the master identity. ‘The master’s denial of dependency and his self-deception with respect to the conditions of his own life carry grave dangers, which include, of course, self-destruction’: at 195.

<sup>30</sup> *Ibid* 44.

<sup>31</sup> The word ‘category’ is a contestable term that I do not contest here because it fits the argument in this chapter that there are socially constructed categories of human beings, some of whom are construed as Other to the idealised category.

this capacity and/or exhibiting more prevalently those capacities associated (derogatorily) with nature. Women, non-white persons and non-propertied classes of men have been associated historically with nature in Western culture. The oppression of women, non-white persons and the poor is as deeply entrenched and ongoing in this culture as is the exploitation of nature; these patterns cover the lot. Part of what makes seeking transformation within the human–earth relationship such a complicated endeavour is this multidimensional weave of oppression and exploitation.

Plumwood helpfully codifies this complexity by mapping a host of linked dualisms of which Western culture is comprised. Links amongst the dualisms are accomplished by what Plumwood calls ‘linking postulates’, which are ‘assumptions normally made or implicit in the cultural background which create equivalences or mapping between the pairs [of contrasting concepts]’.<sup>32</sup> The following chart<sup>33</sup> and explication of some exemplary linking postulates serves to convey the complexity of the overall cultural system, the framework, by which the human–earth relationship is determined.

*Figure 1: The Contrasting Pairs of Interlocking Dualism*

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<sup>32</sup> Plumwood (n 1) 45.

<sup>33</sup> Figure 1 is original to this thesis; these contrasting pairs are identified by Plumwood in *ibid* 43.

<b>Superior</b>	<b>Inferior</b>
Culture	Nature
Reason	Nature
Male	Female
Mind	Body (nature)
Master	Slave
Reason	Matter (physicality)
Rationality	Animality (nature)
Reason	Emotion (nature)
Mind, spirit	Nature
Freedom	Necessity (nature)
Universal	Particular
Human	Nature (non-human)
Civilized	Primitive (nature)
Production	Reproduction (nature)
Public	Private
Subject	Object
Self	Other

In the chart in Figure 1, the dominant or superior side of the related pair of concepts is on the left, and the inferior or underside on the right. Linking postulates emerge at several points:

For example, the postulate that all and only humans possess culture maps the culture/nature pair on to the human/nature pair; the postulate that the sphere of reason is masculine maps the reason/body pair on to male/female pair; and the assumption that the sphere of the human coincides with that of the intellect or mentality maps the mind/body pair on to the human/nature pair, and, via transitivity, the human/nature pair on to the male/female pair.<sup>34</sup>

The role of reason within this complex and interlocking network of dualisms is to provide ‘a basis for a series of further overdetermined hierarchies which it confirms and supports’.<sup>35</sup> In this way,

[v]irtually the whole set of dualisms can be mobilised for this purpose of inferiorising the sphere of nature and those human-beings who may be counted

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid 47.



as part of nature, providing a powerful and all-pervasive model of rational meritocracy which is confirmed and mirrored at every turn.<sup>36</sup>

The next section traces the genealogy of rational meritocracy as cultural model in the West, exposing how deep the roots of this way of thinking are and, therefore, giving some indication of how difficult the human/nature dualism is to uproot or disrupt. Due to the constraints of this thesis, the section comprises a brief review of Plumwood’s cartography and genealogy of Western philosophy on this point.

### *Deep Roots of Dualism*

From the perspective of critical ecological feminism, Plumwood identifies the Platonic worldview as ‘an important source of reason/nature dualism’.<sup>37</sup> This is in contrast both to what others see as Plato’s environmentalism and to where others locate the genesis of reason/nature dualism in the West — namely, Enlightenment-era scientific mechanism and ‘the rise of science, focusing especially on Descartes’.<sup>38</sup> Basic to Platonic philosophy, Plumwood argues, is the division of concepts (love, knowledge, equality, causation and so on) into two sorts, one of which is inferior. In each case of division, ‘the lower side is that associated with nature, the body, and the realm of becoming, as well as of the feminine, and the higher with the realm of reason’.<sup>39</sup> Furthermore, for Plato, ‘nature itself is divided correspondingly into higher rational “cosmos” and lower material “chaos”’.<sup>40</sup> Thus, Plumwood concludes, Platonic thought ‘yields ... a colonisation model [of

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<sup>36</sup> Ibid (hyphenation in original).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 74 (citations omitted).

<sup>39</sup> Ibid 81.

<sup>40</sup> Ibid 82. The Platonic sense of ‘cosmos’ and ‘chaos’ as applied to nature has been rendered thoroughly anachronistic by contemporary theories of an expanding universe, as with the three-tiered universe of orthodox Christianity.

nature] which points not to leaving things be in nature but to imposing human “rational” design on them’.<sup>41</sup>

In analysing the text in which Plato most explicitly deals with nature, *Timaeus*, Plumwood links the philosopher to later, including Christian, philosophers upon which Plato’s work was ‘doubtless a major influence’.<sup>42</sup> Of particular interest to Plumwood in relation to the reason/nature dualism which becomes more and more developed through the rationalists who follow Plato, right through to its ‘distinctively modern form in the thought of Descartes and his successors’, are Plato’s views on ‘the nature of the human self and of human identity and virtue’.<sup>43</sup> Plumwood observes that these views establish hyperseparation between two distinct realms: an immaterial and divine order, and an inferior material order of nature. The ‘true self’ is always aligned with the higher order, and the Platonic account of human nature is ‘as not of the earth’, setting the task of human life as ‘to rise above and distance from both nature within and nature without while here on earth’.<sup>44</sup> Plumwood indicates that this central tenet of the location of meaning for both life and death as ‘elsewhere, not to be found on earth or in human life as part of nature, but in a separate realm accessible only to humans (and only to certain chosen of these)’<sup>45</sup> is carried into Christian dogmatics in the figure of heaven and the doctrine of salvation.

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<sup>41</sup> Ibid 86. Plumwood goes on to note, regarding the colonisation model of nature: ‘Its modern equivalent is development, which, like the colonisation Plato describes in terms of the creation of the perfectly uniform and smooth geometrical figure of the globe, is the project of reforming the world to the master’s rational design, creating uniformity and regular pattern, especially the straight line, which as the shortest distance between two points, admirably expresses the instrumentalisation of nature’. In Chapter Six I identify a direction for future research in interrogating the eco-colonialism inscribed in ideas of private property commonly held in Western liberal democracies.

<sup>42</sup> Ibid 89.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid 92.

<sup>45</sup> Ibid 100.

In Plumwood’s reading, Plato accomplishes the first two steps of a three-step process of the evolution of human/nature dualism in Western philosophy: (1) ‘the construction of the normative (best or ideal) human identity as mind or reason, inferiorising the whole rich range of other human and non-human characteristics or construing them as inessential’; and (2) ‘[t]he construction of mind or reason in terms exclusive of and oppositional to nature’.<sup>46</sup> Plumwood identifies Descartes as the philosopher who makes a third and final step explicit:

the construction of nature itself as mindless ... [a step] which both reinforces the opposition [between reason and nature] and constructs nature as ineluctably alien, disposing of an important area of continuity and overlap between humans and animals and non-human nature.<sup>47</sup>

It is Plumwood’s view that the ‘Cartesian contribution builds on and presupposes the earlier steps, and together they construct the great gulf between the human and the natural world which has become characteristic of the Western tradition’.<sup>48</sup> The principle contribution of the scientific mechanism paradigm associated with the Enlightenment is the ‘new role envisaged for reason’, which is ‘the role of exercising power over the natural world rather than escaping from it or rising above it through death or right living’.<sup>49</sup> It is at this point, notes Plumwood, that the ‘fantasy of complete mastery’<sup>50</sup> over nature enters the dualised construct of the human–earth relationship. Nature, ‘nullified and defined as lack’ and seen as ‘non-agentic, as passive, non-creative and inert’ — as ‘non-mindful, being mere stuff, mere matter, devoid of any characteristics of mind or thought’ — in this

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<sup>46</sup> Ibid 107.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 110.

<sup>50</sup> Ibid.

paradigm ‘lies open to, indeed invites the imposition of human purposes and treatment as an instrument for the achievement of human satisfactions’.<sup>51</sup>

Plumwood notes that it ‘is no coincidence that this view of nature took hold most strongly with the rise of capitalism, which needed to turn nature into a market commodity and resource without significant moral or social constraint;’ and also that this view of nature ‘often underlies and is implicit in early liberal arguments for the legitimacy of private property’ (citing Locke’s ‘famous argument ... justifying private property in terms of the “mixing” of one’s own labour with nature resources in a state of nature’).<sup>52</sup> These comments help to make the connection between Berry’s identification of the mode of consciousness of radical discontinuity and the devastation of the planet. The structure of human/nature dualism in the Western cultural interpretation of the human–earth relationship was never benign, but the scientific revolution and its attendant ideologies of liberalism and capitalism are implicated in this reading as some sort of super-charger to the inherent pathos of this structure.<sup>53</sup>

To whom does this fantasy of complete mastery of nature belong? Who is the subject who has been vested, since the Enlightenment, with the power to mobilise the whole set of dualisms that describe and sustain Western culture’s rational meritocracy within the context of the ideology of annexation of nature and its redefinition as a market commodity? Again, Plumwood’s work is instructive.

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<sup>51</sup> Ibid 110–11.

<sup>52</sup> Ibid 111 (citation omitted).

<sup>53</sup> See generally Carolyn Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* (Harper & Row, 1980).

*The Master Identity*

Structures, whether buildings or philosophical systems, require maintenance. Who maintains the rational meritocracy of Western culture? Plumwood offers a portrait of Western culture's maintenance man: the master identity. Maintenance 'man'? Yes, because the master identity is gendered insofar as the male/female dualism maps onto the reason/nature and human/nature dualisms, as noted in Figure 1 on page 78. Yet also no, to the extent that any human can ostensibly maintain the broader-scale hierarchy of humans versus and over nature. The master identity is a 'multiple, complex identity formed in the context of class, race, species and gender domination'<sup>54</sup> that can, in the context of the human–earth relationship, theoretically be assumed by any human. It is observably true, however, that the master identity is held quite tightly by, and is most readily accessible to, a white male elite.

What this identity implies, for all the reasons catalogued in this chapter as features of dualism, can be summarised in a single statement: this identity entitles the bearer to the presumption of inherent worth *in juxtaposition* to the assigned instrumental value of all Others. The master identity is defined in relation to those mastered, which makes the identity powerful but also precariously dependent. Hence, the high levels of energy — exercises of power — required to maintain the dualistic structure. Energy has to be pumped into the relationship system by the bearers of the master identity at every level of operation and continuously in order to maintain the superiority of a relatively small cohort. I turn to the notion of the

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<sup>54</sup> Plumwood (n 1) 5.

social imaginary as helpful in interpreting the totalising effect of maintaining this cultural construction.

*The Social Imaginary of Mastery and Control*

A social imaginary is defined by philosopher Cornelius Castoriadis as a ‘world of ... social significations whose insaturation as well as incredible *coherence* goes unimaginably beyond everything that “one or many individuals” could ever produce’.<sup>55</sup> Castoriadis notes that ‘[t]hese significations owe their actual (social-historical) existence to the fact that they are instituted’.<sup>56</sup> Code elaborates that to be instituted means to be carried within

the normative social meanings, customs, expectations, assumptions, values, prohibitions, and permissions — the habitus and ethos — into which human beings are nurtured from childhood and which they internalise, affirm, challenge, or contest as they make sense of their place, options, responsibilities within a world, both social and physical, whose ‘nature’ and meaning are also instituted in these imaginary significations.<sup>57</sup>

Who does the work of maintaining the instituted social imaginary, of keeping the saturation and coherence levels high? Whoever is in charge of the institutions. In the Western social imaginary, the bearer of the master identity is in charge, because the Western social imaginary is defined by mastery and control. The Western social imaginary of mastery and control is portrayed succinctly by epistemologist Lorraine Code in terms resonant with themes sounded in the brief exegesis of Psalm 8 at the beginning of this chapter:

God-given human dominion over all the earth and, more precisely, of dominion arrogated to certain chosen members of the human race, not just over the earth but over certain human Others as well.<sup>58</sup>

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<sup>55</sup> Cornelius Castoriadis in David Ames (ed), *Philosophy, Politics, Autonomy: Essays in Political Philosophy* (Oxford University Press, 1991) 62, cited in Lorraine Code, *Ecological Thinking: The Politics of Epistemic Location* (Oxford University Press, 2006) 30 (emphasis in original).

<sup>56</sup> Ibid.

<sup>57</sup> Code (n 55) 30.

<sup>58</sup> Ibid 32.

Code expands upon this depiction by noting that

the social imaginary of mastery extends across the ethos and expectations of the affluent white Western world that sees no limits to human possibilities of mastering and controlling the world’s resources — animal (both human and nonhuman), vegetable, and mineral — no reason to contest the rightness of ‘man’s’ claims to dominion over all the earth, and no reason to take issue with the generic concept ‘man’s’ exclusionary referential scope.<sup>59</sup>

It is Code’s contention that there is every reason to disrupt the social imaginary that ‘holds in place a view of the appropriate human relation to the natural world as one of a spectator consciousness standing outside and apart from the world’.<sup>60</sup> Code works to ‘contest and infiltrate’<sup>61</sup> the epistemic purpose of this ‘entrenched imaginary’,<sup>62</sup> which is to ‘master the ruly and unruly aspects of nature, both physical–geographical and human, and to know the world well enough to be able to manipulate, predict, and control it to serve human ends’.<sup>63</sup> Code’s process is a reflexive one, ‘requiring (the imaginary) to submit its assumptions of universal rightness to scrutiny, its residual and totalising ... assumptions, and its governing beliefs about the nature of nature, knowledge and knowledgeable subjectivity’.<sup>64</sup>

### *Spatial Dimensions of the Social Imaginary*

A constructive way of framing the project of this thesis, aimed as it is at transforming the Western human–earth relationship towards greater mutuality, is in Code’s terms, as indicated immediately above: submitting cultural assumptions to scrutiny. In this section, I have submitted the ‘naturalness’ of intra- and inter-species hierarchies of being to the scrutiny of Plumwood’s critical ecological

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<sup>59</sup> Ibid 31 (brackets in original).

<sup>60</sup> Ibid 32.

<sup>61</sup> Ibid 30.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 32.

<sup>64</sup> Ibid 30.

feminism. I have questioned the Western cultural assumption that the human–earth relationship is hierarchical and that human beings are on top.

In the second half of this chapter, entitled ‘Ecocentrism and Beyond,’ through a brief survey of contemporary frameworks associated with environmental and ecological ethics, I question the assumption that human beings are at the centre. As dualism is the structure of human–earth relations in Western culture, so anthropocentrism is its correlative ethical system. In spatial terms, dualism puts (certain) human beings ‘at the top’ of a relational hierarchy and anthropocentrism puts (certain) human beings at the centre of a circle of moral concern. I have arranged this review of frameworks by degree of disruptiveness to the instituted spatial scheme: from ever-widening expansions of the circle (in which more and more entities beyond the human count) to replacing the circle with a web (in which what counts is interdependency) to the idea of the mesh (in which both everything and no-thing count in equal measure). I conclude this survey with a comment about how this project is positioned in relation to these frameworks.



## Ecocentrism and Beyond

Visible nature is all plasticity and indifference — a moral multiverse ... and not a moral universe. To such a harlot we owe no allegiance; with her as a whole we can establish no moral communion; and we are free in our dealings with her several parts to obey or to destroy, and to follow no law but that of prudence in coming to terms with such of her particular features as will help us to our private ends.<sup>65</sup>

One of the most influential sources of the exclusively human-centric ethic attendant to anthropocentrism is Immanuel Kant. For Kant, only human beings warrant ethical consideration because only human beings possess the value-conferring property of reason.<sup>66</sup> (Here is a key point of connection between this ethic and the reason/nature dualism that is foundational to the dualistic structure of the human–earth relationship, as described in the first half of this chapter.) For Kant, all non-rational beings are to be counted as things because they only have relative worth as means to human ends. Rational beings, by contrast, are a ‘designated “person” because their nature indicates that they are ... things which may not be used as means’.<sup>67</sup>

Even from within an anthropocentric view, this distortion of differentiation<sup>68</sup> is alarmingly problematic, ethically speaking. As J Baird Callicott notes:

[i]f we equitably applied Kant’s ethical theory, we could justifiably perform the same painful and destructive biomedical experiments on unwanted non-rational infants that we inflict on non-rational nonhuman animals; we could open a

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<sup>65</sup> William James, ‘Is Life Worth Living?’, in *The Will to Believe* (Longmans Green, 1896), quoted in Plumwood (n 1) 120.

<sup>66</sup> See J Baird Callicott, ‘The Pragmatic Power and Promise of Theoretical Environmental Ethics: Forging a New Discourse’ (2002) 11(1) *Environmental Values* 3: ‘[C]entral to Kant’s ethic is the precept that each person be treated as an end in him- or herself, not merely as a means. Kant justifies — or “grounds” — this precept by claiming that each person has intrinsic value. That claim in turn is justified by finding in each person an intrinsic value-conferring property, which Kant identified as reason’: at 5.

<sup>67</sup> *Ibid* 6, again discussing Kant (citation omitted).

<sup>68</sup> See Plumwood (n 1). Plumwood uses the phrase ‘distortion of difference’ to codify features of dualism which involve the denial of the other: at 158.

hunting season on the severely mentally-handicapped; and we could make pet food out of the abjectly senile.<sup>69</sup>

Stepping back from these dystopian speculations, there are identifiable problems with an ethic that hinges upon the reason/nature dualism. A narrow (raced, classed, gendered) anthropocentrism has historically justified the denial of enfranchisement to women and non-Anglo men based on the idea that these ‘Others’ did not possess reason to the degree required to exercise this right (see the discussion in the first half of the chapter about the interlocking systems of dualisms constellating around the reason/nature dualism). This position haunts Western culture, even as it is no longer generally socially acceptable in public discourse to identify races or genders as irrational ‘Others’: prohibitions against denying full social inclusion of ‘other’ (non-normative) races and genders are enshrined in law and governance in jurisdictions closely aligned with Western ideology. Discrimination and hierarchies of difference still appear throughout Western-based cultures in ‘soft’ forms such as the pay differential favouring men over women; gerrymandering electoral boundaries in the United States that has the effect of disproportionately disenfranchising the poor and ethnic-racial minorities; and issues of environmental injustice which can be similarly mapped.

Just as intersectional anthropocentrism is culpable for a range of oppressions within human relations, so anthropocentrism rationalises the exploitation and oppression of non-human beings and nature which marks Western human–earth relations. As discussed in the previous section of this chapter, a principle feature of the structure of the human–earth relationship in the West is

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<sup>69</sup> Callicott (n 66) 7.

instrumentalism: in dualism, the centre is justified in using the margins as means to ends. Anthropocentrism, by definition, upholds an exclusively human centre.

Steps to expand the circle of moral concern begin with what is known as broad anthropocentrism. Broad anthropocentrism is touted as

[a] nuanced anthropocentrism [that] would argue ... that ecologically humans are dependent upon and embedded within all other beings and systems, therefore making decisions that are good for humans will inevitably also serve all other elements of the environment as well.<sup>70</sup>

This sounds disconcertingly like the environmental equivalent of contemporary ‘trickle down economics’ or Adam Smith’s historical ‘invisible hand’ theory, which proposes that self-interest unintentionally but inevitably results in social benefit.<sup>71</sup> Gross and widening class inequalities and the mass extinction of species bely the assumed benevolence of inherently self-interested systems on this point. In the case of human–earth relations, moves beyond anthropocentrism are required

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<sup>70</sup> L Goralnick and M P Nelson, Table 1, ‘Anthropocentrism’, in *Encyclopaedia of Applied Ethics* (Elsevier, 2012) 145.

<sup>71</sup> The ‘invisible hand’ theory is attributed to Adam Smith: ‘The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an *invisible hand* to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species. When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to have been left out in the partition. These last too enjoy their share of all that it produces. In what constitutes the real happiness of human life, they are in no respect inferior to those who would seem so much above them. In ease of body and peace of mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for’: Adam Smith, *The Theory of Moral Sentiments: To Which is Added a Dissertation on the Origin of Languages* (A Millar, A Kincaid, and J Bell, 3<sup>rd</sup> ed, 1767) 273 (Web Page, 19 June 2006) <[https://books.google.com.au/books/about/The\\_Theory\\_of\\_Moral\\_Sentiments.html](https://books.google.com.au/books/about/The_Theory_of_Moral_Sentiments.html)> (emphasis added). For comment on the theory, see Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science* 1243, 1244: ‘Adam Smith did not assert that this was invariably true, and perhaps neither did any of his followers. But he contributed to a dominant tendency of thought that has ever since interfered with positive action based on rational analysis, namely, the tendency to assume that decisions reached individually will, in fact, be the best decisions for an entire society’.

in order for there to be any effective shift away from the dynamic of instrumentalism.

### *Moving Beyond Anthropocentrism*

Taking first steps beyond anthropocentrism, interestingly, returns one to Kant structurally if not in terms of content: ‘[t]he form or ethical architecture that [is] retained [in an expansion of the moral community to include nonhuman animals] is Kant’s close linkage of moral ends, intrinsic value, and a value-conferring property’.<sup>72</sup> What shifts in a broadening ethical perspective, allowing for the possibility of considering whether or not (some) animals ‘count’, is the understanding of the value-conferring property. If reason is not held to be the exclusive ticket to the inner circle, then what? Answers vary according to worldview, as indicated in the following brief survey of schemes.

### Zoocentrism

Tom Regan and Peter Singer are proponents of a band of non-human inclusive ethical system known as ‘zoocentrism’.<sup>73</sup> In Regan’s framework, the ‘[s]ubjects of a life have a sense of self, remember a personal past, entertain hopes and fears about the future — in sum, enjoy a subjective state of being, which can be better or worse from their point of view’.<sup>74</sup> Peter Singer proposes sentience, or ‘the capacity to experience pleasure and pain’,<sup>75</sup> as the value-conferring characteristic of living things, human or not.

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<sup>72</sup> Callicott (n 66) 7.

<sup>73</sup> For an overview of zoocentrism, see Alison J Hanlona and Manuel Magalhães-Sant’Anaa, ‘Zoocentrism’ in *Encyclopedia of Global Bioethics* (online at 13 July 2019). The entry also includes a helpful figure depicting the concentric circles of expanding bioethical concern, as discussed in this section (Figure 1, page 2).

<sup>74</sup> Callicott (n 66) 7.

<sup>75</sup> *Ibid.*, discussing Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (Avon, 1977).

It could be argued that anthropocentrism is not so much displaced in zoocentrism as indemnified in the fact that the standard for inclusion is set at traits shared with humans. Nevertheless, these ethical schemes propose some way of considering non-human beings as also mattering or having moral value (almost) of their own. By resetting the value-conferring basis to traits shared by humans and non-humans alike, there is at least a recalibration of homocentrism in the move to decentre reason as the ‘value-conferring property’. Zoocentrism is, therefore, a close, but meaningful, expansion of anthropocentrism.

### Biocentrism

Biocentrism is a category of ethical framework in which all living things are deemed valuable. Paul Taylor is a biocentric thinker who focuses on ‘an attitude of respect for nature’, which is ‘to regard the wild plants and animals of the Earth’s natural ecosystems as possessing inherent worth’.<sup>76</sup> For Taylor, an entity possesses inherent worth insofar as it has ‘a good of its own’,<sup>77</sup> which is to say, according to Patrick Curry, that it ‘can be benefited or harmed in relation to its potential biological development’.<sup>78</sup> For the biocentric thinker, the value-conferring property is that ‘living beings have ends, goals, or purposes — *teloi*, in a word — of their own’.<sup>79</sup> Another thought leader in this category is Warwick Fox, who considers living individuals to have worth as ‘*autopoietic*’ creatures — ‘self-creating and self-renewing’.<sup>80</sup>

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<sup>76</sup> Paul Taylor, *Respect for Nature* (Princeton University Press, 1986) 71, quoted in Patrick Curry, *Ecological Ethics: An Introduction* (Polity, 2nd ed, 2011) 75.

<sup>77</sup> Taylor, discussed in Curry (n 76) 75.

<sup>78</sup> *Ibid.*

<sup>79</sup> Callicott (n 66) 8.

<sup>80</sup> *Ibid.*, discussing Warwick Fox, *Towards a Transpersonal Ecology* (Shamahala, 1990).

The implication of biocentrism in terms of a spatial schematic is that, by expanding the circle of worth to include all living things and systems, the centre is essentially eradicated; the situation of ‘all in’ eliminates the margins. Not all boundaries are eliminated in this scheme, however. There remains in biocentrism a tight boundary around the worth of the individual entity *as an individual*. What counts is the individual entity (albeit, of any kind). Is the idealised human as autonomous individual actually displaced in a scheme that favours individualism, which is a social construct rather than a natural state of existence?

### Ecocentrism

As Paul Taylor calls for an attitude of respect for individual members of the non-human community, so Aldo Leopold, as exemplar of the ecocentric approach, argues that a land ethic ‘implies respect for ... the community as such’.<sup>81</sup> Ecocentrist ideas such as those of the pioneering Leopold can be characterised as relating to holism: the idea that ‘[c]ollectives exhibit emergent properties that allow the whole to be greater than the sum of its parts’.<sup>82</sup> The ‘starting point for valuation and right action’<sup>83</sup> in ecocentrism is to ‘value both wholes and individuals directly’.<sup>84</sup> Another chief proponent of the ecocentric framework, Callicott, ‘argues that an extension of individualist traditional ethics cannot successfully defend the moral inclusion of environmental wholes, and a

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<sup>81</sup> Aldo Leopold, *A Sand County Almanac* (Oxford University Press, 1949) 204. Leopold’s land ethic ‘simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land’ (203–4).

<sup>82</sup> L Goralnik and M P Nelson, ‘Anthropocentrism’ in *Encyclopedia of Applied Ethics* (Science Direct, 2012) 145, 148.

<sup>83</sup> *Ibid* 151.

<sup>84</sup> *Ibid* 152.

scientifically relevant environmental ethic cannot fail to recognise the moral standing of systems and wholes'.<sup>85</sup>

There is not much to distinguish ecocentrism from biocentrism apart from the shift from individual entities as centres of value to multiform systems as centres of value. The basis of conferral of moral value is implicitly the same in both views: systems have value, like individuals, because of their individual existence. Individualism is retained in a way, though it is the individualism of a whole instead of a part. Does this represent any displacement of the sense of Other-ness, or is the boundary around the Other simply redrawn? One way to displace centrism within this scheme would be to set human value in the same terms: humans are valuable because they are multiform systems. To the extent that ecocentrism does not shift the definition of the human being from that of an individual entity (and possessor of reason) relating to Others from a mode of distinction (individuals with the distinctive capacity to interpret and choose to honour the value of systems), the human/nature dualism is insufficiently challenged within this system: *Anthropos* remains as the implied subject (centre) relating to the Other as object (albeit, with respect).

Even Deep Ecology, which, in the words of founding thinker Arne Næss, is based on the '[r]ejection of the man-in-environment image [sic] in favour of the relational, total-field image',<sup>86</sup> maintains a sense of the human in relation to Other from a position of distance or distinction:

the ecological field-worker acquires a deep-seated respect, or even veneration, for ways and forms of life. He [sic] reaches an understanding that others reserve for fellow men [sic] and for a narrow section of ways and forms of life. To the

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<sup>85</sup> *Ibid.*

<sup>86</sup> Arne Næss, 'The Shallow and the Deep, Long-Range Ecology Movement: A Summary' (1973) *Inquiry* 16(1–4) 95, 95.

ecological field-worker, the equal right to live and blossom is an intuitively clear and obvious value axiom.<sup>87</sup>

The sense of partnership that Næss evokes, when talking about the way that the ‘life quality of humans themselves’ depends ‘in part upon the deep pleasure and satisfaction we receive from close partnership with other forms of life’,<sup>88</sup> is a signal of a homocentric remainder in the ethics of Deep Ecology, in a form that might be characterised as spiritual or psychological instrumentalism.<sup>89</sup>

### The Partnership Ethic

Carolyn Merchant depicts and includes herself amongst a category beyond ecocentrism that she calls a ‘partnership ethic’. The partnership ethic is a much more mutual proposition than the sort of partnership focus attributed to Deep Ecology in which, through partnership with non-human others, human subjects fulfill their own satisfactions. The partnership ethic is defined by Merchant as holding ‘that the greatest good for the human *and* nonhuman communities is in their mutual living interdependence’.<sup>90</sup> Merchant argues that a ‘partnership ethic is grounded, not in the self, society, or the cosmos, but in the idea of relation’.<sup>91</sup>

The partnership ethic represents a substantive spatial reconfiguration: beyond the model of expanding concentric circles to a model of the web of interdependency. This alternative, relational framework can be expanded to encompass non-living as well as living reality. Thomas Birch argues that even

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<sup>87</sup> Ibid 95–6.

<sup>88</sup> Ibid 96.

<sup>89</sup> Plumwood engages with the contradictory nature of Deep Ecology at length in her evaluation of its capacity for transcending anthropocentrism. See generally ‘Deep Ecology and the Denial of Difference’, in Plumwood (n 1) 165–89. See, in particular, 175: ‘The proper study of the deep ecologist, it seems is “autology”, and the other is of concern for what it reflects back about the self; the other is made an “instrument of self-definition”’ (citation omitted).

<sup>90</sup> Carolyn Merchant, *Radical Ecology: The Search for a Livable World* (Routledge, 2<sup>nd</sup> ed, 2005) 83 (emphasis added).

<sup>91</sup> Ibid.



inorganic objects ‘might matter morally’.<sup>92</sup> This is Birch’s theory of universal consideration: ‘a potentially-morally-relevant-until-proven-otherwise approach which grants consideration to all things, living and non-living, with the understanding that all relationships are important and necessary’.<sup>93</sup>

*Reaching Out Further: The Mesh*

Timothy Morton argues that reality is not a web but a mesh.<sup>94</sup> In the mesh, the holes matter as much as the wholes. At this point of total interconnectivity, what if no *thing* counts — neither individual nor collective of any scale or type — but if, rather, what ‘counts’ is the interactivity itself? And what if the interactivity has no moral character in and of itself: it is not partnership or care ... it just simply is? What if nothing exists independently, nor even interdependently, but everything and everywhere is symbiosis?<sup>95</sup>

How to value holes, or no-thing-ness? Morton argues for coexistentialism rather than coexistence, which knocks the notion of moral concern into a completely new framework encompassing no-thingness as much as all things, or knowingness and unknowability at once.<sup>96</sup> Evolution indicates, according to

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<sup>92</sup> Goralnik and Nelson (n 82) 148.

<sup>93</sup> Ibid 152.

<sup>94</sup> See Timothy Morton, *The Ecological Thought* (Harvard University Press, 2010) 28: ‘Mesh can mean the holes in the network and threading between them. It suggests both hardness and delicacy. It has uses in biology, mathematics, and engineering and in weaving and computing — think stockings and graphic design, metals and fabrics. It has antecedents in mask and mass, suggesting both density and deception. By extension, “mesh” can mean “a complex situation or series of events in which a person is entangled; a concatenation of constraining or restricting forces or circumstances; a snare.” In other words, it’s perfect’.

<sup>95</sup> See *ibid* 33–4.

<sup>96</sup> *Ibid* 47: ‘The ecological thought needs to develop an ethical attitude we might call “coexistentialism”. ... ‘Interconnection implies separateness and difference. ... The mesh isn’t a background against which the strange stranger appears. It is the entanglement of all strangers’. See also *ibid* 10: ‘If ecology is about radical coexistence, then we must challenge our sense of what is real and what is unreal, what counts as existent and what counts as non-existent’.

Morton, not purposiveness but the opposite: teleology is out the window.<sup>97</sup> This is an ultimate field of intrinsic worth grounded in an almost inconceivable symbiosis that includes endosymbiosis: ‘symbiosis takes places within as well as among organisms’.<sup>98</sup> For Morton:

Well[,] ecology is very simple, it means the interconnection of all life forms, and indeed the interconnection of all those life forms with non life, and you know, where do you draw the line? And where do you stop? Do you stop at the edge of the biosphere, because you need the magnetic shield around Earth and then you need the sun obviously, which then implies the solar system which implies the galaxy, you can’t really stop when you start thinking about it. So it’s not a complete holistic thing, unlike what a lot of people think ecology is, it means thinking something that is boundless, yes? Everything’s related but it’s boundless, there’s no centre and there’s no edge. So there’s no centre, there’s no edge, and there’s no one dominant top level, or there’s no one fundamental bottom level, and there’s no middle level.<sup>99</sup>

In this view there are no concentric circles since there are no boundaries; this is everywhere and nowhere; there is neither here nor there.<sup>100</sup> Is an ethical framework even possible without boundaries? If everything matters *and* no-thing matters, which by logical extension means that in bigger and bigger and boundless succession everything matters, then does anything matter? This is ‘weird’ and ‘uncanny’ territory, to use two of Morton’s favourite descriptors. It is worth

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<sup>97</sup> See *ibid* 40: ‘Total interconnectedness ... has no goal’. Furthermore, ‘[n]atural selection isn’t about decorum or an organic “fit”’: at 30. In Morton’s reading of Darwin’s theory of natural selection, the emphasis of the theory is not on survival of the fittest but the ‘apparent pointlessness of life forms’: at 30. In Morton’s view, ‘this is their saving grace’: at 30. Also: ‘All that we call Nature is mutation and often pointless ... Evolution shares pointlessness with art ...’: at 44.

<sup>98</sup> See *ibid* 36: ‘The insides of organisms teem with aliens. As Lynn Margulis has shown, our cells contain the original bacteria, the Archaean anaerobic ones, the prokaryotes, hiding in organic tissue from the ecological disaster they created, the disaster called oxygen. This is the theory of endosymbiosis: symbiosis takes place within as well as among organisms. Exchange and interdependence occur at all levels ... At a microlevel, it becomes impossible to tell whether the mishmash of replicating entities are rebels or parasites: inside-outside distinctions break down. The more we know, the less self-contained living beings become’ (citations omitted).

<sup>99</sup> Timothy Morton and Hans Ulrich Obrist, ‘Extinction Marathon: Visions of a Future’, *Serpentine Sackler Gallery 18 October 2014–19 October 2014* (Web Page, 9 July 2015) <<https://www.scribd.com/document/271036392/Timothy-Morton-Hans-Ulrich-Obrist-DIS-Magazine>>.

<sup>100</sup> See Morton (n 94) 40: ‘The mesh is vast yet intimate: there is no here or there, so everything is brought within our awareness’. Morton also states: ‘*Here* is shot through with *there*’: at 52 (emphasis in original).

holding ground here in everywhere and nowhere at once because this is a radically open space.

What if the presumption of certitude itself is the real culprit in Western conceptions of the human–earth relationship? According to Morton, the challenge issued by contemporary understanding of the nature of reality is the knowledge of the *strange stranger*: the more something is known, the stranger it appears.<sup>101</sup> In what way might weirdness and a sense of the uncanny be productive as the basis of respect for all things, no-things, and the spaces in between things? What shifts in the human–earth relationship if the paradox of strange familiarity is seen to be the basis for what J Baird Callicott called ‘biophilia’, or the extension of social sympathies recognised by Hume, Darwin and Leopold, to the ‘biosphere per se’, which ‘provides both for the intrinsic value of non-human individual organisms and for superorganismic entities — populations, species, biocoenoses, biomes, and the biosphere?’<sup>102</sup> What if sympathy is, weirdly and uncannily, ignited not by the recognition of the familiar but the drawing curiosity of the strange, a strangeness that at the same time is familiar and therefore cannot be fetishised or deemed exotic?

These are not questions for this thesis, but I travel this path out into the unravelling in order to establish a motif for this project of disrupting the calcified dualism and anthropocentrism of the Western human–earth relationship through emerging theories of the nature of material existence: to embrace, like Morton, the perils of ‘transposing a new science to a worldview’, as per Holmes Rolston III:

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<sup>101</sup> Ibid 41.

<sup>102</sup> J Baird Callicott, ‘Non-Anthropocentric Value Theory and Environmental Ethics’ (1984) 21(4) *American Philosophical Quarterly* 299, 304.

The perils of transposing from a new science to a world view, patent in the history of scientific thought, are surpassed only by the perils of omitting to do so. Granted that we yet lack a clear account of the logic by which we get our values, it seems undeniable that we shape them in significant measure in accord with our notion of the kind of universe we live in. Science has in centuries before us upset those values by reappraising the character of the universe. One has but to name Copernicus and Newton, in addition to our observation that we have lately lived in the shadow of Darwin. The ecological revolution may be of a similar order; it is undeniably at work reilluminating the world.<sup>103</sup>

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<sup>103</sup> Holmes Rolston III, 'Is There an Ecological Ethic?' (1975) 85(2) *Ethics* 93, 108.

## Conclusion

Berry's thesis that the human–earth relationship in Western culture is characterised by a *mode of consciousness* of radical discontinuity, and that this mode of consciousness establishes an instrumental *mode of operation* between humans and the earth which is wreaking havoc on the planet's ecological systems, other species and human futures, is a provocative starting point for the project of this thesis. In the first instance, it prompts inquiry into the features and genealogy of this worldview: what is it and where does it come from? Taking the measure of this pathology, which has been the work of this chapter, is the necessary groundwork for finding a way to productively disrupt it.

In this chapter, through a close reading of the critical ecological feminism of Val Plumwood, I established that the mode of consciousness which sets the instrumental dynamic of the Western human–earth relationship features, first and foremost, denial: the denial of any fundamental human dependency on the physical world, coupled with the denial of any meaningful similarity between humans and non-human beings and life worlds. In the gross distortion of difference that dualism presumes, dualism being the relationship structure of the Western human–earth relationship, human beings are understood to be not only separate from but also superior to nature, due to the presence of the capacity of reason in (certain) human beings and the presumed lack thereof in Others (both human and non-human). Reason is what defines the master identity, and it is by reason that the master identity operates as the subject of the Western social imaginary of mastery and control over nature. By the logic of dualism, human beings are in charge and at the top.

Also, within the logic of dualism, human beings are at the centre. In the second half of this chapter, I demonstrated that just as Western ontology presumes the superiority of (certain) human beings over nature, so Western moral reasoning presumes the inherent worth of human beings exclusively amongst Earth's entities. I surveyed the field of efforts to expand the circle of moral concern beyond the human, concluding that the extension of moral concern beyond the human remains anthropocentric in the sense that human characteristics set the standard of comparison and inclusion. The partnership ethic proposed by Carolyn Merchant is exceptional in that it arises not from the consideration of the characteristics of any entities involved but in the characteristics of relation itself. In this mode, spatiality is a different construct altogether from that of hierarchy or circle: it is web. What matters in this scheme is connection rather than position.

The chapter finished on a speculative note. What if the most promising approach to transforming the human–earth relationship is to surrender one last bastion of denial: the denial of strangeness, of the uncanny? I wondered what transformation in the human–earth relationship becomes possible with a surrender to the idea of uncertainty. What if the 'web' is actually a 'mesh', in which even the spaces in between matter come to matter, or in which it is hard to know, and cannot be determined to any degree of certainty, whether 'this' matters more than 'that'. In these speculations, I signalled something of where this project leads: to conjectures of posthuman normativity arising from contemporary scientific observations of reality at the most micro and most macro levels.

In progressing towards exploring and applying these sorts of conjectures to the human–earth relationship, I turn now from profiling the instituted social imaginary to profiling a particular institution of the social imaginary: law and legal

theory. I interrogate modes of legal consciousness, concluding that both the subject matter of law and law as subject matter express the radical discontinuity and the structure of dualism implicated in this chapter as pathological to the human–earth relationship. My aim is to profile what Anna Grear defines as the socio-juridical imaginary:

The use of the term ‘imaginary’ is here intended to evoke the ways in which liberal law functions as a materio-semiotic and concrete manifestation of a dominant worldview, now operating globally as a frame for sense-making and action. The term invokes a socio-juridical habitus in and through which, arguably, juridical formations do some of their most powerful work as constructs for the ‘normalisation’ of a particular, dominant construction of ‘reality’.<sup>104</sup>

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<sup>104</sup> Anna Grear, ‘Towards New Legal Futures? In Search of Renewing Foundations’, in Anna Grear and Evadne Grant (eds.), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 283, 284 (n 4).

## Chapter Three

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### Law's Role in the Human–Earth Relationship



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### Law's Role in the Human–Earth Relationship

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## Introduction: Laying Down Track

Law doesn't just mop up, it defines. It doesn't just correct, it makes possible. What it defines, the meaning frame it sets forth, is an important force in shaping human behaviour and giving it sense, lending it significance, point and direction. It is this sort of thing — law not so much as a device or mechanism to put things back on track when they have run into trouble, but as itself a constructive element 'within culture,' a style of thought, which in conjunction with a lot of other things equally 'within culture' — Islam, Tibetan Buddhism, etc. — lays down the track in the first place ...<sup>1</sup>

Thomas Berry was highly critical of the role of law as a cultural institution in structuring an ecologically destructive human–earth relationship in the West. In particular, Berry was outspoken in his opinion that a bond between the legal profession and the judiciary in America acts, on the one hand, as a barrier to 'any effort of governments to regulate industrial, commercial, or financial establishments' and, on the other hand, as a licence to 'the predation on the natural world by private corporations'.<sup>2</sup> Furthermore, it was Berry's observation that 'the basic orientation of American jurisprudence is toward personal human rights and toward the natural world as existing for human possession and use'.<sup>3</sup>

Despite these criticisms of the *status quo* in the Western legal system, Berry was able to imagine a role for law and legal theory in fulfilling his vision of an ecologically enhancing (as opposed to exploitive) human presence on the planet. Berry argued that in order '[t]o achieve a viable human–Earth situation a new jurisprudence must envisage its primary task as that of articulating the conditions

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<sup>1</sup> Clifford Geertz, 'Off Echoes: Some Comments on Anthropology and Law' (1996) 19(2) *PoLAR*, 35, quoted in Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press, 2006) 8.

<sup>2</sup> See Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999) 143.

<sup>3</sup> Ibid 60. Although Berry confines his remarks to American jurisprudence, I follow the line of Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009) (n XX) 11: 'And this [in reference to her thesis, not Berry's] is true for all the Anglophone common law countries which are the concern of this book: Australia, New Zealand, Canada, the United States and the United Kingdom. This is not surprising given their common legal and cultural heritage'.

for the integral functioning of the Earth process, with special reference to a mutually enhancing human–Earth relationship'.<sup>4</sup>

In this chapter, I argue that Western culture's institutionalised anthropocentrism as manifest in law and legal theory creates a significant barrier to the realisation of a jurisprudence oriented to ecological sustainability and the flourishing of all life on Earth. Ultimately, the project of this thesis is to propose a means of overcoming this barrier via a specific point of systemic intervention into the way law structures the human–earth relationship: reconceptualising the legal subject in terms that contravene patterns of radical discontinuity between humans and nature by disrupting the structure of dualism that constitute these patterns. In Chapter Two, I characterise the mode of consciousness of radical discontinuity as pathological in terms of the human–earth relationship. The purpose of this chapter is to take the measure of this barrier: how infected is Western legal consciousness, including Earth Jurisprudence, with the mode of consciousness of radical discontinuity and its concomitant structure of dualism?

Principally, I argue that anthropocentrism is the visible framework not only of law's subject matter but also of the matter of law as a subject in and of itself. In the first discussion of the chapter, in a section entitled 'Law's Anthropocentrism: All the Objects in the Room are Red', I make the point that law and legal theory in Western culture revolves exclusively, with few notable exceptions, around human subjectivity and thinking about human interests and concerns.<sup>5</sup> Then I discuss the

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<sup>4</sup> Berry, *The Great Work* (n 2) 61.

<sup>5</sup> Although not a topic of investigation in this thesis, it is worth noting that even environmental law is inherently anthropocentric because its focus is on management. See Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2010) 4 [1.3]: '[T]he central lynchpin around which environmental management throughout the globe revolves, the concept of sustainable development, is itself defined in terms of the integration of environmental and economic factors in decision-making'.

way that thinking *about* the law in Western culture conforms to the dualistic structures that underpin this culture. In the second section of the chapter, entitled ‘Earth Jurisprudence,’ I extend these discussions across a review of Earth Jurisprudence, identifying points at which this legal philosophy is as yet still constrained by a certain level of unquestioned adherence to these paradigms.

These discussions assume that law and legal theory reflect the values, beliefs and perspectives of the culture that constructs it.<sup>6</sup> The assumption that law and legal theory are culturally contingent stands in contrast to a general feeling promulgated within Western culture that law has its own rarefied existence apart from culture.<sup>7</sup> This rarefication is itself a cultural construct of the Western worldview, linked to the objectification and separateness inherent to the scientific mechanism privileged within this worldview. Lawrence Rosen notes that ‘it is not uncommon for those who, by profession or context, are deeply involved in a given

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<sup>6</sup> This thesis adopts a social constructionist approach. See Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin, 1979) 384–5 for a discussion within the field of sociology of the ‘astonishing phenomenon’ of ‘society as part of the human world, made by men [sic], inhabited by men, and, in turn, making men in an ongoing historical process’. See also Elizabeth Mertz, ‘A New Social Constructionism for Sociological Studies’ (1994) 28(5) *Law & Society Review* 1243 for a description of components of a ‘moderate’ social constructionist vision of the law. For a brief history of the relationship between social theory and legal theory generally, see Kim Lane Schepple, ‘Legal Theory and Social Theory’ (1994) 20 *Annual Review of Sociology* 383. See also Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015) for an in-depth discussion on the topic of the relationship between law and culture.

<sup>7</sup> Far beyond a ‘general feeling’, this idea of the set-apartness of law is foundational to a variety of legal theories. See Margaret Davies, *Asking the Law Question* (Lawbook, 3rd ed, 2008). Natural law, for example, assumes that the principles upon which law is based are self-evident rather than derivative, universal and not contingent, and therefore cannot be ‘culturally specific, or dependent on experience, language, class, gender, or race’: at 89. Positivist legal theory contends that law ‘laid down in an authoritative manner by an institution with law-making authority’ can be ‘conceptually separable from morality, custom, religion, and social norms’: at 40 (citation omitted). Although legal positivism maintains that law is part of society and created by human beings (rather than ‘discovered’ within natural principles), this school of legal theory is opposed to the exploration of any primary causes or basis for law. Davies notes that ‘[m]ost of our modern perspectives, however radical and critical they may appear to be, tend in various (though not always obvious) ways to reinforce — or at least to take as a point of departure — the positivist view of law’: at 40. See Chapters 5, 6, 7, and 8 of *Asking the Law Question* for a comprehensive introduction to a range of critical modern perspectives on legal theory.

legal system to act as if “The Law” is quite separable from other elements of cultural life’.<sup>8</sup> More is made of this point later in this chapter, but here the general idea that law and legal theory are social constructs is disclosed as a core assumption of this inquiry. A brief example makes this simple point: compare the idea that ““The Law” is separable from other elements of cultural life’ (Rosen, above) to this description of law in a non-Western culture by Australian Aboriginal legal theorist Irene Watson.

The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it.<sup>9</sup>

A corollary assumption operating in this discussion is that law and legal theory are not only formed by culture, but also formative of culture.<sup>10</sup> Law and legal theory make their contributions to the ‘entire cosmology [of a culture]’ and perform a ‘way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real’.<sup>11</sup> Law and culture are thus mutually interactive and co-creative. There is, therefore, ‘no such thing as natural law, there is only law naturalised’.<sup>12</sup>

Herein lies the promise and possibility, envisioned by Berry and developed to a certain extent within Earth Jurisprudence, for crafting new pathways away from a devastating human presence on the planet and towards a sustainable future for the earth. The promise is that non-anthropocentric law can be naturalised and the possibility is that the cultural presence of those human beings on the planet

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<sup>8</sup> Rosen (n 1) 6.

<sup>9</sup> Irene Watson, ‘Indigenous Peoples’ Law-Ways: Survival Against the Colonial State’ (1997) 8 *Australian Feminist Law Journal* 39, 39 quoted in Margaret Davies, ‘Legal Separatism and the Concept of the Person’, in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy, and Legal Positivism* (Aldershot, 2000) 115, 115.

<sup>10</sup> Rosen (n 1) 11.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* 65.

under the auspices of the Western legal system can be structured by law in ways that are supportive of the flourishing of life on Earth. Fully realising the promise and potential includes questioning hosts of assumptions in Western culture about not only what law is, but also where, how, when, who and why law is.<sup>13</sup> The chapter concludes, in a section entitled ‘Looking Beyond Law’s Limits,’ with a brief engagement with Margaret Davies’s work towards what she calls ‘unlimiting law’, or tracing pathways of releasing ways of thinking about law from constraints endemic to Western culture: constraints attached to anthropocentrism, patterns of radical discontinuity and structures of dualism. These pathways of potential release are instructive to this project, opening up spaces for thinking differently about law’s role in the human–earth relationship.

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<sup>13</sup> Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) viii.

## Law's Anthropocentrism: All the Objects in the Room Are Red

Ms. Circelli stated that what she saw 'severely impaired [her] enjoyment of the animals who were living there,' and that she was 'overcome with sympathy for those animals, particularly Rusty, with whom [she] formed an emotional bond, after watching him in his cage.' ... She further explained that she 'would very much like to revisit the animals [she] observed ... particularly Rusty,' but she 'cannot bear to see the animals treated the way they are treated.'<sup>14</sup>

I am still waiting to live in a society in which the courts will lend themselves to a conversation about Rusty's life, not ours.<sup>15</sup>

The artists Cildo Meireles and Robert Therrien have created installations of rooms in which everything is red.<sup>16</sup> No other colours are allowed. To experience one of these rooms — particularly the Meireles, because the viewer enters and walks around in the room — is to be surrounded by, enveloped in, the colour red. Red is all that matters. The installation and the experience of the installation are *thoroughly* red.

The Western legal system is a room like this, rendered exclusively in the hue of humankind. Law's subject — operationally and philosophically — is the human being and the human community. Law's purpose, form, content and objectives are all human-centric. Law is oriented to, and presupposes, human beings.<sup>17</sup> Within this closed system, human beings are all that *really* matter. This is true not only when some aspect of law is dealing with issues that are specifically

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<sup>14</sup> Brief of Plaintiff-Appellee at 16, *Animal Legal Defense Fund, Inc. v Glickman* (DC Cir, 20 June 1997, Nos. 97-5031, 97-5009, 97-5074), in Christopher D Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Oxford University Press, 3rd ed, 2010) 176.

<sup>15</sup> Stone (n 14) 176.

<sup>16</sup> Cildo Meireles, *Red Shift I: Impregnation* 1967–84. Image and comment available at the website of the Tate Modern Museum in London: *Tate* (Web Page) <<https://www.tate.org.uk/whats-on/tate-modern/exhibition/cildo-meireles/cildo-meireles-explore-exhibition/cildo-meireles-2>>; Robert Therrien, *Red Room* 2000–2007. Image and information on the same website <<https://www.tate.org.uk/art/artworks/therrien-red-room-ar00702>>.

<sup>17</sup> Naffine, *Law's Meaning of Life* (n 3) 1.

related to interactions among human beings, but also when interactions between human beings and non-human life worlds or other ‘natural objects’<sup>18</sup> are at issue.

Until just over 45 years ago, there seems to have been no notable remark within legal discourse regarding human chauvinism, nor any well-developed suggestion that things might somehow be different: that somehow the other-than-human might ever be considered as subject to legal consideration *in its own right*. Christopher D Stone is credited with making a significant contribution to bringing this radical idea to the world of legal discourse and, through it, to Western consciousness in general.

#### *Should Trees Have Standing?*

Stone was not an environmental lawyer in 1971 when he started wondering aloud about whether or not courts would ever open themselves to a consideration of the legal subjectivity of non-human life worlds or entities. In an effort to reignite the flagging enthusiasm of his introductory property law students at the end of a long class session, Stone asked, ‘What would a radically different law-driven consciousness look like? ... One in which Nature had rights ...’<sup>19</sup>

This line of inquiry not only sparked lively discussion to close out the day’s class, but also inspired Stone to write an article that has ‘since assumed a modest but apparently enduring place in contemporary environmental law and ethics’.<sup>20</sup> Stone astutely timed his article ‘Should Trees Have Standing? — Toward Legal

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<sup>18</sup> The use of the term ‘natural objects’ and even ‘nature’ is emblematic of law’s ‘psychic investment in our [human beings’] sense of separateness and specialness in the universe’: Christopher Stone, ‘Should Trees Have Standing? — Toward Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450, 496, quoted in Ngaire Naffine, ‘Legal Personality and the Natural World: On the Persistence of the Human Measure of Value’ (2012) 3(Special Issue) *Journal of Human Rights and the Environment* 68, 75.

<sup>19</sup> Stone (n 14, 2010) xi.

<sup>20</sup> *Ibid.*



Rights for Natural Objects'<sup>21</sup> to be of use to Justice William O Douglas of the United States Supreme Court in a dissenting opinion in *Sierra Club v Morton*, 405 US 727 (1972) ('*Sierra*').<sup>22</sup> With such a prominent citation, the question of law being about or for non-human entities and life worlds entered the arena of legal discourse.

A brief overview of this case illustrates the new possibilities invited by Stone's article whilst also demonstrating how the law was not yet ready to embrace these possibilities. In addition, a short summation of Stone's survey of relevant cases across the over 40 years since *Sierra* indicates that two things remain true: the possibility of other-than-human rights, and the fact that such possibility is yet largely unrealised.

#### *Sierra Club v Morton*

In 1965, the United States Forest Service invited bidding for a recreational development in an area known as Mineral King Valley, adjacent to the Sequoia National Forest in the Sierra Nevada Mountains of Northern California. An extensive \$35 million plan proposed by the Walt Disney Foundation was approved by planning authorities in 1969. The plan, which was comprised of 'motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily', was to be constructed on '80 acres of the valley floor under a 30-year use permit from the Forest Service'.<sup>23</sup> Other facilities, 'including ski lifts, ski trails, a cog-assisted railway, and utility installations', were to be constructed 'on the mountain slopes and in other parts of the valley under a

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<sup>21</sup> Stone (n 18, 1972) 450–501.

<sup>22</sup> See Stone (n 14, 2010) xiii–xiv for the story of how this article came to the attention of J Douglas.

<sup>23</sup> *Sierra*, 405 US 727, 729 (1972).

revocable special use permit'.<sup>24</sup> In addition, a highway '20 miles in length' and a 'high-voltage power line' were also proposed as necessary, requiring 'the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks'.<sup>25</sup>

The prospect of this development was troubling to representatives of the Sierra Club, a non-profit organisation which 'by its activities and conduct ... exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the [United States]'.<sup>26</sup> These representatives took the following actions: (a) seeking a public hearing on the proposed development (which was unsuccessful); (b) expressing objections to the development in private correspondence with the Forest Service and the Department of the Interior; and (c) filing suit in the United States District Court for the Northern District of California,

seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges ... and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project.<sup>27</sup>

The District Court granted the injunction (433 F 2d 24); the respondents appealed, and the Court of Appeals for the Ninth Circuit reversed the injunction. The United States Supreme Court affirmed the reversal.<sup>28</sup> The Disney resort at Mineral King Valley was a 'go'. (The fact that the resort was never built and the

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid [Footnote 8].

<sup>27</sup> *Sierra*, 405 US 727, 730 (1972): 'The petitioner Sierra Club sued ... and invoked the judicial review provisions of the *Administrative Procedure Act*, 5 U. S. C. § 701 *et seq*'.

<sup>28</sup> Stewart, J. delivered the opinion of the Court, in which Burger, C. J., and White and Marshall, JJ, joined. Douglas, J., post, p. 405 U. S. 741, Brennan, J., post, p. 405 U. S. 755, and Blackmun, J., post, p. 405 U. S. 755, filed dissenting opinions. Powell and Rehnquist, JJ., took no part in the consideration or decisions of the case': *Sierra*, 405 US 727.

valley was annexed into the Sequoia National Park in 1978 had more to do with changing circumstances and business strategies within the Walt Disney Foundation than the efforts of conservationists.<sup>29</sup>)

*Sierra* was not actually about Mineral King Valley itself, at least not in terms of the majority opinion of the Supreme Court. The case was decided against representatives of the Sierra Club for failing to prove ‘injury in fact’ to *themselves*. Injury to the wilderness area receded into the background (a predictably familiar position within the human/nature dualism of Western culture as discussed in the previous chapter), whilst deliberation took place on the issue of whether or not the members of the Sierra Club bringing suit would ‘be ... among the injured’.<sup>30</sup> It was decided that the ‘alleged injury [would] be felt only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area [would] be lessened by the highway and ski resort’.<sup>31</sup> The court ruled that the Sierra Club had ‘failed to allege’ that its members, specifically, would be affected ‘in any of their activities or pastimes by the Disney development’<sup>32</sup> and, thus, ‘injury in fact’ had not been proven.<sup>33</sup>

Only in the dissenting opinion of Justice Douglas does the ‘natural object’, the Mineral King Valley, come into view. For Douglas,

the critical question of ‘standing’ [Footnote 2/1] would be simplified and also put neatly into focus if we fashioned a federal rule that allowed environmental

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<sup>29</sup> After Walt Disney died in 1966, the priorities for his ongoing corporation shifted towards completing Walt Disney World in Florida instead of the Mineral King development. The annexation of the valley into the national park ‘effectively kill[ed] any plans to ever build a big commercial ski resort in the area’: Robert Niles, ‘What if Disney Had Built the Mineral King Ski Resort?’, *Orange County Register* (Web Page, 8 February 2017) <<http://www.ocregister.com/2017/02/08/what-if-disney-had-built-the-mineral-king-ski-resort/>>.

<sup>30</sup> *Sierra*, 405 US 727, 735 (1972).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*: ‘Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed action of the respondents’. See Footnote 8 of the citation source.

issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers. ... 34

The Justice argues for ‘the conferral of standing upon environmental objects to sue for their own preservation’,<sup>35</sup> citing ‘public concern for protecting nature’s ecological equilibrium’<sup>36</sup> as impetus; Stone’s article for reference;<sup>37</sup> Aldo Leopold’s land ethic for justification;<sup>38</sup> and the precedent of legal standing being conferred upon inanimate objects for rationalisation.<sup>39</sup>

Until very recently, an opinion that takes into direct account the other-than-human life world has never carried the day in cases of concern for the conservation of ecosystems or the protection of non-human individuals or species.<sup>40</sup> Amongst the cases that Stone (who is now well known for his expertise in the area of environmental law) surveys from the period since *Sierra* through to 2010 in which non-human plaintiffs are named, ‘in no case was the [nonhuman] species the sole plaintiff’.<sup>41</sup> In most instances, the standing of non-human species ‘has usually gone

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<sup>34</sup> *Sierra*, 405 US 727, 741 (1972).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Sierra*, 405 US 727, 742 (1972).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Sierra*, 405 US 727, 752 (1972): ‘The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land’. See also Aldo Leopold, *A Sand County Almanac* (Oxford University Press, 1949) 204.

<sup>39</sup> ‘In rem actions brought to adjudicate libellants’ interests in vessels are well known in admiralty. ... But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. ... And, in collision litigation, the first-labeled ship may counterclaim in its own name. ... Our case law has personified vessels: “A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is mere congeries of wood and iron ... In the baptism of launching, she receives her name, and, from the moment her keel touches the water, she is transformed ... She acquires a personality of her own’: *Sierra*, 405 US 727, 750 [Footnote 2/2] (1972).

<sup>40</sup> On 20 March 2017, the Te Awa Tupua (Whanganui River Claims Settlement) Bill in New Zealand was given Royal Assent. This legislation includes ‘legal recognition of the Whanganui River as Te Awa Tupua (the Maori name) and of Te Awa Tupua as a legal person’: Te Awa Tupua (Whanganui River Claims Settlement Bill) Explanatory Note, 129–2. See Chapter One of this thesis (n 12) for reference to compendia of other Rights of Nature cases.

<sup>41</sup> Stone (n 14, 2010) 160.

unchallenged by the defendant and is not dwelt upon by the court'.<sup>42</sup> Stone notes that *human* standing has been liberalised over the years by 'relaxing the traditional requirements' (such as that the plaintiffs have suffered injury in fact), making it 'easier for humans to bring cases in their own names on the homocentric theory that the damage to the environment was a cognizable injury to [human] individuals'.<sup>43</sup> Stone laments the continuing proclivity for environmental advocates to 'play up to, and reinforce, homocentrist perspectives ... [due to] the prevailing and sanctioned modes of explanation in our society' not being 'quite ready' for something 'less egoistic'.<sup>44</sup>

In reflecting on *Sierra* and Stone's commentary on the continuing egotism/human chauvinism of law and legal theory, I am reminded of the poem 'Learning the Trees' by Howard Nemerov (below). This poem speaks volumes about a primary barrier to the shift from ego-logical thinking to eco-logical thinking about and within law and legal theory. Built into the structure of dualism that undergirds Western culture, as discussed in the previous chapter, is the assumption that one must stand apart in order to know: an epistemological position that precludes intimacy or the kind of knowing in which the Other, and co-

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<sup>42</sup> Ibid. Stone notes one interesting exception in which '[e]xclusive reliance on nonhuman plaintiffs evolved unintentionally during the course of litigation'. In the case of *Loggerhead v County Council of Volusia County* 896 F. Supp. 1170 (M.D. Fla. 1995), 'when the defendant county moved to dismiss based on alleged procedural infirmities of the human plaintiffs, the court continued the proceedings on the basis of the species' own standing (whatever the merit of the alleged bar to the humans) and granted a partial preliminary injunction. On appeal, the Eleventh Circuit did not challenge — and thus, accepted — the district court's reliance on the turtles, exclusively, for standing'. No circuit has yet overruled the position of the Eleventh Circuit court, meaning that Loggerhead turtles in Volusia County, Florida, have standing and that this decision is available as a potential precedent for other animals in other places to be seen as having standing.

<sup>43</sup> Ibid 167.

<sup>44</sup> Ibid 24. See Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 142 for discussion on the topic of egoism in the human–earth relationship. See Paul Babie, 'Reflections on Private Property as Ego and War' (2017) 30(4) *International Journal for the Semiotics of Law — Revue internationale de Sémiotique juridique* 563, 563 for 'reflections on the nature of the metaphysical "wall" erected between the "Included" and the "Excluded/Other" by the concept of private property and its implementation in a state's legal apparatus'.

flourishing in relation with the Other as part of the whole community of life on Earth, is as much a matter of concern as the self. This particular poem is especially apt in the context of the current discussion because it is about trees and the particular knowing of trees that is peculiarly privileged within Western epistemology. Furthermore, as regards the notion of human egotism, there are indications in this poem of some measure of squeamishness about giving up the mastery and control that Western epistemology presumes which, I submit, may be the real barrier at issue as regards transformation in the human–earth relationship.

Before you can learn the trees, you have to learn  
The language of the trees. That's done indoors,  
Out of a book, which now you think of it  
Is one of the transformations of a tree.

The words themselves are a delight to learn,  
You might be in a foreign land of terms  
Like samara, capsule, drupe, legume and pome,  
Where bark is papery, plated, warty or smooth.

But best of all are the words that shape the leaves —  
Orbicular, cordate, cleft and reniform —  
And their venation — palmate and parallel —  
And tips — acute, truncate, auriculate.

Sufficiently provided, you may now  
Go forth to the forests and the shady streets  
To see how the chaos of experience  
Answers to catalogue and category.

Confusedly. The leaves of a single tree  
May differ among themselves more than they do  
From other species, so you have to find,  
All blandly says the book, “an average leaf.”

Example, the catalpa in the book  
Sprays out its leaves in whorls of three  
Around the stem; the one in front of you  
But rarely does, or somewhat, or almost;

Maybe it's not catalpa? Dreadful doubt.  
It may be weeks before you see an elm  
Fanlike in form, a spruce that pyramids,  
A sweetgum spiraling up in steeple shape.

Still, *pedetentim* as Lucretius says,  
Little by little, you do start to learn;

And learn as well, maybe, what language does  
And how it does it, cutting across the world.

Not always at the joints, competing with  
Experience while cooperating with  
Experience, and keeping an obstinate  
Intransigence, uncanny, of its own.

Think finally about the secret will  
Pretending obedience to Nature, but  
Invidiously distinguishing everywhere,  
Dividing up the world to conquer it,

And think also how funny knowledge is:  
You may succeed in learning many trees  
And calling off their names as you go by,  
But their comprehensive silence stays the same.<sup>45</sup>

In the next section of this chapter, entitled ‘Earth Jurisprudence’, I consider in what ways, and to what extent, Earth Jurisprudence departs from the egotism and human chauvinism of Western law and legal theory. Foundational to this movement is an embrace of radical, direct intimacy within the human–earth relationship. This different way of knowing and relating to trees (and other modes of being) has the effect of redirecting some of the focus of concern within law and legal theory away from human interest alone. I argue that the absence in this still-emerging legal philosophy of significant critical challenges to a number of points within the paradigm of rights as a structure for legal relations has the effect of sustaining a degree of homocentrism within the philosophy, which may prove debilitating to the realisation of its espoused values and objectives as regards the transformation of the human–earth relationship.

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<sup>45</sup> Howard Nemerov, ‘Learning the Trees’, *The Collected Poems of Howard Nemerov* (University of Chicago Press, 1977).

## Earth Jurisprudence

According to Linda Sheehan, our legal system

presumes that we can act apart from the environment and that we can control and manipulate it as we choose, to maintain a (false) sense of security in our lives. The dangerously outmoded operational assumptions ignore the fact that we are bound to this Earth. To thrive, we must accept this reality, and the corresponding inherent rights of all of the Earth's ecosystems and inhabitants to have a fighting chance to thrive and evolve as well.<sup>46</sup>

Whilst Thomas Berry was learning the language of trees indoors from books as a classically schooled child within Western paedagogical culture, he was also learning something of the 'comprehensive silence of trees' that Nemerov evokes in the poem featured at the close of the previous section. More accurately, according to his own account, Berry was learning the sights, sounds and smells of a meadow. Berry tells the story of his childhood immersion into the landscape of a meadow across the creek from his family home:

It was an early afternoon in May when I first wandered down the incline, crossed the creek, and looked out over the scene.

The field was covered with white lilies rising above the thick grass. A magic moment, this experience gave to my life something that seems to explain my thinking at a more profound level than almost any other experience I can remember. It was not only the lilies. It was the singing of the crickets and the woodlands in the distance and the clouds in a clear sky. It was not something conscious ...<sup>47</sup>

For Berry, this was a normative experience that framed his life's work: 'Whatever preserves and enhances the meadow in the natural cycles of its transformation is good; whatever opposes this meadow or negates it is not good. My life orientation is that simple. It is also that pervasive'.<sup>48</sup> Given that Berry is credited with

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<sup>46</sup> Linda Sheehan, 'Earth Day Revisited: Building a Body of Earth Law for the Next Forty Years', in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 236, 237. Sheehan is particularly reflecting on the Endangered Species Act but also makes this general comment on the entire legal system.

<sup>47</sup> Berry, *The Great Work* (n 2) 12.

<sup>48</sup> *Ibid* 13.



instigating Earth Jurisprudence,<sup>49</sup> it could be said that this ecocentric legal philosophy began in that meadow across the creek.

It is beyond the scope of this thesis to comprehensively review the whole of Earth Jurisprudence or to construct a genealogy of it. Instead, in keeping with the movement in the previous chapter from a depiction of the anthropocentrism of the Western social imaginary to an engagement with contestations of it from environmental ethics, in this section of the current chapter I enter into conversation with a number of the key components and commitments of this field of contestation of law's anthropocentrism. I conclude that Earth Jurisprudence to date remains caught in an (enlightened) anthropocentric paradigm evidenced by a benevolent paternalism, continuing allegiance to the liberal idealisation of personal rights,<sup>50</sup> and the tacit acceptance of 'sedimented, often merely taken for granted, conceptions of subjectivity that inform [its] descriptive and normative stance'.<sup>51</sup>

In launching this critique, I acknowledge the significant challenge levied by Earth Jurisprudence to the 'basic orientation [in Western law and legal theory] toward personal human [only] rights and toward the natural world as existing for human possession and use'.<sup>52</sup> Furthermore, I acknowledge that Earth Jurisprudence is a work in progress, a burgeoning effort to raise '[t]he entire

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<sup>49</sup> See Peter Burdon, 'A Theory of Earth Jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28, 30: 'Earth Jurisprudence is an emerging philosophy of law, proposed by Thomas Berry in 2001' (citation omitted).

<sup>50</sup> See Jules Cashford, 'Dedication to Thomas Berry', in Burdon (ed), *Exploring Wild Law* (n 46) 3, 8: 'Thomas was not entirely happy with the language of rights, but it was the best we had to be going on with'. Cashford defends the continuing use of the language of rights because it 'answers the legal establishment in its own terms': at 8. This thesis argues that Earth Jurisprudence is well positioned to challenge law to update its terms in ways that take better accounting of the reality of interdependency amongst the whole community of life on Earth.

<sup>51</sup> Lorraine Code, 'Self, Subjectivity, and the Instituted Social Imaginary', in Shaun Gallagher (ed), *The Oxford Handbook of the Self, Oxford Handbooks Online* (Oxford University Press, May 2011) 1, 2.

<sup>52</sup> Berry, *The Great Work* (n 2) 60.

question of possession and use of the Earth, either by individuals or by establishments ... in a more profound manner than Western society has ever done previously'.<sup>53</sup> My aim is to establish the place of the project of this thesis in relation to the movement.

### *Earth Jurisprudence as Critical Legal Theory*

Earth Jurisprudence questions the 'unquestioned starting point for most theories of law', which is the 'hierarchical ordering of the human and non-human world'<sup>54</sup> (as per the lengthy discussion of dualism in the previous chapter, in the section entitled 'The Human–Earth Relationship as Dualism'). This is the critical focal point of the Earth Jurisprudence critique of Western law and legal theory: that human beings are recognised as subjects of law (having inherent worth) and that all other modes of being are designated objects (having only instrumental worth to human beings as property and resources). More broadly, Earth Jurisprudence implicates legal positivism, a 'purely conceptual or descriptive theory of law, free from moral evaluation or external influence',<sup>55</sup> in maintaining the dynamic of radical discontinuity in the Western construct of the human–earth relationship.

From the perspective of legal positivism, the non-human world is 'remote, inappropriate, and unnecessary to the operation of law'.<sup>56</sup> Except that it isn't. The recognition of the interwoven nature of human–non-human existence is central to Earth Jurisprudence. The non-human world, which is to say the 'broader and

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<sup>53</sup> Ibid 61. Cormac Cullinan, in 'A History of Wild Law', in Burdon (ed), *Exploring Wild Law* (n 46) 12, mentions, with regard to the emergence of Earth Jurisprudence, being 'very aware of how long it takes to communicate a very different worldview, and particularly to make a good case for rethinking our entire approach to law and governance': at 16.

<sup>54</sup> Peter Burdon, 'The Great Jurisprudence', in Burdon (ed), *Exploring Wild Law* (n 46) 59, 61.

<sup>55</sup> Ibid 61.

<sup>56</sup> Nicole Graham, *Landscape: Property, Environment & Law* (Routledge, 2010) 20, quoted in *ibid*.

primary earth system' of which 'the human community is a subsystem',<sup>57</sup> is understood in this legal philosophy to be precisely the intimate, appropriate and necessary context for everything, including law and legal theory. *Its* operating principles are actually (whether acknowledged or not) *our* (human) operating principles, by the fact of human material existence/embodiment. The trouble with acting as if the earth's operating principles do not apply to human beings and behaving in ways that contravene them to a significant and forceful degree is that doing so risks disturbing or destroying the balance of a system that fundamentally and inescapably supports human existence: this is the contemporary situation of global environmental degradation. Earth Jurisprudence proposes responding to the situation with a realignment of Human Law with the Great Law. This overarching premise is the first of several key components of Earth Jurisprudence briefly identified in the following section.

#### Key Components of Earth Jurisprudence: The Great Law

The project of Earth Jurisprudence is to align Human Law with the Great Law or Great Jurisprudence, defined as the 'inherent order and lawfulness of the cosmos which structures and sustains all life within it'.<sup>58</sup> A two-tiered jurisprudence emerges:

The first order of law is Great Law, which refers to the principle of Earth community. 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.<sup>59</sup>

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<sup>57</sup> Ibid 72. Burdon reflects on the aspect of Earth Jurisprudence that calls for a shift away from an anthropocentric worldview by noting that 'this is simply the recognition that the human community is a sub-subsystem of a broader and more primary earth system. As integral members of the Earth community, human beings need to act from within this comprehensive context, adapting Human Law to respect the Great Law and learning once more to inhabit the Earth': at 72.

<sup>58</sup> Cashford (n 50) 7.

<sup>59</sup> Burdon, 'A Theory of Earth Jurisprudence' (n 49) 32.

Peter Burdon bases his interpretation of Earth Jurisprudence as a theory of natural law on this structure: natural law theory assumes that principles exist ‘out there’ that are not derived from anything, are self-evident, and are superior, universal, and unchanging.<sup>60</sup> Natural law is not historically associated with the laws of nature per se, but rather principles of human interaction that are discoverable by reason.<sup>61</sup> Whilst not wanting ‘to become focused on an unproductive conflict with legal positivism’,<sup>62</sup> Burdon observes that Earth Jurisprudence ‘employ[s] the broad framework’ of natural law ‘for ecocentric goals’.<sup>63</sup> Chiefly, the laws of nature that comprise the Great Law give purpose and direction to Human Law that shape, control and manage human interaction with the environment in ways that support ecological integrity.<sup>64</sup> In this way, ‘[h]uman law derives its legal quality and power to bind in conscience from the Great Law’ and, Burdon argues, ‘any law that transgresses the Great Law can be considered a corruption of law and not morally binding’.<sup>65</sup>

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<sup>60</sup> See, generally, Burdon ‘A Theory of Earth Jurisprudence’ (n 49) for an in-depth discussion of the relationship of the Great Law and Natural Law.

<sup>61</sup> Ibid 85: Burdon quotes Lynda Warren, ‘Wild Law - the Theory’ (2006) 18 *Environmental Law and Management* 11, 13: ‘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’. Translating this orientation into the purposes of Earth Jurisprudence — to take account of principles of interaction between humans and non-human life worlds — Liz Hosken summarises: ‘Law exists. ... Humans cannot make law but must become aware of it’: Liz Hosken, ‘Reflecting on an Intercultural Journey into Earth Jurisprudence’, in Burdon (ed), *Exploring Wild Law* (n 46) 26.

<sup>62</sup> Burdon (n 49) 33.

<sup>63</sup> Ibid 34.

<sup>64</sup> It is Burdon’s contention that ‘the focus of Earth Jurisprudence should be on the ecological integrity of the Earth community’: Burdon, ‘A Theory of Earth Jurisprudence’ (n 49) 44. Burdon notes that ‘the concept of ‘ecological integrity’ has been developed principally by the Global Ecological Integrity Group: at n 93 (citation omitted). Burdon also refers to Laura Westra’s description of integrity as ‘a valuable whole, [in] the state of being whole or undiminished, unimpaired, or in perfect condition’, citing Laura Westra, ‘Ecological Integrity’, in Carl Mitcham (ed), *Encyclopaedia of Science, Technology and Ethics* (2005) 574.

<sup>65</sup> Burdon, ‘A Theory of Earth Jurisprudence’ (n 49) 32.

## Key Components of Earth Jurisprudence: Wild Law

Cormac Cullinan is amongst those who offer a vision of Human Law in correspondence with the Great Law, calling his approach to Earth Jurisprudence ‘Wild Law’. In this nomenclature, Cullinan signals an interest in making room in law and legal theory for the ‘creative life force’ that is ‘inherent in all people and organisms’.<sup>66</sup> Making space for ‘wildness’ in law, Cullinan argues, ‘foster[s] intimate and passionate relationships between people and nature’<sup>67</sup> that ‘[create] the freedom for all members of the Earth Community to play a role in the continuing co-evolution of the planet’.<sup>68</sup> The aim of fostering intimate and passionate human–earth relationship is, in fact, wildly disruptive to the orthodox view of the purpose of law as depicted by Cullinan:

Law, after all, is intended to bind, constrain, regularise, and civilise. Law’s rules, backed up by force, are designed to clip, prune and train the wildness of human behaviour into the manicured lawns and shrubbery of the civilised garden.<sup>69</sup>

Cullinan indicates that making room for wildness in law is a matter of taking account of three elemental themes of all life in the universe as discussed by Berry: subjectivity, communion and differentiation.<sup>70</sup> Judith Koons elaborates on these themes as a means of developing ‘a platform for re-thinking law and governance’<sup>71</sup> comprised of principles and legal frameworks that reflect an emerging, global, Earth-centred consciousness.

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<sup>66</sup> Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2nd ed, 2011) 31.

<sup>67</sup> *Ibid* 30.

<sup>68</sup> *Ibid* 31.

<sup>69</sup> *Ibid* 29.

<sup>70</sup> Berry, *The Great Work* (n 2) 45. See also Brian Swimme and Thomas Berry, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era: A Celebration of the Unfolding of the Cosmos* (HarperCollins, 1992).

<sup>71</sup> Judith E Koons, ‘Key Principles to Transform Law for the Health of the Planet’, in Burdon (ed), *Exploring Wild Law* (n 46) 45, 46.

### Key Components of Earth Jurisprudence: Three Themes of All Life

Koons asks, ‘How could the philosophical and scientific themes of subjectivity, communion, and differentiation translate into principles for systems of jurisprudence ... and into working legal standards?’<sup>72</sup> Koons’s contribution to Earth Jurisprudence is systematic: she works with the three themes in turn, imagining how each might be translated from the Great Law into Human Law. Koon’s treatment of the themes arises from her analysis of work by Berry (in collaboration with Brian Swimme)<sup>73</sup> in gleaning insights from findings in biological, evolutionary and ecological sciences about the nature and processes of life in all its forms.

#### Theme One: Subjectivity

This theme corresponds to the Berry and Swimme interpretation of the scientific observation of autopoiesis, or the ‘self-organising and self-manifesting’<sup>74</sup> capacities of life forms. For Koons, ‘a jurisprudential reflection of subjectivity [as defined by this capacity] may lie in the principle that all beings, systems, and entities in Nature have intrinsic value, to be expressed in law and governance ... through the principle of standing’.<sup>75</sup>

#### Theme Two: Communion

Perhaps reflecting something of the spiritual perspective that Berry, as a Passionist priest, brought to the process of developing Earth Jurisprudence, the ecological reality of interdependence is named ‘communion’ by Berry and Swimme.<sup>76</sup> This

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<sup>72</sup> Koons (n 71) 47.

<sup>73</sup> See Swimme and Berry (n 70).

<sup>74</sup> Koons (n 71) 47, discussing Swimme and Berry (n 70).

<sup>75</sup> Koons (n 71) 47.

<sup>76</sup> See generally Swimme and Berry (n 70).

terminology evokes more of a sense of a ‘web of relationships’ than a machine with interfunctioning parts, and it attempts to communicate interdependency as a form of ‘unity that is comprehensive’,<sup>77</sup> something greater than the sum of its parts. Koons suggests translating this ecological theme into jurisprudence as ‘a principle of relational responsibility’ which could be legally rendered as ‘a trust and our [human] responsibility as a trustee’.<sup>78</sup>

### Theme Three: Differentiation

The complexity and diversity of life on Earth that is a result of the biological and evolutionary processes of differentiation is the third and final of the ‘big picture’ themes interpreted by Berry and Swimme as comprising the Great Law. Koons indicates that ‘differentiation may be reflected in the notion of an Earth Democracy that supports, at all levels of governance, legal recognition of all components of our Earth community, both present and future’.<sup>79</sup>

### *Observing the Bud, Dreaming of the Flower*

Linking theory and practice, or ‘translating’ themes into principles and principles into working standards as per Koons, is an area of development in the field of Earth Jurisprudence. In 2009, the United Kingdom Environmental Law Association

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<sup>77</sup> Koons (n 71) 47.

<sup>78</sup> Ibid 51, citing Carol M Rose, ‘Joseph Sax and the Idea of the Public Trust’ (1998) 25(3) *Ecology Law Review Quarterly* 351. See Klaus Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Edgar Elgar, 2015) for a full treatment of the construct of trusteeship applied to the earth community.

<sup>79</sup> Koons (n 71) 47. See generally Vandana Shiva, *Earth Democracy: Justice, Sustainability and Peace* (Zed Books, 2016). Shiva articulates 10 principles of Earth Democracy encompassing themes such as the recognition of the intrinsic worth of all living beings, the interconnectivity of social, political, ecological, and economic systems, the localisation of economies and political participation and the globalisation of values such as compassion, justice and sustainability. For a concise account of these principles and discussion of Shiva’s body of work related to Earth Democracy across three volumes, see Christopher Hrynkow, ‘Situating Earth Democracy: Vandana Shiva on Agroecology, Contemporary Politics and Resilience’ (2018) 16(3) *Political Science Review* 205.

published a research review of laws ‘that recognise Nature’s inherent rights to exist, thrive and renew her [sic] natural cycles’, concluding that although none of the environmental laws selected for review from around the world ‘could be completely described as “wild”’, there were indications that Earth Jurisprudence has ‘gained ground’ on the international, national and local levels, including some cases of recognition of indigenous customary law.<sup>80</sup> As Koons puts it, ‘Earth Jurisprudence is in bud’.<sup>81</sup>

In this section, I raise a few issues that I feel either hinder or advance the realisation of the promise of this movement in various ways and to various degrees. Again, this is not meant to be a comprehensive analysis but an engagement with themes related to Earth Jurisprudence that sound throughout this project. The topics covered here are framed as core commitments of Earth Jurisprudence (a structure designed to complement the prior discussion of core components). I discuss the following core commitments: (a) the commitment to ‘care’ as a guiding principle of human–earth interaction; (b) the commitment to rights as a structure by which to achieve the movement’s goals (which I concede may be more of a concession than a commitment); and (c) the commitment to reality, which is to say, to being a Realist form of legal philosophy. I comment on what I perceive to be the strengths and weaknesses of these commitments in terms of bringing the Earth Jurisprudence movement to full bloom.

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<sup>80</sup> United Kingdom Environmental Law Association, ‘Does Wild Law Exist in Law?’, *UKELA* (Web Page) <<https://www.ukela.org/>>. See also United Kingdom Environmental Law Association, *Wild Law: Is There Any Evidence of Earth Jurisprudence in Existing Law and Practice?: An International Research Project* (Report, UKELA and The Gaia Foundation, March 2009).

<sup>81</sup> Koons (n 71) 55. Cullinan talks about ideas as ‘buds’ and describes their ‘insurrectionary’ character in reference to his theories of Wild Law: Cullinan, *Wild Law* (n 66) 178.



### Commitment to Care

Berry developed his reflections on the experience he had as a boy of at-one-ness or unity with the vibrant community of the meadow into an idea he called the ‘communion of subjects’. If there is a kernel or bud of Earth Jurisprudence, it is this idea of a mutually enhancing whole Earth community. The project of Earth Jurisprudence can be framed as trying to reflect and substantiate this character of human–earth relationship within law and governance.

Intimacy, or communion, is the natural state of human–earth relationship for Earth Jurisprudence theorists, as exemplified by Ian Mason:

The first [level of human–earth relationship] is the intimate, personal level in which each individual finds and establishes their own relationship with Nature. This is the real origin of the sense of lawfulness to the extent that, where it is well established and understood, no other law is necessary.

It is when this intimate communion with nature is lost or forgotten that the second, political aspect of Earth Jurisprudence becomes necessary. This political jurisprudence is the use of laws and governance systems of the dominant contemporary kind to reflect the more intimate jurisprudence of close communion with nature.<sup>82</sup>

Although Mason indicates that mutuality lies at the core of the natural or innate intimate relationship or communion between human beings and nature, I note how he displaces mutuality with an anthropocentric hierarchy of care when the second level of Earth Jurisprudence is invoked. In describing Earth-centred law, Mason focuses on ‘protection’ and a ‘common duty of care’,<sup>83</sup> implying that the role of human beings in the intimate relationship with nature is that of caregiver. I observe that Berry evokes this same sense of a special role of human beings *towards* the earth community when he describes ‘the primary concern of the human community’ as ‘the preservation and enhancement of this

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<sup>82</sup> Ian Mason, ‘One in All: Principles and Characteristics of Earth Jurisprudence’, in Burdon (ed), *Exploring Wild Law* (n 46) 35, 40–1.

<sup>83</sup> Mason (n 82) 40.

comprehensive community, even for the sake of its own survival'.<sup>84</sup> There is nothing wrong with care, preservation and enhancement per se; certainly, they are preferable to orientations based on exploitation and an exclusively instrumental view of nature. However, I argue that such benevolently paternalistic orientations weaken the project of Earth Jurisprudence in two principle ways: they insufficiently dismantle the power differential in the structure of the human–earth relationship, and they close off an avenue to the depth of self-reflection required for transformational change.

The orientation of a hierarchy of care — human beings caring for the 'Others' in the earth community — potentially evacuates the foundational commitment of Earth Jurisprudence to mutuality and communion, or coexistence in a community of intrinsically valuable entities. Mutual relationships *can* be mutually caring, but unless mutuality is explicitly articulated and established as the overt structure of a relationship, a relationship of care can implicitly incur a power differential between carer and cared-for.

Identifying a role for human beings as caregivers within the natural world can be read as a response to the existential crisis evoked by the commitment to mutuality: Who are we ([certain] humans) if not in charge? What if picking up this role in response to such anxiety amounts not to a genuine care ethic<sup>85</sup> nor to the partnership ethic envisioned by Carolyn Merchant<sup>86</sup> but, rather, to a lateral move to retain power and control (albeit benevolently reimagined)? This need for a role

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<sup>84</sup> Berry, *The Great Work* (n 2) 58.

<sup>85</sup> This is not a reference to the formal moral theory known as the ethics of care but, rather, refers to a generalised sense of 'to care for' or 'to take care of'. For definition and discussion of the care ethic as a formal moral theory, see Maureen Sander-Staudt, 'Care Ethics', *The Internet Encyclopedia of Philosophy* (Web Page) <<http://www.iep.utm.edu/care-eth/>>.

<sup>86</sup> See my discussion of the partnership ethic in Chapter Two of this thesis, in the section entitled 'The Partnership Ethic'.

for human beings may exist as a semi-conscious or unconscious modality, but semi-consciousness fits neither Berry's drive for a shift in cultural consciousness nor the needs of the hour. Self-interrogation has a critical part to play in the reimagining of human consciousness Berry envisions as concomitant with systemic structural and institutional reformation. (This is a key driver of the focus of this project on reimagining constructs of human identity.)

These points are not to discount the genuine foundation of love for the earth upon which Earth Jurisprudence is established. This love is in fact a great strength of the philosophy, in that it privileges embodied, affective experience in a legal world otherwise dominated by reason. Berry is not the only thinker in this field to explicitly locate the root of his commitment to advocacy for the earth in his own affective experiences of the natural world, as described at the beginning of this chapter. Mason sets his reflections on principles and characteristics of Earth Jurisprudence within a poetic description of the dawning of a new day along the shores of an African lake.<sup>87</sup> Cullinan brings the reader in close to observe with him some anthills and their attendant aardvarks, inviting shared wonder about interdependency and ecosystem interactivity as a strand in the Great Law.<sup>88</sup> These writings evoke a sense of immediate connection with other-than-human life worlds as the impetus for theories about transforming law in order to account for these meaningful relationships.

The framework of 'care' is perhaps best understood as an outgrowth of these articulated affections, this love. Love is not, however, a univocal state and does not necessarily preclude, but instead might in some instances engender, a

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<sup>87</sup> Mason (n 82) 35.

<sup>88</sup> Cullinan, *Wild Law* (n 66) 25–6.

multitude of distortions of mutuality, not least of which is the drive to control and wield power. This is the direct opposite aspiration to that of advocates in the field of Earth Jurisprudence, but without interrogating the narratives of caregiving within dualistic structures that support and promote paternalism, the espoused mutuality cannot show itself fully.

### Commitment to Rights

It strikes me as curious that the language of relationship is so quickly and easily left behind within theories of Earth Jurisprudence, with their grounding in desire for intimate, mutual human–Earth relationship, in favour of the language of rights as a mode of advocacy for securing the conditions for the flourishing of all life on Earth. In this section I comment on the mismatch between relational intimacy and rights talk. I argue that the language of rights, whilst certainly a portal to freedom from oppression and exploitation in so many applications, is not a good fit for the project of Earth Jurisprudence.

Put most broadly, Earth Jurisprudence is a project geared towards optimal conditions of relationship, rather than minimal standards of interaction. Rights are pitched at the level of least common denominator. One can ask, ‘What else if not rights?’ Nothing can be built with a foundation, and rights are foundational in Western law and legal theory. (As Jennifer Nedelsky notes, the reality is that ‘rights have won’<sup>89</sup> as the dominant ‘institutional and rhetorical means of expressing, contesting, and implementing [a society’s] values’.<sup>90</sup>) Furthermore,

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<sup>89</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011) 235.

<sup>90</sup> *Ibid* 241.

rights are ‘essentially confrontational ... in principle’.<sup>91</sup> The reality of the Anthropocene,<sup>92</sup> in which human history and Earth history have now converged,<sup>93</sup> is that the project of people who care for the earth and for continuing human existence on Earth is to instigate systems of ‘mutual self-creation and sustenance’<sup>94</sup> with the earth. Such a project requires co-operation and collaboration, a reaching for a standard of cohabitation that lies beyond competitiveness as implied in conflicts of interest. How does law play a part in human beings learning to ‘live in solidarity with the Earth?’<sup>95</sup> What do rights have to do with solidarity, which is defined by common interest not by (mediated) differing interests? I cannot fully entertain these questions here. I merely wish to query the obviousness of rights as the answer to all wrongs, interrogating the construct as a way of opening up the possibility for a deeper transformation in the human–earth relationship. I query what is lost to the movement of Earth Jurisprudence in the translation of relationship to rights.

Earth Jurisprudence considers the recognition of the inherent value of all Earth entities to be foundational, arguing that this *moral* right must be taken into account, and, in most readings of Earth Jurisprudence, the accounting must

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<sup>91</sup> See Nedelsky (n 89) 76 for engagement with the Joseph Raz argument ‘that free speech is a public good’. See also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) 52–3.

<sup>92</sup> See Paul J Crutzen, ‘Geology of Mankind’ (2002) 415 *Nature* 23, 23. Crutzen, an atmospheric chemist, together with biologist Eugene Stoermer, is credited with introducing this term to refer to ‘the present, in many ways human-dominated, geological epoch, supplementing the Holocene — the warm period of the past 10–12 millennia’. It is beyond the scope of this thesis to catalogue the many and various contestations of the term and its application arising from within both science and the humanities.

<sup>93</sup> See generally Clive Hamilton, *Defiant Earth: The Fate of Humans in the Anthropocene* (Polity Press, 2017) (E-book) <<http://politybooks.com/>> Location 2856.

<sup>94</sup> Nedelsky (n 89) 249.

<sup>95</sup> Hamilton (n 93) Location 2895.

translate into a *legal* right.<sup>96</sup> What if, in so doing, the idea of inherency is compromised: value is no longer recognised but granted or conferred? This is where the trouble begins, in the sense that conferral requires justification and justification nullifies inherency. Furthermore, the process of granting rights requires evaluation, a process that cannot uphold a pure commitment to inherent value. Evaluation by definition is a discriminating process of ascribing value, and therefore, once again, inherency is nullified.

Add to this the fact that rights are not self-executing, and in the case of rights for non-human entities, human beings must not only execute rights but also define them on behalf of the ‘Other’. Because legal rights are a human construct, humans determine river rights, bird rights and insect rights, thereby invalidating the possibility of direct translation of inherent value. Even a human best guess at what a tree needs in order to ‘fulfil its role in the ever-renewing processes of the Earth community’<sup>97</sup> represents an act of interpretation and evaluation, which can be read as being at odds with the commitment to inherent value due to the imposition of values external to the object being evaluated.

Earth Jurisprudence could choose to limit the delineation of legal rights for ‘every component of the Earth community’ to a highest order formulation: the ‘right to be’ and the ‘right to habitat’.<sup>98</sup> Inclusion of non-human entities in this universalising level of rights activates corresponding duties in the same way that a human person’s right ‘to be’ activates the corresponding duty incumbent upon all

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<sup>96</sup> See *ibid* 235 for a discussion of the wide range of claims and contexts related to rights and the importance of distinguishing amongst them in order to bring greater clarity to the language of rights.

<sup>97</sup> Thomas Berry, ‘Appendix’, in Mary Evelyn Tucker (ed), *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club, 2006), cited in Cashford (n 50) 9.

<sup>98</sup> Berry, *Evening Thoughts* (n 97).

other human beings to not harm or hinder that existence (as in the prohibition against murder and bodily harm). Such a move would certainly revolutionise the relationship between humans and other Earth entities, particularly in the context of the energy exchange known as food consumption. Likewise, both the ‘right to be’ of the land itself and the ‘right to habitat’ of every creature in relationship to the land would raise serious questions about the idea of land as property. Is land human property or shared human and non-human habitat? If the latter, what is the human role in relation to the land?

Questions about the nature of the human and non-human relationship are central to Earth Jurisprudence. As rights structure relationships,<sup>99</sup> so it would seem to follow that rights could be of use to Earth Jurisprudence in restructuring the relationship between humans and non-human Earth entities along more benevolent lines than the current terms of neglect and exploitation. Multiple, cascading shifts in the structure of human relationships with non-human Earth entities would ensue from the recognition of the basic right of other Earth components to simply ‘be’. This would be good, but also, I argue, insufficient.

The relationship of human beings to Earth is not merely a matter of interrelating entities, humans and non-humans. It also encompasses the fact of the earth as a whole (not as a sum of parts) as the context of human existence. Human beings necessarily relate to Earth as context, which is to be distinguished from the idea of Earth as background (as per the discussion of backgrounding as a feature of dualism in the section of Chapter Two entitled ‘The Human–Earth Relationship as Dualism’). There is nothing inert or passive about the earth’s part in this

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<sup>99</sup> See Nedelsky (n 89) 234–8.

relationship: it breathes for us, feeds us and forms us. Even if human beings inhabit space, the species will always be as an Earth-ling, or Earthbound.<sup>100</sup> If human beings are someday able to recreate the context that is Earth (that is, at least to recreate some constitutive Earth systems — notably atmosphere, hydrosphere and biosphere), this would not negate the earth as context; rather, it would underscore it.

The point I am establishing is that rights are appropriate only to relations between entities, not to relations between an entity and its context, because the latter relationship, whilst it may be reciprocal or at least interactive, is not transactional. It is constitutive. The ongoing histories of humans and the earth converge in either integration or disintegration, but not in transaction. Rights are inherently transactional: a right incurs a duty, and the failure to meet a duty incurs a remedy. I contend, therefore, that talk of the rights of nature does not account for the nature-as-context reality of human existence. The context is greater than the sum of its parts, but its parts are constitutive, and therefore the human relationship to each part is as of entity to context, not entity to entity. This is a primary source of mismatch between the talk of human relationship with the earth and rights of nature.

As a final point of this discussion: rights talk is the language used to negotiate the border between freedom and necessity. Within the reality of Earth as context, however, this binary is exposed as non-absolute. Life within the context

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<sup>100</sup> Bruno Latour in the 2013 Gifford Lectures at the University of Edinburgh introduces a new descriptor for humans: Earthbound. See Bruno Latour, 'War of the Worlds: Human Against Earthbound', *The Gifford Lectures* (Web Page) <<http://www.giffordlectures.org/file/prof-bruno-latour-war-worlds-humans-against-earthbound>>. For a discussion on the topic, see also Hamilton (n 93).



of the closed system of Earth is defined by freedom *within* necessity, not freedom *opposed to* necessity. Holmes Rolston III calls the required stance within this reality ‘ecosystemic obedience’,<sup>101</sup> arguing that ‘morality is derivative of the holistic character of the ecosystem’.<sup>102</sup> Clive Hamilton argues that ecosystem thinking does not adequately describe the earth context and pitches ‘obedience’ outward to the level of the earth system as a totality.<sup>103</sup> Importantly, both agree to precursor norms that set the field of reference, the context, thereby dissolving the notion of pure freedom that is assumed within the construction of a freedom–necessity duality. To the extent that rights talk depends on the tension of this duality, it is a mismatch for talking about the human–earth relationship.

### Commitment to Reality

Clive Hamilton argues that human beings have to ‘learn to live on this world as it really is’.<sup>104</sup> Earth Jurisprudence resonates with this commitment to clear-eyed realistic thinking, drawing not only from real, affective experiences of the intimate human–earth relationship, but also from two other dynamic streams of insight and information about the world: science and wisdom traditions. These streams of inquiry, so different in process and orientation, nevertheless converge around a number of shared theses. For example, each discipline suggests in its own language that life is a ‘single, dynamic, integrated system’;<sup>105</sup> that life is evolving (and that

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<sup>101</sup> See Holmes Rolston, III, ‘Is There an Ecological Ethic?’ (1975) 85(2) *Ethics* 93, 98: ‘Construct values though man [sic] may, he operates in an environmental context where he must ground his values in ecosystemic obedience’.

<sup>102</sup> Ibid: ‘The claim that morality is a derivative of the holistic character of the ecosystem proves more radical, for the ecological perspective penetrates not only the secondary but also the primary qualities of the ethic. It is ecological in substance, not merely in accident; it is ecological per se, not just consequentially’.

<sup>103</sup> See generally Hamilton (n 93).

<sup>104</sup> Ibid Location 2856.

<sup>105</sup> Ibid Location 463.

evolution is a non-linear expansion rather than a progression); that embeddedness defines agency;<sup>106</sup> and that ‘the Earth always retains something mysterious and inaccessible — an “indivisible remainder”’.<sup>107</sup>

In a brief return to the discussion of rights: postulations about the nature of reality cannot be interpreted with an instrument like rights, dependent as it is on linear causality, the assumption of a closed system and an understanding of autonomy as independence. What has Earth Jurisprudence to do with rights, essentially a boundary-setting enterprise, in a real world in which boundaries do not actually exist or are not *essentially* true? Similarly, how do rights — codifiers of individual entitlement — apply to a relational universe in which there is no such thing as an individual despite experiences of individuality and individuation?<sup>108</sup>

Committed to Revolution?

Focusing on the rights of nature diverts Earth Jurisprudence, I would argue, from realising another domain of revolutionary impact on the law implied within its critique of ways in which the Western legal system legitimates or substantiates a devastating human presence on the planet: Earth Jurisprudence could be calling into question not only the subjectivity of the other-than-human but also the nature of human subjectivity. There is inclination towards this in Berry's notion of reinventing the human<sup>109</sup> as part of the transformation process in which Earth

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<sup>106</sup> Ibid Location 1159.

<sup>107</sup> Ibid Location 1427.

<sup>108</sup> See Nedelsky (n 89) 242: ‘This conceptual limitation of rights language is even clearer with respect to such evolving values as environmental sustainability. Of course, there are efforts to express this value in rights language. There is always a political advantage to get value recognized as a right. But I doubt that what is really at stake in developing a collective commitment to an environmentally respectful and sustainable mode of life is essentially about individual entitlement’ (citation omitted).

<sup>109</sup> See Berry, *The Great Work* (n 2) 159: ‘We might describe the challenge before us by the following sentence. The historical mission of our times is to reinvent the human — at the species level, with critical reflection, within the community of life-systems, in a time-developmental

Jurisprudence might participate, but there is as yet no elaboration on this concept within the field.

There are hints within Earth Jurisprudence about a different subjectivity than the ‘instituted social imaginary’ of the ‘liberal conception of the unified self — ideally self-sufficient, self-making, secure in its self-ownership and transparent to itself, striving for individual rational autonomy and defending its rights’.<sup>110</sup> As already mentioned in this chapter, affective subjectivity is drawn upon as a source of insight and information, and the interdependency of the human–earth relationship figures prominently in Earth Jurisprudence. I question, however, the extent to which Earth Jurisprudence, in the absence of a fully developed critique of dualism and its constructs of both human and non-human identity, merely transfers liberal conceptions of the unified self to the other-than-human Earth entities. It is possible to read Earth Jurisprudence as conveying a picture of human being relating to non-human being that, whilst accounting for each *Other*, need not foreground the constitutive intersubjectivity of both. I am intrigued by the question: how does law change in the direction set by the objective of Earth Jurisprudence related to the flourishing of all life on Earth, if there is no *Other* in any absolute or ontological sense?

The reasons that Earth Jurisprudence is ideally positioned to raise fundamental questions about the nature of subjectivity are twofold: (a) Earth Jurisprudence is overtly committed to expanding the idea of subjectivity (a famous Berry refrain is that the Earth is a communion of subjects, not a collection of

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context, by means of story and shared dream experience. I say *reinvent the human* because humans, more than any other living form, invent themselves’ (emphasis in original).

<sup>110</sup> Code (n 51) 3.

objects<sup>111</sup>); and (b) it is overtly committed to drawing on contemporary science as a source of physical evidence for defining a different paradigm of embodiment and ancient wisdom traditions as sources of metaphysical insight. If both science and spirituality point towards concepts like intersubjectivity,<sup>112</sup> then how can Earth Jurisprudence avoid questioning inherited ideas of human subjectivity as radically as it questions the liberal ideological heritage of objectifying non-human life worlds? This is the direction of travel undertaken in this Earth Jurisprudence project.

In the next section, I draw back and out of particulars within legal theory, the ‘things’ of law like rights, to gain perspective on ways of understanding law as a thing itself. I argue that another dimension of law’s embeddedness in the instituted social imaginary of mastery and control is the mode of understanding of what law is: that it is a thing that can be understood in terms of radical discontinuity, a thing that can be understood outside of and abstracted from its subjects and objects. This is, I argue, another dimension of the barriers which block the way of Western law and legal theory towards more fully embracing and supporting the radical intimacy of human–earth relationship.

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<sup>111</sup> See, for example, Berry, *The Great Work* (n 2) 16.

<sup>112</sup> See Roger Frie and Bruce Reis, ‘Understanding Intersubjectivity’ (2001) 37(2) *Contemporary Psychoanalysis* 297, 297: ‘The term intersubjectivity refers in the most basic sense to the interaction between two subjects: myself and another person, or self and other. The intersubjective field is an area of common engagement in which my individual subjectivity is articulated and communicated’. See Gerda Roelvink and Magdalena Zolkos, ‘Affective Ontologies: Post-Humanist Perspectives on the Self, Feeling and Intersubjectivity’ (2015) 14 *Emotion, Space and Society* 47 for a discussion of the concept in relation to ‘the diverse ecologies of inter-relationality’ that comprise the human–earth relationship.

## Looking Beyond Law's Limits

Can law be understood beyond a subject–object distinction when it has, historically and conceptually, been so committed to such a framework? As human beings have normally been seen as the sole source of law, is there any sense at all in which law can be understood as emerging out of a subject–object dynamic? Can tangible stuff be anything other than an object of law's interpretive gaze? Can law move beyond the human into a posthuman territory? Can it realistically dissolve the nature–culture separation?<sup>113</sup>

Turning now from the primary focus in this chapter, the subject matter of law, to the matter of law as a subject, this section very briefly examines how Western cultural assumptions of hierarchical separability — objective distance and the superiority of reason over other capacities for knowing and relating to the world, such as embodiment and encounter — mark the dominant mode of understanding the law in this culture. Dualism in matters of law establishes the exclusion of constructed Others as *subjects* of law; dualism in law as subject matter excludes Others as *sources* of law. In both instances, I argue, progress towards meeting the objective of Earth Jurisprudence is hindered by fundamental, and fundamentally false (that is, construed by denial of dependency and distortions of differentiation), exclusions of the Other.

This final section of the chapter comprises a brief report on recent work by Margaret Davies to both 'collect and consolidate'<sup>114</sup> contestations of assumed theoretical constants, accrued across several decades of critical theory generally and critical legal theory specifically, and to draw upon emergent theorisations of the dynamism, interdeterminacy and multi-modal interdependencies of life in order to imagine new modes of understanding law. Davies's work is densely layered: within the constraints of this project I am not able to produce a detailed

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<sup>113</sup> Davies, *Law Unlimited* (n 13) 43.

<sup>114</sup> *Ibid* 21.

synthesis or analysis of her collection/collation of critiques and the hints of new understanding she offers.<sup>115</sup> Here I assemble key phrases and themes from Davies into a profile of the conventional mode of understanding law and a sketch of what becomes possible when law's conceptual fetters are loosened.

### *Limited Law*

Law in Western culture is conventionally understood to have an 'abstract and unified nature',<sup>116</sup> notes Davies. Law is understood to be something 'out there' to be studied and applied to life, not something that emerges from the social and material interactions of life. This understanding reflects 'distinctions ingrained in Western philosophy between mind and matter, culture and nature, and subject and object',<sup>117</sup> with the effect of establishing 'conceptual, doctrinal, and institutional boundaries'<sup>118</sup> around the law. In this mode of understanding, law is like a book on a shelf: self-contained, transportable, static and universal. It is something to be thrown at situations (as in the saying 'to throw the book at it'), rather than something that emerges from within the situation itself. This mode of understanding law as a bounded, reified subject is maintained by a host of assumptions that correspond to the mind/body and nature/culture dualisms discussed at various points in this thesis and at length in Chapter Two.

First, law is assumed to be a subject of specialised knowledge, a realm of 'epistemic privilege' which is the domain of 'legal experts positioned entirely within a Western European and colonial model'.<sup>119</sup> The object that is the subject

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<sup>115</sup> Ibid 158: 'In drawing together and hopefully consolidating existing theory, I have hinted at some of the forms this new understanding of law can take'.

<sup>116</sup> Ibid 154.

<sup>117</sup> Ibid viii.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid 23.

of this specialised knowledge and privileged knowing is ‘separate from and external to the subject’<sup>120</sup> (the one who knows). Law perceived as an object in this way is seen to be a ‘solid, limited, and fixed’ thing-concept.<sup>121</sup> It is a ‘static universal’ which ‘transcends the everyday physicality of legal actions and practices’.<sup>122</sup> This ‘thing’ that is law is a system. It is a ‘a self-contained whole of coherently coordinated rules and norms, with its own limits, and differentiated from other systems and from its exterior’.<sup>123</sup> Law is ‘moveable from one place to another’ because it is ‘abstract, conceptual, and resolutely non-spatial and non-physical’.<sup>124</sup>

Davies notes how thinking about the law in these ways ‘diverts us from finding law in (for instance) human identity, the land, habitual social practices, narratives, songs, dances, pictures, myths’.<sup>125</sup> Lost in these diversions, and cut off by such a limited understanding of the law, suggests Davies, are pathways towards greater responsiveness in law and legal theory to ‘urgent matters’ such as ‘the degradation of the earth consequential upon industrialization, human exceptionalism, and the false presumption of infinite resources’.<sup>126</sup> In terms of this

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<sup>120</sup> Ibid.

<sup>121</sup> Ibid 84: ‘Abstract concepts are, then, often comprehended as external to the self through spatial metaphors while space in turn is often seen as immobile. The consequence is that spatialised concepts and representations are themselves seen as solid, limited, and fixed. Theory disrupts this fixity in a number of ways, in particular by emphasising that the stability of any space-structure is produced and reliant on ongoing maintenance and constituted exclusions, and that there is always a dynamic reference forwards and back in time, and an indeterminacy between inside and out, which is part of any act of differentiation. But it is also possible to go further and question the boundary between the interior experience of selves and the spaces in which they exist’.

<sup>122</sup> Ibid 46: ‘Despite the inherent dynamism in doctrinal law, the generalised philosophical *concept* of law has often been regarded as a static universal explaining the distinct nature of law that, because of its universality, transcends the everyday physicality of legal actions and practice. As a theoretical abstraction, it has been described in a formal way — not a process, but a reified thing, albeit an ideational thing’ (emphasis in original).

<sup>123</sup> Ibid 30 (citations omitted).

<sup>124</sup> Ibid 74.

<sup>125</sup> Ibid 30 (brackets in original).

<sup>126</sup> Ibid 158.

thesis, these diversions comprise a barrier to meeting the objective of Earth Jurisprudence. In the next section, I sound themes from Davies's work on unlimiting law that are productive in terms of overcoming this barrier.

### *Unlimited Law*

Davies reflects on the contemporary theoretical terrain as 'complex and infinitely recursive'.<sup>127</sup> In addition to the many socio-critical theories that have been destabilising 'a number of legal theoretical foundations'<sup>128</sup> for the past several decades, legal geographies and new materialisms have more recently added other disruptions to the mix. Davies notes shifts in understanding of aesthetics (towards disruption and lack of coherence); subjectivity (towards fragmentation and hybridity); materiality (towards interconnectivity); and plurality (towards law as 'intrinsically and conceptually plural and empirically open and interconnected with non-law in an ecological sense').<sup>129</sup> These shifts suggest to Davies that theory generally, and legal theory specifically, can be understood as 'process, open-ended, interpretable, in flux, formed by everyday relations, and contextual'.<sup>130</sup> In very broad terms, law can be understood as emerging from below,<sup>131</sup> and as performative 'in the sense that it is manifested in and reproduced by the repeated actions of social actors in their innumerable connections to the objects and places around them'.<sup>132</sup> Law, understood as 'embedded in our bodies'<sup>133</sup> and as 'an

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<sup>127</sup> Ibid 19.

<sup>128</sup> Ibid 23.

<sup>129</sup> Ibid 12.

<sup>130</sup> Ibid 34.

<sup>131</sup> Ibid 33.

<sup>132</sup> Ibid 70.

<sup>133</sup> Ibid 72.



extended material context',<sup>134</sup> has, according to Davies, 'the potential to take the living planet and its ecological characteristics seriously'.<sup>135</sup>

Davies offers the following profile of a mode of understanding law unlimited by the constraints of dualistic thinking:

[L]aw is discursive, performed, assumed, located, relational, and material. It is emergent in social space — through performances, intra-actions, and material relations, and also through the imaginings, narratives, and self- constructions that inform and are informed by these things. Law is inside and outside the self, material and immaterial, immanent to mind and body, and in natureculture. It is intrinsically plural — differentiated by different knowledges, subjectivities, locations, performances. It is also solid and fluid — predictable, merely probable, but also contestable and transient.<sup>136</sup>

This mode of understanding law forms a pathway towards realising this Earth-responsive potential and is, therefore, the framework of understanding law assumed by this thesis.

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<sup>134</sup> Ibid 70.

<sup>135</sup> Ibid 72.

<sup>136</sup> Ibid 89.

## Conclusion

In this chapter, I argued that Western law and legal theory are anthropocentric all the way down, which is to say both *in* their subject matter and *as* subject matter. I developed the argument in stages, dealing in the first instance with the subject matter of law from various angles, before engaging in a brief discussion about modes of understanding law and legal theory.

The first discussions in this chapter about the subject matter of law focused on a case study, *Sierra Club v Morton*. This case is widely recognised as a significant moment at which the question of the rights and standing of non-human living entities was raised. An examination of the key features of the case — most notably (a) the fact that the majority decision does not consider the needs and interests of the forested area being targeted for potentially destructive development as a factor meriting consideration, and (b) the articulation in a dissenting opinion of some measure of juridical discomfort at this omission — is presented as both an emblem of law's anthropocentrism and a signal that this disposition could be contested if sufficient will were summoned. The remainder of this section comprised a brief summary of research conducted by Christopher D Stone, the author of the article referenced in Justice Douglas' dissenting opinion — research which indicates that such a sufficiency has not yet been achieved.

In the second discussion on the subject matter of law, I examined the extent to which Earth Jurisprudence contests law's anthropocentrism. With its explicit concern for the rights of nature, this legal philosophy from which I draw the driving objective of this project — to secure the conditions for a sustainable human–earth relationship — is at one level decisively ecocentric. There is an explicit concern

for non-human Others as subject matter: for the concerns and interests of the whole community of life on Earth to be of both consideration and concern to Human Law and legal theory. Earth Jurisprudence is hindered, I argued in this chapter, in meeting its objective by a lack of constructive critique of the anthropocentric assumptions which undergird the rights paradigm.

The final discussion in this chapter shifted focus from the subject matter of law to the matter of law as a subject. I argued that the traditional mode of understanding what law is and where it comes from adheres to the reason/nature dualism endemic to Western culture, thereby blocking the emergence of a posthuman normativity which could otherwise effectively transform the human–earth relationship. I indicated that ideological blockages to transforming the human–earth relationship from instrumentalism to mutual enhancement are ubiquitous within law and legal theory. I profiled Western legal consciousness as anthropocentric all the way down.

My approach to contesting this legal imaginary, and the social imaginary of mastery and control with which it exists symbiotically, is via a pinpoint of disruption: I target the concept of the legal subject. It is my contention that, because assumptions about human identity which inform the current concepts-in-use of the legal subject normalise instrumentalism as the core dynamic of the human–earth relationship, it follows that challenging these assumptions disrupts the dominance of this concept and thus opens the way for new values, such as mutuality instead of mastery and control, to guide the way that law structures this relationship.

In the next chapter, I catalogue current concepts-in-use of the legal subject and analyse the ways in which they normalise instrumentalism in the human–earth relationship by expressing the features of dualism.

## Chapter Four

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### The Legal Subject

## Chapter Four

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### The Legal Subject

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## Introduction: Who is Law For?

[Legal personification] serves a social and expressive function and is therefore not fully internal to law. It sends a message to the community and expresses, on behalf of the community, who or what is to count — who matters.<sup>1</sup>

Environmental legal philosophies like Earth Jurisprudence promote a core value of respect for nature. Earth Jurisprudence envisions law structuring mutually beneficial relations amongst human and non-human life worlds and between humans and the earth as a whole. This is a comprehensive mandate, requiring law to take account of the earth in all the relationships it structures.

One of the primary ways the law takes something into account is to confer the status of legal personhood upon it: to make it a legal subject. To be a legal subject is to be considered at law on one's own terms, which is to say more intrinsically than instrumentally.<sup>2</sup> The implication of this consideration is that the needs and concerns of the entity to which legal personhood is granted receive the protection of rights.<sup>3</sup> This is why human rights advocates push for legal standing for all human persons; abortion rights advocates push for legal standing for the foetus; and environmental advocates push for legal standing for non-human living beings and ecosystems (this last example having been addressed in the previous

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<sup>1</sup> Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and Legal Theory* (Hart, 2009) 181.

<sup>2</sup> It is possible to *believe in* the intrinsic value of all living beings, but is it possible to *activate* this belief through the law? In the context of thesis supervision, Peter Burdon raised the issue that if the principle that all living beings are considered equally valuable were to be fully inscribed within the law, then judgments between parties would be impossible because there would be no basis for discretion — that is, no evaluative framework. Such practical limitations require a spectrum of value judgment along which more living beings can be shuttled towards greater degrees of acknowledgment of value but which can never end in an absolute *legal* conferral of inherent value to all living beings equally. The recognition of intrinsic value of all living beings is aspirational but not practical, and negotiated rather than absolute.

<sup>3</sup> A corollary implication is that any entity granted legal standing is also encumbered by the obligation of duties. The correlative relation of rights and duties is a classic tenet of legal theory. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed Walter Wheeler Cook (Yale University Press, 1923). The concern of this thesis is to reflect critically on exclusions from protection and rights or what is left out of legal consideration; the concept of 'legal relations' in the Hohfeldian sense is not discussed.

chapter in the section entitled Law's Anthropocentrism: All the Objects in the Room Are Red', as per the focus of this thesis on the human–earth relationship). Arguments in favour of expanding the community of legal subjects in these ways recognise that relating as co-subjects entails a different quality of consideration than relating as subject (human/person) to object (non-human Earth entity/property).<sup>4</sup>

In this thesis, I argue for a different strategy for taking the earth into greater account within law and legal theory. Rather than making a call for the expansion of the community of legal subjects and developing a rationale for doing so, I call for an expansion of the concept of the human legal subject. In this chapter, I analyse a variety of concepts-in-use of the legal subject in order to establish the direction of expansion I propose in the next chapter. In this approach, I am following a pattern initiated in Chapter Three: having begun, in that chapter, by examining the subject matter of law, then law as a subject matter, I now in this chapter, examine the matter of the legal subject.

Terms for those beings or entities who relate at law — words for law's 'basic unit or coinage'<sup>5</sup> — are several, including: "legal units", "legal entities", "legal persons",<sup>6</sup> and legal subjects. Does it matter which term is used? In one sense, the terms are interchangeable — or, as William Twining puts it, '[n]ot much

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<sup>4</sup> It is beyond the scope of this thesis to elucidate the complex distinctions drawn in philosophy between subjects and objects. Simply put: subjects act; objects are acted upon. See, for example, A Kadir Çüçen, 'Heidegger's Reading of Descartes' Dualism: The Relation of Subject and Object' (Conference Paper, The Twentieth World Congress of Philosophy, 10–15 August 1998): 'Starting with Descartes, the subject is a thinking thing, which is not extended, and the object is an extended thing, which does not think'.

<sup>5</sup> Naffine, *Law's Meaning of Life* (n 1) 1.

<sup>6</sup> William Twining, 'Some Basic Concepts', *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 2.



turns on the choice between these terms'.<sup>7</sup> This is because 'all legal units ... are artificial'.<sup>8</sup> This or that is a legal subject if and when the law designates it as such. Legal personhood does not directly correlate to 'natural' personhood in either the direction that 'all human beings are legal persons' or the direction that 'no non-human beings/entities are legal persons' (consider that corporations, ships and idols,<sup>9</sup> and some parts of nature and animal species are designated legal persons<sup>10</sup>). It follows, then, that using the term 'legal person' is problematic insofar as it 'has associations with philosophical issues concerning human identity, individuality, moral personality, gender, and character that have muddied the waters of the extensive debates about the nature of legal personality'.<sup>11</sup>

One obvious route to clarity would be a swing of the pendulum in the opposite direction, towards terms that bring to mind mathematics rather than philosophy, such as 'legal units' or 'legal entities'. These terms fit the notion of law as a science (as characterised by legal positivists), and the Legalist concept of the legal subject is examined first in this chapter. However, as Dennis Lloyd notes, 'law is primarily concerned with regulating the affairs of human beings'.<sup>12</sup> Even though Lloyd argues that 'legal systems are theoretically free to ascribe

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<sup>7</sup> Ibid 2.

<sup>8</sup> Dennis Lloyd, *The Law Relating to Unincorporated Associations* (Sweet and Maxwell, 1938) xx-xxii, in *ibid* 3.

<sup>9</sup> See Bryant Smith, 'Legal Personality' (1928) XXXVII(3) *Yale Law Journal* 283, 284-5: 'A Hindoo [sic] idol being a legal person, it has been held, has peculiar desires and a will of its own which must be respected. A corporation, it is said, "is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own." A ship, described as a "mere congeries of wood and iron," on being launched, we are told, takes on a personality of its own, a name, volition, capacity to contract, employ agents, commit torts, sue and be sued.' Why do lawyers and judges assume thus to clothe inanimate objects and abstractions with the qualities of human beings?' (citations omitted).

<sup>10</sup> See related discussion in the section of Chapter Two entitled Law's Anthropocentrism: All the Objects in the Room Are Red.

<sup>11</sup> Twining (n 6) 3.

<sup>12</sup> Lloyd (n 8) xx-xxii in Twining (n 6) 3.

significance as legal units to things or ideas as required',<sup>13</sup> his use of the term 'theoretically' signals an acknowledgement that reality and people's perceptions of reality constrain this 'perfect' freedom. This project is aligned with theories which recognise that, in practice, it is unavoidable that *personality* will be involved when *persons* are involved (including those that are incorporated or furry).

The term 'legal subject' appears to offer some middle ground. It is not as loaded with natural person associations as the term 'legal person', given that '[t]o a liberal moral philosopher ... a "person" tends to mean a moral agent, that is, a being who can reason and reflect and make rational choices'.<sup>14</sup> Perhaps it requires less of a cognitive leap to use 'subject' instead of 'person': if a dog can be the subject of a sentence (but we 'know' it is not a person), then does it follow that it is easier to imagine the dog as a legal subject rather than a legal person? To say that this is just semantics is exactly the point: the use of the term 'subject' in the legal context returns us to associations with human capacities such as agency and reason, as per the discussion in Chapter Two about the human/nature and nature/reason structures of dualism. This has the effect of narrowing the field of applicability to (certain) humans (or entities and structures comprised of or associated with (certain) human persons, such as corporations). In this sense, the term 'legal subject' constrains in practice the theoretical freedom of the law in much the same way that 'legal person' does.

I deploy the term 'person' in developing an alternative concept of the human legal subject in Chapter Five; I defer discussion of the rationale behind this choice until that later section, entitled 'Introducing the Cosmic Person'. For now,

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<sup>13</sup> Ibid.

<sup>14</sup> Naffine, *Law's Meaning of Life* (n 1) 7.

I take note that even at the most basic level of terminology, the legal subject is complex subject matter. It is also, according to Ngaire Naffine, elusive.<sup>15</sup>

Naffine identifies several reasons for the slippery nature of the legal subject as subject matter. First, in terms of legal theory, the ‘law of persons is not a discrete field of study in the common law world ... but is a pervasive, underlying concept through the different branches of law’.<sup>16</sup> Furthermore, in terms of practice, Naffine notes, ‘there is so very little carefully considered reflection about [the legal subject] in legal judgments and treatises’.<sup>17</sup> In fact, ‘judges not only fail to invoke philosophical support for their ideas of personality, but also inconsistently apply jurisprudential theory in resolving problems of legal personhood’.<sup>18</sup> Naffine concludes that the ‘presence within law of coexisting, competing and shifting understandings of human nature and human value’<sup>19</sup> engenders a situation in which ‘judges seem to use a variety of terms and meanings, often without any obvious awareness that they are doing so’.<sup>20</sup>

This combination of factors means there is a ‘poverty of thought and fuzzy thinking’<sup>21</sup> about the legal subject, which Naffine endeavours to correct ‘by surveying the many parts of law, and then often deriving ... meaning [related to concepts of the legal subject] only by inference’.<sup>22</sup> Due to Naffine’s ‘detective work’<sup>23</sup> in this regard, it is possible to clarify the most common assumptions and

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<sup>15</sup> Ibid 9.

<sup>16</sup> Ibid 15.

<sup>17</sup> Ibid 9.

<sup>18</sup> Dave Faguendes, ‘Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction’ (2001) 114 *Harvard Law Review* 1746 quoted in *ibid*.

<sup>19</sup> Naffine, *Law’s Meaning of Life* (n 1).

<sup>20</sup> Ibid 9.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 15.

<sup>23</sup> Ibid: Naffine notes that ‘some detective work is therefore involved’.

rationales behind the conferral of legal status within Western law and legal theory today and to imagine how emerging understandings of the terms of being human can be enlisted in the development of a new concept of the human legal subject for Earth Jurisprudence.

This chapter begins with a brief report on Naffine's profiles of each of the primary concepts-in-use of the legal subject, including key features; 'creation stories' or 'master narratives about who and what we are'<sup>24</sup> on which they are based; and primary disciplines from which they are drawn. It is beyond the scope of the current project to engage fully with a broader, more strictly theoretical exploration of the topic of legal subjectivity. What the reporting undertaken at the outset of this chapter, drawn from the singular available repository of concepts-in-use of the legal subject, is designed to do is to lay the field at the level at which this thesis aims to make its unique contribution: deployable concepts of the legal subject.

Then, in the next section, entitled 'Analysis: Features of Dualism', I analyse the concepts, reading them through Plumwood's list of the features of dualism. This analysis confirms that the Rationalist concept of the legal subject, which Naffine identifies as the dominant concept-in-use in Western law and legal theory, conforms to the master identity discussed in Chapter Two. This makes sense, given the role of law as an institution of the instituted social imaginary (as discussed in Chapter Three). The analysis also indicates that the Relational concept of the legal subject offers something of a template for accommodating a more expansive, ecological mode of consciousness when translated from the context of

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<sup>24</sup> Ibid 28.

inter-human relations to the human–earth relationship. This translation is the work of the final substantive chapter of this thesis, Chapter Five, ‘Introducing the Cosmic Person’.

## A Brief Catalogue of Law's Contesting Subjects

Broadly speaking, thinking about the legal subject falls into two camps: the legal subject as internal to the logic of law and legal relations, and the legal subject as correspondent to and informed by realities external to law — specifically, ideas about the essential nature or defining features of real or ‘natural’ human persons. In Naffine’s taxonomy of concepts-in-use of the legal subject, these camps are the Legalists and the Metaphysical Realists. For the Legalists, notes Naffine, ‘[i]t is unnecessary, and indeed undesirable, to go elsewhere to find law’s subject: not to philosophy (with its moral agent), not to religion (with its sacred person), nor to biological science (with its natural being)’.<sup>25</sup> By contrast, for the Metaphysical Realists identified by Naffine, it is exactly to these other disciplines that law must look in order to ensure that real persons, or what is considered to be most real about persons, is accounted for within the law.

This section profiles each of the legal subjects associated with these schools of thought, as well as a fourth Realist concept that seeks to account for the constitutive role of relationships in human being and becoming. The Relational concept of the legal subject perhaps ought to be in a category by itself, falling as loosely as it does under the umbrella of the Realists: it maintains an external (to law) referent, but it is differentiated from the others in this category, which feature a self-contained subject and emphasise an inherent quality of the individual, by its focus on relationship as constitutive of the human person.

### *The Empty Slot*

According to John Dewey,

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<sup>25</sup> Ibid 22 (brackets in original).

for the purposes of law the conception of ‘person’ is a legal conception; put roughly, ‘person’ signifies what law makes it signify.<sup>26</sup>

From the Legalist point of view, the legal subject is ‘an empty slot that can be filled by anything that can have rights or duties’.<sup>27</sup> I have said that this section is a series of profiles of the various concepts-in-use of the legal subject. But how does one profile an empty slot? There is no shape or form or content to a pure abstraction, which is how the Legalists think of the legal subject. There is no legal subject in the sense of an entity in this view: there is only ‘a unity of a complex of legal obligations and rights’.<sup>28</sup> The legal person *is* that complex rather than something that *has* that complex. Any sense of capacity associated with the conferral of legal personality is internal to law. It does not, need not, nor, in the Legalist view, *should* not correspond to natural or non-legal capacities. It is not, in this view, ‘law’s business to engage in ... metaphysical, ontological or existential disputes and determinations’<sup>29</sup> that might lend definition to this capacity from outside the law.

This view is summarised as follows:

The defining characteristic of law’s construct is the formal capacity to bear rights and duties. This does not depend on the supposed essential or even inessential attributes of the being to whom the construct is applied. Rather, it depends on, and is formed for, specifically legal purposes.<sup>30</sup>

An advantage of this point of view, in terms of meeting the objective of Earth Jurisprudence to structure mutually beneficial human–earth relations, is that theoretically the community of legal subjects can include anything and everything. All of ‘nature’ — piece by piece or as a whole — could be slotted into the blank

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<sup>26</sup> John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) XXXV(6) *Yale Law Journal* 655, 655.

<sup>27</sup> Richard Tur, ‘The “Person” in Law’, in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell, 1987) 121, quoted in Naffine, *Law’s Meaning of Life* (n 1) 35.

<sup>28</sup> Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 170, quoted in Naffine, *Law’s Meaning of Life* (n 1) 33.

<sup>29</sup> Naffine, *Law’s Meaning of Life* (n 1) 21.

<sup>30</sup> *Ibid.*

and assigned rights and duties, thereby acquiring entitlement to the protection of interests. There is a ready template: substitute ‘nature’ or ‘river system’ or ‘*Vulpes vulpes*’<sup>31</sup> for corporation,<sup>32</sup> and it is accomplished. The only pertinent question to be addressed in making this assignment relates to the legal purpose for doing so. It is beyond the scope of this thesis to examine the legal purposes for the assignment of legal personality to corporations (or any contestations thereof). Likewise, it is beyond the scope of this thesis to examine whether, or in what ways, the recent assignments of legal personality to non-corporate and non-human ecosystems conform to the template of corporate legal personhood in terms of rationale. Are these conferrals based on formalist principles, or is some basis for the conferral of legal personhood drawn from outside of legal purpose? These are interesting questions, but not the inquiries of this thesis.

The evidence for law’s permeability (as opposed to the impenetrable self-enclosure presumed by Legalists) can be found, ironically, in the law itself. Naffine argues that ‘if metaphysical meanings of the person ... have already entered the legal lexicon, as they have, then such metaphysical uses *are* legal uses’.<sup>33</sup> The law shows itself to be permeated by ‘outside’ ideas because, according to Naffine, ‘always there is a decision to be made about who and what is to count for any particular legal purpose and this is a normative, not just a factual decision’.<sup>34</sup> The

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<sup>31</sup> This is the scientific name for the red fox. The choice of animal is deliberate for this illustration. Why not exchange ‘fox’ for ‘corporation’, given the metaphorical ascription foxes have taken on? Corporations have been quite ‘cunning’ in asserting their rights as persons. See Rosi Braidotti, *The Posthuman* (Polity Press, 2013) 69 for a brief discussion of the ‘metaphorization’ of animals: ‘Animals have long spelled out the social grammar of virtues and moral distinctions for the benefit of humans. This normative function was canonized in moral glossaries and cognitive bestiaries that turned animals into metaphorical referents for norms and values. Just think of the illustrious literary pedigree of the noble eagles, the deceitful foxes, the humble lambs ...’.

<sup>32</sup> See Dewey (n 26) 655 for a definitive reading of the history of how the corporation ‘snuck’ its way into legal personality.

<sup>33</sup> Naffine, *Law’s Meaning of Life* (n 1) 41 (emphasis added).

<sup>34</sup> *Ibid* 45.



empirical reality is that ‘the concept [of the legal subject] necessarily remains open to outside influences, despite the protestations of the strict Legalists’.<sup>35</sup> Furthermore, I note that the Legalist concept is itself influenced from outside the law by philosophy: legal positivism is a framework or a perspective which, by definition, does not arise from within the subject of the frame.

### *The Slot is Not Empty*

For the ‘Realists’, or ‘Metaphysical Realists’, ‘the legal person [is seen] as possessing a variety of inherent and natural, even supernatural, characteristics which make some kinds of beings suited for legal personhood but make others ill-suited’.<sup>36</sup> From this perspective, neither everything nor any and all particular things can fill the empty slot but, rather, only those things which possess certain qualifying characteristics. In contrast to the Legalist assertion of the artificiality of the legal subject,<sup>37</sup> Realists argue that legal personality, whilst a legal construct, is constructed out of ‘real’ stuff. For Realists, having rights and duties presumes *existential* capacity for such, the differentiating question amongst the various streams in this school of thought being which existential capacities amount to legal capacity.

Naffine identifies three major ‘families of thinker’<sup>38</sup> within the Metaphysical Realists category: Rationalists, Religionists and Naturalists,<sup>39</sup> each

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<sup>35</sup> Ibid 46.

<sup>36</sup> Ibid 4.

<sup>37</sup> See FH Lawson, ‘The Creative Use of Legal Concepts’ (1957) 32 *New York University Law Review* 915, discussed in Naffine, *Law’s Meaning of Life* (n 1) 36, in which Lawson asserts that law is ‘an artificial world whose members are to some extent arbitrarily, though not irrationally, created to serve certain purposes’. Legal persons are always artificial in that they are designated or created, but the Realists attempt to make their designations according to real characteristics. A gap remains between natural persons and legal persons even in Realist concepts.

<sup>38</sup> Naffine, *Law’s Meaning of Life* (n 1) 20.

<sup>39</sup> Ibid 21. Naffine notes: ‘These are not the only schools of existential thought in law but they are the dominant ones. They exert the greatest influence’.

with distinctive convictions and concerns, creation stories<sup>40</sup> and authoritative disciplines, and ideas of where to set the boundaries for the community of legal subjects. She also describes a fourth category stemming from a relational theory of the self and law.

The following section outlines these ‘prevailing conventions about who and what should count as a metaphysical person’ and thus fill the ‘empty slot’ of the legal subject in practice.<sup>41</sup> According to Naffine, ‘[t]he four families of thinkers ... all exercise an influence on general legal principle, but not in equal measure ... [S]ome are more powerful than others because they are so much a part of legal orthodoxy’.<sup>42</sup> The catalogue of Realists begins with Rationalists for the simple reason that the ‘active, autonomous actor’ is

the person whom laws are supposed to be designed for and addressed to: the one who is meant to be listening and heeding the counsel of law. It is the person supposedly engaged in rational dialogue or conversation with law’s representatives and who can therefore justly be made accountable for his [sic] harmful actions; whose will can thus be constrained by state power.<sup>43</sup>

Although this ‘robust, autonomous, legal individual’ is not the only Rationalist image of the legal subject,<sup>44</sup> it corresponds seamlessly with the Western social imaginary in which reason defines ‘man’.<sup>45</sup>

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<sup>40</sup> See *ibid* 28: ‘Still another way of understanding our different families of thinkers is in terms of story telling and creation stories. There are master narratives about who and what we are. The grand stories have different lineages’.

<sup>41</sup> *Ibid* 4. Naffine endorses the view that ‘the meaning of terms resides in actual use and practice’. This thesis adopts this view.

<sup>42</sup> *Ibid* 30.

<sup>43</sup> *Ibid* 60.

<sup>44</sup> See *ibid*: ‘Other Rationalists demand less of their legal person, because theirs is a rather different legal and human concern. Such legal thinkers are not endeavouring to describe the robust, autonomous, legal individual who “can respond to the call of duty”, who can fully appreciate the complex demands of law, who can assume complex legal obligations and so be held to account’.

<sup>45</sup> *Ibid* 64: Naffine discusses the influence of Kant on legal thinking about the role of reason: ‘Perhaps more than any other philosopher, Kant has shaped legal thinking about the nature and legal significance of human intelligence’. Naffine writes that ‘[Kant] “insisted that: “all rational beings stand under the law that each of them should treat himself and all others never merely as means but always at the same time as an end in himself”’ (citation omitted): at 65. See generally Genevieve Lloyd, ‘The Man of Reason’ (1979) 10(1) *Metaphilosophy* 18; and Genevieve Lloyd,

### The Rational Individual

The Rationalist family of Realist thinkers ‘are convinced that it is reason which most defines and dignifies [human beings] and which law should reflect and preserve’.<sup>46</sup> The Rationalists are concerned with ‘human autonomy and independence as the basis of rights and personality’.<sup>47</sup> The authoritative discipline for Rationalists ‘tends to be moral or political philosophy’, and they draw ‘a direct link ... between the legal person and the philosopher’s person’,<sup>48</sup> with their common emphasis on human agency and the capacity for reason’.<sup>49</sup> Not surprisingly, the Rationalist creation story is ‘of the Social Contract and the emergence of the contractual individual’<sup>50</sup> with ‘intellectual roots in the writings of Locke and Kant’.<sup>51</sup> This formulation of the legal subject makes it ‘law’s task ... to order and constrain relations between these autonomous persons while guaranteeing and respecting maximum freedom’.<sup>52</sup>

The fact that ‘there is an influential view among rights scholars that both rights and duties can only be borne by those with the ability to exercise rational choice’<sup>53</sup> means that the ‘empty slot’ of the legal subject ‘eminently seems to fit the rational adult’.<sup>54</sup> What this in turn means is that those actual human beings who

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*The Man of Reason: ‘Male’ and ‘Female’ in Western Philosophy* (University of Minnesota Press, 1984) for germinal treatment of ‘the maleness of the Man of Reason’, for which latter phrase see Lloyd, ‘The Man of Reason’ (n 45, 1979) 18.

<sup>46</sup> Naffine, *Law’s Meaning of Life* (n 1) 22.

<sup>47</sup> *Ibid* 23.

<sup>48</sup> *Ibid* 25.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* 28. Naffine writes that ‘though intended as an heuristic device of liberal political theory, the story of contract implicitly contains and communicates the idea that we have our own autonomous rational natures before we enter law-governed society. We are imagined as self-created, pre-social, individuals’: at 29.

<sup>51</sup> *Ibid* 28.

<sup>52</sup> *Ibid* 29.

<sup>53</sup> *Ibid* 55.

<sup>54</sup> *Ibid* 56. ‘The legal resistance to the personification of animals strongly suggests that the term “person” is not in fact a formal conceptual slot that fits anyone or anything, but rather a slot thought by many to be designed exclusively for human beings, especially of a rational nature ...’: at 57.

do not fit the ‘rational adult’ shape of law’s outline are potentially either unrepresented or misrepresented.<sup>55</sup> Furthermore, it is argued by relational law theorists, all *actual* human persons are misrepresented by law’s exclusive focus on the rational capacity for choice and autonomy defined as independence, because human beings are neither disconnected nor disembodied but are, rather, relational, affective and embodied.<sup>56</sup> I discuss relational law theory and its view of the legal subject later in more detail further on in this section.

Given that ‘law ... absorbs, reflects and expresses ideas in the broader culture about what and who is of value and why’,<sup>57</sup> and given what has been said in previous chapters of this thesis about the dominance of rationalism in Western culture, it is reasonable to suggest that the Rationalist legal subject is the norm within the Western legal system. Furthermore, it can be noted that the ‘Man of Reason’<sup>58</sup> is actually the ‘person’ whom law assumes, even when it thinks it is not allowing itself to correspond to any outside influences. The notion of rights, around

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<sup>55</sup> See *ibid* 56: ‘And, in the making of empirical legal persons, there have been powerful historical, political and social forces at work, shaping legal use: ensuring the endowment of some beings with moral and social status and so with the ability to act in law (notably men of property), and the denial of others (notably slaves)’. Also, at 57: ‘Some of the most troubling cases of legal personality ... concern the foetus and the pregnant woman. Men, *qua men*, have never caused this sort of legal consternation. What this strongly suggests is that the legal person is powerfully modelled on a certain conception of an individuated moral subject, and hence has a significantly male dimension’. This point is discussed more fully in Chapter 9 of the same work, ‘Embodiment: Humans as Biological Beings’. For further dimensions of the discussion regarding just how ‘empty’ the ‘empty slot’ of the Legalist legal person is, see Naffine’s discussion of ‘Persons of Limited Reason’, which is in Chapter 6 of the same volume.

<sup>56</sup> Jennifer Nedelsky uses these specific terms in the development of a relational theory of the self that she argues informs, or should inform, the concept of the legal person. See Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011). This concept of the relational self is discussed briefly later in this chapter of the thesis and more fully in the following chapter.

<sup>57</sup> Naffine, *Law’s Meaning of Life* (n 1) 11.

<sup>58</sup> See Margaret Davies, ‘Feminisms and Gender in Legal Theory’, in *Asking the Law Question* (Lawbook Co., 3rd ed, 2008) 215 for a discussion of how feminist approaches to the law point out the problematic nature of the gendered associations of ‘rationality and reasonableness, independence and autonomy, objectivity, authority and neutrality’ with the normative legal subject and the law as a whole. Also, see Lloyd (n 45) for citation of two sources of note by Lloyd with regard to the feminist treatment of the concept ‘Man of Reason’.

which the post-Enlightenment jurisprudence revolves, assumes a capacity for rational choice and associates this capacity ‘automatically’ with the rational, autonomous individual. In this way, the Rationalist subject corresponds seamlessly with Plumwood’s master identity.<sup>59</sup>

### Background Deviations

In a word processing or graphics illustration program, designers can choose to fill in the background of a text box or a shape. The Rationalist notion of the legal subject is the filler that most juristic thinkers choose for their ‘box’. Naffine identifies two principle deviations from this standard. The first is more a deviation in tone than a change in base colour, like a gradient filter on an image. The Religionists, like the Rationalists, fundamentally believe that human beings are special and unique, and therefore uniquely deserving of legal standing. What they emphasise, however, is that human specialness derives from a quality of soul or sanctity, conferred on human beings from a divine source.

Those who deviate from the Rationalist standard of the legal subject in the second way, the Naturalists, use a completely different colour to fill in their legal subject box: they believe that human beings are *not* special, both because other animals, in addition to the human animal, experience pain and pleasure and because human beings, like other animals, live ‘natural mortal lives’.<sup>60</sup> Some Naturalists contend that the law should not distinguish between the human and other animal species given these points of corporeal and sentient continuity; others retain something of the distinction, which indicates that they invoke something

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<sup>59</sup> See Chapter Two, ‘The Master Identity’ in this thesis for a discussion of this topic.

<sup>60</sup> Naffine, *Law’s Meaning of Life* (n 1) 24.

‘extra’ to corporeality. The following two parts of this section discuss these alternative points of view in turn.

### The Divine Spark<sup>61</sup>

The creation story for the Religionist concept of the legal subject is *the* creation story, at least in terms of the Judeo-Christian religious tradition: ‘for the Religionists, the creation story is the Biblical tale from Genesis in which “man” is created in God’s image ...’<sup>62</sup> In this story, God grants human beings ‘a unique place in creation’<sup>63</sup> and defines the essence of human being as the ‘spiritual and immortal soul’,<sup>64</sup> thus ‘distinguish[ing] us from all other phenomena’.<sup>65</sup>

Theoretically, given the creation story of the Religionists, it could be assumed that the authoritative discipline for this type of thinker would be theology.<sup>66</sup> In practice, however, most of the discourse that falls into this general category of defining the legal subject references a non-specific sense of ‘human sanctity’ rather than specific doctrine or dogma. Naffine notes that ‘the term “sanctity” is borrowed from religious language’,<sup>67</sup> but also that ‘in much legal writing that applies the term “sanctity” to humanity, its religious nature remains unexamined’.<sup>68</sup> It is primarily the case that ‘the term “human sanctity” is used

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<sup>61</sup> Ibid 99: (chapter title) ‘The Divine Spark: The Principle of Human Sanctity’. Also at 100: ‘The invocation of “human sanctity” ... is intended to tell us that human beings are innately special and that we are somehow always elevated above the animal world, regardless of our individual abilities and capacities. The sacred human person is said to possess inherent value with or without law expressing that value and with or without the human in question possessing any particular characteristics, beyond their raw humanity’.

<sup>62</sup> *Catechism of the Catholic Church* (St Paul’s Publications, 1994) 91, quoted in *ibid* 28.

<sup>63</sup> *Catechism of the Catholic Church* (St Paul’s Publications, 1994) 91, quoted in *ibid*.

<sup>64</sup> Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (St Paul’s Publications, 2004) 64, quoted in *ibid*.

<sup>65</sup> Naffine, *Law’s Meaning of Life* (n 1) 28.

<sup>66</sup> Ibid 25: ‘For Religionists, the authoritative discipline is typically a variety of Christian theology’.

<sup>67</sup> Ibid 100.

<sup>68</sup> Ibid.

loosely by jurists as just another way of expressing respect or reverence for all human beings ...'.<sup>69</sup>

Conferring legal status on human beings because of their perceived 'innate specialness' rather than because of their capacity for rational choice has the effect of widening law's community of persons to include all human beings: 'the sacred human person is said to possess inherent value ... without the human in question possessing any particular characteristics, beyond their raw humanity'.<sup>70</sup> This is not necessarily contested by the Rationalists, who 'seem content to let the term "human sanctity" do its work of expressing the value of all human beings regardless of their individual abilities'<sup>71</sup> in most cases and in a most general way. For the most part, Religionists and Rationalists seek 'the same practical legal results: the legal protection of all human beings',<sup>72</sup> and so they seem to set similar boundaries. Things only become contentious between these views 'when the interests of the rational person may compete directly with those of a being lacking all rational capacity (typically the foetus)'.<sup>73</sup> At these points, the Rationalists tighten up the boundaries of the community of legal subjects, whereas Religionists maintain a wider circle.<sup>74</sup>

Naffine points out that there is a spectrum of intensity within the Religionist thinkers. At the strong end, 'the true person is the spiritual sacred person' and 'law

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid 101.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid 101 (brackets original).

<sup>74</sup> The question can be raised as to whether or not the circle drawn by Religionists who advocate for the legal personhood of the foetus, regardless of the effect of pregnancy on even a rational adult female, is wider or just differently constricted. Naffine provides more discussion of boundary setting distinctions that emerge 'especially at the beginning and end of life': at 101.

must recognise our truly sacred natures'.<sup>75</sup> Towards the more moderate position of this category, the sanctity of human beings is held in a certain tension with 'other considerations', most significantly '[r]espect for autonomy and a liberal respect for difference'.<sup>76</sup> The great movements on behalf of human rights in the 20<sup>th</sup> century, such as the Universal Declaration of Human Rights, and the life work of champions of universal human rights like Eleanor Roosevelt, embody this type of theoretically moderated — but passionately motivated — advocacy for the sanctity of the human being.

### The Human Animal

Just as there is a spectrum of intensity within the Religionist school of thought on the legal subject, so there are differences amongst the Naturalists. Although all Naturalists share the foundational belief that human beings are 'best regarded as natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives, and this is how the law should think of us',<sup>77</sup> they differ in the implications of this regard. Some Naturalists emphasise human frailty with its attendant dependencies; others focus on protecting the bodily integrity and sovereignty of the individual.<sup>78</sup>

A key distinction between this group of thinkers and the other Realists, and indeed within the Naturalist group itself, runs along the lines of species demarcation: for some Realists, species difference is morally, and therefore legally, irrelevant.<sup>79</sup> This belief separates some Naturalist thinkers from the

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<sup>75</sup> Ibid 168.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 24.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid: 'Species are considered morally irrelevant and so implicitly they are legally irrelevant'.



Religionists and the Rationalists, both of whom believe that human beings are special. It also separates some within the Naturalist group from others, either because they ‘appear to be influenced by a religious idea of human uniqueness’, or by the ‘pragmatic concern that the divide between humans and other animals is needed on the grounds of utility’.<sup>80</sup>

Biology is the authoritative discipline for the Naturalists, ‘and especially the principles derived from evolutionary biology’,<sup>81</sup> chiefly as regards our animal origins and commonalities. Darwin himself reflected that ‘[m]an in his arrogance thinks himself a great work worthy the imposition of a deity. More humble and I think truer to consider him created from animals’.<sup>82</sup> In mapping the lineage of the Naturalist thinkers, Naffine points also to David Hume’s writings from 100 years before Darwin.<sup>83</sup> Hume believed ‘[i]t was simple prejudice that prevented us from seeing’ that ‘animals and human beings learned about life in the same way’ and that ‘[t]he thinking of animals ... was little different from the thinking of animals’.<sup>84</sup>

Despite translating scientifically verified evidence of the commonality that exists amongst humans and other species (interpreted at either the most basic level of corporeality or in more nuanced terms related to sentience) into a basis for legal

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid 25.

<sup>82</sup> Ibid 119, quoting *Charles Darwin’s Notebooks*, 300 as quoted in James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford University Press, 1990) 1. See Naffine, *Law’s Meaning of Life* (n 1) 119): Darwin wrote these reflections in personal notebooks rather than public writings because ‘he was keenly aware that his theory of the evolution of the species, by random mutation and natural selection of the best adapted, might prove deeply offensive to those who saw “man’s” nature and place in the universe as divinely ordered, not as a product of natural biological change’. Naffine is here discussing Charles Darwin, *On the Origin of the Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life* (John Murray, 1859).

<sup>83</sup> Naffine, *Law’s Meaning of Life* (n 1) 126: Jeremy Bentham, like Hume, also ‘believed that animals were morally significant’.

<sup>84</sup> Ibid 120. There is further exposition of Hume’s thinking on these topics: at notes 9–12.

consideration, Naturalist theorists have not managed a ‘great revolution in legal thinking about the nature of being human and the consequent nature of the legal person’ in terms of a ‘newly-reconceived human animal’.<sup>85</sup> The person–property divide still rests heavily along the lines of species differentiation: humans as persons, non-humans as property. Naffine describes how the aftermath of the Second World War ‘served to consolidate the species divide in the name of natural human rights and to affirm a strong legal metaphysical stance: that law is for humans essentially understood as non-animals — as moral and spiritual persons’.<sup>86</sup> How important this emphasis is as a corrective to the genocidal atrocities of that conflict! It does, however, keep the boundary of the community of legal subjects firmly and exclusively looped around human beings. Naffine describes the limited impact of Naturalists in expanding the boundary of who counts ‘as intelligent and sentient individuals with protected interests’ to include ‘intelligent and sentient animals’ succinctly: ‘the law has not acceded to [these] demands. ... Furthermore, there is little sign of law doing so’.<sup>87</sup>

The continuing narrow focus on human rights has also kept a tight boundary around the individual as the locus of those rights. The Western cultural drive to protect individual autonomy can obscure the simple realities that, put colloquially, ‘no one is an island’ and ‘there is no such thing as a self-made person’. A relational theory of law and law’s person seeks to account for the interdependency of human life.

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<sup>85</sup> Ibid 122.

<sup>86</sup> Ibid 122.

<sup>87</sup> Ibid 128–9. Naffine is discussing the ‘occasional heroic efforts’ of people like Peter Singer ‘to have [their demands] translated into legal doctrine’. See Chapter Two, ‘Ecocentrism and Beyond’ in this thesis for further discussion on this point.

### The Relational Person

What does it mean to say, in a legal context, that human beings are constituted by relationship? Jennifer Nedelsky, a leading thinker in the relational theory of law, conveys the nub of this theory: ‘Human beings are in a constant process of becoming, in interaction with the many layers of relationship in which they are embedded’.<sup>88</sup> From this perspective, it is not the case that rights correspond to ‘inherent properties of individuals’<sup>89</sup> but that relationships ‘enable the core values that matter to [human beings]’<sup>90</sup> to be expressed as rights (at times unhelpfully with regard to structuring mutual or equal relationships between people, as when they are read as entitlements, or as ‘something a person can simply “have” as an individual’<sup>91</sup>).

According to Nedelsky, the ‘constant process of becoming’ (above) is supported in large part by a value that seems to be at odds with the idea of a relational theory of the self: autonomy. Autonomy is commonly interpreted to be synonymous with independence, or an ability to be and become on one’s own.<sup>92</sup> A central component of Nedelsky’s thesis on relational law is a reconceptualisation of autonomy that disrupts its equation with independence. Autonomy, the ‘acting on one’s own distinctive perceptions, insights, and forms of engagement’,<sup>93</sup> is reconceived relationally: ‘[t]he spontaneity, the imagination of the new comes from within the actor (*enabled by her relational web*)’.<sup>94</sup> Relationships make the

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<sup>88</sup> Nedelsky (n 56) 38.

<sup>89</sup> Ibid 375: ‘The traditional liberal language speaks of rights as the inherent properties of individuals’.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 42: Nedelsky describes autonomy defined as independence as ‘not just central to Anglo-American legal and political thought. It has a kind of iconic value in the culture: everyone should aspire to be independent and in control of his life, and those who are admirable are’.

<sup>93</sup> Ibid 47.

<sup>94</sup> Ibid 49 (brackets in original) (emphasis added).

person, not in a determinative sense but in a constitutive sense. The relational legal subject takes account of human interdependency, or of the ways in which human beings fundamentally co-constitute one another within the interlocking networks of relationship of which they are a part (ranging from the intimate to the most broadly socio-cultural).

## We Have a Winner

This, then, is the cast of characters: the empty slot (Legalists); the rational, autonomous individual (Rationalists); the carrier of the divine spark (Religionists); the human animal (Naturalists); and the relational self (Relationalists). Demarcating these categories risks giving two false impressions: (1) that each of these types of subject is deployed discretely and singularly per instance of legal discourse, and (2) that these subjects populate the legal system equally and with equal influence.

As to the first false impression: the deployment of concepts of the legal subject is more like a play with an ensemble cast than a monologue. Naffine describes the reality that ‘different characteristics of the person are being employed, often with no obvious awareness of the changing cast of characters’.<sup>95</sup> It is even the case that ‘[s]ometimes there are contradictory characterisations of the person within the one case, leading to great existential confusion’.<sup>96</sup>

Within the ensemble cast there is one clear ‘star’: the rational individual outperforms all the other concepts-in-use of the legal subject. This is owing to the fact of its neat conformity with ‘a humanist Enlightenment idea of the person which has grown out of the modern Western political and philosophical tradition’,<sup>97</sup> and to the fact that the basis of the Western legal system, individual rights and duties, presupposes the capacity for rational choice. In a social imaginary of mastery and control, the master identity wins.

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<sup>95</sup> Naffine, *Law’s Meaning of Life* (n 1) 9.

<sup>96</sup> *Ibid* 10.

<sup>97</sup> Ngaire Naffine, ‘Author’s Introduction: The Law of Persons’ (2010) 35 *Australian Journal of Legal Philosophy* 111, 113.

## Analysis: Features of Dualism

In the following chapter I develop a concept of the human legal subject that I position as a creative counterpossibility to the collection of concepts of the legal subject described in this chapter, most particularly the Rationalist concept. The particular concept of the legal subject I propose can be framed as an escape from the dualism by which the human–earth relationship in Western culture is structured via a corrective to the master identity. This section of the current chapter strengthens my argument that there is a need for such a proposal by indicating the ways and the extent to which each of the current concepts-in-use of the legal subject are marked by the features of dualism codified by Val Plumwood as discussed in Chapter Two.

*Figure 2: The Features of Dualism in Concepts of the Legal Subject*

	backgrounding	hyperseparation	instrumentalism	homogenization	incorporation	Nature/Reason
<b>Legalist</b>	N/A	N/A	N/A	N/A	N/A	Yes
<b>Rationalist</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Religionist</b>	Yes	Yes	Yes	Yes	Yes	No
<b>Naturalist A</b>	N/A	Yes	Yes	Yes	Yes	No
<b>Naturalist B</b>	N/A	No	No	N/A	No	No
<b>Relational</b>	N/A	N/A	N/A	N/A	N/A	No

The chart in Figure 2 maps the features of dualism against the concepts-in-use of the legal subject according to my analysis of how each of these concepts expresses the various features. I turn now to an explication of this mapping of each concept, in the order depicted in Figure 2.

### The Legalist Subject

It could be argued that the Legalist concept of the legal subject ought to be considered ‘off the chart’. As it is conceived to be internal to law, it does not correspond to features of a broader conceptual framework. Legalists are adamant that law ‘must not be beholden to other disciplines’<sup>98</sup> and that law is a conceptual world of its own making. It is in this sense that I indicate that the features of dualism do not apply to the Legalist concept of the legal subject (indicated by ‘N/A’, for ‘Not Applicable’, on the chart). There being in this view no direct correspondence between the world of legal meaning and the ‘world of facts’,<sup>99</sup> it follows that observations of the dynamics of the world of facts do not apply.

However, it is the very idea that a conceptual world can exist apart from a ‘factual’ world that prompts me to indicate that this view exemplifies the nature/reason split that underpins the dynamic of radical discontinuity between humans and nature (indicated by an ‘Yes’ on the chart in the column labeled ‘hyperseparation’). To hold the idea of a ‘pure theory’ of law,<sup>100</sup> as one of the recognised greats of legal positivism, Hans Kelsen, espouses, is the essence of Cartesian dualism.

### The Rationalist Subject

As I have already disclosed, the Rationalist concept of the legal subject corresponds directly to the master identity and, thus, expresses all of the features

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<sup>98</sup> Naffine, *Law’s Meaning of Life* (n 1) 31.

<sup>99</sup> Ibid 36–7, citing Lawson (n 36): ‘We must first note and emphasize the separateness and completeness of what we may call the legal plane ... [T]he instruments with which the business lawyer works do not belong to the world of fact ... Legal personality, estates and contracts are parts of a world of their own, which is in some way related to the world of fact but is separate from them. It is an artificial world whose members are to some extent arbitrarily, though not irrationally, created to serve certain purposes. Thus they can be defined with fair exactness, much more satisfactorily than the facts of everyday life’.

<sup>100</sup> See Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967).

of dualism associated with the social imaginary of mastery and control (indicated by a complete row of ‘Yes’ on the chart). There is no room for accounting for Earth within a concept of personhood that denies dependency upon and continuity with the natural world (backgrounding and hyperseparation); that refuses to acknowledge the uniqueness of all non-human Others (and certain human Others) (homogenisation); and that defines the Other by lack (incorporation). Accordingly, there is only room in the Rational legal subject for an instrumental association with nature (instrumentalism).

#### The Religionist Subject

In contrast to the Rationalist, the Religionist concept of the legal subject is not built upon the assumption of the superiority of reason over nature (indicated by ‘No’ on the chart in the column labeled ‘Nature/Reason’). As with the Rationalists, however, humans are understood to be separate from and superior to nature, which has the effect of defining this subject according to all the other features of dualism charted in Figure 2. The simple fact of being a human being as opposed to another sort of being is the basis for conferral of legal personhood. Those natural human beings not endowed with the capacity for reason are included in the community of legal subjects to the exclusion of all Others. Everything other than the human can be put in the background due to the break in continuity between human beings and other beings by divine assignation (indicated by ‘Yes’ in columns labeled ‘backgrounding’ and ‘hyperseparation’). This hyperseparation warrants the homogenisation of non-humans and the definition of non-human beings as lacking this divine spark (incorporation) and, by extension of the logic of dualism, it also warrants the instrumental use of nature for the (divinely ordained) purposes of human being (indicated by ‘Yes’ in columns related to these features).



### The Naturalist Subjects

There are two broad categories of Naturalist concepts of the legal subject, distinguished by views on whether or not to acknowledge a normative divide between human beings and other species. In the chart in Figure 2, Naturalist A adheres to the concept of the legal subject which subscribes to maintaining the division between human and non-human species; Naturalist B allows that the ‘formal conceptual division between animals and humans should be adjusted, diminished or removed altogether’.<sup>101</sup> There are corresponding differences between the two concepts with regard to the expression they give to the features of dualism.

#### Naturalist A

Although neither concept of the Naturalist school is founded on the nature/reason dualism (indicated by ‘No’ on the chart in the column labeled ‘Nature/Reason’ in both instances), Naturalist A adheres to a fundamental and meaningful human–non-human distinction. What does this adherence imply in terms of which, if any, of the features of dualism this concept expresses? I argue that holding to the *meaningfulness* of the human–non-human distinction, whether based on reason or not, implies a distortion of difference as is foundational to the Rationalist legal subject.

Does this necessarily imply that Naturalist A expresses all the other features of dualism (as does the Rationalist)? No, because there is no absolute logical link between recognising difference and denying dependency (the feature of backgrounding, which is indicated by ‘N/A’ in the column labeled

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<sup>101</sup> Naffine, *Law’s Meaning of Life* (n 1) 124.

‘backgrounding’). I argue that recognising a *meaningful* distinction does imply hyperseparation, or a hierarchical distortion of difference freighted by an ascription of difference in moral worth (the upperside being of more worth than the underside; the hyperseparation in this subject is indicated by ‘Yes’ in the related column). It is my contention that the value judgment associated with hyperseparation opens the door to instrumentalism (indicated by ‘Yes’ in the ‘instrumentalism’ column). Given that the human in the naturalist concept of the legal subject is defined *over* (defining the underside as lacking in comparison to the upperside) and *against* (denial of differentiation within the underside) the whole realm of non-human existence, I contend that this concept expresses the features of incorporation and homogenisation, respectively (indicated by ‘Yes’ in these columns).

#### Naturalist B

The Naturalist B concept, by contrast to Naturalist A, is not constructed on a foundational distinction between humans and non-humans. There are those in this school of thought who would not ascribe meaningfulness to species differentiation.<sup>102</sup> This means that the concept maps across the features of dualism in a correspondingly different way to Naturalist A. Naturalist B does not exhibit hyperseparation, instrumentalism or incorporation (indicated by ‘No’ in these columns).

It does not necessarily follow, however, that holding the position that humans and non-humans as corporeal beings are indistinguishable equates to a tendency against homogenisation of non-human species. In fact, on the point of

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<sup>102</sup> For a discussion of the primary contemporary legal theorists and philosophers in this category, see Naffine, *Law's Meaning of Life* (n 1) 126-39.

embodiment and its attendant vulnerability, a key emphasis in some iterations of this concept, *all* beings are lumped in together. For the purposes of argument along these lines, therefore, I indicate that homogenisation is not applicable in considering this concept (indicated with a ‘N/A’ in this column). It is not absent, but it applies to all and is therefore nullified as a marker of dualism. Does the recognition of vulnerability as a feature of life on Earth shared amongst all the species necessarily preclude backgrounding, or the denial of dependency on non-human Others by human others? Although I contend that it does not, neither does this feature define the Naturalist B concept in the way that it does the Rationalist concept. Therefore, I have indicated that this feature is not applicable to this concept (indicated by ‘N/A’ in the ‘backgrounding’ column).

#### The Relational Subject

As with the Legalist concept of the legal subject, many of the features of dualism can be considered non-applicable to the Relational concept, due to the primary defining feature of the concept. The Legalist concept is defined by a fundamental disconnect between legal and non-legal spheres of meaning; features associated with the non-legal sphere of meaning do not apply. The Relational concept analysed in this section refers exclusively to inter-human relations; consideration of features of dualism in terms of the human–earth relationship is not applicable (indicated by ‘N/A’ in all columns except the final column, ‘Nature/Reason’).

Notably, however, the nature/reason dualism is contested in this concept of the legal subject: not by denying the distinctiveness of the human capacity for reason but by ascribing equal value to other aspects of human identity such as affect and, importantly, embodiment. This is a significant contestation of the

nature/reason dualism (indicated by 'No' in the final column). I argue that the alternative concept of the legal subject I develop in the following chapter is a Relational concept expanded to encompass the human–earth relationship.

## Conclusion

What none of the concepts of the legal subject reviewed and analysed in this chapter account for is the possibility that the human–earth relationship is as meaningfully constitutive of human identity as either specific, and presumably exclusive, human attributes or inter-human relations. That human beings are made of the earth and moved by the earth, both physically and metaphysically, in body, mind and spirit; that human beings are fundamentally and absolutely dependent upon the earth: none of this is accounted for in these concepts of the human legal subject. It is my contention that this oversight — a consequence of the blinders associated with the Western mode of consciousness — creates the conditions opposite to the objective of Earth Jurisprudence (to secure the health and future flourishing of the whole community of life on Earth). All of these concepts of the legal subject are inadequate to the task of securing the health and future flourishing of the whole community of life on Earth.

The strategy I undertake for correcting the oversight is to go head to head with the worst offender amongst the various concepts of the legal subject: the rational, autonomous individual. As I have argued in this chapter, this concept of the legal subject corresponds most explicitly to a construct of human identity built out of the denial of human dependency upon, and continuity with, non-human modes of existence: the master identity. Not surprisingly, given its residency within the Western social imaginary of mastery and control, this is the dominant concept-in-use of the human legal subject in Western law and legal theory. The next chapter therefore introduces my concept of taking account of the earth from within a construct of the human legal subject.

As Plumwood indicates, escaping dualism is a matter of reimagining not only the underside but also the upperside. My analysis of the contemporary concepts-in-use of the human legal subject in this chapter very clearly indicates that particular reimaginings of the upperside (the human) in the human–earth relationship are due. If, as Plumwood discerns, the lack of attention to this task of reimagining the upperside in Western discourse generally relates to the absence of a good enough story to propel new imaginings of human significance,<sup>103</sup> then, I contend, the time is ripe to engage. A new story is to hand. Each of the concepts of the legal subject profiled in this chapter have their creation stories. I begin the next chapter, in which I introduce an alternative posthuman legal subject, with a creation story.

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<sup>103</sup> See Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 101.

## Chapter Five

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### Introducing the Cosmic Person

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### Introducing the Cosmic Person

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## Introduction

What is at stake here is nothing less than a challenge to some of the most basic assumptions that have underpinned the modern world, including its normative sense of the human and its beliefs about human agency, but also regarding its material practices such as the ways we labour on, exploit, and interact with nature.<sup>1</sup>

This thesis asserts that certain understandings of the nature of existence and correlative assumptions about subjectivity underpin the Western social imaginary of human mastery and control over nature, defining law's primary objective: to protect and promote the individual life project. As demonstrated in the previous chapter, these assumptions and understandings are activated in the conceptualisation of the legal subject as a rational, autonomous individual. The law structures human relations and the human–earth relationship in such a way as to account for the needs and interests of this subject.

It is the purpose of this thesis to imagine how law might take better account of the needs and interests of the whole community of life on Earth. The premise driving this inquiry is that changing the conceptualisation of the legal subject is a key point of strategic intervention for transforming the way that law structures the human–earth relationship. It is a matter, this thesis argues, of taking greater account of the *earthliness* of human existence within the concept of the legal subject: to account for the material reality of human existence in ways which are both descriptive and normative (that is, meaningful in constructing human identity). Earthliness and materiality carry these dual sensibilities, relating both to corporeality and to the value attached to it.<sup>2</sup>

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<sup>1</sup> Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press, 2010) 4.

<sup>2</sup> In the dominant Western ideology of Cartesian dualism, the moral carriage of materiality or earthliness is defined pejoratively in opposition to spirituality or the idealised realm of abstract reason. See the discussion of the nature/reason dualism foundational to Western ideology in

As with the other Metaphysical Realist concepts of the legal subject profiled in the previous chapter, the material legal subject proposed in this chapter has a creation story. The chapter begins, in a section entitled ‘The New Creation Story’, by telling this story, which is drawn from a necessarily selective reading of new cosmology, Big History, new materialism and posthuman critical theory.<sup>3</sup> This is followed, in a section entitled ‘Introducing the Cosmic Person’, by a discussion of the rationale for naming the new concept of the legal subject that corresponds to this story the ‘Cosmic Person’, including the ways in which this moniker enables escape from dualism as envisioned by Val Plumwood. An analysis of the features of this non-dualised construct of human identity, mirroring the analysis of the contemporary concepts-in-use of the legal subject in Chapter Four, is included. The chapter concludes, in a section entitled ‘Posthuman Normativity and The Cosmic Person: A Case Study’, with speculation about what impact this new legal subject might have on the way law structures the human–earth relationship. This final section is a case study in which I argue that the Cosmic Person is prefigured in the process and outcome of the agreement under discussion.

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Chapter Two of this thesis. In particular, Figure 1 on pages 77-78 depicts in graphic form the position of Western ideology in which the presumed inferior sphere of nature is contrasted to the presumed superior sphere of reason. See, also, the genealogy of this ideology in the same chapter for an exposition of the contribution of Cartesian philosophy to the Western worldview.

<sup>3</sup> As this material spans interdisciplinary fields of inquiry across the sciences and humanities and is therefore quite complex and more kaleidoscopic than cohesive, it is beyond the scope of this thesis to engage with any one or all of these exhaustively.

## The New Creation Story

Ever since human beings developed, they have been looking at points of light in the nighttime sky with awe and respect, learning what they could from direct observations and using this knowledge to make predictions, to travel on land, and to navigate by sea. Without specialised instruments, however, people could not detect much about the origin of our immense universe and the nature of matter, because the scale of the universe and of matter is so different from that of everyday life. By the late twentieth century, scientists had invented instruments that could begin to view the macroscopic heavens and the microscopic domain. Knowledge about these worlds has recently expanded exponentially. Now everyone can understand the amazing universe that is our home ... <sup>4</sup>

The creation story of a concept of the legal subject that takes greater account of the earthliness, or the meaningful materiality, of the human being is, in fact, the story of the origin of the universe, the nature of matter, and the meaning that emerges within it. It is a new story of the oldest realities, composed of scientific observations made within the last half century, and it is unfinished in the sense that much more remains unknown about these realities than is known.<sup>5</sup> This thesis contends that the story is robust enough at this stage, however, to suggest a construct of human identity alternative to the radical discontinuity between humans and the ‘rest’ of nature that characterises the traditional ontology, epistemology and ethics extant within the Western social imaginary. To tell the story of the human being as a matter of matter — rather than as a matter of mind over matter — is to connect the human ontologically to absolutely everything. This radical continuity, intimacy and connectivity entails profound epistemological and ethical shifts.

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<sup>4</sup> Cynthia Stokes Brown, *Big History: From the Big Bang to the Present* (The New Press, 2007) 3.

<sup>5</sup> For a playful compendium of some of the vast array of as-yet-imponderables in physics, see Jorge Cham and Daniel Whiteson, *We Have No Idea: A Guide to the Unknown Universe* (John Murray, 2017).

*In the Beginning ...*

The material human being traces its origins to the emergence of matter itself, a phenomenon interpreted for the scientific layperson by Big History writer Cynthia Stokes Brown as the cooling of a ‘homogeneous substance so hot that it had no known structure at all’. This substance, Stokes Brown explains, was a product of what has been called since 1952 the Big Bang: the eruption of the universe some 13.7 billion years ago from ‘a single point, perhaps the size of an atom, in which all known matter and energy and space and time were squeezed together in unimaginable density’.<sup>6</sup> Within the first one hundred thousandths of a second from this moment of eruption, ‘the smallest constituents of matter that we know about, called quarks, began to clump together in groups of three, forming both protons and neutrons’.<sup>7</sup> Still within the first second of the big bang, the ‘four fundamental forces that govern matter came into being: gravitational force, electromagnetic force, the strong nuclear force, and the weak nuclear force’.<sup>8</sup> This is the moment, then, at which the first constituents of matter emerge along with the forces that govern them, and material reality begins.

There is much more to the story. Atoms, clouds of atoms, and galaxies form. Stars are born, and some of them implode. These supernovas, as imploding stars are called, ‘are the cosmic furnaces out of which new elements are formed’:<sup>9</sup>

Only supernovas can create elements higher than iron. Gradually, over roughly 9 billion years, all the elements of the periodic table were built up in this way. Thus explosions of stars created the elements that make life on Earth possible. We quite literally are made of stardust.<sup>10</sup>

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<sup>6</sup> Stokes Brown (n 4) 4.

<sup>7</sup> Ibid 4–5.

<sup>8</sup> Ibid 5.

<sup>9</sup> Ibid 9.

<sup>10</sup> Ibid 10.

What does it mean to be ‘made of stardust?’ More importantly for this enquiry, what does it mean to be a human being made of stardust in a stardust universe?

*Ashes to Ashes; Dust to Dust ... to Stardust*

For centuries in the classical Greco-Roman/Judeo-Christian West, materiality was a condition requiring either embellishment or transcendence in order for human life to be considered as having any meaning. Creation stories emphasised human exceptionalism, and philosophical and spiritual aspirations centred on transcending the human condition through the triumph of reason over nature, cosmos over chaos, salvation over sin, or resurrection over death. Consider, for example, the two stories of the creation of humankind in the biblical book of Genesis. As in the brief exegesis of Psalm 8 in Chapter Two, I turn to the Bible, not as a comment on its currency in contemporary culture, but for its historical role in shaping the great themes of Western culture.

In the first creation story of Genesis, all living creatures *except* human beings are ‘brought forth from the earth’.<sup>11</sup> Human beings, by contrast, are ‘handcrafted’ by God. When God finishes creating everything else, God declares, “‘Let *us* make humankind in our image, according to our likeness”’.<sup>12</sup> Significantly, the earth plays no part in the creation of humankind in this story. Not only does this set humans apart from the rest of nature in this story, but it also explains the dominant position of human beings in the divinely ordained hierarchy of existence. God continues: “‘ ... and let them have dominion over the fish of the

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<sup>11</sup> Genesis 1:24, *The Holy Bible: King James Version*. BibleGateway (Web Page) <<https://www.biblegateway.com/passage/?search=Psalm+8&version=KJV>>.

<sup>12</sup> Genesis 1:25 (as above) (emphasis added).

sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth, and over every creeping thing that creeps upon the earth”<sup>13</sup>.

In the second story of the creation of humankind in Genesis, God creates ‘man’ out of the dust of the earth. (In this story, woman is created secondarily to, and derivatively from, man — a fact that is not inconsequentially related to the point of interlocking networks of dualism discussed in the section of Chapter Two entitled ‘The Human–Earth Relationship as Dualism’.) Two points of human exceptionalism emerge in this telling: (a) man is created first and, again as in the first story, directly by God, and (b) God breathes animating force into man but does not animate other living things with a measure of divinity in this way. God causes the earth to bring forth all other living things, and nothing else receives the spirit/breath of God. Of note in this story, not only regarding man but also in terms of the earth, dust is presented as inert and lifeless, requiring the inspiring intervention of an outside animating force (that is, God) to render it lively and, therefore, meaningful.

The theological idea that to the human is granted distinction and special animation, elevating the human above and beyond materiality, an idea present in classical philosophy as well as in orthodox theology, is hardly contested by the theory of evolution and Cartesian dualism. As discussed at length in Chapter Two, the human capacity for reason is interpreted as justification for a manner of moral transcendence: according to this creation story, reason makes human beings superior to the rest of nature. But what happens to the story of human being if transcendence is off the table? If human beings are known to be made of the same

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<sup>13</sup> Genesis 1:27 (as above).

‘stuff’ as everything else? And what happens to the story if that ‘stuff’ is known to be lively and dynamic *in and of itself*, as discussed below? This thesis argues that when this happens, the story blurs, flattens and extends in ways that open up possibilities for taking greater account of the earth from within a construct of human identity. Once the old story is disrupted in these ways, a new story can emerge.

First, to the disruptions, and then to the construction.

### The Story Blurs

Karen Barad is a particle physicist who studies matter at the subatomic level and a philosopher of science whose interpretations of the meaning of the matter she studies places her amongst the new materialists.<sup>14</sup> What does Barad say about the smallest observable ‘stuff’ of which everything is made? Most significantly, she contends that it isn’t ‘stuff’ at all. Experimenting at what she describes as the metaphysical level,<sup>15</sup> Barad concludes that the primary ontological reality is phenomena, not objects. This is so challenging to conventional wisdom, in which matter is seen to exist as ‘little bits of nature’<sup>16</sup> and reality is understood to be ‘little bits of nature’ interacting, that only Barad’s own articulation adequately captures her theory of agential realism:

In an agential realist account, matter does not refer to a fixed substance; rather, *matter is substance in its intra-active becoming — not a thing but a doing, a congealing of agency. Matter is a stabilizing and destabilizing process of iterative intra-activity.* Phenomena — the smallest material units (relational ‘atoms’) — come to matter through this process of ongoing intra-activity. ‘Matter’ does not refer to an inherent, fixed property of abstract, independently

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<sup>14</sup> My working definition of new materialism is that it is a field of inquiry which presumes material priority and explores the implications thereof.

<sup>15</sup> This is a reference to Barad’s contention that there is no outside observer standpoint in experimentation and so it is always material-discursive: meaning and matter emerge together in the observation itself.

<sup>16</sup> Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 15.

existing objects; rather, *'matter' refers to phenomena in their ongoing materialisation.*<sup>17</sup>

Matter as a *doing*, not a *thing*, makes the story of human being blurry with indeterminacy: any 'congealing of agency' is never absolute or predetermined, be that congealing a 'mug' or a 'human'.<sup>18</sup> Again, from Barad, for clarity's sake:

That is, human bodies, like all other bodies, are not entities with inherent boundaries and properties but phenomena that acquire specific boundaries and properties through the open-ended dynamics of intra-activity. Humans are part of the world-body space in its dynamic structuration.<sup>19</sup>

No matter that we experience the world as a world of bodies, specified and propertied, a world in which 'I' seems meaningfully different from 'the mug'. Neither 'I' nor 'mug' exist absolutely, fixedly, finally or separately in any of these senses. According to Barad, 'bodies differentially materialize as particular patterns of the world as a result of the specific cuts and reconfigurings that are enacted'.<sup>20</sup> Barad calls this process of differential materialisation intra-action, which she defines in the following way:

The neologism 'intra-action' signifies the mutual constitution of entangled agencies. That is, in contrast to the usual 'interaction,' which assumes that there are separate individual agencies that precede their interaction, the notion of intra-action recognizes that distinct agencies do not precede, but rather emerge through, their intra-action. It is important to note that the 'distinct' agencies are only distinct in a relational, not an absolute, sense, that is, agencies are only distinct in relation to their mutual entanglement; they don't exist as individual elements.<sup>21</sup>

The 'mug' and 'I' are not absolutely differentiated, only relationally in co-constitutional entanglement. This challenges the idea that agency is an attribute,

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<sup>17</sup> Ibid (emphases in original).

<sup>18</sup> See ibid 155: 'At first glance, the outside boundary of a body may seem evident, indeed incontrovertible. A coffee mug ends at its outside surface just as surely as people end at their skins. On the face of it, reliance on visual clues seems to constitute a solid empirical approach, but are faces and solids really what they seem? In fact, an abundance of empirical evidence from a range of different disciplines, considerations, and experiences strongly suggests that visual clues may be misleading'.

<sup>19</sup> Ibid 172.

<sup>20</sup> Ibid 176.

<sup>21</sup> Ibid 33.



something that ‘humans and even nonhumans have to varying degrees’.<sup>22</sup> This in turn challenges the idea that human beings are either, on the one hand, ‘pure cause’ or, on the other hand, ‘pure effect’.<sup>23</sup> Humans are ‘part of the world in its open-ended becoming’.<sup>24</sup> Humans are so thoroughly — elementally or, rather, phenomenally — part of the world in its open-ended becoming as to blur where humans begin and the world ends.

I argue that subatomic intra-activity raises the question, ‘Do we make too much of discontinuity at other levels of existence?’ Do we make too much of it at the level of experience, for example, when ‘we’ claim to ‘know’ that ‘that’ is a ‘mug’ and not a ‘human’? The distinction between mug and human is not meaningless, but in a reality in which the mug and the human are intra-acting does it make any sense to speak of them as if they are of different substance either physically or morally? The meaningfulness of ontological indeterminacy, this blurriness in which meaning and matter emerge together, is in the openness of mattering (as distinct from meaningless relativism) which is always already as normative as it is descriptive.

This is, I argue, the very definition of *normative* materiality. I recount Barad’s articulation of the ethics of entanglement in full, due to its density of theory and its eloquence.

Matter itself is always already open to, or rather entangled with, the ‘Other.’ The intra-actively emergent ‘parts’ of phenomena are co-constituted. Not only subjects but also objects are permeated through and through with their entangled kin; the other is not just in one’s skin, but in one’s bones, in one’s belly, in one’s heart, in one’s nucleus, in one’s past and future. This is as true for electrons as it is for brittlestars as it is for the differentially constituted human. (Electrons, like brittlestars, are complex phenomena that are lively and enlivened; memo and remember-ing are not mind-based capacities but marked historicities ingrained in

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<sup>22</sup> Ibid 172.

<sup>23</sup> Ibid 150.

<sup>24</sup> Ibid.

the body's becoming.) *Just as the human subject is not the locus of knowing, neither is it the locus of ethicality.* We (but not only 'we humans') are always already responsible to the others with whom or which we are entangled, not through conscious intent but through the various ontological entanglements that materiality entails. What is on the other side of the agential cut is not separate from us — agential separability is not individuation. Ethics is therefore not about right response to a radically exterior/ized other, but about responsibility and accountability for the lively relationalities of becoming of which we are a part.<sup>25</sup>

The story of normative materiality arising from contemporary developments in natural sciences presents material reality as a 'complex, pluralistic, relatively open process [of] ... productive contingencies'.<sup>26</sup> Diana Coole and Samantha Frost, in their synopsis of new materialisms, conclude that 'it is no longer tenable to rely on the obsolete certainties of classical physics'.<sup>27</sup> They point out that not only particle physics but also

other currents within physics, notably chaos and complexity theory, are also ... undermining the idea of stable and predictable material substance, hastening a realization that our natural environment is far more complex, unstable, fragile, and interactive than earlier models allowed.<sup>28</sup>

The story of the human being as stardust is substantially blurred by the blurry — indeterminate, contingent, co-emergent — ontological reality of that dust and all of its always provisional congealing.

### The Story Flattens

Our existence depends from one moment to the next on myriad micro-organisms and diverse higher species, on our own hazily understood bodily and cellular reactions and on pitiless cosmic motions, on the material artefacts and natural stuff that populate our environment, as well as on socioeconomic structures that produce and reproduce the conditions of our everyday lives. In light of this massive materiality, how could we be anything other than materialist? How could we ignore the power of matter and the ways it materializes in our ordinary experiences or fail to acknowledge the primacy of matter in our theories?<sup>29</sup>

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<sup>25</sup> Ibid 393 (emphasis added).

<sup>26</sup> Coole and Frost (eds) (n 1) 7.

<sup>27</sup> Ibid 12.

<sup>28</sup> Ibid 13.

<sup>29</sup> Ibid 1.

Central to the new ontology is an understanding of matter as lively rather than inert or passive. The liveliness of matter is described differently at different levels of materialisation and across a variety of disciplines (not everyone is a subatomic physicist like Barad), but it is a common theme throughout the new materialisms. On the one hand, it seems unremarkable that matter is effective: to write this thesis is to sit the way the computer requires; to eat and to sleep and to caffeinate as the body demands. For the new materialists, on the other hand, what is remarkable is taking all of this for granted. As Coole and Frost ask in the passage at the head of this section, excerpted from their work in the field: ‘How could we ignore the power of matter and the ways it materializes in our ordinary experiences or fail to acknowledge the primacy of matter in our theories?’

Matter as powerful, lively, vibrant. Matter as *agentic*. Material agency, a central tenet of new materialism, represents the significant displacement of a core theme of modern Western ideology in which

agency has conventionally been defined as a property unique to humans; [and] inversely, the characteristics that have traditionally been held to define humans and to render them a distinctive and privileged species have been used to define the characteristics of agency, namely, cognition and rationality (and masculinity).<sup>30</sup>

New materialism proposes a shift from agency to agentic capacity: matter is endowed with ‘internal effulgence’ and ‘the shifting associations between and within entities ... are incessantly engendering new assemblages within open systems’.<sup>31</sup>

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<sup>30</sup> Diana Coole, ‘Agentic Capacities and Capacious Historical Materialism: Thinking with New Materialisms in the Political Sciences’ (2013) 41(3) *Millennium: Journal of International Studies* 451, 457 (brackets in original).

<sup>31</sup> *Ibid* 456.

What happens to the story of the human being when everything has, as object-oriented ontologist Jane Bennett puts it, ‘thing-power’?<sup>32</sup> It flattens out. Materialist ontology is non-hierarchical; it ‘does not privilege some kinds of entity or agency over others’<sup>33</sup> but interprets reality as an ‘interlocking, multi-modal becoming’.<sup>34</sup> The flattening — an irreducible imbrication<sup>35</sup> — is rendered visible in the new vocabulary arising in this discourse: nature/culture becomes natureculture; human/non-human becomes human–non-human; and material/discursive becomes material-discursive.<sup>36</sup> The effect of this flattening, in terms of the notion of dualism being scrutinised in this thesis, is to denaturalise the hierarchy which defines this relationship structure.

#### The Story Extends

The reality of a single plane of existence, a natureculture continuum of socio-material meaning, extends the story of the human beyond the self. For Braidotti, posthuman being is the human being extended beyond its self in an accountability she describes as a ‘cognitive brand of empathy, or intense affinity: it is the capacity for compassion, which combines the power of understanding with the force to endure in sympathy with a people, all of humanity, the planet and civilization as a whole’.<sup>37</sup> For Barad, material human being extends the human story outwards to ‘meet the universe halfway’:

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<sup>32</sup> Jane Bennett, ‘The Force of Things: Steps toward an Ecology of Matter’ (2004) 32(3) *Political Theory* 347, 349: ‘Thing-power materialism is a speculative onto-story, a rather presumptuous attempt to depict the nonhumanity that flows around but also through humans’.

<sup>33</sup> Ibid 454.

<sup>34</sup> Ibid 455.

<sup>35</sup> Ibid 454.

<sup>36</sup> See Karen Barad, ‘Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter’ (2003) 28(3) *Gender and Science: New Issues* 801, 818: ‘And the primary semantic units are not “words” but material-discursive practices through which boundaries are constituted’.

<sup>37</sup> Rosi Braidotti, ‘Posthuman, All Too Human: Towards a New Process Ontology’ (2006) 23(7–8) *Theory, Culture and Society* 197, 205.

A delicate tissue of ethicality runs through the marrow of being. There is no getting away from ethics — mattering is an integral part of the ontology of the world in its dynamic presencing. Not even a moment exists on its own. ‘This’ and ‘that,’ ‘here’ and ‘now,’ don't pre-exist what happens but come alive with each meeting. The world and its possibilities for becoming are re-made with each moment. If we hold onto the belief that the world is made of individual entities, it is hard to see how even our best, most well-intentioned calculations for right action can avoid tearing holes in the delicate tissue structure of entanglements that the lifeblood of the world runs through. Intra-acting responsibly as part of the world means taking account of the entangled phenomena that are intrinsic to the world's vitality and being responsive to the possibilities that might help us and it flourish. Meeting each moment, being alive to the possibilities of becoming, is an ethical call, an invitation that is written into the very matter of all being and becoming. We need to meet the universe halfway, to take responsibility for the role that we play in the world's differential becoming.<sup>38</sup>

This is dazzling, calling for an extension of the self beyond knowing to wondering; beyond intellectual grasping to affective experiencing; beyond mastery and control from above to participating within. In tracing the emergence of new materialism, Ian Buchanan notes that ‘in the twentieth century advances in scientific knowledge and practice have been so dazzling they compel humanistic attention — e.g. the discovery of subatomic particles has raised questions about the very nature of matter itself’.<sup>39</sup> To be dazzled by the wonders of being made of stardust; to be daunted by the exigencies of anthropogenic climate change: this material–spiritual affectivity radically extends the ideal of the rational, autonomous individual inscribed in Western ideology.

The powers of the new story for transforming the human–earth relationship from within an engaged critical realism are being speculated upon by a range of theorists in quite spiritual/spirited terms. Bennett suggests that ‘enchantment with the everyday world — with nature but also with commodities and other cultural products — might augment the motivational energy needed to move selves from

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<sup>38</sup> Barad, *Meeting the Universe Halfway* (n 16) 396.

<sup>39</sup> Ian Buchanan, ‘New Materialism’, in Ian Buchanan (ed), *A Dictionary of Critical Theory* (Oxford University Press, 2<sup>nd</sup> ed, 2010).

the endorsement of ethical principles to the actual practice of ethical behaviours'.<sup>40</sup> Braidotti points to Haraway's call 'for a renewed kinship system, radicalized by concretely affectionate ties to the non-human 'others''<sup>41</sup> and argues that the 'strength of Haraway's project is its inspirational force'.<sup>42</sup> Braidotti observes 'traces of residual spirituality' in the postsecular 'vision of consciousness that links critique to affirmation',<sup>43</sup> a vision to which her own work subscribes.

This openness in critical theory to a reimagined spirituality links helpfully to the new cosmology of Big History produced by Thomas Berry and two of his former students, Brian Swimme and Mary Evelyn Tucker. It would be remiss in the context of this project, given Berry's presence at various points in the development of the various inquiries which comprise the thesis, to neglect this source of reimagining the material human being. The story of human being that Berry and Swimme tell in *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era — A Celebration of the Unfolding of the Cosmos* (1992) and that Swimme and Tucker tell in *Journey of the Universe* (2011) emphasises human belonging and becoming within a dynamic material universe. These spiritual themes, and the poetry of their evocation by the authors, convey the remarkable energy of the new creation story:

We are the first generation to learn the comprehensive scientific dimension of the universe story. We know that the observable universe emerged 13.8 billion years ago, and we now live on a planet orbiting our Sun, one of the trillions of stars in one of the billions of galaxies in an unfolding universe that is profoundly creative and interconnected. With our empirical observations expanded by modern science, we are now realising that our universe is a single immense energy event that began as a tiny speck that has unfolded over time to become

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<sup>40</sup> Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press, 2010) xi.

<sup>41</sup> Braidotti, 'Posthuman, All Too Human' (n 37) 199, citing Donna Haraway, *Modest\_Witness@Second\_Millennium. FemaleMan©\_Meets\_Oncomouse™* (Routledge, 1997).

<sup>42</sup> Braidotti, 'Posthuman, All Too Human' (n 37) 201.

<sup>43</sup> Rosi Braidotti, 'In Spite of the Times: The Postsecular Turn in Feminism' (2008) 25(6) *Theory, Culture & Society* 1, 2. See also the various discussions of 'feminist spirituality' and 'life-sustaining spirituality' in Rosi Braidotti, *The Posthuman* (Polity Press, 2013).

galaxies and stars, palms and pelicans, the music of Bach, and each of us alive today. The great discovery of contemporary science is that the universe is not simply a place, but a story — a story in which we are immersed, to which we belong, and out of which we arose.<sup>44</sup>

These themes of belonging and becoming are found throughout new materialism and posthumanism, but what is distinctive about the new cosmology of Berry et al is the teleological interpretation of the dynamism of materiality. Swimme and Tucker, like Berry and Swimme, use the term ‘unfolding’ and speak of human destiny:

Our human destiny is to become the heart of the universe that embraces the whole of the Earth community. We are just a speck in the universe, but we are beings with the capacity to feel comprehensive compassion in the midst of an ocean of intimacy. That is the direction of our becoming more fully human.<sup>45</sup>

Barad, in contrast, uses the term ‘enfolding’ to describe the dynamism of matter and points out that the science indicates that ‘changes do not follow in continuous fashion from a given prior state or origin, nor do they follow some teleological trajectory — there are no trajectories’.<sup>46</sup> Whilst for the purpose of this thesis it is not necessary to resolve this discrepancy on the issue of teleology between the scientific and spiritual accounts of material realism represented by Barad and Berry, respectively, I treat this aspect of new cosmology cautiously here. Too much talk of human destiny is counterproductive to the project of restructuring the human–earth relationship towards greater accountability to the needs and interests of the non-human constituents of the relationship. What is useful to this project about the new cosmology of Berry and others working with him is the evocative articulation of material continuity as both meaningful and significant to

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<sup>44</sup> Brian Thomas Swimme and Mary Evelyn Tucker, *Journey of the Universe* (Yale University Press, 2011) 2.

<sup>45</sup> Ibid 115.

<sup>46</sup> Barad, *Meeting the Universe Halfway* (n 16) 181.

reimagining human identity in terms of radical intimacy instead of in terms of radical discontinuity.

I turn now to the construct of human identity that I see emerging from the blurry, flat, extended and dazzling story of stardust. I am ready to introduce the Cosmic Person, entangled, embodied and embedded, and to propose it as a posthuman legal subject.



## Introducing the Cosmic Person

This story has the power to awaken us more deeply to who we are. For just as the Milky Way is the universe in the form of a galaxy, and an orchid is the universe in the form of a flower, we are the universe in the form of a human. And every time we are drawn to look up at the night sky and reflect on the awesome beauty of the universe, we are actually the universe reflecting on itself.

And this changes everything.<sup>47</sup>

The project of this thesis can be articulated in the following terms: to participate in the process of ‘finding an appropriate and adaptable posthuman normativity’<sup>48</sup> by reimagining the legal subject, as emblem and carrier (icon?) of material normativity, in such a way as to ‘speak to the material, ecological situation of humans in the world’.<sup>49</sup> In this thesis, the reimagined, posthuman legal subject is called the Cosmic Person. Such a moniker might seem contradictory to a materialist, posthumanist concept of the legal subject, insofar as ‘cosmic’ sounds transcendent or other-worldly rather than immanent (or ‘out there’ instead of grounded) and ‘person’ has an immediate and seemingly singular association with the individuated human being. However, this thesis argues that both of these parts of the name correspond to the insights arising from new interpretations of the nature of existence discussed in the prior section and their implications for thinking of human life in terms of coexistence within the whole community of life on Earth.

### *Cosmic*

Taking account of material existence in the 21<sup>st</sup> century means looking up at the stars on a clear night with a fistful of dirt in hand, mouthing the words to the ambient rock song:

People they come together

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<sup>47</sup> Swimme and Tucker (n 44) 2.

<sup>48</sup> Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) 38.

<sup>49</sup> Ibid.

People they fall apart  
 No one can stop us now  
 'cause we are all made of stars'.<sup>50</sup>

Or as mathematician Brian Swimme and religion scholar Mary Evelyn Tucker put it in the passage in the epigraph for this section (repeated here for its poetry):

With our empirical observations expanded by modern science, we are now realising that our universe is a single, immense energy event that began as a tiny speck that has unfolded over time to become galaxies and stars, palms and pelicans, the music of Bach, and each of us alive today.<sup>51</sup>

The intent behind using the term 'Cosmic' is to capture the meaningfulness of the material common denominator of everything in existence: that we are made of stars. As described in the brief overview in the previous section of the Big Bang theory, the science behind this assertion is that the elements of the universe are released in the explosion of super nova. Thus our bodies have the same origin as all bodies: planetary, microscopic, organic and inorganic. According to particle physicist Karen Barad, whose work in this area lends so much to the creation story of this legal subject told in the previous section, bodies are not made of the 'stuff' of stars but of phenomena or the intra-activity of stuff-in-its-always-becoming. The primary ontological reality, argues Barad, based on her experiments with subatomic material reality, is intra-action — phenomena themselves — rather than interaction between pre-existing entities. The primacy of phenomena undergirds Barad's notion of the entanglement of existence introduced in the previous section:

To be entangled is not simply to be intertwined with another, as in the joining of separate entities, but to lack an independent, self-contained existence. Existence is not an individual affair. Individuals do not pre-exist their interactions, rather individuals emerge through and as part of their entangled intra-relating.<sup>52</sup>

Another way that Barad talks about entanglement is to consistently use the phrase 'always already implicated', by which she means that it matters what matter

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<sup>50</sup> Moby, 'We are all Made of Stars', 18 (Muse, V2 and EMI, 2002).

<sup>51</sup> Swimme and Tucker (n 44) 2.

<sup>52</sup> Barad, *Meeting the Universe Halfway* (n 16) ix.

comes to matter.<sup>53</sup> The term ‘Cosmic’ captures not only the ontology of ‘being made of stars’, but also the ethics built into it. For Barad, ontological indeterminacy means that

[e]thicality is part of the fabric of the world; the call to respond and be responsible is part of what is. There is no spatial-temporal domain that is excluded from the ethicality of what matters. Questions of responsibility and accountability present themselves with every possibility; each moment is alive with different possibilities for the world’s becoming and different reconfigurings of what may yet be possible.<sup>54</sup>

The paradoxical implication of entanglement is that whilst human beings do not exist outside of ‘the world’ and thus cannot ‘take charge’ of it, our matter (and the meaning we make of it) is ‘always already implicated’ in the world’s becoming. We matter and what we do matters. There is a renewed and humbling sense of empowerment in this displacement, but not dissolution, of responsibility from ‘outside of’ to ‘within’. The term ‘Cosmic’ attempts to communicate a frame of accountability that extends *absolutely* beyond the self (that is, to all that is) whilst including the self (as *part of* all that is). This accountability emerges in an ontology of intra-relating because differentiation is revealed as non-absolute and, when there is no ‘Other’, everything matters *the same*. To be star-born, ‘Cosmic’, is to *have to* care about *everything*.

This is not about caring in the sense of feeling warmly towards, or being responsible for, the fate of everything (as in the critique I levy against Earth Jurisprudence in Chapter Three), but in the sense of having to take account of and

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<sup>53</sup> Ibid 336: ‘Importantly, materiality is also reconceptualized in terms of the shift in ontology from things to phenomena. In an agential realist account, matter does not refer to a fixed substance; rather, matter is substance in its intra-active becoming — not a thing but a doing, a congealing of agency. Matter is a stabilizing and destabilizing process of iterative intra-activity. Phenomena — the smallest material units (relational “atoms”) — come to matter through this process of ongoing intra-activity. Materiality and discursivity are mutually implicated in the dynamics of intra-activity. This is an outgrowth of the agential realist reconceptualisations of causality and agency’.

<sup>54</sup> Ibid 182.

be responsive to everything. Donna Haraway helpfully breaks open the term responsibility into ‘response-ability’, which divests it of conventional paternalism and invests it instead with a sense of co-becoming. Would it be so bad to imagine and behave as if our fate is entangled in an absolute sense with the fate of all that is? I contend that using a slightly quirky term like ‘Cosmic’ in the context of the very serious and urgent issues facing the planet today is a worthy provocation in this direction. It calls for stretching beyond the self to ‘the point of evacuation or evanescence of the bounded selves and their merger into the milieu, the middle grounds, the radical immanence of the earth itself and its cosmic resonance’.<sup>55</sup>

The term ‘cosmic’ signals accountability to the *radical continuity* of existence. Human beings exist across a continuity of three contexts,<sup>56</sup> like a spiral path encompassing three dynamically intra-active points<sup>57</sup> of phenomena: universe, planet and person. These points as they exist *within each individual human being* set the terms for the human–earth relationship. The image that best conveys this multi-modal becoming is a mathematical model called an umbilic torus (Figure 3).

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<sup>55</sup> Rosi Braidotti, *The Posthuman* (Polity Press, 2013) 145.

<sup>56</sup> Using the term ‘context’ for expanding scales of existence risks the connotation of background or external environment, which is antithetical to the material continuity that forms the basis of the construct of human identity I am attempting to portray in this project. I address this limitation with qualifying phrases: ‘continuity across three contexts’; ‘encompassing three points’; ‘these points as they exist within each individual human being’.

<sup>57</sup> The fixity of a metaphor like ‘point’ is problematic unless it is qualified as referring to an instance of what Barad calls an agential cut. See Barad, ‘Posthumanist Performativity’ (n 36) 824: ‘an agential cut effects a local separability of different “component parts” of the phenomenon, one of which (“the cause”) expresses itself in effecting and marking the other (“the effect”). In a scientific context this process is known as a “measurement.” (Indeed, the notion of “measurement” is nothing more or less than a causal intra-action.) Whether it is thought of as a “measurement,” or as part of the universe making itself intelligible to another part in its ongoing differentiating intelligibility and materialization, is a matter of preference’ (citations omitted).

Figure 3: The Cosmic Person



Cosmic is the context of the universe. The universe imposes three governing imperatives: interdependency, connectedness and emergence. The terms set by this context relate to the fact that nothing is or can become anything without everything else. *Everything* must be taken into account within the human–earth relationship: not in the sense of accounting for every constitutive element (as if that were possible) but in the sense of acknowledging the constitutive and contingent nature of reality as a ‘single, immense energy event’.<sup>58</sup>

Cosmic is the context of the planet. The earth is a closed system, which implies limits. The terms set by this context necessitate the shift in law from focusing on the individual life project to the project of life itself. *Ecology* as the inherent interdependency of life must be taken into account within the human–earth relationship: ‘existence is always coexistence’.<sup>59</sup> We are, as Lorraine Code asserts, ‘creatures of multiplicity and interdependence — be it on other human

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<sup>58</sup> Swimme and Tucker (n 44) 2.

<sup>59</sup> Timothy Morton, *The Ecological Thought* (Harvard University Press, 2010) 4.

beings, on “our” surroundings, on the offerings/resources/limitations of the world as we find it, however depleted or plentiful it may be’.<sup>60</sup>

Cosmic is the context of the person. Being a person involves the dimensions identified by Jennifer Nedelksy: relationship, affect and embodiment. We live, we love, we grow. *Experience* — not abstraction — must be taken into account within the human–earth relationship.

### *Person*

Entanglement evokes one scale of accountability beyond the self; embodiment and embeddedness evoke another. Our materiality locates us not only within the phenomenon ‘cosmos’, but also somewhere specific within the cosmos: ‘the self is differential and constituted through embodied and embedded sets of interrelations’.<sup>61</sup> Attempting to capture this sense of embodiment and embeddedness and these constituting interrelations which are temporal, spatial and social/political, I use the term ‘person’. In this section, I indicate both what commends this choice and its limitations. A full philosophical treatment of the term and its genealogy in Western philosophy is well beyond the scope of this thesis. This discussion, as is the case with the discussion of the legal subject in this thesis, is about concepts-in-use. I focus on what makes ‘person’ as a concept-in-use in both non-legal and legal spheres an effective part of the name for the posthuman legal subject I propose.

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<sup>60</sup> Lorraine Code, ‘The Myth of the Individual’ 2016 16(2) *The American Journal of Bioethics* 59. 59.

<sup>61</sup> Braidotti (n 55) 137–8.

### Why 'Person' Works

In terms of everyday usage, what commends 'person' as part of the name for a posthuman legal subject are its natureculture connotations: it conjures both the corporeal entity 'human being' and the socially contingent identity of said human being. There is a sense of 'both/and' signalled by the term. Although I agree with Ross Poole that 'we should be wary of assuming that this concept signifies what we most essentially are'<sup>62</sup> (a tendency, he notes, that is common across the history of Western philosophy), I argue that reading the sense of 'more than just parts' that the term 'person' conveys in Western plain language usage through the theory of agential realism mitigates against this tendency.

In this reading, in which matter and meaning emerge together and which features indeterminacy, the term 'person' is at one and the same time a statement of what is and what ought to be. It refers to a real thing *and* a figment of the social imaginary. It is a being and a becoming. It is, in this sense, socio-material phenomena masquerading as entity and this makes it a perfect fit to convey agential realism's ethico-onto-epistemology into legal discourse. As opposed to the fiction of the idealised dualistic construct of human identity in Western culture of a pre-existing, pre-social, self-contained and self-propelled essence, 'person' viewed through agential realism signals the matter and meaning co-emergence of becoming human and the always already and ongoing effect of intra- and inter-relations. The individual human being as person is neither singular nor static but, rather, made up of all the interactions and intra-actions of being:

This humbling experience of Not-Oneness, which is constitutive of the non-unitary subject, anchors the subject in an ethical bond to alterity, to the multiple

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<sup>62</sup> Ross Poole, 'On Being a Person' (2006) 74(1) *Australasian Journal of Philosophy* 38, 56.

and external others, that are constitutive of that entity which, out of laziness and habit we call the self.<sup>63</sup>

The Not-Oneness of ‘person’ is an idea that resonates not only in the new science but also in the discipline formerly known as the Queen of Sciences:<sup>64</sup> theology. The material-discursive patterns that present as ‘person’ speak to more than a collection of material and social substances and significations in the sense that coherence is more than collectivity. Coherence is as much a spiritual as a technical term, a sensibility that in theological terms extends beyond the individual human being towards communion with the divine.

It is outside of the scope of this thesis to delve too deeply into these matters, but the work of contemporary Eastern Orthodox theologian JD Zizioulas is provocative:

Man’s [sic] personhood should not be understood in terms of ‘personality’, i.e. of a complex of natural, psychological or moral qualities which are in some sense ‘possessed’ by or ‘contained in the human *individuum*. On the contrary, being a person is basically different from being an individual or ‘personality’ in that the person can not [sic] be conceived in itself as a static entity, but only as it *relates to*.<sup>65</sup>

For Zizioulas, ‘personhood implies the ‘openness of being’, and even more than that, the *ek-stasis* of being, i.e. a movement towards communion, which leads to a transcendence of the boundaries of the self.<sup>66</sup> This connects well with Thomas Berry’s use of the term ‘communion’<sup>67</sup> to describe the sort of transformation he hoped for within the human–earth relationship: that the whole community of life

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<sup>63</sup> Ibid 100.

<sup>64</sup> Notably, in the context of this project, this designation is ascribed to mediaeval theologian Thomas Aquinas. The cosmology of Aquinas is foundational to the thinking of Thomas Berry. A detailed analysis of the influence of Aquinas on Berry and the development of Earth Jurisprudence, particularly in relation to the Aquinas theory of Natural Law, is available in Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015).

<sup>65</sup> JD Zizioulas, ‘Human Capacity and Human Incapacity: A Theological Exploration of Personhood’ (1975) 28(5) *Scottish Journal of Theology* 401, 407–8.

<sup>66</sup> Ibid 408.

<sup>67</sup> See Thomas Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999).



on Earth might be perceived of as a communion of subjects. It is in this sense of communion and coherence that the term ‘person’ commends itself as part of the name for the new legal subject aligned with the objective of Earth Jurisprudence.

Etymologically, the term’s association with *persona* commends it as well. Origins of the term relating to a mask to be put on or a character to be assumed keep a representational sensibility alive within the concept of the legal subject. This disrupts any lurking tendency towards essentialism and builds responsiveness and dynamism into the concept; it helps the concept stay true to open-endedness and indeterminacy.

The *persona* sense of the term has a long history in Western law and legal theory, first appearing in Roman times as an innovation in the theory of legal standing. Poole notes that Marchel Mauss has argued that ‘this legal sense ... emerged when the right to participate in a full range of [Roman] legal and political activities ceased to be the privilege of family heads and became universal amongst free men’.<sup>68</sup> The sense of person as a role to be consciously taken up is productive in the context of this project, which is committed to consciousness-raising about, and alertness to, the role of the human in the human–earth relationship.

### *The Cosmic Person as Legal Subject*

What happens when the Cosmic Person is the legal subject? The answer to this question lies in the primary function of the legal subject generally: how we think about who counts at law, and why, ‘powerfully assists in the determination of the normal and the abnormal’.<sup>69</sup> This thesis argues that the Cosmic Person makes

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<sup>68</sup> Poole (n 62) 39.

<sup>69</sup> Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009) 11.

possible a ‘new normal’ in the human–earth relationship. Specifically, the Cosmic Person as legal subject makes human–non-human coexistence normal and renders self-centred individualism abnormal. This conclusion, I argue, is both supported by the logic of non-dualism as an inversion of the logic of dualism examined at length in Chapter Two and deployed as a framework for analysing the current concepts-in-use of the legal subject in Chapter Four.

I turn now to an analysis of the Cosmic Person as legal subject within the framework of non-dualism.

*Figure 4: The Features of Non-Dualism in the Cosmic Person*

	<b>Acknowledge dependency</b>	<b>Affirm continuity</b>	<b>Recognise independence</b>	<b>Recognise difference</b>	<b>Nature/ reason</b>
<b>Cosmic Person</b>	Yes	Yes	Yes	Yes	No
	Intra-action		Agential cuts		Co-worlding
	Affirm relationship and continuity		Affirm difference and independence of Other		nature-culture
	Recognition of a complex, interacting pattern of both continuity and difference				

The logic of non-dualism features two primary movements that interact to create a dynamic in the human–earth relationship of radical intimacy as opposed to the radical discontinuity fostered by dualism. The steps of the first movement are characterised by acknowledging that which in dualism is denied: dependency and continuity between various mode of being, human and non-human. This aspect of the turn from dualism relates to reimagining the upperside of the naturalised (but not natural) hierarchy of relationship across perceived differences of modality or

type — such as species, or such as the notion of individuals as different from ecosystems.<sup>70</sup>

The second movement comprises inversions of two perceptions of the underside that characterise dualism: as undifferentiated category of being and as defined by lack in comparison to key features of the upperside. The effect of holding both of these inversions together at once — acknowledgement of dependency and continuity across divisions of type, along with recognition of independence and difference of the Other — is to render instrumentalism a logical impossibility. To recognise the independence and difference of the Other equates to a recognition of the inherent worth of the Other: inherent and instrumental worth are mutually exclusive structures of relation. Also, to acknowledge dependency and continuity as constitutive of the self is to not leave anything outside of the self as available for use: there are reciprocities and relations, intra-actions and entanglements, but no transactions or exchanges. That is, nothing comes to completion (central to the definition of transaction), and nothing utterly (as per the etymology of ‘ex’) changes (as in ‘hands’ or ‘sides’).

As I indicate in Figure 4, key features of the Cosmic Person correspond to key features of non-dualism. The theory of agential realism by which the Cosmic Person is defined comprises both movements of the non-dualism dance. The idea

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<sup>70</sup> In fact, individual humans are also ecosystems but are perceived as undifferentiated selves. See Jonathan Beever and Nicolae Morar, ‘The Porosity of Autonomy: Social and Biological Constitution of the Patient in Biomedicine’ (2016) 16(2) *The American Journal of Bioethics* 34, 35: ‘Microbial biology is producing a radically new understanding of “individual” organisms and an emerging series of ethical concerns. Until recently, we have thought of ourselves and of other organisms as being the kind of entities that possess fairly strict spatial boundaries and whose internal functioning was regulated by their respective cellular materials. To our own surprise, we have learned that “bacteria occupy all surfaces of the human body with a combined microbial cell population ten times that of human cells”, “a fact that, in essence, makes us more microbe than man!” We have also learned that everyone’s microbiome makes possible physiological capacities that are not the product of our own evolution’ (citations omitted).

within agential realism of intra-action is an ultimate affirmation of relationship and continuity: nothing, neither subject nor object, exists without the other or is in any fundamental way separate from another thing, because there is no such thing, in a primary ontological sense, as separation. The primary ontological reality, according to agential realism, is phenomena, not entity.

Also, and arising from the agential realist account of existential reality, is the idea of agential cuts or the diffractive process by which meaning and matter emerge together. This is the mechanism by which difference and independence are recognised from within the concept of intra-activity. In the ethics of material ‘always already’ implication, materiality is constitutive but not determinative; cuts and diffractions mean that difference remains meaningful but not absolutely so. In other words, it is simultaneously possible to acknowledge continuity *and* to recognise difference from this perspective, and, in fact, this is the primary moral imperative of normative materiality: to hold this balance within the definition of the person. That the Cosmic Person is always already implicated in the existence of the Other/non-Other fundamentally disrupts instrumentalism, thus requiring the instatement of a different moral structure framed by co-worlding. It is not the intent of this project to describe this structure; I merely signal its instigation and give some indication of it in the case study in the following section.

To bring this introduction of the Cosmic Person as legal subject to completion, I undertake a case study of a single, small-scale local action involving one river on one island in the midst of one ocean at one moment in time. I argue that the *Waimea River Watershed Mediation Agreement* (‘*Waimea*’) reveals glimpses of a posthuman normativity in which the human in the human–earth relationship is reimagined as embodied, embedded and entangled within a single

plane of natureculture existence. Reading this case through the concept of the Cosmic Person, I contend, exemplifies what Davies describes as the performative and prefigurative capacities of law and legal theory: law as pathway to a desired future,<sup>71</sup> which in relation to this thesis is a healthy and flourishing future for the whole community of life on Earth. I submit this case study as a possible pathway to ‘finding an appropriate and adaptable posthuman normativity — a normative world where humans are understood as situated in a natureculture continuum rather than merely in human culture, which speaks to the material, ecological situation of humans in the world’.<sup>72</sup>

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<sup>71</sup> See generally Davies, *Law Unlimited* (n 48).

<sup>72</sup> *Ibid* 38.

## Posthuman Normativity and The Cosmic Person: A Case Study

Yet alternative imaginings of law do begin to prefigure and test possible future legal forms in locations where theory and practice converge. Most significantly . . . prefigurative practices cross the divide between the legal present and our legal futures: they enact possible futures in the present and leave indelible traces of what is to come in the here and now.<sup>73</sup>

In July 2013 lawyers from Earthjustice,<sup>74</sup> acting as legal counsel for the community group Po‘ai Wai Ola/West Kaua‘i Watershed Alliance, petitioned the State of Hawai‘i’s Commission on Water Resource Management to ‘increase [instream flow standards] for the Waimea River system and end the excessive and wasteful diversions’<sup>75</sup> created in the plantation era at the turn of the 20<sup>th</sup> century. Four years later, a mediation agreement resolved the Po‘ai Wai Ola/West Kaua‘i Watershed Alliance’s *Combined Petition to Amend the Interim Stream Flow Standards for Waimea River and Its Headwaters and Tributaries and Complaint and Petition for Declaratory Order Against Waste*.<sup>76</sup> The decision to approach the situation at Waimea through an alternative form of legal practice, mediation, commends this case as an appropriate example by which to illustrate the alternative human legal

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<sup>73</sup> Ibid 17.

<sup>74</sup> See ‘About’, *Earthjustice* (Web Page) <<https://earthjustice.org/about>>. Earthjustice is the ‘original and largest non-profit environmental law organization’ in the United States. It was formed in 1971 by Phillip S Berry, R Frederic Fisher and H Donald Harris as the Sierra Club Legal Defense Fund. This organisation filed suit against the proposed development of the Mineral King Valley in California, ‘securing standing to sue for private citizens’ by demonstrating that the nine plaintiffs with whom they partnered would be ‘irreparably harmed by the development’ due to their relationship with the valley as a wilderness. This action was a response to the favourable ruling for the developers in *Sierra Club v Morton*, 405 US 727 (1972) (‘*Sierra*’) (citation omitted).

<sup>75</sup> Isaac Moriwake, ‘Citizens Demand Restoration of River in “Grand Canyon of the Pacific” on Kaua‘i: Lawsuit Exposes Unlawful Waste of Diverted Water’, *Earthjustice* (Web Page, 24 July 2013) <<https://earthjustice.org/news/press/2013/citizens-demand-restoration-of-river-in-grand-canyon-of-the-pacific-on-kaua-i>>.

<sup>76</sup> State of Hawai‘i, Commission on Water Resource Management, *Po‘ai Wai Ola/West Kaua‘i Watershed Alliance’s Combined Petition to Amend the Interim Instream Flow Standards for Waimea River and Its Headwater and Tributaries, and Complaint and Petition for Declaratory Order Against Waste* (24 July 2013). For a discussion of this case as it relates to posthuman conceptualisation of the legal subject see Jana Norman, ‘Introducing the Cosmic Person: An Ecocentric Legal Subject (2018) 43(2) *Alternative Law Journal* 126.

subject I introduce in this project, the particulars of which I elaborate in the discussion to follow.

*Preface, Part One: The Hawaiian Context*

Hawai'i is a compelling microcosm of the natureculture continuum, being densely populated with resident and transient humans,<sup>77</sup> endemic species,<sup>78</sup> specialised ecosystems,<sup>79</sup> and geologically and environmentally significant land and sea forms.<sup>80</sup> It is the most isolated human population centre on the planet, being 2,390 miles (3,846 kilometres) from California; 3,850 miles (6,196 kilometres) from Japan; 4,900 miles (7,886 kilometres) from China; and 5,280 miles (8,497 kilometres) from the Philippines.<sup>81</sup> Culturally, Hawai'i has a concentrated

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<sup>77</sup> The state of Hawai'i consists of 137 named islands, eight of which are considered 'major' and collectively carry an estimated total human population of 1.43 million. A total land mass of 28,311 km<sup>2</sup> puts the population density of Hawai'i at 82.6/km<sup>2</sup> for a ranking of 13<sup>th</sup> most densely populated states. In 2017, visitor arrivals totalled 9.3 million.

<sup>78</sup> See Sophia Schweitzer, 'Islands in the Balance' (2013) Spring/Summer *American Forests* 17, 19: '[O]f Hawai'i's 1,000 native plant species growing wild, more than 90 percent are endemic'.

<sup>79</sup> For example, the Fish and Wildlife Service of the US Department of the Interior used an ecosystem approach to determine the designation of endangered status for 48 species and critical habitats associated with 47 of them on the island of Kauai, where the Waimea River is located: 'Pacific Islands Fish and Wildlife Office', *US Fish & Wildlife Service* (Web Page, 20 September 2012) <<https://www.fws.gov/pacificislands/kauai48species.html>>.

<sup>80</sup> See Cynthia Barnett, 'Hawaii is Now Home to an Ocean Reserve Twice the Size of Texas', *National Geographic* (Web Page, 26 August 2016) <<https://news.nationalgeographic.com/2016/08/obama-creates-world-s-largest-park-off-hawaii/>>: Hawaii encompasses eight National Parks, which received over 6 million visitors in 2017. Also designated are one National Trail, seven National Natural Monuments and two World Heritage Sites. In 2016, President Obama 'more than quadrupled Papahānaumokuākea's [a National Marine Monument] size, to 582,578 square miles, an area larger than all the national parks combined. Using executive authority under the U.S. Antiquities Act, Obama extended most of the monument's boundary — and its prohibition of commercial fishing — out to the 200-mile limit of the exclusive economic zone (EEZ)'. This remarkable monument consists of 'seamounts and sunken islands inhabited by more than 7,000 species, including the oldest animals on Earth — black corals that have lived for more than 4,000 years. In all, a quarter of the creatures living in the monument are found nowhere else'. Hawai'i is also geologically significant because it is one of the few hot spots on Earth. See *Marine Science* (Web Page) <<http://www.marinebio.net/marinescience/02ocean/hwgeo.htm>>: '[A]n area in the middle of a crustal plate where volcanism occurs ... Kauai is the oldest of the main Hawaiian Islands now, having formed some 5 million years ago, with its volcano considered to be extinct and fully in the process of erosion. Oahu is next, its volcanism is considered to be inactive. Then Maui with its Haleakala crater that could still come to life one more time. And the youngest island is the "Big Island" of Hawai'i itself, with surface lavas all less than one million years old'.

<sup>81</sup> See *Fifty States* (Web Page) <<https://www.50states.com/facts/hawaii.htm>>. (Imperial measurements in original.)

diversity. First inhabited by Polynesians from the Marquesas Islands around 400 CE, the state has the ‘highest racial minority population of any state in the union — 75 percent, according to U.S. census figures’.<sup>82</sup>

The mix of cultures and of culture and nature in Hawai’i gives rise to various tensions and issues. The 1991 publication of the *Native Hawaiian Rights Handbook* by the Native Hawaiian Legal Corporation and the Office of Hawaiian Affairs gives some indication of the cultural tensions:

The spiritual and cultural disintegration of Hawaiians after the illegal destruction of the Hawaiian nation, the pervasive belief that Hawaiians were a ‘dying race,’ and the prolonged territorial period culminated in the statehood declaration that ‘we’re all haoles<sup>83</sup> now’ would not and could not acknowledge Native Hawaiian rights. ... Even today, Native Hawaiians must constantly assert and defend their rights in a foreign, and often hostile, legal system if they are to remain a separate and distinct native people.<sup>84</sup>

In terms of the environmental impact of humans, over 25% of native Hawaiian species are endangered and ‘since the arrival of humans, 28 bird species and at least 10% of plant species have gone extinct’.<sup>85</sup> By the time Captain Cook and the first Europeans arrived in 1778, most of the lower elevation areas with ‘even moderately good soils’<sup>86</sup> were cultivated, and introduced species such as pigs and various food plants were present. One source indicates that ‘about half of Hawai’i’s land birds were extinct before European scientists could observe them’.<sup>87</sup> European invasion and colonisation accelerated ecosystem destruction and native species

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<sup>82</sup> Liane Hansen, ‘Hawaii is Diverse But Far from a Racial Paradise’, *Weekend Edition Sunday* (Web Page, 15 November 2009) <<https://www.npr.org/templates/story/story.php?storyId=120431126>>.

<sup>83</sup> ‘Haole’ is the term for a person who is not a native Hawaiian, especially a white person.

<sup>84</sup> Melody Kapiliialoha MacKenzie (ed), ‘Introduction’, *Native Hawaiian Rights Handbook* (Native Hawaiian Legal Corporation and Office of Hawaiian Affairs, 1991).

<sup>85</sup> Molly Sequin, ‘Humans Have Dramatically Changed Hawaii — Here’s How’, *Business Insider* (Web Page, 30 July 2016) <<https://www.businessinsider.com.au/how-humans-changed-hawaii-2016-7?r=US&IR=T#/#originally-the-native-hawaiian-animals-and-plants-didnt-have-many-natural-predators-1>>.

<sup>86</sup> US Department of the Interior, *Status and Trends of the Nation’s Biological Resources* (Report, 1998) 751.

<sup>87</sup> *Ibid.*



losses, primarily due to grazing animals, exploitation of native sandalwood and other trees, and real estate development.<sup>88</sup>

*Preface, Part Two: Water Disputes in Hawai'i*

Water management issues in Hawaii are notoriously contentious and long-running, described as 'tooth-and-nail' fights.<sup>89</sup> Some water rights litigation has been ongoing in Hawai'i since the early 2000s. The *Waimea River Watershed Management Agreement* is the first instance of resolving water management issues in Hawai'i through mediation and voluntary agreement rather than litigation. As such, *Waimea* has been touted as 'a new path for resolution and reconciliation in the long-running water disputes in Hawai'i'.<sup>90</sup>

This thesis argues for the broader potential impact of this case: *Waimea* is a new path into the 'reconfiguring of the place of humanity in relation to other beings and to the earth's resources'.<sup>91</sup> It is what Margaret Davies calls a prefigurative practice that 'cross[es] the divide between the legal present and our legal futures ... enact[ing] possible futures in the present and leav[ing] indelible traces of what is to come in the here and now'.<sup>92</sup> *Waimea* leaves indelible traces of a posthuman normativity to come, prefigures the presence of the Cosmic Person, and reimagines private property as an enterprise of the project of life itself instead of an enterprise geared towards the realisation of the individual life project.

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<sup>88</sup> Ibid 752.

<sup>89</sup> Isaac Moriwake, 'Waimea Water Deal is a Win-Win-Win for Hawai'i', *Earthjustice* (Web Page, 5 May 2017) <<https://earthjustice.org/blog/2017-may/waimea-water-deal-is-a-win-win-win-for-hawai-i>>.

<sup>90</sup> Ibid.

<sup>91</sup> Davies, *Law Unlimited* (n 48) 158.

<sup>92</sup> Ibid 17.

*Preface, Part Three: Waimea Particulars*

Factual background information included in the petitions put before the Commission on Water Resource Management in the Waimea case indicates the presence of a ‘flourishing, self-sufficient community’ in the area prior to the arrival of the sugar industry.<sup>93</sup> The Waimea River, set within the ‘Grand Canyon of the Pacific’ as the Waimea Canyon is known, is one of the largest in the state and has the highest average annual flow of all Hawai’i streams.<sup>94</sup> Captain Cook’s crew (Waimea was the landing site for Cook’s first anchorage in Hawai’i) took note of the established settlements and taro cultivation along the river delta, with Cook himself recording that its ‘inhabitants far surpass all the neighbouring islanders in the management of their plantations’.<sup>95</sup> Settlements thrived along the inland portions of the river as well, where unique varieties of taro were cultivated. Irrigation ditches, including an ancient aqueduct, were used for irrigation. The Waimea also supplied food in the form of fish and shrimp. In addition to being a food source, rivers like the Waimea are ‘also vital to the perpetuation of Native Hawaiian spiritual practices and values’, including ritual blessings.<sup>96</sup> The Waimea is specifically linked to Native Hawaiian religion as ‘wai is the kino lau [physical embodiment] of the Hawaiian deity Kāne’.<sup>97</sup> It is also home to a sacred stone

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<sup>93</sup> State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 13.

<sup>94</sup> *Ibid* 8.

<sup>95</sup> ES Craighill Handy, Elizabeth Green Handy and Mary Kawena Pukui, *Native Planters in Old Hawaii: Their Life, Lore and Environment* (Bishop Museum Press, rev ed, 1991), quoting original documents belonging to Captain Cook, quoted in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76).

<sup>96</sup> State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 42.

<sup>97</sup> *Ibid*.

marking the location of a ‘leina a ka ‘uhane [point where the deceased depart for the spirit realm]’.<sup>98</sup>

Sugar cane plantations were introduced in the Waimea region in the late 1870s. Although groundwater wells were the first source of irrigation for these plantations, in the early 1900s the plantation company, Kekaha Sugar, began using surface water from the Waimea River. The company constructed irrigation ditches, combinations of open channels and tunnels that diverted flows from the middle section of the canyon and from various headwater tributaries. By 1969, Kekaha Sugar was given the right, through a lease with the Board of Land and Natural Resources, to ‘store, take and use all surface water flowing from Waimea River and the irrigation ditch systems as well as ground water from existing wells and shafts’.<sup>99</sup> (This lease included ‘14,558 acres of Hawaiian Home Lands and the balance of more than 13,000 acres of public land’.<sup>100</sup>) The petition for the action that resulted in the mediation agreement discussed here includes photos of dry channels, boarded-up outlets, and river beds filled with slack water choked with ‘alien green algae, pond scum, and sediment’.<sup>101</sup>

The Kekaha Sugar plantation ceased operation in 2001, and now only a fraction of the land in the area is under cultivation; the crops being cultivated in the area are much less water-intensive than sugar. The petition document in this case alleges that ‘the glaring discrepancy between the ongoing diversions and the radically reduced water demands indicates that the diverted river flows are not

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<sup>98</sup> Ibid.

<sup>99</sup> Alan Murakami, ‘The Hawaiian Homes Commission Act’, in MacKenzie (n 84) 14–15.

<sup>100</sup> State of Hawai‘i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 14.

<sup>101</sup> Ibid 24.

being put to maximum reasonable-beneficial use, but rather are being wasted, contrary to law'.<sup>102</sup> The petitioners document examples of water-dumping from the irrigation ditches, indicating that the infrastructure for the irrigation systems is deficient, thereby causing more water loss. In short, the same amount of water is being diverted now as during the sugar plantation days, even though it is not needed for agricultural use, with the excess 'needlessly [filling] the unlined ditches and reservoirs'.<sup>103</sup>

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<sup>102</sup> Ibid 26.

<sup>103</sup> Ibid 33.

*The Case Study*

## Contents of the Petitions and Complaint

The Po'ai Wai Ola/West Kaua'i Watershed Alliance (hereafter, 'the Alliance') was formed by watershed residents, farmers and other users of the Waimea waters such as Native Hawaiian cultural practitioners, who are 'dedicated to managing and conserving water resources for present and future generations and protecting the long-term sustainability and health of the Waimea River system from its mauka headwaters to makai nearshore marine areas'.<sup>104</sup> Through their counsel Earthjustice, in July 2013, this group petitioned the Commission on Water Resource Management to amend the interim instream flow standards for the Waimea River system to 'reflect the current reduced offstream demands' and to 'protect the range of public trust instream uses that depend on Waimea River system flows'. The petition was accompanied by a complaint and petitions for a declaratory order against the waste of water diverted from the system by the state Agribusiness Development Corporation and its tenant Kekaha Agriculture Association.

The legal framework for these actions arises out of *Hawai'i Constitution* art XI §§ 1 & 7, which 'incorporates the public trust in the water resources of the state and established the foundation for the State Water Code and Commission'.<sup>105</sup>

The constitutional public trust embodies a dual mandate of (1) protection, which ensures 'the continued availability and existence of [state] water resources for present and future generations,' and (2) maximum reasonable and beneficial use, which is 'not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes "use"'.<sup>106</sup>

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<sup>104</sup> Ibid 6.

<sup>105</sup> Ibid 2, in *Re Waiahole Ditch Combined Contexted Case Hr'g*, 94 Hawai'i 97, 130-3, 9 P 3d 409, 442-5 (2000).

<sup>106</sup> Ibid 139-40, 9 P 3d 451-2.

The State Water Code (‘the Code’) established by the Hawaiian constitution mandates that the Commission (also established by the constitution, as noted above) ‘shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State’.<sup>107</sup> Furthermore, the Code provides that ‘[a]ny person with the proper standing may petition the Commission to adopt the interim instream flow standard (IFFS) for streams in order to protect the public interest pending the establishment of a permanent (IFS)’.<sup>108</sup> It is noted in the petition brought by the Alliance that ‘the burden of justifying interim standards ... does not fall on citizen petitioners’, but rather ‘the Commission bears the “affirmative duty under the public trust to protect and promote instream trust uses,” which are favoured by “presumption” and “default”’.<sup>109</sup>

The petition also indicates that the Code ‘contains a specific petition against waste, obligating the Commission to “investigate and take appropriate action” against allegations of waste, including “deficient operation and upkeep” of ditches’.<sup>110</sup>

The Commission has recognized, and the Hawai’i Supreme Court has affirmed, that water not actually used for reasonable-beneficial use must be left undiverted to avoid unlawful waste.<sup>111</sup>

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<sup>107</sup> Haw Rev Stat § 174C-5(3) (2011); accord id. §§ 174C-71, -71(4) (2011) in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 3.

<sup>108</sup> Haw Rev Stat § 174C-71(2)(A) in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 4.

<sup>109</sup> Ibid 153, 142, 9 P 3d 465, 454 in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76).

<sup>110</sup> Haw Rev Stat § 174C-13; Waiahole, 94 Hawai’i 172, 9 P 3d at 484 in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 5.

<sup>111</sup> Waiāhole, 94 Hawai’i 118, 156, 9 P 3d at 430, 468; see also Haw Rev Stat § 174C-3 (2011) in State of Hawai’i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 5.

A final piece of the legal framework for the petition is formed by the protections provided in the state constitution and the Code for Native Hawaiian ‘traditional and customary water rights’, which are protected as a public trust purpose.<sup>112</sup> This is in addition to other general protections of Native Hawaiian rights and the protections afforded to Native Hawaiian home lands.<sup>113</sup>

The petition establishes the standing of the petitioners by indicating their ‘direct, substantial interests in the natural and cultural resources of the Waimea River system that are clearly distinguishable from those of the general public’.<sup>114</sup> The Alliance is made up of ‘Waimea watershed residents, farmers, and users, including Native Hawaiian cultural practitioners’ who

live, work, recreate, and practice their culture in and around the Waimea River system and rely on, use, or seek to use these resources for a host of public trust uses including, but not limited to, fishing, agriculture, recreation, research and education, aesthetic enjoyment, spiritual practices, and the exercise of Native Hawaiian cultural rights and values.<sup>115</sup>

#### Proceedings of the Petitions and Complaint

According to the timeline included in the introductory statement to the *Mediation Agreement for the Waimea Watershed Area*,<sup>116</sup> the first major action taken by the Commission was to engage a firm almost 10 months to the day after the petition was filed to ‘develop an inventory of the stream system, water uses, and water

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<sup>112</sup> State of Hawai‘i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 5, citing Waiahole, 94 Hawai‘i 137, 9 P 3d 449.

<sup>113</sup> State of Hawai‘i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) includes the following citations: Ka Pa ‘akai O Ka ‘Aina v. Land Use Comm’n, 94 Hawai‘i 31, 35, 46–7, 7 P 3d 1068, 1072, 1083–4 (2000); Waiahole, 94 Hawai‘i at 153, 9 P.3d at 465 (citing Haw. Rev. Stat. §§ 174C-101(c), -63 (2011); Hawaiian Homes Commission Act; In re Wai ‘ola o Molok ‘i, 103 Hawai‘i 401, 431, 83 P 3d 664, 694 (2004) (recognising home land water entitlements as a public trust purpose); Haw. Rev. Stat. §§ 174C-101(a), -49(a), -49(e), -31(q) (2011); Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-32, §§ 101(b)(4), 220(d), 42 Stat. 108 (1921); Haw. Admin. R. §§ 13-171-60 to -63 (1995).

<sup>114</sup> State of Hawai‘i, Commission on Water Resource Management, *Combined Petition and Complaint and Petition* (n 76) 6.

<sup>115</sup> Ibid 6.

<sup>116</sup> *Mediation Agreement for the Waimea Watershed Area*, entered into 18 April 2017.

users ... and to conduct an appropriate investigation of the water systems and the water resources in the area'.<sup>117</sup> The information-gathering process continued into the second year following the filing. Then, late in that year, the information gathering took an interesting turn:

WHEREAS, in October 2015, the Commissioners, Commission staff, and interested parties familiarized themselves with the stream system and non-stream uses by visiting the area over two days.

It was also in 2015 that, 'in light of the fact that similar petitions have historically taken decades to resolve', the Commission staff asked the parties involved to consider participating in a mediation process.<sup>118</sup> The year ended with the Commission approving the engagement of a mediator, and the mediation process was conducted during 2016. This third year ended with 'a set of controlled releases of water ... to assist in the resolution of the issues in this matter'.<sup>119</sup> The final agreement was entered into on 18 April 2017 by the following parties: Po'ai Wai Ola/West Kaua'i Watershed Alliance; State of Hawai'i, Agribusiness Development Corporation; State of Hawai'i, Department of Hawaiian Home Lands; Kekaha Agricultural Association; and Kau'i Island Utility Cooperative.

The agreement, designed 'to guide the Commission staff and these parties in their respective and cooperative handling of the area's water resources in the coming years, and to amend the current interim instream flow standards of the Waimea River, its headwaters and its tributaries'<sup>120</sup> consists of the introduction, a statement of guiding principles, and six sections of technical and regulatory

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<sup>117</sup> Ibid 1.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 2.



arrangements and protocols for carrying out the agreement. Key points of the agreement from the standpoint of this thesis include:

1. A statement in the agreement indicating that all parties ‘recognize and respect the intent of the Water Code, Chapter 174C, H.R.S., and the Commission, including to obtain maximum beneficial use of the waters of the State for the purposes such as domestic uses, agriculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses, *as long as there is adequate provision for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty*, and the perseveration and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation’.<sup>121</sup>
2. Two guiding principles ‘that underlie this agreement and all phases of its execution:
  - a. All streams will be allowed to run from the mountains to the sea and no diversion will ever be a total diversion again.
  - b. Any diversion of water from a stream must be justified with no more water taken than is needed for other beneficial uses, and even then, *the health of the stream must be preserved at all times*. All waters not needed at any given time belong in the stream ...’<sup>122</sup>

Certainly the procedure sections outlining how these principles will be enacted are essential if the agreement is to have any immediate effects on the situation in and around the Waimea River watershed, but it is to the articulation of these principles (and the process by which they were agreed), and what they represent in terms of the human–earth relationship more generally, that this thesis turns attention. There is a posthuman normativity present in these principles, and the Cosmic Person is here, too (or it is, at least, prefigured).

#### *Discussion, Part One: Traces of Posthuman Normativity*

Can law be understood beyond a subject–object distinction when it has, historically and conceptually, been so committed to such a framework? As human beings have normally been seen as the sole source of law, is there any sense at all in which law can be understood as emerging out of a subject–object dynamic? Can tangible stuff be anything other than an object of law’s

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<sup>121</sup> Ibid (emphasis added).

<sup>122</sup> Ibid (emphasis added).

interpretive gaze? Can law move beyond the human into a posthuman territory?  
Can it realistically dissolve the nature–culture separation?<sup>123</sup>

I argue that the *Waimea River Watershed Mediation Agreement* is an example of law that has moved into posthuman territory. The agreement is more of a guideline for a mutually constitutive relationship than a water management plan. That is, water is to be managed, but such management for human use is to be carried out within the context of the river system. The limits of the river, rather than human interests and uses, set the terms of management. This suggests a deeply ecological framework, and it sets a trace of posthuman normativity into the agreement: the source of the law (or, in this case, the pre-judicial agreement that binds parties to particular behaviours and standards) is the river.

Margaret Davies asks, ‘As human beings have normally been seen as the sole source of law, is there any sense at all in which law can be understood as emerging out of a subject–object dynamic?’<sup>124</sup> Here in this agreement is the sense in which law (agreement) emerges out of the subject–object dynamic. In this agreement, the ‘tangible stuff’<sup>125</sup> in the form of the river becomes something other than the object of the agreement: it becomes a party to the agreement in and of

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<sup>123</sup> Davies, *Law Unlimited* (n 48) 43.

<sup>124</sup> Ibid 125: ‘There have been some theoretical inroads made into the project of analysing the ways in which law emerges from the mutually constitutive dimensions of place, person, and thing, and also — more recently — from the plane of natureculture’. I include the citations Davies references because of their significance to future directions for the research begun in this project: David Delaney, *The Spatial, the Legal, and the Pragmatics of World-Making: Nomospheric Investigations* (Routledge, 2010); Peter Burdon, ‘The Great Law’ (2011) 14 *Southern Cross University Law Review* 1; Peter Burdon, ‘The Earth Community and Ecological Jurisprudence’ (2013) 3 *Oñati Socio-Legal Series* 815; Peter Burdon, *Earth Jurisprudence* (Routledge, 2015); Nicole Graham, *Landscape: Property, Environment, Law* (Routledge, 2011); Anna Gear, ‘Human Rights and the Environment: In Search of a New Relationship’ (2013) 3 *Oñati Socio-Legal Series* 796; Margaret Davies, ‘The Consciousness of Trees’ (2015) 27 *Law and Literature* 217; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere* (Routledge, 2015); and Olivia Barr, *Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016).

<sup>125</sup> Davies, *Law Unlimited* (n 48) 43.

itself in the sense that it sets the parameters for decision-making about any human uses of the river.

The subject–object dynamic is illustrated in the work of Continental philosopher Michel Serres in which subjectivity in the context of a ball game becomes fluid, with the players serving the ball. I reproduced Davies’s reproduction of the complete illustration in the Introduction to this project and do so again here in order to speak to it directly:

A ball is not an ordinary object, for it is what it is only if a subject holds it. Over there, on the ground, it is nothing; it is stupid; it has no meaning, no function, and no value. Ball isn’t played alone. Those who do, those who hog the ball, are bad players and are soon excluded from the game. They are said to be selfish [*personnels*]. The collective game doesn’t need persons, people out for themselves. Let us consider the one who holds it. If he makes it move around him, he is awkward, a bad player. The ball isn’t there for the body; the exact contrary is true: the body is the object of the ball: the subject moves around this sun. Skill with the ball is recognized as the player who follows the ball and serves it instead of making it follow him and using it. It is the subject of the body, subject of bodies, and like a subject of subjects. Playing is nothing else but making oneself the attribute of the ball as a substance. The laws are written for it, defined relative to it, and we bend to these laws. Skill with the ball supposes a Ptolemaic revolution of which few theoreticians are capable, since they are accustomed to being subjects in a Copernican world where objects are slaves.<sup>126</sup>

Borrowing the language of the Serres game, in the practice of this agreement the river becomes the sun around which the human actants<sup>127</sup> revolve. The terms of the agreement are revealed in practice to be steps in what Donna Haraway describes as the ‘subject- and object-shaping dance of encounters’.<sup>128</sup> The ‘law’ in this agreement has not been inscribed on paper so much as it will emerge from within

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<sup>126</sup> Michel Serres, *The Parasite*, tr Lawrence R Schehr (University of Minnesota Press, 2007) 225–6, quoted in Davies, *Law Unlimited* (n 48) 23.

<sup>127</sup> See Davies, *Law Unlimited* (n 48) 63, citing Bruno Latour, *Reassembling the Social: An Introduction to Actor Network Theory* (Oxford University Press, 2005): ‘The material dynamics of such a game have much in common with, and indeed inspired, aspects of Actor Network Theory, which posits flat networks of inter-actions between “actants”, entities that include human subjects, non-human animals, and inanimate things’.

<sup>128</sup> Donna Haraway, *When Species Meet* (University of Minnesota Press 2008) 4, quoted in Anna Gear, ‘Towards New Legal Futures? In Search of Renewing Foundations’, in Anna Gear and Evadne Grant (eds.), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 283, 296.

the relationship of the people and the river, guided by principles that ‘underlie this agreement and all phases of its execution’ and that have to do with the preservation of the health of the stream at all times. One of the hallmarks of posthuman normativity is its responsiveness to the dynamism of materiality: every day, every season, with every intervention or withdrawal of interference, the river will change, and so the relationship of river and people is never accomplished. The people have agreed to serve the river in an ongoing relationship of co-becoming.

Also of note with regard to the point about the role the river plays in this agreement is the fact that the parties spent two days at the river together during the early phases of addressing the petitions and complaint. The river was studied by experts and facts were presented to the parties to the agreement in the form of written reports, but also the river presented itself ‘in person’ to the participants. Thus, the posthuman normativity of this agreement can be traced, in some unquantifiable measure and by some non-linear and emergent pathway, to the movement of the humans out of the built environment and into the place of immediate interaction/intra-action — the smells, sights, sounds and feel of the river across hands and into bodies reconstituting the people in the moment.

It is not possible to know what difference this sensory material contact and connecting of persons with each other and the river made to the evolution of the agreement, but it is possible, by returning to the Barad definition of agential realism, to recognise that the meaning of the matter (both the materiality of the persons and the river and the ‘matter’ of the agreement) emerges within these encounters. The fact is that, after these encounters, the human parties to the agreement bound themselves (voluntarily, but also publicly) to dancing with the dynamism of the systems of which they are a part, as opposed to crafting a

document that outlines the scope of their control over those systems as per humanist presumptions of mastery and control (including those presumptions of control expressed benevolently as stewardship or care for the environment).<sup>129</sup>

*Discussion, Part Two: Glimpses of the Cosmic Person*

The Cosmic Person in *Waimea* can be glimpsed at those points where the human parties to the agreement appear to operate out of ‘an enlarged sense of inter-connection between self and others, including the non-human or ‘earth’ others’.<sup>130</sup>

This enlarged sensibility is visible at several points:

1. *The choice of mediation as a method of resolution.* As a voluntary process oriented towards consensus and defined by collaboration, mediation is an exercise in lived interdependence. This is the sort of ‘alternative’ practice of law that can ‘introduce values of negotiation, accommodation, recognition of the other, and legal plurality into the practice and meaning of law’.<sup>131</sup>
2. *Telling the story of the Waimea watershed as a human–non-human ecosystem.* The background information included in the petition paints a picture of shared vulnerabilities and co-dependent flourishing of people and river: before the river diversions, communities thrived; in the

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<sup>129</sup> This thesis contends that environmental stewardship and care for the environment as orientations to the human–earth relationship are insufficiently responsive to the intra-activity of the relationship. Although the actions resultant from, and the implications of, these orientations are surely better in terms of the health and flourishing of the environment than those associated with orientations that rationalise exploitation of nature, these orientations are shadowed by the hubris of ‘knowing what’s best’ or being in charge. These orientations do not sufficiently flatten the field so that wisdom and direction can emerge from anywhere in the system. The possibilities for cohabitation remain foreclosed.

<sup>130</sup> Braidotti, *Posthuman* (n 55) 49.

<sup>131</sup> Davies, *Law Unlimited* (n 48) 16. See James A Wall, Jr, John B Stark, and Rhett L Standifer, ‘Mediation: A Current Review and Theory Development’ (2001) 45(3) *Journal of Conflict Resolution* 370, 386: ‘In international, environmental, school, divorce, organisational, consumer, and sexual harassment disputes as well as in other realms, mediation is being practiced, described, studied, proscribed, and proscribed’.

aftermath of the diversions which destroyed the health of the river, losses of livelihood, culture and wellbeing were experienced by the people.

3. *Locating the human in the middle but not at the centre.* The way this agreement looks to the river as a source of normativity reconfigures the location of the human being in the relationship between humans and the river (as structured by law/the alternative legal practice of mediation). Whereas in a traditional legal rendering of the human–earth relationship the human being would be, paradoxically, simultaneously at the centre of the relationship and outside of it — in a position of mastery and control oriented towards the fulfilment of self-interest — in this reading of the relationship the human being is in the middle. Posthuman legal theorist Andreas Philippopoulos-Mihalopoulos, engaging with the work of Gilles Deleuze and Felix Guattari on the *milieu*, describes the middle as ‘the space of responsibility par excellence’.<sup>132</sup> Doing justice to the agreement requires the human parties to be responsive from within their world of relationship with place at Waimea, as opposed to imagining that they can apply an abstract principle to the situation from outside of the relationship. There is no outside.<sup>133</sup>

4. *Recognition of a complex, interacting pattern of both continuity and difference.* I argue that *Waimea* binds the human parties to the agreement to a way of being in relationship with each other and the river that corresponds to the non-dualised construct of human identity that emerges from my analysis of the Cosmic Person in the previous section of this

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<sup>132</sup> See Andreas Philippopoulos-Mihalopoulos, ‘The World Without Outside’ (2013) 18(4) *Angelaki* 165, 172.

<sup>133</sup> *Ibid.*

chapter. Some measure of conscious acknowledgement of human dependency upon the river is required; as is some measure of recognition that the river has needs of its own. The agreement requires the human parties to live in the balance of affirming relationship and affirming difference.<sup>134</sup>

*Discussion, Part Three: Performing Posthuman Property*

In effect, with traces of posthuman normativity and glimpses of posthuman subjectivity, *Waimea* performs a posthuman concept of property, conceiving ‘choice and the individual differently — as socially- and community-situated rather than atomistic’<sup>135</sup> (with ‘community’ being understood as the whole life community in that place). As a result, any regulation in the ecosystem of property<sup>136</sup> as delineated by this agreement emerges from within the ecosystem of the river itself, as opposed to being imposed by an external authority. The river is included and even privileged within the ecosystem as source of regulation. The human is in the middle, neither on top nor in charge. With the human in the middle, the bundle of rights ends up in the middle, too — which is to say that the bundle of rights (such as use, exclusivity and disposition) becomes contingent on the specific human–earth relationship in that place. What uses respond to securing the conditions for the river to flow from the mountain to the sea? What exclusions or

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<sup>134</sup> See Figure 4 in the section entitled ‘Introducing the Cosmic Person’.

<sup>135</sup> Paul Babie, ‘Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change’ (2011) 22(3) *Colorado Journal of International Environmental Law & Policy* 323, 354.

<sup>136</sup> See *ibid* 335 for an application of Joseph William Singer’s depiction of private property as a type of ecosystem: ‘[private] property owners and the public are linked to each other through individual actions [choices] and laws affecting the use of [private] property (which can ... be both beneficial and detrimental). From this perspective, we could conceive of [private] property as a type of ecosystem, with every private action and legislative mandate potentially affecting the interests of other organisms’ (citation omitted).

inclusions? What disposition: can a landowner bound to this agreement (morally if not legally, given the voluntary nature of the agreement) justifiably sell to a party with an interest contrary to the agreement?



## Conclusion

What happens when human exceptionalism and bounded individualism, those old saws of Western philosophy and political economics, become unthinkable in the best sciences, whether natural or social? Seriously unthinkable: not available to think with.<sup>137</sup>

This chapter has introduced a concept of the legal subject as embodied, embedded and entangled human being: human being as part of — instead of apart from — life, the universe and everything. The *Waimea* case study suggests the nascent presence of this legal subject and invites speculation about its potential for transforming the way in which the law structures the human–earth relationship.

To frame the Cosmic Person in terms outlined in the first chapter of this thesis: how does this concept disrupt the dynamic of radical discontinuity by which the human–earth relationship is established in the Western social imaginary? What is the ‘creative counterpossibility’ in this idea of the Cosmic Person, which instigates instituting a social imaginary of ideal cohabitation to replace the human mastery and control of nature which currently defines the Western human–earth relationship? I return to conversation with the work of Val Plumwood to organise the conclusions I reach in this regard.

Plumwood laments that at the time she wrote *Feminism and the Mastery of Nature*, which was published in 1993, there was no ‘single position on human significance’ offering ‘solutions to the problem of identity and continuity’ which were not ‘hostile to the natural world ... based on denial of human connection to nature’.<sup>138</sup> By contrast, as I write this thesis now, threads of possibility for new

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<sup>137</sup> Donna Haraway, ‘Tentacular Thinking: Anthropocene, Capitalocene, Chthulucene’ (2016) 75 *e-flux journal* (Web Page, 18 September 2016) 1 <<https://www.e-flux.com/journal/75/67125/tentacular-thinking-anthropocene-capitalocene-chthulucene/>>.

<sup>138</sup> Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 101.

meaning and identity based on the affirmation and recognition of human connection to nature lie strewn about across a variety of disciplines. The conjuring of the Cosmic Person represents a collecting of some of these but not a tight weaving of them into a single, unifying and universalising narrative. The ideas themselves resist that: intra-activity and indeterminacy are dynamics of becoming, not descriptors of static being.<sup>139</sup>

What these threads suggest is a way of understanding human identity and the human–earth relationship in terms of what Plumwood identifies as ‘a non-hierarchical concept of difference’.<sup>140</sup> As I opened the thesis with a close reading of Plumwood’s identification of characteristics of radical discontinuity — that is, the hierarchical concept of difference which underpins the dualistic structure of the Western human–earth relationship — so I conclude by indicating how the Cosmic Person exhibits key capacities for escaping this structure, thus opening up the possibility for re-establishing the human–earth relationship in the West on far more mutual terms.

Primary to the structure of dualism is the feature of backgrounding, which arises out of the denial of dependency on the part of the upperside of the hierarchical structure on the underside. Ideas — like assemblages in which entities only become what they are because of interactivity with other entities, or agential realism, in which the primary ontological reality is phenomena rather than discrete entities — suggest that interdependency is a material reality at a most fundamental

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<sup>139</sup> To say nothing of the limitations of this author in absorbing and interpreting the depths of these fields. I resonate with Margaret Davies, who herself echoes Joanne Conaghan on this point, in Davies, *Law Unlimited* (n 48) 65 (note 35): ‘I am sadly ill-equipped for such a task’ (citation omitted).

<sup>140</sup> Plumwood (n 138) 60.

level. There can be no background in a world of continuous co-worlding. The story of the Cosmic Person is a ‘system of thought, accounting, perception, decision-making, which recognise[s] the [absolute material] contribution of what has been backgrounded’.<sup>141</sup>

The focus on materiality in the story of the Cosmic Person — framing the story in terms of the *meaningfulness* of being made of stardust in a universe in which everything else is stardust, too — is an attempt to escape the hyperseparation assumed in dualism. Hyperseparation or radical exclusion is the feature of dualism in which any areas of overlap between the upperside and the underside are denied. Central to the story of the Cosmic Person is a reclaiming of the overlap: humans and nature have materiality in common, and this matters. In agential realism, matter and meaning emerge together, rather than, as per the Cartesian assumption, meaning being put upon matter by the superior force of reason. New materialisms assert the agency of matter, which is not an agency of will but is nevertheless world-forming and which includes the continuous forming of human being: the constancy of entanglement and the always already character of reality that is referred to as co-worlding.<sup>142</sup> The continuity of a single plane of existence affirmed by these theories, coupled with the continuity of the narrative of evolution in which everything is made of stars, works against the idea of radical exclusion.

What I appreciate about the idea of material continuity across a single plane of existence, such as deployed in this project, is that this theory, whilst establishing

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<sup>141</sup> Ibid.

<sup>142</sup> See Astrida Neimanis, *Bodies of Water: Posthuman Feminist Phenomenology* (Bloomsbury, 2017) for a book-length treatment of the idea of co-worlding read through the idea of bodies of water. Neimanis indicates that ‘[c]oncepts like transcorporeality, naturecultures, amphimixis, and co-worlding provide a lexicon for this uncanny mode of living both particularly, with a specifically materialised politics of location, but also collaboratively, as part of an always emergent planetary hydrocommons’: at 41.

connection, also contravenes any ‘attempted elimination of the distinction ... between human and nature, and between self and other [nature], and similarly for other pairs in the list of dualism’.<sup>143</sup> The continuum concept implies movement along an axis of differentiation, which is different from either (a) lumping everything in together or (b) establishing a fundamental gap between different modes of being. This aligns with Plumwood’s assertion of the value of balancing independence and connectivity as a basis for mutual relationship.

The establishment of this balance within the concept of the Cosmic Person creates the perspectival spaciousness required for escaping the other three traps of dualism — namely, those associated with denying ‘the other’s independence of self’.<sup>144</sup> Asserting interdependence is a function not only of recognising continuity, but also of respecting independence. This is not a contradiction in terms: all things are true at once. Plumwood articulates this point most succinctly:

The resolution of dualism requires, not just recognition of difference, but recognition of a complex, interacting pattern of both continuity *and* difference.<sup>145</sup>

This is the pattern of the legal person I propose in this chapter. Therefore, based on this case study in which I have shown that the Cosmic Person is present, I am able to conclude this project with the following: the Cosmic Person is a concept-in-use of the legal subject. The law is ready, at least around its edges (in extra-judicial agreement), to express the value of seeing the human–earth relationship in terms of this pattern.

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<sup>143</sup> Plumwood (n 138) 59.

<sup>144</sup> Ibid 66: The features associated with denying the independence of the Other are incorporation, instrumentalism and homogenisation.

<sup>145</sup> Ibid 67 (emphasis in original).

## Chapter Six

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### Conclusion

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## Who Must We Become?

Theory can never deal urgently with the world's problems, it can never formulate immediate solutions or reforms, and its horizon for change is in the medium-future historical range (of decades or centuries), rather than the short-term near-present.<sup>1</sup>

The problems associated with anthropogenic climate change are many, vast and varied; they are complex and interwoven. They must be dealt with urgently. In terms of law's role in dealing with these issues,

the number of cases around the world raising the problem of climate change has increased dramatically and courts have become a critical forum in which the future of greenhouse gas (GHG) emission regulation and responsibility for adaptation to climate change are debated.<sup>2</sup>

The question driving this thesis is complementary to these efforts: to the question of what must be done I add, 'Who must we become?' Starting with the premise that anthropogenic climate change is an outgrowth of a way of thinking about human identity in powerful, globally dominant Western ideology that positions (certain) human beings as separate from and superior to nature and, therefore, entitles (certain) human beings to exploit nature, this thesis interrogates and proposes an alternative to the dualised Western concept of human identity.

Margaret Davies talks about theory 'collaborating with, rather than directing, more practical transformations and activist agendas'.<sup>3</sup> This project is a collaboration between emerging theories of human identity and a groundbreaking approach to establishing practical transformation in a specific instance of the human–earth relationship at the Waimea River in Hawai'i, resulting in ideas which

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<sup>1</sup> Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) 158.

<sup>2</sup> Brian J Preston, 'The Influence of Climate Change Litigation on Governments in the Private Sector' (2011) 2 *Climate Law* 485, quoted in Jana Norman, 'Public Nuisance Claims in Climate Change Litigation' (2018) 7 *Property Law Review* 195, 195.

<sup>3</sup> Davies, *Law Unlimited* (n 1) 158.

can be tested and applied at other nodes of the mesh<sup>4</sup> (all those situated ‘material connections between living bodies, objects, and earth’<sup>5</sup>) of which the whole community of life on Earth consists.

The first substantive chapter of the thesis began the interrogation process, drawing on critical ecological feminism to analyse the dualised construct of human identity that underlies the Western social imaginary of mastery and control over nature. Key features of dualism were reviewed for their implications for the human–earth relationship: nature is seen as background, and any dependency of humans on nature is denied; any overlap or similarities between humans and nature is also denied; nature is homogenised and defined *en masse* in terms of what ‘it’ lacks as compared to (certain) humans; and finally, lacking essential value, nature is deemed to be of instrumental value only. It is noted in the first chapter that patterns of exclusion and oppression link and interlock in multiple hierarchies, making any resetting of the terms of the human–earth relationship a matter of disrupting a whole system rather than simply reworking a single strand.

Dualised human identity underpins the anthropocentrism of the Western social imaginary in which only (certain) human beings ‘count’. In the second half of Chapter Two, entitled ‘Ecocentrism and Beyond’, I investigated the traditional strategy under the rubric of environmental ethics for taking greater account of the non-human world: expanding the circle of moral concern by concentric degrees. I argued that this strategy is inadequate as an approach to transforming the understanding of human–earth relationship into a mutually beneficial cohabitation. I discussed two limitations to the approach: the exclusive focus on reimagining the

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<sup>4</sup> Timothy Morton, *The Ecological Thought* (Harvard University Press, 2010).

<sup>5</sup> Davies, *Law Unlimited* (n 1) 7.



non-human rather than, as Plumwood argues, redefining both the upper- and the undersides of the dualism,<sup>6</sup> and failing to question the more fundamental assumption that relationship is a binary enterprise. I concluded the section with an introduction to ecological thinking in which co-constitutionality is posited as a mode of understanding what it means to relate. These discussions established the primary directive of this project: to develop a non-dualised concept of human identity, which, when deployed as a template for the human legal subject, disrupts the instrumentalist terms by which the human–earth relationship is structured in Western law and legal theory.

The anthropocentrism of Western law and legal theory was the focus of Chapter Three. I argued that anthropocentrism is the visible framework of not only law’s subject matter but also the matter of law as a subject; law is anthropocentric ‘all the way down’. The first discussion, entitled ‘Law’s Anthropocentrism: All the Objects in the Room Are Red’, about law’s subject matter, focused on a case that made history for exposing the homocentrism<sup>7</sup> of Western legal decision-making, *Sierra Club v Morton*, 405 US 727 (1972). Christopher D Stone’s commentary on the history of legal decisions in cases involving non-human plaintiffs since this case (in which Stone played an influential role by writing an article that was referenced in one of the dissenting opinions) formed the basis for my argument that Western law and legal theory is anthropocentric in orientation and effect: for Western law, only (certain) human beings count as subjects.<sup>8</sup>

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<sup>6</sup> See generally Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993).

<sup>7</sup> The term ‘homocentrism’ is a way of rendering anthropocentrism in terms of discrimination, as in racism or sexism. See Christopher D Stone, *Should Trees Have Standing: Law, Morality, and the Environment* (Oxford University Press, 3rd ed, 2010).

<sup>8</sup> This is qualified by those assignments of legal personhood to corporations and idols, for example. However, it is argued that these assignments of legal personhood trace to the capacities of the human beings who manage either. The standard of accountability and accounting for is human.

In the second section of this chapter, entitled ‘Earth Jurisprudence’, I examined ways that the legal philosophy Earth Jurisprudence both challenges and conforms to patterns of anthropocentrism and thus, inadvertently, sustains law’s homocentric agendas. I say ‘inadvertently’ because this legal philosophy is explicitly oriented towards taking greater account of non-human life worlds, with the objective of directing law towards securing conditions for the flourishing of all life on Earth. I argued that Earth Jurisprudence does not adequately contest some of the more foundational layers of assumptions that comprise a conventional mode of understanding the law as subject. I reached the paradoxical conclusion that, by focusing on the rights of nature, Earth Jurisprudence reinforces the structure of dualism that forms a primary barrier to establishing mutually beneficial human–earth relations.

This discussion in this section, entitled ‘Looking Beyond Law’s Limits’, led onto an examination of Margaret Davies’s work of ‘collecting and consolidating’<sup>9</sup> disruptions arising across the past several decades to what had been considered constant, rather than variable, features in the traditional mode of understanding law and legal theory in Western culture. These disruptions, taken together with emerging understandings of the nature of reality such as new materialism and posthumanism, suggest to Davies modes of understanding law alternative to legal positivism. I indicated in this section that Davies’s theory of ‘law unlimited’ sets a productive pathway for overcoming assumptions related to dualistic, anthropocentric thinking about the law, which act as a barrier to meeting the objective of Earth Jurisprudence. More generally in this chapter, I argued that

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<sup>9</sup> Davies, *Law Unlimited* (n 1) 20.

the anthropocentric disposition of Western law and legal theory systemically precludes the full consideration of non-human Others and the earth as a whole, and keeps the human–earth relationship locked in a dualist structure that privileges the needs of humans at the expense of non-human Earth Others.

Escaping dualism, according to Plumwood, is a matter of reimagining both the underside and the upperside of the hierarchical structure. To complement strategies for transforming the human–earth relationship in Western culture that focus on reimagining non-human Earth Others as subjects (of moral concern and as legal subjects), in this thesis I propose a reimagined concept of human legal subjectivity. This process began in Chapter Four with an analysis of current concepts-in-use of the human legal subject, in a section entitled ‘A Brief Catalogue of Law’s Contesting Subjects’. This analysis confirmed that the dominant concept, the Rationalist legal subject, corresponds to the master identity implicated in Chapter Two as the lynch pin holding together the whole interlocking network of dualisms that structure intra- and inter-species relations in Western culture.

Chapter Five, the final substantive chapter, introduced the unique contribution of this thesis: a non-dualised concept of the legal subject, the Cosmic Person. The chapter began, in a section entitled ‘The New Creation Story’, with telling the creation story of the Cosmic Person. The story draws on insights about the nature of existence arising from contemporary sciences and what is being made of these insights within certain fields associated with philosophy and critical theory (specifically, new materialism and posthumanism). An image of human being as embodied, embedded and entangled emerges from these insights: a material *being* which is also a *becoming* and whose very materiality is meaningful: making it ‘part

of the world in its open-ended becoming'.<sup>10</sup> In introducing the Cosmic Person as a legal subject, in the next section of Chapter Five, I analysed the concept for its correspondence to inversions of the features of dualism (features charted in my analysis of the current concepts-in-use of the legal subject in Chapter Four). The Cosmic Person as legal subject, I argued on the basis of this analysis, makes possible a 'new normal' in the human–earth relationship. Specifically, I contend that the Cosmic Person as legal subject, in its capacity to perform a complex interacting pattern of both continuity and difference between the human and the non-human, normalises ideal cohabitation in the way in which law structures the human–earth relationship.

Chapter Five ends with a case study of the *Waimea River Watershed Mediation Agreement* ('*Waimea*'). In discussing this agreement made between several parties with an interest in restoring the stream flow of a culturally and agriculturally significant river in Hawai'i, I identified aspects of the agreement and the process of reaching it in which the human parties to the agreement appear to operate out of 'an enlarged sense of inter-connection between self and others, including the non-human or "earth" others'.<sup>11</sup> I noted in particular that the needs and interests of the river itself are acknowledged in the agreement in a way that designates this agreement as a performance of posthuman normativity. This sensibility is central to the posthuman construct of human identity that I developed in this project as the Cosmic Person. I therefore argued, in the conclusion of Chapter Five, that the Cosmic Person is prefigured in *Waimea*. Based on these

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<sup>10</sup> Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 150.

<sup>11</sup> Rosi Braidotti, *The Posthuman* (Polity Press, 2013) 49.

assessments, I ended this project with the conclusion that the Cosmic Person is a concept-in-use of the legal subject.

## Directions for Future Research

I have deliberately confined the discussion in this thesis to an examination of the Western social imaginary and some of the alternative counterpossibilities emerging from within its epistemological parameters. I have made much of the fact that empiricism, assumed to lead to mastery and control of nature via the observation, measurement and manipulation of natural objects by rational subjects, has instead and paradoxically opened onto emerging theories of ontological indeterminacy which greatly disrupt the subject–object distinction. Material intra-activity makes it possible from within this worldview to reimagine the identity and role of the human in relation to the whole community of life on Earth.

I find this exciting in and of itself, but it is also exciting because this opening up (this ‘unlimiting’, to borrow from Davies<sup>12</sup>) establishes a basis for dialogue with other worldviews in which the human–earth relationship has not been traditionally defined by a dynamic of radical discontinuity. A non-dualised construct of human identity arising from a Western instituting social imaginary of ideal cohabitation is a vastly different starting point for cross-cultural collaboration than the colonising — of planet and people — mentality of the interlocking network of dualisms extant in Western ideology. Exploring resonances between the flat, embodied and entangled ethico-onto-epistemology<sup>13</sup> emerging from Western science and philosophy and Aboriginal ontologies, epistemologies and ethical constructs is one obvious rich vein of future research.

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<sup>12</sup> I refer to Davies, *Law Unlimited* (n 1) front matter: ‘[T]he aim of the book is to *unlimit* law, to take the idea of law beyond its conventionally accepted boundaries into the material and plural domains of an interconnected human and nonhuman world’ (emphasis in original).

<sup>13</sup> See Barad, *Meeting the Universe Halfway* (n 10).

Similarly, the idea of posthuman normativity is not foreign to non-Western worldviews, and this is another area in which a new level of conversation may become possible in light of Western philosophy's contemporary openness to notions of material agency, vibrant matter, assemblages and intra-activity. With these lenses for imagining the co-emergence of meaning and matter, Western law and legal theory can hear and learn from indigenous jurisprudence<sup>14</sup> with more immediacy and greater depth of understanding and, it could be hoped, less propensity for intellectual colonisation.

Of particular interest to me in terms of directions for future research stemming from this project is a deeper investigation into the Waimea River situation. Big questions remain to be answered about the level and type of transformations effected by the mediation agreement in terms of the river system and its ecosystems and the people at home there and working there. What happens to the human–earth relationship in this place as a result of the process of not only forging but also living out this agreement? Is there any evidence of the emergence of an instituting social imaginary of ideal cohabitation in this place? Does the non-dualised construct of human identity that I contend can be glimpsed in the implicit conceptualisation of the legal subject in this case continue to develop and mature, or is it eclipsed over time by inertia or some other force, through the reintroduction of the rational, autonomous individual as subject of the agreement? Do the parties continue to meet together at the river as a means of adhering to the terms of the agreement?

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<sup>14</sup> See generally CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010); Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2016); and Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181.

A productive conversation partner for future explorations of the evolving situation around the Waimea River is work by Anna Lowenhaupt Tsing. Tsing's collaborative and ongoing ethnographic project, which focuses on the social-material worlds, landscapes and economies of the matsutake mushroom trade, suggests a framework and terms by which to observe and interpret aspects of the human–earth relationship at Waimea. This future exploration entails reading post-colonial plantation history in the Waimea River area through Tsing's analysis of alienation as the 'separation of nonhumans as well as humans from their livelihood processes'<sup>15</sup> and, specifically, through her critique of plantations as locations of this extended form of alienation. I sense that Tsing's development of the idea of 'collaborative survival' as comprised of 'patchy landscapes, multiple temporalities, and shifting assemblages of humans and nonhumans'<sup>16</sup> offers productive frames of reference for future investigations of life worlds around the Waimea in the ongoing post-agreement period. Is the Waimea River watershed area a potential site of the anti-plantation in 'which transformative encounters [entanglements of human and nonhuman life worlds] create the possibilities of life?'<sup>17</sup> I wonder what might be observed in this place through the particular arts of noticing identified by Tsing: noticing precarity, noticing contamination, noticing indeterminacy. What story does the mediation agreement forged in the Waimea situation tell about 'what emerges in damaged landscapes, beyond the call of industrial promise and ruin?'<sup>18</sup>

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<sup>15</sup> Anna Lowenhaupt Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princeton University Press, 2015) 290 n 5.

<sup>16</sup> *Ibid* 20.

<sup>17</sup> *Ibid* 43.

<sup>18</sup> *Ibid* 18.



The Waimea situation exemplifies the ways in which posthuman normativity raises a host of questions worth further investigation related to the person's 'opposite number' at law: property. Traditionally, legal theory defines persons and property over and against each other. In what way might it be said that the human participants at Waimea have agreed to let themselves be owned by the river? What have the participants conceded in terms of property ownership by agreeing to work together in common enterprise and to live out their lives and livelihoods in reference to the river instead of their own separate interests? How will the parties of interest resolve issues in which the needs of the river, defined as normative in *Waimea*, come into direct conflict with one or more of the bundle of rights that comprise property ownership for one or more parties of interest? In these terms, a primary future research question relates to the degree to which *Waimea* disrupts traditional ideas about the rights and duties of property ownership. As Margaret Davies asks, 'Are property rights even possible, without a clear sense of differentiation between subjects and objects and the power that attaches to the hierarchical superiority of subjects over objects? Does it make any sense at all to speak of post-human property?'<sup>19</sup>

The Waimea situation also prompts further conversation about private property at a different level of consideration, such as reading *Waimea* through Paul Babe's argument that private property makes eco-colonialists<sup>20</sup> of everyone. In making this argument, Babe implicates the *idea* of private property behind the

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<sup>19</sup> Margaret Davies, 'Material Subjects and Vital Objects: Prefiguring Property and Rights for an Entangled World' (2016) 22(2) *Australian Journal of Human Rights* 37, 46.

<sup>20</sup> See Paul Babe, 'Choices That Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22(3) *Colorado Journal of International Environmental Law & Policy* 323, 348: 'The question, then, is this: are all individuals who hold private property eco-colonialists? In short, yes'.

legal concept, the idea being that ownership confers sovereignty.<sup>21</sup> If, as I argue, there is no ‘self-made man’ as human legal subject, then can it hold that ‘a man’s home is his castle?’<sup>22</sup> What effect might a decolonised concept of the human legal subject have on the colonising idea of human property that pervades the Western mode of consciousness?

Finally, an engaging future direction for this research is to go on with the process of collecting and compiling stories of radical human–earth intimacy, through semi-structured interviews. What might be stirred within the legal imaginary by these stories framed as instances of posthuman normativity? What disruptions might this framing bring to legal categories such as ‘injury in fact’ with regard to human plaintiffs in environmental cases? What can be done to ensure that these stories infiltrate legal narratives so that stories that are ‘offered up’<sup>23</sup> at law convey radical intimacy in the human–earth relationship instead of radical discontinuity?

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<sup>21</sup> See *ibid* for discussion of Morris R Cohen, ‘Property and Sovereignty’ (1927) 13(1) *Cornell Law Quarterly* 8.

<sup>22</sup> The coupling of a construct of human identity featuring self-possession with the ideology of property possession is a foundation of the Western socio-legal imaginary. For a discussion of the genealogy of this collusion, see generally Margaret Davies and Ngaire Naffine, *Are Persons Property?: Legal Debates about Property and Personality* (Ashgate, 2001).

<sup>23</sup> See Laura King, ‘Narrative, Nuisance, and Environmental Law’ (2014) 29 *Journal of Environmental Law & Litigation* 331, 335: ‘Law is not just a governance tool; it is a storytelling tool. Our society has several important realms for storytelling. One is religion, another is art ... Like religious storytelling, legal storytelling has moral force ... religious stories are passed down ... legal stories are offered up in forms that are as varied and novel as life’. King relates climate change nuisance suits to fairytales in terms of their narrative structures the psychological satisfactions made available through these structures. I am thinking about story telling in another sense, also related to climate change litigation. Very specifically, where there are judges willing to be tutored in the science of anthropogenic climate change causes and effects in the process of presiding over cases related to climate change mitigation or adaptation, might tutoring in the concept of posthuman normativity and the science upon which it is based be effective in some way? See Norman (n 2) for a related discussion.

## Concluding Remarks

In concluding this project, I reflect on the story I have told here about the posthuman legal subject in terms of texture: the story as I have told it is chunky rather than smooth. The difference in texture between this emerging story and the story of the rational, autonomous individual — so smooth, so refined — is no doubt due to a range of factors, not least of which is my limited ability to synthesise the broad collection of ideas I have considered.

Beyond my own limitations, however, is the fact of the relatively short time with which theorists have been living with these new understandings and contemplating their implications. The materials by which to construct non-dualised human identity are yet still rough-edged. This is just a beginning moment: a time to celebrate, as I have attempted to do in this project, the arrival of a new story of human significance based on radical immanence<sup>24</sup> instead of the centuries-old story of transcendence of the material condition as moral imperative.

The question ‘How might a story like this take hold, in life and in law?’ leads out from this project into the process of smoothing these edgy ideas by tumble and use, with an effect on the many pressing issues of natureculture in the present and future. I offer, as a last word, this encouragement from Anna Gear for the task of living into this question:

A new juridical imaginary is possible — and vital to build. The philosophical foundations are being laid in new materialist and posthumanist philosophy — and in imaginative experiments in ecological epistemology. Law and legal theory, by responding to these new, passionate visions of an interwoven world, would follow — to borrow again the words of Rhadakrishnan — a deeply ethical impulse. The time has come. New future histories summon the legal theoretical

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<sup>24</sup> See Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti* (Columbia University Press, 2012) for political theory embracing this notion.

imagination — and potential new interpretations and modes of legal process  
augur meaningful, practical ways of responding to the call.<sup>25</sup>

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<sup>25</sup> Anna Gear, 'Towards New Legal Futures? In Search of Renewing Foundations', in Anna Gear and Evadne Grant (eds.), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar, 2015) 283, 312–13 (citation omitted).

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