Earth Jurisprudence in a Cosmological Perspective

Sometimes It Takes a Joker

PATRICIA A. SIEMEN

My life's journey made a significant turn in 2003 when I read Thomas Berry's "The Origin, Differentiation, and Role of Rights." His articulation of the analogous rights of every being to exist, to have natural habitat or home, and to fulfill its purpose in the course of evolutionary life deeply disturbed me. It made ultimate sense, but my legal training resisted: "This is not practical; it's foolish; how could this be implemented?" While I had studied Berry and Brian Swimme's *The Universe Story,* describing the evolutionary journey of the universe, it was Berry's applying a functional cosmology for law and governance, an Earth jurisprudence, that bothered me. Ultimately, it became the foundation for inspiring me to create the Center for Earth Jurisprudence in 2006. Today I use *Journey of the Universe* in all my classes to set the context for an emergent Earth jurisprudence.

The emergence of Earth jurisprudence, of governance from an ecocentric perspective, where human rights are an interdependent subset of Earth rights, is essential for a continuing viable life on Earth. Earth jurisprudence is an expression of the evolutionary creativity expressed in the story of the universe. It is because of a single coevolutionary process that we humans are kin and related to all other beings who share Earth as home. The universe needs the emergence of Earth governance included in its ongoing story of creativity and viability.

3. The Center for Earth Jurisprudence is a program of Barry University School of Law, Orlando, Florida. Thomas Berry was a mentor until his death in 2009.
Earth Jurisprudence: Court Jesters Need Apply

Earth jurisprudence is a new arena within the field of environmental law that many people do not yet understand. It takes both a jurisprudential and practical approach. Its philosophical approach asks what "ought" the law to be or do, and its practical approach explores how we extend legal protection to all entities who are members of the Earth community. Earth jurisprudence shifts the dominant environmental law paradigm from a property law frame to one that respects and protects the inherent rights of all beings to exist and flourish under the law. This is a huge jurisprudential shift for Western-oriented people. Those proposing that Earth and its entities have the right to moral and legal consideration are often deemed ridiculous and clearly not living in the "real" world of commerce and legal realities. Clearly another emergent energy is needed to break this tension, so let me introduce the archetypal energy of the court jester.

The court jester is a ubiquitous character whose role includes risking his tenure in order to tell the truth to the king or ruler. In European medieval times, the jester even dared to tell the king when he was in error or blinded. If the king listened, there was a chance that he might be saved from doing grave harm to the kingdom. Today, Earth needs court jesters, perceived as fools, of every discipline, to step out and speak basic truths to world and corporate leaders about the disruption of Earth's evolutionary processes and the gross climate and environmental devastation taking place. Today's jesters need to dramatize the inadequacy of the current legal and economic policies and inspire imaginative alternatives that are grounded in the emergent functions of the universe. Laws and economic policies are needed that are modeled on Earth's laws and self-regulating patterns to sustain long-term health for all species. Court jester archetypes need to offer a vision for redesigning our governance and legal systems in ways that support and protect the Earth community rather than legitimate its destruction. So much is at stake. We can afford to do no less.

Today's jester has a challenge in identifying the actual "ruler" or system to whom he or she should be speaking. There are so many circles of intertwined governance and economic "kingpins" reigning at local, regional, and global levels. Many are responsible for extractive decisions destroying Earth's functional integrity and health. Proposing to them a framework that is embedded in a wholistic scientific and cosmological context is essential for a viable

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future, even if labeled naive. Imagining that we can successfully adopt legal systems that respect and balance nature’s intrinsic rights to exist and flourish in sufficient time to counter climate justice is revolutionary. Yet the consequences of climate change and the acceleration of extinction of major species demonstrates the urgency for such systemic shifts. As Bill McKibben stated at a talk in Vermont in 2013, “The laws of physics do not wait.”

Current Legal System Woefully Inadequate

Since the beginning of the industrial era most of the Western world has been living out of a legal system narrowly framed by a property law paradigm. This framework considers every entity to be a potential “resource” that is available to become a commodity to be bought and sold. The laws of most nations are premised on upholding economic activity based on an antiquated concept of the public good. There is limited consideration of the cost to the commons, or to the public good, when natural limits are reached. To convince governance and corporate rulers that today’s “public good” requires recognition of the interdependent role played by all members of the Earth community can be an audacious task. Translating Berry’s concept that all members of the Earth community are “a communion of subjects, not a collection of objects,” into legal and economic public policies is indeed a worthy challenge, a great work. Nevertheless, this work is happening around the world. A shift is occurring as indigenous peoples, social justice activists, lawyers, artists, academics, theologians, poets, musicians, environmentalists, economists, educators, engineers, and people of faith and goodwill address the mounting violations of environmental and human rights within a framework of interconnected wholes.

Multiple diverse, yet related movements are gaining momentum. Some, such as the Global Alliance for the Rights of Nature and the Earth Charter Initiative Council, are driving into law the moral duties and obli-

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8. The Global Alliance for the Rights of Nature is a worldwide movement of individuals and organizations creating human communities that respect and defend the rights of nature.
gations of humanity to live in balance and right relationship with the rest of the larger Earth community. For example, in November 2014, two more communities—in Athens, Ohio, and Mendocino County, California—adopted the Community Bill of Rights banning corporate rights to conduct hydro-fracking in their communities, securing rights to a healthy environment and local self-governance, and recognizing rights of nature. These visionary activists who are advancing community rights are contemporary archetypal court jester personas entering the realm of public policy and Earth jurisprudence. And they are not the ones looking foolish in light of collapsing ecosystems. Rather, it is the intractable governance and economic behemoths who continue to legitimate the exploitation and commodification of nature that are tragically and foolishly wrong.

Implications of Earth Jurisprudence

So how would an Earth jurisprudence governance system be different from current law? First, it is important to understand that prevailing US environmental laws provide very little protection of the integrity of the natural world, other species (unless already threatened and nearly extinct), atmospheric health, or ecosystem resiliency. For example, neither the US Clean Air Act of 1970, nor the Clean Water Act gives priority protection to the air or the water. Rather these laws are designed to primarily protect the interests of humans rather than the actual health of the water or air. To illustrate further, if a lawsuit alleging environmental damage to freshwater springs because of excessive nitrate pollutants is to be brought, the plaintiff has to prove that there is significant human injury due to the nitrate pollution. It is not sufficient to establish that the springs or springshed is significantly impaired. Current laws generally do not recognize the actual harm to a natural entity unless threatened or endangered species are involved. As Christopher Stone raised in his groundbreaking 1972 law review article, Should Trees Have Standing? Toward Legal Rights for Natural Objects, under US laws the environmental-

ly injured entity has no standing to get its claim into court. That was true in 1972 and is still the prevailing law today. Earth jurisprudence would expand standing to other-than-human species and ecosystems in order to protect the health and viability of the natural entity in itself.

In the United States, and in nearly all countries except for Ecuador and Bolivia, there is no recognized, enforceable right of the natural world to be protected from substantive damages to its existence and health. As Thomas Berry noted in *The Great Work*, the US Constitution, gives all rights to humans with no legal protection for the natural world. The jurisprudence supporting such a constitution is profoundly deficient. It provides no basis for the functioning of the planet as an integral community that would include all its human and other-than-human components.

Adopting laws that protect the health of an ecosystem or watershed, for example, and providing standing for the natural entity through an appointment of a guardian to speak for the common good of the ecosystem would be a significant step forward for an Earth jurisprudential framework.

*The Universe Story as Context for Framing Earth Jurisprudence*

So what type of legal system could be adopted that *would* respect and protect the emergent dynamics of living systems and the “land community” as described by Aldo Leopold? In Berry’s Ten Principles for Jurisprudence Revision he set forth foundational principles on which a new legal system

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16. Ecuador was the first country in the world to recognize constitutional legal rights of nature (Pachamama) when it ratified a new constitution in 2008. Chapter 7, Article 71 states, “Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions, and its processes in evolution.” It also provided standing to nature and authorizes the public to bring enforcement actions: “Every person, people, community, or nationality will be able to demand the recognitions of rights for nature before the public organisms.” Article 72 authorizes that nature has a right to restoration as well.


could be constructed that would be coherent with Earth’s story of its evolutionary processes and inner dynamics. The first principle states "Rights originate where existence originates. That which determines existence determines rights." He continues, "The natural world on planet Earth gets its rights from the same source that humans get their rights: from the universe that brought them into being." Thus Berry sets the context for legal recognition and protection of the inherent rights of nature and rebalances human rights within the context of Earth rights. And since humanity has evolved from the dynamic complexities of the universe’s journey, human rights are nested within Earth rights. That is why the Universal Declaration on the Rights of Mother Earth adopted at the Peoples Convention on Climate Change and the Rights of Mother Earth was intentionally modeled on the pioneering work of the UN Declaration on Human Rights. As internationally renowned physicist and environmental leader Vandana Shiva says, "Earth rights are human rights. Humans have no rights if Earth is not viable."

Given an inherent Earth rights framework, Earth jurisprudence will develop laws and governance that respect and protect the intrinsic rights of every member of the Earth community to exist, to have a natural habitat, and to fulfill its role in the evolutionary processes of the Earth community. This will require a complex balancing of macro-level biogeochemical cycles of ecosystems, other species, and diverse cultural perspectives. Modes of participatory decision-making by affected parties will be essential. It is a complex and exciting challenge. Some may even think it is foolish, worthy of something only a court jester would suggest. It will require a massive shift in the perception of human relationships with the rest of the Earth community. We have much to learn from indigenous peoples who traditionally see life as an interconnected web and a part of “all my relations.”

21. Ibid.
22. Ibid.
24. The Peoples Convention on Climate Change and the Rights of Mother Earth took place in Cochabamba, Bolivia, in April 2010. It was called by President Morales after the collapse of climatic talks at the UN Conference of Parties at the UFFCC in Copenhagen, Denmark, December 2009.
27. Berry, Evening Thoughts, 149. Paraphrasing Berry’s fifth principle: “Every component of the Earth community, both living and nonliving has three rights: the right to be, the right to habitat or a place to be, and the right to fulfill its role in the ever-renewing processes of the Earth community.”
At its essence, Earth jurisprudence prefers that humans voluntarily self-regulate their own behavior, relate humbly with others sharing Earth, and live in balance and harmony with the larger Earth community. The question for legal systems is, How do we create governance and economic systems that support a celebration of *vivir bien*, or well-being, for diverse future generations?

It is critical that we recognize that our current legal system is woefully inadequate to the challenges and promises facing an Anthropocene Era. Earth can no longer sustain humans doing “business as usual.” The next section addresses the creation of laws that recognize the responsibility that humanity has to protect the interdependent relationships embedded within all members of the Earth community.

**Moving toward an Earth Jurisprudence**

Thomas Berry and Brian Swimme proposed that the universe is organized around three foundational patterns: differentiation, subjectivity, and communion. Each pattern can be found within the emergent capacities of Earth’s processes and components. The work of Earth jurisprudence is to create human governance systems grounded in these natural dynamics. Law by its nature is conservative and meant to protect society’s cultural values and structures from arbitrary change. However, when legal systems do not respond to shifting cultural values, a revolution in society and law can happen, as was seen with the civil rights struggle in the United States. Today an emerging ecological consciousness is driving many grassroots organizations to consider new legal initiatives respecting Earth’s integrity. The UN Report

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28. The concept of “living well in harmony with Nature” has emerged in the past ten years primarily within the indigenous communities of the Andes. It speaks of indigenous cosmovision, in which the concept of material prosperity and consumption does not exist or take priority. See the UN General Assembly Harmony with Nature Report, A/69/322, August 18, 2014, http://www.harmonywithnatureun.org/content/documents/2851450929.pdf.


of the Secretary-General on Harmony with Nature released in August 2014 provides a historical overview of global initiatives wherein different governmental entities are adopting laws and policies providing legal consideration of nature or Mother Earth.32

The crisis of Earth calls us to critique the legal system from a cosmological perspective, even as the capacity for economic behemoths to resist and co-opt such emergent responses seems almost unlimited. The voice of the jester is indeed needed. But the universe will have its own way, and the laws of physics cannot be stopped by economic power. Local and regional movements, seen as tiny cells and organisms, continue to create pockets of receptivity and resilience where the community organizes around the values of diversity, unity, and respect for local watersheds and ecosystems, for example. These are seedbeds for evolutionary change and adaptation. The power of local initiatives builds as networking creates a bonding of cooperation. This is the work of people who are willing to be foolish for the sake of the Earth. Indigenous peoples model this way of Earth jurisprudence by their traditional ways of being “kin” to all that exists. Today they are teaching the rest of humanity how to live in harmony with the rest of Mother Earth.

Adopting an Earth Jurisprudence from a Cosmological Context

In exploring methodologies to apply the cosmological core principles to current US laws, I draw upon the work of my friend and colleague Judith Koons, professor of law at Barry University School of Law in Orlando. In a 2009 law review article,33 Koons, who draws directly from the work of Berry and Swimme in The Universe Story, sets forth a vision of Earth jurisprudence through the lens of subjectivity, communion, and differentiation.34 She proposes that this interior self-organizing, self-regulating capacity can be applied within an Earth jurisprudence paradigm, demonstrating an intrinsic worth of nature. This intrinsic worth warrants moral consideration, which for Koons is a stepping-stone to legal consideration and legal rights.

It should be noted that legal consideration and the recognition of the intrinsic value of Nature is not the same as a governance system “bestowing” rights on nature, because the intrinsic value of nature already exists. Under an Earth jurisprudence system, the legal system recognizes these already existing

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34. Ibid.
rights and then provides a range of legal considerations and protections of those rights. One of the options is seeing nature as a rights-bearing entity in itself. Another is the granting of legal consideration by some legal authority, which, as Christopher Stone argued in 1972, is not the same as holding rights. Koons then presents a range of legal consideration options that can be applied to a nonhuman entity once it is given a jural person status, such as corporations, churches, trusts. She writes,

An entity may be granted rights, be given duties and responsibilities, be the recipient of immunities and privileges, or be held liable—all of which are intermediate, operative notions that flow from the broader principle of legal considerableness. Having legal status means being enabled to participate in the legal system, although not necessarily as a rights holder.

Koons proposes that one way in which subjectivity of Earth entities could be granted legal protection is through the doctrine of standing. Standing is the gatekeeper as to whether one can bring a legal action into court. Numerous legal scholars are reconsidering the standing doctrine that currently prohibits other-than-human species and natural entities the right to sue in their own name. Currently, only human plaintiffs can allege injury and be awarded damages or restitution. There are many arguments for expanding the standing doctrine to include natural entities, especially when nonliving entities such as corporations and trusts are already granted legal standing. The doctrine of guardianship is well established in civil law and could serve to protect the best interests of natural entities in legal proceedings. Focusing on addressing the actual harm to other members of the Earth community, rather than on a contorted legal result granting some human relief, would strengthen the integrity of law as well.

The principle of communion, as expressed in the interdependent, nested relationships that humans have with the rest of the Earth community, asserts that we are one part of the whole. This unity is described by Cormac Cullinan: “Western physicists confirm that the same atoms and sub-atomic particles may be part of the soil on Monday, a plant on Tuesday and us on Wednesday.”

Failing to see our nested relationship to other beings has resulted in our current generation bringing forth the conditions for massive extinction

37. Cullinan, Wild Law, 146.
of species and major climate disruptions, as well as major environmental deterioration.

Koons proposes that the dynamic of interdependency and communion "can be translated into jurisprudence as a principle of relational responsibility."38

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Because of humanity’s capacity for reflective consciousness, we can muse on the wonders of the universe and know that Earth nurtures and provides for us. We are the ones who create legal and ethical systems to govern relationships between ourselves and other humans. Therefore, we have the ability to develop systems of law and governance that create a duty of care to protect Earth’s natural systems.

As noted earlier, our current legal system allows for guardians and trusteeships for people and entities that cannot care for, or protect, themselves. There is the public trust doctrine39 that could be expanded so as to create a trust/trustee relationship with Earth’s natural systems and entities. Normally the state would be the trustee, or designate an appropriate body, held to a fiduciary duty to care for the body or corpus of the trust. The public trust has historically been applied to care for the waterways and shorelines, although under Roman law it extended to air and land that were deemed held in common by the people, or by the state for the good of the people. As Stone noted in 1972, it is conceivable that a guardianship model also could be established to represent the best interests of threatened species and natural entities. Guardians, appointed by local or state authorities, would be people who have a deep knowledge of the needs, capacities, and functions of those beings, as related to their larger natural habitat.40

There is a potential contradiction in trying to protect natural entities through a public trust structure, however, as the corpus or body of a trust, under law, is considered a res, or a “thing” to be protected. Trust law does not infer that the body of the trust (in this case, a natural entity such as a freshwater spring or a geological formation considered sacred to indigenous peoples) is a subject in its own right. Therefore, the rules of guardianship might be better applied. Neither of these approaches supports the concept of

nature being a rights-bearing entity in and of itself. However, legal precedent recognizes that both a guardian and trustee must represent and advocate for the best interests of the one not able to speak for itself.

The third principle of differentiation is an expression of the incredible creativity manifested by the universe. The universe obviously loves diversity! Nothing is the same: no two molecules, no two microbes, no two minnows, no two meadows, no two mountains, nor any two men or women. Every being is a differentiated being with its own internal capacity for autopoiesis, self-organization, and relationship. Koons supports Cullinan’s suggestion that the diversity of the Earth community and natural self-regulating systems form a type of Earth Democracy. 41 International environmental leader, physicist, and author Vandana Shiva describes Earth Democracy as a “living democracy,” a type of self-governance that “grows like a tree from the bottom up.” 42 Shiva says that “Earth Democracy connects the particular to the universal, the diverse to the common, and the local to the global.” 43

Earth Democracy is premised on the idea that the best decisions for nature’s well-being are those decided by the principle of subsidiarity: decisions should be made at the lowest (closest to the parties) and most appropriate level of governance. Some decisions are best made at the local level (e.g., regulating building codes), others at a regional level (e.g., control of pollution in waterways and the extraction of water), and others at a global level, such as atmospheric pollution. And some decisions, such as sources of clean energy and energy use, need to be made at all three levels. The Community Environmental Legal Defense Fund (CELF) under the direction of Thomas Linzey and Mari Margil provide excellent examples of Earth Democracy being implemented at local levels. 44

They work with organized communities to help draft local ordinances banning corporate actors from bringing into the community unwanted commerce such as factory hog farms and hydraulic fracting for natural gas. They work with local communities to expand the home rule provisions of local townships, cities, and counties to grant constitutional rights to natural eco-

43. Ibid.
44. For an overview of CELF’s work, see http://celdf.org/. It is the premier organization in the United States working with local communities and also with international partners in using the law to protect the rights of people and natural communities to determine health and well-being and to resist and challenge the rights of corporations to overrule the rights of community members. They were the key legal advisors to the drafting of Ecuador’s constitutional protections for the rights of nature.
systems while stripping corporations of constitutional rights. Their work is essential for an applied Earth Democracy.

Earth Democracy is a facet of Earth jurisprudence. It calls upon humans to assume a duty of care for the health of Earth, not just to remedy its illnesses. Earth jurisprudence and the preservation of Earth can only be advanced and adopted when local, regional, national, and global governance systems decide to take responsibility for the current and future well-being of Earth, our home. It requires a major shift from solely anthropocentric-focused forms of governance to one where humans and nature are both honored and respected.

**Conclusion**

Earth jurisprudence is the work of all people called at this time to care for Earth's greatest good. Not to act with loving attention, resilience, and resistance may be the most foolish decision we have ever made. Hope for survival and celebration of Earth's bounty and beauty lies in building momentum to care for Earth as demonstrated at the Climate March in September 2014. Over 625,000 people worldwide gathered to illustrate their demands that global leaders take action to curb and control greenhouse gas emissions. The people came to say that if the global representatives do not act, the people will. This is sometimes the best and most effective way that laws and culture change: by exercising a democracy of our feet and hearts.

So much is at stake. It is time that we all become court jesters, willing to tell the truth boldly to the rulers of our day. Let us not be afraid to be seen as foolish or dreamers. So let us put on our jesters' garbs. It is only when we freely and humbly embrace loving service to all our kin and “make the path by walking”\(^{45}\) that the ever-creating jester spirit can use us to bring about harmony and balance with all of creation.

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