

Emerald Star-Law:
Three Interpretations of Earth Jurisprudence

ABSTRACT:

Comparative religion scholar Thomas Berry's influential concept of "Earth jurisprudence" has been helpfully elaborated in three principal books. My first section identifies four of their common themes, deriving therefrom an implicit narrative: (1) the basis of ecology is autopoiesis, which (2) originally generated human communities and Indigenous vernacular laws, which were (3) later reasserted by forest defenders who fought to create the Magna Carta's "Charter of the Forest," which is (4) now championed globally by the Indian physicist and eco-activist Vandana Shiva's Earth Democracy movement. My next three sections identify mutually exclusive elements of the three books, deriving the following alternative narrative: self-conscious new dancing rituals (Cullinan) could empower an historically informed reconstruction of private property (Burdon) via commons-based vernacular law (Weston and Bollier). And my conclusion offers one template for such a strategy, namely a new environmental variation on my dancing-poetic conception of legal justice, christened "emerald star-law."

KEYWORDS: earth jurisprudence; wild law; natural law theory; Indigenous rights

The present article aims to introduce academic philosophers to an emerging theory of jurisprudence that is increasingly impactful in the Anglophone Global South (especially South Africa, India, and Australia). Inspired by the theologian turned environmental activist Thomas Berry, the three most influential interpretations of this jurisprudence are "wild law" (in South African environmental lawyer Cormac Cullinan's *Wild Law: A Manifesto for Earth Justice*), "earth jurisprudence" (in Australian law professor Peter Burdon's *Earth Jurisprudence: Private Property and the Environment*), and "green governance" (in U.S. American law professor Burns Weston and activist David Bollier's *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*). My first section identifies four common themes from these three books and choreographs them into the following sequence: (1) the basis of ecology is autopoiesis, (2) originally generating human communities and Indigenous vernacular laws, (3) later reasserted by forest defenders who fought to create the Magna Carta's "Charter of the Forest," (4) and now championed globally by the Indian physicist and eco-activist Vandana

Shiva's Earth Democracy movement. Shifting my approach, my next three sections isolate mutually exclusive elements of these three interpretations, deriving the following alternate narrative for achieving Earth jurisprudence: self-conscious new dancing rituals (Cullinan) could empower an historically informed reconstruction of private property (Burdon) via commons-based vernacular law (Weston and Bollier). And my concluding section offers one template for such a strategy, namely a new environmental variation on my dancing-poetic conception of legal justice, which I call "emerald star-law."

I. Four Steps to Earth Jurisprudence

According to all three Earth jurisprudence interpreters, its first step consists of eco-political autopoiesis. As Cullinan notes, this constitutes one of Thomas Berry's three qualities or themes of the "Cosmogenetic Principle," namely "*differentiation, autopoiesis* (meaning literally 'self-making), and *communion*" (Cullinan 2011: 79). Similarly, Burdon writes that "Autopoiesis is the central concept in systems and network descriptions of nature," and that, following Thomas Berry, among "the most important aspects of ecological integrity are, first, the autopoietic capacities of life to regenerate and evolve over time at a specific location (Swimme and Berry 1992: 75-77)" (Burdon 2017: 56, 88). Lastly, Weston and Bollier center the autopoiesis-adjacent concept of self-governance, arguing that "profound discoveries in the evolutionary sciences and the rise of complexity science over the past generation validate the power of bottom-up forms of social organization and governance," with "Extensive empirical research" showing "that some of the most robust, stable forms of governance are distributed, self-organized, and collaborative" (Weston and Bollier: 112). For a few examples, "Microbes, ants, humans, and diverse other organisms exhibit characteristics of complex adaptive systems"

(114). Thus, “Given a sufficiently defined and hospitable fitness landscape, self-organization based on local circumstances can occur,” suggesting that “human communities have inborn capacities to create stable order” (114).

These analyses of autopoiesis also align with my previous exploration of poesis in Aristotle and a poetic metaphysics of ontological creation. More specifically, in *On Generation and Corruption*, the *Physics*, and *On the Soul*, poesis functions primarily as (1) “making” or “postulating,” particularly in terms of what a theorist posits as the fundamental layer of reality; (2) “activity,” particularly in relation to how the basic material elements of reality act on each other, as well as the soul understood as the activating verb to the body’s noun; and (3) an aesthetic test of philosophical fitness via the poetic aspects of language.ⁱ And on that basis, I later argued that law per se can be understood as one such kind of poetry. More specifically, this law-as-poetry, drawing on Alexis de Tocqueville and Percy Bysshe Shelley, blends natural law, positive law, and critical legal theories into what I term “natural aristo-poetic counterforce.”ⁱⁱ Thinking together these previous analyses of poetic poesis in Aristotle, and legal poetry in Tocqueville and Shelley, cosmically-ecologically, organisms naturally “self-poetize,” which for human includes the governmental-legal creation of communities and vernacular laws.

The second step toward Earth jurisprudence for its three interpreters involves Indigenous communities, which (as for many westerners) constitute an intuitive site for autopoietic vernacular laws (arguably in part due to malingering racist/ethnocentric assumptions about Indigenous peoples as “primitive” or “savage” remnants of prehistory). Cullinan, for example, briefly invokes the popular trope of shamanism, including in the context of the Indigenous peoples of the Amazon rainforest. For these Tukano people, writes Cullinan, “one of the responsibilities of the shamans of each community is to ensure that ‘vital energy’ continues

flowing and that an appropriate dynamic balance is maintained between the energy within the human community and that [energy] within the animals that they hunt” (Cullinan 2011: 89). Similarly, Burdon affirms that “Perhaps the best example” of a “‘property system’ where nonreciprocal obligations and responsibilities have been recognised in practice” is found in “the many indigenous cultures in Australia who perfected sustainable land management practices for over 40,000 years (Gammage 2013)” (Burdon 2017: 93, 119). Lastly, Weston and Bollier, who claim their central concept of “Vernacular law” is synonymous with “indigenous law,” affirm that “Indigenous commons are arguably some of the purest commons because many have evolved in isolation from dominant, external systems of power over the course of centuries or longer” (Weston and Bollier 2014: 160). These reflections illustrate a prominent problem, which I have explored in detail elsewhere, wherein present-day westerners are ethically obligated to perform a tightrope dance between (a) refusing the temptation of cultural appropriations of a kind of “philosophical shamanism,” while also (b) acknowledging our debt to such cultural practices in guiding our own attempts to craft new rituals and traditions that are more ecologically sustainable.ⁱⁱⁱ

On that note, I proceed to the third step toward Earth jurisprudence for its three interpreters, namely recovering a western history of the commons. Cullinan, again anticipating his two successors, relates how in nineteenth-century Britain, “as a result of so-called ‘enclosures’, much of the common land was fenced off and given to private landowners, primarily to farm sheep,” which deprivation “of access to the commons had a devastating effect on community life, and radically altered British society” (Cullinan 2011: 160). Just so, Cullinan concludes, “A similar process of enclosure has fenced us out, both physically and mentally, from the Earth Community (161). Burdon explores this issue in much greater historical detail and

theoretical specificity, relating how, in 1842, in “a major Rhineland newspaper (the *Rheinische Zeitung*),” a young Karl Marx published a “paper entitled ‘Debates on the Law of Thefts of Wood,’ in which he explored the prosecution of peasants who collected wood from the forest to heat their homes and cook food (Marx 1996)” (Burdon 2017: 39). Explaining the injustice of these anti-commons law, Marx writes that, while “this practice had taken place for countless generations, the growth of industrialisation and the system of private property led to harsh prosecution” (39). More precisely, “Under the new laws, ‘wood thieves,’ who depended on the common stock of the forest for their subsistence, were turned over to the forest owner (whoever had property title) and forced into labour, thereby increasing the profits of the owner (Foster 2000: 67)” (39). In short, Marx argued, this law “turned the ordinary peasant into a ‘criminal’ or ‘enemy of the wood’” (39). Weston and Bollier also discuss these forest defenders, and even more thoroughly than Burdon, but since that discussion is part of their general inquiry into the commons—which is the subject of my fourth section below—I defer my analyses thereof for now and will return to it below.

Forest defenders are also central to the fourth step toward Earth jurisprudence for its three interpreters, involving Vandana Shiva’s Earth Democracy movement.^{iv} “In India,” Cullinan summarizes, “the celebrated environmental activist Dr. Vandana Shiva coined the phrase ‘Earth democracy’ to describe a world view and political movement promoted by Navdanya (an organisation which she founded),” which has “also drawn on traditions of resistance to colonial authority, for example by employing the strategies of Mahatma Gandhi’s salt *satyagraha* to resist legislation which allowed the patenting of seeds and other life forms” (Cullinan 2011: 181-182). Burdon elevates Shiva and Earth Democracy still higher, writing that “Today the most significant political movement that is advocating radical changes to human governance

mechanisms is the Project for Earth Democracy (Shiva 2005)” (Burdon 2017: 93). Lastly, Weston and Bollier acknowledge “perhaps a handful of commons ‘stars’”—one of the three of whom they name is the “Indian activist Vandana Shiva” (Weston and Bollier 2014: 157).

This concludes my summary of the four steps to Earth jurisprudence, as commonly held by all three of these interpretations of Thomas Berry’s call to legal action. On the one hand, it is helpful and illuminating to emphasize that, despite significant differences among these three interpretive approaches, one can discern an overall recommended trajectory. On the other hand, the fact that thus far these efforts have bore limited fruit, at least in a U.S. academic philosophical context, suggests that it is worth approaching these three interpretations from a different angle, in the hopes of deriving therefrom a more sustainable plan of action for Earth jurisprudence today.

II. Cullinan’s Dancing Rituals

Cullinan is acknowledged to be the first person to translate Thomas Berry’s concept of “Earth jurisprudence” into a book-length inquiry into the philosophy of law. And it is clear from the Foreword that Berry wrote for *Wild Law* that Cullinan worked closely with him and has his fullhearted endorsement. Berry himself only got as far as composing a list of ten jurisprudential principles, which jointly view the cosmos as the fundamental basis for ethics and law, and all existents as constituting a communion of subjects (not a collection of objects) who possess entity-specific inherent rights. (For two examples, Berry writes that “Rivers have river rights,” while “Birds have bird rights”) (Cullinan 2011: 103).

Cullinan’s philosophy of law elaborates on Berry’s ten principles by proposing a three-level hierarchy of laws, namely a highest level called “Great Jurisprudence” (naturalist

metaphysical principles, valid for all entities), a middle level called “Earth Jurisprudence” (legal principles, valid only for humans), and a lowest level called “wild laws” (statutory human laws).^v Against natural law per se, Cullinan recalls that, during his own experiences of law school, natural law “was treated as an interesting but outmoded notion,” and that, from “an Earth jurisprudence perspective, the inherently anthropocentric flavour of current concepts of natural law makes the debates that have raged around these ideas seem rather artificial” (Cullinan 2011: 68, 71). More generally, Cullinan is also dismissive of legal theory tout court, recalling for example how, while protesting apartheid in his home country of South Africa, “I, and many others, found at these times we took guidance from our consciences and hearts and not from logic or theory” (62).

Shifting from the argumentative content to the compositional form of Cullinan’s *Wild Law*, what first struck me was its insistent, repetitive valorization of dance (both literal and figurative) as an ideal exemplar of his highest stratum of law, Great Jurisprudence. I will now retrace these instances. First, in the “Preface to the First Edition,” Cullinan writes that “The truth is that I am not a detached observer but a participant in the system—a dancer in the great dance of the universe” (Cullinan 2011: 12). Second, rather “than a construction, the universe is now understood as a surging, swirling dance that unifies all the dancers and is shaped by the constantly changing relationships between them” (47). Third, “Communion,” one of Thomas Berry’s three central principles, “can be understood as the web of relationships or the dance between different aspects of the universal whole” (83). Fourth, again regarding the Tukano people of the Colombian Amazon rainforest, “the Indians might be inspired by the jaguar’s masterful adaptation to its environment to adapt their own behaviour in order to move more gracefully within the dance of the Earth” (91). Fifth, “once we recognize that the universe, like a

dance, exists by virtue of the cooperative relationships between all involved, it must follow that our governance systems should focus on fostering and nurturing intimate relationships between the members of the Earth Community” (115). Sixth, music “is about listening so that you know the right moment to whack that cymbal, about drumming to the same heartbeat until great, cyclical sound waves sweep drummer and dancer along in the unity of the dance” (131).

Seventh, the subsection entitled “Dancing to an Earth Beat” rhapsodizes that “Everywhere you look, our species is drumming and humming, swaying and swinging, tapping and rapping, jumping and jiving, bopping and be-bopping: we are sounding boards for Earth,” as “Singing and dancing bursts out of every happy child” (136). Finally, in that chapter’s last sentence, “If we want to participate fully in the dances of the Earth Community we need to listen carefully for the beat and adjust our rhythm and timing accordingly” (137).

This pervasive valorization of dance in Cullinan also aligns with my previous exploration of justice as a kind of dance.^{vi} More specifically, that analysis is part of the larger project that eventually became “astral legal justice,” and began by exploring how to channel people’s passion for popular arts into legal social justice by reconceiving law as a kind of poetry and justice as dance, and exploring different possible relationships between said legal poetry and dancing justice. First, I rehearse my new conception of social justice as “organismic empowerment,” and my interpretive method of “dancing-with.” Second, I apply that method to the following four “ethico-political choreographies of justice”: (1) the choral dance of souls qua winged chariot-teams (from Plato), (2) a dancingly beautiful friendship with the community (from Aristotle), (3) a tightrope-dance of the cool (from Al-Farabi), and (4) humans dancingly reimagined as positioned actors in fluidly moving groups (from Iris Marion Young). I then synthesize these

analyses into “dancing justice,” defined as the dynamic equilibrium sustained by a critical mass of a community’s members comporting themselves like social dancers.

Returning to Cullinan, his affirmations of ritual are similarly numerous as those of dance. They first mention ritual in yet another reference to the Tukano people, who in Cullinan’s words, “believe that the universe is steadily deteriorating (rather like the physicist’s understand of entropy) and consequently regularly engage in ceremonies during which all the aspects of the universe are *ritually* recreated” (Cullinan 2011: 92, emphasis added). Cullinan’s second invocation of ritual is also juxtaposed with Indigenous peoples, in this case the San (aka “Bushmen”). A San hunter would not be allowed to kill another organism, Cullinan relates, “if he had not complied with the appropriate rituals” (which becomes a template, for Cullinan, for wild law as applied to hunting) (106). For example, hunters “all over the world have made small rituals to thank the dead or dying animal for its sacrifice of life so that the hunter’s family might live, and to acknowledge that one day it will be the hunter’s turn to surrender the nutrients and energy in his or her body back to the Earth system” (116). Later applying this idea to western communities, Cullinan suggests that “Perhaps we should be developing new rituals” (144). More specifically, as they elaborate in a later chapter, we should “observe Earth jurisprudence by including in our lives little rituals and practices that respect, honour, and celebrate Earth and rededicate ourselves to deepening our connection with the whole” (174).

Inspired in part by the admirable example of Cullinan himself, who relate their own efforts to overcome white supremacist indoctrination (as a white man growing up in apartheid South Africa), I confess that (as a white man growing up in post-Jim Crow Alabama) what initially drew me to *Wild Law*, when I read Vandana Shiva’s endorsement thereof, was the titular juxtaposition of the concepts of “the wild” and “the law” (Cullinan 2011: 124). I was therefore

troubled to learn, from the ecofeminist philosopher Ariel Salleh book, *Ecofeminism as Politics: Nature, Marx, and the Postmodern*, that Aboriginal Australians are currently attempting to outlaw the word “wilderness” itself, due to its racist colonialist history and ongoing impacts (their preferred synonym being “country”).^{vii} Similarly troubling to me regarding “wildness,” historian of religion Bron Taylor’s book, *Dark Green Religion: Nature Spirituality and the Planetary Future*, discusses how the concept of “the wild” derives principally from Henry David Thoreau, who was also arguably ethnocentric and perhaps even racist against Native Americans (despite his affirmations of them in other contexts). For example, Taylor writes, “despite being drawn to native people (he studied them in depth and sought out their company), he could also be condescending, viewing them as superstitious and unscientific, unable to provide a model for civilized humanity” (53).^{viii} For me, these points so tarnish and undermine the concept of “the wild” that I wish to dissociate myself from advocacy of that concept going forward.^{ix}

Arguably, this implicitly racist, colonial, imperialist aspect of “the wild” is connected to the main flaw that both Burdon and Weston and Bollier level against Cullinan’s interpretation of Earth jurisprudence, namely an implicit legal positivism. According to Burdon’s brief history of western jurisprudence, the foundational positive law theory of the utilitarian Jeremy Bentham was deployed extensively by the British in their imperialist imposition of laws on colonies such as India, including by trampling various explicit and implicit Indigenous natural law theories and practices (a process which, moreover, continues today). Echoing Burdon’s critique, Weston and Bollier note that “while we agree with Cullinan’s existential sentiments, we do not agree with his jurisprudential outlook, too tied as it is, we believe, to a kind of Austinian positivism that insists that law, to be law, requires the apparatus of the state, everything else being ‘positive morality’”

(Weston and Bollier 2014: 111). Like Burdon and Weston and Bollier, I too wish to preserve Cullinan's strong first step while avoiding this specific misstep.

III. Burdon's Triangulated Property

There are two primary ways in which Burdon's approach differs from Cullinan's. First, as just noted, the former criticizes the latter's legal positivist in favor of a natural law framework. Though many "advocates of Earth jurisprudence," Burdon notes, are "dismissive of natural law philosophy and have expressed concern about becoming locked in the unproductive rivalry between positive and natural law (Bosselmann 1995: 236)," nevertheless "there is no necessary conflict between the two ideas" (Burdon 2017: 82). More specifically, Burdon suggests that "the most relevant" form of natural law for Earth jurisprudence is "Aldo Leopold's natural law environmental ethic, which is articulated in 'The Land Ethic' (1986)" (83). Additionally, Burdon suggests that Earth jurisprudence "can also be considered a form of critical legal theory," though they add in a footnote that "advocates of critical legal studies said very little about the environment" (80). Second, though Burdon admits sympathy for both communist and anarchist philosophers (especially Marx and Murray Bookchin), they nevertheless affirm the inevitability and necessity of a concept of private property (by whatever name).

More specifically, Burdon analyzes the origins and dramatic evolutions in the history of private property, beginning with the assertion that "the Roman Stoics undertook the first sophisticated formulation of private property" (Burdon 2017: 20). Burdon also cites Cicero (who studied under the famed Stoic Diodorus), as describing natural law as having "three important characteristics," namely (1) "there are universal and immutable 'laws' that are accessible at all times to human lawmakers"; (2) the law of nature is a 'higher law' and superior to laws

promulgated by political authorities”; and (3) “all things have natural essences or ends that are directed toward human beings” (21). As this third point anticipates, Burdon objects that “the overwhelming current of Roman jurisprudence was fundamentally human centered” (22). More specifically, the central concept of Roman jurisprudence is *dominium* (“dominion”), “akin to ‘lordship’,” being “a sovereign, ultimate or an absolute right to claim title and thus to possess and enjoy an item (Getzler 1998: 82)” (22). This latter, absolutist principle, Burdon claims, is one from which “our law has never moved away” (22).

Nevertheless, one might find anecdotal counterevidence to this pessimistic conclusion in the fact that both Cullinan and Weston and Bollier affirmingly cite Cicero—who formally studied Stoic philosophy under Diodorus—on the philosophy of law. Cullinan notes that, “as Cicero recognised, the unlimited power of one will destroy the liberty of all,” and Weston and Bollier affirm “Cicero’s great insight ‘freedom is participation in power’” (Cullinan 2011: 116; Weston and Bollier 2014: 94). More broadly, regarding the Romans in general, Weston and Bollier claim that they “were the first society in recorded history to have made explicit laws regarding distinct categories of property, including common property” (135). Of the “several categories of property that could not be privately owned” in Ancient Rome, one is “*res communes*, or things owned in common to all” (such as “the air” and “the right of fishing in a port and in rivers”) (135). This was, Weston and Bollier elaborate, “a category of law enshrined by Emperor Justinian in 535 C.E.,” which the authors claim is “the first legal recognition of the Commons,” as well as “arguably the earliest manifestation of what is known in [U.S.] American law as the ‘public trust doctrine’,” which also “has analogues in most legal systems of the world and indeed in many of the world’s major religions” (136). A second category of non-private

property in Roman law was “*res publicae*, or public things, which belong to the State,” including “public roads, harbors, ports, certain rivers, bridges, and conquered enemy territory” (136).

Further support for this more Stoic-sympathetic view can be found in the twentieth century Jewish German philosopher Ernst Bloch and his maternalistic reinterpretation of natural law theory. Elsewhere, I have reinterpreted two of Bloch’s neglected works, *Avicenna and the Aristotelian Left* and *Natural Law and Human Dignity*.^x The former book articulates a concept of matter as a dynamic and impersonal agential force, which is ever pregnant with possible forms delivered by artist-midwives, who are building thereby Bloch’s messianic utopia. And the latter book resurrects the Stoics’ concept of natural law as drawing on a prehistoric matriarchal utopia, which was channeled later in history into earth cults that worshipped a Great Mother (goddess of animals) and her Son (god of plants). Synthesizing these two threads into what I term “pregnant materialist natural law,” I argue for its embodiment in Dionysus (as the Greek version of the Son of the Great Mother). Though stigmatized throughout our homophobic western history for his queerness and maternal dependence, Dionysus is nevertheless the patron god of Bloch’s hero, the formerly-enslaved revolutionary Spartacus. More specifically, Spartacus’ Dionysian priestess paramour prophesied his divine mission of liberation of their people from Rome.

I now proceed to the second era of Burdon’s history of private property. “Christian myths concerning the divine grant of dominium to human beings,” they write, “fuse with Roman law to form the dominant theory of private property through the Middle Ages and to the nineteenth century” (Burdon 2017: 23). Elaborating on the Jewish sources of this Christian view, Burdon cites religious scholar W. Lee Humphrey’s observation that “Hebrew linguists have interpreted the operative verbs ‘subdue’ (*kabash*) and ‘dominion’ (*radah*) to signify a violent assault or crushing,” whose “image ‘is that of a conqueror placing his foot on the neck of a defeated

enemy, exerting absolute domination” (24). Reinforcing this affirmation of property as domination, Thomas Aquinas argued that “private property was vital to spiritual growth and served the public good by enabling the giving of alms,” under which influence “the Christian view of private property shifted from being a ‘regrettable but unavoidable reality’ to being a theory that was defended with vigour (Pipes 1999: 17)” (26). More generally, Burdon concludes, “from the Middle Ages to the modern era, jurists and political theorists have cited dominion as a justification for private property (Schlatter 1951: 57)” (27).

Proceeding from the Middle Ages to his third era of private property, namely that of the Enlightenment, Burdon notes the massive influence of Francis Bacon and Descartes. Both have become infamous in ecofeminist philosophy for their hostility to nature, as evidenced in part by several examples quoted by Burdon. The two from Bacon are as follows: (1) “I come in very truth leading you to nature with all her children to blind her to your service and make you her slave,” and (2) “We have no right to expect nature to come to us...Nature must be taken by the forelock, being bald behind (Farrington 1939: 130)” (Burdon 2017: 29). As for Descartes, he (3) boasts that “we have ‘rendered ourselves the lords and possessors of nature (Descartes 1985: 141),” (4) dismisses all other species as “insensible and irrational machines that ‘moved like clocks but could not feel pain’ (cited in Nash 1989: 18),” and (5) holds “that ‘coercing, torturing, operating upon the body of Nature...is not torture [because] Nature’s body is an unfeeling, soulless mechanism” (30).

Remaining in the era of the Enlightenment, but traveling across the pond to the Americas, Burdon observes that a similar dynamic was operative in the U.S. With the ascendance of industrial economic powerhouses, “To increase economic growth, lawmakers were required to ‘materially change the meaning of landownership to facilitate...intensive land uses’ (Freyfogle

2001b: 4)” (Burdon 2017: 32). As Burdon interpolates, “Fundamental to this shift, was the idea that private property entailed the right to use the land more intensely that had been practised by previous generations” (32). Turning to the seminal U.S. legal historian and Harvard Law professor Morton J. Horwitz, Burdon elaborates that, “the legal concept of private property was reconceptualised to promote market growth ‘at the expense of farmers, workers, consumers’ (Horwitz 1977: 254) and, of course, the environment” (33). The key event here, from 1805, was the New York Supreme Court decision *Palmer v Mulligan*, which held “that riparian rights [of river access] were to give way to cost/benefit economic analysis (Horwitz 1977: 33)” (33). In Horwitz’s words, this case “represented a dramatic departure from the existing case law of the period” (33). For example, it “introduced the entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally justified injury” (33). The most impactful downstream result of this crucial case was that “the legal-philosophical concept of private property also changed from a focus on the relationship between people and the land to a relationship between and among people,” summarized as “a dephysicalised description of human interactions (Vandavelde 1980: 333)” (34).

This novel, Enlightenment-era concept of private property derives in part from John Locke, the English philosopher who famously drafted the original model for the constitution of the Carolina colony, thus again linking Europe and the Americas. On the one hand, Burdon concedes that Locke’s philosophy assumes that “the environment can only be valued through human interaction (labor, use or ownership) and uncultivated land was waste (1970: 299-303)” (Burdon 2017: 35). But on the other hand, Burdon cautions the reader that Locke “speaks almost exclusively in terms of agrarian farming methods, rather than more intensive labour such as

mining, grazing, manufacture, or other form of industry”—even though, “with the advent of the Industrial Revolution, it was the proponents of the latter forms of labour that most often utilised Locke’s writing as a justification for private property” (35). In other words, Locke’s theory of property assumes the existence of the land as the physical intermediary triangulating human-to-human relations, and without the latter, even more pernicious effects than Locke himself would have sanctioned have become the norm.

Stepping into the fourth era of their history, the nineteenth century, Burdon blames these pernicious effects on utilitarianism founder Jeremy Bentham, who (1) rejected “the natural rights justification of private property,” (2) “promoted a person—person (as opposed to person—thing) conception” of property, and (3) “transformed social wealth from land into a legal right to land” (Burdon 2017: 36). This shift from a natural law to a positive law foundation, according to Burdon, meant that “there was no inherent need for property law to have regard to morality or derive its character from humankind’s relationship to the Earth” (36). “Bentham’s description,” Burdon summarizes, “creates an illusion – what Kevin Gray (1991: 1) described in a different context as ‘property in thin air’” (37). Consequently, Burdon concludes, “property law focused less on environmental considerations and increasingly on providing for the demands of a growing industrial economy” (37). In short, “the sense that property was a social or community institution was eroded” (37).

Bentham’s centrality to positive law theory is an additional reason for Burdon to critique Cullinan’s implicit reliance on legal positivism. Instead, Burdon opts for a combination of all the main traditions in the philosophy of law. First is Burdon’s preferred natural law theory (which they argue is ultimately compatible with positivism). Second, Burdon credits Horwitz’s heroes, the Legal Realists such as Supreme Court Justice Oliver Wendell Holmes, Jr., for having

“provided the first sophisticated elucidation of the social or community aspect of property” (Burdon 2017: 108). Third, Burdon affirms that “scholars operating under the banner of critical legal studies have argued convincingly that the source and internal constitution of private property arises from social relationships” (109).

In support of Burdon’s jurisprudential synthesis, I have elsewhere (as noted above) made such an attempt via a conception of law as poetry, gestures toward which can be found in all three law traditions. More specifically, natural law sees the law as divinely inspired prophetic poetry, positive law sees the laws as creative human positing (from poetry’s *poesis*), and critical legal theory sees these posited laws as calcified prose prisons, vulnerable to poetic liberation. Against this background, I considered two texts at the intersections among these three theories, namely Percy Bysshe Shelley’s “A Defence of Poetry,” and Alexis de Tocqueville’s *Democracy in America*. While Shelley identifies a poetic rebirth in the ruins of natural law, suggesting a philosophy of law as “natural *poesis*,” Tocqueville names several figurative aristocracies capable of redeploying aristocratic law against a democratic despotism of the masses, suggesting a philosophy of law as “aristo-poetic counterforce.” And I bridge these two (bridging) theories with a proposed new theory I call “natural aristo-poetic counterforce.”

For their part, Burdon derives from this blend of jurisprudential traditions a redefinition of private property, namely “as a *relationship* between members of the Earth community, through tangible or intangible items” (Burdon 2017: 102). More precisely, private property in Burdon’s ideal vision (1) is “*limited* by government and community norms,” (2) inherently involves “*nonreciprocal obligations and responsibilities*” (from humans to environment), and (3) “should *respond* directly to the thing itself” (102). Interpreting Burdon’s redefinition of private property alongside Cullinan’s abovementioned call for new dancing rituals, I suggest that the

latter are a necessary social catalyst for creating and sustaining this new notion of private property. In other words, if what makes Burdon's conception distinct and ecologically virtuous is its substantive triangulation of human/environment/human, then Cullinan's dancing rituals could be the dynamic activity that generates this new relationship. Put in a formula, "ritual becomes environment," or "dance represents nature." The only step missing, therefore, is the cultural environment where these rituals can become calcified into positive, statutory law. Between ritual and statute, we need vernacular laws of the commons.

IV. Weston and Bollier's Vernacular Law

Weston and Bollier deploy a two-pronged strategy of (1) a natural law theory of human rights (specifically a procedural right to a clean and healthy environment) and (2) the law of the commons, or "vernacular law" (Weston and Bollier 2014: xx). The latter, the authors define as "the 'unofficial' norms, institutions, and procedures that a peer community devises to manage its resources on its own, and typically democratically" (xx). Additionally, "In its classic form, a commons operates in a quasi-sovereign way, similar to the Market but largely escaping the centralized mandates of the State and the logic of Market exchange while mobilizing decentralized participation on the ground" (xx). Though inspired by "the Arab Spring, the Spanish Indignados, and thousands of Occupy encampments," Weston and Bollier insist that their "vision of green governance does not call us back to communism or socialism, nor rally us to eco-anarchism" (xxii).

In a later elaboration of this vernacular law, Weston and Bollier write that "law does not live by executives, legislators, and judges alone"; instead, law "can and does exist beyond the formal corridors of power" (Weston and Bollier 2014: 33). That is, law "assuredly exists in our

essentially ‘horizontal’ and voluntarist international legal order, which by definition lacks a formal center; but it exists also in ‘vertical’ and compulsory national legal orders, where behavioral codes of all sorts regulate diverse sectors of life (church canons, sports rules, normal of social etiquette) without formal State approval” (33). Additionally, qua “indigenous law” or “subaltern jurisprudence,” vernacular law’s power is indirectly attested by the fact that (a) “colonial powers often used law to repress local languages in favor of their controlling mother tongue,” and (b) “postcolonial governments have also used law to consolidate the rule of their linguistic culture in multilingual settings” (104). Nevertheless, Weston and Bollier elected not to use the synonymous term “subaltern jurisprudence” for their green governance, because in their view “the colonial and postcolonial origins of the term ‘subaltern’ render it insufficient even if illuminating” (104). Instead, the authors “wish to emphasize the ‘living law’ nature of this form or level of legal process – its character as an evolving, communicative life pulse” (104).

Another synonymous term for vernacular law, Weston and Bollier claim, is what legal scholar Michael Reisman calls “microlaw,” defined as “the sensibilities or expectations of ‘right’ and ‘wrong,’ or ‘practical’ and ‘ineffective,’ that emerge from the everyday lives of ‘ordinary’ people” (Weston and Bollier 2014: 105). Whether “self-conscious or unself-conscious,” Weston and Bollier add, such “social protocols that people develop over time in a given social setting constitute an undeniable form of law” (105). The authors admit that “not all Vernacular Law systems are virtuous in the sense of working for the well-being of their constituents,” as illustrated by examples such as “black markets, inner-city gang operations, Internet pirates, and other criminal arrangements (from the vantage point of State Law, at least)” (107). On the other hand, they immediately caution that “these more problematic forms of Vernacular Law cannot be

summarily dismissed as criminal; quite possibly their existence points to the failures of State Law to meet needs that may be entirely legitimate” (107).

On this point, Weston and Bollier return our attention once more to Marx’s forest defenders. “No more appropriate demonstration of this truth is to be found,” the authors write, “than at Runnymede in 1215 when King John of England was forced to make concessions to his feudal baron subjects in armed rebellion against his ruinous foreign policy and arbitrary rule” (Weston and Bollier 2014: 107). These concessions took two forms, namely the more famous Magna Carta, as well as “a companion document, the Charter of the Forest, adopted by King Henry III, son and successor of King John” (107). The Charter of the Forest, which “remained in force from 1215 to 1971,” Weston and Bollier elaborate, “formally recognized the Vernacular Law of the English commoners, that is, their traditional rights of access to, and use of, royal lands and forests,” and was later “incorporated into the Magna Carta” itself, “and considered an integral part of it” (107, 108).

Weston and Bollier’s further discussion of the Forest Charter also constitutes a key moment for the present investigation, where all three Earth jurisprudence theorists are united. Toward the beginning of this Forest Charter era, the authors note, “Medieval courts were known to elevate custom over other claims, as when they upheld the right of commoners to stage maypole dance celebrations on the medieval manor grounds even after they had been expelled from tenancy” (Weston and Bollier 2014: 108). In other words, a dancing ritual (as with Cullinan) sets a formal limitation on unfettered private property rights (as with Burdon), by first becoming established in the vernacular law of the place and its people.

Weston and Bollier later return to these forest defenders in greater detail, relating how, “after the fall of the Roman Empire and the beginning of the Dark Ages,” kings and “feudal lords

throughout Europe started claiming the right of access to ‘public resources’ previously protected as *res communes* under Roman Law” (Weston and Bollier 2014: 137). For example, in “thirteenth-century England, following the Norman Conquest, a series of monarchs claimed increasingly large swaths of forest for their own recreation and profit at the expense of barons and commoners” (137). In brief, “the Normans proclaimed all such land to be the exclusive property of the king,” which amounted to “royal encroachments on commons” that “had a devastating impact on medieval English life, which was highly dependent on forests to meet basic needs” (137). More specifically,

Commoners were denied access to common pastures for their cattle. Livestock were not allowed to roam the forests. Pigs, a major source of food, could not eat acorns from the forest. Commoners could not take wood, timber, bark, or charcoal from the forest to fix their homes and build fires for meals. Private causeways and dams often made it impossible to navigate rivers. Women, especially widows, depended on commons to gather food and fuel, and disproportionately suffered, particularly as targets of witch hunts, as commons were enclosed... [In response, the abovementioned Charter of the Forest] formally recognized and protected certain rights of commoners, such as stipulated rights of pasturage (grazing for their cattle), piscary (fishing in streams), turbary (cutting of turf to burn for heat), estovers (forest wood for one’s house), and gleaning (scavenging for what’s left in the fields after harvest)” (Weston and Bollier 2014: 138).

After the Charter of the Forest, however, in “eighteenth-century England, a community often staged an annual ‘beating of the bounds’ perambulation around the perimeter of a commons to identify – and knock down – any enclosures of it, such as a fence or hedge” ((Weston and Bollier 2014: 139). In another example of these protections, “to ensure that the CPR [common-pool

resources, the management of which defines the commons] would not be overused and ruined, commoners insisted on certain ‘stints’” (139). Thus, a member of the commons “might have the right to cut branches of trees, but only up to a certain height and only after the tenth of November” (139).

While Weston and Bollier acknowledge that the courts “have been uneasy with the idea of informal communities as a source of law because they are not formally organized or sanctioned by the State,” (since the courts themselves have been “generally creatures of the State”), nevertheless “this is precisely why such law is so compelling and authoritative a substitute for government-made law” (Weston and Bollier 2014: 110). In short, vernacular law “reflects the people’s will in direct, unmediated ways” (110). The moral of this story, for Weston and Bollier, is that “Custom thus suggests a route by which a commons may be managed – a means different from ownership either by individuals or the rule of organized governments” (110). In another nod to Cullinan, and thus bringing the present investigation full circle, this vernacular law is “what some approximate with the term ‘wild law’” (111).

V. Resurrecting the Commons: Emerald Star-Law

Fast forwarding to the present moment, Weston and Bollier write that the commons “may be understood less as an ideology than as an intellectual scaffolding that can be used to develop innovative legal and policy norms, institutions, and procedures relative to a given resource or set of resources” (Weston and Bollier 2014: 124). Such commons “are animated by commoners who have the authority to act as stewards in the management of the given resource,” and each such commons “constitutes a kind of social and moral economy,” as well as “a matrix of perceptions and discourse – a worldview” (124). Further, each commons “enacts new forms of governance

without becoming government,” and “mediates the tensions that normally exist between politics and society, and between Nature and community” (125). For example, “Since around 1000 B.C.E., civilizations in southwest Asia, North Africa, and the Middle East arose as people built *qanats* – water delivery systems consisting of a mother well and long, gently sloping underwater delivery tunnels – to secure reliable water supplies” (128, 134). Unfortunately, the overall global historical record falls far short of such ideals. Today, “more than 1.6 billion people actively use the world’s forests (which comprise 30 percent of the global land mass), often as commons,” but “because so many commons are based on traditional usage, and are unrecognized by formal property rights, these lands tend to be highly vulnerable to corporate and State enclosure,” and consequently, “modern economics has largely dismissed it as an historical curiosity” (140).

Yet hope springs eternal, as “formal recognition of the Commons is growing” (Weston and Bollier 2014: 140). Their heroic exemplar of this trend is the Nobel laureate Elinor Ostrom of Indiana University, “the most prominent academic to rebut Hardin and, over time, rescue the Commons as a governance paradigm of considerable merit” (146, 147). In “her path-breaking book, *Governing the Commons*, published in 1990,” Ostrom’s case studies include “the communities of Swiss villagers who manage high mountain meadows in the Alps, and the Spaniards who developed *huerta* irrigation institutions,” the latter of which “have flourished for hundreds of years, even in periods of drought or crisis” (147, 148). These commons flourish, Ostrom explains, due to “their social authority and administrative capacities to allocate access and use rights to finite resources, among other factors such as responsible rules for stewardship and effective punishments for rule-breakers” (148). Encouragingly, Ostrom’s “*Governing the Commons* has had a far-reaching impact on the American legal academy” (148). However,

Ostrom “does not regard her eight design principles as a strict blueprint for successful commons because many contingent, situational factors affect the performance of commons” (148-149).

Although the authors concede that the “dream of a unifying theory may indeed be a chimera,” they nevertheless argue that “implicit in the academic literature on commons is a set of normative values such as inclusive participation, basic fairness, transparent decision-making, and respect for all members of a community” (Weston and Bollier 2014: 152, 153). More generally, they argue that “we must balance the particularities and context of each commons with general principles of ecological sustainability and human rights” (153). For starters, Weston and Bollier affirm two of Ostrom’s central principles, namely “*polycentrism*, the idea that nested tiers of governance provide the best way to manage resources,” and “*subsidiarity*, which holds that “governance should occur at the lowest, most decentralized level possible in order to be locally adaptive” (153). Among the benefits is an increase in the “resilience” of the overall community system (153). Although “polycentrism and the academic commons literature have remained largely confined to the academy and a handful of policy professionals; they have not aspired to speak to the lay public or the press, let alone political activists,” Weston and Bollier observe that “a diverse global movement of commoners began to emerge in the late 1990s and early 2000s” (154, 155). Some of these new commoners, the authors continue, “see themselves participating in a larger political and cultural struggle to upend market capitalism, or save it from itself,” and their ranks include “a strange admixture of centrists, conservatives, hobbyists, libertarians, social democrats, socialists, subsistence peasants, and the apolitical” (155, 156).

To take just one example, and circling back one last time to the forest defenders, Weston and Bollier write that one “type of local commons that is surging in visibility is the community forest in which self-organized local groups, sometimes with the participation of local

governments, buy and manage large tracts of forest land for the benefit of the community” (Weston and Bollier 2014: 234-235). Such “forest commons,” the authors add, are “pervasive in poorer, rural countries,” but also “growing in popularity in developed countries as well, in part because they engage people in everyday stewardship of their local resources and offer an attractive way to reimagine ecological governance beyond the options available via the State or Market” (235). Such examples, finally, illustrate “Yale law professor Carol Rose’s analysis of how the managed commons can produce a ‘comedy of the commons’ – not a tragedy – because the principle of ‘the more, the merrier’ in a commons generates greater collective value than private ownership or markets might produce” (237).

I will now, by way of conclusion, summarize my own contribution thereto. Building on my recent conceptions of law as poetry and of justice as dance, I have articulated three new conceptions of the relationship between law and justice.^{xi} In the first, “poetry-based-justice,” justice consists of a rigid choreography to a kind of musical recitation of the law’s poetry. In the second, “dancing-based-law,” justice consists of spontaneous, freely improvised movement patterns, which the poetry of the law tries to capture in a kind of musical notation. And in the third, “reciprocal-legal-justice,” justice and law consist of a reciprocally determining artistic collaboration between the democratic dancing masses and the aristocratic poetizing elites. Given that each of which predominates in one of three types of community, I then present a reclassification of right-leaning, centrist, and leftist societies as dominated by “literalist,” “kinetic,” and “mutualist” communities (respectively), and offer suggestions for legislators and activists working in each type. In conclusion, law and justice, qua poetry and dance, become more flexible, inclusive, and open to creative improvising and collaboration, a new form that I name, after Astraea, Greek goddess of divine justice, “astral legal justice.”

Against that background, the present investigation could be understood as an ecological variation on this astral legal justice, which I am calling “emerald star-law.” The “emerald” here represents the “green” of environmentalism, and “star” stands for the goddess Astraea of “astral legal justice.” More specifically, I would categorize Berry’s Earth jurisprudence, as interpreted by these three theorists, as an example of “dancing-based law,” aimed at a global community of the “kinetic” variety, wherein democracy trumps republic, and extralegal justice activists hold more power than legislators. I have argued that in such communities, such activists should be mindful not only that they overpower the statutory legislators, but also that their power is inherently diffuse/distributed. Put simply, the power of the activists, being divided among so many bodies, is much more difficult to control or restrain individually. If this power is being deployed unjustly, then my suggestion is that each activist should attempt to embody and perform their power in as eccentric and self-expressive a way as possible, thus creating an internal heterogeneity among the powerful masses. Put differently, if the greatest threat to social justice is homogenous conformity (as has often been suggested, perhaps most famously by Arendt), then social justice activists when in power should pursue their own deviance, for everyone’s sake.^{xii}

References

- Arendt, Hannah. 2006. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Penguin.
- Bloch, Ernst. 2018. *Avicenna and the Aristotelian Left*, trans. Loren Goldman and Peter Thompson. New York: Columbia University Press.
- Bloch, Ernst. 1987. *Natural Law and Human Dignity*, trans. Dennis J. Schmidt. Cambridge, MA: MIT Press.
- Burdon, Peter. 2017. *Earth Jurisprudence: Private Property and the Environment*. London: Routledge.
- Cullinan, Cormac. 2011. *Wild Law: A Manifesto for Earth Justice*. Cambridge, UK: Green Books.
- Hall, Joshua M. 2023. "Astral Legal Justice: Between Law's Poetry and Justice's Dance," *South African Journal of Philosophy* 42(2): 108-16.
- Hall, Joshua M. 2022a. "A Critique of Philosophical Shamanism," *The Pluralist* 16(3): 2022, 87-106.
- Hall, Joshua M. 2022b. "Pregnant Materialist Natural Law: Bloch and Spartacus' Priestess of Dionysus," *Idealistic Studies* 52(2): 111-132.
- Hall, Joshua M. 2021a. "On Justice as Dance," *Eidos. A Journal for Philosophy of Culture* 55(4): 2021, 62-78.
- Hall, Joshua M. 2021b. "On Law as Poetry: Shelley and Tocqueville," *South African Journal of Philosophy* 40(3): 2021, 304-18.
- Hall, Joshua M. 2019. "Core Aspects of Dance: Aristotle on Posture," *Journal of Aesthetic Education* 53(1): 2019, 1-16.

Salleh, Ariel. 2017. *Ecofeminism as Politics: Nature, Marx and the Postmodern*. London: Zed.

Shiva, Vandana. 2015. *Earth Democracy: Justice, Sustainability, and Peace*. Berkeley, CA: North Atlantic Books.

Taylor, Bron. 2009. *Dark Green Religion: Nature Spirituality and the Planetary Future*. Irvine: University of California Press.

Wirth, Jason. 2013. "Dōgen and the Unknown Knowns: The Practice of the Wild after the End of Nature," *Environmental Philosophy* 10(1): 39-62.

Weston, Burns, and David Bollier. 2014. *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Reprint Edition. Cambridge: Cambridge University Press.

Notes

ⁱ See Hall 2019.

ⁱⁱ See Hall 2021b.

ⁱⁱⁱ For more, see Hall 2022.

^{iv} See Shiva 2015.

^v By contrast to Cullinan, as I elaborate below, Burdon advocates a monistic interpretation of “Earth Jurisprudence” as a variation on natural law theory (inspired by St. Thomas Aquinas) wherein only laws and customs that accord with Berry’s principles are genuine laws. Also in this natural law vein, Weston and Bollier defend a “triarchy” of state laws, market vernacular laws, and commons vernacular laws—all obligated to align with natural law understood as a procedural human right to a safe, healthy, and sustainable environment.

^{vi} See Hall 2021a.

^{vii} See Salleh 2017..

^{viii} See Taylor 2009.

^{ix} The most sophisticated argument in defense of “wildness,” perhaps is found in Wirth 2013.

^x See Bloch 2018, 1987. For more, see Hall 2022b.

^{xi} See Hall 2023.

^{xii} See, for example, Arendt 2006.