Ecological Indifference: Thinking about Agency in the Face of Ecological Crisis

By BEN MYLIUS

Naomi Klein contends that “climate change has become an existential crisis for the human species.”1 She is not alone in this view. A growing literature from many disciplines now views our ecological crisis not just as an “environmental issue,” but as a symptom of deep failures in our ways of thinking and being.2 The philosopher Timothy Morton calls it “a crisis for our philosophical habits of thought, [which confronts] us with a problem that seems to defy not only our control but also our understanding.”3

This failure of thought, and the crisis it has caused, poses grave risks to our capacity to continue in negotiated co-existence with each other and with other species. How grave? Kevin Anderson, of the United Kingdom’s Tyndall Centre for Climate Change Research, asserts that the levels of global warming predicted are “incompatible with any reasonable characterization of an organized, equitable and civilized global community.” The Intergovernmental Panel on Climate Change—an organization not known for its sensationalist language—is now warning us about climate change’s “severe and irreversible effects.” Graham Alexander and Cathy Turner, tracking the Club of Rome’s predictions in 1972’s Limits to Growth, advise us to “expect the early stages of global collapse to start appearing soon.”4

These claims are undeniably significant. Many people and communities are already responding to their implications. Given the stakes of the game, we should expect nothing less. Continued indifference, from any quarter, is deeply problematic.

In this article, I propose that the majority of jurisprudence—the academic discipline that gives us our theory of what law is, of where it’s from, and how it works—is currently crippled by exactly such “ecological indifference.” Our dominant doctrine, legal positivism, claims that ecological crisis makes no difference to how we understand the content and validity of laws. It assumes that there is a sharp division between matters that are internal to our law (as a system of rules) and matters that are external to it. As a consequence, when the time comes to ask what makes our laws valid and what determines their content, ecological crisis can simply be dismissed.

This approach ignores the fact that ecological crisis is not “system-external.” It is system-determinative, and it requires us to re-evaluate the founding assumptions of our thought. More specifically, we need to reconsider our guiding notions of human agency and selfhood, which are unrealistic and outdated. They are deeply anthropocentric: they assume that our agency and selfhood exist in an ideal realm, transcendent and independent of the ecological context that in fact sustains them.5 These guiding notions facilitate the assumption that our agency is infinite, and our power unilateral—that we can act in the world without affecting, or undermining, the conditions that sustain them. If human agency...
has no context, neither must human law. If this is so, then law can be valid even when it ignores, facilitates, or worsens the threats to the agency that creates it in the first place.

Ecological crisis has profound consequences for both law and jurisprudence. We need a new paradigm—an Earth Jurisprudence—to do this insight justice.

ACONTEXTUAL AGENCY AND “NORMATIVE INERTIA”

Positivist theories have dominated jurisprudence for many years. They have been ascendant at least since the work of John Austin, and certainly since H.L.A. Hart’s *The Concept of Law* was published in 1961. There are many positions within legal positivism, each with a slightly different view of how law functions from a system-internal perspective. They are all “positivist,” however, because of the thought that underlies them: their agreement on what gives laws validity, a statement known as the “sources thesis.” John Gardner summarizes this thesis as follows: “In any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.” 6 (Hence “legal positivism” because human law is posited by humans.)

On the face of it, this seems like a bland proposition. This is part of its appeal: it allows us (it would seem) to bracket moral and ethical questions and to be content with “neutral” description. It is designed to eliminate the notion that human law relates in any way to something more fundamental than itself. 7 It does so on the grounds that entertaining such ideas creates too many messy complications. 8

But things can’t be as simple as all this. These “relevant agents” that Gardner refers to, and from whose actions legal validity arises, seem suspiciously opaque. Who are they? Where do they live? What is their relation to the context in which they exist? The so-called sources thesis is quietist and creates ecological indifference. It implies that our law is capable of responding to ecological crisis, but with the caveat that any such response will only ever happen if our law-making agents decide that it should. If the social, ethical, or political will is absent, by contrast, nothing will happen. As Gardner points out, legal positivism offers no solace or assistance. It stays agnostic, “normatively inert,” and so does “not provide any guidance at all on what anyone should do about anything on any occasion.” 9

I contend that jurisprudence currently understands this “relevant agent” in ideal, unrealistic terms. These terms propose that it is meaningful to think of human selfhood as divorced from ecological reality, and to think of human agency—the ability to wield power in the world—as infinite and unconstrained. This understanding of power sounds like what Bernard Loomer calls “unilateral power”: the power to act in the world without oneself being affected, to “stand outside” the world and act at arm’s length from its concerns.

Such an understanding has little basis in reality. One of the most resounding achievements of natural science has been its elaboration of the many ways that we, as human beings, are embedded in and dependent upon the natural world. Our species exists as part of ecosystems and patterns of relation that constitute the living world. As such, the selfhood and agency we have necessarily exists within the context of such systems. Our power is “relational”: it functions to affect others, but can only do so in ways that implicate and affect us as agents ourselves. Relationality in this sense is inherent to the concept of action; it constitutes agency itself.

A relational understanding of power, in turn, implies certain inherent constraints on human power that we must understand if we are to exercise that power in a way that remains self-sustaining. This is
not an ethical claim, but a factual observation. The idea of relational power does not imply that we must recognize such constraints, it simply proposes that if we do not do so, clear consequences will follow. The current ecological crisis, indeed, is evidence of the fact that it is entirely possible for us to act in ways that are ultra vires, or “beyond power,” from a relational or ecological perspective. Assuming that our agency depends upon nothing—that our power is unilateral—we have built our theories as if this is true, even as the consequences of doing so become unsustainable in the long term. But our dreams of unilateral power can never make such power real. They simply facilitate the use of our relational power in ways that are becoming self-destructive.

We might ask: Do we really accept that a system-internal norm, which tends to destroy the conditions of possibility for the system in which it exists, can be considered “valid as a norm of that system”? Are we willing to accept that “normative inertia” can become proxy for ethical quietism? To be clear, I am not proposing that we should do away with legal positivism completely—although I do think we must be careful that it doesn’t fail us in its limited imagination. Rather, I am suggesting that we should see it in its context as a tool that is useful within very clear limits (to define the system-internal relationship of laws to each other) but that must be used in conjunction with others. This is an argument for re-imagining or reinterpreting the parameters of legal positivism in accordance with a relational understanding of power. Might there be a way to frame our inquiries so that we understand ecological facts as grounds of our law, in some sense, if we see that they are the conditions of possibility for the social facts upon which we currently conceive of law as being grounded? One important question moving forward is how we might best understand and explain such parameters for the purpose of our thinking about law. Let’s call them “ecological facts,” or ecological possibility conditions. To adapt John Austin’s famous words, what would it mean to understand such ecological facts as part of the sources, not merely the merits, of human law? One approach could be to consider information about the regenerative capacities of ecosystems overall. These ecological facts could include things like ecological integrity and biodiversity, as well as atmospheric, chemical, and physical parameters, which—taken together—represent the planetary boundaries or conditions of possibility for human agency and human law. It is by starting to ask questions like these that we can recalibrate jurisprudence to help us face the crisis we have caused.

ECOLOGICAL SELVES, ACTION, AND POWER

It is dangerous for us to think and act as if ecological crisis makes no difference because to do so is to assume that our existence, and that of our laws, has no context that matters. But in reality, we do have contexts that matter. A farmer who ignores the context of his farm—its climate, its landscape, its water supply—will not be a farmer very long. The same is also true for our jurisprudence and law. We must take account of this as we think about what law is and ask how it works in the world.

The positivistic view of law does not do justice to the size of the crisis we face, nor to the creative potential of our thought. Legal positivism has certainly helped us develop a detailed account of how our laws relate to each other, if we consider them as a closed human system, in acontextual terms. But the price of this has been a bracketing of our law’s relation to its ecological context. This has led to a scrupulous failure to face up to the stakes of ecological crisis, and a stubborn reluctance—even incapacity—to ask the urgent question of how our laws could help us gain resilience and could work so that we, and other life, might thrive and flourish.

Developing an alternative, ecological conception of human selfhood, agency, and power is a profoundly important task for jurisprudence moving forward. Work has already begun in other disciplines to articulate a different conception of human selfhood—one according to which our place in the world, and the power we have in it, is appropriately re-imagined. We might draw upon this work to develop a similar understanding for the purpose of jurisprudence also: one that understands humans and their capacities in more realistic terms. Some of this work goes by the name of anthropology “beyond the human.” Other examples appear in environmental philosophy, the natural sci-
ences, cosmology, history, the post-humanities, and ethics. In their diverse disciplinary languages, this work grapples with variations of the questions I raise here and inquires into how we and our systems are in some sense constituted, informed, and constrained by our ecological context. Some of the most fascinating work, in my view, involves questions about how the natural world (both as context and as bios, or system of life) can itself be agential, and how human agency might emerge from, or be a subset of, this larger range of agential capacities and selfhoods that lie beyond the human altogether.

Jurisprudence provides a particularly charged environment for such questioning precisely because of its engagement with questions of agency, freedom, and power. I began my explorations here with the echoes of Naomi Klein’s assertion that ecological crisis “changes everything.” There is ample scope for conversation and debate about whether our ecological context should be conceived of as a source, or as a set of parameters, or as a horizon of legitimacy for our law, or even as something else entirely. In any case, it seems to me, at some point in the not-too-distant future it will be clear that human law in some sense owes its shape—and, in the long term, its survival—to its own ecosystemic context. Explaining how this is so, and what it means, is the task of the earth jurisprudence to come.

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NOTES
1. N. Klein, This Changes Everything: Capitalism versus the Climate (New York: Simon and Schuster, 2014), 42.
2. I use “ecological crisis” in this article as shorthand for the litany of disasters caused or intensified by human activity on earth—deforestation, ocean acidification, biodiversity loss, global warming, polar ice melts, drought, extreme weather events, and so forth.
7. By which is traditionally meant “morality,” although the questions I am exploring here raise the question whether this is the only possibility. Earth jurisprudence, for its part, is often framed as an offshoot of the natural law tradition in jurisprudence. See, for example, P. Burdon, Earth Jurisprudence: Private Property and the Environment (New York: Routledge, 2015), 79, 81-82. On my view, the fundamental difference between earth jurisprudence and past natural law theory is that earth jurisprudence looks to ecological science, rather than (or at least, rather than exclusively) to “morality.” The various discursive possibilities within the law-morality dichotomy seem to me to have been effectively exhausted. I also have concerns that the notion of “morality” is at least as anthropocentric as the notion of “law” that it is supposed to inform.
8. Of course, this is not the only approach. The alternative position, which holds that human law does depend on, emerge from, or relate to something beyond itself, leads to “natural law” jurisprudence.