# 12 Green(ing) legal theory

## Social logics and their re-formation

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> The law locks up the man or woman
> Who steals the goose from off the common
> But leaves the greater villain loose
> Who steals the common from off the goose.

This anonymous seventeenth-century verse speaks to the English crofters whose overlords enclosed the common lands as private property so as to capitalize on the growing wool trade with the continent. Similarly, when the emerging states of Europe encountered the resource-rich New World, they dismissed resident Indigenous cultures as too "primitive" to govern their "empty" landscape—and then claimed it as their own. Through centuries of such internal and external colonization, physical dispossession provided the foundation upon which the modern state developed. Its institutional expression was the unilateral assertion of sovereignty, drawing on what French philosopher, Jacques Derrida, called *ipseity*, "the power that *gives itself* its own law."[2] By freeing its possessors from external accountability, ipseity provided the narrative for the development of the larger liberal order that now sets the conditions of earthly possibility.

Liberal jurisprudence (including Environmental Law (EL)) is a pillar of this statist order. There the self-referentialism of ipseity manifests in the formalized intentionalism that creates what might (appropriately) be called the "*legal* law." However, behind it all—colonization, sovereignty, ipseity, and the legal law—is a larger, *evolutionary* jurisprudence that infuses the history and inhabits the architecture of the global present. I call this the "*social* law" because it emanates not from human intention (at least, not directly) but from the "logics" of a society's historical creations, its "animations." From the medieval galley to the modern automobile, merchant trade to the iPhone, political parties to the courthouse—countless animations provide the generative context for the "power that gives itself its own law." Yet they are unrecognized and unacknowledged as law. The primary task of green legal theory (GLT) is to explicate this social law that, despite the claims of legal law, drives the liberal order and the problematic of planetary health and survival.

This chapter begins by contrasting the philosophical foundations of liberal and green legalism. It then examines how the law-giving power of the liberal order

shaped environmentalism and environmental legal law in the 1960s and 1970s and contrasts that history with the contemporaneous development of both Critical Legal Studies (CLS) and a diversity of radical socio-ecological movements. The chapter then considers how the "hegemony" of liberal ipseity and its legal law eased the world into the Anthropocene—and now impedes its escape. After discussing the many elements of "greening" legal theory, the chapter concludes with a substantive vision of where a new "green" social/legal theory might lead.

## Unthinking liberal law

In the philosophical tradition of the West, "grounded" social relations are irrelevant. Instead, its lodestar has long been the unencumbered, self-interested "rational man" who embodies the law of "nature." As the seventeenth-century colonial administrator and philosopher John Locke argued:

> The state of nature has a law to govern it, and which obliges everyone: and reason which is that law, teaches all mankind, who will but consult it, that being equal and independent, no one ought to harm another in his life, health, liberty or possessions.
>
> (1980 [1689], chap. II, 9)

Such propertied men entered into what the earlier English philosopher, Thomas Hobbes, metaphorically characterized as a "social contract" that created the all-powerful sovereign state. Following the English Civil Wars, Hobbes saw this state as essential to overcoming the "state of nature" that is marked by the "general inclination of all mankind, a perpetual and restless desire of power after power" (1981 [1651], chap.11, 161).

Hobbes and Locke are members of an intellectual lineage that, from Plato to Descartes, Kant to Rawls, naturalized Western rationalism and individualism, and established the narrative of liberal ipseity and its constitutional imaginary. This tradition provided the justifications for its core animations, especially the sovereign state and its liberal duopoly of a (representative) democracy and a (capitalist) economy, as well as the state's processes of "positive" (i.e. neutral, scientific) lawmaking. As in science and technology, positive law pays obeisance to neither the natural (*physical*) world nor the eco-cultural traditions long constituted within it. Instead, as Yale legal scholar Paul Kahn acknowledges, "reason and will" are generally seen as "the twin sources of a legitimate legal order" (1999, 7).

All social orders have laws that are explicit and visible, and rules that are not. The latter are not found in some playbook hidden behind the unnumbered façades of a department of commerce or constitutional affairs, yet they actively "constitute" social relations. To think of such rules *as law*, however, demands not just a re-definition of law but its re-conception. This is law as "logics" by which I mean the "inherent/emergent characteristics of any socially constructed animation that tend to propel its evolution in dynamic relations with its context." From the Latin, *anima*, I impute a motivating "life force" to "inanimate" creations insofar as their

existence within a human context enables, encourages and even locks in evolutionary developments. For example, the advent of the automobile (itself the culmination of a long evolution) re-formed human movement and the nature of social organization. Such animations have huge constitutive social power; over time, they remake the world. This is evident in the ironic corporate logo, "Toys R Us."

Animations and their logics generate "social laws" that work as "authoritative processes of social self-constitution." Here, the linchpin term is "self." In the liberal order, legal laws derive legitimacy and authority through the *procedural* ("positive") rationality of the individual "selves" who produce the law through a collectively self-legitimated political context. Where the social logics of diverse animations provide the constitutive contexts that shape these "rational" selves—their awareness, intentions and actions—they become "authoritative." In the process, the apparently purposive self (both individual and collective) may become a bracketed [self]. By examining the animations and social laws that work to form the individual or collective self or [self], GLT addresses their *substantive* legitimacy as truly self-constituting selves.

This is the conundrum of the Anthropocene—how to create the conditions for new animations that, in turn, can generate selve*s* freed from the domination of disabling animations and logics. Envisioning such a circular yet evolutionary process resonates with ancient thinking. For example, Rousseau characterized the "general will" as free from "structures and a dynamic which [citizens] neither understand nor control" while also not reflecting a mere "concatenation of individual decisions but a genuine common purpose" (Taylor 1979, 147–148). This also resonates with at least the ideal of the early Athenian *demos* as possessing its own collective wholeness, its own "general will" (Anderson 2018). It also harkens back to Indigenous processes that controlled new animations in light of how they might shape social evolution as far ahead as the "seventh generation."

With its self-referential philosophical orientation and lack of concern for the social law, the ipseity of the liberal order and its focus on the legal (rather than the social) law facilitated the development of what I call today's global "*nomos*phere." *Nomos* is the Greek term for "law" but (again) understood broadly as a "spatially-defined, cultural/material ordering of the legal/social whole."[3] Under the cover of ipseity (ever active in the self-referential lingo of "progress," "innovation" and "moving forward"), the global *nomos*phere evolved into the massive quantum and momentum of structural power that both dominates the processes of global self-constitution and co-opts all re-formative challenges. The result is ironic in that, in the liberal order:

> being and thinking with and through law [has never] been so entrenched [but] . . . people obtain freedom under the law only at the unnoticed cost of being already legal in their being and thinking. Law guarantees them freedom but the thinking behind their freedom guarantees them serfdom.
>
> (Ben-Dor 2007, ix)

Thus, *contra* Hobbes and Locke, the liberal order arose and continues not according to some natural law but from its ipseity of self-referential, taken-as-given

premises (abstract rationality, individual autonomy, self-interest, social competition) and their material embodiments (property, capitalism, class, corporations, technology) as well as the diverse cultural processes that constitute an implicit "police order" (Ranciere 2010). Certainly, legal laws work to protect aspects of the social and natural environment yet do so within the context of a liberal state and commitments that do not necessarily foster flourishing, socio-ecological selves. Indeed, as it evolved in the "West," the state culminated not in what German philosopher Georg Hegel, foresaw as a triumphant global material/cultural *geist* (spirit), but in its transcendent opposite—the *nomos*phere of the "end times."

Unlike EL, EcL responds to this situation by "naturalizing" a substantive reference point for the legal law—the physical ecology. Similarly, GLT puts ecological health at its core and the social logics that produce and infuse, or erode, it. Thus, GLT addresses the internally constitutive character of socio-ecological health, as compared with the legal laws that relate to it from the outside. Necessarily, GLT addresses the hegemonic power that, despite the avowed rationality and intentionalism of the legal law, leads all "reforms" into the bracketing processes of liberal animations (M'Gonigle and Ramsay 2004; M'Gonigle 2008; M'Gonigle and Takeda 2013). As Paul Kahn admonishes legal scholars:

> A new discipline of legal study must abandon the project of reform. . . . We cannot study law if we are already committed to law. We cannot grasp the law as an object of study if the conceptual tools we bring to the inquiry are nothing but the self-replication of legal practice itself.
>
> (1999, 7, 27)

Indeed, to describe a legal approach as environmental or ecological or green will make no difference—unless it *is* different. As the Critical Theorist, Theodor Adorno, warned years ago about the growing institutional capacity for hegemonic co-option: "Only he who recognizes that the new is the same old thing will be of service to whatever is different" (1942, 96).

## Crits, enviros and the hegemony of law

Until recently, no "natural" point of culmination existed for the contradictions of the liberal order. Time and again, its adaptive powers outran all challenges, but in doing so, they always demanded one thing: excess. More land, more resources, more money, more people, more power. This was liberalism's perpetual process: growth, crisis and resolution. Finally, however, that process has revealed the simple truth that its seemingly "open" context was actually closed. In the *nomos*phere, all can now see that the planet has no excess capacity. It is full. Material growth has become a negative process; it is corrosive, not additive. Nevertheless, co-option abides.

In the 1960s, the growth contradiction of the liberal order was apparent although the planet then was far healthier, the quantum of animationist power smaller and environmental erosion less pervasive. Nevertheless, driven by reactions against

the mass conformism of the 1950s and its burgeoning consumerism, visible racism, social inequality, rampant militarism and war, and declining environmental quality, a "legitimation crisis" seized that decade (Habermas 1975). A youthful enthusiasm emerged for taking power and "creating alternatives." Inspired by the "Frankfurt School" of Critical Theory, a "New Left" emerged that explicitly challenged social domination with strategies that integrated theoretical inquiry into practical action. The seminal book of the era was Herbert Marcuse's 1964 *One-Dimensional Man*.[4] "New social movements" flourished: civil rights in the American South, student protests from Paris to Berkeley, social justice alliances and constituencies creating ecologically based "alternatives" to capitalist growth—"alternative technology," cooperative economics, "back to the land" movements, intentional communities, bioregional devolution and so on. Motivated not to reform the law but to re-ground power, "deep" and "social" ecologists criticized the "shallow environmentalism" of professionals (including lawyers) working in the urban corridors of power. Many movements—for environmental justice, Indigenous rights, community-based development, "small is beautiful" and local self-reliance—shared a decentralist commitment to communal re-empowerment. The ambitions of that era far exceeded those of social movements today.

In the 1970s, Critical Legal Studies (CLS) drew together new legal scholars (socialists, feminists, critical race theorists and postmodernists) disaffected by the methodological formalism of liberal jurisprudence. While Critical Theory integrated radical political theory into activist resistance, CLS brought a new awareness of legal biases (particularly those of race, class and gender) into legal practice (Williams 1988). CLS is arguably the most important legal movement in the past century as it opened a door to theorizing about law that liberal jurisprudence had long kept shut. Still, CLS scholars "did not deviate" from the "virtually ubiquitous acceptance of the social as law's relational other [eschewing the issue of] what rules (discursive or otherwise) set the terms for conflicts over the production of rules" (Tomlins 2007, 59). Indeed, many saw an irony in the professional orientation of "left legalism" because it undermined the potential for a broader "left critique" (Brown and Halley 2002).

CLS was not an environmental movement. Wilderness preservation, swimmable urban rivers, air quality and endangered species held little appeal. Meanwhile, EL was not a critical movement. Supported by the urban middle class, it piled up legislative, administrative and judicial reforms, but always within the statist project of managed capitalism and economic growth. Indeed, by the 1980s, EL's mission explicitly embodied the economistic goal of "internalizing market externalities" that could make capitalism work better, not replace it. Still today, EL's responses to climate change depend on legislated incentives (carbon taxes), new technologies ("clean" energy, electric cars), gradualist procedures (environmental assessments, consumption taxes, production incentives) and new rights (e.g. the rights of nature) bequeathed by the state. Meanwhile, critical legal scholars never cared enough about EL to theorize it in ways that might have informed it with a left critique. Only in the past decade has a wide range of Left theorists and lawyers begun to explore the underlying radical challenges posed by the systemic

inattention to the natural world. Even so, "radical" platforms such as the Green New Deal still rest on the regulatory potential of achieving power within a beneficent liberal order.

CLS had an informal motto, "Law is politics," that spoke to legal change through political institutions. CLS scholars deconstructed law for its political content but treated the (political) world as essentially indeterminate and so open to strategic interventions through the law. As Roberto Unger expressed it, law's "formative context" reflected a "doctrinal perspective that puts its hope in the contrast of legal reasoning to ideology, a philosophy and political prophecy [that] ends up as a collection of makeshift apologies" (1986, 11). CLS scholars saw their goal as ameliorating oppression and remaking law's formative contexts through, for example, public interest litigation (Hunt 1993). Indeed, had CLS theorists treated the political context as closed to legal intervention, they risked attack as old-fashioned (i.e. Marxist) determinists who believed that underlying structures of "social reproduction" rendered law a mere "epiphenomenon."

CLS was thus poised between challenging law as a substantive reflection of elite power and the status quo while embracing it as the vehicle for structural change. CLS, argued David Jabbari "is ultimately hoisted on its own Critical petard" (1992, 508). As the early CLS scholar, David Trubek, wrote, the CLS-based Law and Society movement created "a new object of study and a new domain of knowledge, [but] it did so within a 'legally-constructed' frame [that] necessarily reflects the needs and interests of legal elites" (Darian-Smith 2013, 102). By failing to address the emergent logics/dynamics of the state that creates the laws, they extended the legal/social dichotomy.

## Neoliberals, Greens and the pursuit of re-formation

GLT draws on Critical Theory to turn the CLS credo on its head—from "law is politics" to "politics is law." This reversal does not merely re-state the old equation but suggests that state-based politics embodies its own constitutive logics, and that these play out *as law*. The new equation recognizes the artificiality of the legal/social boundary but does so by addressing the core logic of the state. This is the self-justifying logic of centralized sovereign authority with its ipseistic, constitutive power over all physical space and its human and nonhuman populations. This logic manifests in a raft of dynamics that, for example: erode sub-state cultural authorities and displace their territorial status; objectify remote landscapes for their disembodied "resources;" override the constraining implications of the spatial logics of watersheds, wildlife, local cultures and communities; prize animations that enable accumulative economic flows to the centers of power; and support institutions that assert managerial control from the top—extractive industries, agribusiness, global cities, rapid high-volume transportation, industrial supply chains, commodity exchanges and so on.

By accommodating these logics and practices, liberal law long facilitated the animations and the apparatuses of concentrated power that came to define the global *nomos*phere. Consider, for example, that core legal institution, the judiciary.

Under the rule of law, it deploys reason to make judgments that *explicitly* (that is, with intention) shape legal rules. But being itself a constructed animation with its own logics, the judiciary manifests dynamics that shape outcomes *implicitly*. Even where its intention is legal equality, the logics of its elite expertise, liberal state/capitalist ideology and high-priced access "characterize our judicial system far better than any notions of justice, objectivity, expertise or science" (Kairys 1990, 8). The courthouse delivers instances of legal justice at the same time as it reinforces the systemic logics of social domination. Similarly, creating an institution such as the World Trade Organization to "regulate" global trade inherently locks the world not into "trade justice" but into the power logics of globalization.

To recognize the constitutive power of formative contexts invites legitimate concerns about social determinism—yet this pertains only where social actors cannot see and effectively contest these contexts. Again, this is the core conundrum with which GLT engages—the bracketed [self] vs. the empowered self. Admittedly, structural contestation is difficult as the logics of constructed animations and contexts develop gradually over time, reinforce their *anima* through continuous micro-performances and harden their power in the architecture of daily life. In contrast, many liberal ideologues saw Hegel's "end of history" as having arrived with the Kennedyesque technocracy of the early 1960s and, then again, in the Reagan/Thatcher globalization of the 1980s. But neither utopia was long-lived, the first descending into war (Vietnam) and the second into the "conflict of civilizations" (with Islam). As it stands, that progression of Hegel's *geist* more accurately describes the liberal order's dystopian opposite—the existential reality of the climate crisis and the *nomos*phere's never-ending erosion of the natural world (evident in a now-emerging global pandemic). Nevertheless, liberal domination abides with managed reform as the only option, "the winning of state power" as the only strategy and its exercise as the "assassin of hope" (Holloway 2002, 17).

Had CLS and EL put less faith in statist reforms, and instead addressed the momentum of social logics, neither movement could have avoided the other. After all, the systemic subsidies provided by the consumption of the natural world were obvious to anyone who cared to look. What was missing—then as now—was a *re-formative* strategy situated in a *social and ecological* theoretical frame. At the time, a *critical cultural political economy* existed with which CLS was familiar but EL was not. However, no *ecological* political economy existed except on the margins of social activism. Meanwhile, both CLS and EL reflected the era's embrace of "social construction" in a form that "reinforce[ed] the nature/society dichotomy by . . . failing to conceptualize the biophysical environment as an independent causal force" (McLaughlin 2012, 249).

Rather than sailing together, the two socio-legal movements passed each other like ships in the night, neither seeing the light of the other. Both remained hostage to the reification of physical space represented by the territorial state (Manderson 1996), both missing the chance to find the shared destination that critical social theorists had earlier mapped out—that of "unthinking modernity" and its liberal project (Stamps 1995). As Adorno had warned, what was new was the "same old thing." It still is.

In contrast, corporatists recognized what this absent movement did not address—the closing of planetary space—and they sought to re-form the global economy but in ways that could keep the "same old thing" going for as long as possible. Attacking the shackles of progressive postwar liberal reforms, they opened up a new era of economic accumulation through re-formations that divorced the (elite) accumulation of financial capital from the (worldly) production of material goods. For 40 years now, this fracture has riven the planet, generating financial wealth for a couple of generations while driving its erosive effects down and away in ways that entrenched social and environmental precarity for the long term. In short, through their own approach to "politics as law," "neoliberals" re-formed the "old" statist model into the new constitutive *nomos*phere. As Renato Ruggiero, Director-General, World Trade Organization, stated in the late 1990s: "We are no longer writing the rules of interaction between separate national economies. We are writing the constitution of a single global economy."[5]

As part of this, neoliberals everywhere sought to "undo the demos" (Brown 2015) by reconstituting the cultural collective in the mode of fully self-seeking economic actors bereft of countervailing democratic, let alone communal or territorial, allegiance. The resulting re-formations quickly attained the almost organic, self-generative power that propelled a new generation of illiberal fundamentalists to disdain environmental protection, workers' rights, political accountability, human rights and the rule of law. In the 1960s and 1970s, the many non-legal social movements that had also sought larger re-formations did so as critical movements "from below" without the power of an establishment movement "from above."[6] In a last gasp, liberal progressives embraced the 1990s as the "turnaround decade" only to see their hopes fall victim to the neoliberal re-formation. And now . . .?

## Hegemony and historical possibility

The eclipse of EL/CLS was part of the triumph and tragedy of the sixties' radicalism that posed a systemic challenge to modernist social logic at a time when many conditions for transformation still existed. Alternatives to capitalism existed, for example, in the "new international economic order" of dozens of Third World governments. Radical social movements that prized a new/old territorialism flourished throughout the First World in the decentralist "bioregional," "back to the land" and the (then) Indian rights movements. The physical and cultural space still existed for being and living "differently," long before the digital logics of total cultural and material penetration took hold. Neither climate change nor the pace of extinctions had yet taken off, and retrenchment did not encounter the reach and depth of *nomos*pheric intransigence that re-formation faces today.

That the nostalgia for that decade (Bingham 2016) continues a half-century later is more than mere romance. It recognizes an eclipse of historical possibility. Yet today, with no "outside" left into which to cast the physical externalities of liberal capitalism, revitalizing a "radical" movement to re-form the systemic logics of the liberal order remains essential to planetary health. This historical project can now be met only by recognizing the "illusory nature of the superiority of the

West" and the "constitutional logic of modern society—as a set of structures and practices" (Dahms 2011, 254–255). This project will not emerge from any social power that exists today.

Before considering a re-formative GLT, let me summarize the critical lessons from this history of EL. First, its uncritical commitment to legal reform bounded change within the co-optive processes of the capitalist state (Hay 1994). This had been a concern of the early German Greens who in the 1980s made a distinction between "realos" and "fundis" only to see the fundis shut down as the realos took the Greens into the party system of political reform. This co-option now represents the Green legacy worldwide. Second, without a theoretical attention to an ecological political economy (or, in today's parlance, *political ecology*) as the basis for a re-formative agenda, EL and CLS failed to generate a shared, re-constitutive movement informed by the lessons of both social inequities and bio-physical destruction. Instead, despite a raft of reforms, the golden years of CLS and EL witnessed the takeoff of both structural inequality *and* climate change. Third, with the liberal order on autopilot, its unsustainable accumulative economic and political logics drove the *illiberal* deconstruction that has followed the 1980s to this day. The result is a teleological crisis facing EL, EcL and GLT: the "real purpose" of legal reform.

## Performative ontology; re-formative animations

If liberal lawyers confront a crisis of purpose, humanity in the Anthropocene confronts a parallel crisis of ontology: the "truths" of its reality are up for grabs. Both crises are central to GLT and its claim that the old humanist questions of *who* rules and *how*, must make space for a new *post*-humanist concern for *what* rules and *how*. For GLT, this extends the attention paid to the constitutive power of nonhuman *living* things (e.g. animals, insects, bacteria and so on) to the created *non-living* "whats" and their logics—physical things and structures that work beyond human intention.[7] Whether it is automobility or digital screens or overnight delivery, animations have their own non-living "life force" (*anima*) that constitutes the world and we who live in it—and these animations will resist being re-formed through statist half measures such as carbon taxes, or rights for nature or even a Green New Deal.

To see how a single animation works as a "constituent power," consider a prosaic, seemingly trivial, example—the lawn. Like a formal garden, the lawn is a physical/human construct that is fundamentally "unnatural" in the physical environment. As an animation, its logics reflect this constructedness. At one level, these logics are cultural; as an aesthetic, the lawn signals wealth and luxury, a thing of constructed beauty, something to be desired. Its logics have played out in different historical periods and geographic locations, and they remain a pillar of the American Dream. This is a self-perpetuating animation with its own dynamic and demands. Early on it needed land, labor, capital and resources (e.g. water) and, in recent years, chemical fertilizers and pesticides, specialized machinery, energy and professional tending. All this entailed legislation, from zoning laws

to environmental regulations, that enabled complex assemblages of suppliers and advertisers, real estate developers and agents, resource providers and regulators. The result is that the lawn became a defining post-human assemblage in shaping the spatial character of the city with its patterns of sprawl development, freeways and automobility (Kuntsler 1993; Kolbert 2008).

Another more obvious animation is the corporation. It evolved over the centuries to enable the colonial logic of displacement (e.g. of communal economies that recirculated wealth locally) with replacement (by capitalist relations that extract and accumulate wealth for remote elites). Through the centuries, the corporation externalized costs into workers' slums and clear-cut landscapes as the flip side to "internalizing" profits into distant banks. Now, state-enabled growth maintains the economic flows needed to service the expanded demands of the modern corporation and its corporatist economy. These extractive logics infuse the globe with what the constitutional lawyer, Joel Bakan (2004), described as the corporation's "psychopathic" character. This is a pervasive systemic presence—and it effectively transcends human agency. After all, what CEO or Minister of Industry could keep his job if he decided to take resource depletion or climate change seriously by reducing production? From lawns to corporations, cars to credit cards, fishing trawlers to container ships—the logics of such animations have generated a chain of social entrapment. Indeed, from specific animations to productionist "assemblages" to entire institutional "regimes" of corporate management, to the cultural/material *nomos*phere that drives the globe's existential trajectory, social law rules.

Was there ever a time when the trajectories of the lawn or the car or the corporation could have been thwarted? Likely not. Certainly, the creation of new animations—from the printing press to the commercial sewing machine to the industrial division of labor—often sparked opposition, debate and resistance. But in an open world, such opposition usually fell victim to profit and growth, progress and repression. Few critics had the ability to generate a different cultural ontology—different truths—that could shape different patterns of collective social evolution. This remains true in the Anthropocene where the *nomos*phere manufactures the collective oblivion and acquiescence needed for continued financial appropriation. In the 1980s, global financialization made computerization inevitable. Forty years on, maintaining the *nomos*phere in a closed world now makes almost inevitable the turn to the logics of the new "efficiencies" offered by a world of AI and robotic animations (Zuboff 2019). Even the pandemic that has erupted as I finish this chapter provides one more opportunity to advance this disabling animationist trajectory. Who and what can overcome it?

## Ecosystem revolution

This chapter has addressed the scholarly challenge of "green*ing*" legal theory (beyond EL) by addressing the larger jurisprudence of the social law and the broad re-formations it entails. Here I will return to the ecological premises on which EcL and GLT converge. Of particular importance for GLT is the socially-constitutive

role of the "self-sustaining socio-ecosystem." By that phrase I mean an ecologically scaled, socio-physical community that self-constitutes through animations that nurture that community's health and flourishing, and that does so in reciprocity with other socio-ecosystems doing the same. Such entities occupied the Earth for millennia through a diversity of constructed and controlled animations that shaped the planet's socio-ecological evolution. Liberal naturalism eviscerated this "grounded" set of relations in the pursuit of a "higher" (transcendent) sovereignty. As opposed to the statism of Hobbes et al., and the reformism of the legal law, "re-grounding" social power in the socio-ecosystem provides a "natural" legitimacy that challenges liberal *ipseity*. It is telling that the major critique of shallow environmentalism in the 1960s–1980s came from back-to-the-land bioregionalists, deep ecologists, Indian rights activists and Third World communities who envisioned just such a re-grounding of social power through the "re-inhabitation" of place. Rekindling such a re-evolutionary constitutionalism is everywhere the logical (in both senses) antidote to the momentum of the *nomos*phere's animationist power.

A prerequisite for re-inhabitation is the ability to reimagine the constitutive processes of social animation on at least four levels—philosophical, political, economic and cultural. Philosophically, the socio-ecosystem provides the dialectical context for a situated ontology that, by its nature, addresses the cultural/material relations necessary for sustaining life in a limited environment (M'Gonigle 2000). This context would (literally) "re-place" the liberal philosophical referent of the "rational individual" with its ecological other—the "ethical relational." Even the most basic understanding of physical (and social) ecology makes clear the ipseistic fallacy of a self-referencing starting point like the rational individual who is somehow prior to the social/natural world. Instead, the "ethical relational" acknowledges that "individuals" always develop through the preexisting, collective contributions of culture (history, language, communal values, social training), material relations and natural experiences. As a result, by their nature, individuals owe a natural/ethical responsibility to creating conditions that will foster that communal development. This approach overcomes the untenable separation of the legal from the social. In so doing, it expands the realm and nature of "due process." For example, the goal would not be to "represent" future generations by grafting reformist constraints onto existing interests. Instead, the reality would be to embed re-formative logics into new animations, the logics of which would constitute communities of ethical relationals, and do so in the present.

Politically, giving primacy to the socio-ecosystem challenges the territorial absolutism of the modern sovereign state. In fact, the "state" has long embodied a diversity of practical forms (Jessop 2016). Moreover, it achieved formal recognition in its modern form only in the seventeenth century, and it gained global primacy only with (at least "formal") decolonization after WWII. Yet, over this whole history, the modernizing state has abetted a physical dysfunction that, in the Anthropocene, renders obsolete its ipseistic claim to sovereign legitimacy. At best, state legitimacy in a full world can exist only in a *conditional* form insofar as it is able to re-ground political and economic governance in self-sustaining

socio-ecosystems. These, in turn, would operate within a framework of global socio-ecological confederalism. Working as fully *democratic ecosystems* they would give constitutive power to (and demand accountability from) human and post-human inhabitants and animations.

In her study of an Indigenous community, the Algonquin of Barriere Lake in northern Quebec, Shiri Pasternak (2017) elucidated an alternative to Derrida's "ipseity" that she calls "grounded authority." This emanates from the place (not just the power) that generates "the authority to have authority," the "jurisdiction" where one is able to "speak" (*dicto*) the "law" (*juris*). Though it faces the seemingly Herculean task of overcoming today's statist intransigence, "grounding authority" in authoritative socio-ecological jurisdictions draws on a vast array of existing alternatives. Economically, many forms of cooperative organization can be drawn on to replace disembodied capital and its logics of extraction and accumulation. These existed in Indigenous territories and, indeed, in diverse communal entities worldwide that, through practices of "reciprocity and redistribution," ensured the equitable recirculation of wealth throughout the local population (Polanyi 1944). Similarly, the beneficent political logics of the "public trust" have long been acknowledged as a vehicle for sovereign re-grounding (Wood 2013). Indeed, years ago, my research group at the University of Victoria developed the "community ecosystem trust" as a vehicle to devolve power in just these ways (M'Gonigle et al. 2001).

In contrast to the liberal order's continuing evolution with the global *nomo-s*phere that all but guarantees a planetary dystopia, GLT envisions a constitutive re-evolution in the social law as the basis for long-term human and natural flourishing of a flourishing planet. Unfortunately, the legal law and the logics of hierarchical power do not deconstruct themselves in light of lessons learned. As it was centuries ago, so it remains today:

> And geese will still a common lack
> Till they go and steal it back.

## Notes

1 I would like to acknowledge the unrelenting assistance of my two editors, Carla Sbert and Kirsten Anker, and the helpful comments of Mark Zion.

2 *Rogues,* Stanford: Stanford University Press 2005, pp. 10–12. Cited in Christopher Bracken, "Reconciliation Romance: A Study in Juridical Theology," *Qui Parle*, Fall/Winter 2015 14:1, p. 2. Emphasis in original.

3 I coined this term drawing on the German political theorist, Carl Schmidt (1954), to describe a *global* force field that exists (in a quasi-Hegelian sense) as a cultural mind/spirit (*geist*) with an associated material assemblage of driving physical animations. This meaning differs from how the term had, it turns out, to have been used earlier to describe the legal systems of diverse, spatially defined communities. See Delaney (2010).

4 Marcuse's arguments against the "commodification" that works to constitute citizens as one-dimensional "consumers" has obvious implications for my discussion of "animations."

5 This statement has been oft-quoted. See M'Gonigle (1999).

6 The contestation between socially re-formative *movements* (whether from above or below) again supersedes the association of "regulatory" *processes* with formalized (i.e. institutional) law reform. See Cox and Nilsen (2014).
7 These questions raise the issue of GLT's relationship to actor network theory (ANT) that I have not explored in this chapter, nor drawn upon more generally.

## References

Adorno, T. (1942) 2003. "Reflections on Class Theory." In *Can One Live After Auschwitz: A Philosophical Reader*, edited by Rolf Tiedeman, chap. 4. Stanford: Stanford University Press.

Anderson, G. 2018. *The Realness of Things Past: Ancient Greece and Ontological History*. Oxford: Oxford University Press.

Bakan, J. 2004. *The Corporation: The Pathological Pursuit of Profit and Power*. Toronto: Penguin.

Ben-Dor, O. 2007. *Thinking about Law: In Silence with Heidegger*. Oxford: Hart Publishing.

Bingham, C. 2016. *Witness to Revolution: Radicals, Resisters, Vets, Hippies, and the Year America Lost Its Mind and Found Its Soul*. New York: Random House.

Brown, W. 2015. *Undoing the Demos: Neoliberalism's Stealth Revolution*. New York: Zone.

Brown, W. and J. Halley, eds. 2002. *Left Legalism/Left Critique*. Durham, NC: Duke University Press.

Cox, L. and A. Nilsen. 2014. *We Make Our Own History: Marxism and Social Movements in the Twilight of Neoliberalism*. London: Pluto.

Dahms, H. 2011. *The Vitality of Critical Theory*. Bingley, UK: Emerald Group Publishing, Current Perspectives in Social Theory.

Darian-Smith, E. 2013. "Producing Legal Knowledge." In *Laws and Societies in Global Contexts*, edited by Darian-Smith. Cambridge: Cambridge University Press.

Delaney, D. 2010. *The Spatial, the Legal, and the Pragmatics of World-making: Nomospheric Investigations*. London: Routledge.

Habermas, J. 1975. *Legitimation Crisis*. Boston: Beacon.

Hay, C. 1994. "Environmental Security and State Legitimacy." In *Is Capitalism Sustainable: Political Economy and the Politics of Ecology*, edited by M. O'Connor. New York: Guildford.

Hobbes, T. (1651) 1981. *Leviathan*. Edited by C. Macpherson. Hammondsworth, UK: Penguin.

Holloway, J. 2002. *Change the World without Taking Power*. London: Pluto.

Hunt, A. 1993. *Explorations in Law and Society: Toward a Constitutive Theory of Law*. New York: Routledge.

Jabbari, D. 1992. "From Criticism to Construction in Modern Critical Theory." *Oxford Journal of Legal Studies* 12, no. 4: 507–542.

Jessop, R. 2016. *The State: Past, Present and Future*. Cambridge, MA: Polity Press.

Kahn, P. 1999. *The Cultural Study of Law: Reconstructing Legal Scholarship*. Chicago: University of Chicago Press.

Kairys, D. 1990. *The Politics of Law: A Progressive Critique*. New York: Pantheon.

Kolbert, E. 2008. "Turf War: Americans Can't Live without their Lawns—But How Long Can they Live with Them?" *The New Yorker*, July 21, 2008.

Kuntsler, J.H. 1993. *The Geography of Nowhere: The Rise and Decline of America's Man-made Landscape*. New York: Simon and Schuster.

Locke, J. (1689) 1980. *Second Treatise on Civil Government*. Edited by C. Macpherson. Indianapolis: Hackett.

Manderson, D. 1996. "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory." *Melbourne University Law Review* 20: 1048–1071.

Marcuse, H. 1964. *One Dimensional Man*. Boston: Beacon.

McLaughlin, P. 2012. "The Second Darwinian Revolution: Steps Toward a New Evolutionary Environmental Sociology." *Nature and Culture* 7, no. 3: 231–258.

M'Gonigle, M. 1999. "An Emerging Global Constitution." In *Focus on Forests and Communities*. (A publication of the POLIS Project on Ecological Governance prepared for the Seattle meeting of the World Trade Organization, November 1999). Victoria: Victoria University Press.

M'Gonigle, M. 2000. "A New Naturalism: Is There a (Radical) 'Truth' Beyond the Postmodern Abyss?" *Ecotheology* 8(January): 8–39.

M'Gonigle, M. 2008. "Green Legal Theory." *Okologishes Wirtschafton* 4: 34–38.

M'Gonigle, M., B. Egan and L. Ambus. 2001. "The Community Ecosystem Trust: A New Model for Developing Sustainability." *POLIS Project on Ecological Governance*. Victoria: University of Victoria.

M'Gonigle, M. and P. Ramsay. 2004. "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation." *Journal of Environmental Law and Practice* 14: 333–356.

M'Gonigle, M. and L. Takeda. 2013. "The Liberal Limits of Environmental Law." *Pace Environmental Law Review* 30, no. 3: 1005–1115.

Pasternak, S. 2017. *Grounded Authority: The Algonquins of Barriere Lake Against the State*. Minneapolis: University of Minnesota Press.

Polanyi, K. 1944. *The Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon.

Ranciere, J. 2010. *Dissensus*. London: Continuum.

Schmidt, C. (1954) 2003. *The Nomos of the Earth: on the International Law of the Jus Publicum Europaeum*. New York: Telos.

Stamps, J. 1995. *Unthinking Modernity: Innis, McLuhan, and the Frankfurt School*. Montreal: McGill-Queen's University Press.

Taylor, C. 1979. *Hegel and Modern Society*. Cambridge: Cambridge University Press.

Tomlins, C. 2007. "How Autonomous is Law?" *Annual Review of Law and Social Science* 3: 45–68.

Unger, R. 1986. *The Critical Studies Movement*. Cambridge, MA: Harvard University Press.

Williams, R. 1988. "Taking Rights Aggressively: The Perils and Promise of Critical Legal Thought for People of Color." *Law and Inequality* 5, no. 2: 103–134.

Wood, M. 2013. *Nature's Trust: Environmental Law for a New Ecological Age*. Cambridge: Cambridge University Press.

Zuboff, S. 2019. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: Public Affairs.