

# EARTH JURISPRUDENCE AND SUSTAINABLE CONSUMPTION

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## I INTRODUCTION

Earth jurisprudence critiques existing laws and governance structures for being anthropocentric and facilitating the exploitation of the natural environment. Rather than continuing this harm, Earth jurisprudence proposes that they be based on an eco-centric<sup>2</sup> world view, so that humans see themselves as one of many members of the Earth community and create societies that support rather than degrade the natural world.

Earth jurisprudence already offers a rich foundation of literature, including arguments supporting rights for nature<sup>3</sup> and critiques of western legal constructs such as property law.<sup>4</sup> However, a relatively unexplored area is the Earth jurisprudence of sustainable consumption.<sup>5</sup> This paper aims to contribute to the development of Earth jurisprudence by exploring how it might be applied to the complex and difficult problem of unsustainable consumption by western industrialised societies. It argues that due to the pro-growth belief system underpinning the industrialised world, our legal system is reluctant to set limits on many human activities, but as the condition of the natural environment continues to deteriorate, there is an urgent need for laws and governance systems to assist our societies to achieve sustainable

- 1 Griffith University Law School, Brisbane, Australia. The author would like to thank Peter Burdon and Chris Butler for comments on earlier drafts.
- 2 Eco-centric literally means 'earth centred'. This includes human beings, non-human animals and inanimate objects. It can be contrasted with anthropocentrism which is human centred and biocentrism which is life centred. From Peter Burdon, 'Earth Jurisprudence: Private Property and Earth Community' (PhD thesis, The University of Adelaide, 2011).
- 3 Christopher Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2010), Cormac Cullinan, 'If Nature Had Rights, What Would We Have to Give Up?', *Orion Magazine*, January/February (2008), Peter Burdon, 'The Rights of Nature: Reconsidered' (2010).
- 4 Nicole Graham, *Landscape: Property, Environment and Law* (Routledge-Cavendish, 2010).
- 5 There is little literature addressing the role of law in reducing consumption. Key papers include: James Salzman, 'Sustainable Consumption and the Law' (1997) 27 *Environmental Law* 1243–93 and Bradley Harsch, 'Consumerism and Environmental Policy: Moving Past Consumer Culture' (1999) 26 *Ecology Law Quarterly* 543–610. A number of issues relevant to consumption are also discussed in Joseph H Guth, 'Law for the Ecological Age' (2008) 9 *Vermont Journal of Environmental Law* 431–512. The only paper that the author has found that specifically addresses Earth jurisprudence and consumption is Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' (2010) 6 *The Journal Jurisprudence*.

consumption and Earth jurisprudence can provide a framework for filling this gap.

Part 1 maps the problem of unsustainable consumption: its environmental impacts, the inadequacy of state-centred policy responses to the problem and the complex economic, socio-cultural and ideological barriers western societies face if they are to reduce consumption levels. Part 2 explores the current role of law in addressing consumption in western societies and builds on Salzman's argument that our current legal system has no framework for addressing demand.<sup>6</sup> Part 3 explores key elements of the Earth jurisprudence literature and analyses how its eco-centric approach can support efforts to address the barriers outlined in Part 1 and fill the gaps in our current legal system discussed in Part 2. It argues that Earth jurisprudence, with its emphasis on creating human laws that fit within the laws of the natural world, can provide an overarching framework for managing demand that is lacking in our current legal system.

## II PART 1. CONSUMPTION IN A CULTURE WITHOUT LIMITS

Current levels of consumption of natural resources in industrialised nations are unsustainable.<sup>7</sup> Vital natural resources are being depleted, mountains of waste are being produced, air and water pollution contribute to the steady decline of life supporting ecosystem services and biodiversity is being lost at an escalating rate.<sup>8</sup>

The world extracts the equivalent of 112 Empire State Buildings from the earth every single day<sup>9</sup> and the exploitation of these resources to maintain ever-higher levels of consumption puts increasing pressure on Earth's natural environment. The phenomenal escalation of human consumption and production in the past 100 years is brought home when it is noted that 'humankind has consumed more natural resources since 1950 than in all previous human history'.<sup>10</sup> Referring to the Ecological Footprint Indicator, the 2010 Worldwatch State of the World Report noted that 'humanity now uses the resources and services of 1.3 Earths'.<sup>11</sup>

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6 Salzman, 'Sustainable Consumption and the Law' (1997).

7 Millennium Ecosystem Assessment, *Ecosystems and Well-Being: Synthesis* (Island Press, 2005).

8 Ibid.

9 Worldwatch Institute, *2010 State of the World. Transforming Cultures: From Consumerism to Sustainability* (W W Norton and Company, 2010).

10 Alan Durning, *How Much Is Enough? The Consumer Society and the Future of the Earth* (Worldwatch Institute, 1992).

11 Worldwatch Institute, *2010 State of the World. Transforming Cultures: From Consumerism to Sustainability*.

One obvious solution is for human societies to consume less and to 'limit human consumption so it doesn't exceed the sustainable level of production from natural systems'.<sup>12</sup> However, as argued in this section of the paper, although the significance of unsustainable consumption has been acknowledged globally, western industrialised societies currently reflect a complex pro-growth belief system in which consumption plays a central part, and this means that to address consumption, we must challenge its role in our economic, socio-cultural and ideological systems.

### *A Inadequacies in state-centred responses to unsustainable consumption*

Toward the end of the 20<sup>th</sup> Century, the importance of unsustainable consumption was acknowledged by decision makers across the planet. In 1992, the Rio Declaration on the Environment (Agenda 21) saw 178 nations acknowledge that:

The major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in the industrialised countries, which is a matter of grave concern, aggravating poverty and imbalances.<sup>13</sup>

In 2002, the UN World Summit on Sustainable Development at Johannesburg called for the creation of a 10-year Framework of Programmes to support regional and national initiatives to promote the shift towards sustainable consumption and production (SCP) patterns. The Marrakech Process was created the following year and the United Nations Environment Program (UNEP) and United Nations Department of Economic and Social Affairs (UNDESA) became the leading agencies.

The Marrakech Process involves participation by national governments, development agencies, private sector, civil society and other stakeholders.<sup>14</sup> It has created expert meetings and roundtables held at the regional, national and international levels; regional consultations; regional strategies; seven task forces led by different national governments with a focus on specific SCP issues (for example: Sustainable Products, Sustainable Lifestyles, Sustainable Public Procurement, Sustainable Tourism, Education for Sustainable Consumption and so on); a business and industry forum; an NGO forum as well as 'cooperation dialogue processes' with development agencies

12 Ian Lowe, 'Changing Public Attitudes to Long Term Issues' (2006) 12 *Griffith Review*.

13 Un, 'Rio Declaration on the Environment (Agenda 21)' (1992).

14 Unep/Un-Desa, 'Marrakech Process on Sustainable Consumption and Production: Project Brief' (2007) <<http://www.un.org/esa/sustdev/sdissues/consumption/Marrakech/conprod10Yregmeet.htm>> last accessed 2 April 2010

and regional banks and other cooperative and research processes.<sup>15</sup> Many nations have also set up their own national programs to address SCP<sup>16</sup> and other international organisations, such as the OECD have created research programs and produced numerous papers addressing sustainable consumption and development.<sup>17</sup>

Despite this national, regional and international activity, consumption continues to grow. The World Watch Institute reported in 2010 that global consumption of goods and services has increased 28 per cent from 1996 levels. Some of this increase comes from the growth in population, but while human numbers grew by a factor of 2.2 between 1960 and 2006, consumption expenditures per person almost tripled<sup>18</sup> and commentators are noting that consumption ‘shows little sign of abatement’.<sup>19</sup>

**The question then, is if the majority of nation states recognise the negative environmental impacts of unsustainable consumption, why are consumption levels still growing?**

The literature critiquing consumption and the consumer society – from fields as diverse as economics, sociology, political science, environmental psychology, theology, public policy, marketing and to a very limited extent, law – presents consumption as a complex, inter-connected web of systems, activities and beliefs that are fundamental to many aspects of modern society, that have negative consequences for humanity and the natural environment, and are very difficult to challenge.

As is often the case however, it is the gaps in the discourse that reveal the most about the problem. The literature shows that state-centred responses to sustainable consumption and production at both the national and international level focus on increasing the *efficiency* of current production methods and changing *patterns* of consumption, by switching to more ‘environmentally friendly’ services and products. There is rarely, if ever, any mention of setting limits to consumption or *reducing* consumption or production levels in state-centred discourse or policy responses.

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15 Ibid.

16 For example, see UK Government, ‘Securing the Future: UK Sustainable Development Strategy’ (2005).

17 For example, see OECD, ‘Towards Sustainable Household Consumption? Trends and Policies in Oecd Countries’ (OECD, 2002), 161 and OECD, ‘Promoting Sustainable Consumption: Good Practices in Oecd Countries’ (2008) 59.

18 Worldwatch Institute, *2010 State of the World. Transforming Cultures: From Consumerism to Sustainability*.

19 Douglas Kysar, ‘Law, Environment and Vision’ (2003) 97 *Northwestern University Law Review* 711.

While there is insufficient space in this paper to elaborate, examples of this ‘efficiency and switching’ discourse are evident in the overarching objectives and activities of the Marrakech Process (Johannesburg Plan of Implementation)<sup>20</sup> and also in national SCP strategies such as the UK Strategy for Sustainable Development.<sup>21</sup> These strategies focus on ‘improving efficiency and sustainability in the use of resources and production processes’,<sup>22</sup> ‘cleaner, more efficient production processes’ and ‘shifts in consumption towards goods and services with lower impacts’.<sup>23</sup> Despite a significant body of evidence that argues efficiency improvements alone will not create a sustainable level of consumption,<sup>24</sup> strategies such as those discussed above do not raise the issue of setting limits on, or reducing the total volume of, consumption.

The main reason for this is simply that consumption is now so embedded in our economic system, so ingrained in the socio-cultural fabric of life and so strongly supported by mainstream western ideology, that reducing consumption is seen as both extremely difficult and politically unacceptable. Each of these barriers to reducing consumption will now be briefly addressed in turn.

## B *Barriers to regulating for reduced consumption*

### 1 *Economic barriers to reducing consumption*

A substantial barrier to reducing consumption is the fact that our conventional economic system, which drives international and national public policy decisions and strategic corporate investment, believes consumption is not only ‘good’ but vital for human prosperity. Nowhere was this made more obvious than in 2009, when in response to the ‘global financial meltdown’, western governments invested billions of dollars in economic stimulus packages, in order to provide cash handouts to citizens so that they would ‘shop’ the economy out of its all-time low.<sup>25</sup>

20 Unep, ‘Third International Expert Meeting on Sustainable Consumption and Production: Meeting Report and Co-Chairs Summary’ (2007).

21 UK Government, ‘Securing the Future: UK Sustainable Development Strategy’, *ibid.*

22 Unep, ‘Third International Expert Meeting on Sustainable Consumption and Production: Meeting Report and Co-Chairs Summary’.

23 UK Government, ‘Securing the Future: UK Sustainable Development Strategy’.

24 See Francis Schneider, ‘Macroscopic Rebound Effects as Argument for Economic Degrowth’, *First International Degrowth Conference* (2008) 29 available at <<http://www.degrowth.net/>> at 15 October 2010. (2010) and Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (Stead and Daughters Limited, 2009).

25 Georgina Robinson, ‘Rudd’s Stimulus Package: What Will You Get?’, *Sydney Morning Herald*, 2009.

The modern economic system, with its roots in liberalism and its early growth during the industrial revolution, is argued to be built on the core beliefs that growth is necessary, unlimited growth is possible and there are no natural restrictions imposed on the human economic system by nature.<sup>26</sup> Capitalism relies on economic growth to maximise individual and corporate profit and to minimise recessionary contractions. However, as production increases, ever greater materials are required, ‘straining and often destroying’ environmental resources.<sup>27</sup> In addition, traditional economists believe that growth of human economic production is not checked by restrictions imposed by nature. This is because traditional economists accept the view that nature and man-made capital can be treated as substitutes, and ‘although specific types of natural inputs can ... become scarce or depleted, no general scarcity of natural resources can constrain economic growth’.<sup>28</sup> Characterised by deep ecologists and other commentators as ‘empty world’<sup>29</sup> or ‘cowboy’<sup>30</sup> economics, the dominant economic system is criticised as being disconnected from the reality and limits of the natural systems that support it. It is said to be locked into a belief held prior to the industrial revolution, that the world is open, empty and free of natural limits. It is argued further that this world view is instrumental in creating the unsustainable use and destruction of natural resources and ecosystem services.<sup>31</sup>

Critiques of traditional economics are proposed in numerous fields including ecological economics,<sup>32</sup> environmental ethics<sup>33</sup> and neo-marxist theories.<sup>34</sup> A range of alternative economic systems have been suggested, such as Daly’s Steady State, which promote a no-growth or post-growth economy.<sup>35</sup> Sometimes referred to as ‘full world’ and ‘spaceman’<sup>36</sup> economics, the world view of ecological economics is argued to offer a ‘surprisingly radical

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26 Kysar, ‘Law, Environment and Vision’ (2003).

27 Matthew Alan Cahn, *Environmental Deceptions: The Tension between Liberalism and Environmental Policymaking in the United States* (State University of New York Press, 1995).

28 Kysar, ‘Law, Environment and Vision’ (2003).

29 For example see Guth, ‘Law for the Ecological Age’ (2008).

30 Kenneth E Boulding, ‘The Economics of the Coming Spaceship Earth’, in Herman E Daly and Kenneth N Townsend (eds), *Valuing the Earth: Economics, Ecology, Ethics* (1993).

31 Guth, ‘Law for the Ecological Age’ (2008).

32 For example, see Herman E Daly, *Beyond Growth* (1996).

33 For example, see Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge University Press, 1988), Mark Sagoff, *Price, Principle and the Environment* (Cambridge University Press, 1994) and Michael Sandel (dir), *A New Citizenship: Markets and Morals* (2009), *ibid*.

34 See John Bellamy Foster, *Vulnerable Planet: A Short Economic History of the Environment* (Cornerstone Press, 1999), John Bellamy Foster, *The Ecological Revolution: Making Peace with the Planet* (Monthly Review Press, 2009) and James O’connor, *Natural Causes: Essays in Ecological Marxism* (The Guilford Press, 1998).

35 Herman E Daly, *Steady-State Economics: Second Edition with New Essays* (Island Press, 1991).

36 Boulding, ‘The Economics of the Coming Spaceship Earth’ (1993).

departure from mainstream economic thought'<sup>37</sup>: it recognises the absolute limits imposed by nature on the ability of humans to appropriate and utilise natural resources, and aims to create systems and processes that work within these limits. A number of analytical tools from ecological economics – such as 'scale' and 'depletion quotas'<sup>38</sup> – offer modern economics a way of measuring and implementing limits to the consumption of natural resources.

It should be noted that ecological economics are not universally accepted as having the best or only way forward. Environmental ethicists and philosophers<sup>39</sup> argue that environmental policy should not exclusively rely on economics, instead societies should use principles identified and applied through deliberative political processes to make their value choices.

## 2 *Socio-cultural barriers to reducing consumption*

Another fundamental barrier to reducing consumption is that it is now an integral part of personal life for many people in modern societies. People are now so used to their materially affluent lifestyles, cheap, frequently replaced goods and shopping as a leisure activity, that it is difficult to see how such cultural practices could be regulated or rolled back. As stated by Salzman, 'a basic reason the law currently does little to address levels of consumption is that it flies in the face of strongly-held cultural values'.<sup>40</sup> Economic historians map the beginning of the shift from a 'production' economy to a 'consumer' economy as early as the 1920s and 1930s.<sup>41</sup> This shift is seen as being responsible for the dramatic increase in the production of non-essential consumer goods and the rise of the 'consumer society'. Harsch argues that to address consumption, an understanding of consumer culture – not just economic principles – is vital.<sup>42</sup>

The literature on consumer culture and consumption is vast and complex.<sup>43</sup> Consumers are variously depicted as 'victims' or 'drivers' of the consumer culture. As 'victims' they are passive pawns in a game controlled by corporations and governments, manipulated by endless advertising and driven to finding meaning and identity through the insatiable attainment of goods and services. As 'drivers', consumers are blamed for the 'arms race'

37 Kysar, 'Law, Environment and Vision' (2003).

38 Daly, *Beyond Growth* (1996).

39 Eg see Sagoff, *Price, Principle and the Environment*, *ibid.*

40 Salzman, 'Sustainable Consumption and the Law' (1997)

41 Mark Hopkinson, 'Consumer Democracy' (2009) 24 *Griffith Review*.

42 Harsch, 'Consumerism and Environmental Policy: Moving Past Consumer Culture' (1999).

43 See Matthew Bentley, John Fien, and Cameron Niel, 'Sustainable Consumption: Young Australians as Agents of Change. A Report for National Youth Affairs Research Scheme' (2004) 126, for a good overview of the sociological literature on consumption.

of competitive purchasing, the endless production of unnecessary consumer items and the subsequent vandalism of the natural world. Vandenberg and Kysar<sup>44</sup> argue that the reality is probably somewhere in the middle. Modern consumer society is held out as causing not only environmental degradation, but physical and mental health problems (such as the rising epidemic of obesity in the western world) and exacerbating social injustice.<sup>45</sup> Followers of deep ecology condemn modern industrial life as having severed people from nature and from their ability to satisfy basic needs, leading to 'widespread psychopathological and addictive behaviour'.<sup>46</sup>

The World Watch Institute has recently highlighted the role of 'cultural pioneers' in stemming the tide of consumption in modern society,<sup>47</sup> and there are a growing number of movements reacting against the excess of consumer society. Voluntary citizen movements have sprung up around the world, including the Voluntary Simplicity,<sup>48</sup> Degrowth<sup>49</sup> and Slow Food<sup>50</sup> movements, and the phenomenon of 'downshifting' is occurring at an increasing rate in many countries including Australia, the USA and Britain.<sup>51</sup> Many such groups endorse the concept of a 'Steady State', and 'Prosperity without Growth'<sup>52</sup>, and new 'Post Growth' movements and think-tanks<sup>53</sup> are being created in the industrialised world. In addition to these voluntary lifestyle movements, a range of activist groups have been formed, such as 'Adbusters', who focus on providing information and running anti-advertising campaigns, to enhance consumers' abilities to think critically about advertising.<sup>54</sup>

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44 Douglas Kysar and Michael P Vandenberg, 'Introduction: Climate Change and Consumption' (2008) 38(12) *Environmental Law News and Analysis* 10825–33.

45 Clive Hamilton, *Affluenza: When Too Much Is Never Enough* (Allen and Unwin, 2005) 224.

46 Chellis Glendinning, 'Recovery from Western Civilisation', in George Sessions (ed), *Deep Ecology for the 21st Century* (Shambala, 1995).

47 Worldwatch Institute, *2010 State of the World. Transforming Cultures: From Consumerism to Sustainability*.

48 See Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* and see <[www.simplicityinstitute.org/publications](http://www.simplicityinstitute.org/publications)>.

49 Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' (2010) 6 *The Journal Jurisprudence*.

50 See Carlo Petrini, *Slow Food: Collected Thoughts on Taste, Tradition, and the Honest Pleasures of Food* (Chelsea Green Publishing, 2001) and <<http://www.slowfood.com/>>, accessed 6 June 2011.

51 Clive Hamilton, 'Downshifting in Australia: A Sea-Change in the Pursuit of Happiness', *Number 50, Discussion Paper* (Australia Institute, 2003b), Clive Hamilton, *Growth Fetish* (Allen and Unwin, 2003a) 262.

52 Tim Jackson, *Prosperity without Growth* (Earthscan, 2009).

53 For example, the new 'Post Growth Institute' launched in 2011 <<http://postgrowth.org/>> last accessed 30 May 2011

54 See Joseph D Rumbo, 'Consumer Resistance in a World of Advertising Clutter: The Case of Adbusters', *Psychology and Marketing* (February 2002) 19(2) 127–48.

Despite a significant body of literature and a growing number of social movements challenging consumer culture, there are a very small number of instances where laws have been used to reduce the effects of consumerism. One example is the UK's regulatory bans on junk food advertising during children's television,<sup>55</sup> but in general, there are few efforts by governments to attempt to reduce consumerism. Indeed, attempts by governments or other actors to reign in consumer behaviour are accused of being overly interfering and an affront to liberal freedoms. These perceptions of freedom and individual rights can be linked directly to the final barrier: liberalism.

### 3 *Ideological and political barriers*

A final barrier to regulating for reduced consumption is the west's underlying ideology of liberalism. With its emphasis on the rights and freedoms of the individual, and the need to limit the powers of government, liberalism is a belief *system that resists government or collective intrusion into individual rights except in very limited circumstances*; and those circumstances have to ultimately protect or support individual rights.

The liberal approach is particularly demonstrated in the area of property rights. For example, libertarian property theorist Richard Epstein argues that private property means the 'exclusive rights of possession, use and disposition' over a particular resource and individual freedom should not be interfered with by the state, except in exceptional circumstances.<sup>56</sup> In the broader context of sustainability, Cahn argues that liberal societies are fundamentally limited in their ability to resolve the problem of environmental degradation, because liberalism's emphasis on individual self-interest creates a problematic concept of communal good. As a consequence, individual and corporate property rights have consistently overshadowed community claims on resource management.<sup>57</sup>

In terms of sustainable consumption, liberalism is also problematic because of its intrinsically anthropocentric basis. While regulatory intervention, such as bans, imposed to prevent direct harm to humans are acceptable intrusions into liberal freedoms, similar bans based on environmental grounds are seen

55 Mark Sweney, 'Total Ban for Junk Food Ads around Kids' Shows', *The Guardian*, 17 November 2006 2006.

56 Richard Epstein, 'Property as a Fundamental Civil Right' *California Western Law Review* (1998) 29, cited in Burdon, 'Earth Jurisprudence: Private Property and Earth Community' (2011) 84

57 Cahn, *Environmental Deceptions: The Tension between Liberalism and Environmental Policymaking in the United States*. Note the implications of these arguments for global environmentalism: Steven Bernstein, 'Liberal Environmentalism and Global Environmental Governance' (2002) 2(3) *Global Environmental Politics* 1–16.

as intrusive and unnecessary.<sup>58</sup> For example, calls to ban the use of four wheel drive vehicles on environmental grounds (due to their carbon emissions being excessive compared to smaller vehicles) are seen as intrusive and an affront to individual liberties,<sup>59</sup> while in jurisdictions like Queensland, regulations banning provisional licence holders under the age of 25 from driving high performance vehicles on grounds of human safety are seen as acceptable intrusions into personal liberty.<sup>60</sup>

A number of suggestions have been made to ‘modify’ concepts within liberalism to accommodate more effective responses to the environmental crisis. For example, Cahn outlines Rawls’ theory of broadening the self-interest model in liberalism to accommodate a communitarian ethic. This suggests that individual self interest must be broadened to *include* a healthy environment and that regulatory or collective intervention to protect the environment actually provides direct benefits to individuals.

Liberalism is a multi-faceted and deeply entrenched ideology in western societies, and its role in limiting progress towards sustainability requires much more comprehensive deliberation than is possible in this paper. However it is raised here primarily because its vital role in supporting capitalism and the western economic system means that it is a key challenge to be considered when attempting to construct new ways of addressing environmental degradation, and in particular, in trying to reign in unsustainable consumption.

In summary, this part of the paper has argued that state centred responses to unsustainable consumption and production have failed to focus on the *reduction* of consumption as a strategy for creating sustainable societies. This is because consumption is considered central to the current pro-growth economic system and regulating to reduce consumption on environmental grounds represents an infringement of individual rights and freedoms that lay at the heart of western liberalism. This part of the paper has set the context for Part 2, which will examine the limitations in western legal systems regarding the management of demand and the consequent absence of legal frameworks to address consumption.

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58 Eli Lehrer, ‘The Five Dumbest Product Bans, 2009’ (2009) 154 *CEIN Point*, Mary Jo Fisher, ‘Nanny State Is a Poor Guide to Policy Design’ (2008) *IPA Review* 29–30.

59 For example, see the following website for a ‘community discussion’ about this issue: <[http://www.blurtit.com/forandagainst/Should\\_Governments\\_Limit\\_Car\\_Engine\\_Sizes](http://www.blurtit.com/forandagainst/Should_Governments_Limit_Car_Engine_Sizes)>

60 For details of these regulations see the Queensland Government website: <<http://www.tmr.qld.gov.au/Licensing/Getting-a-licence/Car-licence/Restrictions/High-powered-performance-vehicles.aspx>>, the *Transport Operations (Road Use Management) Act 1995 (Qld)* and *Transport Operations (Road Use Management — Vehicle Standards and Safety) Regulation 2010 (Qld)*

### III PART 2. LIMITATIONS IN OUR CURRENT LEGAL SYSTEM REGARDING MANAGEMENT OF CONSUMPTION

Given the economic, socio-cultural and ideological barriers to reducing consumption that were mapped briefly in Part 1, it should come as little surprise that the law in western industrialised nations is poorly equipped to address issues of demand. This part of the paper discusses some of the key limitations in modern western legal systems regarding the management of consumption.<sup>61</sup> These include: a lack of overarching framework for addressing demand; a lack of any common understanding of the problem of or solution to sustainable consumption; the fact that most existing laws regulate patterns, not volume; and the few examples of legal regimes that aim to reduce consumption of natural resources are limited in their operation.

Despite these significant gaps in our current legal system regarding consumption, this part of the paper acknowledges the complex relationship that exists between law and culture and argues that goes on to argue that as law is a product of culture,<sup>62</sup> and culture is malleable to the will of society, there are opportunities for reframing legal and governance structures in order to support sustainable consumption. This part of the paper concludes by flagging a number of normative proposals regarding the regulation of sustainable consumption. Before moving on it should be noted that this paper acknowledges the complex, multidimensional relationship between law, culture and social change<sup>63</sup> and holds the position that there are opportunities for cultural shifts to influence the law, and for law to influence culture. These issues are taken up further in Part 3 of this paper.

#### A *Limitations in our current legal system*

##### 1 *No framework for managing demand*

While the consumption literature is vast, there is little written about *law* and consumption. One of the few papers in this space is by James Salzman, who argues that ‘over the past 25 years, no country’s laws have addressed the environmental impacts of consumption in a systematic manner.’<sup>64</sup> Modern environmental laws are fundamentally ‘production laws’ and have focussed on reducing pollution and managing its environmental impacts, without looking to the underlying causes of the pollution in the first place.

61 These are general comments about western legal systems, with particular reference to the USA and Australia.

62 Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press, 2008).

63 For a discussion of the role of social movements in influencing the law, see Samuel Alexander, ‘Property Beyond Growth: Toward a Politics of Voluntary Simplicity’ (University of Melbourne, 2011).

64 Salzman, ‘Sustainable Consumption and the Law’ (1997).

Salzman claims that this fundamental approach within western environmental law has resulted in a focus on (1) what is an acceptable level of pollution and (2) what kinds of legal rules or regulatory approaches are best suited for reducing pollution to that level? This focus has in turn facilitated the identification of the basic problems posed in minimising pollution discharge and how to solve them, but has not focused on demand.<sup>65</sup>

In defence of modern environmental law, it could be argued that there are a number of regimes that aim to regulate demand for natural resources. Planning and development laws manage demand for greenfield and redevelopment, national parks (terrestrial and marine) and protected area legislation aim to balance demand for development versus demand for preserving natural ecosystems and wildlife protection legislation aims to constrain human use and destruction of certain habitats and species.

**However, Harsch contends that: ‘all of these laws, which together constitute the conventional approach to managing environmental problems, are designed to mitigate the impact of industrialised society on the natural environment’ and none of them offer frameworks for reducing the demand in the first place.** He posits that modern environmental laws tend to rely on three beliefs: that it is possible to concentrate and contain environmental contamination; it is possible to dilute and disperse contaminants through the environment so that they no longer become a threat and it is possible to regulate pollution adequately by focusing on pollutants at the end of pipe. However he argues that statutes based on these principles are not adequate to ensure environmental health and they attempt to mitigate pollution only after it has been created.

Despite the partial successes of conventional and proposed approaches to mitigating the environmental impacts of industrialised society, these approaches neglect to address consumer demand or alter the consumer culture generating this demand.<sup>66</sup>

## 2 *No clear understanding of the problem or the solution*

Closely linked to the failure of western legal systems to address demand, is the difficulty western societies are experiencing in translating the ideals of ‘sustainability’ into broader environmental law and governance systems. Though committed theoretically to creating a more sustainable relationship with the natural world, modern industrialised societies are grappling with how to achieve this transformation. There are also arguments that modern

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65 Ibid 1253.

66 Harsch, ‘Consumerism and Environmental Policy: Moving Past Consumer Culture’ (1999).

societies lack the appropriate institutions,<sup>67</sup> policy targets and timetables<sup>68</sup> and ability to think outside existing disciplinary confines, to effectively address sustainability, or elements of it such as the ‘wicked’ problem of climate change.<sup>69</sup>

With respect to consumption, Salzman notes that there is neither a common understanding of the problem nor of the solution – and this limits the ability of law to play a role. He compares consumption to the more certain world of production:

Unlike sustainable production’s straightforward goal of minimising pollution, sustainable consumption’s ultimate objective remains indistinct, blurred by disagreement over appropriate measures, issues of international and intergenerational equity and ... implications for individual lifestyles.<sup>70</sup>

### 3 Existing laws govern patterns, not volume

A further critique of existing environmental law is that where they exist, laws that have been created to address consumption on environmental grounds typically focus on changing *patterns* of consumption, not reducing volume. Such laws include those relating to *information disclosure*, which typically include green labelling, warnings and endorsements and other environmental impact data aimed at facilitating more rational purchasing decisions. Examples include energy efficiency labels, labelling relating to ozone depleting substances, ‘dolphin safe’ tuna, recycled paper content and so on. Other laws that focus on directing consumption patterns include regulations mandating either product performance or content. The key limitation with these types of mechanisms is that they do not aim to reduce the volume of products or items consumed; all of these techniques aim to ‘switch consumption patterns’ to more environmentally friendly outcomes. While switching must play an important part in addressing consumption, without reducing the volume of natural resources consumed, human societies will not be able to become sustainable.

67 Dan Tarlock, ‘Ideas without Institutions: The Paradox of Sustainable Development’ (2001–2002) 9 *Ind. J. Global Legal Studies* 35–50.

68 John C Dernbach, ‘Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development’ (2002) 27 *William and Mary Environmental Law and Policy Review*.

69 Ross Garnaut, ‘Keynote Address to the ‘Climate Change and Social Justice Conference’, *Climate Change and Social Justice Conference* (Melbourne, 2008), 1–11.

70 Salzman, ‘Sustainable Consumption and the Law’ (1997) 1255.

#### 4 *Laws setting limits on consumption are rare*

Despite the lack of an overarching framework for limiting demand, there are rare examples of regulatory regimes that limit or reduce the volume of consumption of natural resources. Three examples include: commercial and recreational fishing quotas; bans and taxes imposed on plastic bags and restrictions placed on urban water consumption.

The first example is that of fishing quotas. Global fisheries are in crisis, with overfishing causing the decline of many species of fish and the collapse of entire marine and freshwater ecosystems.<sup>71</sup> Numerous countries around the world have regulatory regimes that aim to limit commercial fishing quotas.<sup>72</sup> These have been criticised for their failure to actually protect fish populations,<sup>73</sup> but nonetheless they represent regulatory efforts to impose limitations on human consumption. In Australia both commercial fishing and recreational fishing have limits imposed on them through enforceable quota systems.<sup>74</sup>

The second example is the range of taxes and bans imposed on plastic bags, in order to reduce their sale and consumption. Over the past decade and a half, plastic bags have become among the most widely debated, taxed and banned plastic products on the globe. Plastic bags have been banned in Bangladesh, India, Taiwan and Singapore and they have been the subject of environmental taxes in South Africa, Denmark, Ireland and Germany.<sup>75</sup> In many of these jurisdictions, there have been significant reductions in the number of plastic bags being used and going to landfill.<sup>76</sup> In Australia, the issue was debated within a Council of Australian Governments (COAG) framework for several years and in 2008 South Australia acted unilaterally by passing legislation that banned plastic bags in that jurisdiction.<sup>77</sup>

The final example is that of limitations imposed on urban water consumption. Water – arguably the most precious of all natural resources – is a major

71 Millennium Ecosystem Assessment, *Ecosystems and Well-Being: Synthesis*.

72 Kjellrun Hiis Hauge and Douglas Clyde Wilson, *Comparative Evaluations of Innovative Fisheries Management: Global Experiences and European Projects* (Springer, 2009).

73 For example, see Cormac Cullinan, *Wild Law* (Green Books, 2003), who criticises fishing quotas that are set without any basis in the real world of fish populations.

74 For example, see Government Queensland, 'Queensland Fisheries Strategy 2009–14' (2009), Government Queensland, 'Recreational Fishing Rules and Regulations for Queensland: A Brief Guide' (2010).

75 Jennifer Clapp and Linda Swanston, 'Doing Away with Plastic Shopping Bags: International Patterns of Norm Emergence and Policy Implementation' (2009) 18(3) *Environmental Politics* 315–32.

76 Juin Majumdar and Margaret C Jollands, 'The Plastic Bag – Ban It or Bury It?' (2007) 5(7) *Local Government Reporter: Planning, Environment, Governance – Law, Regulation and Policy* 90–95.

77 See <<http://www.zerowaste.sa.gov.au/plastic-bags>> (last accessed 28 May 2011) and the *Plastic Shopping Bags (Waste Avoidance) Act 2008* (SA).

consumption issue in most countries around the world. Debate and discussion about its availability, use, cost, cleanliness, supply and management has produced a massive body of literature, in many disciplines. Quotas and restrictions on commercial, agricultural and urban water consumption are in place in many jurisdictions throughout the world, including Australia. In 2005–2009, the ‘Millennium Drought’ produced a water security crisis in many Australian states including Queensland, and many urban water systems were subjected to strict water restrictions for many years. In Queensland in particular, a comprehensive regulatory regime was imposed to ensure compliance with water restrictions and remarkable urban water savings were achieved in regions such as South East Queensland.<sup>78</sup>

These regulatory regimes are important, but limited. They are important because they represent some of the only examples of legal and regulatory structures that impose limitations on human consumption of natural resources. They use a range of regulatory measures including taxes, bans and information campaigns and there’s no doubt that there are many lessons to be learnt from these regimes which can inform future efforts to manage consumption. They are limited however because they are ad hoc and focus on a small number of specific areas of consumption and in their current form, do not move human societies towards a culture of sustainable consumption.

## 5 *Can our legal system change to address consumption?*

From this brief overview then, it can be argued that our legal system currently plays a minimal role in regulating consumption. From a liberal standpoint, it would be argued that this is how it should be – the law (the state) should not interfere with or limit citizen’s freedoms. The position of this paper however is that the environmental (and social) implications of consumption are so significant, that our legal system needs to play a role in setting guidelines and rules for sustainable consumption. Other cultures, in other times and places, have been able to successfully impose limitations on their use of natural resources and create a sustainable relationship with the natural world. Indigenous societies throughout the world had governance structures that reflected their understanding and respect of the natural world, and their ability to live within its natural limits.<sup>79</sup>

It is also important to note that our legal system hasn’t always contained barriers to limiting consumption of natural resources. During the Second World War,

78 Philippa England, ‘Managing Urban Water in Australia: The Planned and the Unplanned’ (2009) 20(5) *Management of Environmental Quality: An International Journal*.

79 For example see Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (Penguin, 2005).

governments throughout the western world used legal and communication tools to ensure the general populace conserved material resources to support the war effort. Items including food, clothing, petrol and other materials were rationed<sup>80</sup> and a culture of thrift was promoted and maintained for many years. Regulatory intervention to constrain consumption was seen not only as possible, but vital to the war effort and to the survival of western liberal democratic values and lifestyles.

These examples serve as reminders that laws are not static – they can change over time to reflect society's values and priorities. It is argued by many commentators that the current environmental crisis will force modern western societies to accept greater limits on their 'unlimited' lives, in order to survive,<sup>81</sup> and climate change may be the problem that finally forces significant change in western legal and governance systems.<sup>82</sup> The critical issue will be if we can shift them in time to avert much of the predicted destruction of the natural environment.

## **B Normative suggestions for regulating consumption – scale, values and the onus of proof**

If our culture becomes more accepting of setting boundaries and limitations, how would we do this? As noted previously, there is neither a common understanding of the problem or the solution, and without an 'end-game' to work towards, what kinds of measures or steps can be taken to move modern societies towards sustainable consumption? And what role can the law play in any of this?

There are a number of legislative mechanisms suggested for enabling modern societies to manage consumption. These include legislating to change the tax base from taxing income to taxing natural resources,<sup>83</sup> regulating to directly intervene in sectoral resource management, to extend quotas and restrictions on natural resource use and regulating to remove the drivers which create demand, for example: banning advertising and/or removing the tax deductibility for advertising and thereby removing the demand for consumer

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80 Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (Penguin Books, 2005).

For two different accounts of rationing in Australia during the Second World War, see: Robert Lewis, *A Nation at War: The Australian Home Front in the Second World War: Documents and Commentary* (Longman Cheshire, 1984) and L C Froude, *Coupon Rationing in Australia During World War II: An Exercise in Muddling and Bungling* (University of New England, 1999).

81 Cahn, *Environmental Deceptions: The Tension between Liberalism and Environmental Policymaking in the United States*, Kysar and Michael P Vandenberg, 'Introduction: Climate Change and Consumption' (2008).

82 Kysar and Michael P Vandenberg, 'Introduction: Climate Change and Consumption' (2008).

83 Daly, *Beyond Growth* (1996).

items.<sup>84</sup> Such mechanisms are potentially very important, but arguably face significant resistance in our current legal and political systems, due to the lack of acceptance of and overarching framework for reducing consumption, which was discussed in Part 1 of this paper.

In addition to these direct regulatory interventions, there are other approaches that have been suggested which are relevant to creating an Earth jurisprudence framework for sustainable consumption. These approaches include: setting ‘scale’ to place constraints on total human consumption; using values to prioritise what gets produced and consumed; and reversing the onus of proof in legal doctrines such as torts, so that proponents of new goods and services need to prove their products benefit rather than degrade the natural environment.

### 1 *Setting limits on the total volume of consumption – ‘setting scale’*

There are strong arguments in favour of using Herman Daly’s concept of ‘scale’ to place constraints on total human consumption, and that the law needs to play a role in creating the appropriate frameworks to do so.<sup>85</sup> Daly claims that it is the role of government to put legal frameworks in place to set acceptable total limits on natural resource use, and then other mechanisms (primarily market mechanisms such as ‘cap and trade’ systems) can be used to distribute access to resources within that overall scale or volume.<sup>86</sup>

### 2 *Introducing values into production and consumption*

Linked to the idea of setting scale is that of introducing values into the production and consumption ‘space’. Guth argues that ‘if we are going to be serious about constraining our scale of ecological damage, we may wish to determine which products actually benefit us and forego the rest.’<sup>87</sup> The post-growth literature also addresses this issue. It is suggested that one of many strategies needed to constrict the economy is to ‘impose stricter and more precautionary environmental rules on land use and development, such as prohibiting “intensive” land use and other forms of unsustainable production/manufacture.’<sup>88</sup>

84 Mona L Hymel, ‘Consumerism, Advertising and the Role of Tax Policy’ (2000) 20 *Virginia Tax Review*.

85 Guth, ‘Law for the Ecological Age’, (2008).

86 Daly, *Steady-State Economics: Second Edition with New Essays*, Daly, *Beyond Growth*.

87 Guth, ‘Law for the Ecological Age’ (2008).

88 Alexander, ‘Earth Jurisprudence and the Ecological Case for Degrowth’ (2010).

This point is an important one: at present, in our ‘unlimited’ society, any goods and services are allowed to be made and consumed, provided they do not cause direct harm to human health. Society does not differentiate or place value on the production or consumption of goods based on their overall impact on the environment or overall value to society. Harsch notes that our current ‘unlimited’ economic and political system places no greater emphasis on plastic used for medical purposes than it does on plastic used for children’s toys.<sup>89</sup> This supports arguments posed by environmental ethicists, that markets are ‘morally neutral’ and can be inadequate mechanisms for making important ethical and value-based choices.<sup>90</sup> But if limits on human consumption are accepted, priorities and choices about what is made and consumed will need to be made in more appropriate ways.<sup>91</sup>

The absence of values in the governance of production and consumption of material resources contrasts sharply with other fields of environmental law and management, particularly those relating to the protection of endangered habitat and endangered species, where non-economic factors such as social values are openly acknowledged as playing a critical role in shaping management strategies. For example, the management of South Africa’s elephant population is acknowledged as being ‘a lightning-rod for a whole range of associated values-based policy issues’.<sup>92</sup> Elephant management strategies combine scientific information and legal and policy considerations with consultative and participatory decision making processes, to ensure society’s values and ethical concerns are weighed up and factored into key decisions about the long term management of elephant populations.<sup>93</sup>

It could be argued that consumption and production also have such significant impacts on the environment, that legal and governance structures should be put in place to ensure processes exist that can address social and environmental values, in order to prioritise production and consumption that is environmentally beneficial or benign.

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89 Harsch, ‘Consumerism and Environmental Policy: Moving Past Consumer Culture’ (1999).

90 For example, see Sandel *A New Citizenship: Markets and Morals* (Sandel (dir) and Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment*.

91 For example, Sagoff would argue that we need to use ‘citizen values’ to make such choices, rather than ‘consumer preferences’. See Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment*.

92 South African Department of Environmental Sciences and Philosophy, <<http://www.envsci.ceu.hu/projects/elephant-management-a-scientific-assessment-for-south-africa>> (accessed 1 June 2011).

93 See for example Rj Scholes and Kg Mennell, *Elephant Management: A Scientific Assessment of South Africa* (Johannesburg: Witwatersrand University Press, 2008). Chapter 9 is dedicated to ethical considerations.

### 3 *Reversing the onus of proof for harm*

If we accept that human activity should be limited to fit within the productive capacity of the natural world and that we need to make choices about what gets produced and consumed, then part of this new paradigm for consumption and production would be reversing the onus of proof for environmental harm. Guth argues that if we accept, as ecological economists do, that we live in a ‘full world’, and that there are limits on the earth’s productive capacity and its capacity ‘to sustain ecological damage’, then our legal systems can no longer support limitless economic growth. Instead, the law must ‘incorporate new structures designed to restrain the total scale of ecological damage’.<sup>94</sup>

Guth proposes a specific new principle of law ‘that would promote the social imperative of maintaining an ecologically healthy, self-sustaining’ biosphere. He argues we need a new approach to property law if we are to move towards living within our ecological limits. He argues that current legislative and common law efforts to protect the environment are hampered by fundamental values (and laws that reflect these values) which support economic growth – and the rights of private owners – at the cost of social and environmental well being. He claims we need to create a tort of ‘contributing to environmental degradation’ which would put the burden of proof on those whose conduct may contribute to ecological degradation and allow standing to affected members of the community. In effect, it would mean proponents/economic actors would have to prove their activities were beneficial to society and that no other alternative existed. This contrasts with the legal onus today, which is on a plaintiff to prove special damage – damage greater than ‘general damage’. Finally, Guth argues we need to move away from cost-benefit analysis that only looks at the financial costs of an issue and does not (and cannot) reflect the value of environmental health; we need rules and structures that weigh up the cumulative impacts of industrial and other modern activity, and prevent or limit ecological damage.

While Guth focuses on the creation of a new tort, his overall argument supports the notion that if societies are to rethink their impact on the natural environment, and in particular, to create new frameworks for managing demand, we will need to shift from our current liberal emphasis on rights and freedoms and move towards a culture with ‘positive duties’; duties to care for the health of human societies and the earth.

This section has described some of the gaps in our current legal system regarding the management of consumption. It then set out a range of normative

<sup>94</sup> Guth, ‘Law for the Ecological Age’ (2008) 436.

suggestions for the role that law might play in managing consumption more effectively than is currently done. However if concepts such as scale, the imposition of values in production and consumption, and the reversal of the onus of proof are to work together to effectively manage consumption, a broader legal and policy framework is needed: one that creates an underpinning philosophical commitment to limiting consumption to sustainable levels and which accepts, and creates opportunities for, specific policy and regulatory approaches to reduce consumption of natural resources. This paper suggests that Earth jurisprudence could be used to guide the creation of such a framework and the final part of this paper begins to analyse how.

#### IV EARTH JURISPRUDENCE AND SUSTAINABLE CONSUMPTION

Earth jurisprudence challenges the legal and governance structures which underpin modern industrial society, suggesting that their anthropocentric origin and approach have created a body of law that treats humans as separate from, and superior to, the natural world, and which treats the natural world as a collection of objects that exist simply for humanity's exploitation. Earth jurisprudence proposes instead an eco-centric approach to human legal systems. Eco-centric literally means 'earth centred' and includes human beings, non-human life and inanimate objects. It can be contrasted with anthropocentrism, which is human centred and biocentrism, which is life centred.<sup>95</sup> Eco-centrism acknowledges humanity's dependence and interconnectedness with nature, acknowledges the intrinsic rights of nature to exist and flourish and requires human societies to fit within the limits of the natural world.

While many of the key elements of Earth jurisprudence have been debated in environmental philosophy and human ecology, its direct application to law and legal theory was only proposed by cultural theologian Thomas Berry in November 2001.<sup>96</sup> As a result 'it is still in a very early stage of conceptual development and there is considerable space for the growth of a robust and intellectually satisfying theory.'<sup>97</sup>

This Part of the paper suggests that aspects of Earth jurisprudence are relevant to creating a framework for sustainable consumption. It argues that by using an Earth jurisprudence framework, we can address the 'gaps' in the legal system and take up the normative suggestions set out in Part 2 of this paper. It also helps pave the way for challenging, and transforming, the economic, socio-cultural and ideological barriers outlined in Part 1 of this paper. It then

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95 Burdon, 'Earth Jurisprudence: Private Property and Earth Community' (2011).

96 Ibid.

97 Ibid.

examines two methods for ‘implementing’ Earth jurisprudence and suggests future research which could develop these methods further.

### A *What elements of earth jurisprudence are relevant to creating a framework for guiding sustainable consumption?*

The origins of Earth jurisprudence lie in the work of Thomas Berry,<sup>98</sup> who proposed that the Great Work of our time is to ‘transition from a period of human devastation of the Earth to period when humans would be present to the planet in a mutually beneficial manner.’ His work, together with Cormac Cullinan’s ‘Wild Law’,<sup>99</sup> have created the conceptual framework for Earth jurisprudence and wild law.

There are three interlinked elements of Earth jurisprudence that are most relevant to creating a framework for guiding sustainable consumption: acknowledging the existence of a ‘great jurisprudence’ or ‘higher laws’ of the universe that place limits on human activities; the need for an eco-centric instead of anthropocentric approach to law and the existence of rights for nature.

**The ‘great jurisprudence’.** Thomas Berry suggested that our legal system must evolve to recognise the ‘universe as the primary law giver’. This idea is radical for the legal systems of modern industrial societies, as they have rejected any authority higher than the law of man since the secularisation of western law from religion several hundred years ago. Cormac Cullinan refers to the laws of nature as the ‘Great Jurisprudence’, which set the ‘design parameters within which those of us engaged in developing Earth Jurisprudence for the human species must operate’.<sup>100</sup>

Acceptance of the existence of a ‘great jurisprudence’ would mean a transformation of human governance systems. It would require that human societies develop a deeper and more intimate understanding of ‘nature’, so they can structure all human endeavours to fit within the bio-physical laws of the natural world and it would also give a new focus to key institutions. For example Berry notes that ‘our educational institutions (would) need to see their purpose not as training personnel for exploiting the Earth, but as guiding students toward an intimate relationship with the Earth’.<sup>101</sup> The logical outcome of accepting the existence of a ‘great jurisprudence’ is that limits would need to be set on human activity so that our ‘evolutionary companions’

98 Thomas Berry, *The Great Work: Our Way into the Future* (Bell Tower, 1999).

99 Cullinan, *Wild Law* (2003).

100 Ibid.

101 Berry, *The Great Work: Our Way into the Future*.

and natural systems are able to thrive and continue on their evolutionary path. Cullinan points out that wild law is not about regulating the natural world, but regulating human activity.<sup>102</sup>

**Eco-centrism.** Thesecond element of Earth jurisprudence relevant to sustainable consumption is the need to shift our legal focus from an anthropocentric to an eco-centric or ‘earth centred’ one. Thomas Berry, consistent with many other environmental philosophers,<sup>103</sup> saw anthropocentrism as the deepest cause of the present environmental crisis, and described it as ‘a mode of consciousness that has established a radical discontinuity between the human and other modes of being’. He argued that this attitude is shared by all four of the fundamental establishments that shape human society: governments, corporations, intellectual and religious dimensions of society.<sup>104</sup>

The ability of humans to move away from an anthropocentric view is contested,<sup>105</sup> and it has been noted that ‘most advocates of eco-centrism fail to give a comprehensive account of what an earth-centred ethic means’.<sup>106</sup> Burdon suggests the concept of the Earth community advanced by Berry is one answer to this question, as it is ‘the interacting complexity of all Earth’s components, entities and processes, including the atmosphere, hydrosphere, geosphere, biosphere and mindsphere’. Burdon notes that for this concept of ‘Earth community’ to receive broad acceptance and replace anthropocentrism as the framework for human ethics, further work is required in its conceptual development.

**Rights for nature.** If an Earth-centric focus is accepted, then it is logical that all elements of the natural world have rights – an intrinsic right to exist and to continue their evolutionary journey and development. At its essence, Berry argued that rights emanate from life, not human legal constructs. He and others have challenged the fact that modern law gives extensive legal rights to fictional entities such as corporations, but no rights to other species. The analysis and debate about extending rights to nature is complex and important, but too extensive to adequately cover here.<sup>107</sup> The literature is well covered

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102 Cullinan, *Wild Law*.

103 See for example Arne Naess, *Ecology of Wisdom: Writings by Arne Naess*, Alan Drengson and Bill Devall (eds) (Counterpoint, 2008); Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993).

104 Carolyn Merchant, *The Death of Nature: Women, Ecology and the Scientific Revolution* (Harper and Row, 1980).

Peter Burdon, ‘The Rights of Nature: Reconsidered’ (2010b) 49 *Australian Humanities Review*.

105 For example, see William Grey, ‘Anthropocentrism and Deep Ecology’ *Australasian Journal of Philosophy*, (December 1993) 71(4).

106 Peter Burdon, ‘Earth Jurisprudence: Private Property and Earth Community’ (2011).

107 See for example: Stone, *Should Trees Have Standing?: Law, Morality, and the Environment*, Cullinan, *Wild Law*, Cormac Cullinan, ‘Earth Jurisprudence: To Colonisation to Participation’, in

in Burdon's work<sup>108</sup> and practical examples of giving rights to nature can be seen in the work of groups such as the Community Environmental Legal Defence Fund.<sup>109</sup> This element of Earth jurisprudence and its relationship with sustainable consumption cannot be dealt with adequately in the scope of this paper, but deserves more attention in future research.

### 1 *How elements of Earth jurisprudence relate to sustainable consumption*

Adoption of an Earth jurisprudence approach to law and governance would create a radically different approach to human consumption and production. In terms of the first two elements discussed above – acceptance of the existence of a 'great jurisprudence' and adoption of an eco-centric approach to law – it would lead to two initial 'steps' along the path of creating a new framework for managing demand: (i) the need to **increase knowledge** of the laws governing the natural world and (ii) the need to use that knowledge to set **limits on human activities, including consumption and production**.

### B *Increasing knowledge and understanding of the natural world – understanding the 'higher laws of the universe'*

Accepting that the 'laws of the universe' set parameters for human laws would mean that laws and positive ethical constructs would need to be created that constrain human consumption so that it fits within, and does not interfere with or inhibit, the production cycles of the natural world. To do this, we would first need to improve our understanding and respect of how the natural world works, and how our consumption and production impacts on natural processes and other members of the earth community.

As noted by Berry and others, to live within the laws of the universe, societies would need to develop a deeper understanding of, and connection with, the natural world, especially their local and regional ecosphere or earth community. This enhanced knowledge and reconnection could take place through personal philosophical, cross cultural and spiritual processes, and it would also need to take place at an institutional and societal level. The promotion of such reconnection at a society-wide level could go in some way to challenging the dominant consumer culture outlined in Part 1 of this paper.

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Worldwatch Institute (ed), *State of the World 2010. Transforming Cultures: From Consumerism to Sustainability* (W W Norton and Company, 2010), Cormac Cullinan, 'Justice for All' (2002) 216 Sept/Oct *Resurgence Magazine*, Cullinan, 'If Nature Had Rights, What Would We Have to Give Up?' (available at <<http://www.orionmagazine.org/index.php/articles/article/500>>).

108 For an excellent summary of the rights for nature literature see Burdon, 'The Rights of Nature: Reconsidered' (2010).

109 See <<http://www.celdf.org/>>

At the institutional level, a range of scientific, cross-cultural, economic, policy and decision making tools could be explored and developed further, to ensure our consumption and production occurs not in a vacuum, but within an understanding of the laws of the natural world. Such tools include those that assist the understanding of carrying capacity of natural environments and the limits of natural production cycles, and methodologies for understanding what local catchments and regional biospheres need in order to flourish. The Earth jurisprudence literature also promotes engaging with indigenous knowledge in order to develop and enrich western approaches to understanding the natural world.<sup>110</sup>

By realigning institutional and policy objectives to understand and set clear goals for sustainable consumption and production, we would finally be able to answer the key question of ‘how much consumption is enough’. This would be determined not by economic principles or lifestyle preferences, but by the actual capacity of the natural world to provide for our needs and the needs of other members of the Earth community. The deeper understanding of natural systems in a local catchment would provide information for setting goals about human consumption of – and impact on – water, biodiversity, timber, minerals and so on. This could go some way to addressing one of the shortfalls in western legal and governance systems identified in Part 2 – that is, the lack of clear goals or understanding of what we’re aiming for. By first acknowledging the need for limits, and developing our knowledge of what’s ecologically healthy at the local, regional and national levels, we would be able to set the parameters that our communities and societies could aim to live within.

## C *Setting limits*

In the sustainable consumption and production context, once the laws of the natural world are accepted as the ‘primary law giver’, and governance structures are realigned to support the attainment of knowledge about the limits of the natural world, the key issue then would be *how to set limits on human consumption and production*. This would need a framework that sets broad policy parameters, facilitates dialogue between scientific information and deliberative or citizen-centred decision making processes and which can draw on a range of different regulatory approaches.

### 1 *Broad policy parameters and decision making processes*

Accepting that human activities are limited by the laws of the natural world would assist with a paradigm shift away from the pro-growth economic

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<sup>110</sup> For example, Cullinan, *Wild Law*.

ideology discussed in Part 1 of this paper. Policy frameworks could accept the ‘Steady State’ as a policy objective, and economic structures would focus on post-growth strategies to constrict economic behaviour to environmentally healthy and socially just levels.<sup>111</sup> Legal systems would need to play a vital role in setting limits to total scale. As stated by Daly, governments should set the scale or the upper limits of the total resources allowed to be used, while markets and other mechanisms would distribute resources within that upper limit.<sup>112</sup>

While Daly and other ecological economists focus on market mechanisms for distributing natural resources within the upper limits set by law, other mechanisms would also need to be put in place to assist the prioritisation of which goods and services could be produced and consumed. As noted in Part 2 of this paper, mechanisms would need to be created that enable social and environmental values to be explicitly discussed, so that our society could make choices about what was allowed and not allowed to be made or consumed. The express provision for the articulation of ‘values’ to inform management strategies already has a ‘precedent’ in many existing wildlife management regimes, as noted in Part 2 of this paper. This issue also supports arguments made by environmental ethicists that decision making processes shouldn’t be left to economic principles alone, but need to be based on broader social values and citizen participation.<sup>113</sup>

## 2 *Regulating to reduce consumption*

Once broader parameters are set for understanding and working within nature’s limits, a range of more detailed regulatory options would be available for law makers. Laws that encourage or mandate the ‘switching’ of environmentally damaging goods and services for more benign ones would be continued, but *a greater emphasis would be placed on limiting consumption of specific activities in specific catchment or bio-regional areas*. Sector specific laws that already set limits – such as the fisheries, plastic bags and water regulation regimes mentioned in Part 2 – offer a starting point for further research on how to regulate for reduced consumption.

Acceptance of an eco-centric world view would mean that consumption and production could not operate in the economic vacuum that it operates in today. The impacts of consumption and production on other elements of the Earth community would have to be taken into account before any such

111 For example, see Alexander, ‘Property Beyond Growth: Toward a Politics of Voluntary Simplicity’, (University of Melbourne, 2011).

112 Daly, *Steady-State Economics: Second Edition with New Essays*.

113 Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment*.

activity was permitted, to ensure that human consumption did not interfere with the functioning of the natural world. Regulatory approaches to managing consumption would take in much broader consideration of factors than done at present. As noted in Part 1 of this paper, while liberalism allows regulatory interference on anthropocentric grounds (eg where there is a direct threat or benefit to humans) it typically resists interference with individual rights purely on environmental grounds. An eco-centric approach would allow a broader range of considerations and would require a shift towards positive duties to nurture non-human elements of the natural world.

Within this broader framework for limiting human consumption and taking into account the wellbeing of non-human members of the earth community, laws could create obligations for state and non-state entities to justify the impacts of their activities. Existing tools such as Environmental Impact Assessments (EIAs) would be redesigned so that the onus of proof falls on development proponents to justify the *environmental benefits* of their goods or services, not just mitigate environmental harms. This builds on Guth's point that the onus of proof needs to be reversed to reflect the 'full' status of the natural world. Private agents, such as corporations might be legally required to furnish not just environmental reports but to produce evidence that their activities are beneficial to the natural ecosystems on which they impact.

This simple, initial analysis shows how using an Earth jurisprudence framework can address the gaps in the current legal system outlined in Part 2. It would create an overarching framework for focussing on and managing demand, enable human societies to set limits on their activities, build value-based decision making strategies and demand a reversal of the onus of proof for environmental harm. Indeed, if one subscribes to the need for human laws to fit within the 'great jurisprudence' or the boundaries and laws of the natural world and the belief that our laws must be eco-centric, then the 'gap' in legal and governance structures that currently exist around managing demand could be 'filled' with laws and ethical constructs that limit human consumption. These laws and ethical constructs would have to be based on an in depth understanding of the natural world and importantly, a greater emphasis on duties to care for the environment, rather than rights to protect human interests.

#### D *How do we apply earth jurisprudence?*

If an Earth jurisprudence approach is adopted, how do we use its key concepts to begin transforming legal and governance systems to an eco-centric approach? As a burgeoning legal theory, much work obviously needs to be done to flesh out many of the key concepts of Earth jurisprudence. In this part

of the paper, two approaches to developing Earth jurisprudence, and their implications for creating guiding frameworks for sustainable consumption, are briefly introduced. The first is by Elizabeth Rivers, the second is by Cormac Cullinan.

### 1 *Rivers' Model – Empire vs Earth community*

The first approach is a framework created by Elizabeth Rivers<sup>114</sup> which analyses the links between myths, values, jurisprudence and laws ('Rivers' model'). She uses this model to produce two very different scenarios. The first she calls the 'Empire Model', which reflects the current mode of thinking and how it affects the laws that are made in western industrialised societies. The model starts with the *cultural myths* held in mainstream society (ideas of unlimited economic growth; the illusion of independence from the biosphere; the belief in individualism above collective values and the myth of human superiority) and how these myths create *societal values* (anthropocentrism, fear of scarcity, the need to accumulate, competitiveness, lack of resilience and flexibility or 'brittleness'). These values in turn shape concepts in *jurisprudence*, such as the fact that our philosophy of law doesn't recognise any higher authority than itself and holds an intellect driven or 'pseudo' rationality. These theories of law in turn shape the types of *laws* created in our culture – for example, laws that give humans and corporations rights, but do not give rights to other members of the Earth community.

Rivers then contrasts the 'Empire Model' with the 'Earth Community' model. Its cultural myths are that the world is made up of a community of subjects, not a collection of objects. The values in such a model include: a greater sense of interconnectedness, sufficiency rather than fear and accumulation and security gained from relationships and mutual support rather than 'products'. These values would in turn shape a very different jurisprudence from that which exists in the Empire Model. The theory of law would accept that nature is the primary law giver, not human created laws; would accept and live within ecological limits and would look to indigenous cultures as offering a model for creating a mutually beneficial relationship with the natural world.

Rivers asks: what kind of future is likely to be created from each model? She suggests the Empire Model can only offer more of the same – destruction of the natural world and alienation of humans from their physical and spiritual home. The Earth Community model in contrast, offers a different future, where human relationships with the natural world are transformed and human culture can live sustainably within the natural limits of the world.

114 Elizabeth Rivers, 'What Is Earth Jurisprudence? From Empire to Earth Community', *Wild Law: Australia's First Earth Jurisprudence Conference* (Adelaide, 2009).

An important element of this model is Rivers' claim that the links between myths, values, jurisprudence and laws operate and evolve via a two way flow. Not only do myths and values shape jurisprudence and laws, the practical operation of laws can change jurisprudence, and in turn change the values and myths held in a society. Rivers' model is important to this paper for two key reasons: it highlights the relationships between ideals and action, and argues that **practical reform of existing laws can play a part in shifting the values and myths held by a society.**

## 2 Cullinan's 'flashes' of wild law

The second approach to developing Earth jurisprudence is Cormac Cullinan's concept of 'flashes' of wild law. This concept can be used in conjunction with Rivers' model to help create a practical approach to developing Earth jurisprudence and to progressing the development of a framework for sustainable consumption. In his book 'Wild Law: A Manifesto for Earth Justice', Cullinan suggests that 'in addition to developing a vision of Earth jurisprudence, we can also begin to work on changing our existing governance systems from within' and he suggests that there are already 'a few symptoms of wildness breaking out in the world's governance systems'. However he says that 'most legal provisions and other governance mechanisms that could be seen as reflecting Earth jurisprudence have almost certainly not come about as a result of the any conscious desire to implement a new Earth-centred jurisprudence'<sup>115</sup>, but with a little practice you can 'start to recognise flashes of (wild law) even in our current legal and political systems'<sup>116</sup>.

It is this idea of 'flashes' of wild law that is of relevance to this paper. In the context of sustainable consumption, this paper has argued that our current legal system lacks a framework for managing demand or limiting human consumption levels. However in Part 2 it was noted that there are rare examples of 'stand alone' regulatory regimes that have been created to limit consumption of sector specific resources; for example commercial and recreational fishing quotas; bans and taxes imposed on plastic bags and restrictions placed on urban water consumption. In light of Cullinan's analysis, it could be argued that these regulatory regimes offer 'flashes' of wild law relating to sustainable consumption which should be further researched, and key findings used to demonstrate how laws can be used to limit and manage human consumption of natural resources.

In summary then, we can use Cullinan's ideas about 'flashes' or examples of wild law as a basis for building elements of Earth jurisprudence. We should

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115 Cullinan, *Wild Law*, 189

116 *Ibid*, 32–33.

examine and understand such laws and then work to spread understanding and application of such approaches so that positive, practical law reform takes place that sets limits on human consumption. Using Rivers' model, such laws could in turn begin shaping and changing the values and myths our society has about unlimited consumption, including current liberal views that individual rights cannot be impeded on environmental grounds (as discussed in Part 1). Indeed, further research of these 'flashes' of wild law may show that many communities are ready now, to accept limitations on their consumption habits, in order to care more fully for the natural world – and this may play a part in challenging the role of consumption in our socio-cultural systems as well. It is arguable that these 'flashes' of wild law should be seen as positive steps which are moving our legal system towards accepting its role in setting limits on human consumption.

## V CONCLUSIONS

At present, the barriers to reducing consumption of natural resources in western industrialised societies are significant. Due to the pro-growth belief system underpinning industrial societies and the centrality of consumption to our economic and political systems, our legal system is reluctant to set limits on many forms of human activity and as argued in this paper, lacks the necessary frameworks for reigning in demand.

Earth jurisprudence can fill this gap in our existing legal system and offer a framework that can: (i) build philosophical acceptance of placing limits on human consumption and (ii) inform the creation of specific strategies to reign in and manage consumption over the long term. The fundamental elements of Earth jurisprudence – including acceptance of the natural world as the primary law giver, adopting an eco-centric approach to law and giving rights to nature – would facilitate a new, duty-driven approach to environmental law and governance.

A practical way to start 'building' an Earth jurisprudence of sustainable consumption, is to combine Cullinan's ideas of 'flashes' of wild law with Rivers' model of two-way flow between myths and laws. A number of regulatory regimes that set limits on human consumption were noted earlier in this paper. These regimes – commercial and recreational fishing quotas; bans and taxes imposed on plastic bags and restrictions placed on urban water consumption – could be categorised as 'flashes' of wild law, that is, laws that deliberately or inadvertently respect eco-centric interests. And although they are 'sector specific' and limited in their coverage, these regulatory regimes could be analysed in more depth, and used as building blocks for future

regulatory regimes designed to set limits on human consumption. Indeed, they may well be among the first examples of acceptance by human societies that we must set limits on our consumption and other activities, if we are to play a positive role in sustaining life (including our own) on this lovely green and blue planet of ours.