

New Zealand Journal of Public and International Law



VOLUME 13 ■ NUMBER 1 ■ JUNE 2015

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

THIS ISSUE INCLUDES CONTRIBUTIONS BY

Joshua Aird	Sir Geoffrey Palmer
Klaus Bosselmann	Nicole Rogers
Peter D Burdon	Nathan Ross
Joel Colón-Ríos	Greg Severinsen
Benjamin F Gussen	Linda Sheehan
Catherine J Iorns Magallanes	Gerald Torres
Gay Morgan	

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

NEW ZEALAND JOURNAL OF
PUBLIC AND INTERNATIONAL LAW

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2015

The mode of citation of this journal is: (2015) 13 NZJPIL (page)

The previous issue of this journal was volume 12 number 2, December 2014

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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New Zealand Journal of Public and International Law
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The New Thinking on Sustainability Conference at which preliminary versions of these articles were originally presented was made possible with the generous support of the German Australian Pacific Lawyers Association, the New Zealand Law Foundation and Victoria University of Wellington.



WILD LAW: A PROPOSAL FOR RADICAL SOCIAL CHANGE

Peter D Burdon*

To date, most authors writing Wild Law have focused on philosophy or proposing alternative or ideal laws. In contrast, this article seeks to understand why legal and governance systems around the world have failed to respond to the climate crisis. It also explores the material conditions necessary for enacting a broad social change project. The objective of the article is to initiate a conversation with advocates of Wild Law about how we can move beyond theory and engage in a collaborative project of ethical praxis.

I INTRODUCTION

In his infamous lectures on Hegel's *Phenomenology of Spirit*, the noted philosopher JM Bernstein argued that good academic scholarship always emerges from a crisis. By contrast, Bernstein argued that bad scholarship is motivated not by crisis, but by a puzzle.¹ It is because of the nature and importance of the crisis that good scholarship is read and reread over successive generations. Hegel for example was grappling with the crisis of objective knowledge;² Marx instructs us on the crisis of capitalism;³ Mary Wollstonecraft opens our eyes to the patriarchal foundations of our society;⁴ and Rachel Carson opened the world's eyes to the looming environmental crisis.⁵ The specific problem addressed by these (and other) great authors may have varying importance to successive generations, but their authorial urgency and ability to tap into and articulate a latent social thought remains instructive.

* Senior Lecturer, Adelaide Law School (peter.d.burdon@adelaide.edu.au). This article was written while the author was a visiting scholar at the University of California Berkeley Center for Law and Society.

1 JM Bernstein "Phenomenology of Spirit, Introduction" (27 September 2006) The Bernstein Tapes <www.bernsteintapes.com>. Bernstein is directing his remarks specifically to philosophy.

2 GWF Hegel *Phenomenology of Spirit* (Oxford University Press, Oxford, 1977).

3 Karl Marx *Capital: Volume 1: A Critique of Political Economy* (Penguin Classics, London, 1992).

4 Mary Wollstonecraft *A Vindication of the Rights of Woman and A Vindication of the Rights of Men* (Oxford University Press, Oxford, 2009).

5 Rachel Carson *Silent Spring* (Houghton Mifflin Company, Boston, 2002).

Today there are (too) many crises that warrant serious attention and action. Of course, many of them are also interrelated. For example there is a clear relationship between income inequality and public health⁶ or between racism and environmental degradation.⁷ However, at this historical moment, I contend that because of the dual risk that it poses to human civilization and ecological integrity, climate change stands at the vanguard as the most urgent crisis of our time.⁸

While some authors working within the framework of Wild Law have written on climate change, the majority of this literature has focused primarily on philosophy or proposing alternative or ideal laws.⁹ I would like to offer something different to this conversation. Specifically, I am interested in understanding why legal and governance systems around the world have failed to respond to the climate crisis. I am also interested in exploring the material conditions for enacting the radical social change that climate change demands. Obviously, this second point is a huge undertaking and in this article I only intend to sketch the outline of an alternative theory of social change.

While this analysis is a continuation of my writing on Wild Law, it is informed primarily by political science, critical theory, the relationship between law and social movements, and studies into the political and power dimensions of law. It is written primarily for academics that understand the necessary (indeed inherent) relationship between ethics and praxis. I also write in the hope that as advocates of Wild Law we can support each other to engage in a collaborative project of ethical discourse and resistance. In this respect, this article is a continuation of what Thomas Berry called "The Great Work", that is:¹⁰

... to carry out the transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner.

6 Norman Daniels, Bruce Kennedy and Ichirō Kawachi *Is Inequality Bad For Our Health?* (Beacon Press, Boston, 2000).

7 Robert D Bullard *Dumping in Dixie: Race, Class, and Environmental Quality* (3rd ed, Westview Press, Boulder, 2000).

8 I have also written elsewhere about the potential for multinational climate negotiations to enhance the division between rich and poor countries. See Peter Burdon "The Road to Paris: Climate Barbarism or Ethical Action?" (22 May 2014) ABC Environment <www.abc.net.au>.

9 See for example Nicole Rogers "Where the Wild Things Are: Finding the Wild in Law" in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, Adelaide, 2011) 183; and Glenn Wright "Climate Regulation as if the Planet Matters: The Earth Jurisprudence approach to Climate Change" (2013) 3 EELJ 33.

10 Thomas Berry *The Great Work: Our Way into the Future* (Broadway Books, San Francisco, 1999) at 3.

II THE RADICAL DEMANDS OF CLIMATE CHANGE

It is unnecessary for me to give a detailed exposition of climate science and the emerging scientific consensus on what a significant rise in global temperatures would mean for the planet.¹¹ However, I do want to explicitly identify the facts and assumptions that underlie my portrayal of climate change as a radical demand that requires thinking beyond the narrow limits of liberal reformism.

First, anthropogenic climate change is real¹² and the vast majority of responsibility lies with a small number of multinational corporations.¹³ In fact, a recently study by Richard Heede suggests that approximately 90 companies, including Exxon Mobile, Chevron and BP, were responsible for two-thirds of emissions since the industrial revolution.¹⁴ Research like this lends support to the view that we do not live in the "Anthropocene"¹⁵ but in a period of exploitation and violence¹⁶ perpetrated by a relatively small number of people in the name of capital accumulation.¹⁷

Secondly, we can emit a total of approximately 886 gigatonnes of carbon dioxide into the atmosphere in the first half of the century and have an 80 per cent likelihood of staying below two degrees Celsius of warming.¹⁸ Emissions over and above this planetary boundary put life on Earth in great jeopardy. Best estimates are that emissions have reached 400 gigatonnes for the period 2000–

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- 11 See in particular the Intergovernmental Panel on Climate Change *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, New York, 2014). For an excellent summary of recent science see Clive Hamilton *Requiem for a Species: Why We Resist the Truth about Climate Change* (Allen & Unwin, Sydney, 2010).
 - 12 Intergovernmental Panel on Climate Change *Climate Change 2014: Synthesis Report* (Cambridge University Press, New York, 2014). The report states at 5: "It is extremely likely [95 per cent confidence] that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in [greenhouse gas] concentrations and other anthropogenic forcings together."
 - 13 Suzanne Goldenberg "Just 90 companies caused two-thirds of man-made global warming emissions" *The Guardian* (online ed, London, 20 November 2013).
 - 14 Richard Heede "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010" (2014) 122 *Climatic Change* 229.
 - 15 Paul Crutzen, the Nobel Prize winning chemist, described the period from the industrial revolution to the present as the "Anthropocene"; Paul J Crutzen and Eugene F Stoermer "The 'Anthropocene'" (2004) 41 *Global Change Newsletter* 17. If adopted at the 35th International Geological Congress in 2016, the term "Anthropocene" would serve to mark the significant impact of human activity on the Earth's ecosystem.
 - 16 Rebecca Solnit "Call climate change what it is: violence" *The Guardian* (online ed, London, 7 April 2014).
 - 17 Dipesh Chakrabarty "The Climate of History: Four Theses" (2009) 35 *Critical Inquiry* 197 at 216.
 - 18 Malte Meinshausen and others "Greenhouse-gas emission targets for limiting global warming to 2 °C" (2009) 458 *Nature* 1158 at 1161. Angela Merkel originally proposed a two degree Celsius threshold in 1995 when she was Minister for the Environment for the German government. Note however that there is no scientific reason for proposing two degrees Celsius rather than 1.9 or 2.3; Bill McKibben *Oil and Honey: The Education of an Unlikely Activist* (Times Books, New York, 2013) at 143.

2012 and research from the Carbon Tracker Initiative indicates that corporations have in their reserves an additional 2,860 gigatons ready to burn.¹⁹ Commenting on this report, Bill McKibben notes:²⁰

We have five times as much oil and coal and gas on the books as climate scientists think is safe to burn. We'd have to keep 80 [per cent] of those reserves locked away underground to avoid that fate. ... Yes, this coal and gas and oil is still technically in the soil. But it's already economically aboveground – it's figured into share prices, companies are borrowing money against it, nations are basing their budgets on the presumed returns from their patrimony.

It is circumstances like this that have compelled an increasing number of climate scientists to openly state that limiting global warming to two degrees Celsius is an unrealistic and perhaps utopian goal. Many climate scientists have suggested that an increase of three or four degrees Celsius is a realistic projection.²¹ Such an increase would be catastrophic for life on earth. Best projections paint a picture of Earth characterised by social chaos, environmental refugees, resource wars, system collapse and mass loss of life. For example a 2012 report written for the World Bank by the Potsdam Institute for Climate Impact Research and Climate Analytics concluded that if temperatures rise to four degrees, the human species will cross "critical social system thresholds" and "existing institutions that would have supported adaptation actions would likely become much less effective or even collapse".²² The report concludes:²³

[T]here is also no certainty that adaptation to a 4°C world is possible. A 4°C world is likely to be one in which communities, cities and countries would experience severe disruptions, damage, and dislocation, with many of these risks spread unequally. It is likely that the poor will suffer most and the global community could become more fractured, and unequal than today. The projected 4°C warming simply must not be allowed to occur – the heat must be turned down.

Thirdly, to have even a small hope of limiting warming to two degrees, global emissions must peak by the end of 2015, with rich countries starting to cut their emissions immediately and pushing them to 25–40 per cent below 1990 levels by 2020.²⁴ Like many other commentators, I do not believe

19 Carbon Tracker Initiative *Unburnable Carbon 2013: Wasted Capital and Stranded Assets* (Carbon Tracker and The Grantham Research Institute, London, 2013) at 13–14.

20 Perhaps the most convincing analysis was presented by Bill McKibben "Global Warming's Terrifying New Math" *Rolling Stone* (online ed, New York, 19 July 2012).

21 Hamilton, above n 11, at 73.

22 Potsdam Institute for Climate Impact Research and Climate Analytics *Turn Down the Heat: Why a 4°C Warmer World Must be Avoided: A Report for the World Bank* (The World Bank, Washington, 2012) at xviii.

23 At xviii.

24 McKibben, above n 18, at 202. In contrast see Kevin Anderson and Alice Bows "A New Paradigm for Climate Change" (2012) 2 *Nature Climate Change* 639; and Kevin Anderson and Alice Bows "Beyond 'Dangerous' Climate Change: Emission Scenarios for a New World" (2010) *Philosophical Transactions of the Royal Society* 396. Anderson and Bows contend that industrialised countries need to immediately begin cutting

that such a reduction can be met with the array of modest carbon pricing or green-tech solutions that are advocated by industry and some environmental groups.²⁵ Rather, the most significant outcome of these proposals has been to place blame and responsibility on individual consumers and advance the agenda of the so-called "green economy", in other words, business as usual.

The drop in emissions required to limit warming to two degrees is virtually unprecedented since the industrial revolution. Lord Nicholas Stern observed in his 2006 report to the United Kingdom Government that cuts above one per cent per year have:²⁶

... historically been associated only with economic recession or upheaval, for example, the emissions reduction of 5.2% per year for a decade associated with the economic transition and strong reduction in output in the former Soviet Union.

Stern goes on to say that the "magnitudes of cuts suggest it is likely to be very challenging to reduce emissions by more than a few percent per year while maintaining strong economic growth."²⁷ Klein comments further:²⁸

Even after the Soviet Union collapsed, reductions of this duration and depth did not happen (the former Soviet countries experienced average annual reductions of roughly 5 per cent over a period of ten years). They did not happen after Wall Street crashed in 2008 (wealthy countries experienced about a 7 per cent drop between 2008 and 2009, but their CO₂ emissions rebounded with gusto in 2010 and emissions in China and India had continued to rise). Only in the immediate aftermath of the great market crash of 1929 did the United States, for instance, see emissions drop for several consecutive years by more than 10 per cent annually ... [b]ut that was the worst economic crisis of modern times.

Fourthly, without a concentrated push from civil society, our elected leaders are simply not going to act with the urgency required to reduce emissions.²⁹ This claim is evidenced by the failure of the international community to reach a binding multinational agreement to replace the Kyoto Protocol³⁰

emissions by approximately 10 per cent per year. Importantly, the authors also highlight that many projections for cutting emissions are selected on the basis of "political expediency" rather than on science.

25 See Naomi Klein "How Science is Telling us all to Revolt" *New Statesman* (online ed, London, 29 October 2013).

26 Nicholas Stern *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge, 2007) at 232.

27 At 232.

28 Klein, above n 25.

29 Hamilton, above n 11, at 76.

30 Burdon, above n 8.

and the lack of sufficient targets set by domestic governments.³¹ Indeed, greenhouse gas emissions approximately doubled in the first decade of the 21st century, despite economic slowdown from 2008.³² Global governance structures are simply too embedded within the power structures and coercive pressures of neoliberal growth economics to voluntarily make ethical emission reductions.³³ Even climate scientists like Kevin Anderson and Alice Bows have stated: "[t]oday, after two decades of bluff and lies, the remaining 2°C budget demands *revolutionary change to the political and economic hegemony*."³⁴

III THE FAILURE OF LAW TO RESPOND TO THE CLIMATE CRISIS

It is often said that law is a reflection of the society that it governs.³⁵ The climate crisis, perhaps more than any other issue, demonstrates the insufficiency of this description. Indeed, qualitative evidence demonstrates significant disparity between public opinion and public policy. For example, a 2013 poll showed that 57 per cent of people surveyed in the United States believed in human-caused climate change.³⁶ This figure can be compared to 86 per cent in Canada³⁷ and 87 per cent in

31 In Australia, pressure from industry led to the Rudd Government scrapping their election promise for a fixed price on carbon. See Stephanie Peatling "Kevin Rudd Confirms Government to Scrap Fixed Carbon Price" *The Sydney Morning Herald* (online ed, Sydney, 14 July 2013). The European Union has set targets of 40 per cent carbon cuts and 27 per cent share of renewables by 2030. This target has been heavily criticised by green groups for ignoring the urgency of the climate crisis; see Friends of the Earth Europe, CARE, Christian Aid, Oxfam and World Development Movement "Shameful European Climate Plans 'Ignore Science' and Fail the Poor" (22 January 2014) One World News <www.oneworld.org>.

32 Suzanne Goldenberg "UN: Greenhouse Gas Emissions Nearly Doubled in First Decade of 21st century" (11 April 2014) *The Guardian* <www.theguardian.com>.

33 Peter Burdon "The Project of Earth Democracy" in Laura Westra, Prue Taylor and Agnes Michelot (eds), *Confronting Collapse: What Agencies, Institutions and Strategies Are Needed for a Better World? How to Achieve Environmental Justice?* (Routledge, Oxon (UK), 2013) at 244.

34 Klein, above n 25, quoting Kevin Anderson. See also Anderson and Bows "A New Paradigm for Climate Change", above n 24; Anderson and Bows "Beyond 'Dangerous' Climate Change: Emission Scenarios for a New World", above n 24; and David Harvey *Seventeen Contradictions and the End of Capitalism* (Oxford University Press, Oxford, 2014) at 246–263.

35 See for example Kermit Hall *The Magic Mirror: Law in American History* (2nd ed, Oxford University Press, Oxford, 2008). See also Mauro Zamboni "The 'Social' in Social Law: An Analysis of a Concept in Disguise" (2008) 9(2) *Journal of Law in Society* 63 at 63: "The law and legal disciplines are not created in a vacuum. Though they appear 'natural' and almost self-evident, the law and legal disciplines always tend, to a greater or narrower extent, to mirror the reality in which they are born and in which they grow."

36 Lydia Saad "A Steady 57% in US Blame Humans for Global Warming" (24 March 2014) Gallup <www.gallup.com>. Note also that 70 per cent of people surveyed in the United States believed that there is solid evidence for global warming.

37 Jennifer Graham "Only 2 per cent of Canadians don't believe in climate change: poll" *The Globe and Mail* (online ed, Toronto, 15 August 2012).

Australia.³⁸ Alongside these figures, it is important to also note that only 40 per cent of Americans rank *dealing* with global warming high on their list of priorities for the President and Congress.³⁹ This number is extremely low. Indeed, half or more citizens in South Korea (85 per cent), Japan (72 per cent), Canada (59 per cent) and Australia (52 per cent) have called for immediate government action on climate change.

If law were truly a reflection of society, one would reasonably expect to see comparable domestic and international policy and legislation that matched majority opinion. This has not happened. Instead, we have witnessed representatives from governments just listing block progress on international climate negotiations,⁴⁰ a lack of leadership from developed countries in introducing legislation to tackle climate change,⁴¹ and in some countries, like Australia and Japan, the rollback of existing legislation that provided minimal government oversight on emissions.⁴²

Why has this occurred? This question cannot be answered from inside the apolitical description of law as a magic mirror of society.⁴³ Rather, we need some account of the way that money, power and ideology have influenced governance structures and the climate debate itself. Put otherwise, we need to understand law as a social relationship that is drenched in power politics.

38 Kristina Stefanova *Climate of the Nation 2013: Australian attitudes on climate change* (The Climate Institute, Sydney, July 2013).

39 Pew Research Center "Climate Change and Financial Instability Seen as Top Global Threats: Survey Report" (24 June 2013) <www.pewglobal.org>.

40 Burdon, above n 8.

41 "Report hails international progress on climate change laws" *The Guardian* (online ed, London, 27 February 2014). See also the report from Globe International: Michal Nachmany and others *The Globe Climate Legislation Study: A Review of Climate Change Legislation in 66 Countries* (GLOBE International and the Grantham Research Institute, London School of Economics, London, 2014). The report found that almost 500 laws to tackle climate change have been passed in countries which account for nine-tenths of global emissions. However, the report also notes that the majority of this initiative has been taken by developing countries and that current legislation is insufficient to avoid a 2 degrees plus rise in temperature.

42 "Report hails international progress on climate change laws", above n 41. Perhaps the starkest example was the attempt by the Abbott Government in Australia to remove the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and create a "one stop shop" for all environmental approvals to be governed by the States. For a detailed analysis see Rob Fowler "Federal Environmental Law under Siege – Green Tape or White Lies?" (paper presented to the Mahla Pearlman Oration, Federal Court of Australia, Sydney, 6 March 2014).

43 Justice Oliver Wendell Holmes Jr noted: "This abstraction called Law is a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been!" Oliver Wendell Holmes Jr *The Speeches of Oliver Wendell Holmes* (Cambridge University Press, Cambridge, 1891) at 17.

A theoretical examination into law might begin with the claim by Karl Marx and Friedrich Engels that "[t]he ideas of the ruling class are in every epoch the ruling ideas".⁴⁴ According to Marx and Engels, the ruling class can influence the way society functions because of their dominant influence on the processes of production, schooling, the media, religion, artistic expression, governance and law.⁴⁵ With respect to law, commentators have noted with increasing urgency and concern the inordinate influence that economic interests have on existing governance structures.⁴⁶ There are also countless studies⁴⁷ that illustrate that many of the top decision makers in western Governments have come from the executive suites and law offices with close ties to the financial sector.⁴⁸

While the relationship between government and private finance is particularly blatant and egregious today, the existence of the relationship itself is not new. Scholars affiliated with the critical legal studies movement⁴⁹ have illustrated the activist role that the emerging capitalist class played to shape laws to facilitate their own intensive use of the air, water and land.⁵⁰ For example Harvard historian Morton Horowitz notes that prior to the industrial revolution, property rights were underpinned by an "explicitly anti-development theory" that limited use-rights to the natural use of the land.⁵¹ The "natural use" idea of private property equated to strong trespass law, which barred all uncontested physical entities, and nuisance law that prohibited neighbours from indirectly impairing

44 Karl Marx and Friedrich Engels "The German Ideology" in Robert C Tucker (ed) *The Marx-Engels Reader* (WW Norton & Company, New York, 1972) 146 at 172.

45 At 172.

46 See for example Burdon, above n 33. See also Cynthia Kaufman *Getting Past Capitalism: History, Vision, Hope* (Lexington Books, Lanham, 2012); and Lawrence Lessig *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (Twelve Books, New York, 2011).

47 This is often referred to as the "revolving door". For an overview see Robert Bryce "Cheney's Multi-Million Dollar Revolving Door" (13 August 2000) Mother Jones <www.motherjones.com>; and Timothy J Burger "The Lobbying Game: Why the Revolving Door Won't Close" *Time Magazine* (online ed, New York, 16 February 2006).

48 Noam Chomsky *Government in the Future* (Seven Stories Press, Boston, 2005) at 50. Thus, Chomsky contends: "... [y]ou can't vote the rascals out, because you never voted them in, in the first place. The corporate executives and corporation lawyers ... remain in power no matter who you elect."

49 For an introduction see Roberto Mangabeira Unger *The Critical Legal Studies Movement* (Harvard University Press, Cambridge, 1986).

50 For a more detailed treatment of this literature see Peter Burdon *Earth Jurisprudence: Private Property and the Environment* (Routledge, London, 2014).

51 Morton Horowitz *The Transformation of American Law, 1780–1860* (Harvard University Press, Cambridge, 1977) at 32.

a neighbour's enjoyment of land.⁵² In the context of river systems, a landowner could not disturb the natural drainage of land or take water from a river to the extent that it "diminished its quality or quantity" for landowners downstream.⁵³ To encourage economic growth, parties within the sector set about "chang[ing] the meaning of landownership to facilitate ... intensive land uses".⁵⁴ Horwitz comments:⁵⁵

Law once conceived of as protective, regulative, paternalistic and above all, a paramount expression of the moral sense of the community had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power.

The private sector shaped laws that would permit them to use the land more intensely than had been practised by previous generations. For example, in the context of river systems, laws that protected flow were removed so that industries could draw more water and even introduce pollutants into the water system. Industrial parties required the right to emit smoke that degraded air quality, to make noise that scared livestock and on occasion to emit sparks which had the potential to set wheat fields on fire.⁵⁶ Waterwheels disrupted the migration of fish, tall buildings blocked sunlight.⁵⁷ Thus to adopt Marx's terms, the ruling class shaped the law to promote industrial development at the expense of communities, workers and even the environment.⁵⁸

Since the industrial revolution, our legal system has increasingly been shaped to facilitate economic growth and the concentration of power in the hands of a few.⁵⁹ While there has been a proliferation of environmental laws, planning regulations and multinational regulatory frameworks on climate change, the overall effectiveness of these initiatives has always been limited to the extent that they challenge or impede economic growth. More recent developments, such as international

52 Eric T Freyfogle "Property Rights, The Markets and Environmental Change in Twentieth-Century America" (Research Paper 00-01, Illinois Public Law and Legal Theory Research Papers Series, University of Illinois, 2001) at 4.

53 At 4.

54 At 4.

55 Horowitz, above n 51, at 253.

56 Freyfogle, above n 52, at 4.

57 At 4.

58 Horowitz, above n 51, at 254.

59 This is in spite of important recognitions gained by women and people of colour.

lobbying⁶⁰ from groups like the American Legislative Exchange Council⁶¹ and rulings from the United States Supreme Court regarding campaign finance laws,⁶² also give some indication of how the ruling class is tightening their control over law and governance.

Looking specifically at climate change, numerous books⁶³ have described in clear detail the influence of the fossil fuel lobby (what Clive Hamilton called the "Greenhouse Mafia"⁶⁴) on national climate change policy and the intimidation and bullying that it has brought against climate scientists.⁶⁵ Other studies have described the role of leading emitters such as the United States in actively blocking multinational climate negotiations and opposing efforts to help developing countries adapt to climate change.⁶⁶ For example, former lead United States climate negotiator William Nitze argues that his government single handedly prevented the 1992 United Nations Framework Convention on Climate

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- 60 While the American Legislative Exchange Council (ALEC) operates primarily inside the United States, it has also campaigned against plain cigarette packaging laws in Canada, Australia and the United Kingdom. See Jamie Doward "US Free Market Group Tries to Halt Sales of Cigarettes in Plain Packets in UK" *The Guardian* (online ed, London, 15 July 2012).
- 61 ALEC consists exclusively of multinational corporations who not only lobby politicians, but actually draft legislation. Perhaps the best-known example is the role of ALEC in drafting Florida's "Stand Your Ground Laws" which resulted in the shooting death of African American Teenager, Trayvon Martin. See Paul Krugman "Lobbyists, Guns and Money" *New York Times* (online ed, New York, 26 March 2012).
- 62 See in particular *Citizens United v Federal Election Commission* 558 US 310 (2010) and *McCutcheon v Federal Election Commission* 572 US No 12-536 (2014). For commentary see Peter Burdon "Citizens United and the Crisis of Democracy" (5 July 2012) University of Adelaide Public Law Blog <www.blogs.adelaide.edu.au>. See also "The Next Citizens United: McCutcheon Opens Floodgates for 1 Percent to Spend Millions on Campaigns" (3 April 2014) Democracy Now <www.democracynow.org>.
- 63 See Naomi Oreskes and Erik M Conway *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury, New York, 2010); James Hoggan *Climate Cover-Up: The Crusade to Deny Global Warming* (Greystone Books, Vancouver, 2009); Michael E Mann *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* (Columbia University Press, Columbia, 2013); and James Hansen *Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity* (Bloomsbury, New York, 2009).
- 64 Clive Hamilton *Scorcher: The Dirty Politics of Climate Change* (Black Inc Agenda, Melbourne, 2007). For further information on the influence of the fossil fuel lobby on Australian politics see Robert Manne "A Dark Victory: How Vested Interests Defeated Climate Science" *The Monthly* (online ed, Melbourne, 13 August 2012).
- 65 Raymond S Bradley *Global Warming and Political Intimidation: How Politicians Cracked Down on Scientists as the Earth Heated Up* (University of Massachusetts Press, Cambridge, 2011). See also Donald A Brown "Lessons learned from the climate change disinformation campaign about responsible scientific scepticism" in Laura Westra, Prue Taylor and Agnès Michelot (eds) *Confronting Ecological and Economic Collapse: Ecological integrity for law, policy and human rights* (Routledge, Oxon (UK), 2013) 81. Here Brown argues that corporate-sponsored programmes of disinformation should be regarded as a crime against humanity.
- 66 Amy Goodman and Juan González "Leaked Memo Reveals US Plan to Oppose Helping Poor Nations Adapt to Climate Change" (19 November 2014) Democracy Now <www.democracynow.org>.

Change⁶⁷ from having enforceable targets.⁶⁸ Nitze's argument has been supported by subsequent research from Donald Brown (also a former United States climate negotiator) who has rigorously tracked the interventionist role of the United States in climate negotiations since their inception in 1988.⁶⁹

These, and other examples, lend support to the description of law as a social institution that is shaped by the ruling class to further their varying (and sometimes conflicting) class objectives. However, the relationship between law and power can become overly simplistic if it focuses only on the structures and institutions of the ruling class. The power and ideological dimensions of law affect our lives at a much more intimate level and we need concepts that can articulate the role that law plays in shaping the subjectivity of those it governs and who come to internalise its central messages.⁷⁰

Michel Foucault used the term discourse⁷¹ to describe a structure of power relations that manifests in the social order as a result of a combination of attitudes, ideas, and institutions.⁷² He argues that specific discourses structure social reality and individual agents.⁷³ The precise subject matter of discourse is not fixed and one would expect it to vary across time and place. For example in his genealogical investigation into governmentality and biopolitical reproduction,⁷⁴ Foucault describes how the absolutist and centralised state that emerged in Europe during the sixteenth and seventeenth centuries was adapted to ruling class politics of laissez-faire. This transition was successfully

67 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 9 May 1992, entered into force 21 March 1994).

68 William A Nitze "A Failure of Presidential Leadership" in Irving M Mintzer and J A Leonard (eds) *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge University Press, Cambridge, 1994) 187 at 187.

69 See Donald A Brown *American Heat: Ethical Problems with the United States' Response to Global Warming* (Rowman & Littlefield Publishers, Lanham, 2002); and Donald A Brown *Climate Change Ethics: Navigating the Perfect Moral Storm* (Routledge, London, 2013).

70 Kaufman, above n 46, at 71.

71 Michel Foucault *The History of Sexuality* (Vintage, New York, 1980) vol 1 at 83.

72 With respect to law see Michel Foucault *Discipline & Punish: The Birth of the Prison* (2nd ed, Vintage Books, New York, 1995). See also Ben Golder and Peter Fitzpatrick *Foucault's Law* (Routledge-Cavendish, Abingdon, 2009); and Ben Golder (ed) *Re-reading Foucault: On Law, Power and Rights* (Routledge, Abingdon, 2014).

73 Foucault, above n 71, at 83.

74 This thought is developed most explicitly in Michel Foucault *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Picador, London, 2009); and Michel Foucault *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (Picador, London, 2010). See also Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago, 1991).

accomplished using the discourse of freedom⁷⁵ and required the ruling class to internalise limitations upon their autocratic powers and devolve the production of consensus to freely functioning individuals who also internalised notions of social cohesion around the nation state.⁷⁶

Today the dominant discourse that is shaping law is neoliberal capitalism. This discourse constructs the environment in anthropocentric terms: as a resource that exists for human use and exploitation. To adopt the terms of capital, the environment is "nothing more than a vast store of potential use values – of processes and things – that can be used directly or indirectly (through technologies) in the production and realisation of community values".⁷⁷ Nature has become, as Heidegger predicted, "one vast gasoline station"⁷⁸ and ecological processes are reduced to commensurable commodities. From this perspective, the notion of inherent value ("an exchange value that is inseparably connected with the commodity"⁷⁹) is a contradiction in terms.

The discourse of neoliberal capitalism is most explicit in legislation that supports deregulation, privatization of the commons and regressive tax policies.⁸⁰ However, as Wendy Brown reminds us, neoliberalism is also a "governing rationality that disseminates market values and metrics to every sphere of life and construes the human itself exclusively as *homo oeconomicus*".⁸¹ Neoliberal rationality works on us without our consent and despite our motivations, as well as being actively taken up by individuals in conscious ways. Law's perpetuation of neoliberal rationality plays a role in constituting citizens as subjects who think of themselves and one another primarily through the lens of neoliberalism. This lens constitutes us first and foremost as individuals competing in the global

75 Harvey, above n 34, at 281.

76 Foucault *The Birth of Biopolitics*, above n 74, at 20. See also Foucault, above n 71, at 88: "The history of the monarchy went hand in hand with the covering up of the facts and procedures of power by juridico-political discourse."

77 Harvey, above n 34, at 250. Harvey describes capital as a working and evolving ecological system. For an elaboration see David Harvey *Justice, Nature and the Geography of Difference* (Wiley-Blackwell, Oxford, 1996). See also Neil Smith *Uneven Development: Nature, Capital, and the Production of Space* (3rd ed, University of Georgia Press, Georgia, 2008).

78 Martin Heidegger *Discourse on Thinking* (Harper Torchbooks, London, 1966) at 50 as cited in Harvey, above n 34, at 250. The original passage reads: "The world now appears as an object open to the attacks of calculative thought, attacks that nothing is believed able any longer to resist. Nature becomes a gigantic gasoline station, an energy source for modern technology and industry."

79 Karl Marx, above n 3, at 126. See also David Harvey *A Companion to Marx's Capital* (Verso, New York, 2010) at 17–18.

80 See David Harvey *A Brief History of Neoliberalism* (Oxford University Press, Oxford, 2005). Note further that in practice neoliberalism is neither unified nor constant but differs across with respect to time and place: Jamie Peck *Constructions of Neoliberal Reason* (Oxford University Press, Oxford, 2010).

81 Wendy Brown *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press, Cambridge (Mass), 2015) at 176.

marketplace. That is, as capitalist desiring subjects.⁸² We reproduce this discourse through our everyday activities; for example through contracts we enter into, property choices that we make and the way we treat people.⁸³

This subjective dimension of power has led theorists to assert that there is no "outside" from beyond neoliberal discourse from which to critique or resist it.⁸⁴ If power is, as Foucault puts it, an "omnipresence",⁸⁵ if there is no outside from which to contest it,⁸⁶ then from where does the possibility of resistance arise? An equally pressing set of questions concern whether neoliberal rationality has reduced our capacity for resistance and for creating alternative social forms. Who is homo oeconomicus at the moment of its ascendancy over other notions of the human that stressed moral autonomy and popular sovereignty? What consequence has the loss of these values had on democratic processes and the radical imagination?⁸⁷ Has neoliberal rationality generated subjects that are unfree in novel ways?

These are important questions, but for now I only want to suggest that understanding the role that law plays in forming a specific type of subject is of critical importance for comprehending why we have failed to respond to the climate crisis. Neoliberal rationality has enclosed so much of the public sphere that it is increasingly difficult to imagine how people can live (let alone thrive) outside of its structures and ideological commitments.

Further, I also contend that a focus on the emotional life of a person and their biopolitical reproduction is important for thinking about how we might collectively respond to the climate crisis (and of course other pressing issues). Following Foucault, I contend that our resistance to power must

82 Kaufman, above n 46, at 77. The notion of "desiring subject" was originally coined by Gilles Deleuze and Felix Guattari *Anti-Oedipus: Capitalism and Schizophrenia* (University of Minnesota Press, Minnesota, 1983).

83 See Pierre Bordieu *The Logic of Practice* (Stanford University Press, Stanford, 1990) at 56. Bordieu argues that patterns that underlie social functioning are reproduced through *habitus* or habit. This argument seeks to explain how social patterns are reproduced by our daily activities.

84 See Clifford Geertz "Introduction" in David Hoy (ed) *Foucault: A Critical Reader* (Wiley-Blackwell, London, 2001) 11. See also Alain Touraine "From understanding society to discovering the subject" (2002) 2 *Anthropological Theory* 387. Touraine critiques the Foucauldian construction of power as incapable of explaining the "constant transformation of society by social actors" since Foucauldian accounts of power construct social actors as merely "the manifestations of a hidden domination"; at 388.

85 Foucault, above n 71, at 93.

86 Michael Foucault "The Subject and Power" in James D Faubion (ed) *The Essential Works of Foucault, 1954–1984, Vol 3: Power* (The New Press, New York, 2001) 301.

87 Max Haiven and Alex Khasnabish *The Radical Imagination: Social Movement Research in the Age of Austerity* (Zed Books, London, 2014).

not be limited to either combating or building external social structures.⁸⁸ Because power and ideology play a role in constructing who we are, we cannot use the idea of the autonomous self as the locus for liberation. There is, in other words, no view from nowhere.⁸⁹ As a result, a necessary component of resistance is the Freudian command to "know thyself". As Foucault suggests, this command represents not only a method for gaining self-understanding but is also a process for self-creation.⁹⁰ Thus as well as challenging the overt and material operations of power in our society we also need to understand the operations of networks of power that constitute our social reality and work to subvert and rework those networks of power.⁹¹

The analysis of law and power presented in this section has implications for how we understand the relationship between legal change and social movements. In particular, in the next section I am interested in exploring whether traditional social movements can grapple with the multifaceted description of power just described. Can social movements not only engage with law reform but also play a role in building counter institutions to replace those that currently exist under capitalism? What of the human subject: can social movements go beyond activist training and education to focus on the subjectivity of participants?

IV LAW, SOCIAL MOVEMENTS AND RADICAL CHANGE

Social movements represent a fundamental material element of social and legal change.⁹² Yet, despite the clear historical importance of social movements, it has been noted that "legal scholars seem largely oblivious to the existence of social science literature on social movements".⁹³ Further to this, Michael McCann has written that the "[r]igorous study of law and social movements has been a surprisingly limited and marginal intellectual endeavor in the modern American academy".⁹⁴ Conversely, McCann also observes that social movement specialists "have rarely directly analyzed

88 Foucault, above n 71, at 45.

89 Thomas Nagel *The View From Nowhere* (Oxford University Press, Oxford, 1989).

90 Foucault, above n 71, at 45.

91 Kaufman, above n 46, at 72.

92 See for example Michael McCann (ed) *Law and Social Movements* (Ashgate Publishing, London, 2006); Michael McCann *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, Chicago, 1995); Stuart A Scheingold *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press, Michigan, 2004); and Anne N Costain and Andrew S McFarland (eds) *Social Movements and American Political Institutions* (Rowman & Littlefield Publisher, London, 1998).

93 Edward Rubin "Passing Through the Door: Social Movement Literature and Legal Scholarship" (2001) 150 UPaLRev 1 at 2.

94 Michael McCann "Law and Social Movements: Contemporary Perspectives" (2006) 2 Annual Review of Law and Social Science 17 at 17.

whether, or to what extent, law does or does not matter for the struggles at stake".⁹⁵ The lack of engagement between legal scholarship and the social sciences is unfortunate. Both fields would benefit from a more nuanced "approach for understanding the origin and meaning of legal concepts" as well as how legal concepts change and adapt in the face of social pressure.⁹⁶ Ideally, this scholarship would also be a useful resource for movement participants.

A survey of the literature in the social sciences reveals that there is no clear or settled description of what constitutes a social movement or how it differs from other kinds of political activism.⁹⁷ Sidney Tarrow's often cited definition holds that social movements are "groups possessing a purposive organization, whose leaders identify their goals with the preferences of an unmobilized constituency which they attempt to mobilize in direct action in relation to a target of influence in the political system".⁹⁸ While this represents a useful starting point, Tarrow's description is broad enough to encompass anything from law reform campaigns to revolutionary movements.

In her engagement with the ambiguity in social movement literature, Claire Nettle contends that theorists tend to emphasise one of three characteristics:⁹⁹ "resource mobilization theorists", who focus on the social function of movement organisations;¹⁰⁰ "political process theorists", who focus on political engagement and campaign opportunities;¹⁰¹ and "new social movement theorists", who focus on collective identity and the role of movements in cultural change.¹⁰² Alongside these theorists are pluralists like Brian Doherty who seek to merge these categories into a single stream.¹⁰³ Doherty presents four elements that he contends are characteristic of social movements and differentiates them from other forms of political action. The four elements are:

- (1) a refusal to operate within predefined political avenues and engagement in civil disobedience;
- (2) fostering of a collective identity that is shared broadly by movement participants;

95 Michael McCann *Law and Social Movements*, above n 92, at xi.

96 Edward Rubin, above n 93, at 3.

97 Brian Doherty, Matthew Paterson and Benjamin Seel *Direct Action in British Environmentalism* (Routledge, London, 2000).

98 Sidney Tarrow *Struggling to Reform: Social Movements and Policy Change During Cycles of Protest* (Cornell University Press, New York, 1983) at 7.

99 Claire Nettle *Community Gardening as Social Action* (Ashgate Publishing, London, 2014) at 50.

100 John D McCarthy and Mayer N Zald *The Trend of Social Movements in America: Professionalization and Resource Mobilization* (General Learning Press, New York, 1973).

101 Charles Tilly *Popular Contention in Great Britain 1758–1834* (Paradigm Publishers, Boulder, 2005).

102 Alain Touraine *The Voice and The Eye: An Analysis of Social Movements* (Cambridge University Press, Cambridge, 1981).

103 Brian Doherty *Ideas and Actions in the Green Movement* (Routledge, London, 2002).

- (3) an inclusive organizational structure that provides for a broad membership base; and
- (4) an explicit resistance to dominant forms of power and cultural norms.¹⁰⁴

Social movements employ a wide range of tactics to advance their cause. Most commonly, movements are directed toward legal or governance reform and employ a range of methods to achieve campaign goals. Common tactics include public education, media campaigns and disruptive tactics such as marches, protests, strikes and theatrical stunts.¹⁰⁵ This is a dialectical process, in the sense that social movements aimed at law reform can change the law and the law can also affect social movements. Commenting on this point, Susan Coutin notes that social movements "shape (or attempt to shape) the path of law, even as such pathmaking can redefine social reality in ways that, in turn, redefine causes and reshape activism".¹⁰⁶

However, movements can also go further and adopt more radical goals including "social and political transformation" and creating a "different, better society".¹⁰⁷ While I do not want to dismiss the work that is currently being directed toward legal and governance reform I contend that the magnitude of this task requires a framework for thinking about social change that goes far beyond the limits of liberal reformism.

A useful place to start is the suggestion from Saint-Simon that "no social order can achieve changes that are not already latent within its existing condition".¹⁰⁸ Applying this argument to dominant social structures such as capitalism one can see that their historical emergence did not constitute a radical break from the past. Rather, capitalism emerged very gradually out from feudalism and only rose to ascendancy once the institutions, social relationships and class structures were in place that enabled it to thrive.¹⁰⁹ Similarly, any vision for an alternative future society can only be realized if its foundations are laid in the present. Fortunately we do not need to begin this work from scratch and countless organisations such as Post Growth,¹¹⁰ the Simplicity Institute¹¹¹ and the

104 At 7. See also Nettle, above n 99, at 50; and Brian Doherty and Timothy Doyle "Beyond Borders: Transnational Politics, Social Movements and Modern Environmentalisms" (2006) 15 *Environmental Politics* 697.

105 McCann *Law and Social Movements*, above n 92, at xiv.

106 Susan Bibler Coutin "Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees" in Austin Sarat and Stuart A Scheingold (eds) *Cause Lawyers and Social Movements* (Stanford University Press, Stanford, 2006) 101 at 101.

107 McCann *Law and Social Movements*, above n 92, at xiv.

108 David Harvey *Paris, Capital of Modernity* (Routledge, London, 2005) at 1.

109 See Ellen Meiksins Wood *The Origin of Capitalism: a longer view* (Verso, New York, 2002); and Giovanni Arrighi *The Long Twentieth Century: Money, Power and the Origins of Our Times* (Verso, New York, 2010).

110 <www.postgrowth.org>.

111 <www.simplicityinstitute.org>.

Transition Network¹¹² remind us that much of the social and community infrastructure required to build an alternative society already exists and is beginning to be implemented by communities around the world.

David Harvey elaborates further on Saint Simon's material conception of social change through a creative interpretation of Karl Marx.¹¹³ While Marx is often dismissed as a materialist or technological determinist,¹¹⁴ Harvey has sought to shine light on the complexity of Marx's thought on social change. Harvey centres his interpretation on the fourth footnote in a chapter entitled "Machinery and Large-Scale Industry" in *Capital: Volume I*.¹¹⁵ According to Harvey, in this footnote Marx outlines a general framework for dialectical and historical materialism.¹¹⁶ The footnote unfolds in three phases and while each component is interrelated, it is the second phase that is most relevant to my present argument. Here Marx offers a short, but important statement that requires elaboration: "[t]echnology reveals the active *relation of man to nature*, the direct *process of the production of his life*, and thereby it also lays bare the process of the production of the *social relations* of his life, and of the *mental conceptions* that flow from those relations".¹¹⁷

In this sentence Marx reveals six identifiable conceptual elements. Harvey lists them as follows:¹¹⁸

- (1) technology;
- (2) the relationship between human beings and nature;
- (3) the process of production: for example, democracy over the means of production;
- (4) the production and reproduction of social life: I interpret this point broadly to include human subjectivity;¹¹⁹
- (5) human social relationships, including law and governance structures; and
- (6) mental conceptions of the world: this can include debates about anthropocentrism and ecocentrism.

As described by Marx (both in this footnote and throughout *Capital* itself) these elements are not fixed. They are in motion and linked through a "process of production" that guides human

112 <www.transitionnetwork.org>.

113 Harvey, above n 79, at 189–212; and David Harvey *The Enigma of Capital: and the Crisis of Capitalism* (2nd ed, Oxford University Press, Oxford, 2011) at 126–130.

114 GA Cohen *Karl Marx's Theory of History: A Defence* (Princeton University Press, Princeton, 1978).

115 Marx, above n 3, at 492, n 4.

116 Harvey, above n 79, at 189.

117 Marx, above n 3, at 492, n 4. Emphasis added.

118 Harvey, above n 79, at 189–212.

119 Henri Lefebvre *Critique of Everyday Life* (Verso, New York, 2014).

development.¹²⁰ Each element constitutes a moment in the process of social development. Moreover, each element is dynamic and subject to perpetual renewal and transformation as dynamic moments within the totality. We can study this evolution from the perspective of one of the moments or examine interactions among them. For example how are our mental conceptions of the world altered by the technologies available to us? Do we see the world differently once we have microscopes or view the Earth from space? How have our conceptions of the human-self shifted in light of the insights from evolutionary science and ecology?

Harvey's interpretation of Marx highlights something of crucial importance for social movements. Too often theorists and movement participants focus on only one or two of the conceptual elements identified by Marx and treat them as determinant of all others. For example, it is common for environmental campaigners to ground their analysis purely in the sphere of mental conceptions: shifting from anthropocentrism to ecocentrism.¹²¹ Lawyers commonly focus on implementing a new law or governance structure.¹²² Autonomist Marxists look at changing the processes of production¹²³ or shifting toward worker-owned businesses.¹²⁴ Advocates for the so-called green economy argue that broad change can occur through changes in lifestyle and consumption.¹²⁵

Certainly a deterministic focus on any one of these elements is insufficient. In practice, radical social change occurs through dialectic of transformations across a range of moments and develops unevenly in space and time to produce all manner of local contingencies. This is evidenced in the contrast between the Occupy movement and the second Arab revolt. A focus on any one of the conceptual elements identified by Marx, to the exclusion of others, misrepresents the requirements for radical social change.

¹²⁰ Harvey, above n 79, at 189.

¹²¹ George Sessions (ed) *Deep Ecology for the Twenty-First Century* (Shambhala Publications, Boston, 1995).

¹²² Polly Higgins *Eradicating Ecocide: Exposing the corporate and political practices destroying the planet and proposing the laws needed to eradicate ecocide* (Shephard-Walwyn Publishers, London, 2010).

¹²³ John Holloway *Change the World Without Taking Power: The Meaning of Revolution Today* (Pluto Press, London, 2002).

¹²⁴ Richard D Wolff *Democracy at Work: A Cure for Capitalism* (Haymarket Books, Chicago, 2012).

¹²⁵ Paul Hawken *Blessed Unrest: How the Largest Social Movement in History is Restoring Grace, Justice, and Beauty to the World* (Penguin Books, London, 2008).

V **CONCLUDING REMARKS: BEYOND TRADITIONAL SOCIAL MOVEMENTS**

While many Governments around the world have responded to threats posed by global warming by doubling down in their commitments to the fossil fuel industry¹²⁶ and cutting funding to climate bodies,¹²⁷ civil society has also responded with protest,¹²⁸ boycotts¹²⁹ and with hidden acts of resistance.¹³⁰ Most relevantly for this article, the climate crisis has also catalysed the re-emergence of prefigurative political movements that have sought to both oppose government or corporate practices and to propose alternative social forms.¹³¹ Examples include Transition Towns,¹³² groups within the Occupy movement¹³³ and the thousands of local or community groups that have emerged around the world.¹³⁴ I describe the proliferation of prefigurative politics as a re-emergence because, despite the claim by mainstream media (and sometimes even movement participants) that groups like Occupy came from nowhere and represent a new kind of politics, they actually have a much longer history.

126 Terry Macalister "Government told to come clean on energy subsidies" *The Guardian* (online ed, London, 1 December 2013).

127 Lexi Metherell "Greg Hunt labels Clean Energy Finance Corporation a 'green hedge fund', says it will be shut down" (18 September 2013) ABC News <www.abc.net.au>.

128 John Vidal "Russian military storm Greenpeace Arctic oil protest ship" *The Guardian* (online ed, London, 19 September 2013).

129 Desmond Tutu "We need an apartheid-style boycott to save the planet" *The Guardian* (online ed, London, 10 April 2014).

130 Here I am thinking of everyday and often hidden acts of resistance such as those detailed by James C Scott *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, New Haven, 1987).

131 The combination differs from Davina Cooper's investigation into "everyday utopias". See Davina Cooper *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press, Durham, 2013) at 2: "Everyday utopias don't focus on campaigning or advocacy. They don't place their energy on pressuring mainstream institutions to change, on winning votes, or on taking over dominant social structures. Rather they work by creating the change they wish to encounter, building and forging new ways of experiencing social and political life."

132 See the Transition Network <www.transitionnetwork.org>. Transition towns emerged specifically in response to the dual threat of climate change and peak oil.

133 Jeremy Brecher "Occupy Climate Change" *The Nation* (online ed, New York, 2 April 2012).

134 Hawken, above n 125.

Wini Breines provides a useful description of prefigurative politics in her seminal book *Community and Organisation in the New Left, 1962–1968: The Great Refusal*.¹³⁵ Breines argues that in the movements of the 1960s there developed a whole new way of thinking of politics that was opposed to the vanguardism of the left-politics.¹³⁶ She writes:¹³⁷

The term *prefigurative politics* is used to designate an essentially anti-organizational politics characteristic of the movement ... and may be recognized in counter institutions, demonstrations and the attempt to embody personal and anti-hierarchical values in politics. Participatory democracy was central to prefigurative politics. ... [The guiding task was] to create and sustain within the live practice of the movement, relationships and political forms that "prefigured" and embodied the desired society.

An example of a group that embodied these principles is Movement for a New Society (MNS). MNS was a radical pacifist organisation based primarily in Philadelphia during the 1970s and 1980s. Participants popularised forms of consensus decision-making, communal living, direct action and self-education. MNS also built a range of prefigurative counter-institutions including self-managed businesses, alternative education centres, free-health clinics, land trusts that removed housing from the market, neighbourhood safety committees and local assembles that allowed residents in the community to democratically make decisions as a whole. Finally, MNS pioneered re-evaluation counselling as a tool to help movement participants deal skilfully with their emotions and subjective development.¹³⁸

In prefigurative movements like this, participants sought to reweave the social fabric by creating alternative social institutions and using these spaces as a platform from which to engage in political protest. Breines suggests that the dynamic interplay within these spheres provides the foundation for the alternative social world that is being formed.¹³⁹ Moreover, participants in prefigurative movements believe that the means they use to create change are intimately connected with the world that they are striving to create.¹⁴⁰ Put otherwise means are deeply connected with ends and movement participants are encouraged to treat one another with respect and pay attention to race, class and gender dynamics within the group and broader social institutions.

135 Wini Breines *Community and Organisation in the New Left, 1962–1968: The Great Refusal* (Rutgers University Press, New Brunswick, 1989).

136 At 6.

137 At 6.

138 Andrew Cornell *Oppose and Propose: Lessons from Movement for a New Society* (AK Press, Oakland, 2011). On re-evaluation counselling see also Chris Barker, Brian Martin and Mary Zournazi "Emotional self-management for activists" (2008) 9 *Reflective Practice* 423 at 424.

139 Breines, above n 135, at 52.

140 This behaviour resonates with what Max Weber called "value rational action"; Max Weber *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, Oakland, 1978) at 24.

Prefigurative political movements have many insights to offer for proponents of Wild Law. Most importantly, they are complex and have the capacity to engage with multiple sites of power. They can both oppose current practices of exploitation and propose alternative social forms along the lines of the six spheres identified by Marx. Prefigurative movements combine the education and political agitation of traditional social movements, the counter-culture focus of utopian movements and uniquely, they can also extend to support the individual emotional development of movement participants. It is the combination of these attributes that makes prefigurative movements uniquely placed to respond to the climate crisis.

While underdeveloped, the potential for this alternative bottom-up theory of social change for advancing the principles of Wild Law is great.¹⁴¹ Alongside this potential, we also need a much clearer understanding of: why past movements failed; whether contemporary citizens feel too disempowered or lack the time to build an alternative society; and whether decentralised transition initiatives require central co-ordination to actualise large-scale change.

Deepening our understanding of the requirements of social change is a first order challenge for advocates of Wild Law. In thinking about this work, I am motivated by a slogan promoted by MNS: "most of what we need to know in order to bring about a nonviolent revolution we have yet to learn".¹⁴² The disappointing setbacks that our movements have faced in recent years seem to indicate the continuing validity of such a proposition. Still, it seems clear that a good deal of what we have to learn can be gained from studying the specific successes and shortcomings of sympathetic movements not just in the nineteenth and early twentieth centuries but also in the recent past: and then modifying our practice accordingly.

141 Samuel Alexander "Wild Law from Below: Examining the Anarchists Challenge to Earth Jurisprudence" in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge, London, 2014) 31.

142 Cornell, above n 138, at 81.

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