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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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CONTENTS

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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"IF YOU OBEY ALL THE RULES YOU MISS ALL THE FUN": CLIMATE CHANGE LITIGATION, CLIMATE CHANGE ACTIVISM AND LAWFULNESS

Nicole Rogers*

The author considers the transformative possibilities inherent in climate change litigation and climate change direct action. The author also reflects on what these different forms of cultural performance reveal about the role and significance of lawfulness in the context of climate change. Some climate change litigation challenges accepted norms and assumptions. Its transformative potential lies, the author argues, in the symbolic value of such litigation and the resulting rhetorical debates about the meaning of legal and cultural terms. Climate change direct action and related courtroom performances provide, on the other hand, a forum in which the norm of lawfulness can be contested and debated.

I INTRODUCTION

Climate change litigation,[1] in which activists argue that legal doctrines and existing legislation should be applied to achieve either climate change mitigation or adaptation outcomes, has become an increasingly common occurrence in Western courtrooms. The wisdom in resorting to legal rules, which reflect values and principles antithetical to those held by most climate change activists,[2] is

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The quotation in the title of this article has been attributed to actor Katherine Hepburn.

1 The definition of climate change litigation remains contentious; see Lisa Vanhala and Chris Hilson "Climate Change Litigation: Symposium Introduction" (2013) 35 Law & Policy 141 at 144–145. In this article, I am analysing trials of climate change activists and compensation lawsuits directed against such activists as a separate phenomenon to climate change litigation in which activists attempt to use existing legal doctrines and legislation to achieve climate change mitigation and adaptation outcomes.

2 Laurence Tribe has written that, in mounting lawsuits to protect the environment, "a subtle transformation is likely to be occasioned by the philosophical premises of the system in which the effort is undertaken. The felt obligation will be translated into the terminology of human self-interest"; Laurence Tribe "Ways Not To Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale LJ 1315 at 1330.

debatable. It could be argued that litigation as a well-entrenched form of cultural performance cannot effectively challenge established codes of behaviour and values which have contributed and continue to contribute to anthropogenic climate change; in fact, climate change litigation can be seen as supporting and reinforcing such codes and values.[3]

Climate change activism, by way of contrast, offers more potent possibilities, particularly when it involves role-swapping, farce and the arsenal of the trickster.[4] Climate change activism can be most effective in generating a paradigm shift when it highlights instabilities in established structures, institutions and stereotypes. As a form of cultural performance it is often deliberately subversive; rather than reinforcing established social and political structures, it attacks and undermines such structures. It also raises an important question about legitimacy and lawfulness: what exactly is the meaning of lawfulness in the context of climate change?

Activists who initiate climate change litigation can find that lawfulness operates to prevent successful outcomes. Appropriating a phrase from authors Sam Blay and Ryszard Piotrowicz,[5] I have previously designated this "the awfulness of lawfulness".[6] By way of contrast, lawfulness becomes a contested norm in climate change direct action.

In the following sections, I will consider the transformative possibilities inherent in climate change litigation and climate change direct action, reflecting in particular on what these different forms of cultural performance reveal about the role and significance of lawfulness in the context of climate change.

II LAWFULNESS AND CLIMATE CHANGE LITIGATION

Climate change activists who resort to litigation must operate within the constraints of the official discourse of law. They must deploy its terms and phrases, principles and values; since this discourse has evolved within the capitalist paradigm, they are operating on enemy terrain or in what Baz

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3 The insidious impact of public interest environmental litigation was recognised by Tribe, who wrote at 1330–1331:

> What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest—by articulating environmental goals wholly in terms of human needs and preferences—he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts.

4 See Baz Kershaw "Ecoactivist Performance: The Environment as Partner in Protest?" (2002) 46 TDR 118 at 128.

5 Sam Blay and Ryszard Piotrowicz "The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law" (2000) 21 Australian Yearbook of International Law 1.

6 Nicole Rogers "Climate Change Litigation and the Awfulness of Lawfulness" (2013) 38 Alternative Law Journal 20.

Kershaw would describe as a "paradoxical landscape".[7] In fact, Kershaw points out that when activists take any form of "cultural action", they "risk recreating the pathology—endemic denigration of the 'natural world'—that it is trying to eliminate".[8]

Litigation as a form of cultural action poses particular challenges for activists. Within the self-referential system which is law, the concept of lawfulness operates as a force for systemic inertia, encompassing as it does the requirement that judges decide cases according to precedents and established legal principles, the principle that legislation trumps judge-made law, and the structural and doctrinal barriers which prevent judges from making new law in response to shifting values and changing social norms. Thus lawfulness restricts opportunities for practical and systemic change through climate change litigation.

One important obstruction faced by activists lies in the existence of a vast body of authoritative judge-made law and legislation. Much of this body of law evolved before and outside the context of climate change awareness and has been shaped by the dominant "tale of capital".[9] Such precedents are readily available to support judicial interpretations which are consistent with a conservative business as usual approach, rather than an approach which permits an innovative adaptation of the legal system to the ominous realities of climate change. This is illustrated in the *Macquarie Generation* case.

In *Macquarie Generation*, two climate change activists unsuccessfully argued that the "licence to pollute" held by one of Australia's largest energy producers should be read, in its application to its greenhouse gas emissions, as subject to an implied condition relating to health and the environment. The New South Wales Court of Appeal applied legal principles relevant to the interpretation of commercial contracts in resolving this issue.[10] These included a requirement that the implied term "be necessary to give business efficacy to the contract".[11] Justice Handley held that he could "see no reason why these principles should not apply by analogy to the implication of a term in a statutory licence, making due allowance for the differences the nature of the instruments".[12] In his view, it was "not necessary to imply any condition to make [the licence] effective, and the condition relied on would contradict the licence".[13]

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7 Kershaw, above n 4, at 119.

8 At 119.

9 James Thornton "Our World Needs a New Renaissance" *Sydney Morning Herald* (Sydney, 6–7 June 2009) at 16.

10 *Macquarie Generation v Hodgson* [2011] NSWCA 424 at [61]; see my discussion of this case in Rogers, above n 7, at 20–21.

11 *Macquarie Generation v Hodgson*, above n 10, at [61].

12 At [63].

13 At [65].

Ironically, even law designed to protect human rights can be ill suited to the resolution of climate change issues. Kiribati citizen Ioane Teitota unsuccessfully sought to claim refugee status under New Zealand law, arguing that Kiribati is rapidly becoming uninhabitable due to climate change impacts. A deciding factor for the judge was the absence of persecution as required under the 1951 Convention relating to the Status of Refugees.[14] He concluded that:[15]

> The optimism and novelty of the applicant's claim does not … convert the unhappy position of the applicant and other inhabitants of Kiribati into points of law.

An additional obstacle to effective climate change litigation arises from the traditionally distinct functions of the different arms of government: according to the doctrine of separation of powers, the legislature makes law and determines policy and the role of the judicial arm of government is to apply and enforce the law. Some judges have refrained from making controversial decisions in climate change litigation on the basis that the relevant issues are non-justiciable[16] or best left to the political sphere.

Admittedly, a "suitably minded court" may be prepared to repurpose a regulatory regime designed for other purposes in order to achieve climate change mitigation outcomes.[17] One well-known example is the decision of the United States Supreme Court that greenhouse gas pollutants should be regulated as air pollutants under the 1990 Clean Air Act.[18] The interpretation and application of existing legislation is an accepted function of the judiciary. Regulatory agencies opposed to such repurposing have raised the argument of climate exceptionalism.[19] Climate change activists have also expressed doubt as to whether climate change can be effectively addressed through existing regulatory regimes.[20]

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14 Convention relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954).

15 *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, [2014] NZAR 162 at [63].

16 As one United States commentator has expressed this: "The courts of this country are not the appropriate forum in which to resolve these complex policy issues." Matthew Hall "A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine" (2010) 13 Chapman Law Review 265 at 266.

17 Navraj Singh Ghaleigh "'Six honest serving-men': Climate change litigation as legal mobilization and the utility of typologies" (2010) 1 Climate Law 31 at 41.

18 *Masschusetts v Environmental Protection Agency* 549 US 497 (2007).

19 Lisa Heinzerling "Thrower Keynote Address: The Role of Science in *Massachusetts v EPA*" (2008) 58 Emory Law Journal 411 at 416.

20 John Copeland Nagle "Climate exceptionalism" (2010) 40 Environmental Law 53 at 55 and 75–76.

In fact the existence of a regulatory framework, irrespective of its operational inadequacies or even possibilities in the context of climate change, can deter judges from resolving climate change issues. For instance, an action in public nuisance against four electric power companies and the Tennessee Valley Authority was unsuccessful when the United States Supreme Court held that any common law right was displaced by the United States Clean Air Act.[21] An action in public nuisance brought by the Inuit Village of Kivalina against oil, power and coal companies failed for the same reason.[22] Another example can be found in the most well-known of the myriad Children's Trust lawsuits and petitions.[23] In 2012, the United States District Court for the District of Columbia dismissed the argument that the United States government had a fiduciary obligation to protect the atmosphere under the public trust doctrine. The judge held that even if the doctrine were part of federal law, it had been displaced by the Clean Air Act.[24]

Furthermore judges who are prepared to make progressive decisions directed towards climate change mitigation can find that the impact of such decision-making is negated or eroded by the subsequent enactment of legislation. For instance, after the Queensland Court of Appeal set aside a decision to approve the extension to the Newlands Coal Mine[25] on administrative law grounds,[26] the Queensland government amended the relevant legislation within four days to ensure that the mine went ahead.[27] In 2013, after Justice Preston broke new ground in holding that the expansion of Rio Tinto's Mount Thorley Warkworth open-cut coalmine should be refused on the basis that the

21 *American Electric Power Company v Connecticut* 131 S Ct 2527 (2011).

22 The village will have to be relocated due to the impact of global warming on the sea ice which protected the village from inundation. The suit was dismissed by the United States District Court and an appeal to the Ninth Circuit Court of Appeals was unsuccessful on the basis that the claim was non-justiciable and displaced by legislation. In 2013 the United States Supreme Court refused to hear the case. The village of Kivalina also argued that the defendants were guilty of conspiracy in attempting to subvert the public debate on global warming.

23 In these lawsuits and petitions, young people are attempting to compel United States governments and government agencies to protect the atmosphere as part of the public trust; see "Legal Action" Our Children's Trust <www.ourchildrenstrust.org>.

24 Memorandum opinion in *Alec L v Jackson* 11-cv-02235 (DDC 2012) 31 May 2012 at 6–7. In 2014 an appeal to the US Court of Appeals for the DC Circuit was unsuccessful. In December 2014, the plaintiffs' petition for a writ of certiorari was denied by the United States Supreme Court.

25 *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33.

26 *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338.

27 Chris McGrath "The Xstrata case: Pyrrhic victory or harbinger?" in Tim Bonyhady and Peter Christoff (eds) *Climate Law in Australia* (The Federation Press, Sydney, 2007) 214 at 227.

economic benefits did not outweigh the social impact on the community,[28] the New South Wales government amended an existing planning instrument[29] such that the economic significance of the resource became the principal consideration in approving any mining project. As a consequence, despite an unsuccessful appeal against Justice Preston's judgment,[30] the company lodged a new application for the mine extension which was assessed as approvable by the New South Wales Planning Assessment Commission in March 2015.[31]

More comprehensive legislative schemes can prevent innovative judicial decision-making directed towards climate change mitigation. In the second Ulan mine case,[32] Justice Pain revisited her earlier unprecedented decision[33] that conditions which required the offsetting of Scope 1 greenhouse gas emissions should be imposed on the approval of an extension to the Ulan coal mine at Mudgee in New South Wales. She held that the conditions were not warranted in light of the subsequent enactment of federal greenhouse gas legislation.[34] In so doing, she impliedly conceded that policy and legislative initiatives, however short-lived,[35] could replace the need for judicial innovation in the area of climate change mitigation.

Structural barriers also adversely affect the outcome of climate change activist litigation. Common law standing requirements can deny activists access to courts.[36] Entrenched legal rules and statutory constraints, which limit the issues to be decided and identify relevant factors in decision-making processes, can confine the impact of judicial findings. Only in merits appeals can judges remake

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28 *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48. The judge, in an innovative judgment, referred to the concept of "sostalgia" or loss of place at [404] and held at [18] that the project's adverse impacts "would exacerbate the loss of sense of place, and materially and adversely change the sense of community, of the residents of Bulga and the surrounding countryside".

29 State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW).

30 *Warkworth Mining Limited v Bulga Milbrodale Progess Association Inc* [2014] NSWCA 105.

31 New South Wales Planning Assessment Commission *Warkworth Continuation Project Review Report* (4 March 2015).

32 *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40.

33 *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221.

34 *Hunter Environment Lobby Inc v Minister for Planning (No 2),* above n 32, at [17].

35 In 2013, the Abbott government was voted into power with the election promise that it would repeal this legislation and subsequently made good on that promise.

36 Rodgers and Moritz describe standing barriers as the "most conspicuous" of the doctrinal barriers which "offer a constitutionalized hindrance to those so rash as to quarrel with perversion of science and destruction of nature unsubtly disguised as federal policy"; William H Rodgers and Anna T Moritz "The Worst Case and the Worst Example: An Agenda for Any Young Lawyer Who Wants to Save the World from Climate Chaos" (2009) 17 Southeastern Environmental Law Journal 295 at 309.

decisions;[37] in many other matters, they find themselves restricted to "policing the procedural parameters of decisions".[38] For instance, although in 2006 Justice Pain broke new ground in holding that environmental assessment of the proposed Anvil Hill coalmine in New South Wales had to include all greenhouse gas emissions, including Scope 3 emissions,[39] she had no decision-making power to prevent the approval of the mine itself.

The above examples demonstrate the awfulness of lawfulness in the climate change context. However, it is not my intention to downplay the significance of climate change litigation. Most commonly, commentators refer to the capacity of climate change litigation to "transform or tweak the regulatory landscape".[40] Climate change litigation is often viewed as a driver for regulatory change.[41] Climate change litigation, even if unsuccessful, can also generate change by suggesting a new understanding or re-evaluation of key concepts in the legal system, including human rights, nuisance, intergenerational equity and even justice. The resulting debate can form part of a paradigm shift when the public imagination is captured by the symbolic or rhetorical significance of the litigation.

As I have discussed elsewhere,[42] the use of children as plaintiffs in the Children's Trust lawsuits constitutes effective symbolism; they provide an embodied representation of the concept of intergenerational equity in the climate change context and their expression of personal grievance and deprivation through the lawsuits evokes both guilt and a sense of responsibility in adult spectators. Osofsky and Peel have identified climate change litigation which changes norms and values as an

37 One example of a successful merits appeal in which an approval for the extension of a coalmine was set aside was *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited*, above n 28. Another example of a merits appeal in which the judge gave paramountcy to the reduction of global greenhouse gas emissions was the decision of Justice Preston in the Taralga wind farm case; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59. In holding at [3] that "the broader public good of increasing the supply of renewable energy" should prevail over the "geographically narrower concerns" of local residents, Justice Brian Preston approved the wind farm with more turbines than originally approved by the Minister.

38 David Farrier "The limits of judicial review: Anvil Hill in the Land and Environment Court" in Tim Bonyhady and Peter Christoff (eds) *Climate Law in Australia* (The Federation Press, Sydney, 2007) 189 at 204.

39 *Gray v The Minister for Planning* [2006] NSWLEC 720.

40 Hari M Osofsky and Jacqueline Peel "The role of litigation in multilevel climate change governance: Possibilities for a lower carbon future?" (2013) 30 EPLJ 303 at 304.

41 See, for instance Brian J Preston "Climate Change Litigation" (2009) 26 EPLJ 169 at 189. In Osofsky and Peel, above n 40; and Hari M Osofsky and Jacqueline Peel "Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia" (2013) 35 Law & Policy 150, the authors develop a model for understanding how climate change litigation influences regulation.

42 See Rogers, above n 7, at 22–24.

indirect pathway to regulatory change[43] and observe that such indirect pathways "may often be some of the most significant and transformative".[44]

The distinction between changing the way we interpret and apply particular concepts and norms, and changing legal rules, is important. Systems analyst Donella Meadows identified a number of different places to intervene in artificial systems and called these leverage points, or points of power.[45] The rules of the system constitute "high leverage points"[46] but changing the rules of the system is less effective than changing the mindset out of which the system arises.[47] According to Meadows, "paradigms are the sources of systems".[48] Thus unsuccessful climate change litigation which engenders debate on the meaning of key legal concepts can be a more effective force for systemic change than climate change litigation which tinkers with legal rules.

The most powerful climate change litigation compels us to reconsider the fundamental concepts and assumptions which underpin the tale of capital which is law. However, activists who bring lawsuits must accept the way in which the legal system defines lawfulness and confers legitimacy upon certain activities and actors. In contrast, activists interrogate the meaning of the concept of lawfulness through climate change direct action. In the following parts I shall evaluate the political efficacy of climate change direct action and in particular, consider the challenges posed by climate change direct action to the concept of lawfulness.

III CLIMATE CHANGE DIRECT ACTION

A conference paper with the provocative title of "Is Earth F**ked?", which was delivered at an academic forum in 2012 by complex systems analyst Brad Werner, has attracted some interest.[49] According to one commentator, the radical nature of the presentation lay in the author's references to environmental direct action, or what he termed resistance.[50] In Werner's modelling of the coupled human-environmental system, existing forms of environmental management constitute part of capitalist cultural dynamics: they may slow down the catastrophic end results of climate change but cannot prevent them. Resistance, however, involves the adoption of a certain set of dynamics

43 Osofsky and Peel, above n 40, at 326; and Osofsky and Peel, above n 41, at 155.

44 Osofksy and Peel, above n 41, at 155.

45 Donella H Meadows *Thinking in Systems: A Primer* (Chelsea Green Publishing, White River Junction, 2008) at 145.

46 At 158.

47 At 162.

48 At 163.

49 See for instance Naomi Klein "How science is telling us all to revolt" *New Statesman* (online ed, London, 23 October 2013).

50 Jonathon Mingle "Scientists Ask Blunt Question on Everyone's Mind" *Slate* (online ed, New York, 7 December 2012).

antithetical to capitalist culture. According to Werner, "the future sustainability of the coupled human-environment system may well depend on the strength of resistance and the ways that the society acts to suppress that resistance".[51]

In evaluating the political efficacy of climate change direct action, it is necessary to acknowledge the broad spectrum of climate change direct action and to consider, furthermore, the legal response to this phenomenon. Certainly, environmental activists have always utilised the theatre of direct action to draw public attention to environmental issues. Greenpeace pioneered much of this theatre, staging "image events for mass media dissemination".[52] Environmentalists who deploy strategies such as lobbying and negotiation, and even litigation, remain within the parameters of institutional politics[53] and of the system which they are critiquing.[54] Environmental activists who utilise direct action strategies are engaged in what Kevin De Luca describes as discourse politics; he contends that they are challenging "the grand narrative of industrialism".[55]

The images generated by direct action can arguably be powerful tools in deconstructing central ideologies and cultures in contemporary society.[56] However, performance studies theorist Baz Kershaw is sceptical about the effectiveness of environmental protest image events. He draws a distinction between such events, exemplified in the Greenpeace occupation of a defunct oil rig in which the carefully orchestrated dramaturgy of the event ensured that "human culture [was] still the primary focus of attention",[57] and more spontaneous forms of environmental protest which draw upon "the traditions of the trickster".[58] Kershaw argues that protest events which fall into this second category manage to sidestep the contradictions in traditional image events and pose a subversive challenge to entrenched institutions, stereotypes and cultural norms.[59] Such protest events feature multiple references, satire and caricature through role playing, the subversion of traditional images, and irony.

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51 Brad Werner "Is Earth F**ked? Dynamical Futility of Global Environmental Management and Possibilities for Sustainability via Direct Action Activism" (paper presented to AGU Fall Meeting, San Francisco, 2–7 December 2012).

52 Kevin Michael De Luca *Image Politics: The New Rhetoric of Environmental Activism* (Guilford Press, New York, 1999) at 3–4.

53 At 65.

54 At 71.

55 At 64.

56 At 92; see also Claudia Orenstein "Agitational Performance, Now and Then" (2001) 31 Theater 139 at 151.

57 Kershaw, above n 5, at 125.

58 At 128.

59 At 128.

Two examples from this second category can be found in the fraudulent bidding for oil and gas leases by American activist Tim DeChristopher and the 2013 share market hoax perpetrated by Australian activist Jonathon Moylan. Both of these actions disrupted commercial activity through playful misrepresentation and the assumption of false identities, and the subversive impact of such actions is apparent in the subsequent response of those responsible for upholding the law and protecting the authority of the marketplace.

Tim DeChristopher presented himself as an authentic bidder, Bidder 70, at a controversial Bureau of Land Management oil and gas lease auction in Salt Lake City in 2008, in an attempt to highlight its serious climate change and other environmental implications. He successfully placed bids of almost $1.8 million but refused to complete the sales. He was charged with and convicted of two offences and sentenced to two years in prison.[60]

In January 2013, Jonathon Moylan issued a counterfeit press release stating that the ANZ Bank had withdrawn $1.2 billion in funding from Whitehaven's controversial Maules Creek mine project. As a consequence, shareholders sold shares and Whitehaven's share price temporarily dropped by $314 million. Moylan was prosecuted[61] by the Australian Securities and Investment Commission (ASIC) and faced a maximum penalty of $495,000 or up to ten years in jail. He pleaded guilty to the charges prior to his Supreme Court trial[62] and received a prison sentence of one year and eight months, but was released on a good behaviour bond. His lawyer commented that Moylan had "learnt a big lesson" and would continue to protest only "as far as he can within the confines of the law".[63]

The Bidder 70 and Whitehaven hoaxes highlight the weaknesses, corruption and falsehoods of the marketplace, the key capitalist structural institution.[64] DeChristopher's crime lay in the fact that he masqueraded as a legitimate bidder when he had no intention of exercising his rights under the leases and had no money to pay for them. Since, however, the relevant market itself lacked legitimacy

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60 The offences were interfering with the provisions of Chapter 3A of the Federal Onshore Oil and Gas Leasing Reform Act 1987 (30 USC § 195(a)(1)) and making a false and fraudulent material representation (18 USC § 1001).

61 Under Corporations Act 2001 (Cth), s 1041E.

62 The case was removed to the Supreme Court rather than to the District Court at the request of the Department of Public Prosecutions, apparently due to the complexity of the charges; Leo Shanahan "Jonathon Moylan's Whitehaven Hoax Case to go to Supreme Court" *The Australian* (online ed, Sydney, 24 September 2013).

63 "Activist Jonathon Moylan avoids prison over mining hoax" *The Australian* (online ed, Sydney, 25 July 2014).

64 Such actions are markedly different to climate change activism directed at financial investment markets through legitimate channels, such as climate change shareholder activism and what has been described as risk-based corporate campaigning; see Susan Shearing "Raising the Boardroom Temperature? Climate Change and Shareholder Activism in Australia" (2012) 29 EPLJ 479; and Aidan Ricketts "Investment Risk: An Amplification Tool For Social Movement Campaigns Globally and Locally" (2013) 15(3) Journal of Economic and Social Policy (article 4).

and was subsequently dismantled,[65] there was no real distinction between genuine and false bidders. His sham bids drew attention to the nebulous nature of that particular market and the surreal nature of all financial markets.

Moylan's hoax exposed the susceptibility of the share market to lies and both non-corporate and corporate fictions. Moylan himself did not envisage that his hoax would have such a dramatic impact on share prices or on investors.[66] The market's vulnerability to virtual representations indicates that it is itself a chimera and lacks material substance.[67]

ASIC[68] and commentators[69] expressed alarm at the threat to market integrity posed by Moylan's hoax. Yet the hoax drew attention to the fact that investment decisions with large-scale climate change implications are generally made in an ethical vacuum; Moylan has maintained that he "made the announcement that ANZ *should* have made".[70] In Moylan's worldview, the oxymoronic phrase 'market integrity' has quite different connotations than it assumes in the world of business and investment.

Moylan was engaged in an act of parody, which he compared at the time to the Chaser team's incursion into the APEC security zone in 2007[71] and the announcement on the part of United States culture jammers, the Yes Men,[72] that Union Carbide had shut down.[73] Those responsible for protecting the marketplace took Moylan's hoax seriously. They maintained that "the credibility and

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65 The leases were cancelled in 2009 when the Obama administration came into power, on the basis that environmental reviews had not been undertaken in relation to the relevant parcels of land. Bidders were refunded their money. See Leslie Kaufman "Drilling leases scrapped in Utah" *The New York Times* (online ed, New York, 4 February 2009).

66 Interview with Jonathon Moylan (SBS television, 9 January 2013).

67 See Anne McNevin "Market fraud or politics of the market?" (24 February 2013) Acts: The Archives Project <www.enginfisin.eu>.

68 ASIC's acting chairman Greg Tanzer stated in an interview that "Our focus is on market integrity, and preserving market integrity, and we're concerned about threats to market integrity wherever they arise"; "ANZ hoaxer facing jail despite no profit motive" *ABC News* (online ed, Sydney, 10 January 2013).

69 See for instance Peter Ker and Mark Hawthorne "How hoaxsters hold market to ransom" *The Sydney Morning Herald* (Sydney, 12–13 January 2013) at 5.

70 Moylan, above n 66, (emphasis added).

71 See Nicole Rogers "Law and the fool" (2010) 14 Law Text Culture 286 for an analysis of this incident and the legal fallout.

72 See "Latest Hijinks" The Yes Men <theyesmen.org> for a summary of the actions taken by these two cultural satirists.

73 Peter Ker and Ben Cubby "ASIC to look into Whitehaven hoax" *The Sydney Morning Herald* (online ed, Sydney, 7 January 2013).

functionality" of the financial marketplace was at stake.[74] The zeal with which ASIC initiated legal action against Moylan, a non-corporate target, has been contrasted with its marked tolerance of corrupt behaviour on the part of corporate players.[75] The heavy-handed approach has been justified by ASIC as a necessary strategy to protect the market and reassure investors.[76] The sentencing judge, in deciding to impose a sentence of imprisonment, also emphasised the serious impact of Moylan's actions on the market even while noting that he was not, unlike others guilty of market misconduct, motivated by personal profit.[77] He described Moylan's actions as "much more than some sort of public mischief offence",[78] stating that:[79]

> Here, the market was manipulated, vast amounts of shares were unnecessarily traded and some investors lost money or their investment in Whitehaven entirely. These were not just "day traders and speculators" as the Offender said to Mr Duffy – superannuation funds and ordinary investors suffered damage. It was intended that ANZ at least be embarrassed and that Whitehaven should be damaged or threatened, even if there was no intention to hurt shareholders and investors as such.

The response of both ASIC and the sentencing judge to Moylan's hoax can also be explained by the subversive impact of parody, which Baudrillard has described as "the most serious crime"[80] since it "cancels out the difference upon which the law is based: the difference between obedience and transgression".[81] Parody is an affront to the literalness of law, to its "deadly seriousness".[82] It seems that the only individuals and groups who commit offences by engaging in acts of parody and who escape prosecution, do so by virtue of their role as the Fool.

I have argued elsewhere that the "state's ongoing 'discourse of self-legitimation' is ill-served by prosecuting the Fool".[83] As Brian Sutton-Smith has put it, the Fool "live[s] in the place where the

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74 McNevin, above n 67.

75 Bernard Keane "Double Standards as Gutless ASIC Targets the Little Guy" *Crikey* (online ed, Melbourne, 5 July 2013).

76 See Ker and Hawthorne, above n 69.

77 *R v Moylan* [2014] NSWSC 944 at [101].

78 At [102].

79 At [103].

80 Jean Baudrillard *Simulations* (Semiotext[e], New York, 1983) at 40.

81 At 39.

82 Margaret Davies *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, London and Chicago, 1996) at 132.

83 Rogers, above n 71, at 287.

'writ does not run"'.[84] Charges against the Australian Chaser team for breaching a section of the APEC Meeting (Police Powers) Act 2007 by carrying out their 2007 APEC stunt were eventually dropped. During the 2007 APEC meeting the Chaser team, in a cavalcade of cars and motorcycles parading 'insecurity' passes and complete with jogging 'security guards', found themselves unexpectedly waved through checkpoints in a restricted security zone to emerge, one audaciously impersonating as Osama bin Laden, on to Macquarie Street in Sydney's central business district. They were promptly arrested and charged with unauthorised entry into a restricted area, though these charges were later dropped. The United States Yes Men, who have both impersonated individuals in a process of identity correction and maintained fake websites, have thus far escaped prosecution. In 2009 they were sued for trademark and copyright infringement by the United States Chamber of Commerce but the Chamber abandoned its lawsuit four years later.

Satirists such as the Chasers and the Yes Men, who have an established cultural following, enjoy a relative immunity from prosecution which climate change activists do not share. I have written that:[85]

> The rational play of law is ill-suited to controlling the arbitrary and the frivolous, the satirical and parodic, the carnivalesque. The state cannot effectively assert its authority over satirists and comedians by recasting satire and parody as legal transgression.

Despite the existence of a substantial network of supporters who include David Suzuki and Noam Chomsky,[86] Moylan did not have a recognised social role as a satirist, as a Fool. As an activist, he was vulnerable to prosecution for his act of parody. Moylan's plea of guilty meant that his Supreme Court trial did not proceed but it is quite possible that his trial, particularly if the defence of necessity had been argued, would have amplified the political effectiveness of the hoax even while putting him at far greater risk of a non-suspended prison sentence.

IV LAWFULNESS AND CLIMATE CHANGE DIRECT ACTION

From the above discussion it is apparent that climate change direct action encompasses image event and spectacle, performance and metaphor, satire and parody. The illegality of much climate change direct action contributes to its political efficacy by providing further transformative possibilities. Lawfulness becomes a contested norm when activists engage in acts of civil disobedience. Activists are prepared to break the law in order to change the law and in the ensuing legal performances, the court is compelled to re-evaluate the meaning of lawfulness.

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84 Brian Sutton-Smith *The Ambiguity of Play* (Harvard University Press, Cambridge (Mass), 1997) at 212.

85 Rogers, above n 71, at 305.

86 See "We Stand With Jonathan Moylan" Facebook <www.facebook.com/Standwithjonathan>.

Such legal performances are generally prosecutions but corporations have also attempted to claim compensation for profits lost or corporate damages sustained as a consequence of climate change protests. In one such Australian case,[87] the magistrate warned activists that anyone who similarly entered coal loading facilities in order to protest would be liable for resulting financial loss which could be proven and quantified.[88] In such lawsuits, victimhood becomes another contested norm in the context of climate change. Large emitting corporations present a narrative of victimhood contested by protesters, who maintain that such corporations are, instead, the perpetrators of crimes against humanity. The Rising Tide defendants in this particular lawsuit argued that "the real victims here are those affected by climate change and Newcastle coal exports".[89]

In such cases we witness a surreal clash between two competing narratives of persecution and victimhood, and two opposing discourses: the alternative ecocentric discourse of the protesters and the dominant discourse of capitalism within which corporations have rights, markets have integrity and all activities can be commodified and costed.

More commonly climate change protesters appear in courts as defendants in criminal trials, prosecuted for offences against property or, as in Moylan's case, corporate offences. Such trials can be powerful political spectacles. Joel Schechter describes the trial of a protester as "a continuation of the resistance that begins with civil disobedience".[90] Importantly, as Robert Cover wrote in 1983: "By provoking the response of the state's courts, the act of civil disobedience changes the meaning of the law articulated by officialdom."[91]

An activist himself, Cover wrote eloquently on the intimate relationship between violence and law, reminding us that judges administer violence.[92] An ideological if not experiential distinction has been drawn between such violence, law-preserving violence in the typology of Walter Benjamin and Jacques Derrida, and the acts of lawmaking violence which overthrow existing legal systems and found new ones, and which are constructed as acts of civil resistance and even terrorism at the moment

87 The case involved a claim made under the Victims Support and Rehabilitation Act 1996 (NSW) in relation to a 2010 climate change protest at the Port of Newcastle and was unsuccessful due to lack of evidence of actual loss.

88 Sue Higginson "Coal, climate activism and the law of victims compensation" (2011) 36 Alt LJ 131.

89 Alison Branley "Rising tide activists win" *The Newcastle Herald* (online ed, Newcastle, 3 March 2011).

90 Joel Schechter *Satiric Impersonations: From Aristophanes to the Guerilla Girls* (Southern Illinois University Press, Carbondale, 1994) at 88.

91 Robert M Cover "*Nomos* and Narrative" (1983) 97 Harv L Rev 4 at 47.

92 Robert M Cover "Violence and the Word" (1986) 95 Yale LJ 1601.

of enactment.[93] Lawmaking violence acquires a belated legitimacy in the newly established legal system.[94] Law-preserving violence, which "maintains, confirms, insures the performance and enforceability of law"[95] is lawful at the time it is administered but its legitimacy may be retrospectively questioned if a new legal system with different norms and values is subsequently established.[96]

This distinction is helpful because legitimacy and lawfulness are clearly portrayed as relative rather than absolute concepts. Other theorists have argued that civil disobedience can be justified through an invocation of "the commonly shared conception of justice that underlies the political order"[97] and as an expression of an individual's moral judgment.[98] These theorists have argued that existing legal systems can accommodate and should accept civil disobedience. Rawls wrote that civil disobedience operates "within the limits of fidelity to law"[99] and Allan suggests that the rule of law is entirely consistent with an individual's decision to disregard morally unjust laws as non-laws.[100]

Once it is conceded that the legitimacy of existing laws is not an absolute legitimacy, we can query the legitimacy currently conferred upon the activities of big greenhouse gas emitters and indeed upon our own often unthinking contributions to climate change, in a legal and social system dominated by the tale of capital. Such activities may well be condemned as unethical, illegitimate and even evil[101] in an alternative normative universe and alternative legal system.[102] On the other hand, the activities of climate change activists which are currently construed as unlawful or illegitimate may be

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93 This distinction was made by Walter Benjamin in: Walter Benjamin "Critique of Violence" in Marcus Bullock and Michael W Jennings (eds) *Walter Benjamin: Selected writings, Volume I: 1913–1926* (The Belknap Press, Cambridge (Mass), 1996). Derrida discussed this distinction in his influential essay: Jacques Derrida "Force of Law: The 'Mystical Foundation of Authority' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge, New York, 1992).

94 Derrida, above n 93, at 36.

95 At 31.

96 For instance, Saddam Hussein was tried and executed for detaining, torturing and executing people believed to have been involved in an assassination attempt on his life. These acts were legitimate under his regime at the time they were committed. He argued at his trial that "[t]hese people were charged according to the law, just like you charge people according to the law": Nicole Rogers "Violence and Play in Saddam's Trial" (2007) 8 Melb J Intl L 428 at 435.

97 John Rawls *A theory of justice* (Oxford University Press, Oxford, 1973) at 365.

98 T R S Allan "Citizenship and Obligation: Civil Disobedience and Civil Dissent" (1996) 55 Cambridge Law Journal 89 at 93.

99 Rawls, above n 97, at 366.

100 Allan, above n 98, at 108.

101 See Jeffrey Newman "Hannah Arendt: Radical Evil, Radical Hope" (2014) 47 European Judaism 60.

102 Cover discusses the interplay between normative universes and official systems of law in Cover, above n 91.

viewed as lawful and legitimate in this alternative normative universe, in the same way that the activities of members of the Jewish resistance in Nazi occupied Europe are no longer represented as crimes in contemporary Western societies.

A judge, confronted with civil disobedience, can choose to administer law-preserving violence and thus reinforce the official interpretation of what is law and what is lawful. However, if a judge refrains from penalising or punishing protesters, he or she is thus implicitly and sometimes explicitly acknowledging the legitimacy of an alternative normative order, of alternative narratives and alternative paradigms.[103] It is at this juncture, when those responsible for upholding the existing system of law concede that alternative narratives and understandings of lawfulness might have validity, that we find possibilities for a fundamental paradigm shift. Hence such moments constitute significant leverage points[104] in the artificial system which is law.

V LAWFUL EXCUSE AND NECESSITY: LEGAL AVENUES FOR RENEGOTIATING THE NORM OF LAWFULNESSS

This moment of renegotiation of a fundamental norm is particularly powerful when climate change activists argue in a courtroom that it is necessary or even lawful to break the law in an attempt to avert the much greater evils associated with climate change impacts. One of the most publicised cases in this regard involved the successful use of the lawful excuse defence on the part of six climate change activists in England.

The activists were members of Greenpeace, who scaled the Kingsnorth power station chimney in 2007 with the intention of writing on it "Gordon, bin it". Their aim was to draw public attention to Prime Minister Gordon Brown government's imminent decision to approve a new coal-fired power station at the site. The protest caused a temporary closure of the power station and attracted nationwide publicity. The company claimed that it spent thirty thousand pounds to remove the graffiti.[105] The activists were charged with criminal damage; since the extent of the damage was more than five thousand pounds, they were entitled to a jury trial. If found guilty, they would have faced prison sentences.[106]

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103 Cover expresses it thus: "The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and control." Cover, above n 91, at 47–48.

104 Donella Meadows describes significant leverage points as "places in the system where a small change could lead to a large shift in behavior"; Meadows, above n 45, at 145.

105 "Climate danger 'justifies power station damage' caused by environmental activists" *The Australian* (online ed, Sydney, 12 September 2008).

106 Criminal Damage Act 1971 (UK), s 4(2).

One important aspect of the case was that the relevant legislation made it permissible to commit the offence of destroying or damaging property in order to prevent the commission of a greater property offence.[107] The jury held that the global emergency of climate change justified otherwise criminal activity in the form of acts of civil disobedience and minor property damage.[108]

The jury reached this conclusion after listening to the compelling evidence of five expert witnesses, including eminent climatologist James Hansen and a former president of the Inuit Circumpolar Council, Aqqaluk Lynge. Hansen, who surprised Greenpeace by accepting the request to be a witness, explained to the jury how their own coastline in Kent would be affected by climate change.[109] Lynge told the jury that he had "witnessed the effects of climate change with my own eyes right across the Arctic".[110] Such testimonies were compelling. As Graeme Hayes has pointed out, the testimonies "negotiate[d] climate change as proximate and material",[111] "making the global, distant, abstract, and immaterial relevant to the concrete, material, local, and immediate concerns of the citizenry".[112]

After listening to this evidence, the jury was prepared to accept a new meaning of lawfulness in the context of climate change. The radical implications of this conclusion were clear; as one of the activists stated outside the courtroom:[113]

> When twelve normal people say that it is legitimate for a direct action group to shut down a coal-fired power station because of the harm that it does to the planet, then one has to ask: where exactly does that leave government energy policy?

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107 Section 5.

108 Michael McCarthy "Cleared! Jury Decides That Threat of Global Warming Justifies Breaking The Law" *Common Dreams* (online ed, Portland, 11 September 2008).

109 Geraldine Bedell "Why six Britons went to eco war" *The Guardian* (online ed, London, 31 May 2009). See "Statement of witness James E Hansen" in "Kingsnorth trial: witness statements in full" (12 September 2008) *Greenpeace* <www.greenpeace.org.uk>.

110 "Statement of witness Aqqaluk Lynge" in "Kingsnorth trial: witness statements in full" (12 September 2008) *Greenpeace* <www.greenpeace.org.uk>.

111 Graeme Hayes "Negotiating Proximity: Expert Testimony and Collective Memory in the Trials of Environmental Activists in France and the United Kingdom" (2013) 35 Law & Policy 208 at 220.

112 At 221.

113 See Nick Broomfield *A Time Comes* (documentary, 2009) Nick Broomfield <www.nickbroomfield.com>.

The corresponding defence of necessity has also been raised, but thus far unsuccessfully, by climate change activists on trial in Australia,[114] the United Kingdom,[115] the United States[116] and Canada.[117] This defence similarly requires the court to reconsider the meaning of the norm of lawfulness in the context of climate change. Activists assert that it is necessary to break the law in order to prevent a greater imminent harm to life or property.[118] Judges have dismissed this argument on various grounds, including the remoteness or absence of the connection between the defendants' actions and the prevention of death or injury,[119] and the fact that alternative legitimate avenues could have been adopted instead.[120]

Judicial refusal to allow the defence of necessity to be argued at all by climate change activists[121] can be explained in light of the fact that the courtroom, when evidence pertaining to necessity is presented, is transformed into "a privileged and uncontested space for the construction of political

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114 Six protesters who were convicted of trespass on rail tracks at Newcastle Coal Terminal in 2008, and thus contributed to a delay in the export of 20,000 tonnes of coal, appealed their conviction to the District Court on the basis of this defence; see Dale Mills "Hazel fights on" *The City Hub* (online ed, Sydney, 3 March 2010). However, the judge dismissed the appeal as the mining and exporting of coal are legal activities which should be protected from disruption.

115 See accounts of protesters' attempts to use this defence in the United Kingdom inMartin Wainwright "Drax protesters found guilty of obstructing coal train" *The Guardian* (online ed, London, 4 July 2009); Mike Schwarz "Why did Ratcliffe defence fail where Kingsnorth Six succeeded?" *The Guardian* (online ed, London, 16 December 2010); "Manchester airport climate change protesters found guilty after judge says actions not justified" *Manchester Evening News* (online ed, Manchester, 20 February 2011); and Andrew Hickman "Climate activism: is the trial more important than the protest?" *The Ecologist* (online ed, London, 25 August 2010).

116 See for instance Nick Engelfried "Montana Coal Protesters Argue Necessity Defense" *Waging non-violence* (online ed, New York, 14 January 2013). The author wrote in January 2013 that he and other defendants intended to argue necessity at their forthcoming trial for trespass. However in April 2013 the judge refused to allow the use of the defence; Sanjay Talwani "Coal Protesters Admit Trespassing into the Montana Capitol" *Billings Gazette* (online ed, Montana, 18 June 2013).

117 See examples in Hugo Tremblay "Eco-terrorists Facing Armageddon: The Defence of Necessity and Legal Normativity in the Context of Environmental Crisis" (2012) 58 McGill Law Journal 321 at 328.

118 This defence is explained in its application to environmentalists who engage in acts of civil disobedience by Cesar Cuauhtemoc Garcia Hernandez in "Radical Environmentalism: The New Civil Disobedience?" (2007) 6 Seattle Journal for Social Justice 289 at 315–321. Hernandez contends at 318 that it is easier to establish this defence when this greater harm is framed as a discrete threat rather than when it is something as "amorphous" as climate change.

119 See "Manchester airport climate change protesters found guilty after judge says actions not justified", above n 115.

120 See Schwarz, above n 115.

121 For example, in 2009, an English judge held that the defence of necessity could not be raised in the trial of 22 defendants who obstructed a coal train; Wainwright, above n 115.

challenge".[122] In arguing necessity, activists can draw on expert testimony about climate change impacts without such testimony being challenged. It is, in fact, a tactical mistake for the prosecution to call its own expert witnesses, as the prosecution would thus concede that what is at stake is a policy contest rather than a criminal prosecution. In climate change litigation directed towards mitigation outcomes, judges have been swayed by conflicting evidence on climate change impacts presented by experts employed by industry or government interests.[123] By way of contrast, the defence provides activists in climate change trials with a valuable opportunity to present an unchallenged political case about climate change impacts.[124]

Judicial resistance to the defence can also be explained by the fact that it poses such a profound normative dilemma for the legal system. It is the nature and magnitude of the alleged threat of climate change which contributes to this dilemma: as one commentator has put it: "What acts might the law permit in fighting a threat of global, even catastrophic, proportions?"[125] Hugo Tremblay discusses the possibility that the invocation of the doctrine of necessity in the context of climate change might "dissolv[e] … law's normativity".[126] He maintains that the use of the doctrine by climate change activists who break the law "could indicate a threshold in the continuum between legal certainty and flexibility", beyond which "law may become incapable of performing its function and ensuring its own normative power".[127] This was acknowledged by a New South Wales District Court judge, who dismissed the defence of necessity in an appeal brought by climate change protesters with the observation that it could lead to anarchy.[128]

Judicial resistance to the use of this defence is exemplified in Tim DeChristopher's trial. The judge refused to allow DeChristopher to argue the defence of necessity or to present evidence in relation to the Bureau of Land Management's possible violation of environmental laws, expressing reluctance "to open [his] courtroom to a lengthy hearing on global warming and environmental concerns when this is a case based on simple criminal actions".[129] On appeal, this ruling was upheld.

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122 Hayes, above n 111, at 215.

123 See for instance *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 013.

124 Hayes, above n 111, at 214.

125 Jonathon Mingle "The Climate Change Defense" *The New York Times* (online ed, New York, 12 December 2008).

126 Tremblay, above n 117, at 351.

127 At 353.

128 Mills, above n 114.

129 Emiley Morgan "Judge rejects DeChristopher's 'necessity defense'" *Deseret News* (online ed, Salt Lake City, 17 November 2009). DeChristopher's trial and its political fallout have been documented in a 2012 film: George Gage and Beth Gage *Bidder 70* (Gage & Gage Productions, Telluride, 2012).

In spite of the judge's refusal to hear political arguments of necessity, DeChristopher's trial created a forum for participants and onlookers to articulate and interrogate fundamentally different understandings of the meaning of lawfulness in the context of climate change. Sympathetic commentators heralded DeChristopher as a hero and emphasised the importance of civil disobedience in redefining both the law and the meaning of lawfulness.[130] DeChristopher himself made reference to an alternative normative order, stating that:[131]

> The reality is not that I lack respect for the law; it's that I have greater respect for justice. Where there is a conflict between the law and the higher moral code that we all share, my loyalty is to that higher moral code.

Statements made by the judge during the sentencing hearing indicated that he imposed a term of imprisonment partly as a consequence of DeChristopher's "continuing trail of statements" about his "civil disobedience" and his propensity to "step to any bank of microphones that he could find to give a speech … and advocate that it was fine for him to break the law".[132] On appeal, Judge Baldock of the United States Court of Appeal upheld the judge's right to take DeChristopher's widely promulgated views on civil disobedience and lawfulness into consideration in determining a sentence "necessary to deter Defendant from future violations and to *promote respect for the law*".[133]

In DeChristopher's view and the view of other climate change activists, lawfulness loses its moral authority when the government and legal system support the activities of major greenhouse gas emitters and fail to take effective steps to protect the community and the environment. Lawfulness assumes paradoxical dimensions in this line of reasoning, in that breaking the law is portrayed as a necessary means of obeying a higher law; through civil disobedience and the flouting of relatively minor legal rules, activists hope to draw public attention to the unethical and, from their perspective, unlawful conduct of governments and corporations.[134]

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130 See for instance the commentator in Rolling Stone who described DeChristopher's conviction as a "Rosa Parks moment"; Jeff Goodell "A Rosa Parks Moment: Climate Activist Tim De Christopher Sentenced to Prison" *Rolling Stone* (online ed, New York City, 27 June 2011).

131 Jake Hanson "Tim's official statement at his sentencing hearing" (26 July 2011) Peaceful Uprising <www.peacefuluprising.org>.

132 Quoted in *United States v DeChristopher* No 11-4151 (10th Cir 2012) at 23.

133 At 25 (emphasis added).

134 For instance, one protester at his trial stated: "The law will eventually have to change and acknowledge the harm that carbon emissions do to all of us, by making them illegal." Quoted in Martin Wainwright "Jury retires to consider verdict in Drax hijack trial" *The Guardian* (online ed, London, 3 July 2009).

VI CONCLUSION

The concept of lawfulness plays a pivotal role in climate change activism. Lawfulness impedes activists in their pursuit of practical outcomes through climate change litigation. Climate change litigation can identify possibilities for policy reform and legislative changes. However, it is arguable that regulatory modifications cannot generate significant climate change mitigation outcomes while our legal landscape continues to be shaped by the tale of capital.

Some climate change litigation challenges accepted norms and assumptions; its transformative potential lies in the symbolic value of such litigation and the resulting rhetorical debates about the meaning of legal and cultural terms, rather than in the practical outcomes.

Climate change direct action is inherently more subversive in that it tells a different narrative to the tale of capital. Importantly, climate change direct action and related courtroom performances provide a forum in which the norm of lawfulness can be contested and debated.

Meadows wrote that people change paradigms by "pointing at the anomalies and failures in the old paradigm" and "speaking and acting, loudly and with assurance, from the new one".[135] Climate change activists who engage in acts of civil disobedience are contributing to a paradigm shift in our current understanding of what is lawful in the climate change context. They are doing this by compelling courts and the public to consider what is meant by lawfulness, and highlighting the contradictions and anomalies in the ways in which our current legal system legitimises the behaviour of those who contribute the most to climate change and criminalises the behaviour of those who seek to curb such activities. Such a paradigm shift is imperative if we are to address effectively the looming crisis of climate change.

135 Meadows, above n 45, at 164.