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Law, the Humanities and Political Incertitude in a Time of Climate Change¹

Matteo Nicolini

Abstract:

This article addresses how climate triggers relevant transformations in the realm of the law and affects our politico-legal paradigms. To this end, it delivers cross-disciplinary research by focusing on a non-fictional literary genre, i.e. climate-change pop-science, which has arisen very recently. The article also explores the concept of ‘strategic formalism’, i.e. a strategic legal device unable to govern societal concerns. On the one hand, it shapes our approach to climate change and migration; on the other, it adapts ecological issues to the ‘traditional’ legal framework. Against this background, the article argues that non-fictional texts also reflect the ideas of the most active forces within society, and fuel dynamism when tackling the ecological crisis. In a time of climate change, these forces stir strategic formalism, and make the law act as a bridge linking our troubled reality to an inclusive future.

Keywords: climate change, climate migrants, political bonds, contractarianism, law and humanities, strategic formalism, critical comparative law.

Consumer culture sets our minds at ease that individual acts of environmental virtue will do the trick. (McFarland Taylor, *Ecopiety*, 2)

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INTRODUCTION

Climate change is a relatively new topic in legal studies. Whereas climatologists, geographers, political scientists, and sociologists have been studying it for at least 40 years, legal scholars' interest has emerged only very recently (cf. Novel 2019). Nevertheless, several publications now explore how global warming intertwines, say, with international law, global law, and migration law (e.g. Gupta 2010; Ruppel et al. 2013; Bodansky et al. 2017; Farber and Peeters 2016; Carlarne et al. 2016; Gray et al. 2016; Mayer 2018).

Such an interest has given rise to innovative areas of research; among the others, 'climate change and the law' tackles the issues global warming raises within legal studies (e.g. Hollo *et al.*; Fermeglia 2020). These cross-disciplinary interactions allow us to investigate one of the less uncharted ambits of climate-change-related studies, i.e. the impact of non-legal variables, such as global warming, on the legal spectrum.

This article intends to further explore these connections. In so doing, it reappraises the assumptions we usually make about the law by locating them *in a time of climate change*.

Our troubled times recommend we address how global warming refashions our politico-legal paradigms *by a change of mood*. The change is both substantive and methodological. It is substantive, since we must adapt the law, its contents, and its role to existing environmental challenges. It is methodological, inasmuch as this article proposes a cross-disciplinary turn in legal studies. And both changes aim to capture the manifold connections between climate change and the law. As climate change 'promises to transform everything we thought we knew about nature' (Wallace-Wells 2019, 172 and 150), it is impossible to tackle it by adopting purely legal (and technical) responses.

As for its content, the article revolves around the concept of 'strategic formalism' (section 2). The concept reveals a disjuncture at the heart of our legal taxonomies, which reflects the mainstream legal discourse in climate-change-related issues. As we shall see, the law acts inconsistently when it comes to addressing climate change. On the one hand, it seeks to prevent (or mitigate) the effects of global warming; on the other, traditional legal patterns are not able to grasp the 'ecological and political devastation' it provokes (Wallace-Wells 2019, 150).

The article then considers how climate change is threatening our politico-legal communities (section 3). The threats are addressed through the analysis of several 'non-fictional texts': prepared by the Extinction Rebellion group and other climate crisis advocacy writers,

these give voice to our ecological concerns. The texts are complemented by other texts from the Western, Judaeo-Christian tradition (section 4). Not only do ecological threats challenge the foundations of political authority (section 5), but they also cause what this article terms *state failures*: nation states are unable to address how climate change impacts on both political communities (section 6) and migration policies (section 7).

Against this background, the article challenges the effects of strategic formalism applied to climate change (section 8) and maintains that certain arguments may stimulate a renewed debate on the sustainable foundations of our political communities (section 9). In challenging strategic formalism, the article links our troubled 'reality to an imagined alternative' (Watson 1988, 36). This means reframing the role of the law in tackling global warming (section 10). In reimagining our future, the article suggests that these non-fictional texts may be extremely useful. Written, as they are, by the most active actors engaged with climate change, they supply us with 'new building blocks' for reconstructing our 'ecological' legal systems (Thomas 2017, 9).

OLD LEGAL PATTERNS – NEW QUESTIONS: TACKLING CLIMATE CHANGE BY WAY OF STRATEGIC FORMALISM

As noted above, climate change raises new issues. On the one hand, it challenges our legal paradigms, which must adapt to often unpredictable environmental changes; on the other, it alters how societies perceive their political bonds. In so doing, it makes us navigate 'an entirely new social and political structure', with 'massive impact on the way human life on Earth is organized'. No wonder, therefore, that its effects 'have already eaten into trust in state authority ... igniting a complex bundle of social kindling' (Wallace-Wells 2018, 127–28; see also Mann and Wainwright 2018, ix).

The state of flux requires an urgent process of political and legal adaptation. This entails not being able to confront climate change by merely applying our traditional paradigms; by contrast, climate change requires innovative responses.

This article challenges the traditional legal approach to climate change and labels it 'strategic formalism'. The approach is *formalistic*, since the employ of old legal patterns does not offer innovative responses to the challenges posed by the environmental crisis. Quite the opposite: it merely adapts 'new' ecological issues to the 'traditional' framework, which is therefore unable to cope with the societal disruptions caused by climate change.

As ecological threats strike indiscriminately around the world, strategic formalism assumes that only one-size-fits-all responses might adequately counter the ecological decline (see Young 2011). However, tackling the challenges posed by global warming demands more than a general commitment to universal responses. In climate-change-related issues, handling ‘extra-legal circumstances’ does not require a sort of ‘convergence-through-pressure’ strategy (Yntema 1957). This attitude does not respect local knowledge or conditions, thus insulating, i.e. generalising, ecological concerns from the territorial contexts where they take place.

This approach triggers a disjuncture at the heart of our legal taxonomies. It follows that the law acts in contradictory terms when it comes to addressing climate change. On the one hand, it does not provide innovative responses; on the other, formalism probes strategic use of the law when confronting global warming. When we have resort to it, we act *strategically*, and normalise the very idea of ecological and climate losses. This also explains the resilience capitalism exhibits in climate-change-related studies. By virtue of *strategic formalism*, the forces of capital seek a connection with the public sphere and code, i.e. generalise, their own interests through the law. Therefore, states are not ‘neutral when it comes to whose interests in an asset shall be given priority’. The prospect of benefiting from capital gains is ‘more likely to find [its] blessings than claims that assert self-governance or seek to ensure environmental sustainability’ (Pistor 2019, 23).

‘Instead of tackling climate change, our democratic societies have endorsed ‘Climate Behemoth’ (Mann and Wainwright 2018, 145), i.e. the ‘mutual support for capitalism and for the nation-state’ (Wallace-Wells 2019, 192). In order to code their own interests through the law, the forces of capital seek a connection with the public sphere. The connection is drawn by providing the political community with a renovated ‘morally eligible foundation on which’ the latter might ‘organise [its] practical affairs’ (Mullender 1997, 25). The ‘powerful holders of global capital’ have thus ‘found ways to utilize the law’ by generalising their interests as *the* organising theme of our communities; and their interests now count as the interests of the whole (Pistor 2019, 154). In sum, these forces create cross-border regulatory systems that are suitable for their ‘private ordering in the name of party autonomy’ (Muir Watt 2014, 9).²

These processes of generalisation also have some bearing on our ecological commitments. They have resulted in a *commodifying state of mind* within our communities and favoured a change in our perception of spatiality. Living, as we do, in a ‘buyosphere’, or sphere of purchase,

we practice *ecopiety*, which is a ‘contemporary practice of environmental (or ‘green’) virtue through daily, voluntary works of duty and obligation’. These practices, however, ‘reflect and perpetuate the logics of global capitalism and market ideology’ (McFarland-Taylor 2019, 3 and 5).

As a consequence, strategic formalism traps the law in a set of circular justifications. It accounts for the generalisation of private actors’ interests through the law; in coding such interests, it favours the preservation of the capitalism-nation state nexus, which acts as a powerful, ‘strategic’ device. Being the organising theme of our acquisitive communities, this nexus is strongly rooted in traditional, i.e. formalistic, approaches to climate change. In shaping our commodifying state of mind, strategic formalism tries to convince us that there are no real alternatives to the narrative of acquisitiveness and exploitation. Strategic formalism assumes that the legal, and biological, decline is consistent with the radiant future promised to humanity. Adaptation to climate change is therefore the ‘progress’ of our times.

THE CROSS-DISCIPLINARY TURN: A NEW METHODOLOGICAL LEGAL APPROACH TO GLOBAL WARMING

A methodological change is therefore required if we want to challenge the strategic use of the traditional patterns which are adaptation and normalisation in a time of climate change. From a legal point of view, climate change is a transnational phenomenon. *Transnational Climate Law*, therefore, must be ‘multi-scalar, and its responses ‘multi-jurisdictional’ so as to reflect our troubled reality (Etty et al. 2018, 199).

The need for cross-disciplinary understanding is particularly urgent. How climate change affects the political bonds may be properly understood within the context of ‘contractarianism’, according to which ‘political society is a form of contract produced by the consent of the people’ (Ward 2004, 48). The failure of current systems of governance to tackle climate change means that our political societies evidently need a new social compact (see e.g. Ison and Straw 2020). And the several ‘Green New Deals’ proposed around the world may draw transdisciplinary insights from several scientific fields (such as economics and politics) where the failure of our climate governance is clearly addressed (Mastini et al. 2021).

A similar cross-disciplinary shift has taken place within the context of law and the humanities. There is indeed a non-fictional literary genre which has arisen only very recently. It is the ‘climate-change

pop-science’: prompted by the insurgent ecological crisis, it comprises essays, pamphlets, letters, and other writings related to the outcomes of our burning the planet. In so doing, they convey a convincing ‘callout to the public ... in response to climate and ecological emergency’ (Thompson 2020, 6; see also Wallace-Wells 2019, Thomas 2017, Mann and Wainwright 2018, Extinction Rebellion 2019, Aronoff et al. 2019).

The climate crisis has also triggered the publication of several religious and climate change-related non-fictional texts. Christian activists, for example, consider tackling global warming an act of ‘transformative change’ within political communities. To name just a few: *Like There’s No Tomorrow*, *Ecopiety*, and *Time to Act* share disquieting features with the Book of Revelation. In depicting the apocalyptic dissolution of both the ‘first heaven’ and the ‘first earth’, they provide an instructive, albeit alarming, description of what climate change may mean to our political communities (e.g. Christian Climate Action 2020; Ward 2020).

I understand that scholars may find it unusual to focus only on the most recent literature in the field of climate change. The topics explored in this article have already been examined by several scholars (on the transformative change climate change triggers in the field of land law see e.g. Babie 2013). Although popularised by Wainwright and Mann (Wainwright and Mann 2013), ~~for example~~, concepts such as ‘Climate Behemoth’ or ‘Climate Leviathan’ have also been implicit in several ‘non-fictional’ texts and pamphlets for decades, such as the reports to the Club of Rome (cf. Meadows et al. 1972; Gabor et al. 1978).

Despite its much longer historical trajectory, the article mainly focuses on how these recent texts convey our transnational ecological concerns. Like cross-border economic interests, ecological worries are shared by our transnational communities (Bohman 2007, 65); but, unlike economic interests, these are extremely concrete. Therefore, we should avoid making them fall prey to strategic formalism. This would mean reducing their concreteness to an abstract, and merely academic, exercise in futility. And several legal sub-disciplines are well-equipped when it comes to avoiding the shortcomings of strategic formalism. Take, for example, comparative law, which exhibits an inherent interdisciplinary attitude. In addition, its empirical, ‘problem-based approach’ (Siems 2018, 32) is apt for exploring the connections between legal systems, their environmental contexts, and the concrete concerns of our transnational communities.

This methodological approach allows us to contextualise our mitigation strategies so as to adequately take into account how global

warming is actually affecting our communities. To this extent, climate-change pop-science becomes a channel through which our contemporary ecological concerns have been given voice. Our non-fictional texts help us avoiding ‘one-size-fits-all’ mitigation solutions. In so doing, they also permit us to bridge the law with its cultural, as well as environmental, contexts.

THE MELTING BONDS OF POLITICAL COMMUNITIES IN ‘HUMAN-ALTERED WORLD’

As we stated in the previous section, our non-fictional texts give voice to how individuals and communities ‘perceive’ our ‘human-altered world’ (IE, 29). The way that they address the insurgent ecological crisis is particularly distressing.

The Uninhabitable Earth points to ‘climate horrors’, ‘sufferings’, and ‘deprivation’ (Wallace-Wells 2019, 198, 200 and 192). *This is not a Drill* and *Time to Act* are oversaturated with either the term ‘extinction’ or its associated lexical items (Extinction Rebellion 2019, 7, 30, 78; Christian Climate Action 2020, 45). *Inheritors of the Earth* warns us against a ‘human-created mass extinction’ (Thomas 2017, 117; see also Wallace-Wells 2019, 173). Finally, the books are percolated by the ideas of ‘climate and ecological emergency’ and ‘collapse’ (Extinction Rebellion 2019, 9; Thompson 2020, 5; Wallace-Wells 2019, 155; Aronoff et al. 2019, 19), and ‘destruction’ (Christian Climate Action 2020, xvi). The ‘ecological and political devastation’ provoked by climate change ‘promises to transform everything we thought we knew about nature’ (Wallace-Wells 2019, 172, 150).

On the brink of the final judgement, we are obsessed over our acting ‘selfishly’ (Wallace-Wells 2019, 10). After building ‘our way out of nature,’ we realise ‘how hard, and how indiscriminately’, climate change ‘is hitting’ (Wallace-Wells 2019, 71 and 74). Our brooding over is partly caused by our *commodifying state of mind*. Because of our living in the Global North, we thought that ‘wealth was a shield against [its] ravages’, and allowed climate change to affect less-developed countries (Wallace-Wells 2019, 1 and 54).

The apocalyptic lexicon employed by our non-fictional texts resonates with the idea of our political and ecological ‘passing away’. Linguistically and culturally embedded in the Western world,³ this can be traced back to the Bible, where God reveals through Isaiah that the ‘former’ heavens and earth ‘shall not be remembered, nor come into mind’ (Is 65:17). ‘Heaven and earth shall pass away’, the Gospel declares (Mt 25:35). Within the English politico-literary landscape, Gerard Winstanley’s

The new law of righteousness describes how the collapse and renovation of political communities take place on earth – and the sweeping away of our acting ‘selfishly’ has already begun:

this will be no troublesome businesse, when covetousnesse, and the selfish power is killed and cast out of heaven, and every one is made willing to honour the King of Righteousnesse in action, being all of one heart and one mind: Truly we may well call this a new heaven, and a new earth, wherein dwells righteousness. And that prophesie will not generally be fulfilled till this time (Winstanley 1649, 40; see Hill 1971, 144).

In his ‘~~The Second Coming~~,’ finally, William Butler Yeats depicts the Book of Revelation as the ‘inescapable sourcebook for Western anxiety’ (Wallace-Wells 2019, 208; see Butler Yeats 1934, 215).

No wonder, therefore, that the insurgent ecological crisis has prompted a renewed interest in what is termed ‘apocalyptic thinking’. Already present in Western thought since the 1960s, the ecological catastrophe accounts for its revival in the twenty-first century (Di Tommaso 2020). ~~And the~~ earth’s dissolution also calls the Book of Revelation back to the fore. For example, chapter 10 of *Time to Act* (‘Apocalypse Now – Revelation for a Climate Crisis’) visibly turns to it in order to provide ‘the contemporary church [with] a clear call to have hope and courage in times of crisis’ (Christian Climate Action 2020, 63).

Our troubled times are indeed experiencing a dissolution which is earth dependent. Evidently, ‘There is No Planet B’ (Berners-Lee 2019). The chapter headings of *The Uninhabitable Earth* are revealing: parts of our earthly environments will be rendered un-survivable by ‘Heat Death’, ‘Dying Oceans’, ‘Freshwater Drain’, ‘Unbreathable Air’, and ‘Plagues of Warming’. Politico-legal arrangements presuppose geographic scenarios.

There are ~~also~~ some striking differences, though. As noted, ‘Apocalyptic imaginaries’ are part of the Judaeo-Cristian tradition of the ‘beginning’ and ‘the end of all things and the life everlasting in the Kingdom of Heaven’, that is, the new Jerusalem (Embler 1966, 65): ‘And I saw a new heaven and a new earth’ (*Rev.* 21:1). Our ‘present day millennialism’, by contrast, points to ‘an apocalypse without the promise of redemption’ (Swyngedouw 2013, 12). Contemporary apocalyptic visions are ‘quasi-theological’, inasmuch as they leave ‘behind any hope of rebirth or renewal ... in favor of an unquenchable fascination with being on the verge of an end that never comes’ (Jay 1994, 33). ~~As Derrida put it: they~~ are ‘without vision, without truth, without revelation’ (Derrida and Leavey Jr 1984, 34).

Unlike the Revelation, the passing away of our physical world is *anthropogenic* in nature: the Anthropocene epoch is altering the laws of nature; and strategic formalism has allowed capitalism to hegemonically confound its own presence in law and rearrange our communities around its economically driven organising themes. We have been seduced by capitalism and its values: as *Time to Act* argues, we now worship the ‘Unholy Trinity’: ‘consumerism, unrestrained capitalism and individualism’ (Christian Climate Action 2020, 68). Whereas God promised that there ‘shall any more be a flood to destroy the earth’ (*Ge.* 9:11), our human-made ecological collapse will make extreme events possible. ‘There’ll be fires in the forests, floods in the cities’, *Letters to the Earth* poetically confirms (Thompson 2020, 76).

The ‘new world’ God promises to us in the Book of Revelation is closely linked with the ~~concept~~ of covenant, which is central in our politico-religious tradition. In our troubled times, its relevance is completely undermined: ‘faith ... keeps hope alive in the covenant of love ... That covenant, though, doesn’t guarantee a happy ending, so in what sense can we live in hope?’ (Ward 2020, 5–6).

ANTHROPOGENIC FAILURES: COMMODIFYING CLIMATE CHANGE

The anthropogenic pillaging of natural and biological resources triggers three consequences, which deal with what, ~~in the second section,~~ I have termed our *commodifying state of mind*. The first consequence points to the fact that, as human beings, we commercially exploit, and therefore commodify, every resource. *Ecopiety* reflects on how the capitalist-state nexus has encouraged the ‘popular production of environmental (green) virtue as a commodity’ (McFarland-Taylor 2019, 7).

Capitalist-oriented interests have contributed to the commercial appropriation of everything, even of oceanic resources. Take, for example, Parts V and VI of the 1982 United Nations Convention on the Law of the Sea (UNCLOS): ‘nature is represented as passive and instrumentalized’, ‘the ocean ... abstracted and flattened, and life-forms with no immediate commercial value are blindsided and discursively partitioned’ (Sammler 2020, 64). This process of oceanic territorialisation raises several issues; among them, whether the submersion of islands would unleash their former EEZ to pillaging by economic transnational actors: ‘Pacific islands have already been evacuated, because they are low lying and sea level rise has made them unliveable’ (Christian Climate Action 2020, 74), and face the risk of being ‘entirely underwater’. This points to both their submersion and ‘loss of territory’, as well as ~~rights~~ to

their rights on the territorial sea (Article 76 of UNCLOS; Leal-Arcas 2013, 46). We still do not know, however, whether the submersion of islands would unleash their former seabed to pillaging by economic transnational actors, which may try again to convince us of an unceasing economic growth.

The second consequence is related to the demise of the legal arrangements whereby we tried to restrain carbon emissions. The 1992 UN Framework Convention on Climate Change and the 2015 Paris Agreement seem to encapsulate (or are underpinned by) a Judeo-Christian sentiment. Both were supposed to be our *katechon*, ‘what withholdeth that’ (2 *Th.* 2:6) global average temperature be increased, and what makes efforts to limit it ‘well below 2°C above pre-industrial levels’ at least (Art. 2.1(a) of the Paris Agreement; see Rajamani 2016). ‘Influenced by corporate lobbyists’, and fearful of suffering the loss of our acquisitive lifestyle, we boosted the consumption of such resources, ~~thus accepting~~ restraints to emissions be lifted. The signatories to both the 1997 Kyoto Protocol and the 2009 Copenhagen Accord managed to establish an emission trading system. Besides commodifying carbon dioxide (the principal greenhouse gas), this legal arrangement favours not only ‘big emitters’, i.e. states with the largest emissions, but also international aviation and shipping, which fall outside the scope of the Paris Agreement (Art. 17 of the 1997 Kyoto Protocol; see Victor 2004; Popovski 2019; on big emitters see Larkin et al. 2018, 692). Quite unsurprisingly, the Agreement reflects the formalistic approach the law exhibits when confronting climate change. Indeed, this is part of the ‘construction of a nominally “global” frame’ that is the ‘political and geographical extension of the rule of the extant hegemonic bloc’ (Wainwright and Mann 2018, 31).

There is, then, a third consequence. The loss of territories will trigger considerable migration; and sea levels would probably boost climate-change migration (Risse 2009; Moore 2015, 210; Wesselbaum 2021). This would also increase the threats of war adding fuel to the fire of climate-related migrations.

CLIMATE CHANGE AND STATE POLITICAL FAILURES: ‘CONSTITUTIONAL VIOLATIONS’

As *This is Not a Drill* argues, ‘Normal politic has failed us:’ granting ‘access to government by big business ... has brought the whole planet to the brink of ecological disaster’ (Extinction Rebellion 2019, 22–23). Two ‘state failures’ have emerged: how to tackle climate-change and climate-change induced migration.

The first failure regards the legitimacy of our political obligation. States seem to ignore the consequences of climate change for their communities (Lieve 2020). We accepted the idea that ‘economic growth [would] save us from anything and everything’ (Wallace-Wells 2019, 115) – global warming included. Induced by strategic formalism, our commodifying state of mind made us believe that green growth would be possible (Hickel and Kallis 2020).

However, the availability of resources is even more reduced, and ‘our fragile web of life ... poisoned and broken’ (Extinction Rebellion 2019, 6). This means that our political obligation becomes unsustainable. In times of political and environmental crisis, the conveyancing of the political obligation should seek an innovative, and equitable, balance of bargain powers and conflicting interests. When global financial dominance promotes a paradigm for innovation, the proposed paradigm usually coincides with that of liberal democracy: ‘the one thing that has been almost completely absent from the 50 or so cases of attempted democratization since 1974 is experimentation beyond the basic institutions of liberal democracy’ (Schmitter 1995, 16). Liberal democracy perfectly fits the new universal of global economic and financial dominance: ‘[i]ndeed, Western liberal democracies have acted together to construct the current system that enables the global economy to operate’ (Bohman 2007, 28). Liberal democracies are thus ‘the only viable societal model left, for only they are compatible with economic success and [the] rapidly integrating information-intensive world economy’ (Kurki 2010, 366).

As is evident, ‘democratic participation’ in decision-making processes related to climate change is strategically trapped within the ‘traditional’ liberal democratic scheme that Robert Keohane terms ‘nominal democracy’:

meets democratic standards on the surface and embodies the rhetoric of democracy, but lacks the content. Transnational and trans-governmental elite networks can play valuable roles in world politics, but they do not constitute democracy in the classic sense (Keohane 2015, 344).

Public-finance and budgetary concerns have also marginalised climate-change issues in almost all political discussions. This produces a further state failure, that is, the creation of ‘the law that was wanted’ by the political community, and firmly rooted in a sustainable egalitarian commitment. In order to protect its own interests, capitalism ‘overruns the world’s borders to address the planetary crisis’ (Wallace-Wells 2019, 192), and seeks a connection with both the public sphere and transnational communities. The ‘readiness on the part of the state

authorities to allow' the private international investors to 'make a considerable part of the law' discloses state opportunism towards these contentious topics (Watson 1984, 87 and 96).

This is Not a Drill suggests 'Every parliament, state legislature and local authority ... declare a climate and ecological emergency', following the lead of more than 25 countries and more than 1,000 local councils throughout the world (Extinction Rebellion 2020, 22). The UK House of Commons was the first House to declare

an environment and climate emergency following the finding of the Inter-governmental Panel on Climate Change that to avoid a more than 1.5°C rise in global warming, global emissions would need to fall by around 45 per cent from 2010 levels by 2030, reaching net zero by around 2050 ... (HC Hansard 1 May 2019 Vol 659, Columns 317–318).

Several other countries followed suit.⁴

This also explains why Extinction Rebellion has recently declared the same 'bonds of the social contract ... to be null and void.'

When Government and the law fail to provide any assurance of adequate protection, as well as security for its people's well-being and the nation's future, it becomes the right of its citizens to seek redress in order to restore dutiful democracy and to secure the solutions needed to avert catastrophe and protect the future (Extinction Rebellion 2019, 1–2).

The hints of contractarianism in Extinction Rebellion's indictment resonate with resistance theories populating the history of constitutionalism. Among them, there are intriguing analogies with Johannes Althusius's idea of gross 'constitutional violation'. Mostly known for his fruitful contribution to federal theories, he also delivered a theory of resistance which became 'textbook Calvinism' and complemented his 'most comprehensive theory of rights and liberties, law and order, society and politics' (Witte Jr. 2007, 154–155). There are hints of *abusus potestatis publicae* when a ruler 'violates, changes, overthrows, or destroys' the fundamental law and people's rights. Its intrinsically contractarian theory of human nature offers a promise for a positive ecological understanding of the law. Indeed, rulers are stewards of the rights of the people, as well as their environmental contexts. This means that 'the people have not transferred these rights' to rulers, 'but reserved them to themselves'. Therefore, it is legally possible to appoint new stewards of our 'natural laws' and environmental rights when their demise is caused by any 'egregious', 'chronic', 'persistent', 'pervasive', 'wilful', 'intentional', or 'widespread' 'breach of a ruler's

constitutional duties’ (Althusius 1617, I.113.9–17; see Witte, Jr. 2007, 201). In fact, the ‘Climate Behemoth outcome’ has ‘chronically neglected the sick, the poor, and the innocent’ (Althusius 1617, I.113.1–3 and I.113.8–9, 13).

Althusius’s theory of resistance is illuminating. It offers the possibility of reimagining the future of our political communities even when strategic formalism seems to deceive us. Besides a good dose of fearlessness, it suggests reframing the law by acts of constitutional creativity and reinvention of the political. As we shall see, the most active actors engaged with climate change are also able to perform such acts of political creativity.

‘UNNATURAL’ ARGUMENTS: MIGRATING FOR A RADIANT FUTURE, BUT LIVING UNDER COLONIAL HIERARCHIES

Global warming is the outcome of what we have termed ‘state failures’. According to *Climate Leviathan*, the ‘principle failure’ is the demise of the Paris Agreement:

[it] does not keep fossil fuels in the ground, but this does not mean it will not set the foundation for adaptation on a burning planet. On the contrary, the so-called ‘failures’ of Paris are enabling, and part of, a crucial adaptation, the adaptation of the political (Wainwright and Mann 2018, 38).

This has consequences in the field of migration: the insurgent ecological crisis may ‘unleash as many as a billion migrants by 2050’ (Wallace-Wells 2019, 133). Yet, strategic formalism is an enthralling organising theme for state communities. Immigration is treated by ‘some powerful elites in the West’ as an acceptable ‘collateral damage’ in a time of climate change, as well as the ‘just price we pay for “more civilized” people to continue their lifestyle unchanged and unchecked’ (Christian Climate Action 2020, 74).

In placing emphasis on the radiant future promised to humanity, the global forces of capital seek a connection with both political communities and economic and climate migrants. Under the aegis of the United Nations, two *Global Compacts* were signed in 2018, the *Global Compact for Safe, Orderly and Regular Migration* (GCM), and the *Global Compact on Refugees* (GCR).⁵ The GCM acknowledges that migration has been ‘part of the human experience throughout history’; it also makes reference to it as ‘a source of prosperity’, whose ‘positive impacts can be optimized by improving migration governance’. Paras 3 and 4 of GCM stipulate that both instruments are ‘complementary international

cooperation frameworks', because 'migrants and refugees may face many common challenges and similar vulnerabilities'.

Strategic formalism percolates the praise of global mobility. Climate-induced refugeeism hardly squares with existing legal instruments, such as the 1951 Geneva Refugee Convention and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Cournil 2018; on the OAU Convention see Leal-Arcas 2012, 94). Furthermore, the GCM is non-legally binding and therefore is not enforceable. The UN High Commissioner for Refugees (UNHCR) also argues that the 1951 Convention 'rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution' (UNHCR 2019, 39). Nor is the 1967 Protocol applicable, since it does not cover 'sociopolitical factors', such as 'fleeing climate breakdown' or 'economic collapse' (*HE*, 31).⁶ A citizen from Kiribati applied to New Zealand in order to qualify as the 'first' climate change refugee in 2015; but there was 'no evidence that the Government of Kiribati [was] failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can'.⁷ That is why, in 2015, the International Organisation for Migration (IOM) addressed the topic by establishing a dedicated 'Migration, Environment and Climate Change' (MECC) Division.

Strategic formalism provides additional arguments in favour of our radiant future. The GCM indeed hides a *narrative of superiority*, where such 'radiant future' covers an imbalanced correlation between the actors of globalisation. Egalitarian in its commitment, this narrative facilitates the harmonisation and the convergence of laws in order to stimulate business and economic development. It also proposes a transnational, borderless legal framework into which heterogeneous legal systems coalesce. The pursuit of happiness and the illusion of taking part in the global distribution of wealth mobilises mass migration.

This triggers a spill over effect, because it makes the capitalism-state nexus the organising theme of the transnational community. The theme is contractarian but, at the same time, it multiplies the iniquitous effects of the economic conveyance underpinning state politico-legal arrangements. In fact, the capital-state link generates sharp divides between discrete sectionalities of the same political community, and replicates 'colonial histories and racialised hierarchies of powers' between groups (Goodfellow 2019, 39). This is evident when we consider how Western states have reproduced the 'racially marginalised hierarchies' between the metropolis and its colonies within their urban areas. As a result, migrants are located into cordoned-off 'periphractic

spaces', which constrain immigrants' participation in public life 'in terms of location and their limitation in terms of access – to power, to (the realization of) rights, and to goods and services' (Goldberg 2001, 71 and 72).

These processes of displacement and spatial marginalisation trigger a 'really hostile environment for [allegedly] illegal immigrants' (Goodfellow 2019, 35),⁸ i.e. a by-product of 'heightened border measures that restrict migration, measures that play well with anxious electorates and hawkish politicians'. This also accounts for another application of strategic formalism: the securitisation of climate-induced migration. Whilst praising the economic benefits of global mobility and the protection of migrants' rights, 'politicians work together across borders to make it more difficult for people to move, while capital is allowed to flow freely' (Goodfellow 2019, 35).

Not only do migrants enter into irredeemable conveyances with the capitalism-nation state nexus, but they also accept to bear the costs of such politico-legal marginalisation. This creates a flaw within the contractarian speculation. Although 'Nature herself seems to proclaim this with a loud voice', i.e. that 'rulers receive their authority ... by the free and lawful consent of the people' (Hotman 1969, 55–70), it is undeniable that the capitalism-state nexus arranges the political bonds of the community after 'structures of [economic] authority and [political] obedience' (Witte, Jr., 2007, 183). Althusius termed these bonds 'unnatural'. Migrants – even the climate-induced ones, who bear the costs of the politico-economic domination – 'subject themselves' to this organising principle and accept its 'authority by their own consent and voluntary act'. Within our wealthy communities, they accept 'these "unnatural" structures and strictures of authority, for they realize that without them ... even their most basic rights will mean little' (Witte, Jr., 2007, 184).

The process whereby this organising theme is accepted by the political community is based on a persuasive and *consociational* argument. The expression points to those federalist processes whereby highly conflictive societies, usually divided along ethnolinguistic cleavages, are accommodated and the maintenance of territorial integrity is secured. The consociational argument arranges the different sectionalities around a power-sharing organising principle. It assumes that there is an unequal distribution of wealth; and yet, this does not prevent each member of the community – even the displaced climate migrants – from gaining access to it.

Although it does not reflect an egalitarian commitment, the consociational argument is egalitarian in its commitment, because

it gives us all the illusion of taking part in the global distribution of wealth. Indeed, processes of decision-making can give the illusion of democratic legitimacy, when in fact they are exclusionary and little decision-making power is given to the constituents. ~~However, in~~ a time of climate change, this mobilisation is also palatable to those who are environmentally displaced and forced to join a new political community.

CONFRONTING CLIMATE BEHEMOTH THROUGH 'CREATIVE RESISTANCE'

Strategic formalism scarcely squares with the current state of ecological affairs. Under no circumstances does it formulate innovative responses to the concerns raised by climate change; but, in trying to adapt them to our traditional taxonomies, it normalises the idea of ecological loss. Take, for example, the Alliance of Small Island States (AOSIS). These obtained a mechanism for compensation and insurance for losses due to rising sea-levels, the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM). Whilst implementing Article 8 of the Paris Agreement, its role is still limited to the 'recommendation and assistance' for losses triggered by climate change (cf. Reinhard Mechler et al. 2018).⁹


Strategic formalism also narrows our scope of manoeuvre when we, as legal scholars, take part in the 'dynamics of environmental moral engagement and process of civic social transformation' (McFarland-Taylor 2019, 9). The commodifying state of mind also affects 'contemporary culture', within which 'it is utterly unsurprising to participate in social activism' related to migration and environmental issues' by buying something' (Mukherjee and Banet-Weiser 2012, 1). *Ecopieté* thus thrives 'within the hospitable conditions of depoliticized marketplace environmentalism and mediasphere that generate ... individualized acts of "green virtue"' (McFarland-Taylor 2019, 4).

Reframing the political bonds of our communities, it becomes clear, entails boosting the potential of our politico-legal imagination, so that 'we can invent the future we want, rather than merely prepare for the futures' the capitalism-state nexus and its 'experts tell us we should expect' (Baldwin 2014, 526). To this end, both the Book of Revelation and Althusius's moderate theory of resistance have been extremely illuminating, because the passing away of our contemporary heaven and earth is also linked to the regeneration of our social, political, and legal imaginaries and, therefore, deeply rooted in the establishment of 'our' new Jerusalem.

That is why this article has dealt with climate-change pop-science. Not only ~~do~~ it give voice to the concrete concerns of our communities, but our non-fictional texts may help us to challenge strategic formalism. In stretching our thinking into the future, we should reframe the role of the law in tackling global warming. *Letters to the Earth* invites us to 'be the authors of what come next': we should mobilise our societies and their forces because we need 'the largest creative response to these times of crisis the world has yet seen' (Thompson 2020, 6). *This is Not a Drill* advocates for 'the liberation of our mind from colonizing categories' (Extinction Rebellion 2019, 7), which may also entail 'undertaking mass civil disobedience to create a new political reality the whole world over' (Extinction Rebellion 2019, 22). *The Uninhabitable Earth* points to what Mann and Wainwright indicate as the 'Climate X', that is, 'a global alliance operating in the name of a common humanity' (Mann and Wainwright 2018, 173), rather than in the interest of its sectionalities, such as 'the interests of capital or nations' (Wallace-Wells 2019, 192).

Against this background, we do not need what, in contractarian terms, Theodore Beza termed as the 'theory of self-defence', while 'sorting out what people could and should do when a political structure [goes] awry' (Beza in Witte 2007, 124). Nor am I advocating the 'creation of spaces of collective rebellion' (Silver 2018). Certainly, 'resistance' and 'civil disobedience' may be highly productive when it comes to challenging the Behemoth connection; ~~and yet, as a form of 'considered, public, nonviolent breach of the law' (Christian Climate Action 2020, 24), they~~ still operate within the traditional precincts and resort to the same formalistic legal arguments ~~which saturate~~ the capitalism-state nation nexus and its outcomes.

What, as a legal scholar, I encourage is 'creative resistance' (Christian Climate Action 2020, 19), ~~according to which 'every~~ principled and peaceful citizen' is called to challenge the application of strategic formalism, ~~as well as~~ to 'liberate [themselves] from the economic categories' (Extinction Rebellion 2019, 7) imposed on us by the 'Climate Behemoth' connection, and therefore to arrange political ~~arrangements~~ around new organising principles.

It is not just a matter of upholding climate justice or addressing 'the distributive effects of climate change' (Wenta et al. 2019, 110). This entails continually '[stirring] up what the law,' as well as its formal  approach, sets down (Watt 2009, 1). This also means stirring 'politicians and institutions, economists, and everyone else to different priorities, and very quickly', *Like There's No Tomorrow* warns us (Thompson 2020, 7). This is the kind of legal pragmatism which reflects our concerns

triggered by climate change and underpinning the law. That is the reason why it is necessary to mobilise the most active forces within society.

CALLING FOR MORE IMAGINATION: STIRRING STRATEGIC FORMALISM IN A TIME OF CLIMATE CHANGE

When stirring the law, these societal forces open it up to contexts of mutual interference and interdisciplinarity. I understand that the legal mobilisation of the most active forces within societies perfectly matches ‘the deep-rooted Anglo-American practice of the common law, according to which the law involves an unceasingly exercise of imagination’ (Bennett et al. 2020, 9).

In so doing, this article runs somewhat counter to mainstream jurisprudential analyses, according to which the alignment of the common law method is considered open to formalistic legal method. In more radical jurisprudential traditions, it is seen as hegemonic in such an orientation. It is not my purpose to champion the common law as a means to bring law into alignment with a new ethic; nor does the article intend to portray the common law as it were suffused by legal imagination.

My point is this: in order to overcome strategic (and structural) formalism, we clearly need new imaginings. The article suggests that the common-law legal culture supplies us with a possible paradigm. Such acts of imagination are made possible, because the common law also possesses a ‘procedural’ state of mind, which gives primacy to ‘procedural creativity’. In so doing, it the processes of reinvention we need in a time of ecological disruption. This type of reinvention also accommodates complexity in accordance with a two-level pattern: imagination and legislation, i.e. invention and positivism. The common law requires us to be inventive. Take, for example, the judiciary, whose function is ‘developing the common law ... and discarding judge-made rules’ if these ‘have outlived their purpose and are contrary to contemporary concepts of justice’.¹⁰

It is no accident that ‘stirring the law’ is a typical Anglo-British legal device, which describes the relation between equity and its formalistic counterpart, i.e. the more ‘classical’ common law as it had been moulded in Westminster Hall. To this extent, equity offers us a paradigm applicable to cross-disciplinary research in this ambit. The way that it stirs the law reminds us that it is ‘a door having one side within the law and one side without’, whilst strategic formalism prefers ‘to keep the door closed and to see only their side of it’ (Watt 2009, 1).

In addition, equity resonates with Althusius's moderate resistance. The mobilisation of the most active forces of society does not mean breaking legal rules, but merely bending them with the aim of progressively overriding strategic formalism. *A Planet to Win*, *On Fire*, and *The Case for a Green New Deal* advocate for a deal as the new foundation of our political bonds (Pettifor 2019; Klein 2019). Assisted, as we are, by unceasing exercises of legal imagination, we should indeed stir the law so that it might 'be interpreted and applied in a manner that responds to changing conditions' (Wenta et al. 2019, 108). We must pluralise the legal debate in order to contrast the effects of climate change and the forms of racial, neo-colonial segregation the Western world practices as regards migrants – even if they are climate-induced migrants. We must also foster 'new regulatory practices' and new 'forms of governance', such as public participation, or legislative frameworks which may forestall the inception of 'a new heaven and a new earth' (*Rev.* 21:1). Besides this, and like equity, we should be able to stir the law and open it up to the plurality of forces and interests which populate our communities.

The comparison with equity also assists us in redeeming the bonds, interests, and organising themes within our communities and in challenging strategic formalism incrementally. By progressively introducing a set of 'comparatively novel legal principles', we might therefore 'override the older jurisprudence' that advocates transnational legal derivatives as the new organising themes within societies 'on the strength of [their] intrinsic ethical superiority' (Sumner Maine 1908, 45). In so doing, we give rise to a new organising principle, which reflects 'the view that, as conceptions of justice change over time, so too should' our legal rules in a time of climate change (Mullender 1997, 27).

CONCLUDING REMARKS

The central, and animating, argument of this article has been the critique of the concept of strategic formalism. The article has advocated reframing our methodological attitude to the study of the law in a time of climate change. The aim is to discard the narrative according to which our traditional legal paradigms are fit to govern the threat which is climate change.

It has proposed a new paradigm, which revolves around the following constitutive features: (1) a cross-disciplinary turn in legal studies; (2) adopting an empirical methodological approach when tackling the concrete concerns of our transnational communities; finally, (3) boosting the potential of our politico-legal imagination when reframing the law beyond formalism.

These features cannot be assessed separately as if they were in watertight compartments. Quite the opposite; they mutually interact. The cross-disciplinary turn in legal studies has meant challenging strategic formalism. This has meant *being subversive*, inasmuch as it has disclosed the ideological presuppositions of strategic formalism (i.e. our *commodifying state of mind*), as well as the related idea that adaptation is the sole type of progress of our time. At the same time, this has revealed that we cannot propose innovative responses to the concerns raised by climate change by merely adapting 'new' ecological issues to 'traditional' legal frameworks. Being subversive, then, runs counter to the idea of normalisation of ecological and climate concerns in legal studies.

Such a subversive approach has entailed reframing our methodological attitude in a time of climate change. Legal studies should revitalise their pristine empirical, and problem-based, approach to transnational concerns, and therefore become more pragmatic and cross-disciplinary. From a methodological perspective, comparative law may favour the cross-disciplinary turn in law.

Being cross-disciplinary involves unceasing conversations with the forces within our societies, whose callouts to the public in response to climate and ecological emergencies stretch our thinking into the future. We do not need a climate-change altered law for a 'Human-Altered World'. Certainly, ecological threats and 'the extinction crisis' are real (Extinction Rebellion 2019, 30). But, as we have said, this article ~~also intends~~ to explore the hints of hopes and the arguments in favour of open futures. As comparative legal studies suggest, we should act accordingly and shake off the 'pessimism-laden, loss-only view' of our future (Thomas 2017, 117 and 9).

This article has termed such conversations 'stirring up' the law. In so doing, we may set aside our political incertitude; and, in stirring the law, the new organising principle shall wipe away all tears from their eyes; and there shall be no more death, neither sorrow, nor crying, neither shall there be any more pain: for the former things are passed away. (Rev. 21.4)

This, I argue, may forestall the inception of new way of practicing the law in a time of climate change. Assisted, as we are, by unceasing acts of legal imagination, we stir the law and explore it with a subversive, empirical, and critical gesture. In this lies our commitment; despite the changes caused by anthropogenic drivers, the law must cope with global warming and 'responds by evolving' (Thomas 2017, 117). This means proposing a new organising theme whereby confronting the challenges climate change is likely to pose in the foreseeable future.

NOTES

1. This article pertains to the activities of the IEL (innovative education laboratory) GEOLawB, which is part of the research excellence project 'Law, Changes and Technology', sponsored by the Ministry of Education and carried on by the Law School of the University of Verona.
2. On how economic actors penetrate the public sphere see e.g. Braithwaite (2005), 9. On the connections between them and the environmental public sphere see Grabosky (1994). On the regulatory side of 'environmental' connections see Parker and Haines (2018); Besselink and Yesilkagit (2020).
3. For a broader examination see e.g. Lisboa (2011). See also the essays collected in Germanà and Mousoutzanis (2014); and in McAllister (2020).
4. A comprehensive list of climate emergency declarations is available at <https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/> (Accessed on 10 March 2021).
5. Resolution adopted by the General Assembly on 19 December 2018, UN Doc A/RES/73/195 (11 January 2019) Annex: Global Compact for Safe, Orderly and Regular Migration. Report of the United Nations High Commissioner for Refugees (13 September 2018) UN Doc A/RES/73/12 (Part II) Global Compact on Refugees.
6. See *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985, available at https://www.refworld.org/cases,USA_BIA,3ae6b6b910.html (accessed 30 December 2019).
7. *Teitiota v Ministry of Business Innovation and Employment* [2015] NZSC 107 (20 July 2015), at 13.
8. The so-called 'hostile environment immigration' policy was coined by the then UK Home Secretary Theresa May. See J. Kirkup and R. Winnett, 'Theresa May interview: "We're going to give illegal migrants a really hostile reception",' (London) *The Telegraph* (25 May 2012).
9. Decision 2/CP.19 'Warsaw international mechanism for loss and damage associated with climate change impacts,' Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10/Add.1.
10. *Cassell & Co Ltd v Broome* [1972] AC 1027, 1127, *per* Lord Diplock.

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