

**JUST TRANSITIONS LAW:
PUTTING LABOUR LAW TO WORK ON CLIMATE CHANGE**

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Abstract:

Climate change will dramatically affect labour markets, but labour law scholars have mostly ignored it. Environmental law scholars are concerned with climate change, but they lack expertise in the complexities of regulating the labour relationship. Neither legal field is equipped to deal adequately with the challenge of transitioning to a lower carbon economy and the effects of that transition on labour markets, employers, and workers. This essay considers whether a legal field organized around the concept of a ‘just transition’ to a lower carbon economy could bring together environmental law, labour law, and environment justice scholars in interesting and valuable ways. “Just transitions” is a concept originally developed by the North American labour movement, but has since been endorsed by important global institutions including the International Labour Organization, the UNFCCC, and the U.N. Environmental Program. Although ‘just transitions’ has received considerable policy attention, it has been under-explored by legal scholars. This paper marks an early contribution to this challenge. It explores the factual and normative boundaries of a legal field called Just Transitions Law and considers whether such a field would offer any new, valuable insights into the challenge of regulating a response to climate change.

**JUST TRANSITIONS LAW:
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“There appears to be an emerging framework that allows for a Just Transition to operate on several levels, ranging from the global-societal level down to workplaces and local communities. This framework is grounded in some well-established social practices in the face of job challenges, and is reflected in the ongoing work of the ILO, the trade unions, national and local governments, business and industry, and community-based organizations. However, it is a framework that has been structured around a principle and a goal. The principle holds that the costs and benefits of a transition to sustainability should be shared widely across society. The goal is to generalize this principle at the level of policy. Steps are being taken here and there to turn the Just Transition approach into reality, but there is still a long way to go before it becomes a policy norm.”

- United Nations Environmental Programme, 2008¹

INTRODUCTION

In a recent article exploring law and climate adaptation, environmental law Professors J.B. Ruhl and James Salzman dusted off the ‘law of the horse’ anecdote long used by American legal scholars to demonstrate the quintessential non-legal field.² The anecdote proceeds like this. Lots of law concerns horses: consumer law, animal welfare and veterinary laws, gaming law, contract law, tort law, and so forth. We could cluster

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¹ Worldwatch Institute, *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World*, United Nations Environmental Program, (2008) 278, online: <http://www.unep.org/PDF/UNEPGreenjobs_report08.pdf>.

² J.B. Ruhl & James Salzman, “Climate Change Meets the Law of the Horse” (2013) 62 DUKE J.L. 975

these disparate laws together, stamp the name Horse Law on it, and call it a new field of legal study and practice. Law professors could offer courses in Horse Law and write Horse Law texts. Lawyers who practiced in the field could be ‘Horse Lawyers’, and bar associations could charter new Horse Law chapters. The value of the anecdote rests in the observation that we do not recognize the Law of the Horse as a distinct legal field, and we are challenged to ask why not. What distinguishes the non-legal field Horse Law from the many recognized legal fields, such as tort, contract, family, labour, and environmental law?³

Ruhl and Salzman were interested in climate change and in how law can best respond to it. They questioned whether the “profound need for social and economic adaptations to climate change create an equally profound need for legal adaptations”. In particular, the authors were interested in whether “law and policy for climate change adaptation will evolve as a disconnected ‘Law of the Horse’ or coalesce into a coherent legal field.”⁴ They argued that a new legal field of Climate Change Adaptation was unlikely to emerge on its own, but that there were good reasons why legal academics, activists, lawyers, and policy-makers should intervene to create one. According to Ruhl and Salzman, the creation of a new legal field, “can serve political ends by legitimizing a

³ See also: Karl Llewellyn, “Across Sales on Horseback” (1939) 52 HARV. L. REV. 725 at 735; Frank H. Easterbrook, “Cyberspace and the Law of the Horse” (1996) U. CHIC. LEGAL F. 207; Todd S. Aagaard, “Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy” (2010) 95 CORNELL L.J. 221; Harold Hongju Koh, “Is There a “New” New Haven School of International Law?” (2007) 32 YALE J. INT’L. L. 559; Darian M. Ibrahim & D. Gordon Smith, “Entrepreneurs on Horseback” Reflections on the Organization of Law” (2008) 50 ARIZONA L. REV. 71; Lawrence Lessig, “The Law of the Horse: What Cyberlaw Might Teach” (1999) 113 HARV. L. REV. 501 at 501. Professor Brian Langille uses ‘Swimming Pool Law’ to the same ends in the labour law context: Brian Langille, “Labour Law’s Back Pages” in Guy Davidov and Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) at 2 and 15 [hereinafter *Boundaries*].

⁴ *Ibid.* at 981.

social movement, enhance efficiency by providing a focal area for technical expertise, ensure effectiveness by reorienting laws and policies in a more productive structure, or some combination of all three.”⁵

All new legal fields must confront their Law of the Horse moment, that point when a decision is made that a new legal field is warranted or desirable because developments in the law or the world around us have outgrown existing legal taxonomies. Environmental and labour law confronted theirs at different points in the mid to late 20th century. Labour law came into its own as a distinct legal field in the years surrounding the Second World War; environmental law is a much newer field, dating only from the 1970s. Before that, there were common law torts, rules of contract, and government regulation affecting labour and the environment, but no one had cobbled them together and suggested they be treated as distinct legal fields. Legal scholars made a conscious decision to re-organize legal boundaries and treat labour and environmental law as distinct legal fields. Other legal fields have had their Law of the Horse moment more recently. Health law is an example⁶, as is energy law⁷, sports law⁸, technology or cyber law⁹, entrepreneurial law¹⁰, and disaster law¹¹.

Sometimes new legal fields evolve as corollaries of established fields, or at least an attempt is made to accomplish this result. This evolutionary process has been taking

⁵ Ibid at 989.

⁶ Wendy K. Mariner, “Toward an Architecture of Health Law” (2009) 35 AM. J.L. & MED. 67; Einer R. Elhauge, “Can Health Law Become a Coherent Field of Law?” (2006) 41 WAKE FOREST L. REV. 365.

⁷ Ruhl & Salzman, *supra* note 2 at 999-1000.

⁸ Paul Weiler, *et al*, *Sports and the Law: Texts, Cases and Problems*, 4th ed (St. Paul: West Publishing Company, College & School Division, 2010).

⁹ Lessig, *supra* note 3; Frank H. Easterbrook, “Cyberspace and the Law of the Horse” (1996) U. CHIC. LEGAL F. 207.

¹⁰ Ibrahim & Smith, *supra* note 3.

¹¹ Daniel A. et al, *Disaster Law and Policy*, 2nd ed (Aspen Publishers, 2010).

place in both environmental and labour law in recent years. Labour law scholars fear the erosion of their field as the standard employment model upon which it was constructed and ‘labour’ as a class and a movement erodes.¹² Some scholars have proposed to reinvent the field as ‘labour market law’¹³, or the ‘law of economic subordination and resistance’¹⁴, among other possibilities. In environmental law, climate change is perceived by some scholars to be a game changer that will welcome unprecedented new challenges that will strain the traditional boundaries and coherence of the field as presently constructed.¹⁵ Professor Ruhl has opined that the “path of environmental law has come to a cliff called climate change, and there is no turning around”.¹⁶ Environmental law scholars have proposed new legal fields such as “climate change law”¹⁷, “climate adaptation law”¹⁸, and environmental justice law¹⁹. The futures paths of both environmental and labour law seem uncertain.

This existential crisis the two disciplines share. Beyond that, they traditionally have had little in common. They are concerned with difficult sorts of social and economic

¹² See, e.g., collected works in Davidov & Langille, *Boundaries*, *supra* note 3.

¹³ Paul Davies & Mark Freedland, *Towards a Flexible Labor Market: Labour Legislation and Regulation since the 1990s* (Oxford: Oxford University Press, 2007); Harry Arthurs, “Charting the Boundaries of Labor Law: Innis Christie and the Search for an Integrated Law of Labor Market Regulation” (2011) 34:1 DAL. L.J. 1.

¹⁴ Harry Arthurs, “Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?” (2012) OSGOODE CLPE RESEARCH PAPER NO. 10/2012, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2056624>.

¹⁵ Aagaard, *supra* note 3 at 223; A. Dan Tarlock, “Is There a There in Environmental Law?” (2004) 19 J. LAND USE & ENVTL. L. 21 at 215-217.

¹⁶ J.B. Ruhl, “Climate Change Adaptation and the Structural Transformation of Environmental Law” (2010), 40 Env. Law 343 at 343

¹⁷ John Dernbach & Seema Kakade, “Climate Change Law: An Introduction” (2008) 29:1 ENERGY L. J. 1; J.B. Ruhl, “What is Climate Change Law?” (22 August 2015) *OUPblog*, online: <<http://blog.oup.com/2015/08/what-is-climate-change-law/>>.

¹⁸ Ruhl & Salzman, *supra* note 2; Robin Kundis Craig, “Stationarity is Dead—Long Live Transformation: Five Principles for Climate Change Adaptation Law” (2010) 34 HARV. ENVTL. L. REV. 9.

¹⁹ Adam D. Schwartz, “The Law of Environmental Justice: A Research Pathfinder” (1995) 25:10 ENVTL. L. REP. 10543.

problems; they are balancing different types of interests; they deploy different legal rules, techniques, modes of reasoning, and different discourses, and they are concerned with social and economic problems with very different temporal and geographic scopes. Environmental law scholars and lawyers rarely speak to their labour law counterparts. They publish in different journals, attend different conferences, appear before different tribunals.

The goals and outcomes of environment and labour law often conflict. Labour law addresses tensions produced at the intersection of the political and economic demand for more jobs, and the social and economic demand for better, decent jobs.²⁰ Environmental law too is concerned with preserving jobs, but also with the impacts of consumerism and economic activity on climate, air, and water quality and other harmful effects on the natural environment. While labour law is mostly concerned with balancing efficiency and equity concerns that are primarily local and immediate, environmental law addresses matters that can span vast geographic spaces and extend for decades or more. Environmentalists and labour organizations, key actors that inhabit the respective legal systems, have frequently found themselves on different sides of policy debates.²¹

For all of these reasons, the prospects for the emergence of a legal field that brings together labour and environmental law seem bleak. On the other hand, both fields are in a period of self-reflection, facing the prospect of an uncertain future. This uncertainty has led scholars in the respective fields to look outward in search of potential allies, and to contemplate new narratives around which their fields could be adapted to

²⁰ See Brian Heap and Jennifer Kent, eds, *Towards Sustainable Consumption: A European Perspective* (London: The Royal Society, 2000) arguing that present trends in consumption are unsustainable and must be restrained, particularly in rich countries.

²¹ Ben Obach, "New Labor: Slowing the Treadmill of Production" (2004) 17 ORGANIZATION & ENV'T 337.

ensure their continued vitality and relevance. It is hardly surprising that environmental law scholars would look towards climate change as a possible foundation around which to organize a revitalized legal field. Climate change poses among the greatest, most complex legal policy challenges humanity faces today, and traditional environmental law is obviously well situated to be part of the solution.²²

But climate change is also a complex, cross-sectional problem that will have implications for many other fields of law as well, including labour law. It requires law and policies that will guide a transition towards a lower carbon and more sustainable economy. As noted in a recent report by the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC), this transition will have “both positive and negative impacts on employment. Generally, output and employment in low-carbon industries and services will grow, while energy and resource-intensive sectors are likely to stagnate or contract”.²³ The economic transition towards a lower carbon economy will introduce new challenges to existing legal models, new pressures will be brought to bear on unemployment, adjustment, and training strategies, legal models designed to regulate high carbon industrial workplaces may prove ill-suited to new lower carbon industries and workplaces, and labour market patterns and practices may be affected in unpredictable ways as the key industrial relations actors (governments, employers, workers, and unions) adapt and adjust to environment-related changes.²⁴ There will be

²² Ruhl & Salzman, *supra* note 2 at 978; Holly Doremus, “Adapting to Climate Change with Law That Bends Without Breaking” (2010) 2 SAN DIEGO J. CLIM. & ENERGY L. 45.

²³ See UNFCCC, “Just transition of the workforce, and the creation of decent work and quality jobs” (October 2016) <http://unfccc.int/resource/docs/2016/tp/07.pdf> at 11-13. See also C. Lipsig-Mumme, “Climate, Work and Labour: The International Context” in *Climate@Work* (Fernwood, 2013), 21-40

²⁴ Sophie Dupressoir et al., *Climate Change and employment: Impact on employment in the European Union-25 of climate change and CO2 emission reduction measures by 2030* (Brussels:

winners and losers in domestic and international labour markets, and labour law has always been interested in these sorts of distributional, economic and social justice based concerns.

Despite this, labour law scholars have so far participated little in the ongoing debates about climate change and its potential impact on law, legal scholarship, and legal taxonomy. This article marks an early contribution to that discussion. It considers a variety of possibilities for bringing the insights of labour law into the dialogue about how law can best respond to climate change. Like the Ruhl and Salzman paper referenced at the outset, it utilizes legal taxonomy towards this end. It examines the origins and justifications for recognizing environmental law and labour law as legal fields and contemporary challenges to those justifications, as well as more recent proposals in favour a new legal fields to address climate change. Against this background, the article explores the potential utility of a new legal field organized around the emerging concept of “just transitions”—Just Transitions Law (JTL)—that would combine insights from environmental law, environmental justice, and labour law.

The idea of “just transition” to a greener, lower carbon economy has its roots in the global labour movement, but more recently has been endorsed by important international legal bodies, including the International Labour Organization (ILO) and the United Nations Environmental Program (UNEP).²⁵ Just transition was recently adopted as

ETUC; Social Development Agency; Wuppertal Institute, 2007); Carla Lipsig-Mummé, ed, *Climate@Work* (Halifax: Fernwood Publishing, 2013).

²⁵ UN Conference on Sustainable Development, *Rio+20, The Future We Want* (2012), online: <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20J%20une%201230pm.pdf>> at para. 152; International Labour Organization, “Guidelines for a Just Transition Towards Environmentally Sustainable Economic Societies for All” (2015) http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf; ILO, “Climate change and labour: The need

a policy objective in the Paris Agreement concluded at the Conference of the Parties (COP) under the United Nations Framework Convention on Climate Change (UNFCCC).²⁶ Just transition refers to a policy platform that advocates legal and policy responses and planning that recognizes the need for economies to transition to lower carbon economic activity, while at the same time respects the need to promote decent work and a fair distribution of the risks and rewards associated with this transition.

A recent report of the UNFCCC describes the ambition of a “just transition” as follows:

The transition towards inclusive and low-carbon economies must be just and fair, maximizing opportunities for economic prosperity, social justice, rights and social protection for all, leaving no one behind. For this reason, the Paris Agreement stated the imperative for just transition as essential elements of climate action.²⁷

The implementation of an ambitious ‘just transitions’ policy at the domestic and supranational levels will demand careful policy planning and involve legal strategies and responses that cut across existing legal categories.

As noted in the UNFCCC report, a just transition policy strategy requires “cooperation and coordination between employment authorities and their counterparts in various fields, including finance, planning, environment, energy, transport, health, and economic and social development.”²⁸ *Legal* coordination across these fields will be crucial to the implementation of a just transition policy. Without an early, coordinated response, there is good reason to believe that climate law policy will develop piecemeal in a “passive Law-of-the-Horse approach” that will fail to produce a coherent and

for a “just transition” (2010) 2 International Journal of Labour Research 2, online: <http://www.ilo.org/actrav/what/pubs/WCMS_153352/lang--en/index.htm>

²⁶ See UNFCCC, “Just transition of the workforce, and the creation of decent work and quality jobs” (October 2016) <http://unfccc.int/resource/docs/2016/tp/07.pdf>

²⁷ UNFCCC, *ibid.* at 17.

²⁸ *Ibid.* at 18.

effective just transition program.²⁹ This article considers whether a deliberate intervention by legal academics, policymakers, lawyers, and activists to develop a legal field of Just Transitions Law could produce a more effective mechanism for implementing an effective just transitions strategy that cuts across various legal fields than would an approach that leaves each of the legal fields necessarily implicated in a just transition strategy to evolve autonomously.

We are no doubt a long way from recognizing JTL as a distinct legal field. However, this paper argues that there is nevertheless value in theorizing about what such a legal field might look like. The exercise encourages scholars of labour law, environmental law, and environment justice (among other legal fields discussed in this paper) to examine the boundaries of their legal fields through a different critical lens. When we examine the challenge of governing climate change through JTL, we might see new pathways for dialogue and new regulatory strategies that would be missed if the various legal fields remain enclosed within their own intellectual silos.

The paper proceeds as follows. Part I considers the legal taxonomy scholarship in order to assess when it is appropriate to develop new legal fields, as well as the significance of this exercise to our understanding of the law. Part II examines recent efforts by legal scholars to develop a legal field organized around the defining feature of climate change, noting the absence of absence of labour law voices in this debate. Part III explores the origins of labour and environmental law as distinct legal fields and the challenges presently confronted by both fields. The challenges of bringing labour and environmental law together are explored in Part IV. Finally, in Part V, the paper discusses three possible proposals for bringing labour law insights into the climate

²⁹ Ruhl & Salzman, *supra* note at 983.

change dialogue, and concludes with a cautious endorsement of a Law of Just Transitions as a promising option for a re-organized legal field that is potentially capable of organizing the complex the legal challenges associated with implementation of a just transition strategy.

I. LEGAL TAXONOMY AND CONSTRUCTION OF LEGAL FIELDS

Legal taxonomy, the categorization of legal fields, helps construct our understanding of legal knowledge and the role of law in society.³⁰ Recognizing a legal field of study can legitimize not only the lawyers and academics who practice and research in the field, but also the non-governmental organizations (NGOs) and ‘think tanks’ that inhabit it. This recognition can influence not only resource allocation and access to funding for those actors, but also the weight given their opinions and arguments.³¹ Legal fields produce legal experts whose specialization give credibility to the field in public policy debates. Specialized lawyers go forth into their field and develop new legal rules, new techniques, and new modes of legal reasoning that can impact social and economic policy.

Professor Emily Sherman described the benefits of legal categorization as follows:

[O]rganisation of law into categories...facilitate[s] legal analysis and communication of legal ideas... [A] comprehensive formal classification of law provides a vocabulary and grammar that can make law more accessible and understandable to those who must use and apply it. It assembles legal materials in

³⁰ Stephen A. Smith, “Taking Law Seriously” (2000) 50 U. TORONTO LJ. 241 at 244: “We draw classifications in law not just for the sake of classifying but because classifying rules, cases, and so on is a large part of what acquiring legal knowledge means”; Samuel D. Warren & Louis Brandeis, “The Law of Ponds” (1889) 3 HARV. L. REV. 1.

³¹ Ruhl & Salzman, *supra* note 2 at 989: “Depending on the circumstances, then, creation of a new field can serve political ends by legitimating a social movement, enhance efficiency by providing a focal area for technical expertise, ensure effectiveness by reorienting laws and policies in a more productive structure, or some combination of all three.”

a way that allows observers to view the law as a whole law. This in turn makes it easier for lawyers to argue effectively about the normative aspects of law, for judges to explain their decisions, and for actors to coordinate their activities in response to law.³²

The growth of environmental law as a recognized field of study in the early 1970s gave greater prominence and influence to professional environmental law associations.³³ Strong legal fields have a symbiotic and sometimes embryonic relationship with government departments and government funding. For example, as labour law hit its peak of influence in the 1960s-1970s, so too did the influence of labour ministries and labour departments within government, and as the neoliberalism ascended beginning in the late 1980s and public policy turned against government intervention in labour markets and collective bargaining, labour law's influence in government and in the legal academy began to wane.³⁴

Some legal fields owe their distinction to a legal mode of reasoning or rationality. Tort and contracts are examples.³⁵ Legal fields such as environmental, labour, sports, and family law acquire their legitimacy, on the other hand, by offering insights into specialized corners of our world. As Professor Brian Langille has explained, “[s]ubjects like labour law take a dimension (a chunk, a slice) of human life such as work, family, or trade between nations, and then draw together all of the law which applies to that aspect

³² Emily Sherwin, “Legal Positivism and the Taxonomy of Private Law” in Charles E.F. Rickett and Ross Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Brinks* (Portland: Hart Publishing, 2008) at 103 and 119; Aagaard, *supra* note 2 at 226-27. Also Emily Sherwin, “Legal Taxonomy” (2009) 15 *Legal Theory* 25.

³³ For example, the Canadian Environmental Law Association was formed in 1970, just as law schools began to teach Environmental Law as a distinct course. In 1978, the Ontario government began funding the organization as a specialty legal clinic. See CELA website: <http://www.cela.ca/howeare>, and discussion of CELA's origins in Paul Emond, “Are We There Yet?” (2008) 46 *OSGOODE H.L.J.* 219.

³⁴ See discussion in Harry Arthurs, “What Immortal Hand or Eye? Who Will Redefine the Boundaries of Labor Law?” in Davidov & Langille, *Boundaries*, *supra* note 3 at 375; Cynthia Estlund, “The Death of Labor Law?” (2006) 2 *Annual Review of Law & Social Sciences* 105.

³⁵ Langille, *supra* note 3 at 15.

of life.”³⁶ What interests legal taxonomists is the question of which slices of life make sense as hubs around which to bundle legal rules into distinct legal fields. Langille describes the challenge as follows:

[H]ow is one to know whether one has carved up reality ‘at the joint’ as it were. How do we know we have a coherent and appropriate subject if we obtain it by simply looking at life without a guiding legal framework to tell us where to carve? On this approach one could (and some have) come up with categories such as ‘swimming pool law’... The thinking is—here is a part of reality, swimming pools, and we should draw together all of the law which applied to them (people can be injured in them, they can be bought and sold, they raise planning and environmental issues) and write a text, or offer a course, to satisfy our need to address all of these issues comprehensively.³⁷

We do not could cobble together all those laws that affect horses, or swimming pools, because legal scholars do not do believe those slices of life are meaningful in a legal sense.³⁸

Therefore, a task of legal taxonomy is to identify which ‘slices of life’ are legally meaningful.³⁹ Scholars have described this exercise in different terms. However, common to most accounts is the idea that new legal fields should contribute something novel to our understanding of the world and law’s role in it, which might otherwise be missed if law was not categorized in this way.⁴⁰ There must be coherence to the legal story that is produced by the legal field, such that it improves our understanding of law if we organize legal materials together in this way.⁴¹ This is Langille’s point when he notes that a proper carving up of reality into a legal field should result in the whole being greater than the sum of its parts: “[T]here must be a benefit to be obtained from an

³⁶ *Ibid* at 15-16.

³⁷ *Ibid*.

³⁸ Ibrahim & Smith, *supra* note 3 at 77.

³⁹ *Id* at 79.

⁴⁰ Langille, *supra* note 3 at 16.

⁴¹ Aagaard, *supra* note 3 at 226; D. Solove, “A Taxonomy of Privacy” (2006) 154 U. PA. L. REV. 477 at 484; Langille, *supra* note 3 at 19.

overview of all of the law which bears upon our chosen category in the form of insight which would be lost if we did not carve reality here”.⁴² Aagaard makes the same point when he argues that a legal taxonomy “is useful if the organizational framework reflects patterns that reveal something important to us about the materials being classified.”⁴³

Those patterns include factual similarities or boundaries that make it is sensible, and feasible, to bundle law together at a particular point, such as “laws affecting employment” or “laws regulating pollution”. Yet factually distinct patterns or boundaries alone can produce a weak form of legal coherence. Factual patterns can change, or become more complicated in ways that overburden a legal field founded on little more than a common factual epicenter. Ruhl and Salzman reference “the law of oceans” as an example of a “dysfunctional and ineffective legal regime” defined by an incoherent mish-mash of laws held together only by the common thread that they in some manner are concerned with oceans.⁴⁴

A stronger coherence is provided by a shared value or set of values that guides how we think about law in a particular subject domain.⁴⁵ Legal fields that derive their coherence not just from a factual commonality or boundary, but also from a shared underlying normative value or belief system, from “a set of distinctive, fundamental principles”⁴⁶ or “a constituting narrative”⁴⁷, may be more versatile, adaptive, and

⁴² Langille, *ibid* at 16.

⁴³ Aagaard, *supra* note 3 at 227; Elhauge, *supra* note 4 at 370: “[D]o we gain insights from thinking as a group about the set of legal materials grouped under this rubric?”; Lessig, *supra* note 3 at 502; Ibrahim & Smith, *supra* note 3 at 84 [a field of study should offer “unique insights about law”].

⁴⁴ Ruhl & Salzman, *supra* note 2 at 983.

⁴⁵ Aagaard, *supra* note 3 at 231.

⁴⁶ Tarlock, *supra* note 13 at 228: “One of the primary characteristics of a distinct area of law is that it contains a relatively unique set of core principles distinguishing it from other areas of law”.

⁴⁷ Langille, *supra* note 3 at 19.

functional. They may be more likely to expose helpful patterns in the law that advance our understanding of our world, or that expose existing limitations in the law, and to help organize and guide legal reasoning and rule-making.⁴⁸

New legal fields emerge when legal scholars decide to carve up the world in an original manner. This can occur because evolving factual complexities overburden existing legal categories. This is the story of environmental law, for example, as discussed below. Environmental law emerged as a legal field because legal scholars, lawyers, activists, and policymakers realized that modern environmental problems had grown too complex to be dealt with as simply a branch of nuisance law.⁴⁹ Sometimes new legal fields are proposed in response to significant new events that strain the boundaries of existing legal classifications. Internet or cyber law is an obvious example.⁵⁰ Climate change may be another. Its widespread impacts could have profound effects on our social and economic models and strain existing legal categories.

II. CLIMATE CHANGE LAW?

Environmental law scholars are debating whether existing legal classifications are sufficient to explain, conceptualize, and manager the challenges introduced by climate change.⁵¹ New legal fields have been proposed to take up that task, including “climate change law”⁵² and “climate adaptation law”⁵³. Proponents argue that climate change calls

⁴⁸ See discussion of “reason-based” legal classifications and “normative” legal taxonomy in Sherwan, *supra* note 32.

⁴⁹ Ruhl & Salzman, *supra* note 2 at 997-998.

⁵⁰ Lessig, *supra* note 2; Easterbrook, *supra* note 7.

⁵¹ Ruhl & Salzman, *supra* note 2 at 981. See also: Matthew D. Zinn, “Adapting to Climate Change: Environmental Law in a Warmer World” (2007) 34:1 *ECOLOGY L.Q.* 61; Craig, *supra* note 15 at 17; Richard J. Pierce, Jr., “Legal Disputes Related to Climate Change Will Continue for a Century” (2012) 43 *ENVTL. L. J.* 1.

⁵² Dernbach & Kakade, *supra* note 17; Jacqueline Peel, “Climate Change Law: The Emergence of a New Legal Discipline” (2008) 32:3 *MELBOURNE U. L. REV.* 922.

into question base line assumptions that have shaped existing social, economic, and legal patterns. As a result, legal fields that relate to biophysical change—environmental law, water law, natural resources law, and land use law especially, but also agricultural law, insurance law, and littoral-property rights—are ill-equipped to deal with the dramatic changes that will be wrought by climate change.⁵⁴ These scholars argue that when we look out the window to see what is going on in the real world⁵⁵, we should focus on climate change, and all of the ways that it engages the law, or should engage the law. It is argued that a new cross-cutting legal field that re-organizes legal boundaries around the unifying concept of climate change will be more responsive and effective in dealing with the complexity of a warming world.

Proposed legal fields such as climate change law or climate adaptation law would reclassify law along ecological fault lines. They would cross traditional legal fields and (re)bundle together laws that relate in some manner to the causes and effects of, or proposed responses to, climate change. Whether this exercise would result in a meaningful, distinctive, coherent legal field—whether it would add something new to our legal understanding that might otherwise be missed—is a matter of scholarly debate. A taxonomy based around climate change would also raise difficult boundary issues: given the vast range of human activities that can impact climate, and all of the laws that regulate those activities, how do we know a climate change law when we see one?

How that question is answered could have important implications for other legal fields, including labour law. As developed more fully below, labour law's traditional

⁵³ Ruhl & Salzman, *supra* note 2; Craig, *supra* note 15; Michael B. Gerrard & Katrina F. Kuh, eds, *The Law of Adaptation to Climate Change: United States and International Aspects* (Chicago: American Bar Association, Section of Environment, Energy, and Resources, 2012).

⁵⁴ Ruhl & Salzman, *ibid* at 1012.

⁵⁵ The window metaphor is borrowed from Langille, *supra* note 3 at 15.

boundaries comprise those legal rules that regulate the employment relationship. It is common to speak of there being three “regimes” of labour law: the common law of employment regime, including contract and torts; the regulatory standards regime (i.e. employment standards, occupational health and safety); and the collective bargaining regime.⁵⁶ So far, the legal scholars leading the charge for a new legal field organized around climate change have paid little attention to labour law. Scholars have explored possible intersections of climate change and a broad range of other legal fields, including: energy law, water law, maritime law, immigration law, environmental law, land planning law, insurance law, disaster law, even military law and securities (disclosure) law.⁵⁷ But there are few articles, books, or chapters on ‘climate change and labour law’.⁵⁸ The intersection of climate change *law* and labour *law* remains largely unexamined.

This might be explained by a lack of expertise in labour law by those leading the climate change law discussion. Or, there may be an assumption that existing labour laws are robust enough to adapt to whatever pressures climate change might bring to labour markets and labour institutions without need for a fundamental transformation: climate change will alter work patterns, but the details of how working conditions are governed by law need not undergo a dramatic transformation due to a warming climate. Just like family law, for instance, it is possible to imagine factual scenarios and challenges arising

⁵⁶ See e.g., D. Doorey, *The Law of Work: Common Law and the Regulation of Work* (Emond, 2016). In North American legal scholarship, “labour law” usually refers to the collective bargaining regime, whereas “employment law” is used to describe the other two regimes. This paper will employ the European syntax using “labour law” to refer to all three regimes.

⁵⁷ See the collection of articles in Gerrard & Kuh, *supra* note 42, covering off many of these subject areas. See also: A. de Sherbinin *et al.*, “Preparing for Resettlement Associated With Climate Change” (2011) 334 SCIENCE 456.

⁵⁸ See e.g. Katherine Regan, “The Case for Enhancing Climate Change Negotiations with a Labor Rights Perspective” (2010) 35:1 COLUMBIA J. ENVIRONMENTAL L. 249

within the labour law field caused by climate change.⁵⁹ For example, climate change and climate change policies are likely to affect the distribution of jobs across sectors. Some industries will experience job losses (fossil fuels, winter tourism), others job gains (clean energy, renewable technologies). Workers displaced from high carbon industries will require re-training to find jobs in new “greener” industries. These adjustments may strain existing unemployment insurance and job adjustment and training schemes, and influence the sorts of adjustment and severance language bargained into collective agreements, for example.⁶⁰ However, if we assume that existing labour law systems are capable of absorbing and managing these pressures, then we would not expect much emphasis within labour law on climate change issues.

Whatever the reason, the lack of attention to date on how labour law might contribute to climate change policy is striking given that labour market adjustments will almost certainly need to be part of whatever solutions government adopt to respond to climate change. This is especially true if a ‘just transition’ towards a lower carbon economy becomes policy.

III. A TAXONOMY OF LABOUR AND ENVIRONMENTAL LAW

Although environmental law and labour law are well situated to play important roles in a new legal field organized around climate change and industry related transitions, the two fields are not natural allies. Labour law is concerned with striking a balance between worker and employer interests, between efficiency and equity, while

⁵⁹ Ruhl & Salzman, *supra* note 2 at 993-994, discussing how Family Law and other legal fields that do not depend on assumptions about the biophysical world will not be threatened directly by climate change.

⁶⁰ UNFCCC, *supra* note 23 at 12-14. See also database of climate change related collective agreement language compiled by Work in a Warming World, <http://www.adaptingcanadianwork.ca/green-collective-agreements-database/>

considering impacts on the economy and society more broadly. While the principal private actors in the labour law system (workers, employers, and their respective associations) sometimes disagree over the share of the economic pie, both sides usually agree that a bigger economic pie is better than a smaller one, that more production is better than less. This expansionary vision is usually fed by strong consumer demand and spending.

Economic expansion and consumerism, particularly when connected with high carbon output or pollution, is antithetical to the goals of environmental protection. Alan Schnaiberg describes the drive for ever-expanding production that comes at the expense of environmental degradation as “the treadmill of production”.⁶¹ The pursuit of decent jobs in labour law can impose higher costs on employers which in turn propels capital to expand production, while limiting other costs of production. Reducing industrial production, requiring a phase out of high carbon producing practices, or imposing new costs on employers in order to reduce environmental harm and emissions, sometimes a stated outcome of environmental law, may be contrary to the goal of labour law to produce decent, high paying jobs, at least in the short term.

This simple background describes the basic foundation of the well-worn “jobs versus the environment” controversy. However, the relationship between labour law and environmental law is more nuanced and complex than that story indicates. This relationship can be better understood if we reflect briefly upon the origins of the two legal fields, and the sources of contemporary angst within those fields.

A. *The Origins of Labour Law*

⁶¹ Allan Schnaiberg, *Environment: from surplus to scarcity* (Oxford University Press, 1980).

The origins of labour law as a distinct legal discipline vary by nation, fluctuating in large measure on the timing of industrialization, the relative strength and development of indigenous labour movements, and law's efforts to restrain and manage labour conflict. As Professor Harry Arthurs has described, "labour law [in English speaking countries] effectively emerged as a full-blown academic discipline only in the years before and after the second world war."⁶² That occurred because legal scholars of the day saw value in re-bundling those parts of tort, contract, criminal, and administrative law that dealt with work-related disputes and situating them under the new banner of 'Labour Law'.⁶³

What was that value? This question has received a lot of attention from labour law scholars in recent years. The debate comes in two parts. The first part asks what has been the traditional, or historical, foundation of labour law as a discipline. What made it an appropriate field of legal study during the New Deal era and in the period that followed? The second part asks whether that explanation, or justification, has stood the test of time, and if not, how the legal field might evolve in order to remain relevant and viable moving forward.

Most labour law scholars agree on the answer to the first part. Labour law originally evolved to deal with what were perceived by scholars to be the special problems associated with the waged employment relationship, owing to the inherent imbalance of bargaining power that characterized it.⁶⁴ The central normative pillar of

⁶² Arthurs, *supra* note 12 at 3. See also discussion in Estlund, *supra* note 26 at 6.2-6.4; Langille, *supra* note 3.

⁶³ This section draws heavily on Langille, *ibid.* See also David Beatty, "Labour Law in a Nutshell" (1996) 75 Can. Bar. Rev. 35.

⁶⁴ See e.g. Matthew Finkin, "Book Review: The Death and Transfiguration of Labor Law" (2011-2012) 33 COMP. LAB. L. & POL'Y J. 171 at 178-79; Otto Kahn-Freund, *Labour and the Law*

labour law was the insight that the contract law model as applied by the courts to the employment relationship left the individual worker vulnerable to opportunism, coercion, and injustice at the hands of the more powerful employer.⁶⁵ That injustice was manifest in low pay, long hours, economic insecurity, and dangerous working conditions. Since society has an interest in human beings not being unjustly treated, and in an economic system that produces a fair and sustainable distribution of wealth and privilege in part through the functioning of labour markets, legal rules were needed to prevent injustice in the employment relationship. Those rules were the subject of the legal field of labour law.⁶⁶

Central to this understanding of labour law were two concepts captured by the slogans: ‘labour is not a commodity’ and ‘inequality of bargaining power’. Together, they carved out labour law’s distinctive normative ground. Inequality of bargaining power is not itself a unique to waged labour, and nor is it considered particularly problematic in the contract law world. However, since decent employment is so central to human social and economic well-being and development, as well as to political stability, labour law’s central normative claim is that the employment relationship should not be treated as just another mundane market transaction.⁶⁷ The labour relationship demands a

(Steven & Sons Ltd, 1972); Guy Davidov, “The (Changing?) Idea of Labor Law” (2007) 146:3-4 INT. LAB. REV.; Langille, *supra* note 3 at 23-25; Harry Arthurs, “Labour Law After Labour” (1995) U. TORONTO L. J. 1 at 17-18.

⁶⁵ *Ibid*; See also, Hugh Collins, “Theories of Rights as Justifications for Labour Law” in Davidov & Langille, *supra* note 3 at 137.

⁶⁶ See Langille, *supra* note 3 at 23: “Labour law is thus primarily conceived as a set of interventions in the labour market, that is, in the negotiation process for contracts of employment. That point of all this is, of course, ‘justice’ in this part of our lives, that is, in employment relationships.... When employees negotiate contracts of employment they suffer from an ‘inequality of bargaining power’. As a result, they will not obtain just outcomes.”

⁶⁷ David Beatty, “Labor is Not a Commodity” in J. Swan & B. Reiter, eds, *Studies in Contract Law* (Butterworths, 1980) at 313; Langille, *supra* note 3 at 105-106.

theory of justice, and labour law as an academic legal field was organized around that theory. Thus, labour law was defined by both a descriptive boundary (laws governing the labour relationship and especially the ‘employment’ relationship) and a normative boundary (the law *should* protect workers from the superior power of the employer).

The second part of contemporary debates in labour law is less settled. It asks whether this labour law narrative remains persuasive. A number of recent developments have strained the traditional story.⁶⁸ Firstly, the employment relationship has undergone fundamental changes since the 1940s. Far fewer workers are engaged in the standard, full time employment relationship that was the prototype in the 1940s and 1950s when labour law was coming into its own. As a greater segment of the working population falls outside of the traditional employment model, the descriptive, explanatory, and predictive power of legal models designed to instill justice into that model declines.⁶⁹

Secondly, this shift away from standard employment has exasperated the declining presence of trade unions, which were already under threat from a variety of other sources. Economic restructuring in most advanced economic nations away from highly unionized goods manufacturing has cut into union density.⁷⁰ In Canada, private sector union density (the percentage of private sector workers in unions) sits at about 17 percent, down from 26 percent in 1984.⁷¹ In the United States, unions represent only about 6 percent of private sector workers, and collective bargaining coverage is eroding

⁶⁸ See Arthurs, *supra* note 51.

⁶⁹ Katherine Stone, “Rethinking Labour Law: Employment Protection for Boundaryless Workers” in Davidov & Langille, *Boundaries*, *supra* note 3 at 155; Leah F. Vosko, Nancy Zukewich and Cynthia Cranford, “Precarious Jobs: A New Typology of Employment” (2003) 4:10 PERSPECTIVES at 16; *Ibid* at 21; Arthurs, *supra* note (labour law after labour)

⁷⁰ Leo Troy, “Market Forces and Union Decline: A Response to Paul Weiler” (1992) 59 U. CHIC. L. REV.

⁷¹ D. Doorey, *The Law of Work: Industrial Relations and Collective Bargaining* (forthcoming, Emond, 2017). Public sector union density has remained high at approximately 74%.

throughout much of the advanced of the economic world. The collective bargaining regime—the rules governing union organizing, collective bargaining, collective agreements—has long dominated academic interest within the field of labour law, and so as collective bargaining coverage declines, so too has interest in labour law.⁷²

Thirdly, the importance of ‘labour’ as a class has declined.⁷³ Fewer people define themselves as members of the ‘working class’, and political parties historically linked to that class are moving away from class-based politics and policy definition. Fourthly, serious, sustained attacks against the core labour law narrative have put the legal field on the defensive for decades. Most notably, neoliberal law and economics scholars have developed powerful market-based critiques of labour law’s claim to special legal protections in antitrust laws, and have mocked the claim that inequality of bargaining power in employment creates a social or economic problem requiring protective legislation.⁷⁴

These forces have coalesced to create a crisis in labour law, as noted by Arthurs:

If labour’s identity is dissolving, if class generally matters less, if workers’ issues have fallen off the public policy agenda, the familiar ‘constituting narrative’ of labour law ceases to constitute.⁷⁵

⁷² Estlund, *supra* note 26; H. Arthurs, “Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of the Labour Market Regulation” (2011), 34 Dalhousie L.J. 1

⁷³ Arthurs, *supra* note 51 at 18-19; Marion Crain & Ken Matheney, “Labor’s Identity Crisis” (2001) 89:6 CAL. L. REV. 1767.

⁷⁴ Richard Posner, “Some Economics of Labor Law” (1984) 51 U. CHICAGO L. REV. 988; Richard Epstein, “In Defense of the Contract At Will” (1984) 51 U. CHICAGO L. REV. 947; Richard Epstein. “A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation” (1992) 92 YALE L.J. 1357.

⁷⁵ Arthurs, *supra* note 51 at 20

This crisis of legitimacy has caused soul searching within the labour law academy. Some scholars have sought to redefine ‘the boundaries’ of the field to ensure its continued relevance moving forward, as we will see below.⁷⁶

B. *The Origins of Environmental Law*

Environmental law is an even younger legal field than labour law. It evolved in North America only in the 1970s.⁷⁷ Before then, there was law that regulated issues related to the environment, but the intersection of law and the environment was addressed primarily in tort law and then eventually administrative or regulatory laws that touched on pollution and clean water issues. Prior to the 1970s, there were no law school courses on environmental law, and no textbooks that consolidated the laws into a coherent field of study. Professor Paul Emond describes the situation as it existed in Canada in the late 1960s:

There was no such thing as "environmental law" in those days. It was not taught in law schools; there were no professional associations charged with promoting the practice of environmental law; and there were certainly no firms" whose practice was exclusively or even partially restricted to environmental law." Instead, there was optimism that, with enough imagination, a good lawyer (or law student) could cobble together tort, property, and perhaps criminal law to stop, or at least severely curtail, any pollution problems.⁷⁸

Professor Lazarus has described how early American environmental lawyers debated the merits of proposing and developing a new legal field of environmental law, and how some believed that the best strategy was to resist the temptation to forge a new field and

⁷⁶ See collection of articles in Davidov & Langille, *Boundaries*, *supra* note 3.

⁷⁷ Ruhl & Salzman, *supra* note 2 at 982; Aagaard, *supra* note 2 at 251-82; Richard Lazarus, "Thirty Years of Environmental Protection Law in the Supreme Court" (1999) 17:1 PACE ENV'T L. REV. 1; Tarlock, *supra* note 13; Paul Emond, *supra* note 25 at 222 (explaining how Canadian environment law was initially inspired by developments in the United States, in particular the passage of the *National Environmental Policy Act of 1969*, 42 U.S.C. 4321)

⁷⁸ Emond, *ibid* at 223. See Ruhl & Salzman, *supra* note 2 at 996 for a similar account of the state of environmental law prior to the 1970s in the US.

instead argue that “there is nothing at all unique about environmental law”.⁷⁹ In the end, this position did not win the day, and a decision was made by leading legal scholars, environmental activists, and policymakers to cobble all of the various tort, property, and regulatory laws together under the new category of ‘Environmental Law’.⁸⁰

Environmental law is (mostly) accepted as a distinct legal field today.⁸¹ However, even among environmental law scholars, there is no agreement on what makes it so. The difficulty can be demonstrated in a simple question: How do we know an environmental law when we see one?⁸² Some statutes seem to be a natural fit, such as environmental protection and clean air and water legislation. This type of legislation is concerned with ‘the natural environment’ and the impact of human activity on it.⁸³ Yet can environmental law be reduced to the study of laws that have environmental impacts? If so, then where does the boundary of environmental law begin and end. As Aargaard notes: “If environmental law includes all laws that affect the environment, then virtually every law could fall within that definition because almost every law affects human behavior, and almost every human behavior affects the natural environment in some respect.”⁸⁴

This boundary problem has left some environmental law scholars struggling to define what distinguishes their field from ‘non-fields’ like the law of the horse, and

⁷⁹ Lazarus, *supra* note 63 at 48.

⁸⁰ *Ibid*; Ruhl & Salzman, *supra* note 2 at 982, 997; Tarlock, *supra* note 13 at 215.

⁸¹ Lazarus, *ibid* [arguing that the US Supreme Court judges treat environmental law as just a subset of administrative law, rather than a distinct field offering distinct legal insights]; David A. Westbrook, “Liberal Environmental Jurisprudence (1993-94) 27 U.C. DAVIS L. REV. 619 at 619: “Despite being a burgeoning area of practice, environmental law is not a discipline, because it lacks the professional consensus on a coherent internal organization of materials a discipline requires.” Jay D. Wexler, “The (Non)Uniqueness of Environmental Law” (2006) 74 GEO. WASH. L. REV. 260.

⁸² See Westbrook, *ibid* at 632.

⁸³ See discussion in Aargaard, *supra* note 3 at 260.

⁸⁴ *Ibid* at 262.

concerned about the sustainability of the field.⁸⁵ If environmental law entails nothing more than the cobbling together of laws that consider *the environment*, or that impact it in some way, then it “seems uselessly broad”.⁸⁶ Put differently, if all we are doing is grabbing at disparate laws that seem to have something to do with the environment and placing them under the banner of environmental law, then it seems unlikely that this field is contributing any genuinely new legal insight—it is not teaching us something we would otherwise miss.

Environmental law scholars moved on several fronts to meet this challenge. One response was to argue that modern environmental problems and challenges are too complex and multifaceted to be dealt with piece meal through a spattering of seemingly unrelated tort rules and administrative statutes.⁸⁷ For example, Lazarus has argued that what distinguishes environmental law is the complexity of the causes and effects of ‘ecological injuries’ with which it is primarily concerned: ecological injuries can be irreversible and continuing; injuries are not jurisdictional specific and can affect broad areas; injuries are often temporally distant, actions now may not result in manifest harm until later; the complexity of ecological harm creates uncertainty, so that much of the law is about risk management rather than actual, provable impact; injuries are usually the result of a chain of events and activities, so assigning blame is a highly complicated exercise; the types of damages in environmental law are not always economically quantifiable.⁸⁸ Environmental law tells a “story” about the complexity of cause and effect

⁸⁵ Tarlock, *supra* note 13 at 215-217, discussing the threats to environmental law as a legal field.

⁸⁶ Zygmunt Plater, *et al.*, *Environmental Law and Policy: Nature, Law, and Society*, 4th ed (New York: Aspen Publishers, 2004) at 5; Aargaard, *supra* note 2; Tarlock, *ibid* at 221.

⁸⁷ Ruhl & Salzman, *supra* note 3 at 998.

⁸⁸ Richard Lazarus, “Restoring What’s Environmental About Environmental Law in the Supreme Court” (2000) 47 UCLA L. Rev. 703.

in the case of ecological damage that is missed when that damage is treated as just another incident of tort or administrative law.⁸⁹

Another approach has been to construct a normative boundary for environmental law, organized around some guiding principles, such as ‘protecting the environment’ from harm caused by human activities. With this normative agenda in mind, scholars have proposed principles to guide environmental policy and legal decision-making.⁹⁰ David Westbrook argued that environmental law’s coherence derives from the fact that it is law’s way of responding to the difficult challenge of fitting the normative pursuit of collective environmental protection into the dominant political orthodoxy of ‘liberalism’ that pervades western thinking and is based in the pursuit of individual autonomy. Because much of what environmental law does cannot be defended as advancing individual human autonomy—indeed, it often restricts that autonomy—it forces us to question our view of the relationship between humanity and the world. Environmental law, says Westbrook, “forces liberal theory to ask after the future”.⁹¹

Aagard responds that attempts to link environmental law’s coherence to the normative goal of protecting the environment misstate what the field is really about. Much of the law that is considered to fall within the boundary of environmental law is not about ‘protecting the environment’ at all, or at least that is not its primary objective:

Environmentalism does not predominate in current environmental law. And there is little prospect of that changing significantly in the future. Instead, environmental law reflects a balance among a variety of competing values and interests, which include environmentalism but also other, arguably more

⁸⁹ *Ibid*, calling for a better effort by lawyers to “present environmental law’s story” to judges.

⁹⁰ Tarlock, *supra* note 13 at 248-253, proposing five principles to guide environmental law policy and decision-making, all premised on a goal of protecting the environment.

⁹¹ Westbrook, *supra* note 67 at 709.

powerful, values such as maintaining traditional patterns of resource exploitation and resistance to government regulation.⁹²

Aagaard argues what primarily distinguishes environmental law are its factual characteristics. It deals with ‘physical public resources’ (public lands, air, water, wildlife) which are not privately owned, and which give rise to complex competing usage claims and well-known collective action problems.⁹³ The “special difficulties” associated with regulating conflicting use claims is what “lies at the heart of all problems that arise in environmental law”.⁹⁴ Resolving these conflicts is particularly challenging due to the ‘pervasive interrelatedness’ that defines the world’s ecological system.⁹⁵ Actions here can affect ecological outcomes there, though the causal ripple effects may difficult to track, prove, and assess. Environmental law draws attention to this interrelatedness in ways that might be missed if environment-related issues were left to “insular subfields” of law.⁹⁶

IV. THE INTERSECTION OF ENVIRONMENTAL AND LABOUR LAW

Although environmental and labour law scholars have not much interacted over the years, they have recognized that their fields do occasionally overlap, or at least can influence one another. In some respects, legal rules and statutes falling within the scope of labour law are also environmental statutes. The most obvious example is occupational health and safety laws, which control exposure to and use of deleterious substances in work settings. There is overlap when those substances are also harmful to the

⁹² Aagaard, *supra* note 2 at 256.

⁹³ *Ibid* at 266; Westwood, *supra* note 67 at 652; Garrett Hardin, “The Tragedy of the Commons” (1968) 162:3859 *SCI.* 1243 at 1245.

⁹⁴ *Ibid* at 265.

⁹⁵ *Ibid* at 268.

⁹⁶ *Ibid* at 282.

environment, so in a sense laws regulating harmful workplace substances are also environmental laws.⁹⁷

However, other than instances of direct statutory overlap of subject matter, the ‘environment’ has usually been treated as just one of various external systems that can affect labour law. Just as labour laws and the outcomes of workplace level negotiations can be influenced by changes or disturbances in the political, economic, cultural, and social makeup of a society, so too can climate affect labour law outcomes. For example, climate influences the range of labour market activities and employment levels available in a region, as well as the relative bargaining power and strategies of workers, unions, and employers.⁹⁸ Environmental laws can also impact the labour law subsystem. For instance, new regulations limiting emissions or requiring ‘green’ production equipment or techniques can affect production systems in ways that impact working conditions, cause layoffs, or create downward pressure on labour costs. These effects can influence the negotiating strategy of labour law actors, and possibly shape the substance of rules and practices that emerge from the labour law system.

The point is that environmental law and labour law are semi-autonomous legal fields, inhabited by their own set of actors and operate according to their own logics and discourses. Yet each recognizes the other as an occasional source of exogenous influence. This is how environmental and labour law scholars have traditionally perceived their worlds. Not surprisingly, legal scholars in the two fields have only infrequently interacted.

⁹⁷ Dimitris Stevis, “Unions and the Environment: Pathways to Global Labor Environmentalism” (2011) 14:2 WORKING USA: J. LABOR & SOC. 145.

⁹⁸ Alton Craig & Norman Solomon, *The System of Industrial Relations in Canada*, 5th ed (Pearson Canada, 1995) at 42 and 14-15; David Doorey, *The Law of Work: Common Law and the Regulation of Work* (Emond, 2016), at 40-41.

One reason why is that labour law and environmental law are concerned with fundamentally different policy projects and objectives. Labour law is the system of rules used to regulate work-related conflict between workers and employers. Its objectives are to strike an appropriate balance between employer efficiency interests (productivity and profitability) and worker interests in more decent jobs, within a system characterized by ‘inequality of bargaining power’. The objective of environmental law is to strike a different sort of balance, between protection of the environment from harms caused by human activities, while also recognizing the economic and social need for decent jobs and a productive economy.

Thus, both labour law and environmental law are concerned with balancing the need to promote jobs and economic activity with competing concerns about the impacts of that activity. Both legal fields are concerned in large measure with government imposed legal restrictions on commerce and freedom of contract in the pursuit of broader public policy goals. Both impose a countervailing power on unbridled economic activity, but the countervailing interests involved are different, and sometimes conflict.

There are other important differences between labour law and environmental law that relate to the complexity of the problems they address, and the geographical and temporal scales of those problems. Labour law’s focus, especially in the decentralized North American format, is mostly local, directed at the level of individual employment contracts or collective agreements that apply to relationships that exist at single workplaces or, at most, multiple locations of a single employer. Labour law is concerned largely with the minutia of personal economic relationships—wage rates, hours of work, benefits, the conditions under which an employment relationship can be terminated, and

so forth. The temporal scope of labour law is also narrow. It is concerned primarily with the formation, negotiation, administration, and termination of employment relationships that can last decades but rarely (any more) do so. Environmental law, on the other hand, emerged precisely because environmental problems often are not localized but rather can affect entire regions covering vast geographic spaces.⁹⁹ Environmental problems can involve highly complex causal relationships, and harm that can be widely dispersed, both geographically and temporally. Environmental law was designed to provide a framework to manage these complexities.

These differences in policy objectives and temporal and geographic scale have left environmental lawyers and labour lawyers on different sides of the room in general, and in particular, in more recent conversations about how law and policy might best respond to climate change. In the following section, we explore several possibilities for bringing the two legal fields together.

V. THREE PROPOSALS FOR PUTTING LABOUR LAW TO WORK ON CLIMATE CHANGE

Devising policies that tackle climate change while recognizing the need for more decent jobs is among the most difficult policy problems the world faces today.¹⁰⁰ It is no less a challenge for legal scholars precisely because the complex problem crosscuts multiple fields of law. A non-exhaustive list of legal fields potentially affected by climate change includes labour, environmental, water, securities, energy, human rights, insurance, immigration, tax, civil litigation and class action, torts, contracts, corporate, and international and transnational law. Attempts to cobble together under a single

⁹⁹ Ruhl & Salzman, *supra* note 2 at 998.

¹⁰⁰ Richard Lazarus, “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future” (2010) 94:5 CORNELL L. REV. 1153.

banner all of the law potentially relevant to climate change will run into a familiar problem. What would make that exercise legally meaningful?

As noted above, some environmental scholars have proposed new legal fields such as climate change law or climate adaptation law. Proponents of these new fields argue that no existing field has the capacity to recognize and deal with the complexity of climate change, and its impacts on society and the economy. These proposals vary in their approach to defining the new legal field, but the substance of the law that interests their advocates are mostly environmental laws, along with related fields like energy, water, land use and planning law.¹⁰¹ Labour law rarely appears in their sightlines, although sometimes ‘justice’ issues do.¹⁰² In particular, as we will discuss later, some environmental justice scholars are very aware of how climate change, and efforts to regulate it, raises important equality and justice issues.¹⁰³

There has to date been little effort to develop a new, coherent legal field that combines insights from labour and environmental law in a manner that could help us wrestle with the complexity of climate change and the need to transition to a lower carbon economy.¹⁰⁴ This may be due to the fact that labour law scholars have been largely absent from climate discussions. Yet labour lawyers have something important to contribute to the debates about climate change, and law’s role in addressing it. A legal model to address climate change should promote public voice and stakeholder engagement, and recognize the many public and private actors already engaged in

¹⁰¹ See for example, J. Derbach & S. Kakade, *supra* note 14 [charting the legal areas that relate to climate change law, but not including reference to Labor law]...

¹⁰² Ruhl & Salzman, *supra* note 2 at 1021 [proposing a legal field of Climate Change Law that includes ‘adaptation equity’ as one of several guiding normative values].

¹⁰³ See e.g., Eric A. Posner & David Weisbach, *Climate Change Justice* (Princeton University Press, 2010).

¹⁰⁴ Regan, *supra* note 58

dialogue, contestation, and problem solving around climate mitigation and adaptation.¹⁰⁵ It should include a theory of justice that recognizes that there will be costs and benefits to societies associated with climate change and the transition to a greener economy, which should be distributed in an equitable manner. As noted by Regan, a “climate change framework informed by the lens of labour rights could include both the moral elements of the individual rights of the labourer and economic focus of traditional climate change agreements.”¹⁰⁶

Climate change also demands a regulatory solution that overcomes market failures and well-known collective action problems associated with environmental degradation.¹⁰⁷ As political commentator and activist Naomi Klein noted in a recent speech about climate change to labour leaders: “It is not hyperbole to say that our future depends on our ability to do what we have so long been told we can no longer do: act collectively.”¹⁰⁸ Few legal fields know more about harnessing collective voice and power in pursuit of social and economic justice than labour law. With this in mind, the remainder of the paper explores three possibilities for a new legal field organized around climate change that could bring a measure of internal coherence to a field that will by necessity bring together a wide range of legal fields.

A. *A Law of Economic Subordination and Resistance*

¹⁰⁵ UFCCC, *supra* note 23 at 18.

¹⁰⁶ Regan, *supra* note 58 at 250.

¹⁰⁷ Hardin, *supra* note 79 at 1243; Tseming Yang, “Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation” (2002) 26 HARV. ENV. L. REV. 1.

¹⁰⁸ Naomi Klein, “Unifor Should Fight For a Green Labor Revolution”, *Rabble.ca* (2 September 2013) online: <<http://rabble.ca/news/2013/09/naomi-klein-unifor-should-fight-green-Labor-revolution>>.

Harry Arthurs has offered one vision for a re-imagined role for labour law that has expanded potential for a legal field that could respond to the challenge of climate change. He proposed a ‘counter-factual’ to the traditional constituting narrative of labour law. He questioned what might have had occurred if, rather than rallying around the slogan “labour is not a commodity”, early labour law scholars had carved their reality differently:

Suppose that during the inter-war years—in say 1920 or 1930--...the pioneers of labour law had decided that abuses attributable to disparities of economic power were not unique to labour markets. Suppose that they therefore invented not labour law but ‘the law of economic subordination and resistance’? Suppose that they had developed a body of legal learning that dealt comprehensively not just with the regulation of employment relationships and labour markets, but of all relationships in which individuals share experiencing economic subordination, resisting it through various strategies of self-defense and seeking legal redress against it in various legal forums.¹⁰⁹

Arthurs engaged in this counter-factual as a device for proposing a new way forward for labour law. The central insight, the basis upon which this model carves off a portion of reality for legal study, is economic subordination and law’s role in governing resistance to it. It builds on the insight that workers in an employment relationship are “but one representative example of the experience of many groups under capitalism, for all of whom there should be some protection.”¹¹⁰ As Arthurs notes, re-mapping the legal field in this way offers the potential of new integrations of what have “up to now been separate subjects, specialties or discourses.”¹¹¹

Arthurs provides us with a non-exhaustive list of the types of individuals and groups who experience economic subordination and who through various means resist it. Workers and their resistance to economic subordination with the aid of regulatory

¹⁰⁹ Arthurs, *supra* note 11 at 7.

¹¹⁰ *Ibid* at 8.

¹¹¹ *Ibid*.

standards and collective bargaining laws are one example, but others include: tenants and rent control laws and ‘rent strikes’; consumers and consumer rights laws and consumer boycotts; welfare recipients and welfare laws and welfare ‘sit-ins’; small scale farmers and competition rules and farmer cooperatives; minority shareholders and insider trading and shareholder protection laws and investor activism.¹¹² Arthurs did not expressly include impoverished (often visible minority) communities and land use and environmental laws, and the countervailing environmental justice resistance movement, but he could have.

‘Environmental justice’ is both a social justice and resistance movement and a strategy of legal engagement.¹¹³ Environment justice emerged in the United States in the early 1980s in the wake of high profile oppositions to the locations of hazardous waste landfills.¹¹⁴ Environmental justice activists and scholars surveyed the distribution of benefits and harms flowing from the application of environmental and land use laws and found that the harms were disproportionately burdened by visible minority communities. Like labour law, environmental justice’s defining narrative is based in notions of distributive justice and collective voice of economically subordinate groups.¹¹⁵ As

¹¹² *Ibid.*

¹¹³ It may also have risen to the level of a distinct legal field, though that is contested. Ruhl & Salzman, *supra* note 2, argue that environmental justice is a distinct legal field. My thanks to Professors Ruhl and Salzman and Professor Alice Kaswan, for a thoughtful email discussion on these issues.

¹¹⁴ Scholars usually date the birth of environmental justice to the opposition by an African-American community to the placement of a hazardous waste landfill in North Carolina in 1982: Alice Kaswan, “Environmental Justice: Bridging the Gap Between Environmental Laws and ‘Justice’” (1997) 47:2 AM. U. L. REV. 221 at 226; A. Gosine & C. Teelucksingh, “Environmental Justice and Racism in Canada: An Introduction” (Emond Montgomery, 2008)

¹¹⁵ The literature on the origins of environmental justice is rich and lengthy. See, e.g., Kaswan, *ibid*; Alice Kaswan, “Environmental Justice and Environmental Law” (2013) 24 FORDHAM ENVIRONMENTAL L. REV. 149; Yang, *supra* note 94; Gerald Torres, “Environmental Justice: The Legal Meaning of a Social Movement” (1996) 15 J.L. & Com. 597; Kaswan, *ibid*; Schwartz, *supra* note 16

Kaswan notes, “the environmental justice movement brought together two concepts that had rarely been joined: environment and justice.”¹¹⁶

Also like labour law, environmental justice has roots in a bottom-up resistance movement critical of a dominant legal system that benefits economically and politically powerful, privileged segments of society. The emphasis in environmental justice is on distributive and political justice, particularly along racial and socio-economic lines, across a variety of legal fields, principally environmental law, land use and planning law, water law, and energy law. Labour law too is concerned with distributive and political justice, its focus being on those laws that intersect at the work site. Because environmental justice treats “environmental problems as only one part of the larger social issues of racism and cultural and economic injustice¹¹⁷”, it is a natural ally to labour law in a re-imagined legal field organized around Arthurs’ theme of subordination and resistance.

Environmental justice is also central in discussions about the relationship between climate change and the environment, on one hand, and social justice issues on the other.¹¹⁸ Some environmental law scholars have argued that a legal field organized around the subject boundary of “climate adaptation” should be robust enough to recognize, explain, predict, and address equality or equity issues related to climate change and measures to address it. For example, Ruhl and Salzman argue that climate adaptation law should be guided by three “overarching normative goals”: (1) reducing vulnerability

¹¹⁶ Kaswan, *supra* note 100 at 228.

¹¹⁷ Eileen Gauna, “Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice” (1995) 22 *ECOLOGY L. Q.* 9 at 12. See also, Kaswan, *ibid* at 227; Luke W. Cole, “Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law” (1992), 19:4 *ECOLOGY L.Q.* 619 [goal of environmental justice is to achieve structural societal change to achieve social justice].

¹¹⁸ Kaswan, *supra* note 101 at 169.

[preventing harm from climate change]; (2) increasing resilience [recovering from climate change harm that is not avoided]; and (3) *adaptation equity*.¹¹⁹ The authors explain adaptation equity as follows:

[Adaptation equity] is designed to ensure that the benefits of promoting resilience and reducing vulnerability are distributed fairly. Whose vulnerability is reduced and whose is worsened? The same for resilience. Climate mitigation policy has triggered rousing debates over the equitable allocation of costs between nations and within nations.¹²⁰

Ruhl and Salzman argue that climate adaptation law would analyze law through the lens of their three normative goals, including adaptation equity. They argue that this crosscutting field would produce new insights into challenges to regulation caused by climate change that might otherwise be missed. Among those insights would be observations about the role and effects of organized resistance to injustices produced by climate related legal policies.

A legal field based on economic subordination and law's role in regulating resistance offers a number of benefits. It would acknowledge that climate change is related to power relations, both domestically and at the global level.¹²¹ Large and powerful business enterprises produce a substantial proportion of greenhouse gases, and citizens of wealthy nations contribute far more to climate harm than do citizens of poor nations. As noted by Professor Amy Sinden, "the haves of the world are responsible for the vast majority of the greenhouse gases that have already accumulated, and yet it is the have-nots who are likely to bear the brunt of its effects."¹²² Resistance by citizens and activist organizations towards this injustice is resistance to power. Situating climate

¹¹⁹ Ruhl & Salzman, *supra* note 2 at 1020-1022.

¹²⁰ *Ibid* at 1022.

¹²¹ See e.g. Amy Sinden, "Climate Change and Human Rights" (2007), 27 J. Land Resources & Env'l L. 255

¹²² *Ibid.* at 256.

change and environmental degradation within a broader legal field organized around economic power and resistance could help legal scholars recognize patterns in the law that might otherwise be missed if we continue to compartmentalize labour law, environmental law, and environmental justice law. Moreover, it could provide a narrative around which we can make sense of the vast array of laws that affect and are affected by climate change.

Yet there are also limits to this approach. Resistance to economic subordination provides a means of bundling together disparate legal rules under a common banner. However, it does not provide us with an obvious normative agenda for law. Sometimes economic power causes harm to society, sometimes it does not; some resistance is valuable, some is disruptive and harmful. Economic power almost always benefits some segment of the population and harms others, while it has a neutral effect on other segments. Arthurs' proposed field might help us to recognize how law perpetuates economic power and regulates resistance to it, but it tells us little or anything about how to differentiate between good economic power and bad, and good resistance and bad.

This shortcoming matters greatly for the challenge of climate change. An economically powerful corporation may engage in activities that are harmful to the environment. However, local communities who benefit from high paying jobs created by those corporations may not resist, and in fact may be quite content, especially if the environmental harm is widely dispersed and not immediately apparent to the local community. The same issue arises when we expand our gaze to the regional or global level. The wealthy industrialized nations of the global north greatly benefit from high paying jobs in greenhouse gas producing industries, while much of the harm from climate

change is incurred in faraway developing countries. Those persons and communities most at risk may not be aware of the harm being done or its sources, or might be powerless or unmotivated to build a resistance movement. Some problems require collective government response, even when no ‘resistance movement’ emerges to address a problem. A legal field organized around economic subordination and resistance would have little if anything to tell us about when that response should occur, and what it should look like.

B. *Human Capital or Capacities Law*

Some labour law scholars have looked to Amartya Sen’s ‘human capabilities’ theory as a promising new direction for their field.¹²³ Environmental justice scholars too have identified Sen’s capabilities approach as a promising avenue through which to realize the normative goal of justice in environmental regulation.¹²⁴ The capabilities approach has also been explored in relation to sustainable development and intergenerational justice.¹²⁵ Sen’s capabilities approach provides a foundation for

¹²³ Langille, *supra* note 3; Brian Langille, “Labour Law’s Theory of Justice” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) [hereinafter *Idea of Labour Law*]; Jude Brown, Simon Deakin and Frank Wilkinson, “Capabilities, Social Rights, and European Market Integration” in Robert Salais & Robert Villeneuve, eds, *Europe and the Politics of Capabilities* (Cambridge University Press, 2005) at 205. Note that the attempts to graft Sen onto a new map of labor law has also be criticized: See especially Finkin, *supra* note 51; Arthurs, *supra* note 51 at 24-26; Judy Fudge, “Labor as a Fictive Commodity” in Davidov & Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) at 126-128.

¹²⁴ Shannon Roesler, “Addressing Environmental Injustices: A Capability Approach to Rulemaking” (2011) 114 W. VIRGINIA L. REV. 49.

¹²⁵ Gutwald, Rebecca, Ortrud Leßmann, Torsten Masson, & Felix Rauschmayer, "A Capability Approach to Intergenerational Justice? Examining the Potential of Amartya Sen's Ethics with Regard to Intergenerational Issues." (2014) 15 J. of Human Development & Capabilities 15 (4): 355-368; L. Voget-Kleschin, "Employing the Capability Approach in Conceptualizing Sustainable Development", (2013) 14(4) J. of Human Development & Capabilities 483-502

intergenerational justice arguments that current generations have a duty to address climate change in order to preserve the capabilities of future generations.¹²⁶

Sen offers a normative foundation based in the idea of ‘human freedom’, understood as social and economic development measured by “the expansion of the ‘capabilities’ of people to live the kinds of lives that they value—and have reason to value.”¹²⁷ Langille has noted that labour law has always been about improving human freedom and, in particular, about “contributing to a more fulfilling and freer life” of the sort that people have reason to value.¹²⁸ He argued that by remapping labour law around Sen’s concept of human capacities, the field could escape the constraints of the normative claim that “labour is not a commodity”:

Our reason for being interested in contracts of employment is no longer simply an idea of justice or fairness which demands that we need to equalize bargaining power in a certain type of contract. Our new idea of human freedom provides an overarching framework for organizing much of what is not currently central to labour law, such as education, family care (including child care), training and active labour market policies, intellectual property, and so on, as well as much of what is currently central to labour law’s familiar categories, such as employment standards..., collective bargaining, health and safety, human rights, etc.¹²⁹

An important reminder emphasized in Sen’s work is that, “human beings are not merely the means of production, but also the ends of the exercise.”¹³⁰ This simple yet powerful idea could guide a new legal field concerned with the regulation of “human capital deployment”. We are still concerned with productivity and economic outcomes, but the

¹²⁶ Ibid. J. Ballet, J-M. Koffi, J. Pelenc, “Environment, Justice and the Capability Approach” (2013) 85 *Ecological Econ.* 28

¹²⁷ Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) at 18 [hereinafter *Development as Freedom*]; Amartya Sen, “Capability and Well-Being” in Martha C. Nussbaum & Amartya Sen, eds, *The Quality of Life* (Oxford Scholarship, 1993) [hereinafter *Quality of Life*].

¹²⁸ Langille, *supra* note 105 at 112.

¹²⁹ Langille, *supra* note 107 at 33

¹³⁰ Sen, *Development as Freedom*, *supra* note 107 at 295.

normative goal that guides policy and law-making functions is maximization of human freedom.¹³¹

Professor Roesler advocates a capabilities approach to environmental justice, arguing that “to assess whether a particular environmental rule or policy is fair, we need an approach to justice that focuses on human lives, not just the environmental good or bad being distributed.”¹³² That means assessing environmental rules according to “how they restrict or enhance opportunities people actually have to do and be the things they have reason to value.”¹³³ According to Roesler, Sen’s capabilities approach “directs our attention to how forms of structural oppression, such as racism and class oppression, affect well-being, a concern at the heart of environmental justice.”¹³⁴ For Roesler, and other environmental justice scholars seeking to ground their discipline in a broader theory of justice, Sen’s capabilities approach helps demonstrate how environmental injustice is associated with other injustices, including economic injustice.¹³⁵

Sen is critical of the definition of sustainable development developed initially in the influential 1987 Brundtland Report, which was: “meeting the needs of the present without compromising the ability of future generations to meet their own needs”.¹³⁶ He

¹³¹ Langille, *supra* note 105 at 114.

¹³² Roesler, *supra* note 108 at 71.

¹³³ *Ibid.*

¹³⁴ *Ibid* at 77.

¹³⁵ *Ibid* at 78; Robert Kuehn, “A Taxonomy of Environmental Justice” (2000) 30 ENVTL. L. REP. 10681. See also Yang, *supra* note 94 at 23:

In a sense, what [environmental justice] activists have been looking for are not just the minimum conditions necessary for human survival but also factors necessary for human thriving and quality of life. Concerns such as aesthetic and livable communities, places where pollution, odors, and traffic associated with such industrial facilities do not make it impossible to enjoy and play in one’s backyard, connect with neighbors, and have a good sleep at night are indispensable in that respect.

¹³⁶ See Amartya Sen, “Why We Should Preserve the Spotted Owl” (2004) 26:3 *London Review of Books* 10. Amartya Sen, “The Ends and Means of Sustainability” (2013) 14:1 J. HUMAN DEV. & CAPABILITIES 6 [hereinafter *Sustainability*]

notes that the definition had been refined by thinkers like Robert Solow to mean the preservation or improvement of the “standard of living” from one generation to the next.¹³⁷ Sen notes that “sustaining living standards is not the same thing as sustaining people’s freedom to have—or safeguard—what they value and to which they have reason to attach importance.”¹³⁸ Important human freedoms can be lost even though living standards are preserved.

Sen explains this point as follows:

In the ecological context, consider a deteriorating environment in which future generations are denied the opportunity to breathe fresh air (because of especially nasty emissions), but where those future generations are so very rich and so well served by other amenities that their overall standard of living may well be sustained. An approach to sustainable development on the Brundtland-Solow model may refuse to see any merit in protests against those emissions on the ground that the future generation will nevertheless have a standard of living at least as high as the present one. But that overlooks the need for anti-emission policies that could help future generations to have the freedom to enjoy the fresh air that earlier generations enjoyed.¹³⁹

Sen argues for a “freedom-based view of sustainability”, preserving or expanding “substantive freedoms” without compromising the ability of future generations to have equal of more freedoms.¹⁴⁰ Humans have good reason to value a clean environment *and* decent jobs, and therefore development policies should incorporate concern for the capacity of humans to enjoy both, now and in the future.

What precise policy prescriptions would result from a legal field organized around human capabilities and freedom is a matter of debate. However, a benefit of this approach is that rejects the simplistic contest between ‘jobs and the environment’. Since

¹³⁷ *Ibid.* Robert Solow, “An Almost Practical Step Toward Sustainability” (1993) RESOURCES POLICY 162.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Sen, *Sustainability*, *supra* note 118 at 9-10.

humans have good reason to value both the capability to exercise human capital in productive means *and* to live in a world with a clean environment, legal policy would be encouraged to consider both and not trade one of against the other. It steers policy-makers away from too great a focus on short-term economic productivity and encourages a more thoughtful dialogue about how human freedom, today and in the future, is advanced or impeded by legal agendas.

C. *A Law of Just Transitions*

A third possibility for a new legal field organized around climate change, the environment, and work that draws on insights from the first two options just considered is Just Transitions Law (JTL).¹⁴¹ Since the 1990s, the North American and global labour movement has rallied around the concepts of ‘green jobs’ and a ‘just transition’ to a lower carbon economy in response to the challenges posed by climate change.¹⁴² Stevis summarizes the labour movement’s turn to ‘just transition’ as follows:

Responding to climate negotiations and their significant implications for organizing the economy, national and global union agendas center around jobs that are environmentally benign (‘green jobs’) and a transition to a green economy that does not leave workers and communities behind (‘just transition’).¹⁴³

Unions argue that a just transition will require worker and union solidarity and input at the domestic and supranational level, and a strong labour voice to dialogue with

¹⁴¹ See Anabella Rosemberg, “Building a Just Transition: The Linkages Between Climate Change and Employment” (2010) 2:2 INT. J. LAB. RES. 125; Sean Stephenson, “Jobs, Justice, Climate: Conflicting State Obligations in the International Human Rights and Climate Change Regimes” (2010) 42 OTTAWA L.J. 155. Peter Newell & Dustin Mulvaney, “The Political Economy of the ‘Just Transition’” (2013) 179:2 GEOGRAPHIC J. 132; Dimitris Stevis & Romain Felli, “Global Labour Unions and Just Transition to a Green Economy” (2015) 15:1 *International Environmental Agreements: Politics, Law and Economics* 29.

¹⁴² Stevis, *supra* note 83; The Canadian Labour Congress has been active in developing the concept of ‘just transitions’. See Canadian Labour Congress, *Just Transition for Workers During Environmental Change* (Canadian Labour Congress, 2000) online: <<http://www.canadianlabour.ca/news-room/publications/just-transition-workers-during-environmental-change>>.

¹⁴³ Stevis, *supra* note 83 at 146.

governments, business, environmentalists, and other important equity seeking organizations.¹⁴⁴

At the core of a just transitions strategy is the assertion that a transition to a ‘greener’ economy is a necessary and desirable response to threats caused by climate change, and that this transition should be guided by a theory of justice.¹⁴⁵ JTL would draw on insights from the growing literature on sustainability transitions¹⁴⁶ and environmental and climate justice, while placing greater emphasis on the role of law and legal policy in steering economies towards greener practices, with an eye on the distributive outcomes of this transition and the goal of promoting collective voice by workers, communities, and other stakeholders.¹⁴⁷

Given the prominent role of labour law in the just transitions vision, it is not surprising that the ILO has adopted ‘just transitions’ as a policy platform around which to organize its response to climate change:

It can be said that the notion of Just Transition is in line with the long-standing philosophy that has inspired the creation and the history of the International Labour Organization: the idea that social concerns have to be part and parcel of economic decision-making, that the costs of economic transition should be socialized as much as possible, and that the economic management of the economy is best achieved when there is genuine social dialogue between social partners.¹⁴⁸

¹⁴⁴ *Ibid*; Virginia Silverman, “Sustainable Alliances: The Origins of International Labor Environmentalism” (2004) 66 INT’L. LABOR & WORKING-CLASS HIST. 118; Darryn Snell & Peter Fairbrother, “Toward a Theory of Union Environmental Politics: Unions and Climate Action in Australia” (2010) 36:1 LABOR STUDIES J. 83; Geoff Evans, “A Just Transition From Coal to Renewable Energy in the Hunter Valley of South Wales, Australia” (2007) 3:3-4 INT’L J. OF ENVIRONMENT, WORKPLACE, AND EMPLOYMENT 175.

¹⁴⁵ *Ibid*; Rosemberg, *supra* note 123; UNFCCC, *supra* note .

¹⁴⁶ See David Hess, “Sustainability Transitions: A Political Coalition Perspective” (2014) 43:2 RESEARCH POLICY 278; Clark Miller, Alastair Iles, & Christopher Jones, “The Social Dimensions of Energy Transitions” (2013) 22:2 SCIENCE AS CULTURE 135.

¹⁴⁷ See UNFCCC, *supra* note 23.

¹⁴⁸ Dan Cunniah, “Preface” (2010) 2:2 INT. J. LAB. RESEARCH 121-123.

JTL could bring together environmental law, environmental justice, and labour law in interesting new ways that would allow the fields to work together on the shared legal response to climate change. It could provide some narrative and normative clarity around which a legal field can be developed.

1. *The Descriptive and Normative Boundaries of Just Transitions Law*

There is growing scholarly interest in ‘just transitions’ strategies, but virtually none of it comes from legal scholars.¹⁴⁹ We can draw the boundaries of a re-imagined law of just transitions by examining the sorts of policies that have been associated with just transitions policy strategies. For example, both the ILO and the UNFCCC have produced extensive just transitions policy papers.¹⁵⁰ Among the list of policy recommendations listed by the ILO are the following:

- Integrate provisions for a just transition into the agendas of line ministries, rather than assigning them to only one ministry
- Promote close collaboration between relevant national ministries, including ministries of economic planning and finance, with a view to establishing policies and programmes that can adapt to changes in the fiscal and political landscape;
- Enable sustainable industries, including through fiscal and tax reforms
- Provide financial incentives (grants, loans, tax incentives) for businesses adopting sound environmental practices
- Provide assistance to management and workers in transitioning away from high carbon industries and promote a just transition for affected workers
- Provide training opportunities for up and re-skilling, with equal access for skills acquisition “in particular for young people, women, and workers who need to be re-deployed including across borders

¹⁴⁹ For a case based discussion see Alan Ramo & Deborah Behles, “Transitioning a Community Away From Fossil-Fuel Generation to a Green Economy: An Approach Using State Utility Commission Authority” (2014) 15 Minn. J.L. Sci. & Tech. 505

¹⁵⁰ See ILO, *supra* note 25; UNFCCC, *supra* note 23.

- Promote a culture of workplace dialogue and knowledge sharing
- Study new or increased OHS risks associated with climate change and adopt new regulations accordingly. Incentivize companies to reduce risks.
- Establish social protections systems to provide health care and income security in line with international labour standards with a view of safeguarding populations against the impacts of economic and environmental vulnerabilities and contributing to the goals of productive employment, decent work, and the eradication of poverty during the transition.
- Integrate adequate social protection measures into national climate change responses.
- Encourage sound labour market policies that help enterprises and workers in the anticipation of changing labour market demands in the context of the transition to environmentally sustainable economies by facilitating access to jobs, strengthening employability and training;
- Consider supporting public works and employment programmes, including initiatives linking poverty eradication and ecosystem protection, as well as those for workers affected by the transitioning to environmentally sustainable economies, including climate change, who have been laid off due to structural or technological change.
- Use trade and investment policies to reach social, economic and environmental sustainability, to facilitate access to environmentally friendly technology, to nurture domestic green industries in their infancy, and to encourage and facilitate green innovation and jobs.
- Use public investments to develop infrastructure with the lowest possible adverse environmental impact, to rehabilitate and conserve natural resources and to prioritize resilience in order to reduce the risk of displacement of people and enterprises
- Consider implementing environmental tax reform that could also help financing the compensation of those disproportionately affected by the transition towards economically sustainable activities.¹⁵¹

This partial list of just transitions policy recommendations provides direction in terms of the descriptive boundary of a just transitions legal field. ‘Just Transitions Law’ would

¹⁵¹ ILO, *ibid.*, at 8-17.

encompass environmental laws designed to regulate and reduce carbon producing industrial practices, as well as laws and policies governing a ‘transition’ to a cleaner economy that includes protections for workers and communities adversely affected by, and during the transition stages.

As indicated by the ILO list of policies, there is a broad range of laws and legal fields that could potentially fall within these boundaries, including tax law, insurance law, welfare law, occupational health and safety law, unemployment insurance law, environmental law, trade law, immigration law¹⁵², corporate law¹⁵³, collective bargaining law, among others. Just transition law could provide a framework for organizing a coherent body of law developed from parts of these various other legal fields.

An important part of developing that coherence would be creating the normative boundary of the new legal field. Here, there will be much that is familiar to labour lawyers. A ‘just’ transition adopts the idea that ‘labour is not a commodity’ and all that idea has meant to labour law over the years. It reminds us that climate change policy and transitional strategies must not abandon the goal of decent jobs, opportunities for workers, and economic development, if it is to attract broad public and political support. A just transition envisions an active state using law to tame market forces, which if left

¹⁵² Sujatha Byravan & Sudhir Rajan, “Providing New Homes for Climate Change Exiles” (2006) 6:2 *Climate Policy* 247; Stephanie Dickson, Sophie Webber, & Tim Takaro, *Preparing B.C. for Climate Migration* (Canadian Centre for Policy Alternatives, 2014) online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2014/11/ccpa-bc_ClimateMigration_web.pdf>.

¹⁵³ Geoffrey Rapp, “A New Direction for Shareholder Environmental Activism: The Aftermath Caremark” (2006) 31:1 *William & Mary Environmental Law & Policy Rev.* 163; Charles Cray, “Revising Corporate Charters” (2007) Summit on the Future of the Corporation, Paper No. 7, online: <<http://www.corporatepolicy.org/pdf/charters.pdf>>.

unchecked, could produce environmental and economic catastrophe. Professor Stevis describes this perspective as ‘environmental Keynesianism.’¹⁵⁴

JTL would be guided by a theory of justice encapsulated by the following normative claims (NC) drawn from climate science, environmental law, environmental justice, and labour law. Firstly, climate change is a pressing global problem that market forces alone will not adequately address. Therefore, states should respond through public policy and law (NC1). Secondly, public policy should encourage a transition towards ‘greener’, lower carbon economies (NC2). Thirdly, there will be social and economic costs and benefits associated with climate change, and with the transitional policies aimed at responding to it, and those costs and benefits will also not be equitably distributed by market forces alone. Therefore, governments should seek to minimize the economic and social harms associated with the desired transition to a greener economy, and attempt, through law and policy, to distribute those harms and any resulting benefits in an equitable manner (NC3).

Each of the above claims is challengeable, and of course there is considerable room for debate about which laws and policies would best achieve the objective of a just transition to a lower carbon economy, or whether a just transition is possible or even a desirable objective.¹⁵⁵ JTL scholars would find early work defending the normative claims upon which the field’s foundation rests, or arguing over what those claims should be. But this is true of all new legal fields, and many well-established ones too—including

¹⁵⁴ Stevis, *supra* note 83 at 154.

¹⁵⁵ There is already a literature critical of the “just transition” agenda: Helen Masterman-Smith, “Green Collaring a Capital Crisis?” (2010) 20:3 LABOUR & INDUSTRY 317. See also Richard Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995) at 286-299 for discussion of competing approaches to regulating environmental threats, including pollution, strip mining, damage to wetlands and habitat, and dirty coal.

labour and environmental law. These are healthy debates that help shape the legal field and solidify its theoretical core.

NC1 and NC2 are widely accepted by the scientific, political, environmental (even religious¹⁵⁶) communities.¹⁵⁷ Broad consensus around them explains why the United Nations has for over twenty years convened international conferences and promulgated global framework agreements and protocols aimed at finding political solutions to global warming.¹⁵⁸ NC3 is a key theme in environmental justice as well as intergenerational climate justice scholarship.¹⁵⁹ It also aligns closely with Ruhl and Salzman's concept of 'adaptation equity'.¹⁶⁰ This scholarship has not much focused on labour market policies, but JTL could invite labour law scholars into the climate change discussion, adding their expertise in matters of equitable distribution of work-related costs and benefits and how law can organize and promote collective voice in key public policy and economic debates.

Just as labour law's traditional theory of justice, discussed above, guided early labour law scholars as they developed their discipline, so too could NC3 help JTL scholars chart the early maps of their new legal discipline. NC3 informs us about what legal material we are interested in when we look at climate change through the lens of JTL. It is those laws and policies that are directed at, or that affect, the transition towards

¹⁵⁶ See the extraordinary Encyclical Letter of Pope Francis, *On Care for Our Common Home* (2015) online: <http://i2.cdn.turner.com/cnn/2015/images/06/18/papa-francesco_20150524_enciclica-laudato-si_en.pdf>.

¹⁵⁷ Eric Posner & Cass Sunstein, "Climate Change Justice" (2007) PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 177; UNFCCC, *supra* note __; ILO, *supra* note __

¹⁵⁸ United Nations Framework Convention on Climate Change, *Background on the UNFCCC: the international response to climate change* (United Nations Framework Convention on Climate Change) online: <http://unfccc.int/essential_background/items/6031.php>.

¹⁵⁹ Roesler, *supra* note 108; Tseming, *supra* note __; B. Weston, "Climate Change and Intergenerational Justice: Foundational Reflections" (2007-08) 9(3) Vermont J. Envl. L. 375

¹⁶⁰ Ruhl & Salzberg, *supra* note 2.

greener economies, and that influence how the rewards, harms, and risks associated with that transition are distributed throughout societies. This approach to defining the contours of the legal field of JTL is similar to the framing of labour law, which is distinguished from other legal fields by its subject matter (work and employment) and its traditional theory of justice, as expressed in the slogans “labour is not a commodity” and “inequality of bargaining power”, as discussed earlier.

2. *Transitional Law*

JTL would obviously also be transitional law. “Transitions” refers to a process of system wide change designed to move from one state of being to another, in this case, from a high carbon economy towards a lower carbon economy. According to Rotmans, Kemp, and van Asselt, this transition process requires a clear vision, and “an important task for government is to assist in formulating that vision, and to inspire and mobilize other actors.”¹⁶¹ As noted by the Canadian Labour Congress in an early paper promoting a just transitions strategy, governments need to “anticipate economic change and plan transition...as an integral part of industrial change”.¹⁶²

The UNFCCC summarized the policy challenge associated with a just transition strategy as follows:

Coherent policies across the economic, environmental, social, education, and training and labour portfolios need to provide an enabling environment for enterprises, workers, investors, and consumers to embrace and drive the transition towards environmentally sustainable and inclusive economies and societies. These policies also need to provide a just transition framework for all in order to promote the creation of more decent jobs, including as appropriate: anticipating impacts on employment, adequate and sustainable social protection for job losses

¹⁶¹ Jan Rotmans, Rene Kemp, Marjorie van Asselt, “More Evolution than Revolution: Transition Management in Public Policy” (2001) 3:1 FORESIGHT 15 at 25.

¹⁶² Canadian Labour Congress, *supra* note 124.

and displacement; skills development, and social dialogue, including the effective exercise of the right to organize and collective bargaining.¹⁶³

This highly complex mandate means working just transitions objectives into policy planning at all stages and also across multiple legal disciplines. The sheer complexity of the transitional project, including the need to coordinate policy across multiple “portfolios” and government ministries supports the claim that implementation of just transitions will require a re-thinking of legal boundaries.

Labour law was itself a transitional legal field; it emerged in tandem with industrialization and the growth in waged labour and accompanying worker exploitation and industrial conflict, and the rise of the welfare state as a means of responding to perceived market failures.¹⁶⁴ Labour law was a means used by the state to plan a capitalist economy that incorporated justice issues into labour market outcomes while limiting industrial conflict.¹⁶⁵ Social insurance schemes, such as unemployment insurance and workers’ compensation were part of this movement, as was collective bargaining legislation that promoted a more equal footing between workers and employers in negotiations and greater worker voice in the workplace.¹⁶⁶ Environmental law as well has transitional roots. Much environmental regulation is concerned with changing how industry functions, and transitional policies are often incorporated into regulation to

¹⁶³ UNFCCC, *supra* note at 16.

¹⁶⁴ Mark Barenberg, “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation” (1993) 106 HARVARD LAW REVIEW 1381.

¹⁶⁵ *Ibid.* G. Davidov, “Re-Matching Labour Laws with Their Purpose” in G. Davidov & B. Langille (eds), *The Idea of Labour Law* (Oxford U Press, 2011), 179.

¹⁶⁶ Simon Deakin, “The Contribution of Labour Law to Economic and Human Development” in Davidov & Langille, *Idea of Labour Law*, *supra* note 107 at 164-165.

account for immediate and longer term costs associated with implementation of these changes.¹⁶⁷

There are other well-known examples of transitional legal strategies. One is the Treaty establishing the European Coal and Steel Community (or ESTC Treaty) of 1951.¹⁶⁸ The ESTC Treaty was ostensibly a regional trade agreement, but its grander objective was a planned transition of the post-World War II European market in coal and steel that included a social dimension.¹⁶⁹ Political leaders recognized that many enterprises would collapse under a system of European economic integration and legal ordering was intended to provide protections to the victims during the transition stage, as explained by Professor Gerhard Bebr:

... the Treaty provides for a five- to seven year period of adjustment, during which the Community, in cooperation with the Member States, will financially assist and grant temporary protection to the weaker coal and steel enterprises. Financial assistance will aid beleaguered enterprises in specializing their production, modernizing their methods, or otherwise modifying their activities, even to the extent of creating new ones outside the coal and steel industries. The enterprises which are forced to close are given preference in establishing new industries. Before granting such financial assistance, the Community must find the proposed project economically sound and capable of providing employment for the released miners and steel workers. If these adjustments cause unemployment, the Community contributes to the employee's unemployment compensation. The released workers will also receive financial assistance for their re-training and transfer to new industries.¹⁷⁰

¹⁶⁷ See e.g. B. Huber, "Transition Policy in Environmental Law" (2011), 35 *Harvard Env'tl. L. Rev.* 91

¹⁶⁸ *Treaty Constituting the European Coal and Steel Community*, 1 April 1951, online: <<http://www.consilium.europa.eu/uedocs/cmsUpload/Treaty%20constituting%20the%20European%20Coal%20and%20Steel%20Community.pdf>>.

¹⁶⁹ G. Bebr, "The European Coal and Steel Community: A Political and Legal Innovation" (1953) 65 *YALE LAW JOURNAL* 1.

¹⁷⁰ *Ibid* at 11.

There is a rich political science literature on “sustainability transitions”.¹⁷¹ This literature emphasizes the role of public policy and the need to harness private actors towards the objective of transitioning to a lower carbon economy. However, the role of labour law in the planning and implementation of transitional strategies, and the short and long term effects on labour market outcomes of those strategies, have been underexplored.¹⁷² JTL could provide a framework through which labour law insights could be incorporated into the sustainability transitions discourse, adding important depth to our understanding of the transition process.

The focus of inquiry is on legal strategies to transition to a lower carbon economy, and how those strategies will produce “just”, or equitable outcomes. JTL would be guided by a series of inquiries: What laws and policies could encourage a transition away from high carbon industries to lower carbon industries? Who will participate in the decisions about how a transition should be implemented, and how should law manage that participation? Who will most benefit by these transitional policies, and who is most at risk from them? What laws and policies can achieve a more equitable distribution of harms, risks, and benefits associated with the transition? Since transitional policies will inevitably involve job displacement, collective stakeholder negotiations, a requirement for new labour force skills and retraining, transitional funding schemes to support

¹⁷¹ See, e.g., Hess, *supra* note 128; Adrian Smith, Andy Stirling, & Frans Berkhout, “The Governance of Sustainable Socio-Technical Transitions” (2005) 34 RESEARCH POLICY 1491-1510; Jochen Markard, Rob Raven, & Bernhard Truffer “Sustainability Transitions: An Emerging Field of Research and Its Prospects” (2012) 41 RESEARCH POLICY 955-967; Elizabeth Shove & Gordon Walker, “Caution: Transitions Ahead: Politics, Practice, and Sustainable Transitions Management Environment and Planning” (2007) 39:4 ENVIRONMENT AND PLANNING 763 – 770.

¹⁷² But see Dimitris Stevis, “US Labour Unions and Climate Change: Technological Innovations and Institutional Influences” in Neil Harrison & John Mikler, eds, *Climate Innovations: Liberal Capitalism and Climate Change* (Hampshire: Palgrave MacMillan, 2014) at 164.

workers as they transition to the new economy, and decent jobs once those new ‘green’ industries develop, labour lawyers should have a lot to contribute to JTL.

VI. Conclusion

If governments are to confront climate change, and to use law as a means to facilitate a transition away from a high carbon economy, they will need public support. That support is unlikely to be forthcoming unless policies are in place to protect those families and communities who will be adversely affected during the transition. This basic observation is at the root of just transition movement and policy platform.

To implement a just transition strategy, governments need to design policies that cross existing government ministerial portfolios and legal regimes. A key challenge is how to coordinate this cross-cutting, multi-disciplinary project to create a coherent legal and policy model. Legal scholars can assist with this difficult project by helping to uncover useful legal and factual patterns and providing a normative framework for re-organizing legal materials. One way scholars have responded to similar challenges in the past is to develop new legal fields that re-organize existing categories. If the exercise is successful, the new legal field can expose useful new ways of looking at the legal world, and expose patterns theretofore unseen.

A challenge for the development of JTL is that the subject draws from so many diverse legal fields. The same challenge confronts Arthurs’ “law of economic subordination and resistance”, and most other efforts to remap legal boundaries across multiple existing fields. Labour lawyers know a lot about labour laws and policy to pursue decent jobs and training opportunities and to encourage worker voice, but next to nothing about cap and trade rules or environmental assessment laws. Moreover, as noted

earlier, labour lawyers are used to dealing with problems that are mostly localized and immediate, whereas transitioning to a greener economy and wrestling with climate change through adaptation and mitigation policies involves challenges on a much greater temporal and spatial scale.

Environmental law scholars have much greater experience dealing with the complexity of environmental problems. They will continue to play a leading role in policy debates over greenhouse gas emission legislation and other legislative mitigation and adaptation strategies.¹⁷³ However few environmental law scholars can explain whether unemployment insurance laws fund retraining for workers who lose their jobs as a result of their coal-mining employer being phased out, whether those workers are entitled to state-subsidized retraining, or what legislative systems are in place to ensure those workers have a voice in their fates. Environmental justice scholars can explain how land use planning laws produce inequitable environmental outcomes, but not whether occupational health and safety laws do a good job of ensuring windmill factories are safe.¹⁷⁴

A legal field organized around the idea of just transitions would require lawyers, legal scholars, and policy-makers to expand their areas of expertise, and for experts from different legal fields to converge and coordinate around a new narrative. This presents a challenge, but also a great opportunity at a crucial moment in time when governments are searching for mechanisms and strategies to plan for climate change and the transition

¹⁷³ J.B. Ruhl, “Climate Change Adaptation and the Structural Transformation of Environmental Law” (2010), 40 *Environmental L.* 343

¹⁷⁴ See European Agency for Safety and Health at Work, *Working in the Wind Energy Sector* (European Agency for Safety and Health at Work, 2014), online: <<https://osha.europa.eu/en/highlights/safe-working-in-the-wind-energy-sector>>; U.S. Department of Labor, *Green Job Hazards: Wind Energy*, online: <<https://www.osha.gov/dep/greenjobs/windenergy.html>>.

towards a greener economy that accounts for the economic and social consequences. JTL could take a holistic view of the role of law and legal planning by drawing together experiences and knowledge from all those legal fields that have relevance to the transitioning process. This exercise could prove immensely useful as governments struggle with short and long term plans to transition their economies in response to climate change while opening up interesting new collaborations and avenues of research for legal scholars.

On the other hand, the notion of developing a new legal field that cuts across so many different legal disciplines is highly ambitious. It may also be unnecessary. Environmental law may very well be capable of managing climate change and a transition to a lower carbon economy. Labour law can deal with transitional labour market policies on an ad hoc basis as they arise, whether those policies are driven by climate change or technological advances or other fundamental shifts in the nature of how work is performed. This paper has made the case that there is nevertheless value in exploring how labour law could be brought into the climate change discussion. Climate policy will need to coordinate with labour policy moving forward, and this coordination can be strengthened with closer ties between the environmental law and labour law communities.