REPRESENTING CLIMATE WRECKERS

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In recent years, lawyers have become increasingly aware of the implications of the climate crisis for legal practice. Amidst this context, United Nations Secretary General António Guterres has urged recent graduates to decline work on behalf of "climate wreckers." This Article examines how professional responsibility rules and principles in the United States should be interpreted on a warming planet, particularly in the context of attorneys representing so-called "climate wreckers" in civil matters. I use the term "climate wrecker" to refer to fossil fuel corporations and trade associations that have engaged in public disinformation campaigns to stall climate action and sow doubt regarding climate science.

The Article explains how dominant approaches to attorney ethics are frustrating private governance efforts to persuade attorneys to fulfill their duty to the rule of law by securing a transition away from fossil fuels. Law firms that invoke fossil fuel corporations' right to counsel as a justification for their choice of clients distort foundational legal principles to remain unaccountable. Ultimately, I argue that climate change requires a transformation in the practice of law, namely that lawyers choosing to represent climate wreckers should be held accountable for their decision to do so. The notion that "everyone deserves representation," and thus lawyers are fulfilling their public citizen duties when representing climate wreckers, distorts professional ethics to justify a decision that ultimately enables further planetary disruption. It is time for lawyers to reckon with the transformation climate change demands and start declining representation that is at odds with a stable climate.

> "[O]ur norms should not force or nudge lawyers into the role of subservient technicians or ignore willful ignorance as a way to insulate lawyers from liability for conduct that furthers criminal or fraudulent conduct. Such norms make lawyers the ex officio co-conspirators with unworthy clients."[1]

INTRODUCTION

In 2022, the United Nations Secretary General António Guterres urged recent graduates to use their talents to create a renewable energy future rather than to "work for climate wreckers."[2]

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[1] Irma S. Russell, *The Sense of an Ending: Shifting Paradigms in Search of Our Common Future*, 53 UNIV. TOL. L. REV. 301, 310 (2022). Upton Sinclair famously said, "It is difficult to get a man to understand something when his salary depends on his not understanding it." UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR, AND HOW I GOT LICKED 109 (1935).

[2] UN News, *'Don't Work for Climate Wreckers' UN Chief Tells Graduates, in Push to a Renewable Energy Future*, UNITED NATIONS (May 24, 2022), https://news.un.org/en/story/2022/05/1118932. This term has emerged to identify the enablers and profiteers of the climate crisis. *See* Georgia Wright, Liat Olenick & Amy Westervelt, *The Dirty Dozen: Meet America's Top Climate Villains*, THE GUARDIAN (Oct. 27, 2021), https://www.theguardian.com/commentisfree/2021/oct/27/climate-crisis-villains-americas-dirty-dozen (identifying twelve individuals who have "managed to evade accountability and scrutiny for decades as they

Guterres joined others who have singled out corporations who fund and otherwise prop up misinformation campaigns to stall climate regulatory efforts for their role in driving a planetary crisis.[3]

Climate change operates as a destabilizing force across society, creating a moral challenge for existing legal regimes that were developed under the presumption of stable and predictable conditions.[4] The disruptive nature of climate change has highlighted the biases and limitations of the law, with legal institutions playing a central role in upholding a fossil fuel-based economy and contributing to the disproportionate and unequal impacts of the climate crisis.[5] Every time a fossil fuel project is proposed, designed, financed,

helped the fossil fuel industry destroy our planet. The actions of these climate supervillains have affected millions of people, disproportionately hurting the vulnerable who have done the least to contribute to global emissions."). *See also* Graham Redfearn & Adam Morton, '*Climate Villain': Scientists Say Rupert Murdoch Wielded His Media Empire to Sow Confusion and Doubt*, THE GUARDIAN (Sept. 22, 2023), https://www.theguardian.com/media/2023/sep/23/rupert-murdoch-climate-change-denial (reporting on how several scientists "have described the media tycoon Rupert Murdoch as a 'climate villain' who has used his television and newspaper empire to promote climate science denial and delay action"); *cf.* Alex Trembath, *There Are No Villains in Climate Change*, THE BREAKTHROUGH INST. (Apr. 17, 2023), https://thebreakthrough.org/journal/climate-change-banned-words/big-oil-villains-climate-change (arguing that the narrative identifying "climate villains" and blaming fossil fuel corporations is misdirected and counterproductive because the majority of fossil fuel resources are state-owned, the bulk of fossil fuel consumption comes from outside the Global North, and until recently, there were no cost-effective alternatives to fossil fuels); *see also* Murray Shearer, *Oil and Gas Companies Are Seen as Climate Villains. Truth Is, We'll Need Their Expertise to Make Green Hydrogen a Reality*, THE CONVERSATION (Mar. 1, 2023), https://theconversation.com/oil-and-gas-companies-are-seen-as-climate-villains-truth-is-well-need-their-expertise-to-make-green-hydrogen-a-reality-188598 (arguing that "climate villains" are not the enemy).

[3] In response, in a controversial column in the New York Times the same year, renowned ethicist and philosopher Kwame Anthony Appiah wrote that legal representation of so-called "climate villains" does not automatically render a lawyer a "malefactor." Kwame Anthony Appiah, *Is It OK to Take a Law-Firm Job Defending Climate Villains?*, N.Y. TIMES MAG. (Sept. 6, 2022), https://www.nytimes.com/2022/09/06/magazine/law-firm-job-ethics.html; *c.f.* The Flaw (@TheFlawMagazine), TWITTER (Oct. 31, 2022, 1:43 PM), https://twitter.com/TheFlawMagazine/status/1587138151784382465 (arguing Appiah distorts the role of corporate lawyers).

[4] *See generally* J.B. Ruhl & Robin Kundis Craig, *4°C*, 106 U. MINN. L. REV. 191, 195 (2021) ("[C]limate change disruptions will extend not only to ecological systems, but to social systems as well, including systems of governance.").

[5] *See* Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C. R.-C.L. L. REV. 445, 456 (2018) ("Current

and constructed, lawyers with transactional, negotiating, regulatory, and contracting skills are present. When there is opposition to a particular project or a legislative proposal on the table, lawyers frequently engage in lobbying. When climate litigation is filed in court, defense lawyers advocate zealously[6] on behalf of their clients.[7] Much of the law as it currently exists enables and upholds an economic model that prioritizes profits and deregulation over environmental and human wellbeing.

It is now clearly established that the fossil fuel industry understood climate science and was aware of the implications of burning fossil fuels on the planet's atmosphere as early as the 1950s.[8] Several fossil fuel companies engaged in decades-long climate-denial and climate disinformation campaigns, attempting to sow doubt amongst the public and impede regulatory efforts to tackle climate

legal structures and underlying principles facilitated, if not actively produced, both the significant disruption to global atmospheric chemistry as well as the erratic and uneven vulnerability to its effects."); *see also* Russell, *supra* note 1, at 302 (describing "the cruel irony" whereby "the peril for democracy comes from laws and civil structures" that have systematically excluded communities and allowed planetary disruption by climate change).

[6] The term "zealous" and its derivatives do not appear in the rules but appear in the Preamble and comment to Model Rule 1.3. For a discussion of the term and its interpretation, *see* Daniel Q. Harrington & Stephanie Katsigiannis Benecchi, *Is it Time to Remove "Zeal" From the ABA Model Rules of Professional Conduct?*, A.B.A (May 26, 2021), https://www.americanbar.org/groups/litigation/resources/newsletters/ethics-professionalism/is-it-time-remove-zeal-aba-model-rules-professional-conduct/ (summarizing a critical position of the term "zeal" because it has been "invoked as an excuse for unprofessional behavior.").

[7] *See* Steven Vaughan, Faculty of Laws, University College London, The Unethical Environmental Lawyer, Inauguration Speech at University College London (Oct. 13, 2022), *in* UNIV. COLL. LONDON RSCH. PAPER SERIES, no. 18/2022, Oct. 30, 2022, at 2, https://ssrn.com/abstract=4253980 [hereinafter *The Unethical Environmental Lawyer*] (describing how through drafting contracts, engaging in legal disputes, and participating in adjudication processes, lawyers facilitate transactions and operations on behalf of the fossil fuel industry).

[8] *See* Oliver Milman, '*Smoking Gun Proof': Fossil Fuel Industry Knew of Climate Danger as Early as 1954, Documents Show*, THE GUARDIAN (Jan. 30, 2024), https://www.theguardian.com/us-news/2024/jan/30/fossil-fuel-industry-air-pollution-fund-research-caltech-climate-change-denial. In 1965, Lyndon Johnson recognized that "this generation has altered the composition of the atmosphere on a global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels." *See* Special Message to the Congress on Conservation and Restoration of Natural Beauty, 1 PUB. PAPERS 155–165 (Feb. 8, 1965).

change.[9] Other companies moved from attacking the scientific certainty around anthropogenic climate change to "employing delay tactics that focus on denying the urgency of the situation, and to blame-shifting tactics (e.g., arguing that consumers are to blame for depending so deeply on fossil-fuel energy)."[10] In fact, British Petroleum (BP), the second largest non-state-owned oil company globally, coined and mainstreamed the term "carbon footprint" in the early 2000s, aiming to offload responsibility for climate change onto individuals.[11]

Given such extreme malfeasance, it makes sense that many climate advocates have targeted fossil fuel companies. But these companies do not operate on their own. Climate wreckers rely on lawyers to assist them in their transactional, lobbying, and litigation work,[12] making the legal profession instrumental to the existence

[9] *See* Geoffrey Supran, Stefan Rahmstorf & Naomi Oreskes, *Assessing ExxonMobil's Global Warming Projections*, 379 SCIENCE 1, 6 (2023); *see also* KATHY MULVEY & SETH SHULMAN, UNION OF CONCERNED SCIENTISTS, THE CLIMATE DECEPTION DOSSIERS: INTERNAL FOSSIL FUEL INDUSTRY MEMOS REVEAL DECADES OF CORPORATE DISINFORMATION 1 (2015), https://www.ucsusa.org/resources/climate-deception-dossiers.

[10] *See* SHARON YADIN, FIGHTING CLIMATE CHANGE THROUGH SHAMING 41 (2023), https://www.cambridge.org/core/product/identifier/9781009256230/type/element; *see also* Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 HARV. J. ON LEGIS. 337 (2023) (arguing that regulatory shaming is a suitable tool for combating corporate disinformation and deception).

[11] *See* Rebecca Solnit, *Big Oil Coined 'Carbon Footprints' to Blame Us for Their Greed. Keep Them on the Hook*, THE GUARDIAN (Aug. 23, 2021), https://www.theguardian.com/commentisfree/2021/aug/23/big-oil-coined-carbon-footprints-to-blame-us-for-their-greed-keep-them-on-the-hook; *see also* Doug Kysar, *The Duty of Climate Care*, 73 DEPAUL L. REV. 487, 509, n.87 (2024). Some courts have adopted this narrative of individual culpability. *See, e.g.*, City of N.Y. v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021).

[12] *See* Law Students for Climate Accountability, *2024 Climate Change Scorecard*, LSCA (Jun. 24, 2024), https://www.ls4ca.org/scorecard (ranking the Vault 100 law firms according to how much fossil fuels work they have engaged in over a five-year period, highlighting the "role law firms play in creating, implementing, and safeguarding fossil fuel projects.") The Author is a co-founder of the organization and currently sits on the board. Haley Czarnek, LSCA's National Director, paints a grim picture of the current state of the U.S. legal system in perpetuating the climate crisis, as law firms "provide lucrative fossil fuel companies with the highest-quality representation available, raking in tremendous short-term profits at a cost that is not fully measurable but which likely includes millions of lives lost and trillions of dollars in damage." Haley Czarnek, *In Case of Emergency Break Glass*, 17 CHARLESTON L. REV. 603, 603–604 (2023).

and continuance of a fossil fuel economy.[13] Some advocates are more inclined to believe the lawyers providing competent counsel to big emitters are an important part of a transition away from fossil fuels.[14] The argument goes that without competent counsel advising emitters about the regulatory and litigation risk of a carbon intensive model, emitters' behavior will be worse for the climate.[15] Under this theory, a competent lawyer would advise clients to stop particularly harmful, risky, or illegal behavior. Of course, this presumes that lawyers have the power to dissuade powerful clients from pursuing certain actions in the first place.[16] Under either view, lawyers play a central role in how we think of private climate governance.[17]

While climate change raises an existential challenge for society and law more broadly, the notion of "controversial" or "unsavory" clients is not new.[18] One of the legal profession's pillars is the adage that "everyone deserves representation" or, at the very least, that access to legal counsel and the legal system is paramount.[19] Naturally, the field of legal ethics has reckoned with this question in the

[13] *Id. See* Russell, *supra* note 1; *see also* Law Students for Climate Accountability, *supra* note 12.

[14] *See* Katie Kouchakji, *How the Climate Crisis is Changing the Legal Profession*, INT'L BAR ASS'N (Sept. 28, 2021), https://www.ibanet.org/How-the-climate-crisis-is-changing-the-legal-profession.

[15] *See* J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 835 (Jan. 4, 1994) (observing that the duty to advise on compliance and reporting requirement is crucial to the environmental protection system and the rule of law).

[16] For a general critique of this idea, *see* Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 672, 677 (2016) (Roiphe explains how lawyers "gradually retreated" from a prior vision of lawyering, which focused on a "collective purpose" and the "pursuit of common social goals," and moved instead towards the delivery of legal services and loyalty to individual clients); *see also* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 35 (1994).

[17] As Doug Kysar explains, a central question raised by a duty of climate care is why certain actors "should be singled out" from among billions of present and past emitters. *See* Kysar, *supra* note 11, at 493. This Article examines the legal profession's duty of climate care.

[18] Bradley Wendel, *Lawyer Shaming*, 2022 U. ILL. L. REV. 175, 181–84 (2022) (providing historical examples of lawyer shaming); *see also* David Luban & Bradley W. Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 338 (2017) ("[i]n one way, this problem about the lawyer's role morality is among the oldest of all philosophical questions, going back to Plato's critique of the Sophists.").

[19] *See infra* III(A).

context of lawyers facilitating torture or crime,[20] or defending Nazi officials or rapists.[21] What is new, however, is the scale of disruption that climate change presents.

This Article argues that attorneys should decline representation of "climate wreckers" because, at least in the United States, there is no obligation to represent this type of client. Because there "is no requirement in American law to represent any given client,"[22] attorneys who *choose* to represent these clients are affirmatively deciding to engage in representation of corporations whose conduct is directly at odds with a stable climate. The legal industry should not only face societal and professional scrutiny for furthering the destructive interests of climate wreckers, but should re-examine legal ethics writ-large and conform them to the scale of the challenge. Although the Model Rules of Professional Conduct offer some guidance to refrain from engaging in illegal conduct, their enforcement falls short of securing a landscape where lawyers are not actively enabling and facilitating planetary disruption.[23] As they exist, the Rules are part of a broader legal framework that has upheld the conditions leading to climate change in the first place.

I am not arguing that climate wreckers do not have the right to counsel. They do, particularly in an adversarial system. Instead, I argue we need to interrogate the idea of moral non-accountability in the context of well-resourced and powerful law firms lending their services to actors who prioritize their profits at the expense of a stable climate. At a minimum, clients seeking legal counsel to develop *new* fossil fuel infrastructure should have a hard time finding it. Attorneys assisting climate wreckers should carefully examine whether their services will lead to additional emissions given an

[20] *See, e.g.*, Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010); David Luban, *The Torture Lawyers of Washington*, *in* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162 (2007).

[21] *See, e.g.*, Abbie Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?* 57 AM. CRIM. L. REV. 1569 (2020); Jan Ransom & Michael Gold*, 'Whose Side Are You On?': Harvard Dean Representing Weinstein is Hit with Graffiti and Protests*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html.

[22] Wendel, *supra* note 18, at 180; *see also* Monroe H. Freedman, *Response, The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995) (arguing it is proper to ask attorneys to justify their representation of certain clients).

[23] *See infra* IV. For a discussion on the Model Rules as setting a "floor" for attorney behavior, see *infra* III(A).

already very tight carbon budget.[24] In parallel, the Model Rules could be amended to incorporate specific climate or environmental components as some scholars have suggested.[25] Alternatively, the Rules could be interpreted and enforced such that attorneys who have facilitated deception or other questionable behavior by their clients face meaningful repercussions for their actions.

Part I examines how climate change raises implications for the Model Rules of Professional Responsibility and the legal profession more broadly. This section explores how different actors across the profession have responded to the climate crisis, particularly through private environmental governance efforts to incentivize the development of renewable energy and the phasing out of fossil fuels.[26] Part II borrows and elaborates on the term "climate wreckers" to explain which actors may qualify as such and why they are especially deserving of attention. Part III considers different legal ethics approaches underlying the notion that lawyers are neutral service providers, teasing out the distinct conceptions of the lawyer in society and their implications in the climate context. Part IV then argues that climate change requires a transformation in the practice of law, namely that lawyers choosing to represent climate wreckers should be held accountable through private governance efforts such as naming and shaming campaigns or moral boycotts.[27] The notion that

[24] *See* Damian Carrington, *How Much Of The World's Oil Needs To Stay In The Ground?*, THE GUARDIAN (Sep. 8, 2021), https://www.theguardian.com/environment/2021/sep/08/climate-crisis-fossil-fuels-ground (explaining that to effectively tackle the climate crisis, 90% of coal and 60% of oil and gas reserves will need to remain in the ground); *see also* Stewart M. Patrick, *To Tackle Climate Change, Keep Fossil Fuels in the Ground*, COUNCIL ON FOREIGN RELS. (Dec. 9, 2021), https://www.cfr.org/article/tackle-climate-change-keep-fossil-fuels-ground.

[25] *See* Tom Lininger, *Green Ethics for Lawyer*s, 57 B.C. L. REV. 61 (2016).

[26] *See* Michael P. Vandenbergh, *The Emergence of Private Environmental Governance*, 44 ENV'T L. REP. 10125 (2014); *see also* Joshua Galperin, *Foreword: Private, Environmental, Governance*, 9 GEO. WASH. J. ENERGY & ENV'T L. 1 (2018) (recognizing the incredible growth of private environmental governance as an area of study in the legal academy); *see also* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

[27] I do not mean to imply that all boycotts or naming and shaming efforts are inherently good, democratic, or transparent. As Wendel explains, these efforts tend to lack the "virtues of formal lawmaking" that make other democratic forms of disagreement or debate (e.g., legislation or administrative rulemaking) more legitimate. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES OF ACCOUNTABILITY, TOLERATION, AND REGRET 147 (2024). However, these efforts

"everyone deserves representation," and thus lawyers are fulfilling their duties as public citizens when representing climate wreckers, distorts legal ethics principles and ultimately threatens the institutions that create, interpret, and uphold the law.[28] Tackling climate change demands a regime shift where lawyers who hinder the transition away from fossil fuels no longer enjoy the social license to do so.[29] These accountability efforts build on "moral remainders" to create reluctance to certain types of representation and "ensure that lawyers stay within permissible limitations" in the course of their work.[30] Ultimately, leveraging the notion that "everyone deserves representation" as a blanket justification for professional behavior is troublesome and warrants interrogation.

I. CLIMATE CHANGE & THE LEGAL INDUSTRY

Scholars, advocates, and bar associations have begun to explore how the legal profession can facilitate—and at times hinder—the transition away from a fossil fuel economy, adopting divergent visions of what lawyers should do to respond to climate change. While these actors are all differently positioned and employ distinct strategies to create change, they have pursued a shift in formal and informal norms primarily through private governance efforts. Some of these proposals encompass net-zero pledges,[31] increased

are important attempts to accomplish "public policy objectives that were unattainable through the formal lawmaking processes, perhaps because formal processes have been captured by powerful special interests." *Id.*

[28] Wendel notes that lawyers may decide to represent fossil fuel companies not because they believe that "everyone deserves counsel," but because "there is something worthwhile about participating in a process through which genuinely difficult technical and normative issues are resolved." *Id.* at 145.

[29] Shell has acknowledged that reputational harms may impact their social license to operate, observing that "[r]eal or perceived failures of governance or regulatory compliance… could harm our reputation." Shell also recognizes that "[a]n erosion of our business reputation could have a material adverse effect on our brand, our ability to secure new hydrocarbon or low-carbon opportunities or access capital markets, and on our licence to operate." Shell plc, Annual Report and Accounts for the Year Ended December 31, 2023 16 (Mar. 14, 2024).

[30] Wendel, *supra* note 18, at 184.

[31] *See Our Work*, NET ZERO LAWS. ALL. (NZLA), https://www.netzerolawyers.com/our-work (last visited Nov. 12, 2024).

leadership by bar associations,[32] advised emissions schemes,[33] and modifications to professional responsibility rules,[34] among others. This section examines these responses and explains how these actors envision legal ethics and the role of lawyers in a new geologic era.

Increasing attention is now devoted to how *all* legal sectors should adapt their practice to the realities of climate change. Some advocates have called for a "climate conscious" approach to lawyering.[35] For instance, Chief Justice Brian J. Preston of the Land and Environment Court in New South Wales observed that "[w]hile climate change issues may have been considered relevant only to environmental lawyers in the past, many areas of legal practice now require knowledge and skills relevant to climate change."[36] Along similar lines, former Special Presidential Envoy for Climate John Kerry told the American Bar Association (ABA) in 2021 "you all are climate lawyers now."[37] Kerry and Chief Justice Preston are not

[32] *See* Victor Byers Flatt, *Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change*, 2020 UTAH L. REV. 569 (2020); Achinthi C. Vithanage & Nadia Ahmad, *ABA at COP28: Calling on the Legal Community for a Common Cause*, A.B.A. (Mar. 1, 2024; *see infra* I(C)).

[33] *See* Tracy Hester, *Can Counselors Be Complicit?*, 41 ENV'T L. F. 38 (2024); Matthew Gingell, *Measuring 'Advised Emissions'—A Framework for Assessing the Carbon Footprint of a Law Firm's Advice*, OXYGEN HOUSE (2023), https://legalsustainabilityalliance.com/wp-content/uploads/2023/09/Measuring-Advised-Emissions-final-200923.pdf.

In 2024, the Net Zero for Professional Service Providers Working Group—which is part of the UN Race to Zero—issued Draft Guiding Principles for Serviced Emissions. *See Professional Service Providers in a Net Zero Future*, UNFCCC, *https://climatechampions.unfccc.int/system/net-zero-for-professional-service-providers/*, (last visited Nov. 12, 2024).

[34] *See* Lininger, *supra* note 25, at 62 (arguing that ethics rules should offer greater guidance for lawyers on advising clients against environmental harm); *see also* Joshua Gostel, *Ethics, Energy and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet*, 30 GEO. J. LEGAL ETHICS 819 (2017); *see also* Futrell, *supra* note 15, at 838 (arguing that environmental law will need to close the gap between environmental ethics and professional conduct).

[35] *See* Justice Brian J. Preston, *Climate Conscious Lawyering*, 95 AUSTL. L. J. 51 (2021); John C. Dernbach, Tracy D. Hester & Amy L. Edwards, *ABA Encourages Climate-Conscious Lawyering at COP27*, A.B.A. (Mar. 3, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/march-april-2023/aba-encourages-climate-conscious.

[36] *Id.*

[37] Karen Sloan, *'You are all climate lawyers now,' John Kerry tells ABA*, REUTERS (Aug. 5, 2021), https://www.reuters.com/legal/litigation/you-are-all-climate-lawyers-now-john-kerry-tells-aba-2021-08-05/. *See also* Irma S. Russell,

wrong. All kinds of lawyers are facing increasing pressure to understand how climate change impacts their line of work, particularly with regard to climate impacts,[38] regulatory developments (e.g., disclosure requirements),[39] and potential legal risks.[40]

As Dean Steven Vaughan writes, "[l]awyers are everywhere in the context of climate change."[41] Lawyers secure the contracts necessary to maintain and build fossil fuel infrastructure, represent fossil fuel companies in litigation and arbitration disputes, and manage regulatory compliance. Czarnek, critical of the role of attorneys in driving the status quo, describes how "thousands of lawyers continue to do the bidding of Big Oil."[42] Other advocates embrace a

John C. Dernbach & Matthew Bogoshian, *The Lawyer's Duty of Competence in a Climate-Imperiled World*, 92 UMKC L. REV. 859, 860 (2023) (arguing that under Rule 1.1, lawyers will need to adapt as the client's needs in a changing climate evolve); MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. [8] (AM. BAR ASS'N 2023).

[38] *See* FRESHFIELDS BRUCKHAUS DERINGER, LEGAL RISK AND CLIMATE CHANGE (Oct. 2019), https://www.freshfields.com/4aeb7b/globalassets/our-thinking/campaigns/climate-change/07803_fi_climate_change.pdf; John Dernbach et al., *The Role of Lawyers, Bar Associations and Law Societies in Combatting Climate Change*, A.B.A. SECTION OF ENV'T, ENERGY, & RES. (Aug. 7, 2023), https://www.americanbar.org/groups/environment_energy_resources/resources/natural-resources-environment/2023-summer/role-lawyers-bar-associations-law-societies-combatting-climate-change/.

[39] *See* Scott Hirst, *Saving Climate Disclosure*, 28 STAN. J.L. BUS. & FIN. 91 (2023); *see also* George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REV. 101 (2022); Perry E Wallace, *Climate Change, Corporate Strategy, and Corporate Law Duties*, 44 WAKE FOREST L. REV. 757 (2009) (discussing the physical, regulatory, and litigation risk that climate change poses).

[40] *See* Lisa Benjamin & Sara Seck, *The Escalating Risks of Climate Litigation for Corporations*, 18 SCITECH LAW. 10 (2021–2022) (warning that "[l]egal and financial advisors may incur liability as a result of their failure to warn their clients of the risks of fossil fuel-intensive activities.") (citing Flatt, *supra* note 32).

[41] Steven Vaughan, *Climate Change and the Rule of Law(yers): What Thinner and Thicker Accounts Might Require of Those in Practice* 1 (Univ. Coll. London Rsch. Paper Series, no. 11/2022, Aug. 2022) [hereinafter *Climate Change and the Rule of Law(yers)*]; *see also* Achinthi C. Vithanage & Nadia Ahmad, *ABA at COP28: Calling on the legal community for a common cause*, A.B.A. (Mar. 1, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2024-march-april/aba-at-cop28/ (observing that lawyers are "adjudicators, drafters, negotiators, advisers, mediators, and translators of complex scientific data and goals into actionable policies and legal frameworks . . . Most of all, they are professionally mandated to deliver on the quality of justice.").

[42] *See* Haley Czarnek, *supra* note 12 (citing Law Students for Climate Accountability, *Fueling the Climate Crisis: Measuring T-20 Law School Participation in the Fossil Fuel Lawyer Pipeline*, LSCA 11 (Mar. 9, 2023),

theory of change where corporate lawyers can play a crucial role in the transition away from fossil fuels, such as the Net Zero Lawyers Alliance (NZLA), a voluntary initiative composed of 35 member firms encompassing more than 100,000 lawyers across over 40 jurisdictions.[43]

Under the fiduciary service ethic enshrined in the lawyer-client relationship,[44] "doing the bidding of Big Oil [clients]" is exactly what lawyers are supposed to do—or at least what professional ethics require *after* the attorney-client relationship has been formed.[45] Perhaps paradoxically, many of the firms servicing fossil fuel industry clients also publicly commit to sustainability initiatives and less disruptive forms of climate action by the firm, such as reducing direct emissions or providing pro bono services to renewable energy companies.[46] For example, some of the NZLA members represent fossil fuel clients, including Clifford Chance who advises Shell.[47]

https://static1.squarespace.com/static/646e3b899493ae261720e957/t/648bcd012260183ea0763a1b/1686883593460/LSCA+-+Fossil+Lawyers+Report.pdf).

[43] *See About Us*, NET ZERO LAWS. ALL., https://www.netzerolawyers.com/about-us (last visited Oct. 15, 2024). NZLA members "commit to reducing operational emissions, contributing pro bono time to projects to achieve climate objectives, building capacity among all their lawyers, and providing net zero aligned advice." *Our Commitment*, NET ZERO LAWS. ALL., https://www.netzerolawyers.com/commitments/our-commitment (last visited Oct. 15, 2024).

[44] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (AM. L. INST. 2000).

[45] Having lawyers impose their own moral views on their clients would arguably dishonor the pluralism of society. *See* Luban & Wendel, *supra* note 18, at 353; *see also* DANIEL MARKOVITS, A MODERN LEGAL ETHICS 27 (2008).

[46] Traditionally, lawyers have welcomed pledges to reduce Scope 1 and Scope 2 emissions but have not sought to reduce their advised emissions. Scope 1 emissions refer to direct emissions resulting from sources that are under the direct control or ownership of the emitter, while Scope 2 emissions are indirect emissions resulting from the purchase of electricity, heating, or cooling. Advised emissions are *indirect* emissions stemming from the provision of legal services as opposed to direct emissions from a firm's operations. *See Scope 1 and Scope 2 Inventory Guidance*, EPA, https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance (last visited Oct. 15, 2024); *see also* Gingell, *supra* note 33; *see infra* Parts I(D) & IV(C).

[47] *See* Russell Wells, Olamide Oladosu & Halim Uddin, *Clifford Chance Advises Lenders on Acquisition of Oil and Gas Assets in Nigeria*, CLIFFORD CHANCE (Feb. 3, 2021), https://www.cliffordchance.com/news/news/2021/02/clifford-chance-advises-lenders-on-acquisition-of-oil-and-gas-as.html; *Our Members*, NET ZERO LAWS. ALL., https://www.netzerolawyers.com/our-members (last visited Oct. 15, 2024).

Climate change raises crucial questions about the role of lawyers on a warming planet.[48] Which actors have contributed or continue to contribute significantly to the global carbon budget? In what ways are these actors historically, legally, and morally responsible for climate disruption? What role do practitioners play in upholding or challenging the status quo? Scholars, bar associations, advocates, and law firms have begun answering these questions, often leveraging private environmental governance initiatives to shift the profession away from fossil fuels.

A. *Scholars*

Legal scholars have explored how climate change interacts with professional responsibility standards and legal ethics more broadly, with some commentators arguing that professional conduct norms can be aligned with meaningful climate change action.[49] Indeed, the U.S. Model Rules of Professional Conduct encourage "participation in activities for improving the law"[50] and detail ways in which lawyers have duties as "public citizens."[51]

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[48] *See generally* the work of Law Students for Climate Accountability, LSCA, www.ls4ca.org (last visited Oct. 25, 2024). The UK-based organization Lawyers Are Responsible (LAR) has also drawn attention to the role of prominent UK law firms in upholding the fossil fuel industry through their legal services. LAR has called for lawyers to pledge to withhold their services supporting new fossil fuel projects. *See* Jack Womack, *Slaughter and May Agrees to Meet Lawyers Climate Group,* LAW.COM (Sept. 11, 2023), https://www.law.com/international-edition/2023/09/11/slaughter-and-may-agrees-to-meet-lawyer-climate-pressure-group/.

[49] For example, the Model Rules contemplate pro bono work and advocates have compiled a list of pro bono activities to support climate action. *See* MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2023) (discussing voluntary pro bono public service); *See An Example of Pro Bono Efforts to Tackle Climate Change Include Legal Pathways to Deep Decarbonization*, LEGAL PATHWAYS TO DEEP DECARBONIZATION, https://lpdd.org/pathways/.

[50] *See* MODEL RULES OF PRO. CONDUCT r. 6.1(3) (AM. BAR ASS'N 2023).

[51] *See e.g.*, MODEL RULES OF PRO. CONDUCT pmbl. para. 6 (AM. BAR ASS'N 2023). The Model Rules state the following:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. . . all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those

For example, Professor Victor Flatt observes that states' ethics law could be interpreted "to require, or at least permit, attorneys to disclose client activity relating to greenhouse gas emissions."[52] Flatt explains that "[b]ecause of the lack of any comprehensive federal regulatory scheme to address major greenhouse gas emissions and the scale of the problem, climate change is fundamentally different from an ethics standpoint than more traditional, heavily regulated pollution like hazardous waste releases."[53] Flatt argues that existing rules could require, or at least allow, attorneys to disclose client activity that may result in "death or substantial bodily harm" from greenhouse gas emissions.[54] He also notes that in light of a wave of climate lawsuits against governments and corporations, state bar requirements may change due to the increasing pressure to reckon with the implications of greenhouse gas emissions.[55]

Similarly, Professor Keith Rizzardi argues that under existing professional responsibility norms, lawyers, particularly those

> who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

See also Russell et al., *supra* note 37, at 860 ("As 'public citizens,' lawyers have a duty to reform the law when reform is necessary for the public good.").

[52] Flatt, *supra* note 32. For other scholarship examining the rules in the context of environmental law or environmental issues, see Daniel Riesel & Victoria Shiah Treanor, *Ethical Considerations for the Clean Air Act Attorney*, 30 PRAC. REAL EST. LAW. 5 (2014).

[53] Flatt, *supra* note 32, at 575.

[54] *Id.*; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 2023), which states that "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm." Note that the duty of confidentiality has been interpreted narrowly and to the author's knowledge, there has not been any instance where the rule has been interpreted in such a way.

[55] *See* Flatt, *supra* note 32, at 576 ("[g]iven climate activism to reduce greenhouse gas emissions, the ease of filing attorney ethics complaints, and requirements to disclose potential ethical violations of other attorneys, the application of ethical rules to representation of greenhouse gas emitters is not only possible but likely."). Flatt also observes that even though ultimately it will be high courts and administrative bodies who will determine the extent of disclosure obligations, regulatory risk is looming when it takes only one state to apply ethics rules to a client's activities. *See id.* at 577.

The current rules do not allow for climate or environmental factors to overcome the duty of zealous advocacy, although there may be some exceptions when environmental concerns may translate into health risks. *See* Lininger, *supra* note 25, at 65.

working for the government, must force a dialogue regarding sea level rise denial.[56] Although it is true that ethical breaches are rarely disciplined by the bar,[57] Rizzardi argues that "society is increasingly poised to hold lawyers accountable for failing to disclose their clients' lies and wrongdoings" as they relate to sea-level rise.[58] Professor Tom Lininger calls for "greening" legal ethics by adopting specific amendments to the Rules incorporating environmental considerations.[59]

Other scholars have critiqued existing norms for facilitating or failing to meaningfully discourage attorney conduct that may result in climate change harms, namely in the form of additional fossil fuel infrastructure (e.g., pipelines). Professor Katrina F. Kuh has raised the concept of "malignant normality"[60] to illustrate the ways "legal professional norms may frustrate an efficacious response by the profession to climate change."[61] Indeed, current ethics rules offer little

[56] *See* Keith W. Rizzardi, *Sea Level Lies: The Duty to Confront the Denies*, 44 STETSON L. REV. 75, 75 (2014) (exploring how other professional responsibility norms such as duty of candor apply to climate induced sea level rise).

[57] *See* Barry Sullivan, *In the Interest of Justice: Reforming the Legal Profession*, *5* LEGAL ETHICS 179, 184 (2002); *see also* Jonathan Macey, *Occupation Code 541110: Lawyers, Self Regulation*, *and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1081 (2005) (arguing that the costs of being sanctioned by bar associations and other professional bodies has eroded). Macey observes that there are strong incentives to avoid sanctions, where "individual members of the bar have little incentive to lobby the bar to impose strict sanctions on other lawyers." *Id*. at 1085. Courts are also not much better. *See id.* at 1086.

[58] Rizzardi, *supra* note 56, at 139. For a critical view of Macey's and similar arguments, *see* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1147 (2009) (arguing law is a heavily regulated industry).

[59] Lininger, *supra* note 25.

[60] Katrina Fischer Kuh, *Malignant Normality*, ENV'T L. PROF. BLOG (Nov. 11, 2018), https://lawprofessors.typepad.com/environmental_law/2018/11/malignant-normality.html.

[61] *Id.*; *see also* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 44–47 (2007) (describing how zealous advocacy as traditionally understood may often conflict with "ordinary morality"); *see also* Norman S. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1380 (2008) (observing that according to Luban, the adversary system "permits, and even sometimes invites obfuscation . . . encourages lawyers to press for advantages that exceed the entitlements of their clients and infringe upon the rights of their adversaries … [ultimately] allow[ing] lawyers to manipulate the scales."); *see also* Etienne C. Toussaint, *The Miseducation of Public Citizens*, 3 GEO. J. ON POVERTY L. & POL'Y 287, 303 (2022) ("[b]y calling upon lawyers to separate their personal moral views from their professional ethical obligations to their clients, yet simultaneously imbuing them with a special responsibility for the quality of

guidance to attorneys on how to respond to the climate crisis. For example, there is limited advice for lawyers assisting corporate clients, including climate wreckers, on how to avoid misleading the public through greenwashing and corporate disinformation campaigns.[62] In light of this lacuna, Professor Kuh and Professor Lissa Griffin have explored the ethical role of attorneys representing corporate clients who seek to mislead the public to block or forestall the development of regulations contrary to their interests. Given the role that lawyers play in drafting and reviewing public communications such as press releases,[63] Kuh and Griffin argue attorneys involved in public disinformation campaigns should exercise caution to avoid violating ethical rules, observing that

justice as public citizens, the ABA Model Rules of Professional Conduct tend to numb moral accountability and constrict social justice advocacy") (internal citations and quotation marks omitted) (citing James E. Fleming, *The Lawyer as Citizen*, 70 FORDHAM L. REV. 1699 (2002)).

[62] While there is limited guidance, some guidance *does* exist. For instance, as discussed earlier, Rule 1.2(d) prohibits attorneys from assisting or advising a client in committing a crime or fraud. *See* MODEL RULES OF PRO. CONDUCT r. 3.12 (AM. BAR ASS'N 2023). This, at least in theory, limits the role that a lawyer can have in supporting fraudulent or criminal acts. However, while greenwashing efforts may remain immoral and reprehensible, they are not always *illegal* unless they violate consumer protection laws or implicate the client in fraudulent activity. Rule 1.16(a)(4) requires withdrawal where the client aims to use the lawyer to engage in criminal activity or fraud, see MODEL RULES OF PRO. CONDUCT r. 1.16(a)(4) (AM. BAR ASS'N 2023).

Other rules that provide limited guidance include Rule 3.1, which disallows attorneys from raising frivolous claims or defenses in litigation. *See* MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

Rule 4.1 requires lawyers to be truthful with third parties in the course of representing a client. *See* MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2023) ("[A] lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.").

[63] Lawyers have increasingly developed "sophisticated, integrated PR strategies" to deploy alongside litigation. Among these PR-related activities, lawyers play a role in drafting and reviewing public communications such as press releases related to legal obligations (e.g., disclosure to regulators, investors, and shareholders) and providing general oversight of media engagement on a particular case or issue. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1279, 1280, 1288 (2009).

> the deep public harms from disinformation efforts as well as the unpalatability of the notion that attorneys may ethically deploy their stature and skills to advance corporate deception when not otherwise specifically prohibited by law suggests, at a minimum, that the profession should seriously evaluate the scope of its obligations in this regard.[64]

In this context, law students have responded with their own demands for greater accountability from the legal profession.

B. *Students*

A number of law students have chosen to join the legal profession to combat climate change and leverage the law to effect positive change in the environmental sphere.[65] United Nations Secretary General António Guterres's advice to not work for climate wreckers comes at a time when surveys indicate younger generations are greatly concerned by climate change. In a global survey on climate anxiety published in The Lancet, more than half of respondents across all countries surveyed indicated they were anxious about climate change.[66] A similar survey showed young people generally

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[64] Lissa Griffin & Katrina F. Kuh, *Chapter 5: Professional Responsibility and the Corporate Hoodwink: Using the Climate Disinformation Campaign to Examine the Ethical Responsibilities of Attorneys When Corporate Clients Mislead the Public to Avoid Government Regulation, in* ENVIRONMENTAL LAW, DISRUPTED 107 (Keith Hirokawa & Jessica Owley eds., 2021).

[65] *See generally*, Renée Cho, *Climate Education in the U.S.: Where It Stands, and Why It Matters*, COLUMBIA CLIMATE SCH. (Feb. 9, 2023), https://news.climate.columbia.edu/2023/02/09/climate-education-in-the-u-s-where-it-stands-and-why-it-matters/; *see also* Note, *Alienation in Law School*, 137 HARV. L. REV. 958, 963 (2024) ("Making the world a more just place is an important commitment of some incoming law students. One may hope to advance a particular cause; to zealously represent the interests of individuals; or simply to practice law well, out of a conviction that doing law is doing justice.").

[66] *See* Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey*, 5 THE LANCET 863 (2021), https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(21)00278-3/fulltext (finding that 59 percent of respondents were "extremely worried" and 84 percent were at least "moderately worried."). Significantly, more than 45 percent of all respondents indicated that their feelings about climate change "negatively affected their daily life and functioning." *Id.* Another survey conducted by the Pew Research Center across 17 advanced economies spanning North America, Europe and the Asia-Pacific region found that about 80 percent of those surveyed indicated being willing to change how they live and work in response to climate change. *See* James Bell et al., *In Response to Climate Change, Citizens in Advanced Economies Are Willing to Alter How They Live and Work*, PEW RSCH. CTR. (Sept. 14, 2021), https://www.pewresearch.org/

prefer to work for employers who manage "an environmentally sustainable business."[67]

Parallel to these findings, students across the world are calling for greater public scrutiny of fossil fuel companies and their so-called enablers. Undergraduate students in the United Kingdom have successfully barred fossil fuel recruiters from certain campuses and organized boycotts of recruitment events that showcase mining and fossil fuel companies.[68] Between 2019 and 2020, dozens of students across U.S. law schools including Yale, Harvard, and NYU protested the law firm Paul Weiss over the firm's representation of fossil fuel company Exxon Mobil.[69] The protesters, organizing under the hashtag #DropExxon, disrupted recruitment events geared towards luring prospective associates from highly-ranked law schools.[70]

The momentum behind these cross-campus protests eventually led to the creation of Law Students for Climate Accountability (LSCA), an organization led by law students seeking to push the

global/2021/09/14/in-response-to-climate-change-citizens-in-advanced-economies-are-willing-to-alter-how-they-live-and-work/. Seventy-six percent of Europeans between the ages of 20-29 reported that the climate impact of a prospective employer is an important factor when applying for a job, with 22 percent indicating climate impact was a top priority. *76% of young Europeans say the climate impact of prospective employers is an important factor when job hunting*, EUR. INV. BANK (Mar. 21, 2023), https://www.eib.org/en/press/all/2023-112-76-of-young-europeans-say-the-climate-impact-of-prospective-employers-is-an-important-factor-when-job-hunting.

[67] Laetitia Exertier, *Youth Wants Green Jobs, but the World isn't Ready to Supply Them Yet*, IMPAKTER (Feb. 13, 2023), https://impakter.com/youth-wants-green-jobs-but-the-world-isnt-ready-to-supply-them-yet/.

[68] *See* Damian Carrington, *Fossil Fuel Recruiters Banned from Three More UK Universities*, THE GUARDIAN (Dec. 1, 2022), https://www.theguardian.com/environment/2022/dec/01/fossil-fuel-recruiters-banned-from-three-more-uk-universities.

[69] *See* Emily Holden, *Harvard Law Students Ramp Up Protest Against ExxonMobil Climate Firm*, THE GUARDIAN (Jan. 15, 2020), https://www.theguardian.com/business/2020/jan/15/harvard-law-students-protest-firm-representing-exxon-climate-lawsuit; *Law Students Protest Outside Paul Weiss's New York Office Over Firm's Exxon Representation*, LAW.COM (Oct. 9, 2020), https://www.law.com/americanlawyer/2020/10/09/law-students-protest-outside-paul-weisss-new-york-office-over-firms-exxon-representation/?slreturn=20240025182526.

[70] *See* Holden, *supra* note 69.

legal industry to reckon with its role in the climate crisis.[71] LSCA produces an annual Climate Change Scorecard, which designates a letter grade to the "Vault 100" law firms.[72] Each firm's score is calculated by examining the activities the law firm conducts to support fossil fuels versus renewable energy through transactional, lobbying, and litigation work.[73] The organization has grown into an international network of law students across the United Kingdom,[74] Canada,[75] and Australia.[76]

Although some may argue that fossil fuel companies are beyond shaming or external pressure, the existence of efforts to deny climate science and greenwash their operations should serve as evidence that the industry is sensitive to its public image.[77] By interrogating the notion that lawyers cannot be held accountable when they represent climate wreckers, while providing information about fossil fuel work by leading law firms, students are empowering their

[71] *See* Law Students for Climate Accountability, *supra* note 48. This work builds upon the legacy of other campaigns targeting public-relations firms and financial institutions for their role in enabling fossil fuel extraction and combustion. *See e.g.*, *The Future of Creativity is Clean*, CLEAN CREATIVES, https://cleancreatives.org/ (describing "a movement of advertisers, PR professionals, and their clients cutting ties with fossil fuels."); Rainforest Action Network et. al, *Banking on Climate Chaos – Fossil Fuel Finance Report* 2023, https://www.ran.org/wp-content/uploads/2023/04/BOCC_2023_vF.pdf (finding that the world's 60 largest banks continue to fund fossil fuel infrastructure, reaching USD $5.5 trillion in the seven years since the adoption of the Paris Agreement); *see also* WENDEL, *supra* note 27,137–139 (describing Law Students for Climate Accountability as perhaps "[q]uixotic" but an example of "cancel culture in a good sense.").

[72] *See Vault 100*, https://vault.com/best-companies-to-work-for/law/top-100-law-firms-rankings; *see also* Law Students for Climate Accountability, *supra* note 12.

[73] This type of activism uses "naming and shaming" to create reputational risks for firms and thus, "incentives for corporations to become more socially responsible" independent from regulation. YADIN, *supra* note 10, at 17.

[74] Law Students for Climate Accountability, *The Carbon Circle: The UK Legal Industry's Ties to Fossil Fuel Companies*, LSCA (May 10, 2023), https://www.ls4ca.org/blog-show-all/the-carbon-circle.

[75] Law Students for Climate Accountability, *The Canadian Law Firm Climate Impact Report*, LSCA (Nov. 6, 2023), https://www.ls4ca.org/blog-show-all/canadianimpactreport.

[76] *See, e.g.* E-mail from Australian LSCA member, to Camila Bustos, Assistant Professor of L., Elisabeth Haub Sch. of L. (June 28, 2023 8:40am) (on file with author).

[77] *See* YADIN, *supra* note 10, at 46.

peers to work for employers more aligned with a stable climate future.[78]

In addition to student efforts, several bar associations around the world have offered guidance on how to align the legal profession with climate-friendly goals.[79]

C. *Bar Associations*

The American Bar Association (ABA) issued a landmark resolution in 2019 urging greater action to reduce greenhouse gas emissions "to net zero or below."[80] The resolution called on all levels of government as well as the private sector to address climate change and encouraged lawyers "to advise their clients of the risks and opportunities that climate change provides," urging them "to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change."[81] At COP27,[82] the ABA discussed the role of bar associations and lawyers in combatting climate change together with other professional associations.[83] More recently, at COP28, the ABA recognized that lawyers share a common responsibility to take action.[84]

In 2023, The Law Society of England and Wales, a professional association representing solicitors, published groundbreaking

[78] Law Students for Climate Accountability, *supra* note 12. LSCA has also shed light on the environmental justice consequences of fossil fuel-enabling work, which disproportionately burdens marginalized communities and communities of color. LSCA believes "climate accountability must extend . . . to the concrete harms suffered by frontline communities who are forced to live out the legacies of corporate complicity." Law Students for Climate Accountability, *Legal Legacies: How Firms Fuel Generations of Harm*, LSCA (Jun. 16, 2023), https://www.ls4ca.org/blog-show-all/legal-legacies-how-firms-fuel-generations-of-harm.

[79] *E.g.*, JOHN C. DERNBACH, MATTHEW BOGOSHIAN & IRMA S. RUSSELL, SUSTAINABILITY ESSENTIALS: A LEADERSHIP GUIDE FOR LAWYERS (2022).

[80] A.B.A. HOUSE OF DELEGATES, RESOL. 111 (Aug. 12–13, 2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf.

[81] John C. Dernbach, Tracy D. Hester & Amy L. Edwards, *ABA Encourages Climate-Conscious Lawyering at COP27*, A.B.A. (Mar. 3, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/march-april-2023/aba-encourages-climate-conscious.

[82] COP27 refers to the 27th annual meeting of the Conference of the Parties to the U.N. Framework Convention on Climate Change.

[83] *See* Dernbach et al, *supra* note 35.

[84] *See* Achinthi C. Vithanage & Nadia Ahmad, *ABA at COP28: Calling on the Legal Community for a Common Cause*, A.B.A. (Mar. 1, 2024).

guidance on climate change.[85] The first part of the guidance offers insights for firms on how to manage their business in a way that is consistent with a transition to net zero.[86] The second part of the guidance deals with how climate change raises physical and legal risks, which may be relevant when advising clients, as well as other issues relating to the solicitor-client relationship in the context of climate change.[87]

Notably, the guidance recognizes that firms might consider whether "to advise on matters that are incompatible with the 1.5°C goal."[88] The guidance observes that solicitors have "wide discretion in choosing whether to accept instructions" because they are "not obliged to provide advice to every prospective client that seeks it."[89] The guidance also includes language on greenwashing, observing that marketing materials "should not mischaracterize or overstate" the firm's "targets, or progress."[90] In sum, the guidance encourages firms that describe their services as "sustainable" or aligned with particular climate goals like net zero or the Paris Agreement's 1.5°C target to consider "whether those claims can stand up to external, objective scrutiny."[91]

The International Bar Association (IBA) is a global organization of legal professionals, with memberships spanning more than 170 countries.[92] In 2020, the IBA published a Climate Crisis

[85] *See The Impact of Climate Change on Solicitors*, THE L. SOC'Y (Apr. 19, 2023), https://www.lawsociety.org.uk/topics/climate-change/impact-of-climate-change-on-solicitors. The Solicitors Regulatory Authority (SRA), the entity responsible for regulating solicitors, has expressed support for the guidance.

[86] See *id.*

[87] *See id.*

[88] *Id.*

[89] *Id.*

[90] Although many would like to see the ABA lead an effort similar to the Law Society's guidance, there is skepticism that such a broad and politically diverse organization may be able to issue a similar document. *See The Roles of Lawyers and Bar Associations in Combating Climate Change*, CLIMATE WEEK (Sept. 18, 2023), https://www.climateweeknyc.org/events/roles-lawyers-and-bar-associations-combating-climate-change.

[91] *The Impact of Climate Change on Solicitors*, *supra* note 85, at 1.5. Greenwashing.

[92] *See About the IBA*, INT'L BAR ASS'N, https://www.ibanet.org/About-the-IBA (last visited Jan. 3, 2025). The IBA aims to promote and uphold the rule of law, advance international legal standards, and facilitate professional development and networking opportunities for its members. *See The Global Voice Of The Legal Profession*, INT'L BAR ASS'N (2021), https://www.derebus.org.za/wp-

Statement, declaring that "the legal profession must be prepared to play a leading role in maintaining and strengthening the rule of law . . . in an era marked by a climate crisis." The statement urges lawyers to, among other things, implement climate-conscious lawyering in day-to-day legal practice and engage with policymaking efforts to address the climate crisis.

In an informational paper prepared by the IBA Bar Issues Commission's International Trade in Legal Services Committee for member bars of the IBA, the Committee summarized some of the recent advocacy efforts to hold law firms accountable for enabling fossil fuel clients to continue operating without any consequences. The document observed that increasingly, attention is turning to the "the degree to which lawyers should be held accountable for the societal impact of their clients' actions, and whether lawyers should be viewed as professional enablers of undesirable ends."[93] The document warns lawyers and bar associations that

> although measurement of indirect contributions [to climate change] is not yet a reality, bars need to be aware of such developments so that they can contribute to the debate in preparation for the future. The alternative is that, when the moment arrives, bars will have to accept frameworks for their members for measuring indirect climate impact.[94]

In addition to professional associations, several law firms have launched their own climate-friendly initiatives.

content/uploads/2022/08/IBA-Brochure-2021-1.pdf; *Climate Crisis Statement*, INT'L BAR ASS'N (May 5, 2020), https://www.ibanet.org/document?id=822C1967-F851-4819-8200-2FE298164922.

[93] Bar Issues Commission International Trade in Legal Services Committee, *Legal Services and Climate Change*, INT'L BAR ASS'N para. 8 (Dec. 2021), https://www.ibanet.org/document?id=BIC%20ITILS%20paper%20on%20 Legal%20services%20and%20climate%20change; Jonathan Goldsmith, *The New Slur: We Are Professional Enablers*, THE L. SOC'Y GAZETTE (Mar. 2, 2021), .https://www.lawgazette.co.uk/commentary-and-opinion/the-new-slur-we-are-professional-enablers/5107611.article.

[94] Bar Issues Commission International Trade in Legal Services Committee*, supra* note 93, para. 14; Hester, *supra* note 33; David Hunter, *Advised Emissions—Assessing the Impact*, THE L. SOC'Y GAZETTE (Apr. 28, 2023), https://www.lawgazette.co.uk/practice-points/advised-emissions-assessing-the-impact/5115871. article.

D. *Industry Initiatives*

The Legal Charter 1.5 is a joint initiative between several firms "to reduc[e] greenhouse gas emissions at the speed and scale necessary to restrict global temperature increases to no more than 1.5°C by 2030."[95] The initiative stands out from other efforts because it is led by a coalition of corporate law firms.[96] While it is still at a nascent stage, the Charter consists of common principles that include supporting the development of a framework for measuring advised emissions (Principle 2) as well as a commitment to annual reporting on progress (Principle 5).[97] "Advised" or "serviced emissions" refers to indirect emissions stemming from representation or provision of legal services as opposed to direct emissions from a firm's operations.

However, the language of the Charter does not contemplate any specific timeline, pledge, or commitments. This raises questions regarding the firms' real interest in, first, disclosing the impact of their advised emissions, and second, in taking steps to decarbonize their portfolio by reducing representation of fossil fuel clients, steering clients away from carbon-intensive activities, or developing a clear climate standard to guide their future business. Lacking clear, concrete commitments, the legal profession will not disrupt the status quo and instead will continue to pave the way for climate wreckers to conduct business as usual. It is with this context in mind that I propose examining the role of attorneys who seek to justify their representation of "climate wreckers."

II. THE CLIMATE WRECKER

I use the term "climate wrecker" to refer to fossil fuel corporations or trade associations that have engaged in public disinformation campaigns to stall climate action and sow doubt regarding climate science. In confining my analysis to these companies, I do not intend to deny that many more corporate actors contribute significantly to climate change and environmental harm through

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[95] *Inspiring Ambitious Transformative Action to Combat the Climate Crisis*, LEGAL CHARTER 1.5, https://legalcharter1point5.com/ (last visited Jan. 3, 2025).

[96] *See id.*

[97] *See* LEGAL CHARTER 1.5, https://legalcharter1point5.com/wp-content/uploads/2024/01/The-Legal-Charter-1.5-.pdf (last visited Jan. 3, 2025).

carbon-intensive industries,[98] rampant deforestation and land use change[99] and dispossession of traditional communities from their territory.[100] There are also, of course, other major purveyors of massive climate disinformation campaigns outside of fossil fuel companies, such as public relations firms[101] and right-wing think tanks.[102] And, of course, many financial institutions, including Bank of America, JP Morgan Chase, and the World Bank, have enabled climate wrecking by bankrolling continued fossil fuel extraction and infrastructure despite scientific consensus indicating the path to net-zero emissions by 2050 requires no new oil and gas fields.[103]

However, there is a robust body of literature documenting the ways in which several fossil fuel corporations and trade associations have engaged in long-term campaigns of deception. I argue that (1) the scale of climate disruption caused by these companies, (2) the efforts of these companies to protect their financial interests above people and the environment, and (3) the ability to trace emissions to

[98] *See, e.g.*, Daina Bray & Thomas M. Poston, *The Methane Majors: Climate Change and Animal Agriculture in U.S. Courts*, 49 COLUM. J. ENV'T L. 145 (2024) (proposing the term "methane majors" to refer to noteworthy actors in the animal agriculture sector which emit methane); Viveca Morris & Jennifer Jacquet, *The Animal Agriculture Industry, US Universities, and the Obstruction of Climate Understanding and Policy*, 177 CLIMATIC CHANGE 1, 8–41 (2024).

[99] *See* GABRIELLE KISSINGER, MARTIN HEROLD & VERONIQUE DE SY, DRIVERS OF DEFORESTATION AND FOREST DEGRADATION—A SYNTHESIS REPORT FOR REDD+ POLICYMAKERS 5 (Aug. 2012), https://www.forestindustries.eu/sites/default/files/userfiles/1file/6316-drivers-deforestation-report.pdf (discussing the role of commercial agriculture as well as timber extraction and logging activities on deforestation).

[100] *See, e. g.*, *IACHR Files Honduras Case with IA Court over Violations of the Rights of Members of the Aguán Campesino Movement*, INTER-AMERICAN COMM'N. ON HUM. RTS. (Oct. 26, 2023), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/251.asp.

[101] *See e.g.*, *The Future of Creativity is Clean*, *supra* note 71.

[102] *See* Riley E. Dunlap & Peter J. Jacques, *Climate Change Denial Books and Conservative Think Tanks*, 57 AM. BEHAV. SCI. 699 (2013) (noting that "the conservative movement and especially its think tanks play a critical role in denying the reality and significance of anthropogenic global warming").

[103] *See* Rainforest Action Network, *supra* note 71; INT'L ENERGY AGENCY, NET ZERO BY 2020—A ROADMAP FOR THE GLOBAL ENERGY SECTOR (Oct. 2021), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf; Fergus Green et al., *No New Fossil Fuel Projects: The Norm We Need*, 384 SCIENCE 954 (2024) (arguing in favor of "[a] social-moral norm against new fossil fuel projects has strong potential to contribute to achieving global climate goals.").

their operations warrant special treatment of these "climate wreckers." In short, these companies *knew* and lied about their products, which sets them apart from other corporate actors based on the level of malfeasance. My analysis, however, may be applicable to other actors who have behaved similarly, and I do not intend to suggest that an analogous argument cannot be extended beyond this analysis.

A. *Scale of Climate Disruption*

Fossil fuel companies are not unique in promoting activities that result in environmental and social harm. Numerous corporations have been critiqued for their role in perpetuating human rights violations that have nothing to do with climate change as legal frameworks have sought how to best align corporate behavior with human rights.[104] However, the scale at which anthropogenic climate change is disrupting life on the planet is unparalleled. The Anthropocene refers to an era where humans have become a "significant geological force," so much so that geologists have named an entire era after humans.[105] Human activity has changed the atmospheric composition of the planet, ultimately resulting in massive extinctions, an increase in global temperatures, and atmospheric changes at an unprecedented rate.[106] While there are examples of companies harming society writ large through their products, such as tobacco and opioid companies, the ultimate effect of consumers purchasing and using these products has not altered the geology of our planet as fossil fuel combustion has.

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[104] *See e.g.*, UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[105] Viven Holmes, *Legal Ethics in the Anthropocene*, 26 LEGAL ETHICS 201, 202 (2023) (citing Paul Crutzen, *The Anthropocene, in* ECHART EHLERS & THOMAS KRAFFT, EARTH SYSTEM SCIENCE IN THE ANTHROPOCENE 13, 15 (2006)). Note that a committee of geologists rejected the term "Anthropocene" from becoming an official epoch in geological timeline to describe the period we are currently in. Alexandra Witze, *Geologists Reject the Anthropocene as Earth's New Epoch—After 15 Years of Debate*, NATURE (Mar. 6, 2024), https://www.nature.com/articles/d41586-024-00675-8.

[106] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), SIXTH ASSESSMENT REPORT SYNTHESIS REPORT 18, 28 (Mar. 20, 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf (noting the scale of changes across the climate system are unprecedented).

B. *Documented Deception*

As early as the 1950s, scientists understood the role of greenhouse gas emissions in trapping heat in the atmosphere, resulting in planetary warming at an unprecedented scale.[107] Groundbreaking research by Naomi Oreskes and Erik M. Conway shed light on the fossil fuel industry's efforts to promote a network of think tanks and climate skeptics to publicly question anthropogenic climate change.[108] Internal fossil fuel industry memos reveal how companies such as Chevron, ConocoPhillips, Exxon Mobil and Peabody Energy intentionally deceived the public about the threat posed by climate change through trade associations and front groups.[109] These documents reveal that for almost three decades, companies distorted scientific findings and blocked efforts to adopt legislation to transition away from fossil fuels.[110] The systemic and coordinated nature

[107] *See* Crutzen, *supra* note 105.

[108] *See generally* NAOMI ORESKES, MERCHANTS OF DOUBT (2015); *see also* Benjamin Franta, *Early Oil Industry Disinformation on Global Warming*, 30 ENV'T POL. 663, 663 (2021) (finding that early oil industry disinformation "suggests commercial fossil fuel interests played a more obstructive role in climate change discourse and policy throughout the 1980s than previously understood."); A. J. Ley, *Mobilizing Doubt: The Legal Mobilization of Climate Denialist Groups*, 40 LAW & POL'Y 221, 221(2018); *cf.* Eric Merkley & Dominic Stecula, *Unbalance—How Liberal Elites Have Cued Climate Polarization*, BREAKTHROUGH INST. (Mar 1, 2021), https://thebreakthrough.org/journal/no-13-winter-2021/unbalanced (arguing that there is relatively little evidence that this misinformation campaign directly reached or influenced the public in a meaningful way). A rebuttal to Merkley & Stecula argues that while "[o]il companies and libertarian think tanks may not have single-handedly generated climate denial, … they certainly did a damned good job of priming the narrative vacuum with their arguments." George Marshall, *Learning to Speak Across the Climate Divide*, BREAKTHROUGH INST. (Aug. 11, 2021), https://thebreakthrough.org/articles/learning-to-speak-across-the-climate-divide.

[109] *See* MULVEY & SHULMAN, *supra* note 9, at 1. *The Climate Deception Dossier* contains seven "deception dossiers" containing approximately "85 internal company and trade association documents that have either been leaked to the public, come to light through lawsuits, or been disclosed through Freedom of Information Act (FOIA) requests." *See generally id.*

[110] *See id.*; Peter Frumhoff, Richard Heede & Naomi Oreskes, *The Climate Responsibilities of Industrial Carbon Producers*, 132 CLIMATIC CHANGE 157, 162 (2015) (noting that several companies, "including ExxonMobil, Shell, and British Petroleum, created the Global Climate Coalition (GCC) to oppose greenhouse gas emission reduction policies. From 1989 to 2002, the GCC led an aggressive lobbying and advertising campaign aimed at achieving these goals by sowing doubt about the integrity of the IPCC and the scientific evidence that heat-trapping emissions from burning fossil fuels drive global warming."). *See generally* Marco

of these campaigns resembles tactics previously employed by the tobacco industry, which spread disinformation on the dangers of cigarette smoking in order to protect its profits.[111] Fossil fuel companies' knowledge that their products contribute to greenhouse gas emissions and climate change distinguishes them from other corporate actors who may cause social and environmental harm but whose business model is not diametrically opposed to a stable planet.[112] The industry could have planned to transition away from carbon intensive models but instead chose to use deception in order to continue exploring, producing, and marketing fossil fuel products.[113]

These findings have resulted in dozens of lawsuits brought on behalf of U.S. counties and municipalities, arguing these companies violated consumer protection laws by orchestrating widespread disinformation campaigns marketing fossil fuels as safe despite knowing the use of their products would result in climate change.[114] Most of these cases have been filed in state court, alleging harms under legal theories such as common law torts, product liability, consumer protection, and racketeering.[115] Over and over again, the industry has sought to remove state tort claims to federal court, arguing state courts are preempted by federal law from awarding damages.[116]

Grasso & Katia Vladimirova, *A Moral Analysis of Carbon Majors' Role in Climate Change*, 29 ENV'T VALUES 175, 175 (2020).

[111] *See* Frumhoff et al., *supra* note 110*,* at 160; *see also* Geoffrey Supran & Naomi Oreskes, *Rhetoric and Frame Analysis of ExxonMobil's Climate Change Communications*, 4 ONE EARTH 696 (2021).

[112] *See* MULVEY & SHULMAN, *supra* note 9, at 5 ("There is ample evidence demonstrating what companies did know. Exxon, for example, had a staff scientist serve as an expert reviewer for the first IPCC scientific assessment on climate change, published in 1990. The industry's own scientists were internally warning of climate dangers by the mid-1990s, as evidenced by a leaked draft document by a team headed by a scientist at Mobil that was distributed to other major fossil fuel companies in 1995") (internal citations omitted).

[113] Frumhoff et al., *supra* note 110, at 159.

[114] For an overview, see *Climate Damages (Cost Recovery) & Climate Fraud (Consumer Protection)*, CTR. FOR CLIMATE INTEGRITY, https://climateintegrity.org/cases (last visited Jan. 3, 2025). The plaintiffs include states such as California, New Jersey, Delaware, Vermont, and Minnesota.

[115] *See id.*

[116] *See* Korey Silverman-Roati, *Cities, Counties, and States Score Major Procedural Win in Climate Liability Suits Against Fossil Fuel Companies*, CLIMATE LAW (May 12, 2023), https://blogs.law.columbia.edu/climatechange/2023/05/12/cities-counties-and-states-score-major-procedural-win-in-climate-liability-suits-against-fossil-fuel-companies/ (explaining that fossil fuel defendants have "vigorously fought to keep the cases in federal court because they viewed them as

More recently, members of Congress have urged the Department of Justice to investigate whether these companies' deception campaigns violated federal law.[117]

The companies' resistance to climate accountability through litigation efforts and congressional investigations has been accompanied by a mixed record regarding their plans to decarbonize and transition in line with the Paris Agreement.[118] The International Energy Agency, an independent intergovernmental organization providing policy recommendations on energy policy, has observed that oil companies' investments in clean energy are "marginal."[119]

easier to dismiss in federal court. This is because they argue that the claims are actually federal common law claims and federal common law climate claims are displaced by the Clean Air Act."); *see also* Kysar, *supra* note 11 at 502; *see also* Chelsea Harvey, *These Fossil-fuel Groups Joined a Historic Climate Lawsuit. Now, They Want to Get Out of It*, WASH. POST (May 23, 2017) (explaining efforts by fossil fuel defendants to intervene in litigation to only later change their position). In January 2025, the Supreme Court allowed these cases to proceed in state court. City and County of Honolulu v. Sunoco LP, 537 P.3d 1173 (Haw. 2023), *cert. denied*, 604 U.S. __(2025).

[117] *See* Press Release, Rep. Lieu and Sen. Blumenthal Lead Bicameral Letter Urging DOJ to Investigate Big Oil's Climate Lies (July 25, 2023), https://lieu.house.gov/media-center/press-releases/rep-lieu-and-sen-blumenthal-lead-bicameral-letter-urging-doj.

[118] A congressional report found that six entities (Exxon Mobil, Chevron, Shell, BP, API, and the Chamber of Commerce) obstructed investigations and "significantly redact[ed] or entirely with[eld] more than 4000 documents." *Denial, Disinformation, and Doublespeak: Big Oil's Evolving Effort to Avoid Accountability for Climate Change*, HOUSE COMM. ON ACCOUNTABILITY AND OVERSIGHT, DEMOCRATS & SENATE COMM. ON THE BUDGET (Apr. 2024), https://www.budget.senate.gov/imo/media/doc/fossil_fuel_report1.pdf. The report also concluded that these companies made public pledges to achieve net zero emissions following the Paris Agreement "while internally recognizing that they could not achieve those goals or referring to them as outside of their business plan." *Id*.

[119] INT'L ENERGY AGENCY, THE OIL AND GAS INDUSTRY IN NET ZERO TRANSITIONS 13, 224 (Dec. 2023), https://iea.blob.core.windows.net/assets/41800202-d427-44fa-8544-12e3d6e023b4/TheOilandGasIndustryinNetZeroTransitions.pdf ("[T]hese producers face pivotal choices about their role in the global energy system."). Many of these companies have launched campaigns promoting "minimal investments in clean or renewable energy." *Denial, Disinformation, and Doublespeak*, *supra* note 118. *See also* Kysar, *supra* note 11, at 489 (describing how the industry refused to plan for alternatives to fossil fuel energy and instead "doubled down on fossil fuel production, seeking to maximize asset recovery by obfuscating public understanding of climate science"; Jeff Brady, *Exxon Lobbyist Caught on Video Talking About Undermining Biden's Climate Push*, NPR (July 1, 2021), https://www.npr.org/2021/07/01/1012138741/exxon-lobbyist-caught-on-video-talks-about-undermining-bidens-climate-push.

Some of these companies have also sought to blame individuals for the climate emergency by arguing that we all use and burn fossil fuels and thus, that the attention critics devote to the role of fossil fuel companies is misplaced.[120] By blaming individual consumers, these companies attempt to shift attention away from producers who distributed and marketed their products despite knowing their impact on health and the environment.[121] The comparison between energy companies and individuals seems inadequate when an average coal-fired power plant releases enough emissions in one year to result in approximately 190 deaths, while an individual would have to operate their car for 22,000 years to cause one death, according to the same calculation.[122]

The deception enacted by the fossil fuel industry is often compared to campaigns by Big Tobacco spreading disinformation on the dangers of smoking cigarettes.[123] In the case of tobacco, society increasingly rejected the idea that companies were immune from scrutiny and concluded that "manufacturing a product that killed people, even if legally, was morally problematic."[124] A similar trend has occurred with asbestos[125] and opioids,[126] where producers publicly undermined the connection between their products and severe health

[120] *See Denial, Disinformation, and Doublespeak*, *supra* note 118, at 16 (observing companies have either de-emphasized or ignored responsibility for their role in reducing emissions while "transferring blame and responsibility to consumers"); *see also* Christopher M. Matthews & Collin Eaton, *Inside Exxon's Strategy to Downplay Climate Change*, WALL ST. J. (Sept. 12, 2023), https://www.wsj.com/business/energy-oil/exxon-climate-change-documents-e2e9e6af.

[121] *See* Frumhoff et al., *supra* note 110, at 160 (observing that the tobacco industry argued that individual smokers were responsible for smoking and any resulting illness); *see also* Supran & Oreskes, *supra* note 111, at 706–708 (finding that Exxon Mobil's rhetoric emphasized consumer demand and individualized responsibility).

[122] *See* Flatt, *supra* note 32, at 602.

[123] *See* Supran & Oreskes, s*upra* note 111, at 709.

[124] Frumhoff et al., *supra* note 110 at 160.

[125] *See* M. BOWKER, FATAL DECEPTION: THE TERRIFYING TRUE STORY OF HOW ASBESTOS IS KILLING AMERICA (2003); D. MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH (2008).

[126] *See e.g.*, *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies*, DEPT. OF JUST. (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies.

impacts. In those cases, however, client misconduct did not result in global climate disruption.

C. *Traceability*

In addition to massive misinformation campaigns, the emissions stemming from climate wreckers' products—and therefore their climate impacts— are fairly traceable to individual companies. In a groundbreaking study, Richard Heede et al. coined the term "carbon majors" to refer to 90 companies that produced and marketed fossil fuel and cement products responsible for two-thirds of atmospheric carbon dioxide and methane emissions between 1751 and 2010.[127] Nearly one third of these emissions can be traced to 20 private and national companies.[128] Climate litigation efforts have relied on this data to sue some of the corporations in domestic and international tribunals for their historic contribution to greenhouse gas emissions.[129] Whereas assessing the extent of other actors' deception and climate impact is much more complicated, fossil fuel companies' historic contribution to emissions is relatively easy to quantify. In addition, these companies' entire business model depends on fossil fuels being extracted, unlike other actors whose *raison d'être* lies beyond fossil fuel production.

The responsibility of investor-owned fossil fuel producers is distinctive given the significant role that these 90 companies have played. Significantly, "more than half of all industrial emissions of carbon dioxide have occurred since 1988: after the establishment of the IPCC, after leading scientists had stated publicly that anthropogenic climate change was underway, and after a vigorous and visible public discussion of its causes and risks had begun."[130] The companies largely behind the climate crisis have already been identified. Furthermore, developments in attribution science have made it

[127] Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers*, *1854–2010*, 122 CLIMATIC CHANGE 229, 234 (2014).

[128] *See id.*

[129] *See* Benjamin & Seck, *supra* note 40; *See generally* JOANNA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2023 SNAPSHOT (2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf; Sabrina McCormick et al., *Strategies in and Outcomes of Climate Change Litigation in the United States*, 8 NATURE CLIMATE CHANGE 829 (2018).

[130] Frumhoff et al., *supra* note 110, at 159.

easier to attribute an extreme weather event, such as a heatwave, to anthropogenic climate change.[131] Source attribution studies have thus allowed researchers to "allocate shares of responsibility for specific climate impacts."[132]

In defining who constitutes a climate wrecker, I must entertain the possibility that some companies may in good faith reimagine their business model to align with a climate stable future by phasing out fossil fuel production and using their know-how to produce renewable energy or other technologies that can accelerate a transition away from fossil fuels. For example, Danish energy company Ørsted reinvented its model, which relied primarily on coal combustion for revenue, and is now a leading offshore-wind power producer.[133] These rare and exceptional trajectories complicate my definition and would likely merit a different treatment than more traditional climate wreckers whose rhetoric on renewable energy serves more to greenwash their image and evade accountability than as a substantive commitment. However, the examples are few and far between, and while they make for an interesting case study, they are far from representative of the broader fossil fuel industry.

III. NOT EVERYONE DESERVES A CO-CONSPIRATOR?

Traditionally, lawyers have adhered to the principle of neutrality and non-accountability with regard to their client's views or actions. A survey of 57 corporate finance lawyers working at global law firms based in London found high levels of apathy toward the potential social or environmental impacts of the services they

131 *See* Kysar, *supra* note 11, at 506.

132 *Id*. at 507; *see also* Marco Grasso & Richard Heede, *Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages*, 6 ONE EARTH 459, 460 (2023) (proposing that fossil fuel producers, emitters, and governments have an equal share of the responsibility for the economic damages resulting from climate change between 2025 and 2050).

133 *See* McKinsey and Martin Neubert, *Ørsted's Renewable-Energy Transformation*, MCKINSEY (Jul. 10, 2020), https://www.mckinsey.com/capabilities/sustainability/our-insights/orsteds-renewable-energy-transformation (explaining that over a decade ago, the company's revenue came primarily from selling coal-fired heat and power until 2009, "when management announced a major strategic shift: the company would seek to generate 85 percent of heat and power from renewable sources by 2040.").

provide.[134] Although the survey's scope and its implications may be limited, the findings illustrate the widespread acceptance of the non-accountability principle among corporate lawyers. Survey respondents claimed it was not their role to judge what their clients did and that as lawyers acting in their professional capacity, they should not be held accountable for their clients' actions.[135] The interviewees generally indicated that "ethics was … more of a subconscious than conscious matter."[136] The survey authors observed that when lawyers "distance themselves from the ethics of their work," it is easier for them to ignore ethical considerations when they further questionable objectives on behalf of their client.[137] Respondents also distanced themselves from their own power and agency vis-à-vis their representation of unsavory clients, reiterating that "they were not

[134] *See* Steven Vaughan & Emma Oakley, *'Gorilla Exceptions' and the Ethically Apathetic Corporate Lawyer*, 19 LEGAL ETHICS 50, 73 (2016) (observing that "[t]his apathy stems from various sources. It is linked to assumptions about the sorts of clients that large law firms are willing or not willing to act for, and assumptions about the 'right sort of people' the firm hires and retains; it is linked to strong notions of role morality; and it is founded on the classic legal ethics 'standard conception' principles of neutrality and non-accountability.").

[135] This resonates with the underlying principle of "non-accountability" under the standard conception of the lawyer. Under said principle, lawyers should not be judged by their client's views even if the lawyer's assistance is crucial to accomplishing a client's questionable goals. *See* Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24, 28–29 (2004); *see also* TIM DARE, THE COUNSEL OF ROGUES? (2009); *see generally* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (identifying non-partisanship and neutrality as fundamental principles); Luban & Wendel, *supra* note 18, at 353 (Luban and Wendel describe the "institutional settlement" argument for the rule of law and explain the need for a "political process that creates laws and legal institutions for the peaceful and orderly resolution of conflicts." In this way, these institutional mechanisms help to resolve normative conflict and establish some shared social basis for coexistence and cooperation); *see also* Bradley W. Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L. J. 89, 89 (2021) (identifying a foundational value of the legal profession to be "adherence to positive law as enacted and applied by institutions of the legal system and respect for the political-ethical ideal of the rule of law").

[136] Vaughan & Oakley, *supra* note 134, at 65.

[137] *Id.* at 61 (the survey authors also note that in addition to an ethical distancing, there was a clear geographical distance between London and the places facing the consequences of the lawyer's services); *see also* Wendel, *supra* note 18, at 182 (describing the psychological distance some lawyers may take from the actions they perform in their professional capacity).

the decision makers."[138] They simply advised and facilitated.[139] Professor Deborah Rhodes describes a similar phenomenon by observing that "[m]any lawyers seem never to have entertained the idea that they could actually do something about how law is practiced."[140]

Perhaps unsurprisingly, the survey results mirror the conception of lawyers as neutral actors who advocate for their client's interests regardless of whether they agree with the client's decisions on moral grounds. This is not to say that these lawyers did not consider the *legal* implications of assisting clients in legally dubious activities. However, it does reflect that at least for those surveyed, moral or ethical considerations were not paramount. Furthermore, the concept of the lawyer as a public citizen or as an officer of the court—and the subsequent duties that follow each of these conceptions—did not appear to impact how these lawyers thought of their professional role. Interestingly, while ethics rules may be replete with duties to serve the public interest broadly by not raising frivolous causes, advising clients on moral considerations, being truthful, and refraining from providing counsel or assistance to clients seeking to commit a crime or fraud, the respondents did not see these "public citizen" duties as central to their work. As the following section will explore, the survey respondents seemed to agree with standard conceptions of the "neutral" and morally non-accountable lawyer.

A. *Legal Ethics & ABA Model Rules*

Under conventional wisdom, lawyers act as neutral service providers, offering legal counsel independent of their own views or their client's opinion. Indeed, Model Rule 1.2 expressly states that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[141] Lawyers *may* consider "moral, economic,

[138] *See generally* Postema, *supra* note 135, at 65 (explaining that this notion echoes the tension between the norms of professional conduct and "concerns of private morality," contributing to a phenomenon known as "moral distance").

[139] *See* Vaughan & Oakley, *supra* note 134, at 65.

[140] DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 13 (2000) (citing Benjamin Sells, *Counsel on the Verge of Nervous Breakdown*, S.F. DAILY J. (May 25, 1994)).

[141] Wendel notes this is "an exceedingly strange rule" given that it does not offer guidance on specific duties or best practices and seems to apply to observers,

social and political factors" when providing advice, but do not need to.[142] Paragraph 5 of the rule's Commentary describes the connection between the principle of neutrality and access to justice, explaining that "legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."[143] Under Rule 1.2, the main prohibition on lawyers is against knowingly providing counsel or assistance to clients seeking to commit a crime or fraud.[144] Although the Model Rules are not in themselves binding, they have been adopted by all jurisdictions as the basis for professional standards of conduct, where violations of the rules can result in disciplinary proceedings and potential grounds for disbarment through grievance procedures.[145] However, some commentators see these rules as simply guidance—instead of imposing a prohibition or requirement, they offer a general observation that may serve as a shield for lawyers who seek to justify their behavior. Under this

not lawyers. Wendel, *supra* note 18, at 196; *see also* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10–11 (1975) (arguing that if lawyers replaced their client's views with their own, this would represent an "undesirable shift from a democracy to an oligarchy of lawyers.")

142 *See* MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); John C. Dernbach, Irma Russell & Matthew Bogoshian, *Lawyering to Make a Difference: Ethics and Leadership for a Sustainable Society*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 19, 28 (2022) (arguing that this rule imposes an obligation on attorneys when they represent clients who should be educated about climate change-related risks relevant to them).

143 MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. [5] (AM. BAR ASS'N 2023)

144 *See* MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2023) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

145 *See Model Rules of Professional Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Jan. 3, 2025) ("The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most jurisdictions.") Some jurisdictions have made slight modifications to the Model Rules. In general, state supreme courts promulgate professional responsibility codes, oversee the disciplinary process, and preside over the common law governing lawyers. *See* Zacharias, *supra* note 58, at 1174.

view, the rules set forth "the lowest common denominator of conduct," preventing an attorney from facing criminal charges or losing the ability to practice.[146]

Relatedly, Model Rule 2.1 states that lawyers are not confined to providing legal advice alone and "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[147] "Purely technical legal advice" may not be sufficient, and public relations concerns should be integrated into broader advice for it to be practical and valuable.[148] In turn, some scholars have suggested amending Rule 2.1 to expressly consider reputational factors among those that lawyers can take into account when advising a client.[149]

Together, Rules 1.2(b) and 2.1 tell us that moral concerns *may* be a part of a lawyer's advice to a client (e.g., you should refrain from engaging in X conduct, which may be morally reprehensible even if legal). The rules provide some guidance to consider moral implications, but ultimately reify the view that an attorney remains a neutral agent providing a service. Even if the lawyer decides to provide "moral counseling," she ought not to allow extra-legal moral concerns to shape how she interprets, explains, or advises on the law.[150]

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146 *See* Futrell, *supra* note 15, at 836.

147 MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

148 *See* MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. [2] (AM. BAR ASS'N 2023); Beardslee, *supra* note 63, at 1301.

149 The current rule states that lawyers can advise on "moral, economic, social and political factors." MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023). Arguably, "reputational" considerations may fall under the listed factors. In this sense, reputational risks arising from representation of fossil fuel clients should be considered. *See* Beardslee, *supra* note 63, at 1309. Under the "economic factors" prong, attorneys may choose to advise clients of potential repercussions of losing their social license to operate, particularly after a public relations disaster or other reputational damage to the company. More holistic advice considering reputational elements would supplement a more traditional assessment of the legal risks stemming from regulation and other efforts that may interfere with the business' planned activities. *See* Justice Brian J. Preston, *supra* note 35, at 53; *see also* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995).

150 *See* MODEL RULES OF PRO. CONDUCT pmbl. para. 9 (AM. BAR ASS'N 2023) ("Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a

A lawyer's duty to provide her services competently and diligently is seen as a bedrock of legal practice for a few reasons. First, the notion of due process dictates that *everyone,* regardless of their identity or the allegations against them, has a right to counsel, at least in the criminal context.[151] Second, the principle that lawyers themselves are independent of their clients theoretically protects the attorney (and arguably, the profession writ large) from backlash rooted in the client's controversial or unsavory character.[152] Third, standards of competency and zealous advocacy ensure—at least theoretically—that a client will receive adequate representation despite their questionable reputation or conduct.[153] Fourth, the adversarial system relies on opposing counsel to establish their client's case to the best of their abilities, helping the court find the facts or apply the relevant law[154] so that judges and juries can reach decisions that

professional, courteous and civil attitude toward all persons involved in the legal system."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (AM. L. INST. 2000).

[151] *See* U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1963) (extending this requirement to the states).

[152] See discussion on cab-rank rule *infra* III(B)). *See also* MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2023) (stating that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

[153] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. [1] (AM. BAR ASS'N 2023), ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

See also MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023) (stating "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (AM. L. INST. 2000).

[154] Luban & Wendel, *supra* note 18, at 329 (observing that the standard conception of a lawyer "has its origins in the adversarial structure of adjudication" and summarizing arguments in favor of the adversarial system as "the best way to find the truth" and "the best way to defend the individual's rights"); David Luban, *The Adversary System Excuse, in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 34–55 (2007) (observing that the adversarial system may be "the form that justice takes in our world of plural, conflicting values."); *see generally* Spaulding, *supra* note 61; *c.f.* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means.").

comport with the relevant legal framework—however imperfect it may be.[155]

In the United States, unless a lawyer is appointed by the court,[156] or has entered into a contract to provide legal services, there is no duty to take on any client.[157] Ethics rules further elaborate on other situations where a lawyer may decline to represent a client when there is a conflict of interest[158] or when representation implicates "action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[159]

Once a representation has commenced or a professional relationship has been formed, a lawyer may withdraw for one of several listed reasons:[160] if the client insists on violating the law,[161] other good cause exists,[162] or if continuing "the representation will result

[155] *See* Spaulding, *supra* note 61, at 1393. Underlying this notion is that the adversarial system will also help "find the truth," which may be enough to justify the standard conception of lawyering. *See generally* MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975). For early critiques of the "adversary system excuse" see David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983). *See also* Luban & Wendel, *supra* note 18, at 353 (explaining that the existence of society requires us to abide by the results of an "institutional settlement" consisting of laws, rules, and procedures even if we do not always like the results produced); WENDEL, *supra* note 27, at 140 (describing the law and the legal system as a type of "social settlement" to help facilitate cooperation in a society "deeply divided over questions of morality and justice.").

[156] In this case, a lawyer may try to avoid the appointment if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." MODEL RULES OF PRO. CONDUCT r. 6.2(c) (AM. BAR ASS'N 2023).

[157] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (AM. L. INST. 2000) ("A lawyer is not required to accept a client, to undertake representation without pay (except when a court has appointed the lawyer), or to remain in a representation when withdrawal is permissible" (internal citations omitted)).

[158] *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 2023) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest").

[159] *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2023).

[160] *See id*.

[161] *See* MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2023) ("[T]he client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.").

[162] *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2023) ("other good cause for withdrawal exists.").

in violation of the rules of professional conduct or other law."[163] In cases where lawyers have agreed to accept appointment by a tribunal, the attorney may only decline for specific reasons.[164]

The Rules also permit lawyers to cease representation when a client insists upon reprehensible behavior.[165] In the climate context, the rule may become relevant when a client seeks to engage in climate disinformation or greenwashing efforts that would violate state or federal law. Relatedly, Rule 8.4 permits a finding of misconduct where a lawyer "engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation."[166] In parallel, an attorney is free to withdraw from representing a client as long as this will not result in prejudice to the client by having a "material adverse effect on the client's interest."[167]

In sum, U.S. lawyers do not have a duty to represent any particular client absent a court-appointment,[168] may decline to do so at will, and may withdraw from existing representation when there is good cause and withdrawal will not impose an adverse material effect on the client.[169] The Model Rules offer guidance for attorneys

163 *See* MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2023).

164 *See* MODEL RULES OF PRO. CONDUCT r. 6.2 (AM. BAR ASS'N 2023) (A "lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.")

165 *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(2) (AM. BAR ASS'N 2023); *see also* Czarnek, *supra* note 12, at 612 (observing "the model rules create no restrictions on the ability of an attorney to turn down civil legal work."); Rizzardi, *supra* note 56, at 139; Flatt, *supra* note 32, at 606 (explaining that ultimately in the United States, whether "withdrawal and disclosure are required or merely permitted depends on whether using unquestionably false materials in specific administrative activities . . . would constitute a criminal or fraudulent act under [state law]").

166 MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2023).

167 *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2023).

168 Wendel, *supra* note 18, at 192 ("[i]n contrast with the English 'cab-rank' rule, under which barristers are obligated to accept all clients who seek their services, there is no requirement in the rules of professional conduct for lawyers which require them to accept the representation of any particular client."); *see also* discussion of the cab-rank rule in section III(B) of this article.

169 *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2023) ("A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse

on the general factors shaping their advice to clients and whether withdrawal may be appropriate. Significantly, they do not impose the obligation to take on representation except in a few circumstances. In contrast, the cab-rank rule in England and Wales imposes a duty on barristers to represent a client who seeks their services, although this restriction does not apply to solicitors.[170]

B. *The Cab-Rank Rule*

I will briefly explore the cab-rank rule[171] to illustrate how outside of the United States, other common law jurisdictions such as England, Wales and Australia prohibit barristers from refusing to represent any client under the cab-rank rule. The rule is seen as essential for securing access to justice for natural and legal persons,[172] and the embodiment of the principle that everyone is entitled to legal representation. The rule presumes that access to a barrister is equivalent to access to justice,[173] and thus has historically sought to

effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.").

[170] While there is no formal requirement in the Model Rules or other law that corresponds to the cab-rank rule, Wendel believes there may still be a similar obligation at play. WENDEL, LAWYERS AND FIDELITY TO LAW 143–144 (2010) (arguing that there may be a "cab-rank principle" in U.S. practice (not law) even if there is not a cab-rank rule insofar as lawyers believe themselves to be required to set aside moral objections to pursue their clients' objectives even in the absence of an enforceable rule). *See also* RONALD DWORKIN, JUSTICE IN ROBES 2–5 (2006); Ronald Dworkin, *The Models of Rules*, 35 U. CHI. L. REV. 14, 25, 27 (1967) (drawing a distinction between rules and principles).

[171] The rule is codified in the Bar Standards Board's Handbook via Rules 29 and 30. *See* BAR STANDARDS BOARD, THE BSB HANDBOOK—VERSION 4.8 Part 2-C Rules C29–C30, Guidance to Rules C29–C30 (2024), https://www.barstandardsboard.org.uk/the-bsb-handbook.html [hereinafter BSB Code]. Under Rule 29 of the Bar Standards Board's Code of Conduct, a barrister must accept representing a client irrespective of "the nature of the case" or "any belief or opinion [the barrister] may have formed as to the character, reputation, cause, conduct, guilt or innocence of the *client*." BSB Code C29.

[172] *See* John Flood & Morten Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* 2, (Univ. of Westminster Sch. Of L. Research Paper No. 13-01, 2013); Andrew Higgins, *Rebooting the Cab Rank Rule as a Limited Universal Service Obligation*, 20 LEGAL ETHICS 201, 201 (2017).

[173] *See* Flood & Hviid, *supra* note 172, at 6. Samuels explains that the:

guarantee that anyone can have representation in court by prohibiting barristers from denying services to prospective clients if the client is able and willing to pay a reasonable fee.[174]

In England, the practice of law is divided between solicitors and barristers. "When a solicitor's client goes to trial, the solicitor investigates the facts of the case . . . researches the law . . . [and] selects the barrister who will try the case."[175] Conversely, in the United States, one attorney is often responsible for seeing the case from beginning to end.

The cab-rank rule does not apply to solicitors. This was reaffirmed after Russia's invasion of Ukraine, when the Solicitors Regulation Agency (SRA) indicated it was "highly unlikely" to become involved if a law firm withdrew representation of a client in this context. The SRA explained in its guidance that solicitor firms are free to choose who they represent.[176]

The rule does not apply to barristers when representation would implicate a conflict of interest, allowing advocates who are acting

> concept [of access to justice] establishes the context for a rule which, in effect, forbids barristers to form any judgment about the moral quality of the client's case. This is the ethos of the cab-rank principle. It ensures the desired independence, since it would be unconscionable to require a barrister not only to accept the client's brief, but to embrace his moral values as well.
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> Gordon Samuels, *No More Cabs on the Rank?—Some Reflections about the Future of Legal Practice*, 3 NEWCASTLE L. R. 1, 9 (1998).

[174] *See* Flood & Hviid, *supra* note 172 at 3; Christine Parker, *A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics*, 30 MONASH U. L. REV. 49, 59 (2004).

[175] *See* NCJRS Virtual Library, *English Barrister System and the American Criminal Law—A Proposal for Experimentation*, U.S. DEP'T OF JUST., https://www.ojp.gov/ncjrs/virtual-library/abstracts/english-barrister-system-and-american-criminal-law-proposal (last visited Jan. 7, 2025).

[176] *See* Solicitors Regulation Authority, *The Importance of Complying with Russian Financial Sanctions*, SRA (Mar. 4, 2022), https://www.sra.org.uk/sra/news/russian-conflict-and-sanctions/ ("The current situation with the conflict in Ukraine is clearly novel, and whether there is a 'good reason' for terminating a client retainer in response will be a matter for the courts to decide, on the individual facts. Either way, from a regulatory point of view, our concern is to ensure that the firm has carefully considered the legal position and also understood and mitigated any risks to the client."). The SRA also maintains a professional ethics helpline for solicitors that offers advice on the relevant standards and regulations. Solicitors Regulation Authority, *SRA Standards and Regulations*, THE L. SOC'Y (Nov. 25, 2019), https://www.lawsociety.org.uk/topics/regulation/sra-standards-and-regulation.

in good faith to avoid sanctions as a result.[177] Advocates may also decline representation if it will result in "professional embarrassment," which can refer to the barrister lacking experience or competence necessary to represent the client or having little time to prepare.[178] There are other exceptions, including whether the client will not be able to pay the proper fees.[179]

Commentators have traced the origins of the cab-rank rule (and relatedly, its justification) to slightly different time periods, primarily in cases where the defendant was part of the royal family or a controversial figure.[180] In Thomas Erskine's defense of Thomas Paine, Erskine argued that attorneys should not be in the business of judging their clients as their role is one founded on advocacy instead of judgment.[181]

Several arguments have been invoked to justify the existence of the rule: to protect lawyers' independence, uphold autonomy and choice of lawyer, ensure access to counsel, and discourage discrimination based on unreasonable grounds, among others.[182] For instance, by protecting the lawyer's autonomy, lawyers who represent unpopular clients are shielded from public and governmental pressure. Consequently, the lawyer is insulated "from personal moral responsibility of associating or disassociating oneself from the client's cause."[183] This can in turn reduce the possibility of tainting juries or the judge, when refusal to represent could be disseminated

177 *See* Flood & Hviid, *supra* note 172, at 7.

178 Flood & Hviid, *supra* note 172, at 8.

179 However, internal tensions within the Code exist because other clauses prevent a barrister from denying representation on the basis of financial support. *See* BSB Code, *supra* note 171, C29, Guidance to Rules C29–C30.

180 *See* Mark Humphries, *Legal Ethics, Past and Present—Part Two*, LAW SOC'Y GAZETTE (Sept. 30, 2009), http://www.lawgazette.co.uk/features/legal-ethics-past-and-present; Andrew Watson, *The Origins and Development of the Cab Rank Rule for Barristers in England and Wales*, 13 J. EUR. HIST. OF L. 12 (2022).

181 *See* R v. Paine (1792) 22 St. Tr. 357, 412 (KB) (holding "[f]rom the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgement."); John Flood, *Traditions, Symbols, and the Challenges of Researching the Legal Profession: The Case of the Cab Rank Rule and the Bar's Responses*, 29 INT'L J. OF LEGAL PRO. 3, 6 (2022).

182 Higgins, *supra* note 172, at 204.

183 *Id.* at 205.

online.[184] The focus has primarily been on individual clients, making it less clear how to reconcile this principle with access to representation for corporations, whose legal personhood is a legal fiction.[185] As Samuels observes, "[i]n our modem commercial world, dominated by corporate influence, the context is a very much more complex and sophisticated one than that which obtained when Erskine made his appeal for the independence of the Bar."[186]

As discussed earlier, the primary duty of lawyers is traditionally understood to require attorneys "within the established constraints upon professional behaviour [to] maximise the likelihood that the client will prevail."[187] The cab-rank rule's existence is connected to the importance of representation in an adversarial legal system, where parties attempt to prevail by adducing evidence with the help of an advocate familiar with the appropriate procedure.[188] However, as previously discussed, *normatively*, lawyers appear to have competing duties to the justice system and to the broader public interest. While lawyers will utilize "every means permitted by the law and by the canons of professional conduct" to further the interest of their clients, they are also expected to contemplate "the speedy and efficient administration of justice."[189] The Solicitors Regulation Authority has not sought to provide specific guidelines on how to resolve the tension between representing a client's

184 *See id.* In England specifically, the courts have justified the rule with the imperative of having competent and reputable advocates to those who are "unpleasant, unreasonable, disreputable, and have an apparently hopeless case." Rondel v. Worsley [1967], 3 All ER 993 (HL) 1029 (Lord Pearce) (UK).

185 *See* Luban & Wendel, *supra* note 18, at 349 (explaining why the client autonomy argument does not translate to the corporate context where defendants are not natural persons and have no human dignity).

186 *See* Samuels, *supra* note 173, at 10. In Australia, there is a similar understanding around the cab-rank rule, which is seen as essential to prevent lawyers from shunning unpopular clients or "persons accused of unsavoury crimes." Samuels also writes that the rule serves other related purposes. *Id.* at 2, 9. *See also* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 934 (2000) (arguing that "even in the most despicable cases, where clients have done terrible, terrible things, criminal defense lawyers must represent the accused" zealously).

187 Murray Schwartz, *The Professionalism & Accountability of Lawyers*, 66 CAL. L. R. 669, 673 (1978).

188 *See* Samuels, *supra* note 173, at 5.

189 *Id.* at 8.

interests and upholding the rule of law, perhaps in part because this tension is inherent to legal ethics and is context-specific.[190]

Today, supporters of the cab-rank rule argue that the rule is essential to upholding "the rule of law" and "the public interest," whereby a lawyer's own autonomy and ability to choose is irrelevant; only the client's choices matter and therefore the lawyer's behavior lacks accountability or weight—she is merely an agent.[191] This is in stark contrast to U.S. legal practice, where lawyers retain autonomy through their ability to decline representation for any non-discriminatory reason, including ideological differences.[192]

One of the main critiques of the rule stems from its application to barristers alone, given that those barristers have been previously retained by a solicitor. As Higgins explains

> At most therefore, [the cab-rank rule] provides well-off clients who can find and afford a solicitor willing to act for them with access to the barristers of their choice if they can also afford their fees. Put simply, the rule supposedly designed to guarantee legal representation only becomes operative when a person already has legal representation.[193]

The fact that only a small number of legal advocates are bound by the cab-rank rule means that most providers are actually "free to discriminate in their choice of clients on any grounds not covered

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[190] *See Climate Change and the Rule of Law(yers)*, *supra* note 41, at 8, n.42; *The Unethical Environmental Lawyer*, *supra* note 7, at 4 (noting that neither the SRA principles nor the regulatory toolkit state that the client's interests take precedence). The SRA also makes a distinction between contentious and non-contentious matters. Non-contentious matters involve (1) the application or interpretation of law; (2) acting on behalf of a client, or providing advice on or in connection with, a commercial transaction, negotiation or any other dealing with a third party; (3) the preparation, execution or verification of a legal document. *Sanctions: Legal* Services, SOLICITORS REGUL. AUTH. (July 7, 2023), https://www.sra.org.uk/sra/news/sra-update-117-russian-services/. Generally, non-contentious work involves a client's personal or business matters (e.g., mergers), while contentious legal cases tend to involve disputes between two or more parties.

[191] *See* Flood & Hviid, *supra* note 172, at 24. *See also* Postema, *supra* note 135, at 77 ("[s]ince the lawyer often acts as an extension of the legal and moral personality of the client, the lawyer is under great temptation to refuse to accept responsibility for his professional actions and their consequences. Moreover, except when his beliefs coincide with those of his client, he lives with a recurring dilemma: he must engage in activities, make arguments, and present positions which he himself does not endorse or embrace.").

[192] *See* Flood & Hviid, *supra* note 172, at 24.

[193] Higgins, *supra* note 172, at 202.

by anti-discrimination law."[194] As to whether the rule ensures representation that otherwise would not be guaranteed—the supposed ultimate goal—some observers have said that cases where counsel cannot be found are quite exceptional since "the very opposite has occurred; the 'worse' the client, the more attractive and desirable"[195] possibly because of the potential revenue and reputational benefits of representing a high-profile client. As Wendel notes, supporters of the cab-rank rule

> seem to be unable to cite data, as opposed to scattered anecdotes, showing that morally motivated refusals to represent have created a pervasive problem of lack of access to counsel. The real scandal of differential access to lawyers is that *wealth, not the morality* of the prospective client's projects, determines whether a lawyer will be willing to accept the representation.[196]

The rule has also been critiqued as "virtually unenforceable,"[197] and between its limited application and several exceptions, some consider it "meaningless."[198] Yet the rule is often invoked in the context of controversial clients to emphasize the professional responsibility of barristers to facilitate access to justice by providing legal services. In fact, numerous law firms and lawyers have pointed to the rule and the principle that everyone deserves representation when their work for fossil fuel clients is scrutinized.[199] The rule's

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194 Higgins, *supra* note 172, at 206.

195 Flood & Hviid, *supra* note 172, at 31.

196 WENDEL, LAWYERS AND FIDELITY TO LAW, *supra* note 170, at 152 (emphasis added).

197 *Id.* at 213. There seems to have only been one recent application of the rule, where the Bar council held proceedings involving a Christian barrister who refused to represent a gay client. *See* Watson, *supra* note 180, at 5; Flood & Hviid, *supra* note 172, at 2 (citing Charles Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (1984)) (arguing that the rule is unenforceable, only applies to a small group of lawyers, and contains enough exemptions to undermine it.)

198 Flood & Hviid *supra* note 172, at 2, 34.; *cf.* Higgins, *supra* note 172; BSB Code, *supra* note 171, C21 (listing circumstances in which barrister cannot accept instructions to act).

199 *See* Katie Kouchakji, *How the Climate Crisis is Changing the Legal Profession*, INT'L BAR ASS'N (Sept. 28, 2021), https://www.ibanet.org/How-the-climate-crisis-is-changing-the-legal-profession. Many have espoused the view that "everyone is entitled to representation, and you want even the worst emitters to have good representation to bring them along."); *see also* Victoria Basham & John Malpas, *Professional Vandalism or Conscientious Objection: UK Lawyers' Eco-declaration Sparks National Debate Over 'Cab-rank' Rule*, THE GLOB. LEGAL POST

limits were tested in 2023, when more than 120 lawyers signed a pledge to not act on behalf of the fossil fuel industry, defying the bar by declaring they would not prosecute climate protesters or support fossil fuel projects.[200] The signatories pledged to withhold their services and self-referred themselves to the Bar Standards Board (BSB) for breaching their duty under the cab-rank rule.[201] Those who criticized the pledge defended the rule as central to protecting access to justice and stability in the profession.[202] Despite the fanfare around the pledge and the presumed importance of the rule, to this author's knowledge, none of the attorneys have faced consequences. However, the BSB Director General published commentary on ethics and access to justice, arguing that "to make ethical choices about whether to act for certain types of client or in certain types of cases" is "to take a step beyond [lawyer's] general duties."[203]

C. *The Role of Lawyers*

The proper role of lawyers has remained a contested subject since the emergence of legal ethics as a distinct field.[204] Lawyers are bound by a set of norms governing the profession and the attorney-client relationship. But they are also, at least in theory, bound to

(Mar. 28, 2023), https://www.globallegalpost.com/news/professional-vandalism-or-conscientious-objection-uk-lawyers-eco-declaration-sparks-national-debate-over-cab-rank-rule-2125452824; *cf.* Wendel, *supra* note 18, at 186 ("[t]here is no such duty on individual lawyers [in the United States] as a matter of law.").

[200] *See Declaration of Conscience*, LAWYERS ARE RESPONSIBLE, https://www.lar.earth/sign/ (last visited Jan. 6, 2025); Daniel Gayle, *Top Lawyers Defy Bar to Declare They Will Not Prosecute Peaceful Climate Protesters*, THE GUARDIAN (Mar 24, 2023, 07:14 AM), https://www.theguardian.com/environment/2023/mar/24/top-lawyers-defy-bar-declare-will-not-prosecute-peaceful-climate-protesters; *see also* Jerome Entwisle, *Climate Change and the Cab Rank Rule*, BAR NEWS (Winter 2023), https://bn.nswbar.asn.au/article/climate-change-and-the-cab-rank-rule.

[201] *See id.*

[202] *See* Neil Rose, *Lawyers' Eco-declaration Sparks Cab-rank Rule Row*, LEGAL FUTURES (Mar. 24, 2023), https://www.legalfutures.co.uk/latest-news/lawyers-eco-declaration-sparks-cab-rank-rule-row.

[203] Mark Neale, *Ethics and Access: Striking the Right Balance*, BAR STANDARDS BD. (Apr. 28, 2023), https://www.barstandardsboard.org.uk/resources/press-releases/ethics-and-access-striking-the-right-balance.html.

[204] Luban & Wendel, supra note 18.

those commitments that are necessary to uphold the rule of law.[205] Climate change presents an existential threat to the law and society more broadly, forcing us to reckon with the role of lawyers on a warming planet and whether lawyers should represent any client that requests their services.[206] The following sections will describe how scholars have conceptualized the lawyer's role before exploring how we may begin to answer these questions in the context of climate change.[207]

1. Lawyers as Zealous Advocates

The predominant view across common law countries conceives of the lawyer as a zealous advocate in an adversarial system who owes special duties to clients.[208] This traditional approach posits that lawyers should advocate vigorously on behalf of the client regardless of ordinary moral considerations, provided that the means and the ends of representation are lawful.[209] This view presumes that

[205] *The Unethical Environmental Lawyer*, *supra* note 7, at 4; DARE, THE COUNSEL OF ROGUES?, *supra* note 135, at 27 (identifying the general principles that make up the "standard conception" of the law as the principles of neutrality, nonaccountability, and partisanship); BRIAN T. TAMANAHA, ON THE RULE OF LAW—HISTORY, POLITICS, THEORY 58–59 (2004) (observing that the rule of law requires that lawyers ascribe to fidelity to the law); *see also* Russell, *supra* note 1, at 301 (describing how lawyers have a special responsibility in society given their knowledge of rules and the rule of law).

[206] *See* Parker, *supra* note 174, at 50.

[207] Please note that these categories are not meant to be comprehensive or all-encompassing, but an illustration of traditional conceptions of lawyering.

[208] *See* Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, *supra* note 135, at 24 (adopting the standard conception of the attorney as a zealous advocate but offering an alternative reading by drawing a distinction between "mere-zeal" and "hyper-zeal").

[209] *See* discussion of Rule 2.1, *supra* note 142; Model RULES OF PROC. CONDUCT r. 2.1 (AM. BAR ASS'N 2023); *see also* Parker, *supra* note 174, at 56–57; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613, 613 (1986) (arguing that this "amoral" role is the proper stance for the lawyer as a professional actor). Under the standard conception, lawyers support the client's autonomy by facilitating what the client has chosen to do within the confines of the law. See also MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) (offering an autonomy argument based on the text of the U.S. Constitution, primarily in the criminal legal context).

"the relationship of the attorney to the client is an absolute value, integral to the right of fair representation."[210]

The right to representation is often invoked in the criminal context where a client's life or liberty may be at stake. The principle is also regularly invoked—although not always guaranteed—in the civil context, given the ubiquitous need for assistance with navigating a complex legal system where clients may face comparable losses: immigrants facing deportation, tenants facing eviction, or parents losing custody of their children.[211] Thus, in the civil context, attorneys are also essential to conduct business and further private interests.[212]

The traditional approach is justified insofar as lawyers who adhere to the institutional role are by extension upholding the legal system.[213] This model presumes that every person or firm will

[210] Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 448 (1997); Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, *supra* note 135, at 28 (observing that since legal representation is seen as necessary to allocate rights, lawyers who refuse representation or make "less than [a] zealous effort on behalf" of their clients render the person's claim to rights "worthless"). Note that the ABA modified Model Rule 1.6 in the aftermath of this article being published, addressing some of the criticisms raised; *cf.*, Postema, *supra* note 135, at 86 (observing that although "we might agree that individual autonomy and rights should be respected, we might still deny that it is the lawyer's moral as well as role duty to assist his client in any lawful exercise of his legal rights.").

[211] *See, e.g.*, Lassiter v. Department of Social Services, 452 U.S. 18, 46 (1981) (Blackmun, J., dissenting) (stating "[w]hen the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable"); *see also* Spaulding, *supra* note 61, at 1404 (explaining that *Lassiter* has been criticized "for failing to recognize that publicly subsidized counsel is as important to the legitimacy of certain civil proceedings as it is in cases where freedom from state confinement is at issue."). Another example is habeas corpus proceedings, which raise similar issues as criminal prosecutions where a defendant has experienced a long period of confinement without being properly charged. *See* Wendel, *supra* note 18, at 195 (discussing the Guantanamo detainees' cases). Several scholars have argued in favor of the right to counsel in civil proceedings. *See, e.g.*, Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 61 (2007); Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14 (2013).

[212] *See* Parker, *supra* note 174, at 57.

[213] *See* Wasserstrom, *supra* note 141, at 10 (discussing how this principle ensures that all criminal defendants have access to counsel and their day in court and lawyers do not substitute their own judgement).

operate within a "framework of rules, institutions, and procedures which ensures that in the aggregate all this self-interested behavior will result in general social benefit, or at least in more good than harm."[214] The culture of adversarial legalism is seen as serving the interests of a pluralist society, where lawyers can put forth the best argument possible on behalf of their clients.[215] The Model Rules, for example, explain that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."[216] Indeed, the origin of the Model Rules can be traced to attempts to "give primacy to the advocate's role."[217] It is unsurprising, then, that some scholars conclude that the view of the attorney as a zealous advocate on behalf of their client dominates the Model Rules.[218]

There is a parade of horrors that ensues when this approach is taken to a logical extreme: lawyers will resolve all ambiguities in favor of their client and be incentivized to take advantage of every loophole in professional responsibility rules to advance their client's interests.[219] Under this approach, as Professor Bradley Wendel explains, the law is seen as an obstacle that must be managed or dealt with to achieve the client's goals.[220] Professor Gerald Postema observes that lawyers are not an instrument of law, but rather law is the instrument of the client, who retains lawyers to promote her own interests.[221] After all, the adversarial system operates at its best when counsel for each party zealously advocates on behalf of the client.

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214 Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 258 (1990).

215 ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 20 (2019). For a critique of the adversary system as a distrusted, undemocratic institution, *see* LUBAN, *supra* note 61, at 51–55.

216 MODEL RULES OF PRO. CONDUCT pmbl. para. 8 (AM. BAR ASS'N 2023); *see also* Russell, *supra* note 210, at 427.

217 Gordon, *supra* note 214, at 278.

218 *E.g.*, Russell, *supra* note 210, at 466.

219 *See* Parker, *supra* note 174, at 60.

220 *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV 107, 134 (2019).

221 *See generally* Postema, *supra* note 135, at 89 (explaining that the lawyer, and not just the client, bears some responsibility for the harms done in the course of the representation and that whether there is moral justification for these harms "will be determined by the substantive moral considerations relevant in the case."); *id.*

Under the "zealous advocate" approach, lawyers can remain both neutral and non-accountable actors since "individual lawyers and their clients do not have to concern themselves directly with justice or the public interest."[222] Because of the attorney-client relationship, the lawyer can insulate herself from scrutiny and be indifferent "to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance."[223]

2. Lawyers as Officers of the Justice System

Lawyers are also often conceived as officers of the court, having broader duties to society.[224] Across jurisdictions, lawyers are seen as responsible for "facilitating the public administration of justice according to law in the public interest."[225] This approach to lawyering requires that when navigating gray areas, lawyers will "contribute to the effectiveness and enforcement of the substantive law."[226] Lawyers will also remain independent from clients and unwilling to compromise the integrity of the justice system.[227] In this vein, Professor Robert Gordon writes that lawyers should work "to maintain the integrity of the framework of laws, institutions, and procedures that constrain their client's practices and their own."[228]

While, as a general matter, the "officer of the court" role is widely understood, the exact contours of a lawyer's obligations under the "rule of law" vary given the multiple conceptions of this

222 Parker, *supra* note 174, at 60.

223 Wasserstrom, *supra* note 141, at 6 ("provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician"). Wasserman observes that for many lawyers this approach to the profession is attractive in part because "the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life." *Id.* at 9.

224 *See* Justice Brian J. Preston, *supra* note 35, at 61. *See also* MODEL RULES OF PRO. CONDUCT pmbl. para. 6 (AM. BAR ASS'N 2023).

225 Parker, *supra* note 174, at 56. *See also* Esau Alvin, *Teaching Professional Responsibility in Law School*, 11 THE DALHOUSIE L. J. 403, 404 (1988) (explaining that lawyer's conduct in private may be seen as "part of the public administration of justice" given the public impacts of the lawyer's advice.).

226 Parker, *supra* note 174, at 161 ("[a lawyer] will not use loopholes, procedural rules or barely arguable points to frustrate the substance and spirit of the law. Responsible lawyers see the practice of law as a 'public profession' in which lawyers have a mediating function between the client and the law.") *See generally* Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT'L L. J. 550 (1997).

227 Parker, *supra* note 174, at 62.

228 Gordon, *supra* note 214, at 255.

principle.[229] These obligations could be understood as formal or procedural, but can certainly implicate broader values that underpin the rule of law itself.[230] In this sense, Chief Justice Preston has called for climate conscious lawyers to act in a manner that honors their "duties to the legal system and uphold[s] the values of public law," which in turn "facilitates the achievement of justice," and ultimately "underpins the legal system."[231] Similarly, former Hawaii Supreme Court Justice Michael Wilson has observed that in the face of the climate emergency, judges in particular have little time "to apply the rule of law to protect the rights of citizens to a life-sustaining climate."[232] He further calls on other judges to courageously "achieve the just application of the climate rule of law."[233]

Given the inherent tension that may arise between an individual client's interests and the legal system's integrity, common law systems tend to emphasize the broader duty of lawyers to the court while also emphasizing the duty of zealous advocacy.[234] However, some commentators have observed that the duty to the court and the administration of justice "override any particular client interests that are contrary to the duties."[235] Others observe that, rather than rejecting the zealous advocate model, the lawyer as officer of the justice system "simply rejects the absolute form" of the zealous advocate model and thus, modifies or informs the role without becoming totalizing.[236]

3. Lawyers as Legitimizing Agents

Legal representation has been understood as a key feature of a pluralist democracy, framing professional obligations as necessary

[229] Roiphe, *supra* note 16, at 672 (arguing that the role of lawyers as professionals serving the public good and democratic society was lost as a market ideology took hold in the 1970s); Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PROF. L. 49 (2016) (discussing the reasons for the fall of social trustee professionalism, whereby lawyers were seen as "social trustees" who served broader societal interests).

[230] *See Climate Change and the Rule of Law(yers)*, *supra* note 41, at 6.

[231] Justice Brian J. Preston, *supra* note 35, at 62.

[232] Justice Michael Wilson, *Timely Judicial Recognition and Protection of Climate Rights*, 62 JUDGES J. 19, 19 (2023).

[233] *Id.* at 23.

[234] *See* Parker, *supra* note 174, at 64.

[235] Justice Brian J. Preston, *supra* note 35, at 61.

[236] Russell, *supra* note 210, at 451–52.

to sustain social order.[237] Legal scholars have theorized about the role of lawyers as part of broader political institutions. This group of scholars is less concerned about how the lawyer's role can be reconciled with ordinary morality and instead seeks to understand the role of lawyers in a pluralist society.[238]

Professor Daniel Markovits has emphasized the role of lawyers as legitimizing agents whose assistance is necessary for clients to pursue their interests.[239] A central feature of the legal process is lawyers acting in their professional capacity to legitimize adjudication.[240] Litigation, settlement negotiations, and other activities where lawyers play a central role "implicate the authority of the state's mechanisms for applying law to resolve disputes," i.e., the legitimacy of the law.[241]

Parties who can afford to hire an attorney and seek the legal adjudication of a conflict can leverage the legitimizing power of attorneys. Professor Markovits describes how the legal process "legitimates the application of political power through the participatory engagement that it requires of the parties to legal disputes."[242] Even if the parties may disagree and appeal the resolutions that the process produces, they "take ownership" over them; engagement with the legal process "fundamentally reconstitutes" disputants' claims.[243] In this way, adjudication has the power to legitimate the process and its outcomes.

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[237] *See* Luban & Wendel, *supra* note 18, at 329 (describing the "second wave" of legal ethicists as concerned with this question.).

[238] Luban & Wendel, *supra* note 18, at 352 (in a pluralist society, "[c]oncrete decisions must be made about a wide range of matters of importance to the community, yet citizens of that community disagree about what constitutes a good life, what ends are worth pursuing, and what facts bear on the resolution of these controversies.").

[239] *See* DANIEL MARKOVITS, A MODERN LEGAL ETHICS 171–211 (2008); *see also* Daniel Markovits, *What Are Lawyers For?,* 39 ZDAR 119 (Sept. 2014).

[240] *See id.* at 190. Quoting Robert Gordon, Markovits argues that part of a lawyer's job is "selling legitimacy" one client at a time. *Id.* at 195.

[241] *Id.* at 172. Significantly, Markovits draws a distinction regarding the plausible appeal to the role-ethic for lawyers who lobby versus those who litigate. He explains that "lawyers who serve clients in the political process participate in other forms of legitimation associated with democracy rather than adjudication." *Id.* at 173.

[242] *Id.* at 188.

[243] *Id.*

The paradox lies insofar as the legal system allows powerful parties to deploy the legal process to promote and protect their interests, which may in turn undermine the legitimacy of the legal process as a whole.[244]

4. Critique of Current Legal Ethics

The predominant views described above (i.e., zealous advocate, officer of the court, and legitimizing agent) are often presumed to conflict with alternative models understanding lawyers as "agents for justice."[245] In other words, critics argue the mainstream

[244] Markovits notes that this approach emphasizing legitimacy "will sometimes undermine (at least in respect of their first-personal ethics) the more traditional connection between lawyers and justice." *Id.* at 172.

Legal ethics scandals involving Enron and Lincoln Savings exemplify the extent to which the Model Rules and legal ethics have failed to prevent professional misconduct in service of financial interests. *See, e.g.,* Susan Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239–43, 1264 (2003); Dorothy J. Glancy, *Ethical Responsibilities in Regulatory Practice: Where Does Kaye Scholer Leave Us*?, A.B.A. SECTION OF NAT. RES., ENERGY & ENV'T, (Sept. 13, 1993), https://law.scu.edu/wp-content/uploads/ethical_responsibilities.pdf.

In the aftermath of Enron, the ABA reformed the Model Rules. E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. CIN. L. REV. 731, 737–38 (2003).

[245] Parker, *supra* note 174, at 56; *see also* WILLIAM H. SIMON, *PRACTICE OF JUSTICE—A THEORY OF LAWYER'S ETHICS* 7–12 (1998) (explaining that the "dominant view" of lawyers role is zealous advocacy). Simon advocated for a type of "deprofessionalization" to deal with some of the problems embedded in the traditional attorney-client relationship, where a lawyer's morality would shape advocacy on the client's behalf. Simon argued for lawyers to promote "justice" by refusing to provide counsel to clients whose goals undermine the law's purpose. Wendel has critiqued Simon's conception of justice, explaining that

> [w]hat 'justice' amounts to in Simon's theory is actually a fairly complicated matter to untangle. He explicitly equates justice with legal merits, but then develops something like a Dworkinian antipositivist account of legal merits, in which 'substantive criteria of interpretation and application, appeals to broad standards and purposes, and . . . general social background customs and values' all bear on the determination of the legal merits of a particular case.

Wendel, *supra* note 135, at 96, n.29. For a critique of deprofessionalization, see also Postema, *supra* note 135, at 71.

Simon also offered one of the first precise definitions of the "standard conception" of legal ethics, emphasizing the principle of moral non-accountability in William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978); Luban & Wendel, *supra* note 18, 343

approaches wrongly ignore or fail to consider social justice questions external to the law and its administration. Professor Etienne Toussaint describes the dominant vision of professional identity as hindering "a justice-oriented interpretation of the lawyer's public citizen charge," as it "tends to overlook the way law can construct the very social conditions that it seeks to contain."[246]

Legal ethics are often understood to be embodied in professional responsibility standards across jurisdictions.[247] However, these standards have been criticized due to the inherent limitations of attempting to capture complex ethical problems through a set of rules governing attorney behavior. This approach holds that while the rules of professional responsibility distill and codify the ethical obligations of lawyers into duties, "mere compliance with such rules does not discharge the obligation to abide by moral and ethical principles."[248] Otherwise, attorneys may fail to consider the values that should motivate lawyer behavior and, significantly, when it "may even be necessary to disobey [the rules] for ethical reasons."[249]

The abstract nature of professional norms means that counsel assisting or participating in questionable corporate conduct (e.g., greenwashing or facilitating disinformation campaigns) as a "hired gun" may be operating within the confines of the Model Rules even when the client's actions morally dubious.[250] As Green explains

(explaining the standard conception enshrined the principles of partisanship, neutrality, and non-accountability).

246 *See* Toussaint, *supra* note 62, at 292 (explaining how "some law professors have historically adopted a formalistic and doctrinally neutral approach to law teaching rooted in a 'fidelity to law' framing of professional lawyering identity" (citing W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 118 (2010) (arguing that lawyers must observe fidelity to the law, not to a client's goals)).

247 *See* Parker, *supra* note 174, at 53.

248 Justice Brian J. Preston, *supra* note 35, at 60.

249 Parker, *supra* note 174, at 53.

250 Griffin & Kuh, *supra* note 64, at 120 (citing Bruce A Green, *Thoughts about Corporate Lawyers after Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407 (2001)). *See also* Alvin, *supra* note 225, at 421 ("[c]entral to much of the literature is the denial that lawyers can personally avoid responsibility for harm by hiding behind a client. What we do on behalf of clients is still something that we do. Doing what is legal is not necessarily doing what is morally right."); Delshad Irani, *'Things Ban Be Lawful but Awful': L'Oréal's Emmanuel Lulin*, ET BRAND EQUITY (Jan. 8, 2020), https://brandequity.economictimes.indiatimes.com/news/business-of-brands/things-can-be-lawful-but-awful-lorals-emmanuel-lulin/73141782 (quoting

when describing the role of corporate lawyers representing the tobacco industry,

> [lawyers] may assist clients in conduct that is immoral, unconscionable, or even illegal as distinguished from criminal. Nothing in the Model Rules encourages lawyers to refrain from assisting clients engaged in morally reprehensible conduct or exhorts lawyers to discourage clients from engaging in harmful or antisocial behavior . . . Lawyers may easily get the message that it is not only perfectly permissible from a disciplinary perspective, but perfectly acceptable from a normative perspective for lawyers to assist clients in conduct that is immoral, antisocial, or legally questionable.[251]

Similarly, Czarnek observes that "it is apparent that professional codes of ethics are not inherently tied to external morality," which suggests that the norms governing lawyers are more concerned with "preserving the legitimacy of the profession" than conforming with ordinary morality.[252]

Perhaps none of this is surprising given the origins of the American Bar Association and the Model Rules. After the formation of the ABA in 1878, the ABA adopted the first national code of ethics in 1908, which was heavily influenced by the 1887 Code of Ethics of the Alabama State Bar Association.[253] Professor Norman

the former Chief Ethics Officer of L'Oréal, "very often things can be lawful but awful.").

[251] Green, *supra* note 250, at 420. With respect to this quote, it is important to note that there have been some significant changes in the Model Rules addressing this critique. Rule 1.16(a)(4) *requires* an attorney to withdraw from representing a client seeking to engage her services or assistance to commit a crime. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(a)(4) (AM. BAR ASS'N 2023).

[252] Czarnek, *supra* note 12, at 617.

[253] *See* Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2021 (2005) (these developments were followed by the emergence of "mandatory, integrated state bar associations with prescribed rules of admission, authority to disbar, and authority to speak with one voice for the profession on matters touching the administration of justice in each state."); *See also* Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 n.2, 474 (1998). Spaulding also observes "that antebellum professionalism left ample room for elite lawyers to defend taking cases of doubtful justice (even knowingly representing guilty clients) as serving rule of law values." Spaulding, *supra* note 253, n.100 (citing Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1406 (2003)). The Alabama State Bar Association's Code of Ethics was adopted in Alabama in 1887. By the

Spaulding traces the origins of the Alabama ethics code and the desire of lawyers to adopt a formal code to the relationship between post-war reform efforts during Reconstruction, "political and moral conservatism," and racism.[254] He argues that efforts to professionalize the practice of law came from efforts in southern states to overturn Reconstruction, disenfranchise African Americans, and ultimately establish white supremacy.[255] He concludes that "racism directly influenced not only the retreat from Reconstruction, but also ideologies of practice."[256]

In response to the perceived shortcomings of a positivist view of the lawyers' role, numerous scholars have proposed a different theory of legal ethics centering a lawyer's individual sense of morality. These "moral activist" or moral counselor lawyers are concerned with "doing good" and promoting justice as the ultimate goal of their work.[257] Professor Luban defines moral activism as "a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship but tries to influence the client for the better."[258] These lawyers see justice as the foundation of the legal system, and thus, see themselves as responsible for making the system more just.[259] Under this model, lawyers are not able to evade moral accountability by hiding behind the adversarial system.[260] These lawyers may often try to represent clients aligned with their own set of values or who embody

time the final ABA committee report was issued in 1908, the Alabama Code had been adopted by eleven other states with only slight modifications. *See* John M. Tyson, *A Short History of the American Bar Association's Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility*, 1 CHARLOTTE L. REV. 9, 10 (2008).

254 *See* Spaulding, *supra* note 253, at 2023 n.61.

255 *See id.* n.356 (summarizing literature describing the anxiety of white elite lawyers in states like Alabama and Mississippi, where efforts to consolidate the profession ran parallel to white supremacy goals); *see also* Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 ROGER WILLIAMS U. L. REV. 41 (1999).

256 Spaulding, *supra* note 253, at 2107.

257 *See* Parker, *supra* note 174, at 56.

258 David Luban, *The Opportunity in the Law*, *in* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 148, 160 (1988); David Luban, *supra* note 20, at 162.

259 *See* Parker, *supra* note 174, at 65–66 (observing that "[m]oral activist lawyers seek to challenge and persuade clients to do what the lawyer considers the just thing, always bearing in mind the possibility that the client might also persuade the lawyer about what justice involves.").

260 *See id.* at 65.

"worthy causes" and may be unable or unwilling to represent certain clients who they may deem outside this category.[261] Given the abstract nature of justice and what it means to achieve a "just" outcome, it is possible that these lawyers may position themselves against or in favor of a particular business interest and, in the case of climate change, in favor or against the status quo.

Naturally, there are several critiques against the "moral" lawyer.[262] Professor Wendel has critiqued those who assign moral blame to lawyers who have "provided legal assistance to a client bent on pursuing antisocial projects, and did so without violating any applicable standards of professional conduct."[263] For Professor Wendel and others who remain skeptical of the "moral activist" lawyers, as long as the lawyer abides by professional responsibility norms, they should not be subject to criticism from a legal ethics perspective. In other words, regulation of legal practice should not be correlated with morality or moral permissibility.[264]

However, Professor Wendel concedes that criticisms may have some purpose insofar they push lawyers to reflect upon the moral significance of their work, forcing them to reflect on what lines they would cross and which ones they would not.[265] These criticisms, which he calls "moral remainders," can serve a distinct purpose: to ensure those operating in their professional role do not operate in isolation from ordinary morality.[266] It is in the spirit of these moral remainders that I propose a paradigm shift where we seriously interrogate the role of lawyers, welcoming critiques of those who "neutrally" exacerbate the climate crisis.

In sum, climate wreckers and their attorneys are distorting foundational principles of criminal defense. In cases where

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261 *Id.* at 66.

262 *See, e.g.*, Vaughan & Oakley, *supra* note 134, at 53; W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727 (2012).

263 Czarnek, *supra* note 12, at 605; *see also* Wendel, *supra* note 18, at 180.

264 Wendel, *supra* note 220, at 126, 146 ("From the point of view of a political community, there may be moral value in establishing a framework of norms that purport to obligate citizens (or permit them to do things), with the further qualification that ascertaining the content of those norms does not require re-engaging in the moral reasoning they are intended to supersede and replace.").

265 *See* Wendel, *supra* note 18, at 181.

266 Wendel, *supra* note 18, at 183; *see also* Vaughan and Oakley, *supra* note 134, at 54.

attorneys have represented controversial individuals in criminal proceedings, such as Nazis, apartheid supporters, or segregationists, lawyers played a central role in ensuring those *individuals* had access to justice when facing the power of the state. But in the case of climate wreckers, multimillion dollar corporations are employing lawyers to navigate *civil* cases to ensure their businesses continue to thrive at the expense of communities, ecosystems, and the planet.

IV. PARADIGM SHIFT

Legal ethics have created a "client-centered paradigm" that has supported, if not upheld, a system in opposition to a stable climate.[267] In the context of climate change, communities most harmed by fossil fuel interests can rarely access legal representation. The vast power asymmetry between those who have enabled the crisis and those feeling its impacts the most "necessitate[s] a turn toward legal realism . . . [as] the idea that lawyers are merely neutral actors providing advice in service of the rule of law is revealed as a legal fiction."[268]

Lawyers representing "climate wreckers" are unable,[269] unwilling, and unlikely to represent communities on the front lines of the climate crisis. This furthers significant power imbalances between large and well-resourced corporate actors and those at the forefront of fossil fuel extraction, ultimately disadvantaging those that face the most climate-related harm.[270] While climate wreckers such as Chevron and Exxon Mobil continue to attempt to evade accountability across jurisdictions,[271] victims of climate harms are left without recourse, facing countless procedural obstacles with limited resources to get their day in court.[272]

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[267] Lininger, *supra* note 25, at 67 (citing Irma Russell, *Unreasonable Risk: Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 119 (1998)).

[268] Czarnek, *supra* note 12, at 605.

[269] Due to conflicts of interest.

[270] *See* Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108, 113 (2021).

[271] *See supra* II.

[272] *See* Katrina Fischer Kuh, *North South Climate Justice and Private Climate Accountability*, JINDAL GLOB. L. REV (forthcoming); Aisha I. Saad, *Attribution for Climate Torts*, 64 B.C. L. REV. 867 (Apr. 2023) (discussing key challenges to U.S. climate tort lawsuits related to causation requirements).

Legal ethics are codified in professional responsibility rules to reflect the mainstream understanding of the lawyer's appropriate role and behavior. But as discussed, legal ethics do not reflect ordinary morality and often conflict with a layperson's understanding of what may be morally sound. For some, this may be irrelevant. To Professor Wendel, legal ethics is about understanding what "constitutes right and wrong conduct by lawyers."[273] What may be deemed proper conduct under legal ethics does not necessarily entail a positive good. Legal ethics, and the law more generally, may not always deliver "good" results, but there is something inherently good in law and the legal system as a means to organize society.[274] Reflecting on a morally dubious transaction, Professor Wendel explains that whatever moral views one may have of a client's conduct, if the transaction or activity is lawful, "that counts for something in the evaluation of the lawyer's decision to assist the client . . . there is something that can be said in moral terms for giving reasons that refer to a distinctive kind of obligation created by the law and the legal system of a society."[275]

This example illustrates the ways in which legal ethics under the standard conception of lawyering govern what may be procedurally just or legal, while ignoring more substantive questions about the ultimate outcome of a lawyer's representation. In turn, Professor Allan Hutchinson argues that "lawyers compound the very problem that legal ethics is supposed to resolve" by presenting ethical behavior as synonymous with "conformity to law without any real attention paid to the worthiness of any particular laws or process."[276]

I would add "result" or "outcome" to Professor Hutchinson's critique because it is another legal fiction to distinguish the underlying law or process from the material results of a particular activity, i.e. representation of a defendant that results in harm. For example,

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[273] *See* Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, *supra* note 262, at 731.

[274] *Id.*

[275] Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, *supra* note 220, at 148.

[276] ALLAN C. HUTCHINSON, FIGHTING FAIR: LEGAL ETHICS FOR AN ADVERSARIAL AGE 63 (2015); *see also Climate Change and the Rule of Law(yers)*, *supra* note 41, at 7 n.38 (observing that "[t]his sort of 'we are only doing our jobs' response by lawyers is seen in multiple forms, by those who some would label 'professional enablers' as well as by those who some would label 'left-wing activists'.").

assisting a fossil fuel company with obtaining a new lease or permit to extract oil may be *legal* and even the right thing to do under the guise of facilitating access to the legal system, while at the same time undermining the scientific consensus—and arguably moral imperative—of keeping fossil fuels on the ground.[277] A system that entrenches climate injustice by being accessible to fossil fuel interests while mostly inaccessible to those at the forefront of climate change is not a neutral system. It is a system embedded in racial capitalism, where the outcomes are in direct opposition to justice.

So what about those attorneys who represent climate wreckers? What is the "worthiness" of defending climate wreckers and under what circumstances can this representation be deemed less or more virtuous? It would be an oversimplification to apply the same treatment to a lawyer representing an individual facing criminal penalties under an environmental statute, a lawyer arranging a merger between two energy companies, and a lawyer defending a fossil fuel company in civil litigation against a tort lawsuit brought on behalf of a municipality. Not all situations where counsel advises a client have the same implications for the climate and democracy. Attorneys assisting in a bid for a new fossil fuel project will ultimately impact the emissions trajectory of our planet in a way that a lawyer investigating a human resources issue for a climate wrecker does not. Similarly, assisting fossil fuel companies with evading corporate accountability efforts through litigation or congressional hearings allows these actors to shield themselves from liability, or at the very least stall these efforts. Ultimately, I argue it is appropriate to shame attorneys who help develop new "carbon bombs," meaning facilities or projects that will get us closer to climate disaster by exceeding widely accepted temperature limits.[278] If the direct impact of a particular representation will exacerbate climate change by contributing additional emissions, those lawyers should not be able to use "access to justice" arguments to defend the indefensible. While I hope in future work to sift through a variety of services offered by law firms and evaluate professional responsibility implications, one red line should be established: law firms should not enable further

[277] INT'L ENERGY AGENCY, *supra* note 119.

[278] Damian Carrington & Matthew Taylor, *Revealed: the 'Carbon Bombs' Set to Trigger Catastrophic Climate Breakdown*, THE GUARDIAN (May 11, 2022), https://www.theguardian.com/environment/ng-interactive/2022/may/11/fossil-fuel-carbon-bombs-climate-breakdown-oil-gas.

planetary disruption by enabling or facilitating new fossil fuel projects against scientific consensus to keep fossil fuels in the ground.

Beyond the question of what may entail "virtuous" and "less virtuous" representation, we must interrogate the principle that attorneys cannot be held accountable for their choice of clients, particularly in the United States but also in other jurisdictions with the cab-rank rule. More often than not, principles like "everyone is entitled to representation" and the values underlying the cab-rank rule—which are essential to a functioning legal system and the broader rule of law—are distorted by attorneys and firms in an attempt to shield themselves. Firms leverage these longstanding principles in defense to external scrutiny and accountability efforts for their choice of controversial clients.

At the same time, the status quo benefits a "rule of law" that is solely concerned with the legality of attorney conduct, continuing to facilitate the existence of fossil fuel infrastructure and thus, planetary disruption. As currently written, the Model Rules (and their "lingering anthropocentrism")[279] allow, and arguably encourage, conduct that is in direct opposition to sustaining life on the planet.

The production and combustion of fossil fuels is threatening our survival. As Judge Staton reasoned in her dissent in *Juliana v. United States*, the climate crisis is a direct threat to our rule of law, institutions, and legal system—an existential threat testing the "Constitution's commitment to perpetuity."[280] Climate change threatens "the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[281] In a planet with erratic climate patterns, the liberties "protected by the Constitution to live a good life are meaningless."[282] Given the existential threat we face, Czarnek

[279] Tom Lininger, *supra* note 25, at 71 (observing that "the ABA Model Rules have remained anthropocentric since their passage in 1983.").

[280] The *Juliana v. United States* case is one of the most important rights-based climate change cases filed, whereby a group of children and youth sued the U.S. federal government for violating their constitutional right to a stable climate. Juliana v. United States, 947 F.3d 1159, 1163 (9th Cir. 2020). Judge Staton observed in dissent that "the perpetuity of the Republic occupies a central role in our constitutional structure as a 'guardian of all other rights,'… Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society" (internal citations omitted). *Id.* at 1178 (Staton, J., dissenting).

[281] *Id.* at 1175 (Staton, J., dissenting).

[282] *Id.* at 1178.

invites the legal profession to embrace a "new legal ethics" where we "recognize that both public trust in lawyers and even the sheer existence of the rule of law are threatened by continued support for the fossil fuel industry."[283]

Professor Irma Russell has observed that lawyers have "a duty to reform the law, including the sometimes intricate presumptions and doctrines that determine legal outcomes."[284] She explains that "[w]hen the interests of clients threaten people and society by creating threats to survival, law reform is necessary."[285] In the context of the climate crisis, "the tension between the existential threats in a carbon-based economy and the lawyer's duty to clients"[286] crucially positions lawyers to use their skills to protect democratic institutions and their future existence. Even if lawyers decide that representing a controversial client like a climate wrecker is ultimately positive for the rule of law, calls for accountability build on "moral remainders" and invite reflection about the actions lawyers take.[287] In the context of law firms representing climate wreckers, I share Dean Vaughan's observation that lawyers have distorted the principles of "public interest," "rule of law," and the cab-rank rule, utilizing them as rhetorical devices to justify their choice of clients.[288] Even in a context where legality matters greatly in connection with values such as due process, fairness, and the right to counsel, it is not a "conclusive justification" for representing the worst clients.[289]

In the remaining sections, I outline some suggestions for pivoting legal ethics in a direction that is aligned with a stable climate. I

283 Czarnek, *supra* note 12, at 617.

284 Russell, *supra* note 1, at 306.

285 *Id.*

286 *Id.* at 309.

287 Wendel, *supra* note 18, at 184.

288 *See Climate Change and the Rule of Law(yers)*, *supra* note 41, at 9; *The Unethical Environmental Lawyer*, *supra* note 7, at 5 (noting that "lawyers often wave the rule of law around like a flag, assuming that it—the rule of law—is this neat, easy, agreed-upon thing and that it also supports whichever particular argument they are trying to make"); Wasserstrom, *supra* note 141, at 14 (noting that lawyers talk about justice and seek to persuade, both characteristics that subject lawyers to public scrutiny and distinguish them from other service providers); Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, *supra* note 262, at 741 (concluding that "[i]f there is something distinctive about our profession, it has to be a commitment to the value of legality and a corresponding obligation to respect the law.").

289 *See* Wendel, *supra* note 18, at 175.

argue that by declining representation of climate wreckers in specific situations, enforcing existing ethics rules in the context of climate disinformation, and imagining new rules, the legal profession can embrace a paradigm shift in legal ethics.

A. *Declining Representation*

U.S. lawyers are not required to represent any particular client. As a result, attorneys typically decide which clients to take on, a choice that arguably vests them with some moral or personal responsibility.

In the United States, attorneys seeking guidance on ethical matters may consult the Model Rules and the professional norms in their respective jurisdictions. There are no rules or guidelines that prevent U.S. attorneys from rejecting potential clients. "[D]ecisions to act for any given client are commercial decisions, and not ones of legal ethics."[290] As Professor Wendel acknowledges, "[a]ny purported duty to represent is, in virtually all cases, a matter of conscience only, not legal obligation."[291]

In England and Wales, however, the cab-rank rule is often invoked to argue that "everyone deserves representation," including climate wreckers. But as discussed, the rule is rarely enforced in practice. Furthermore, the cab-rank rule does not seem to be doing much work since barristers representing climate wreckers are often instructed by a solicitor who has freely chosen their client. Yet law firms facing scrutiny for their choice of client invoke the rule to evade accountability when pressed by advocates, insisting on their neutrality as service providers acting in their professional capacity.

The lawyer's choice of whether to accept a client (and arguably to cease or withdraw representation) "is troubling if it leads to foreclosure of a person's access to the law."[292] In the context of criticisms of representing controversial clients, the right to counsel is equated with access to justice. But, at least in the United States, this is a constitutional right granted to criminal defendants.[293] The legal

[290] Steven Vaughan, *Existential Ethics*, 76 CURRENT LEGAL PROBS. 1, 33 (2023).

[291] Wendel, *supra* note 18, at 193.

[292] Pepper, *supra* note 209, at 634.

[293] U.S. Const. amend. VI guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the [a]ssistance of [c]ounsel." *see also* U.S. Const. amend. XIV § 1,

distinction between criminal and civil matters has been justified insofar as criminal matters involve the defendant potentially losing their life or liberty as a result.[294] The underlying logic presumes that punishments in the criminal context are more severe than punishments inflicted in civil cases, although those facing deportation and termination of parental rights proceedings may beg to differ.[295] In a context where so many people lack counsel in civil matters, law firms invoking the right to counsel for fossil fuel corporations distort foundational principles to remain unaccountable.

The issue is not whether climate wreckers are *entitled to* representation, but whether normatively we think they *deserve* representation. Under perverse pretexts, such an argument can be taken to logical extremes and be leveraged against poor and marginalized clients. However, I am not arguing that climate wreckers or others with unsavory reputations should or do not have the right to counsel. I instead argue that we must interrogate the idea of moral non-accountability in the context of well-resourced, powerful law firms lending their services to actors who prioritize their financial wellbeing at the expense of a stable climate.

which forbids a State from "depriv[ing] any person of life, liberty, or property, without due process of law. . . ."; *see also* Wendel, *supra* note 18, at 180 (the constitutional right serves as a "starting point for constructing a defense to an effort to shame lawyers for their choice of clients.").

294 *See* Wasserstrom, *supra* note 141, at 12 ("Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused-without regard, so to speak, for the merits. This coupled with the fact that it is an adversarial proceeding succeeds, I think, in justifying the amorality of the criminal defense counsel."); *cf.* Pepper, *supra* note 209 at 623 (arguing that this distinction may not be as clear as has been suggested because the purpose of civil litigation is precisely "to allow the private plaintiff to gain the power of 'the state' to enforce her claim against the defendant").

295 *See* Joan Grace Ritchey, *Limits on Justice: The United States Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L. Q. 317, 327–328 (2001) (quoting Lassiter v. Department of Social Services, 452 U.S. 18 (1981)) ("[A] rebuttable presumption exists that an indigent defendant has a right to appointed counsel 'only when, if he loses, he may be deprived of his physical liberty.'").

B. *Different Representations Merit Different Responses*

There are important distinctions to be made between types of representation provided. An associate at a firm whose portfolio includes assisting a fossil fuel corporation with securing access to land for clean energy development is differently positioned than an attorney representing an oil company lobbying against climate change legislation. At one end of the spectrum, there is representation that supports decarbonization or supports meaningful compliance with environmental regulations.[296] On the other end of the spectrum, there is representation that perpetuates the fossil fuel economy by helping secure new permits for fossil fuel extraction or greenwash a client's operations. While in all these cases the lawyer is presumably acting on behalf of the client's interests, in some of these examples the lawyer's services are in contradiction with a stable climate. Relatedly, the arguments raised to justify lawyer neutrality and non-accountability lose force in the context of corporate actors. As Dean Vaughan and others have argued, "if the basis for neutrality is respect for the individual as an autonomous moral person, it is harder to see how that applies where the client is a company, a legal fiction."[297] This is why defense attorneys representing clients accused of reprehensible behavior (e.g., torture, election fraud, sexual abuse, etc.) in the criminal context are differently positioned than those representing corporate actors in the civil context. I challenge the notion that lawyers or firms representing climate wreckers are in fact upholding access to justice through zealous advocacy. The amorality of the zealous advocate seems excessive and at times inappropriate outside the criminal context.[298] As Pepper argues, "we need a good deal less rather than more professionalism . . . among lawyers in particular."[299]

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[296] A contemporaneous example involved Harvard Law Professor Jody Freeman who served on and later resigned from the board of ConocoPhillips, who had defended her choice to serve on the board because "she believed her work at the company was 'positive' and that she joined the board to 'help advance the transition to a low-carbon economy.'" Neil H. Shah, *Harvard Law Professor Jody Freeman Resigns from ConocoPhillips Board*, THE CRIMSON (Aug. 6, 2023), https://www.thecrimson.com/article/2023/8/6/freeman-steps-down-conocophillips/.

[297] *The Unethical Environmental Lawyer*, *supra* note 7, at 8.

[298] *See* Wasserstrom, *supra* note 141, at 12.

[299] Pepper, *supra* note 209, at 12.

Critics may retort, but if everyone desists from representing these companies, who will? I offer two responses. The first one deals with the practical realities of capitalism. The second one deals with the moral and ethical dimensions underlying this choice.

First, fossil fuel companies are never foreclosed access to legal representation and it is unclear how rhetoric about due process and the rule of law explains why they would be deprived of due process if some firms declined taking them as clients.[300] Due process rights or the constitutional right to counsel in the criminal context does not create "a constitutional right to retain a specific lawyer" or suggest that "a lawyer's refusal to represent a specific client is of constitutional significance."[301] Furthermore, the right to counsel is an obligation of governmental authorities, not of individual lawyers.[302] If anything, climate wreckers have the financial means to enjoy representation by in-house counsel and at times, several law firms simultaneously.[303] This reality is further confirmed by empirical evidence showing that in practice, most attorneys rarely walk away or say "no" to a client.[304] Indeed, Vaughan and Oakley note being struck by the fact that declining representation or refusing to act operates as nuclear deterrent: "powerful and potent in theory, but unused and somewhat limp in practice."[305]

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[300] *See* Wendel, *supra* note 18, at 187 (discussing an analogous example where it was unclear why Harvey Weinstein not being able to access Ronald Sullivan, a prestigious Harvard Law faculty member, would deprive him of due process).

[301] Wendel, *supra* note 18, at 191–92.

[302] Wendel, *supra* note 18, at 195 (arguing that while "[t]he legal system as a whole certainly places considerable emphasis on securing representation for criminal defendants . . . there is a gap between that value and any obligation on the part of an individual lawyer to represent any particular client.").

[303] For example, several law firms including Jones Day; Pillsbury, Winthrop & Shaw; and Latham & Watkins have represented Chevron's refinery against civil class actions. *See* Law Students for Climate Accountability, *Legal Legacies: Richmond, California*, LSCA (Dec. 22, 2023), https://www.ls4ca.org/blog-show-all/legal-legacies-richmond.

[304] Vaughan and Oakley, *supra* note 134, at 67–68 (expressing interest in when and whether lawyers withdrew from acting given the scholarly discussion by "morally activist philosophers" on the option of "saying no" and the "standard conception" of legal ethics allowing lawyers to reject or withdraw from acting on behalf of a client) (citing Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. UNIV. L. REV. 1919 (1978)); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613 (1986).

[305] Vaughan & Oakley, *supra* note 134, at 68.

While unequal access to resources affects the average person's ability to access competent legal representation,[306] the market allows wealthy clients to hire as many lawyers as necessary in service of their commercial interests.[307] In other words, law firms respond to the logic of the market. Given the high legal fees and profits involved in multi-million-dollar contracts, it is virtually impossible that no lawyer would represent climate wreckers. The common retort of "well, if not me, then someone else would represent them" is a red herring. Access to the justice system for climate wreckers in our current economic system is a given in light of the strong financial incentives underlying corporate law. In a society where meaningful access to the legal system requires legal counsel, the lawyer becomes "the means to first-class citizenship."[308] Climate wreckers, as are many transnational corporations, are granted first-class access to the legal system. In the words of Professor Robert Gordon, "[c]lients who can afford to pay for [legal services] can rapidly exhaust adversaries who cannot, and thus turn the legal system into a device for evading the very rules it is designed to enforce."[309]

Professional duties aside, the financial incentive to represent climate wreckers is often enough reason for lawyers who have *chosen* to represent or continue to represent climate wreckers. While attorneys could still incorporate public interest considerations when counseling clients per the Model Rules, in practice there are many disincentives from doing so.[310] When there is at least one lawyer

306 *The Unethical Environmental Lawyer*, *supra* note 7, at 10 ("At the same time, if there are law firms saying 'You can't associate me with my oil and gas clients because everyone deserves legal advice' then I think we might want take a really close, really hard look at exactly how much pro bono work that law firm does. When you say everyone deserves legal advice, do you just mean everyone who can afford your £1000 an hour charge out rates?").

307 *See* Parker, *supra* note 174, at 60; Sullivan, *supra* note 57, at 183 ("The current system offers overly zealous representation to those who can afford it and representation that is inadequate or nonexistent for everyone else") (citing DEBORAH RHODES, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000)).

308 Pepper, *supra* note 209, at 617.

309 Gordon, *supra* note 214, at 259; Gordon also argues that at some point, lawyers' zealous advocacy may severely damage the broader legal framework. *See id.* at 260.

310 In practice, there are often multiple alternative pathways that may comply with the Model Rules, even when these may contradict each other. For example, an attorney who is acting as a "zealous advocate" may suggest a different course of action that is compliant with legal ethics norms, instead of choosing to prioritize

that would be willing to represent the unpopular client, the notion of "if not me, who will represent this person?" loses its moral force.[311] It is harmful when attorneys use the language of legal ethics and access to justice to justify their choices instead of confronting, or at least being transparent about, their moral commitments or lack thereof. Gordon clearly articulates that "unless lawyers are willing to examine the aggregate effects of their clients' practices" on the rule of law, "they cannot rely on the [legal] framework to justify what they do."[312]

This gets me to my second point. Firms *choose* to represent climate wreckers. Corporate law firms have a *choice* in whether they represent a client whose interests involve ignoring climate science. By hiding under their professional identity and claiming to serve "the rule of law" by representing fossil fuel companies, firms distort the very notion of justice. Lawyers often "obscure the rent-seeking process with a rhetorical façade."[313] Dean Vaughan goes one step further and characterizes these firms' statements that "everyone deserves representation" as hypocritical insofar as they rarely—if ever—promote this principle in practice by representing marginalized communities or others in dire need of legal representation. Many of the firms representing climate wreckers would be hard pressed to find examples of cases where they have supported frontline communities in their search of climate justice.

My argument deals with the importance of eroding the social license of climate wreckers, and in turn, that of law firms to claim neutrality and lack of agency in their representation. Those who claim they are "just doing their job" or following orders from their supervisors are not excised from participating in wrongdoing.[314] If anything, "the tendency to defer to others acting within institutional

the "public interest" in a particular case. For further examples, see Pamela R. Esterman, *Ethical Considerations for the Environmental Lawyer*, SN033 ALI-ABA 319 (Oct. 2007).

311 Higgins, *supra* note 272, at 206.

312 Gordon, *supra* note 214, at 260.

313 Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, *supra* note 262, at 729 (rejecting critiques based on the indeterminacy of law, which Wendel equates to "abandoning the ideal of legality and the norms of the very craft we purport to teach to our students.").

314 *See* Wendel, *supra* note 18, at 209.

roles is one of the causal factors underlying catastrophic moral failures."[315]

It is time for lawyers to reckon with the transformation climate change demands from us and start declining representation that is at odds with a stable climate. This starts with more lawyers normalizing saying no. Lawyers should refuse their services when the direct result of representation will contribute emissions and exacerbate planetary warming. Attorneys currently representing fossil fuel producers must ensure that their advice incorporates the technical, legal, and moral risks associated with fossil fuel production. Lawyers may contemplate phasing out of these contracts, especially for those clients who, despite the overwhelming scientific evidence that fossil fuels should be kept in the ground, insist on a business model at odds with our future. Withdrawing from existing representation needs to account for the client's interests, but also with the reality of climate science if we are to protect life on this planet.

C. *Enforcing Existing Rules*

Rebuking the notion that fossil fuel companies deserve representation is not the only answer. The Model Rules can offer guidance to minimize or prevent attorney misconduct in the context of representing fossil fuel clients.[316] Most complaints alleging violations of ethical rules, however, are dismissed, and many instances of misconduct are unreported.[317] The unenforceability of the Model Rules and the self-governing nature of the profession seem to remain an obstacle to aligning the legal industry with a climate-stable future.[318] Stronger enforcement of existing rules would aid in minimizing deception, misrepresentation, fraud, and other violations of law.

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315 *Id.*

316 *See* discussion on Victor Flatt's arguments. *See* Flatt, *supra* note 32.

317 *See* Sullivan, *supra* note 57, at 184.

318 Lininger notes that lawyers stand in stark contrast with other professionals who have embraced an ethical obligation to protect the environment. Lininger, *supra* note 25, at 75. Of course, there are reasons grounded in the adversarial system that separate lawyers from other professions, some of which have been discussed earlier. *See* Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2611 (2014). Macey has argued that "the self-regulatory structure of the legal profession represents the worst aspects of self-regulation . . . display[ing[the typical self-interested behavior of a cartel." Macey, *supra* note 57, at 1096.

Under Rule 3.1, attorneys are prohibited from raising frivolous claims or defenses.[319] In the context of SLAPP (strategic lawsuits against public participation) efforts and other questionable tactics, attorneys should be hesitant to assist clients raising frivolous claims against climate advocates. A recent investigation by The Guardian reveals the extent to which fossil fuel lobbyists orchestrated a campaign to adopt SLAPP legislation against climate protesters.[320] Lawyers who enable this type of intimidation should be wary of using their professional identity to further repress peaceful protest.

Rule 8.4 prohibits attorneys from engaging in deceit and misrepresentation. The rule imposes limitations on lawyers' ability to support greenwashing campaigns that will engage in misrepresenting climate science and risks. Meanwhile, as discussed in section III(A), Rule 1.2 prohibits assisting a client with committing fraud or another crime,[321] while Rule 1.16 requires withdrawal when a client insists on using the lawyer's services to commit a crime.[322] The ongoing controversies surrounding Exxon Mobil and other climate wreckers facing liability for their decades-long consumer deception efforts raises questions about the conduct of lawyers assisting with these campaigns.[323] As others have argued, it is likely that attorneys advising climate wreckers in matters at the time did not adhere to the Model Rules.[324] Finally, the duty of candor and truthfulness are both found across multiple rules, including Rule 3.3 (candor toward the tribunal)[325] and Rule 4.1 (truthfulness in statements to others).[326]

For those skeptical or hesitant to interrogate the role of lawyers and the questions raised in this Article, enforcement of the Model Rules through greater monitoring and oversight by state bars would certainly aid in ensuring attorneys are not assisting in facilitating

319 *See* MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023).

320 *See* Hilary Beaumont & Nina Lakhani, *Revealed: How the Fossil Fuel Industry Helps Spread Anti-Protest Laws Across the US*, THE GUARDIAN (Sept. 26, 2024), https://www.theguardian.com/us-news/2024/sep/26/anti-protest-laws-fossil-fuel-lobby?CMP=share_btn_url. Courts have been critiqued for not being better than bar associations in imposing sanctions on lawyers who behave unethically or unprofessionally. *See* Macey, *supra* note 57, at 1086.

321 *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023).

322 *See* MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2023).

323 *See* Griffin & Kuh, *supra* note 64, at 102–3, 113.

324 *Id.*

325 *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2023).

326 *See* MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2023).

client misconduct. Interpretations of these rules that provide specific guidance for the climate change context would help attorneys balance clients' interests with their professional responsibilities.

Enforcement of existing rules could help climate accountability by providing "a normative evaluation of [] past wrongful behavior or [] an assessment of what [is owed] moving forward given the climate crisis."[327]

D. *Developing New Rules*

Jurisdictions may decide to develop ethical guidance on how lawyers can navigate climate-related matters, building on The Law Society's guidance to solicitors. In the United States, the ABA or individual states can develop and adopt new rules, from a general rule encouraging attorneys to consider a climate-conscious lawyering approach to more specific rules prohibiting specific actions, such as supporting greenwashing, misinformation, or any type of consumer deception.[328] States that have already brought lawsuits against climate wreckers are well positioned to urge their bar to lead on this front by having clear guidance, or at the very least convening stakeholders to foster a conversation.[329] Oregon has considered rules on attorneys protecting the environment.[330] Vermont recently became the first state to pass legislation allowing cost recovery from fossil fuel companies for climate damages.[331] New York soon

[327] Kysar, *supra* note 11, at 494; *see also* Toussaint, *supra* note 61, at 294 (proposing to rearticulate professional responsibility through a deep critique of justice as opposed to throwing out the rules to increase awareness on the choices made by lawyers).

[328] *See also* Russell et al., *supra* note 37, at 890–91 (identifying four main principles for climate-competent lawyering).

[329] Others have made similar arguments in the context of environmental issues. *See e.g.,* Futrell, *supra* note 15, at 835 (arguing for more guidance on how legal ethics interacts with environmental ethics); Lininger, *supra* note 25 (proposing specific amendments to the Model Rules to promote environmental health).

[330] Oregon has also been the first state in the country to create a Sustainable Future Section. *About,* OR. STATE BAR: SUSTAINABLE FUTURE SECTION, https://sustainablefuture.osbar.org/about/ (last visited Jan. 7, 2025); *see also* Lininger, *supra* note 25, at 63 n.15 (describing efforts in Oregon to "elevate the importance of environmental issues in the bar's regulation of lawyers.").

[331] *See* Aime Williams & Jamie Smyth, *Vermont Becomes First US State to Make Big Oil Pay for Climate Damages*, FIN. TIMES (May 31, 2024), https://www.ft.com/content/21f45534-fb09-4ca2-9f23-a10a0ceb3458.

followed.[332] Lawyers interested in integrating environmental considerations into their practice beyond the legal minimum requirements can disclose to clients that their advice will be aligned with a stable climate[333] to ensure they meet their duty of transparency.

A change in ethics codes might entail encouraging attorneys to consider not only how they may offer pro bono services in support of environmental or climate advocacy, but also how their services ultimately undermine or support a stable climate. Developing robust frameworks for advised emissions or other environmental impacts may be part of quantifying how lawyers contribute to the climate crisis. Bar associations will have a key role in supporting these processes to ensure these efforts are not empty promises to further delay action and reorient attention away from law firms. Expanding existing rules requiring attorneys to disclose confidential information to prevent a client from committing a crime or fraud could also be expanded to consider other types of harm beyond bodily or financial harm.

Future discussions may implicate the representation of climate wreckers in the criminal context as the scope of legal advice will change to include criminal dimensions. While the focus of this Article has been on civil litigation, there is increasing momentum towards imposing criminal liability on climate wreckers, from a recent criminal case filed in France against oil company TotalEnergies[334] to proposed changes to the Rome Statute allowing the International

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[332] *See Governor Hochul Signs Landmark Legislation Creating New Climate Superfund*, NEW YORK STATE (Dec. 26, 2024), https://www.governor.ny.gov/news/governor-hochul-signs-landmark-legislation-creating-new-climate-superfund#:~:text=Governor%20Hochul%20Signs%20Landmark%20Legislation%20Creating%20New%20Climate%20Superfund,-Governor%20Hochul%20Signs&text=Governor%20Kathy%20Hochul%20today%20signed,2129%2DB%2FA.

[333] Note that advocates have adopted different scientific targets, such as 1.5°C, 350 ppm, or net zero by 2050. For a critique of temperature targets, *see* Juan Auz & Phillip Paiement, *The Neocolonial Violence of the 1.5°C Threshold*, OPEN GLOB. RTS. (Oct. 5, 2023), https://www.openglobalrights.org/neocolonial-violence-1-5C-threshold/.

[334] *See* Damian Carrington, *Climate Victims File Criminal Case Against Bosses of Oil Firm Total*, THE GUARDIAN (May 21, 2024), https://www.theguardian.com/environment/article/2024/may/21/climate-victims-file-criminal-case-against-bosses-of-oil-firm-total.

Criminal Court to oversee ecocide prosecution.[335] Bar associations and other legal organizations may be pressed to think about some of the questions raised in this Article in a criminal context where the decision to decline representation carries different implications. Additionally, lawyers can share individual responsibility for any illegal activity they facilitate directly. At a minimum, the tides of climate accountability seem to indicate attorneys of all kinds will continue to face increased scrutiny in both the civil and criminal contexts.

CONCLUSION

Tackling climate change demands a regime shift where existing ethics rules and principles are meaningfully enforced to prevent law firms representing climate wreckers from facilitating crime or fraud, but also where lawyers' social license to hinder a transition away from fossil fuels is interrogated. Beyond existing and emerging professional rules governing legal practice, lawyers should consider how their actions align with a stable climate.[336] By hiding under foundational legal principles such as "access to justice" and invoking concepts of "neutrality" and "moral nonaccountability" in the context of climate disaster, lawyers are distorting key principles to shield themselves from accountability. Even if legal ethics are not meant to perfectly capture ordinary morality, lawyers should not be able to hide under their professional role to perpetuate climate harm.

[335] *Experts Call for International Criminal Court to Introduce New Crime of 'Ecocide'*, STOP ECOCIDE INT'L, (Mar 1. 2024), https://www.stopecocide.earth/2024/experts-call-for-international-criminal-court-to-introduce-new-crime-of-ecocide.

[336] *See* Justice Brian J. Preston, *supra* note 35, at 59.