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LEGAL ACTIVISM AND THE CLIMATE CRISIS

LAWS523 - International Climate Change Law and Policy

Faculty of Law

Victoria University of Wellington

2022

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I Introduction

The earth's climate is quickly approaching its tipping point.¹ Considering humanity's need for drastic change, it is clear that collective action is a necessity. The legal profession now face an important question: Do they have an obligation to play a leading role in this action? Or conversely, are they bound by professional duties that prevent them from doing so?

Legal activism has become an important topic of debate in the face of the climate crisis. There is an underlying tension between those who believe lawyers have the power to enact great change using the law as a transformative force, and those that view legal activism as a threat to the rule of law. Through redefining the scope of legal activism, this paper will show that many of the arguments used in opposition are founded on a warped and self-defeating definition of the concept. After analysing the arguments on both sides of this debate, it will be ultimately concluded that not only is it possible for lawyers to engage in legal activism, but in relation to the climate crisis, lawyers may more successfully uphold their professional duties by doing so. Finally, this paper will offer guidance on how the legal profession can best engage in legal activism to support climate action. In doing so, it will be shown that legal professionals have the ability to contribute significantly to climate action without risking their professional obligations.

II The Importance of Activism: Law and the Climate Crisis

There is now strong consensus amongst scientists on the reality of climate change: In 2021, the Intergovernmental Panel for Climate Change (IPCC) stated that, "Scientific evidence for warming of the climate system is unequivocal" and the impacts of this are becoming increasingly apparent.² According to the World Health Organisation, by 2030 climate change will be the cause of approximately 250,000 additional deaths *per year* through malnutrition, malaria, diarrhoea and heat stress.³ The World Bank's latest climate change report also found that by 2050, over 216 million people could be forced to migrate to escape the effects of climate change.⁴ The recent

¹See Paul DL Ritchie and others, "Overshooting Tipping point Thresholds in a Changing Climate" (2021) 592 *Nature* 517 at 517-23; and Timothy Lenton "Tipping Points in the Climate System" (2021) 76 *RMET* 325 at 325.

²*Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2021), at 4.

³ World Health Organisation "Climate Change and Health" (30 October 2021) <www.who.int>.

⁴ The World Bank "World Bank's Groundswell Report" (Press Release, September 13, 2021).

surge in extreme weather events such as floods⁵, heatwaves⁶, droughts⁷ and wildfires⁸ are reminder enough that the consequences of climate change are already undeniable.⁹ Yet, collective state action has been dispassionate and grossly insufficient.¹⁰

In order to reach the target set in the Paris Agreement¹¹ to restrict temperature rise to within 1.5 degrees Celsius, states must reduce their emissions by 45% by 2030.¹² However, according to the 2022 UNEP ‘Emissions Gap Report’, the most recent Nationally Determined Contributions will only see emissions decrease by an average of 7.5% in this timeframe.¹³ We are currently on track to see a global temperature rise of 2.7°C within this century, but the collective response of nation-states has been largely apathetic.¹⁴

Climate change is a human-created crisis with very real humanitarian consequences. It is only natural that there must be radical human effort for change to occur. The changes that need to be made are vast, and accordingly, we cannot expect individual citizens to carry the burden alone. Given the grossly insufficient response from states, it is more important than ever that those

⁵ Yukiko Hirabayashi and others “Anthropogenic Climate Change has Changed Frequency of Past Flood During 2010-2013” 8 *Prog Earth Planet Sci* 36 at 40.

⁶ Yuming Guo and others “Quantifying Excess Deaths Related to Heatwaves Under Climate Change Scenarios: A Multicountry Time Series Modelling Study” (2018) 15 *PLoS Medicine* 7.

⁷ Felicia Chiang and others “Evidence of Anthropogenic Impacts on Global Drought Frequency, Duration, and Intensity” 12 *Nature Communications* 2754.

⁸ Nerilie J Abram and others “Connections of Climate Change and Variability to Large and Extreme Forest Fires in Southeast Australia” 2 *Communications Earth & Environment* 1 at 1-17.

⁹ See generally *Sixth Assessment Report*, above n 2, at 4.

¹⁰ Louis Kotzé and Sam Adelman “Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope” (2022) 112 *Law and Critique* 22.

¹¹ Paris Agreement Under the United Nations Framework Convention on Climate Change 3156 UNTS (opened for signature 16 February 2016, entered into force 4 November 2016).

¹² United Nations Online “For a livable climate: Net-zero commitments must be backed by credible action” United Nations <www.un.org>.

¹³ United Nations Environment Programme Emissions Gap Report, UNEP Copenhagen Climate Centre (UNEP-CCC), (27 October 2022) at 29.

¹⁴ At 15.

working in the legal profession use their unique expertise to address climate change from within the legal system.

III Legal Activism Defined

There is very little congruency in the terms used to describe lawyers taking professional action to further climate concerns. Academics and legal professionals engaged in this debate have used various phrases such as “professional activist,”¹⁵ “legal activist”¹⁶ and “the climate conscious lawyer,”¹⁷ among others. Despite the variance in terminology, under all of these interpretations there are similar apprehensions and arguments levied against lawyers taking professional action in the climate crisis, regardless of how the term is labelled. But perhaps one of the most talked about terms is legal activism.

The word “activist” is often treated as a ‘dirty’ term in this debate, one that is connected to more traditional forms of activism that participate in behaviour that is illegal or controversial.¹⁸ Accordingly, there could be a temptation to avoid using the term “legal activist” in this context, largely because of these preconceived ideas. However, it is my belief that the arguments levied against lawyers being involved in climate activism are largely based on an incorrect or unhelpful view of what it should mean to be a legal activist. In order to engage directly with critics of legal activism in this climate crisis, I wish to contribute to a reframing of what the concept should look like. As will be discussed throughout this paper, many of my arguments are founded on the fact that I would define the scope of legal activism in a different way to many other academics.

There is no clear agreement on what “legal activism” really means, and therefore the discussion throughout this paper will be framed around an original definition. It is my opinion that understanding the scope of this term is key to ensuring that when encouraging legal professionals

¹⁵ Chan Suh “Differential Participation in Professional Activism: The Case of the Guantánamo Habeas Lawyers” (2014) 19 MIQL 287 at 290.

¹⁶ James Douglas “The Distinction between Lawyers as Advocates and as Activists” (2002) 40 CSLR 405.

¹⁷Brian J Preston “Climate Conscious Lawyering” (2021) 95 Australian Law Journal 51.

¹⁸ See generally Kylie Message “Soup on Van Gogh and graffiti on Warhol: climate activists follow the long history of museums as a site of protest” (10 November 2022) The Conversation <www.theconversation.com>.

to engage in legal activism, one does so without encouraging unethical or unprofessional behaviour.

The definition of “professional activism” is a useful starting point in clarifying the meaning of legal activism. According to Suh, professional activism is defined as “collective actions primarily driven by highly educated professionals in legal, medical, religious, journalistic, academic, and other occupations who voluntarily provide their professional skills and knowledge to make collective claims based on common causes.”¹⁹ This concept focuses on individuals taking not only personal accountability, but also professional and institutional responsibility, for social change. There is an emphasis on using the *professional skills and knowledge* of these individuals to further important causes, which is a distinct concept from activism engaged with in a personal capacity.

I would view legal activism as a subset of professional activism, whereby legal professionals can use their professional skills and knowledge in order to drive collective professional actions for a common cause. In the case of the climate crisis, legal activism should focus on how lawyers can use their legal skills and knowledge to further institutional and social change that addresses the need for climate reform.

It must be emphasised that a fundamental part of this definition is that legal activism should only encourage lawyers to take action that is compatible with their role as a lawyer. Actions that undermine a lawyer’s professional code of conduct or other important principles, such as the rule of law, should not be viewed as within the scope of legal activism. The value of legal activism is that lawyers are able to use their *professional skills and knowledge* to help further climate action; this concept becomes entirely redundant if a lawyer is not acting within the bounds of their profession. A definition of legal activism that encourages unethical or illegal behaviour is entirely counterproductive to the purpose of engaging professionals in activism, and therefore should not be adopted.

As will be discussed throughout this paper, I believe that a misunderstanding of this key term is what has led many to be reluctant to participate in legal activism, particularly in relation to the climate crisis. Clarifying the bounds of what it really means to be a legal activist should allow legal professionals to realise that being an advocate for the climate does not undermine their roles as lawyers, their professional duties, or pose a danger to justice.

¹⁹ Suh, above n 15, at 288.

IV Legal Activism: Arguments in the Debate

A The Role of a Lawyer in Society: Lawyers as “Rule Interpreters”

The topic of activism, and its place in the legal field, is a discussion often tied up in questions of ethics and morality. There is an apparent tension between the need to address the growing issue of the climate crisis, and the desire to maintain the integrity and stability of the legal profession.

There is significant debate in this field over “what it means to be a lawyer,” and how the profession is perceived by both society and those within it. There are many important questions that have implications in the debate around professional activism: Are lawyers merely rule interpreters? Or do they have a moral duty to further the interests of wider society? Would moral duties encourage a lawyer to engage in climate activism within their role as a lawyer?

James Douglas argues that there is a clear distinction between advocacy and activism, and a lawyer's role is to maintain the “rules,” rather than assist in changing them.²⁰ Douglas asserts that activism is never within the ambit of a lawyer's professional role, and that lawyers should not view their profession as being a part of encouraging legal change. In writing for *The Justice Mission of American Law Schools*, Douglas stated:

If one wants to change the definitions of the rules that govern the interrelationships of members of the society, one cannot change the definitions while operating as a lawyer. One can only seek to change the definition of a rule by functioning as a social activist. The dilemma is that a lawyer's role in society is not to change the rules of the game, but to assist in maintaining the rules and to help resolve conflicts under the established rules. When I talk to my students about their roles as lawyers, I say to them that those people who want to change society have to step outside of their role as a lawyer and become social activists.²¹

Douglas' view of lawyers is decidedly singular and reduces the profession to that of mere rule interpreters. The Author claims that lawyers cannot uphold the rule of law whilst seeking to change the rules they are applying. In Douglas' view, impartiality requires lawyers to work within the legal system without using their professional influence to advance new law.²² I would

²⁰ Douglas, above n 16, at 406.

²¹Douglas, above n 16, at 407.

²² At 407.

contend that whilst lawyers do play an important role in resolving conflicts under established law, they also have the ability to enact great changes in society through their work. The proposition that lawyers should never challenge the law, and instead should *always* have a focus on maintaining the rules, suggests that lawyers should be expected to sit silently and without opinion even when the law is grossly unjust.²³ It also suggests that the law is always clear and obvious. If shared by all, such a stern view of the legal profession would have severe consequences for society: We rely on the legal profession, as experts in the law, to recognise when the decisions of Parliament, or equally the judiciary, are incompatible with human rights, the rule of law, or the greater pursuit of justice.²⁴ Understanding the consequences of the decisions made by lawmakers is something that lawyers are in a unique position to do.²⁵

Whilst lawyers do play an important role in resolving conflicts under established law, they also have the ability to enact great changes in society through their work. Ruth Bader Ginsburg²⁶, Thurgood Marshall²⁷, Dr. Clarence B. Jones²⁸ and Cesare Beccaria²⁹ were all activists in their own right, and used their roles as lawyers, and the power of the law, to further a movement or cause. Ruth Bader Ginsburg is a great example of how the role of a lawyer can extend far beyond the limitation of “rule interpreter.” Bader Ginsburg was a professional activist best known for being a proponent of gender equality. In her early career, Bader Ginsburg was a professor of law and published numerous articles on gender equality and women’s rights.³⁰ She later worked on a

²³ Srinivas Burra “A Reductionist View on the Role of Lawyers” (1 October 2021) *OpinioJuris* <www.opinionjuris.org>.

²⁴ Preston, above n 17, at 52.

²⁵ Burra, above n 23.

²⁶ Tanya Elahi “Profile Of An Activist Lawyer: Justice Ruth Bader Ginsburg” (30 November 2020) *Human Rights Pulse* <www.humanrightspulse.com>.

²⁷ See Floyd G Delon “The Legacy of Thurgood Marshall” 63 *JNE* 278 at 279-287.

²⁸ See Michele Norris “Clarence B. Jones: A Guiding Hand Behind *I Have A Dream*” *NPR* (Online ed, 27 August 2013).

²⁹ See Marcello T Maestro “Cesare Beccaria and the Origins of Penal Reform” (Temple University Press, 1973).

³⁰ See Kenneth Davidson and Ruth Bader Ginsburg *Text, Cases and Materials on Sex-Based Discrimination* (1st ed, Columbia Press, New York, 1974). Ruth Bader Ginsburg “Inside the Columbia Archives: Writing by Ruth Bader Ginsburg ’59” (August 2018) *Columbia Law School* <www.law.columbia.edu> and Ruth Bader Ginsburg and Amanda L. Tyler *Justice, Justice Thou Shalt Pursue* (University of California Press, California, 2021).

series of gender-discrimination cases, including the case *Reed v Reed*, which saw the US Supreme Court strike down a law on the basis of gender discrimination for the first time.³¹ In her later career, Bader Ginsburg was appointed to the US Court of Appeal, and then later the US Supreme Court, where she was involved in a number of landmark civil rights decisions, including *Obergefell v Hodges* which legalised same-sex marriage.³² Bader Ginsburg was known for using her voice as a professor, lawyer, and then judge, to support equal rights through legal mechanisms.³³ Most importantly, Bader Ginsburg's activism was all undertaken from within her career as a law professor, lawyer and then later judge: She used her professional knowledge of the law, as well as her position as a lawyer, to further important social causes. Famously, in an address at the Radcliffe Institute, Bader Ginsburg said: "Fight for the things that you care about, but do it in a way that will lead others to join you."³⁴ Rather than blindly interpreting the rules before her, Bader Ginsburg used the law, and existing legal mechanisms, to challenge the validity of laws she saw as unjust.

Douglas' assertion that lawyers "who want to change society have to step outside of their role as a lawyer and become social activists" neglects to acknowledge that we have already seen generations of lawyers use their position within the law to enact social good.³⁵ The law is a great transformative force, and meaningful activism can take place using existing and developing legal mechanisms. Activism should not be viewed merely as an anarchist exercise in enacting change through abandonment of legal principles. Lawyers, who have an intimate knowledge of the law and its impacts on society are in the best position to work *within* the ambit of the law to bring about crucial changes that address the climate crisis and other issues of justice. Lawyers should not avoid climate activism for fear that it goes beyond their role in society as a lawyer; some of the most respected lawyers in history are those that have accepted that their profession has the power to do more than just blindly interpret rules.³⁶

Nevertheless, Douglas is not alone in holding this narrow view of the legal profession; in response to the World Lawyers' Pledge for Climate Action, Benoit Mayer argued that it is a

³¹ *Reed v Reed* 404 U.S. 71 (1971).

³² *United States v Virginia* 518 U.S. 515 (1996); and *Obergefell v Hodges* 576 U.S. 644 (2015).

³³ Elahi, above n 26.

³⁴ Colleen Walsh "Honoring Ruth Bader Ginsburg" (29 May 2015) The Harvard Gazette <www.news.harvard.edu>.

³⁵ Douglas, above n 16, at 407.

³⁶ Ronald Dworkin *Justice in Robes* (1st ed, Harvard University Press, Cambridge, 2008) at 23.

lawyer's job to ascertain what the law is, but not to question its efficacy or morality.³⁷ Mayer takes a firmly positivist view of the law, and by extension lawyers, whereby the law is seen as something not connected to morality at all. In my view, there is a lack of nuance in any argument that conceptualises the law in such a simplistic way. Scholars of legal jurisprudence have debated the nature of law for centuries, and whilst positivism is a prominent legal theory, it is only one of many.³⁸ Mayer asserts that "Our function as curators of human knowledge isn't to advocate for causes that we believe to be right, but to help society determine what is true (eg what the law is)."³⁹ Whilst I agree that a fundamental part of legal practice involves determining what the law really is, this does not by necessity require a lawyer to withhold judgement on whether the results are unjust. This is particularly true in the case of the climate crisis, where unjust outcomes for domestic law can have manifest and widespread impact on not only human rights, but also on a state's international legal obligations.⁴⁰

Engaging in analysis of the moral implications of particular rules cannot be seen as incompatible with the endeavour of objectively ascertaining the substantive content of the law.⁴¹ The law can be understood and examined through a range of jurisprudential lenses, and each perspective will conceptualise the role of a lawyer differently.⁴² But as legal scholar Srinivas Burra explains, lawyers who believe in other moral theories, such as feminist legal theory, critical legal studies, or marxist jurisprudence, will "reject the idea of the autonomy of law and question what the law is today. At the same time, many of them [still] engage with the existing law on a daily basis."⁴³ As Burra points out, is illogical to argue that when dealing with the current law, these individuals remain as lawyers, but when engaging in critical analysis they are no longer acting within the bounds of their profession. Mayer's conception of lawyers, much like Douglas', is overly simplistic and reduces the role that lawyers play in society to its most basic form.

³⁷ Benoit Mayer "Why I Can't Sign the World Lawyers' Pledge on Climate Action" (15 September 2021) *OpinioJuris* <www.opinionjuris.org>.

³⁸ Anne Orford and Florian Hoffmann *The Oxford Handbook of the Theory of International Law* (Oxford University Press, Oxford, 2016).

³⁹ Mayer, above n 37.

⁴⁰ Sara Aminzadeh "A Moral Imperative: The Human Rights Implications of Climate Change" (2007) 30 *HICLR* 231.

⁴¹ Burra, above n 23.

⁴² Marett Iboff *Legal Theories: Contexts and Practices* (2nd ed, Thomson Reuters Professional, New South Wales, 2014).

⁴³ Burra, above n 23.

I disagree with both Douglas and Mayers' claims that a lawyer cannot objectively discharge their duties if they also question the morality or effectiveness of the current law. A lawyer can still be objective about *what the law currently is* whilst separately evaluating whether this ought to change. To say that there is a direct tension here is misleading, and relies on a warped interpretation of what legal activism should look like. In contemplation of this debate, Mayer posed a series of questions to justify his position. I would argue that the articulation of these questions exposes clear shortcomings in his argument:

What should I do, as a signatory of the [Climate] Pledge, when my research finds that, after all, states have no firm legal obligation to act consistently with the 1.5/2°C temperature targets; or that human rights treaties open only “narrow windows” on the applicability of general mitigation obligations? Should I suppress such findings on the ground that these conclusions aren't conducive to the agenda that I agreed to promote? Should I manipulate my research to arrive at “better” conclusions?⁴⁴

The suggestion that legal activism would require, or even encourage, lawyers to act in a way that is deceitful is absurd. The purpose of encouraging lawyers to become more involved in climate activism is to have those working within the law acknowledge that the existing legal response has been insufficient. A large part of legal advocacy in this area will be focused on highlighting the current flaws in international and domestic law and finding new ways to get states to take action. Mayer is right that activism that invites lawyers to mislead their clients and the public would conflict with a lawyer's professional responsibilities. However, there are varied opportunities for activism in the field of law, none of which would legitimately ask a lawyer to act unethically. These opportunities will be discussed in greater detail in Part V of this paper, however, it should be noted here that the “right” approach to climate activism will be different for every lawyer, depending on their expertise and constraining factors like conflict of interest.

The implications of viewing lawyers as mere rule interpreters suggests that if lawyers are to be critical of the law, they can only do so in a personal capacity.⁴⁵ To suggest that those who are most involved in navigating legal systems are unable to criticise them in a professional capacity is extremely disconcerting; the unique knowledge that lawyers offer comes from their position

⁴⁴ Mayer, above n 37.

⁴⁵ Burra, above n 23.

within the legal system, not because of their experience as a citizen.⁴⁶ In no other profession would there be such an expectation of professional censorship.

In contrast, in the medical profession physicians are encouraged to question the morality of their practice, even when their conduct is sanctioned by both the law and professional codes of conduct.⁴⁷ It is through this professional scrutiny that public health and medical ethics has remained dynamic and developed swiftly in response to society's needs.⁴⁸ Most recently, many nurses and physicians debated New Zealand's decriminalisation of assisted suicide and engaged in discussions of the morality of life sustaining practices in the context of terminal illness.⁴⁹ These practitioners were allowed, and in fact encouraged, to question the ethical implications of changes in public health, regardless of the fact that supporting assisted suicide could objectively be seen as being at odds with their professional code of conduct (the hippocratic oath).⁵⁰ Nevertheless, it was acknowledged that those engaged in the medical profession provided invaluable insight on the ethical implications of work in their own field.⁵¹ In contrast, Douglas and Mayers' conception of the role of lawyers suggests that lawyers should not be able to do the same.

If a lawyer cannot comment on the inefficiencies of the law, then who can? Ostensibly, the answer would be *everyone else*; there are no other professions that feel so bound by objectivity that they cannot raise questions about the law, or equally the professional environment they work in. There are certainly other professions that engage regularly with the law and they can, and should, also provide important contributions on the development of climate legislation. However, none know the law as intimately as lawyers; those who have dedicated their entire careers to the pursuit of understanding these mechanisms. The question is, should it be left to those with less knowledge to work out how the law can adapt to address the climate crisis? And should it be only them who can criticise the lack of adaptation so far?

⁴⁶ As above.

⁴⁷ George J Annas "Doctors, Patients, and Lawyers — Two Centuries of Health Law" (2012) 367 N Engl J Med 445 at 446.

⁴⁸ At 446.

⁴⁹Pam Oliver and Michael Wilson "New Zealand doctors' and nurses' views on legalising assisted dying in New Zealand" (2017) 130 NZ Med J 10.

⁵⁰ Howard Markel "I Swear by Apollo — On Taking the Hippocratic Oath" (2004) 350 N Engl J Med 2026 at 2027.

⁵¹Annas, above n 47, at 445.

Furthermore, we can already see evidence of lawyers engaging in critical analysis on the morality and validity of laws in their everyday work. To limit the role of a lawyer to “rule interpreter” neglects the reality of how most within the legal field currently function. In the Rules of Conduct and Client Care for Lawyers, it is acknowledged that all client obligations are subject to other overriding duties, including duties to the courts and to the justice system.⁵² Most importantly, lawyers are expected to uphold the rule of law and ensure that legal decision making is not made without consideration for its impact on the justice.⁵³ Most recently, criminal defence lawyers openly criticised a new policy from the Ministry of Justice that allowed duty lawyers to be paid a fee if they had their clients plead guilty at their first court appearance.⁵⁴ Despite the fact that this policy was “good law” from a positivist perspective⁵⁵, these lawyers “raised questions about the ethicality of such an incentive.”⁵⁶ To argue that lawyers are mere rule interpreters and cannot comment on the efficacy or morality of the law, assumes that those currently practicing law do not subvert this definition already. Lawyers have a duty to uphold justice, and this often requires them to think critically about whether the current law is facilitating this aim. In all areas of law, legal professionals will be discerning in their application of legal rules. To ascertain what the law is and apply it blindly is not only shortsighted, but neglects to address the more overarching aims of justice.

The law is designed to progress in response to society’s changing needs, morals and ideals. Much of our law has developed piecemeal in response to emerging problems that society deems as undesirable. The climate crisis is the biggest issue facing humanity today, and the law needs to swiftly respond to face this challenge. Although the conception of a lawyer changes depending on who you ask, one thing that should be agreed upon is that lawyers are the leading experts in the law. Of course, it follows that lawyers would be in the best position to advise on how legal mechanisms can address the growing concern for the climate. Limiting the role of a lawyer to

⁵²Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, s 3.

⁵³ Section 3.

⁵⁴Marine Lourens “‘Profoundly unethical’: Duty lawyers paid an extra \$120 if clients plead guilty at first court appearance” (15 October 2022) Stuff News <www.stuff.co.nz>.

⁵⁵Legal positivists do not judge the law based on its inherent morality or facilitation of justice. Instead, “good law” is seen as law that is judged on the process in which the law is made. If due process is followed, then a law is “good,” regardless of its apparent morality. See Frederick Schauer *Normative Legal Positivism* (1st ed, Cambridge University Press, 2021) at 505.

⁵⁶Lourens, above n 54.

that of a mere rule interpreter is not only detrimentally prohibitive, but also a complete fallacy: Lawyers throughout history, along with those in modern legal practice, criticise the law whilst still carrying out their other professional duties. In the context of the climate crisis, such criticism has never been more necessary.

B Independence: Separation of Personal Beliefs and Professional Action

It is also argued that to label a lawyer as a legal “activist” undermines the important separation between advocacy and private interest.⁵⁷ The severance between a lawyer’s personal beliefs and professional actions are important to allow them to do their job properly.⁵⁸ It is suggested that if lawyers choose to engage more meaningfully as activists in their professional roles, they may be going beyond the normal conception of their profession and threatening independence.⁵⁹ I disagree that this is an irreconcilable issue.

It is true that lawyers across the world are bound by ethics codes that require them to provide legal representation whether or not they agree with the cause they are representing; this is an essential pillar of the rule of law.⁶⁰ It is my belief that identifying with the cause you represent does not prevent your opposing counsel from conversely choosing to maintain separation in their work. It is certainly not uncommon for lawyers to take on cases in which they agree with their client and see merit in the cause they are representing. Equally, most lawyers will no doubt work cases where their personal morals do not align with that of their client’s. This is no different in the case of the climate crisis: There will be instances where a legal professional engages with a client that has virtuous environmental aims. Simultaneously, lawyers will regularly engage with clients whom are heavy emitters or engage in business practices that damage the environment. Nevertheless, a lawyer can be a climate activist regardless of which side of the fence they fall.⁶¹

⁵⁷ Lynn C Jones “Career Activism by Lawyers: Consequences for the Person, the Legal Profession, and Social Movements” in *Legal Professions: Work, Structure and Organization* (Emerald Group Publishing Limited, 2001) 181 at 190.

⁵⁸ At 190.

⁵⁹ At 195.

⁶⁰ James Fleming *Getting to the Rule of Law* (New York University Press, New York, 2011) at 6.

⁶¹Katie Kouchakji “How the Climate Crisis is Changing the Legal Profession” (28 September, 2021) International Bar Association <www.ibanet.org>.

Representation of heavy emitters is still an important part of climate activism: As was explained by Christy Baker; “you want even the worst emitters to have good representation to bring them along.”⁶² My argument is not that lawyers should transform the bounds of their profession, but rather, a more concerted effort should be made to consider the ability of lawyers to influence and navigate the law in a way that furthers the development of climate change regulation and response. Legal activism is something that is accessible to *all lawyers*, even those who represent clients that engage in activities that harm the environment. As will be discussed in Part V, in this context, lawyers can still engage in legal activism by giving more holistic advice that advises clients of the repercussions their decisions may have on the climate.

Those who criticise legal activism seem most concerned with the impacts it would have on their professional obligations, in particular, their duty to provide access to representation for all.⁶³ In New Zealand, the legal Code of Conduct states:

4. A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer’s fields of practice.

4.1 Refusing instructions: Good cause to refuse to accept instructions includes a lack of available time, the instructions falling outside the lawyer’s normal field of practice, instructions that could require the lawyer to breach any professional obligation, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for the relevant work.⁶⁴

It must follow that being a legal activist should not require lawyers to only represent clients who are climate conscious. As highlighted by Baker, it is, in fact, incredibly important that even the worst emitters have access to legal representation.⁶⁵ Solutions to the climate crisis need to be comprehensive and widespread, and accordingly, it is not only consumer demand that needs to change: In order to appropriately address the crisis, supply-side solutions will also play a key

⁶²As above.

⁶³ Mayer, above n 37.

⁶⁴Lawyers and Conveyancers Act 2008, s 3.

⁶⁵ Kouchakji, above n 61.

role in moving toward a more sustainable society.⁶⁶ The climate crisis will impact all areas of life, and therefore, all areas of the law need to adapt. In order for this law to be both environmentally and economically sustainable, industries that are the greatest carbon emitters need to be involved in discussing a path forward, particularly when these emitters often sustain entire economies. No doubt, having legal activist lawyers occupy advisory positions in these entities will bring the climate crisis to the forefront of decision making.⁶⁷

Ultimately, professional activism should never require or encourage individuals, or institutions, to sacrifice professional obligations in order to further a cause. To do so would be entirely counterproductive; the entire purpose of legal activism is to encourage a sustainable adaptation of the legal profession in response to the crisis, not to create a subset of lawyers who are subverting their ethical code and are therefore likely to be reprimanded. The suggestion that legal activism should require lawyers to take any action that is *not legal* is regrettable. However, many of those who oppose legal activism have had their interpretation of the concept informed by misguided representations.⁶⁸ For example, in the World Lawyers' Pledge for Climate Action, it is stated:

Where possible and appropriate, we will use our skills and positions to bring actionable climate cases before courts, and will pursue or support strategic climate litigation. In parallel, we choose to refrain from providing legal advice to individuals or corporate actors who seek to circumvent or undermine meaningful climate action or avoid climate responsibility, where that is compatible with our professional standards.⁶⁹

The suggestion that lawyers should “refrain from providing legal advice”⁷⁰ to any person or organisation on this basis is problematic at best. Although the pledge does note that this should only be done where “compatible with professional standards”⁷¹, this proposition itself is

⁶⁶ Francesco Clora and others “Impacts of supply-side climate change mitigation practices and trade policy regimes” (3 December 2021) IOP Science: Environmental Research <www.iopscience.org>.

⁶⁷ Preston, above n 17, at 52.

⁶⁸ Mayer, above n 37.

⁶⁹ “World Lawyers’ Pledge for Climate Action” (2022) Lawyers Climate Pledge <www.lawyersclimatepledge.org>.

⁷⁰ As above.

⁷¹ As above.

misleading. If an organisation or individual intends to *lawfully* undermine climate action, lawyers still have an obligation to provide services if they are available.⁷² It already goes without saying that if an organisation intended to unlawfully avoid climate responsibility, a lawyer would be expected to refrain from assisting them. This is not climate activism, it is simple legal ethics.

Under Chapter 4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, a lawyer “must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer’s fields of practice.”⁷³ Specifically, services cannot be withheld because of either “(a) any personal attributes of the prospective client” or because of “(c) the merits of the matter upon which the lawyer is consulted.”⁷⁴ This rule, known colloquially as the ‘cab-bank rule’ requires lawyers to take on cases regardless of their own personal interests.⁷⁵ Accordingly, a lawyer could not justify declining a client based on their position as a legal activist. Even in the face of the climate crisis, I would assert that lawyers should continue to pursue zealous advocacy and strictly avoid discrimination in their representation. Professional activism should always be exercised with the utmost regard to the professional code of conduct, and lawyers should be guided by these ethical principles in deciding the most appropriate ways to engage with legal activism. It would be regrettable if lawyers were to undermine the public faith in the legal profession by subverting important rules, like the cab-bank rule, in order to further climate reform. Ultimately, the greatest power lawyers have is the ability to navigate the law and advocate for the interests of parties based on their professional knowledge. If legal ethics are cast aside, the ability for this work to be done is entirely undermined. It is certainly true that change can often be achieved through grassroots initiatives involving civil disobedience.⁷⁶ However, lawyers should focus on how their actions as engaged professionals can *compliment* this action, rather than model it.

In part, the World Lawyers’ Pledge does build support for arguments against legal activism: One can understand how this type of activism would be inappropriate for a legal professional. At best,

⁷² See Lawyers and Conveyancers Act 2008, Section 3.

⁷³ Lawyers and Conveyancers Act 2008, s 3.

⁷⁴ At Section 3.

⁷⁵ Donald Nicholson “Making Lawyers Moral? Ethical Codes and Moral Character” (2005) 25 Society of Legal Scholars 601 at 622.

⁷⁶ Elisabeth Eide and Risto Kunelius “Voices of a Generation: The Communicative Power of Youth Activism” (2021) 169 CCLJ 6 at 6.

statements that encourage lawyers to operate in legal grey areas are harmful to the concept of legal activism as a whole. Nevertheless, legal activism does not begin and end with the strategic acceptance of clients: As will be discussed later in this paper, there are a number of ways in which lawyers can meaningfully engage with activism in their careers without threatening their professional obligations. Professional duties need not, and should not, be put at risk when engaging in legal activism. This is particularly important considering the need for lawyers to engage with heavy emitters in order to bring them to the table when generating solutions.

C Conflict of Interest and Career Risk

A further concern is that lawyers who engage in legal activism will be putting their careers at risk by introducing significant conflicts of interest.⁷⁷ This is not an irrelevant consideration given the ability for widespread environmental legislation to impact all areas of life: It is possible that activists for climate change will bring about legislative changes that have impacts on a number of industries, many of which could be perceived negatively by clients. However, it is important to consider that climate change is inevitable and industries which rely on unsustainable practices need to be advised on this.⁷⁸ Lisa DeMarco argues that lawyers need to adapt to shifts in society and take climate change considerations more seriously for their clients.⁷⁹ In order to properly discharge their fiduciary duties, lawyers who represent heavy emitters need to have a more robust view of how being a legal activist for the climate can have long term benefits for the strategic positioning of their clients. Baker-Jones elaborated on this concept further:

In the past, so many lawyers and law firms, I am sure, looked at me as some kind of liberal with a green agenda, but I have always looked at climate change as a risk for clients...In a global economy that's transitioning to a net-zero economy, your advice to a petroleum client has to be that there are policy and regulatory risks in holding potential stranded assets and they need to engage with financiers and shareholders to manage this...Lawyers have to step out of their very comfortable, often removed and sometimes shiftless position of saying "this is what the law says" and be more strategic...If you're only advising your client on what the law says, you're not really assisting them with their transition.⁸⁰

⁷⁷ Suh, above n 15, at 291-299.

⁷⁸ Above n 17 at 52.

⁷⁹ Kouchakji, above n 61.

⁸⁰ Kouchakji, above n 61,

It is important to acknowledge that climate activism will not look the same for every lawyer: A lawyer working in a large firm will be unable to engage in strategic litigation that opposes the interests of their client, and a lawyer working in government will be unable to openly oppose government legislation. Conflicts of interest must still be navigated with care and diligence. Nevertheless, there is no lawyer who will be unable to engage in some level of professional climate activism. It is essential that the specifics of climate activism in the legal profession are seen as something context-dependent and nuanced; the professional duties of a lawyer should not be disregarded in favour of taking on the climate as a client. In seeking change we need to strengthen our legal system, rather than cripple it.

Lawyers must understand that climate change litigation and legislation is becoming increasingly relevant to all lawyers.⁸¹ As the climate crisis worsens, the pervasiveness of its impacts and responses will continue to expand. Lawyers will play a large role in applying and navigating these reforms and accordingly need to understand the important role they play in driving them. The science of the climate crisis is indisputable, and it tells us that the consequences of climate change are imminent.⁸² As society adapts to these changes, legal reform will undoubtedly come, whether this is preventative or reactive. Having an understanding and regard for the climate crisis only puts lawyers in a better position to navigate this challenging environment as it develops.

Australian law reform expert Rachel Walmsley noted that climate change, which was once viewed as only relevant to environmental lawyers, is becoming increasingly prevalent in other practice areas, “including constitutional, corporate, torts, human rights and insurance law...”⁸³ Being knowledgeable about the climate crisis, and the legal reform that develops in response, would certainly not be seen as a conflict of interest. If anything, remaining aware of how the law is developing, and analysing the strategic risk that is involved in failing to address climate concerns, is important for clients in all industries.⁸⁴

Those engaging in professional activism can seek to avoid conflicts of interest in the same way any other lawyer would; by ensuring that they do not engage in activism that would directly harm their client’s interests. Conflicts of interest, just like in any area of legal practice, will only

⁸¹ Naomi Neilson “‘Use legal skills to solve this wicked problem’: The role of lawyers in climate change debates, litigation and social change” (30 November 2021) Lawyers Weekly <www.lawyersweekly.com.au>.

⁸²Ritchie, above n 1, at 325.

⁸³ Neilson, above n 81.

⁸⁴ Neilson, above n 81.

become an issue if you are not exercising judgement. As will be elaborated on in part V, a lawyer who represents clients that are heavy emitters, this does not mean that they cannot be a legal activist for the climate.

D Lawyers Provide “No Unique Insight”

A further argument against legal activism in the climate crisis is that lawyers, unlike scientists, economists and moral philosophers, allegedly offer no unique insight on the climate crisis.⁸⁵ Mayer argues that the insights lawyers provide are informed by their knowledge as citizens, rather than their experience as lawyers:

...most lawyers don't have advanced training in science, economics, or moral philosophy, which would allow us to have unique insights about what should be done about climate change. I am a climate law scholar, and I strongly believe that ambitious climate action is needed, but the two are unrelated: my belief that ambitious climate action is needed isn't informed by my knowledge of climate law, but merely by reading the news and some synthetic publications on climate science, climate economics, and climate ethics. My belief in the need for ambitious climate action is that of an informed citizen, not that of a lawyer.⁸⁶

Whilst it is true that lawyers cannot single-handedly address the climate crisis, I disagree with Mayer that lawyers offer no unique insights in a professional capacity. The solution to climate change is in no way obvious, and the answer to how we move toward a low carbon economy whilst balancing economic advancement and moral concerns is complex and multi-faceted.⁸⁷ Lawyers may not be able to provide professional insight into the science behind climate change, nor be the best to offer technological solutions or philosophical frameworks for balancing ethical trade-offs. However, lawyers are certainly able to provide insight into the *law* and how it interacts with the environment, enables or limits environmental destruction, and empowers individuals and institutions to make change.⁸⁸

⁸⁵ Mayer, above n 37.

⁸⁶ As above.

⁸⁷ Laura Burgers “Should Judges Make Climate Change Law?” (2020) 9 *Transnational Environmental Law* 55 at 59.

⁸⁸Burra, above n 23.

The exact content and architecture of law reform will ultimately be decided by states, but this must be informed by a greater understanding of how the law interacts with different aspects of society and can be improved to provide greater accountability to various groups and actors. Lawyers, as the leading experts in the law, can provide insight into the current inefficiencies of the law so that other professionals can contribute to solutions.

The climate crisis is the biggest issue currently faced by humanity, and thus an ‘all hands on deck’ approach is needed.⁸⁹ Lawyers can work *with* scientists, politicians, economists and moral philosophers to find a balanced approach to law reform that is both ambitious and effective.⁹⁰ Whilst it is true that lawyers “are the guardians of the law, not its legitimate owners,”⁹¹ this should not prevent legal professionals from being able to propose solutions for the climate crisis and contribute to legislative reform. Legal activism does not aim to override democracy, nor disregard the contributions of other professions. Instead, I would argue that lawyers offer a unique perspective on how we can use *legal mechanisms* to more effectively govern the climate. Lawyers can help to assist the public in understanding the law and how it can be used as a tool for change and reform, as well as identify inefficiencies in the law to be addressed by policy makers and the public. Lawyers can also work with scientists to suggest legislative changes that best incorporate scientific solutions, as well as assist in holding states to account when international agreements are not upheld. A lawyer’s ability to make change in this field is just as valuable as scientists and economists, which is particularly important given the need for all to be involved in addressing the biggest issue humanity is yet to face.

V What Can Climate Activism Look Like in the Legal Field?

Climate activism must be expansive and multifaceted. Within the legal field, there is room for lawyers to engage in varied legal activism so as to not jeopardise their duty to clients or introduce conflicts of interest. The International Bar Association released a Climate Crisis Statement which outlined several ways lawyers can address the climate crisis from within the profession:⁹² Regardless of which area of the law one practices in, there is scope to incorporate small and large considerations into ones professional practice. Whether a legal professional is working in government, private practice, or the court system, there is an area of legal activism that all can engage with. Bringing climate concerns to the forefront of decision making not only

⁸⁹ Preston, above n 17, at 51.

⁹⁰ Burra, above n 23.

⁹¹ Mayer, above n 37.

⁹² International Bar Association “Climate Crisis Statement” (Press Release, 5 May 2020).

allows modern legal professionals to play a role in addressing the climate crisis, but it also allows them to take a more comprehensive approach when discharging their duties.

A Holistic Legal Advice: Legal Activism in Everyday Legal Practice

In their everyday practice, lawyers should “[advise] their clients of the potential risks, liability, and reputational damage arising from inactivity that negatively contributes to the climate crisis.”⁹³ This will not only provide benefit to the climate, but also ensure that lawyers are actively discharging their fiduciary duties.

It is a common misconception that lawyers only give advice about the law. Whilst arguably a lawyer’s greatest expertise lies in ascertaining what the law is, in reality this is not the extent of a lawyer’s role.⁹⁴ Legal problems are never only about the law: Good legal advice addresses “not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental and the ethical consequences of different courses of action.”⁹⁵ Lawyers are expected to provide guidance on a client’s legal rights, the likely outcome of any litigation, and also the benefits and possibilities of solving disputes outside of the legal system. In this way, the work of the everyday lawyer is far more holistic than it may first appear.⁹⁶ This approach to advice allows clients to understand the impact of their decisions and the potential advantages, disadvantages and uncertainties associated with various courses of action. As the climate crisis grows more severe, addressing “the climate change consequences as a consideration [in legal advice] is a natural extension of this everyday practice.”⁹⁷

This holistic approach to legal advice is something that is both encouraged and recognised by national and international law associations.⁹⁸ For example, the Law Association for Asia and Pacific (LAWASIA) recently acknowledged that “lawyers are often at the centre of issues of business, human rights and the environment and are increasingly expected to address these issues

⁹³ As above.

⁹⁴ Preston, above n 17, at 52.

⁹⁵ At 52.

⁹⁶ At 52.

⁹⁷ Preston, above n 17, at 52.

⁹⁸ For example, see: International Bar Association, above n 92.

in their practices.”⁹⁹ Moving forward, these legal associations can play a key role in encouraging lawyers to view climate conscious legal advice as a necessary part of fulfilling their duties to clients.

In the context of the climate crisis, incorporating legal activism into advice provides great benefit to clients; a climate conscious approach gives clients the tools to make more informed decisions.¹⁰⁰ Lawyers should think about the impact that different decisions would have on the climate and recommend a preferred course of action that attempts to reduce environmental harm. In a world that is increasingly conscious of the environmental impacts of business, more holistic advice in this area is certainly to the benefit of clients. Such advice aims to be more comprehensive, rather than coercive: A lawyer should still act on their client’s instruction and follow through with whichever course of action is elected, even if this is not the climate conscious option.¹⁰¹ However, allowing clients to at least understand the trade-off of their decisions goes a long way to encouraging informed decision making.

Arguably, lawyers who continue to neglect the climate crisis when giving legal advice are less able to defend this approach as time goes on. For a long time, “greenwashing” has allowed entities to use disinformation to maintain the support of consumers, even while engaging in business practices that negatively contribute to the climate crisis.¹⁰² However, consumers are gradually becoming more discerning about these practices and entities now face higher business risk as a result.¹⁰³

Although organisations may have a legal license to carry out environmentally damaging business activities, the “social license” for these actions is becoming less reliable.¹⁰⁴ A social license is a notional concept that refers to “the latitude or freedom that society allows a business to use land and its resources without interference by society.”¹⁰⁵ Where a business doesn’t have a social

⁹⁹Christopher Leong (ed) *Business and Human Rights: A Guide for Lawyers in the Asia Pacific* (online looseleaf ed, LAWASIA) at 8.

¹⁰⁰ Preston, above n 17, at 52-54.

¹⁰¹ At 54.

¹⁰² Nancy Furlow “Greenwashing in the New Millenium” (2020) 10 ABEJ 22 at 23.

¹⁰³Chitra de Silva Lokuwaduge and Keshara de Silva “ESG Risk Disclosure and the Risk of Greenwashing” (2022) 16 AABFJ 146.

¹⁰⁴ Preston, above n 17, at 53.

¹⁰⁵ At 53.

license to carry out their activities, they face significant business risk as society will seek to protest, interfere with business activities and ‘vote with their dollar’ by boycotting businesses.¹⁰⁶ Businesses that negatively contribute to the climate crisis may currently have a legal license, but if they do not make climate conscious decisions they face increasing risk of losing public support. It is incredibly important that lawyers are aware of such factors and provide advice to these business risks to their clients. Making decisions to enter into environmentally damaging practices, continue with high-emissions activities, or oppose legislative reform are likely to have an increasing impact on a business’ reputation.¹⁰⁷

Moreover, the risk to businesses goes beyond just reputational risks. According to Hon Justice Brian J Preston, climate change poses direct financial risks to businesses, falling into three categories: “Physical risks, transition risks, and liability risks.”¹⁰⁸ Physical risks include any impacts that will effect an entity physically, which in the climate context may involve considerations like extreme weather events and their potential to damage assets or affect supply chains.¹⁰⁹ Alternatively, transition risks are those risks “associated with developments that may (or may not) occur in the process of adjusting to a lower-carbon economy.”¹¹⁰ The climate crisis is already upon us and warming temperatures will impact states whether we adapt or not. The only question is whether legislation will be *proactive* or *reactive*. Eventually, all businesses will have to acclimate to a lower-carbon economy, and the cost of this transition is a major liability that businesses must account for.¹¹¹ Lawyers need to be aware of this risk and make it clear that the decisions entities make *now* may have negative impacts on transition costs later.¹¹² Moreover, liability risks are becoming an increasing concern for entities that engage in high-emissions business activities; these risks include the cost of litigation and settlements, which are evidently increasing in frequency: In the past decade alone, at least 1,300 private climate lawsuits have

¹⁰⁶ Sophie Marjanac and Lindene Patton, “Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Casual Chain” (2018) 36(3) *Journal of Energy & Natural Resources Law* 265 at 293.

¹⁰⁷ H Zhou and others “How Do Environmental Violation Events Harm Corporate Reputation?” (2015) 24 *Business Strategy and the Environment Review* 836.

¹⁰⁸ Preston, above n 17, at 53. See also Marjanac, above n 106, at 293.

¹⁰⁹ Preston, above n 17, at 53.

¹¹⁰Noel Hutley and Sebastian Hartford-Davis “Climate Change and Directors’ Duties” (Memorandum of Opinion, Centre for Policy Development and Business Council, 2016).

¹¹¹ At 3.

¹¹² Preston, above n 17, at 53.

been brought in 28 countries.¹¹³ Most importantly, according to the NZ IAS 37 Accounting Guidelines, the costs of litigation must be accounted for in an entity's Annual Financial Reports if it is "probable" that a lawsuit will be filed.¹¹⁴ Accordingly, businesses who engage in environmentally damaging activities are likely to see a negative impact on their financial statements, even if they don't lose the cases brought against them.

Furthermore, there is growing acknowledgement that company directors have their own duty to assess and disclose financial risks associated with climate change.¹¹⁵ Lawyers need to be prepared to advise directors on such concerns and warn of the reputational damage and risk that entities can face when not disclosing these matter to investors, shareholders, creditors, and even the general public.¹¹⁶

The New Zealand Government released a discussion paper in October 2019 which outlined new mandatory climate-risk disclosures for some organisations. This requirement applies to large, publicly-listed companies and around 200 financial institutions.¹¹⁷ The aim of these disclosures is to ensure that organisations with a "higher level of public accountability" provide information that allow public stakeholders to make more informed decisions. There is a growing acknowledgement that financial information alone no longer provides sufficient context for decision making, and thus the social and environmental impacts of business must be made clear to those outside the organisation.¹¹⁸

The Financial Sector Amendment Act 2021 was commenced at the end of 2021, and amends the Financial Markets Conduct Act 2013, the Financial Reporting Act 2013, and the Public Audit Act

¹¹³ Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2019 Snapshot* (Policy Report, 4 July 2019, The University Centre for Climate Change Economics and Policy) at 3.

¹¹⁴NZ IAS 37 "Provisions, Contingent Liabilities and Contingent Assets" (31 Jan 2022) Rule 4.3(b).

¹¹⁵Brian J Preston "The Adequacy of the Law in Satisfying Society's Expectations for Major Projects" (2015) 32 EPLJ 182 at 182-184.

¹¹⁶ Stephanie Venuti and Martijn Wilder "Obligations on Australian Companies to Address Climate Change" (2018) 92 ALJ 789.

¹¹⁷Ministry for the Environment "Mandatory Climate-Related Disclosures" (17 June 2022) <www.environment.govt.nz>.

¹¹⁸As above.

2001.¹¹⁹ The most important amendment includes a requirement for specified entities to release “climate reports” in addition to their General Purpose Financial Reports.¹²⁰ Whilst these guidelines currently only apply to a select group of entities, there is growing agreement from within the accounting profession that whilst sustainability reporting is mostly unregulated at present, the trending popularity of the practice will mean that accounting standards will need to adapt and expand to smaller entities as well.¹²¹ The Climate Disclosure Standards Board, which was once an independent organisation, has now been consolidated with the International Financial Reporting Standards (IFRS) Foundation; this highlights how financial reporting standard setters are becoming more sympathetic to climate and social concerns.¹²² There is a clear intention from within the accounting profession to contribute to ensuring greater accountability in this area through financial standards.¹²³

Lawyers must be aware of the growing risk that businesses face as a result of changes in public perception and the corresponding trends in reporting standard development. Recent changes in accounting standards suggest that many of those who engage in damaging business practices will eventually be obligated to disclose this in their financial statements.¹²⁴ So whilst organisations may continue having a legal license to carry out harmful activities, when these practices have to be explained to the public this becomes a significant risk that businesses, and their legal representatives, need to consider.¹²⁵

Having an awareness of such risks allows lawyers to not only give more comprehensive legal advice, but also incorporate climate concerns into their everyday legal practices. This is a way for every lawyer to engage in legal activism that complies with their professional code of conduct but also includes environmental issues as an important factor in decision making. Most importantly, this type of legal advice can be viewed more as a “necessary corollary of a lawyer’s

¹¹⁹ Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.

¹²⁰Section 461Z.

¹²¹Joshua Wong and others “Sustainability Assurance: An Emerging Market for the Accounting Profession” (2016) 28 Pacific Accounting Review 238.

¹²² Bill Edge, Chairperson for Auditing and Assurance Standards Board “Recent Developments in Sustainability Reporting” (13th Annual Australian Accounting Hall of Fame Awards 3 July 2022).

¹²³ Edge, above n 122.

¹²⁴As above.

¹²⁵Preston, above n 17, at 52.

duties to their clients,”¹²⁶ rather than a voluntary extra service. In tort, lawyers owe a duty of care to their clients which requires them to “exercise the standard of care and skill expected of a qualified and ordinarily competent and careful lawyer in the exercise of their profession.”¹²⁷ In order to uphold this duty, lawyers need to acknowledge that engaging with environmental considerations when making business decisions is only becoming more necessary. Although one may argue that participating in such actions is therefore not “legal activism” at all, we must still remember that legal activism doesn’t just require *individual professionals* to participate in actions that address the climate crisis, but also *professional institutions*. The legal profession as a whole, including important institutions like academic institutes and law societies, need to be dedicated in supporting lawyers to remain conscious of how they can use holistic legal advice to give their clients the tools to make more ethical environmental decisions.

B Judicial Interpretation and Legal Activism

Professional activism is something that can be engaged with not just in giving holistic legal advice, but also in the interpretation of legal rules by judges and lawyers alike. The outcome of legal disputes is never guaranteed and the resulting interpretation and application of legal principles is always dependant on the unique facts of a case. As a result, one is never able to say “unqualifiedly” what the law is when applied in a given context.¹²⁸ Furthermore, as Brian Preston J explains, “environmental law, including climate law, is ‘hot law,’ ever evolving, making it difficult to ascertain the law at any particular time.”¹²⁹ Given this reality, judges have significant choice when deciding cases that consider climate claims.

In line with Blackstone’s theory of judicial decision-making, it is often asserted that judges do not and cannot make law; they merely discover and declare it.¹³⁰ However, this positivist view has been “trenchantly criticised as fiction or myth.”¹³¹ Legal rules do not always readily apply to the facts of a dispute and in such cases, new rules will result. Conversely, judges may deal with

¹²⁶ Above n 17, at 54.

¹²⁷ *Hawkins v Clayton [1988] HCA 15 at 32.*

¹²⁸ Preston, above n 17, at 54.

¹²⁹ At 54.

¹³⁰ William Blackstone *Commentaries on the Laws of England Book 1* (first published 1765, reprinted in Legal Classics Library, 1983) at 69–70.

¹³¹ Preston, above n 17, at 54. See also EW Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP, 2005) at 25–27 and James Reid “The Judge as Law Maker” (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22.

competing legal rules, the meaning of legal rules may be unclear, or there may be doubt in how to apply new rules. In these situations, the interpretation of the law is “rarely clear cut” and judges will make choices in the process of resolving disputes. In this way, judges cannot be seen as merely “declaring” the law. As was asserted by EW Thomas: “judges cannot exercise the choice or choices that make law and at the same time be declaring a preexisting law.”¹³²

Throughout the process of dispute resolution, judges decide which rules will apply, as well as the meaning and scope of a given rule, and the law will often develop piecemeal as a result of these choices. There is an inherent uncertainty in how rules will apply in a given case, and accordingly, judges often use very general standards, such as “reasonableness, fairness, or what is just and equitable” to guide them in their application.¹³³ By doing so, judges incorporate the changing views of society into the law, allowing legal norms to reflect modern values.¹³⁴

It is in these moments of choice and uncertainty where judges have the opportunity to adopt frameworks that better incorporate climate concerns into the interpretation and application of the law, provided that “doing so is constant with and required by the principles of genuine interpretation.”¹³⁵ More directly considering climate concerns also has positive effects on the enforcement of human rights and equally will seek to greater upholds states’ obligations under international agreements.

Nevertheless, opponents of this form of judicial engagement argue that the separation of powers principle is threatened when judges interfere with climate concerns.¹³⁶ In response to a threatened lawsuit from a Dutch NGO, gas giant Royal Dutch Shell (Shell) stated: “We believe that climate change is a complex societal challenge that should not be addressed by courts.”¹³⁷ Although Shell undoubtedly have a vested interest in arguing this point, many scholars and legal professionals would still agree with their view on principle:¹³⁸ Following the landmark decision

¹³² EW Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP, 2005) at 25.

¹³³ Preston, above n 17, at 55.

¹³⁴ Julius Stone *The Province and Function of the Law* (W.S Hein, New York, 1973) at 144.

¹³⁵ Preston, above n 17, at 56.

¹³⁶Burgers, above n 87, at 57.

¹³⁷ At 56.

¹³⁸ At 56.

in *Urgenda Foundation v State of the Netherlands*¹³⁹, many legal academics expressed concerns that the judiciary had “overstepped its powers” and thereby threatened the “balance between branches of democratic government.”¹⁴⁰ Although climate change is an issue that will undoubtedly impact all people in society, the solution to the crisis remains politically sensitive. As a result, many argue that it is inappropriate for judges to “interfere” with the law in this area by incorporating climate concerns into their judicial reasoning.¹⁴¹ In some cases, this has led judges to abstain entirely from delivering judgement,¹⁴² as was seen in the 2018 case *Greenpeace Norway v. Norwegian State* where the court’s decision to not consider a claim was based on their view that climate change was an wholly political issue.¹⁴³

However, there are clear issues with relying on politics to address the climate crisis in a timely manner. The process of policy development in this area is extraordinarily slow and states have struggled to introduce policies when global economic wealth is still “based on extractive industries.”¹⁴⁴ Nearly every individual will engage in activities that emit greenhouse gases, and similarly, the world’s strongest economies have benefitted greatly from the same practices that first created the climate crisis. States are reluctant to be pioneers in change, given that to do so they would have to forfeit profit whilst other states continue to exploit the environment for financial gain. In this way, solving the climate crisis will ultimately involve sacrifice, something that is inherently “difficult to negotiate in politics.”¹⁴⁵

It is against this contentious political backdrop that many climate activists turn to the judiciary to address environmental concerns. Although many view this strategy as virtuous, others “reject it because they believe the issue of climate change belongs to the political domain, subject to the

¹³⁹ *The State of the Netherlands v Urgenda Foundation* [2018] HCA BC1757.

¹⁴⁰ Burgers, above n 87, at 58.

¹⁴¹ Phil Goldberg “Climate Change Lawsuits Are Ineffective Political Stunts” (3 January 2018) The Hill Law <www.thehill.com>.

¹⁴² In the United States, tort claims have been rejected because of the courts’ unwillingness to engage with alleged questions of politics. See Jackie Dugard and others “Red-Green Lawfare? Climate Change Narratives in Courtrooms” (2015) Climate Talk 1.

¹⁴³ *Greenpeace Nordic and Others v. Norway* [2021] ODC 16 at 5.

¹⁴⁴ Burgers, above n 87, at 59.

¹⁴⁵ At 59.

power of the people rather than to the discretion of a court.”¹⁴⁶ Certainly, it is important that the actions of the judiciary to not threaten the structure of democracy. However, according to Jürgen Habermas’s political theory on deliberative democracy: “the judiciary may oppose the majority when fundamental rights are at stake because these rights guarantee democracy...”¹⁴⁷ In this way, legal activism in the judiciary should not be seen as a violation of the separation of powers, but rather an intentional effort to ensure that fundamental rights are upheld and thus democracy remains stable.

This argument can be further explained by more closely examining Haberman’s theory on deliberative democracy. According to Haberman, in democracies we all have “public political autonomy” because individuals have the ability to engage in debate and discussion over the law and therefore influence the decisions of political institutions.¹⁴⁸ Law is democratically legitimate because it can be met with the assent of all citizens, given that all have the ability to participate in the system.¹⁴⁹ In a democratic society, these debates are essential because they “create a public sphere allowing citizens to influence the outcome of the political process, or to interfere where the institutions seem to make the wrong decisions...”¹⁵⁰ It is through public political autonomy that society can collectively decide which laws they should be bound by, so that even when an individual disagrees with a particular legal provision, they can still endorse the process of democracy that brought it about. The “essence of democratic legitimacy” is that “the law lies in the general agreement among citizens that they can and must challenge the laws they dislike through their public autonomy in the (formal and informal) democratic process, rather than through violence.”¹⁵¹

It is for this reason that the separation of powers is deemed as so important: it acknowledges that judges should not devise new law because this could undermine the importance of rules being dictated by citizens through democratic procedures.¹⁵² This is why many argue that if no law

¹⁴⁶At 58.

¹⁴⁷ At 60.

¹⁴⁸ Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons, 2015) at 110.

¹⁴⁹ At 110.

¹⁵⁰ Burgers, above n 87, at 61.

¹⁵¹ Burgers, above n 87, at 62.

¹⁵² Habermas, above n 148, at 162. .

exists to decide who is liable for climate harm, judges should not consider climate concerns in their decision making.¹⁵³

However, Haberman's theory emphasises that it is of great importance that fundamental rights must always be maintained by the law, as these rights allow people to retain their public political autonomy and are thus a safeguard for democracy.¹⁵⁴ If the fundamental rights of individuals within a democracy are undermined by the law, the system is unable to function and we can no longer accept the law as "democratically legitimate."¹⁵⁵ Accordingly, Haberman argues: "in order to make sure that democracy is upheld, a judge can oppose the democratic majority when the democratic system itself is brought into danger."¹⁵⁶ Essentially, if the breach of a fundamental right goes so far as to threaten democracy, judges must then intervene. Burgers explained this concept further: "the judiciary may interpret any legal rule dynamically to fit present-day conditions; however, where an interpretation goes against democratic majority decision making, it must be built on a fundamental right to count as democratically legitimate, as only democracy itself... can serve as a justification for judges to oppose a democratically established opinion."¹⁵⁷ In the context of the climate crisis, judges could be seen as going against democratically established opinion when they consider climate concerns where domestic policy remains largely silent on these issues or opposes them.¹⁵⁸ However, this is justified when rights that are essential for proper democracy, like the right to life, are put at substantial risk.¹⁵⁹

Recent cases have seen judges more readily deliver judgements that consider the impact of climate change on fundamental rights.¹⁶⁰ The Court of Appeal in *Urgenda* relied on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to affirm that the Dutch state has a duty to take "more stringent climate change mitigation

¹⁵³ Burgers, above n 87, at 62.

¹⁵⁴ At 62.

¹⁵⁵ Habermas, above n 148, at 122-123.

¹⁵⁶ Burgers, above n 87, at 63.

¹⁵⁷ At 64.

¹⁵⁸ At 64.

¹⁵⁹ At 64.

¹⁶⁰C Vallejo "Suing the State for Climate Change; Empirical Assessment of Climate Change Jurisprudence in Cases against Governments" (PhD thesis, Los Andes University, 2018).

methods”¹⁶¹ due to the “severity of the consequences of climate change and the great risk of climate change occurring.”¹⁶² This decision was reached despite the fact that the democratically elected Dutch government chose to lower their reductions goal from 20% from an initial target of 30%.¹⁶³ The decision in *Urgenda* may oppose a democratic majority decision, yet by doing so the court successfully protected fundamental rights and therefore democracy. According to Burgers, it was “generally the opinion among legal experts that relying on fundamental rights as the primary legal basis strengthened the democratic legitimacy of the *Urgenda* case.”¹⁶⁴

Similarly, in the recent decision of *Thomas v Minister for Climate Change*, the High Court of New Zealand ruled on the legality of emissions targets set by the government. In its judgement, the court stated:

It may be appropriate for domestic courts to play a role in Government decision making about climate change policy... The courts have recognised the significance of the issue for the planet and its inhabitants and those within the court’s jurisdiction are necessarily amongst all who are affected by inadequate efforts to respond to climate change.¹⁶⁵

Of course, there are constitutional limits on how far this “judicial activism” should extend.¹⁶⁶ The decisions in both *Urgenda* and *Thomas* show how judges can consider climate concerns whilst also exercising judicial restraint by “leaving the concrete definition of policy measures”¹⁶⁷ to democratically elected officials.¹⁶⁸ Nevertheless, judges should engage in legal activism in order

¹⁶¹Valentina Jacometti “Climate Change Litigation: Global Trends and Critical Issues in the Light of the *Urgenda* 2018 Decision and the IPCC Special Report “global Warming of 1.5 °C” 20 *Global Jurist Journal* 1 at 1.

¹⁶²*The State of the Netherlands v Urgenda Foundation*, above n 139.

¹⁶³As above.

¹⁶⁴ Burgers, above n 87, at 65.

¹⁶⁵ *Thomson v Minister for Climate Change Issues [2017] NZHC 733* at 133.

¹⁶⁶ At 133.

¹⁶⁷ Jacometti, above n 161, at 12.

¹⁶⁸ In *Urgenda*, the court emphasised that the judiciary can rule on legality, but should not engage in policy decisions. As a result, was explicitly left open to the Dutch government to decide how to implement the 25% goal. Similarly, in *Thomas* the court explained that whilst the judiciary can provide a remedy to ensure action is taken, the content of such action would be left to the appropriate state body. See: *Urgenda* above n 139 and *Thomas* above n 165.

to ensure that politics do not stall progress so much that democracy is put at risk. A cautious approach should always be taken, but ambitious protection of rights can be delivered by the judiciary. There is significant scope for judges to engage in legal activism from within their roles, in that judges can use their professional skills and expertise to ensure that inaction of states does not continue to impact the fundamental rights of individuals.

C Strategic Litigation: The Role of a Lawyer

Much like judges, lawyers can also use the court system to engage in legal activism. For some lawyers, strategic climate litigation will become the sole focus of their legal careers. Substantial change will come from those who invest their time into litigating important climate cases and furthering international and domestic law reforms. Richard Harvey asserts that strategic litigation may have the greatest impact on climate change reform:¹⁶⁹ Although international agreements are key to widespread change, individual states are reluctant to be pioneers in emissions reduction. Litigation provides a unique form of accountability that “applies huge pressure on corporations and governments, integrating overwhelming evidence from scientific experts with mass public support backed by a broad spectrum of the media.”¹⁷⁰ Climate cases allow citizens and special interest groups to engage directly with heavy emitters and state actors to bring environmental concerns to the forefront of discussion. Even when these climate cases are not won, there are clear strategic benefits for the cause: The aim of strategic litigation is to “[force] everyone to confront the reality of the end of oil, something unthinkable for countries that have built their entire economies and resilience on fossil fuels.”¹⁷¹

Comprehensive legal reform is an absolutely necessary step in addressing the climate crisis, yet so far, progress on this front has been more tokenistic than effective. Strategic litigation challenges the validity of states’ domestic climate action, particularly in relation to international obligations and human rights concerns, as well as extends liability to corporations who negatively contribute to climate change. Climate change litigation then becomes a “mechanism of climate governance” that allows civil society to address the disparity between international agreements and domestic policy, as well as encourage private actors to reduce harmful activities in order to avoid potential liability or public scrutiny.¹⁷²

¹⁶⁹Stephen Knight “System Change for Climate Justice” (2021) 84 Sc LJ 24 at 26.

¹⁷⁰ Knight, above n 169, at 25.

¹⁷¹ At 26.

¹⁷²Jacometti, above n 161, at 2.

In relation to private entities, climate litigation can allow victims to receive compensation for climate-related harms. This acts a powerful tool of dissuasion for corporations participating in environmentally damaging behaviour. Importantly, even when the law is insufficient and corporations are not found to be liable for harmful environmental practices, the cost of reputational damage and the undesirable uncertainty of contingent liability reporting provides at least some form of sanction.

But it is important to note that climate litigation is often complex and can have mixed results.¹⁷³ There are many factors that make these cases complex to litigate, including the fact that the scope of climate related harm can make causation difficult to prove,¹⁷⁴ the direct damage of greenhouse gases can be hard to measure,¹⁷⁵ and domestic policy often offers very little guidance in relation to climate concerns.¹⁷⁶ Nevertheless, the “performance and spectacle” of climate change litigation can still be a successful tool in driving change. According to Baz Kershaw, “spectacles of of deconstruction have a radical impact” and can “challenge or even dismantle existing power structures and replace existing paradigms with alternative ways of viewing the world.”¹⁷⁷ Nicole Rogers asserts that climate change litigation can act as a spectacle of deconstruction, even when climate cases are not won: “the courtroom performances of climate change litigation, even those in which the awfulness of lawfulness prevails, are in fact spectacles of deconstruction. As such, they have a much more subversive impact than immediate outcomes would suggest.”¹⁷⁸

Democratic action is an important tool for making collaborative and meaningful change in the climate crisis, and cases that expose unethical and damaging business practices, inefficiencies in the law, or unsatisfactory loopholes in liability may not create sound legal precedent but they are a way to encourage public discussion. This factor alone cannot be undervalued, as significant change will require international collaboration and sacrifice, something that cannot be achieved without changing attitudes. Furthermore, unsuccessful cases are also “the cradle of circulation of legal concepts, principles and standards among legal systems” which can influence and inspire

¹⁷³At 2-12.

¹⁷⁴At 11.

¹⁷⁵At 11.

¹⁷⁶At 12.

¹⁷⁷Baz Kershaw “Theatre Ecology: Environments and Performance” (2009) 25 NEQ 102 at 214.

¹⁷⁸ Nicole Rogers “Climate Change Litigation and the Awfulness of Lawfulness” 38 ALJ 20 at 20.

future litigation as well as encourage inter-judicial dialogue that brings climate concerns to the forefront of judge's minds.¹⁷⁹

Lawyers can engage in legal activism by participating in strategic litigation or climate dispute resolution, particularly if they can offer this on a reduced fees or pro-bono basis.¹⁸⁰ Even when international and domestic law does not favour climate concerns, as long as there are actionable climate cases to bring before the courts, lawyers can further public interest by participating in litigation that at least holds states and corporations to account, as well as facilitates transparency and public discussion. The legal profession, as the protectors of the law, may not be able to decide the outcome of these cases, but participating in the process still has its merits. The most important step for change is a shift in thinking, which can be facilitated through climate litigation. If corporations are aware that they are going to be held accountable, or at least will have to face public questioning for their actions, they are far more likely to take the climate into consideration when making business decisions. Therefore, this method of legal activism is incredibly important: Even if domestic law is insufficient and climate cases are lost, encouraging public discussion and challenging business' attitudes is an incredibly important endeavour.

D Education

1 Education of the Public

The New Zealand legal profession as a whole needs to take greater accountability and play a more dominant role in educating the public on the existing mechanisms available to hold private and public actors to account. Education and accessibility are a key tool in facilitating change, and understanding the law is the first step to helping citizens to compel their government to meaningfully commit to legislative reform. International and environmental law are complex to understand, and often difficult to access, which creates a barrier between citizens and climate action. Moreover, whilst public understanding of the climate crisis has increased significantly, many citizens remain unaware of how grossly insufficient the legal response has been thus far. International agreements often give a false sense of hope to citizens who do not realise that domestic law either fails to uphold, or will at times directly conflict, with the aims of such law. Democracy cannot function properly when states use ambitious international agreements to appear sympathetic to climate concerns but do not mirror this concern when drafting domestic legislation. The New Zealand legal profession needs to make an effort to support the public in developing a clearer understanding of what different international agreements mean, how these

¹⁷⁹Jacometti, above n 161,t 12.

¹⁸⁰At 13.

international obligations are translated into domestic policy, and whether the New Zealand government is appropriately complying with the promises they have made.

The New Zealand Law Foundation already fulfils an important role in funding legal research and outreach in order to facilitate political and social development.¹⁸¹ Since the foundation was first founded, two major projects have been undertaken to increase accessibility and public understanding of environmental law.¹⁸² The first, to make environmental court decisions available in digital form, and the second to update the online guide to the Resource Management Act.¹⁸³ Nevertheless, the climate crisis ultimately impacts all aspects of life and therefore the scope of required legal reform extends far beyond just environmental law. Therefore, these resources do not go nearly far enough.

Legal activism is not just about individual accountability, but also *collective action*, and the New Zealand legal profession as a whole can use their skills and knowledge to provide greater education to the public on the interaction of the climate and law. Already, we can see positive developments in this area with the recent establishment of the New Zealand Law Society’s “Climate Change Law Committee.”¹⁸⁴ The aim of this committee is to “[monitor] and [make] recommendations on proposed legislative reforms relevant to New Zealand’s climate change commitments and obligations.”¹⁸⁵ All New Zealand legal institutions, including New Zealand law schools, can similarly engage in legal activism by providing platforms for research and publication of resources that not only support *legal professionals* in navigating the climate crisis, but also the *general public*.

2 Educating Legal Professionals

As per the discussion in section V, lawyers can engage in legal activism by offering legal advice that more meaningfully considers the impact that business decisions have on the climate. To some extent, the provision of this holistic legal advice is not only a way to address climate concerns, but also an important part of properly upholding a lawyer’s duty to their client.

¹⁸¹Law Foundation New Zealand “Delivering legal knowledge – with independence, quality and enduring impact” (2022) The Law Foundation New Zealand <www.lawfoundation.org.nz>.

¹⁸²Above n 181.

¹⁸³ The purpose of which was to ensure that the website more clearly answered environmental law questions. See Law Foundation New Zealand, above n 181.

¹⁸⁴ “Climate Change Law Subcommittee” (2022) New Zealand Law Society <www.lawsociety.org.nz>.

¹⁸⁵As above.

Institutions that are entrusted to educate law students must make a more comprehensive effort to prepare individuals to give such legal advice. It must be noted that there is also a competitive advantage for universities to teach students about their role in the climate crisis.¹⁸⁶ Given the changing dynamic in this area of law, it should be seen as an important duty for law schools to teach students of how climate reform will interact with practice on an increasing basis.¹⁸⁷

Currently, no New Zealand law school offers climate change law as a substantial component of core study for students.¹⁸⁸ This is despite the fact that the climate crisis will undoubtedly have an increasing impact on both the law and legal practice. The legal profession owes a duty to future lawyers to adapt in the delivery of education to make sure that the changing needs of society are actually met by lawyers. By neglecting to properly address this issue, law schools are failing to prepare students for the realities of future practice: The law will eventually have to change, whether this is proactive or in response to irreversible changes in the environment. Education therefore plays a key role in ensuring that future lawyers are prepared for this reality.¹⁸⁹ The more climate conscious the next generation of lawyers are, the more likely we are to see a practice that is not only able to assist in solving the crisis, but are also able to provide more comprehensive legal advice to their clients. It is worth reemphasising that legal activism is not just about individual change, but also institutional and collective action, and a modern and comprehensive approach to legal education is of fundamental importance to the climate and lawyers alike.

VI Conclusion: Lawyers As Activists

¹⁸⁶ Simon Bruck and Katharine Huxley “Climate Change and the Law Briefing Paper” (29 October 2019) NSW Young Lawyers Human Rights Society <www.lawsociety.com.au>.

¹⁸⁷ Preston, above n 17, at 66.

¹⁸⁸ This evidence is purely anecdotal, collected from surveying the core requirements and course descriptions for the LLB degrees at the University of Auckland, Victoria University of Wellington, Canterbury University, The University of Otago and the University of Waikato. See “Bachelor of Laws Programme Structure” (2022) Auckland University <www.auckland.ac.nz>, “Bachelor of Laws (LLB) Overview and Requirements” (2022) Victoria University of Wellington <www.wgtn.ac.nz>, “Bachelor of Laws Subjects and Courses” (2022) <www.canterbury.ac.nz>, “Bachelor’s Degree in Law: Programme Requirements” University of Otago <www.otago.ac.nz>, “Bachelor of Laws: Degree Requirements” (2022) University of Waikato <www.waikato.ac.nz>.

¹⁸⁹ Preston, above n 17, at 66.

As experts in the law, the legal profession are in the best position to assist humanity in using legal mechanisms to address a crisis which threatens the existence of all of humanity. Lawyers play an important role in society which extends far beyond the mere interpretation of rules: Lawyers are guardians of the law and champions of justice and must engage directly with climate concerns in order to discharge these responsibilities. Legal activism will allow individuals and institutions within the legal profession to use their professional skills and knowledge to address the drastic need for climate action. In a time where the action of states is grossly insufficient, this involvement is not just virtuous, but entirely necessary.

By reframing the scope of legal activism, we can ensure that ambitious action can be taken without threatening the integrity of the legal system: Lawyers should focus on how they can engage with legal activism from *within their roles* by incorporating climate concerns into their daily practices whilst remaining conscious of constraining factors like conflict of interest rules. Delivering more holistic legal advice is a key way for lawyers to engage with legal activism, regardless of which clients they are representing. Additionally, judges can engage in activism by prioritising fundamental rights, and therefore democracy, when deciding climate cases. Methods of engaging in legal activism will be necessarily varied across the profession, but it is important that all lawyers pay greater attention to how they can make adjustments and greater engage with climate concerns in their practice.

The legal profession must understand the power and influence they have to make a difference. The climate crisis is humanity's most pressing issue and must be addressed as such. An irreversible and certain threat to human existence cannot be reduced to a mere political issue, nor can we continue to ignore the ways in which legal professionals can play a vital role in the climate response. Although the effects of climate change will harm the most vulnerable first, it is certain that without change, everyone will feel its impacts. Before that occurs, the legal profession should join the ranks of professionals who are fighting to make a difference.

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Word count is approximately 12,053 (excluding footnotes and bibliography).