

Proceedings of the Witnessing Professionals and Climate Change workshop
May 12, 2018
Princeton University

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I'll start out with some thank you's to Melissa [Lane] and Nancy [Rosenblum] for having me. I realized I had not even ever looked at the American Association of Law Schools' (AALS) Statement of Good Practices before coming here today, so at minimum you've made me a better law professor and as long as I'm giving thank you's... Patrick Kinney, thank you for doing research that undergirded the endangerment finding. It's very important to us attorneys.

I'll note that we're followed by a separate panel on academia, so I'm going to try to reach out and discuss law in different capacities but I would be remiss if I didn't tell you I am a law professor. So that is the perspective that I come from, and I think in terms of thinking about intersections between the legal professionals' climate knowledge, climate advocacy, and professional responsibilities. There are some pretty easy cases, and there are also some harder cases. I'll talk to you about what the easy cases are, and then highlight three areas where I think there's a little bit of muddle and some harder questions.

In terms of why climate advocacy is a pretty comfortable fit for environmental law professors, when you go back to the AALS Statement of Good Practices, they explicitly say that because legal academics are freed from serving client interests we actually have a special responsibility to pursue individual and social justice and to seek law reform and advocate for improvements in the law. So it's kind of a core part of what we do in terms of the kinds of work that I do as a legal advocate related to climate change. A lot of it's already been touched on. It's participating in amicus briefs, publishing papers, speaking at conferences. I'm also a campus representative for the Climate Science Legal Defense Fund, a group that provides pro bono representation to climate scientists, and part of that is talking to scientists on campus about how to respond to harassing FOIA [Freedom of Information Act] requests and congressional subpoenas and the like.

Engaging in climate advocacy is a pretty easy fit for law professors. It's also, I think, a pretty easy case from a pro bono perspective for practicing attorneys. If you look at the model rules of professional conduct, attorneys are encouraged, or should aspire to, at least fifty hours of pro bono legal service per year. While the core of that is meant to be service to low income persons of limited means, which might fit climate adaptation for environmental justice communities into that, the model rules also recognize the value of participation in activities for improving the law. So, law reform—law reform efforts. In

terms of advising clients, the model rules at least say it's permissible—though they don't say you have to, or should, but say it's permissible—for attorneys advising clients to advise them about moral, economic, social, and political factors relating to their business, so the door is open to that.

There have now been two national conferences of the National Conference of Lawyers Committed to Addressing the Climate Emergency that brings lawyers together from all different aspects of the professional life of lawyering to try to think about our responsibility and role in addressing the climate solution. I think in terms of the traditional tool box of lawyers, I'm pretty confident that lawyers have really gone to the four corners of our traditional tool kit in terms of climate change. So, in terms of the ex-post litigation side, I think enterprising lawyers have used catalyst litigation to squeeze just about every single ounce of legal authority they could find in existing statutes to try to control climate change. Whether it's litigation under the Clean Air Act or seeking to force the consideration of climate impacts under the National Environmental Policy Act, or trying to get species who are climate-threatened listed under the Endangered Species Act. I'm pretty comfortable we've done a really great job on that. There's also an enormous amount of really interesting catalyst litigation going on in the common law and constitutional side of things, so... cases seeking to bring public nuisance actions or to hold large emitters responsible for climate harms. They're forging some really fascinating and new legal theories at the intersection of public nuisance law—some interesting theories trying to force government to act, averting to the public trust doctrine, and substantive due process.

Lawyers have been really active on the law reform side. Being engaged in helping to craft America's Climate and Energy Security Act, which is probably the closest we've gotten to federal climate legislation. It passed the House. Lawyers were deeply engaged in negotiating the Paris Agreement as well. But that's all maybe within the traditional toolkit. Maybe it's part of our malignant normality, and as Melissa's book *Eco-Republic* suggests, maybe we need something more transformative. So thinking about what are three kind of harder cases I see with respect to the intersection of climate and the legal profession...

One is what I think of as: “what do we think about agnostic mitigation and adaptation approaches?” Or I sometimes think of them as the bait and switch. So, the idea that we kind of try to trick people into action on climate by disguising it as something else, because we're worried that they have an ideological reaction to climate. So that's one kind of harder case. The second I just kind of think of as: lawyers and corporate climate lies. So, the role of lawyers in perpetuating the disinformation campaigns on climate science and whether there's some ethical uneasiness we might have about that. Then the last would be the intersection between lawyers as climate advocates in their professional

capacity and their private lives. So “walking the walk” is how I think about it. Is there some sense in which we have a professional responsibility to reduce our own carbon footprint?

I'll talk a little bit about each of these.

First, in terms of the bait and switch, or agnostic adaptation and mitigation, what do I mean there? So, it's ubiquitous to do this. The idea is... So, for example, one of the most successful on-the-ground efforts to get individuals to reduce their energy use was the Kansas Climate and Energy Project. Essentially what they did is they went to six small towns. They got them to achieve a 5% reduction in energy use, but the messages they used were purposely divorced from climate change. They did not use the term. So, they focused on creation care, economic development through green jobs, and thrift. In their own words, although we believe global warming is the defining challenge of our generation, CEP consciously decided to sequester the climate conversation. They focused instead on finding common ground with people across the state.

Similarly, legal scholars—or a group of legal scholars—have come out and suggested how could we use law to try to promote a norm of carbon neutrality and what they suggest is that we not ground that norm of carbon neutrality in environmental protection because it's too polarizing and not widely enough accepted, and instead that it be grounded in a norm of personal responsibility.

With respect to agnostic adaptation, I know we've had some discussion already about farmers being on the front lines. There are lots of examples of government policy specifically designed to try to get people to adapt to climate change but without talking about climate change. So if you go on the AgroClimate website, which is part of the USDA [United States Department of Agriculture] Climate Change Adaptation Strategy, you have to click a lot to find any reference to climate change. Is this kind of bait and switch or agnosticism good or bad? And how does it relate to some responsibility we might have as professionals to bear witness?

In terms of whether it's good or bad, I just run into a lot of, “I'm not sure, I don't know.” I can see potential benefits and potential problems that I'll flag. Maybe it's good, because we can reach audiences we wouldn't otherwise reach, who get turned off by the concept of climate change, so it can increase mitigation efficacy. It can increase the efficacy of our adaptation outreach because we are able to avoid that problem, so there is some evidence. I think there's an article in the Journal of Environmental Psychology that suggests that if you take a group of conservatives and you suggest to them a way to change their watering practices on their farms and you couch it as an improvement in farm technology they love it. If you couch it as a climate adaptation technology they don't really like it. Maybe there is some reason to think that it actually would increase efficacy.

I think there's also maybe an argument to be made that it doesn't matter why I get someone to buy a Prius. Once they have a Prius and they realize, "oh it actually fits better into parking spots," or there are there other co-benefits, and it becomes part of the... opens up the possibility, so then it doesn't really matter why they originally adopted it.

I think there are also a lot of concerns, though. One concern you might raise about agnostic adaptation and mitigation is that it strikes me that it's possible that we're missing a cognitive gateway for people to engage with climate change. Particularly with respect to adaptation and—now, I'm a lawyer with a BA in American History citing to social science research, so in terms of paying respect to other fields that's what I'm doing, there. Some folks have suggested a risk salience hypothesis, the idea that adaptation by making climate impacts more salient to people can increase concern about climate change which can then increase support for willingness to reduce climate change.

There's something that has been raised: the disentanglement principle. So some people say it's a lot of people don't like the solution... the things you have to do to mitigate climate change because it's hard or they think it's going to be expensive for them. Adaptation which is around local communities organizing to protect themselves is more appealing... people like that idea better and therefore aren't as resistant to accepting climate change in that context. In that way you could understand talking about climate change in the context of organizing local communities around adaptation as a cognitive gateway to encourage acceptance of climate science.

Another concern I have is that I just find it a little bit repugnant from the perspective of climate justice that in a society that already has a—compared to the rest of the world—enhanced capacity to adapt that we're going to go about protecting ourselves against climate change without recognizing the problem. And what does that do with respect to our sense of responsibility to the rest of the world and funding for international climate adaptation?

I think there are also concerns about when we shroud climate policy or make it agnostic that it can lead to imperfect policy. So, mitigation and adaptation are oftentimes closely connected so you wouldn't want to, for example, adopt an adaptation policy that increased greenhouse gas emissions, right? Or you wouldn't want to adopt a mitigation policy that was maladaptive. So I think there's a potential difficulty there.

I think it's always a good sign when you're at a workshop and you keep changing your presentation based on what other people have said. One thing I'll add that occurred to me hearing the prior presentations is that I do think we should be mindful of if we're going to be the experts in the back room trying to sell something and obscure the reasons why we're selling it – of the possibility we could undermine our credibility as experts and professionals. One of the biggest pieces of learning we have is that messengers need to be trusted. I think we are already seeing a rejection throughout the rest of the country

that certain words like sustainability are toxic because they are understood to be an umbrella, a code word for lots of other things that come under it. I think that's a potential problem with adopting a bait and switch approach.

In terms of lawyers and corporate climate lies ... I'm thinking here now about what Naomi's [Oreskes] work most notably has revealed in gory and graphic detail, the concerted effort by certain energy interests to sow doubt about climate science in various ways. In terms of, I think there's some first order impacts you can see from that. Gallup for example, has a nice description on its website going through the history of public opinion polling in the US and they actually suggest that certain dips in public opinion are related to flare-ups of disputes about climate science.

I think you can, certainly in terms of an impact of that, look at the fact that we feel the need to hide that we're talking about climate change through agnostic mitigation and adaptation at all. In terms of our lack of political will, that's probably a piece of that. What's more interesting right now in the legal field to me is that there are a whole host of second order legal ramifications that are flowing from the revelation of this disinformation campaign. One is: did this disinformation campaign result in violations by those companies of various securities laws or the Martin Act? These are the investigations brought by the attorney generals of New York and other states.

I think there's a really fascinating review of *Massachusetts vs. EPA*—which is a great decision under the Clean Air Act—holding that carbon dioxide is a pollutant under the Clean Air Act. Typically an agency would have been afforded great deference in that decision and it wasn't here, and one of the best explanations for that that I've seen is that the Supreme Court was really worried about politicization of science at the agency. Even though they didn't come right out and say that, that's maybe why the agency wasn't given a lot of deference to try and say carbon dioxide couldn't be a pollutant.

But another kind of second order legal ramification that this conference made me think about was, “what was the role of Exxon's in-house legal counsel at the time that they were orchestrating this public disinformation campaign?” Going back to the model rules of professional conduct, it's hard to see a violation. You could make the argument that maybe there was something improper, but there's certainly not a strong case, and you'd kind of be pushing the boundaries of ethical norms in the law profession to do that.

Lawyers are prohibited from knowingly making false statements of fact to a tribunal, but of course we're not talking here about an adjudication before a court so it's probably irrelevant. Lawyers are also prohibited from knowingly making false statements of material fact to a third person. I think there's enough wiggle room about what's a “material fact” and what's “knowingly” that that probably doesn't provide much help.

The one that is maybe a little bit intriguing is that there is a general catch-all rule maintaining the integrity of the profession: rule 8.4, “Misconduct,” that provides it as professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. This so-called dishonesty rule, it might be interesting—and maybe I’ll see what kind of reaction I get—to take a spin and go through that and try to see if there’s any juice that you could get out of that. After today’s conference maybe I’ll be encouraged to do that. Some would argue that part of what the lawyers involved in orchestrating these campaigns are doing is zealous advocacy on behalf of their clients, so there’s going to be some counter-arguments there. There may also be some First Amendment concerns about whether we can stop attorneys from doing that.

In some sense, contemplating today’s discussion with respect to this idea that as experts we need to also know the limits of our knowledge and respect experts in other fields, that’s a little bit different for attorneys, because we’re not really experts in much. What we’re really expert at is translating other experts into law and policy and into the courtroom. In that regard it does occur to me maybe there is an ethical rule that, maybe we should contemplate something that it may be tricky, and we might get it wrong, but at minimum when we know it’s not true, be able to put it forward.

Then the last—and I think I’m out of time—one very quick. Should lawyers as professionals walk the walk? Do we have an obligation to take action in our personal lives? I certainly think legal climate professionals have an opportunity to be norm-entrepreneurs, so to encourage others to take behavior. I also think maybe the more interesting example is that the absence of personal action consistent with your professional belief can undermine your professional credibility in this regard, so I think there’s maybe a close connection.

I will say just anecdotally, I do sense that relating to—even in a professional context the students and at conferences, how decisions I’m making in my personal life reflect my own belief about what’s going on in the climate—seems to really resonate with people. For example when environmental law professors get together, we inevitably have a conversation about eco-necro-tourism. What dying climate ecosystem are we going to make sure to get our kids to soon before it’s gone? Which people seem to, “Oh my gosh!” So you really have to do that.

So that’s where I’ll stop.

“Witnessing Professionals and Climate Change” was a workshop hosted by the [Social Science Research Council](#) [Anxieties of Democracy](#) program as part of its [Working Group on Climate Change](#). The workshop was hosted in collaboration with Princeton University’s [University Center for Human Values](#), [Program in Science, Technology, and Environmental Policy](#), [Climate Futures Initiative](#), and the [Princeton Environmental Institute](#).