THE SENSE OF AN ENDING: SHIFTING PARADIGMS IN SEARCH OF OUR COMMON FUTURE

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The role of law school deans and all lawyers as leaders is of tremendous importance. Lawyers and legal leaders have played a pivotal role throughout the history of our country,[1] and today their leadership is more important than ever. The need for law reform intensifies as the threats of climate disruption and other perils grow.[2] Indeed, the survival of our planet depends in significant part on lawyers and the law. In a democracy the responsibility to confront such challenges belongs to everyone, but lawyers have a special responsibility for justice in our society.[3] Lawyers are involved in drafting the law, advising clients on legal requirements, and helping adapt the law to threats to our survival. Lawyers understand rules and the rule of law. Most important, lawyers have a duty as "public citizens" to reform the law when reform is necessary for the public good.[4] The point of this essay is that the real peril we face today demands scrutiny of the law, and also demands scrutiny of the role of lawyers to respond to the challenges in the real world.

Law school deans are important leaders in fostering law reform. Deans set the tone in law schools, other legal institutions, and in their communities. Their attitudes and voices have the power to shape the law. When deans act as a heat shield for faculty scholars, that protection encourages freedom of research and

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1. *See generally*, DEBORAH RHODE, LAWYERS AS LEADERS (2013).

2. When the *Toledo Law Review* invited me to write about the leadership of law school deans today, I felt flattered and flummoxed – in equal measure: flattered simply to be asked and flummoxed because I decided I must decline because I am a former dean who plans never to be a dean again. (Notice the last phrase does not say "I am not planning to…." Rather it is a statement of a plan, not the absence of planning. Also, "flummoxed" is too strong a word; its virtue is alliteration.) When the student editor explained that past deans are eligible to write, I accepted the offer, eager to discover and share my views about the important issue of law reform.

3. MODEL RULES OF PRO. CONDUCT, pmbl, para. 1 (A.B.A. 2020) (stating "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

4. *Id.*

expression. If deans respect the idea of legal reform and the need for continuous scrutiny of the building blocks of law, effective legal reform is more likely and more respected. When they embrace the ongoing study of law reform and the changes necessary to respond to emerging threats to society and our planet, law reform as a mechanism for change becomes a respected part of our law.[5]

Survival is the most fundamental goal of individuals and society. The will to continue – both as individuals and as part of a species or something larger – is inherent in existence itself. The norm and push of life is to continue to live. Trees and foxes, corporations, countries, social clubs, and professional organizations all seek to go forward into the future. Survival is the necessary precondition of all political and social freedoms.[6] The founders of our country sought a more perfect Union and Justice and domestic Tranquility. They sought to secure "the Blessings of Liberty to ourselves and our Posterity."[7] They sought survival of their ideals and their posterity, goals we see as tending toward human flourishing and essential for life and political rights.

THE REALITY OF CLIMATE CHANGE

Today, believing science, scientists, and our own senses, we see a country on edge and a world on fire from climate change, political uncertainty and grievances, a world tilting on the brink of catastrophe, ecological cascade, and existential change, a health care system groaning under the weight of an ongoing pandemic, and a democracy at risk. Despite the aspirations of freedom and equality, our democracy has itself failed to protect citizens equally, creating the cruel irony that part of the peril for democracy comes from laws and civil structures that have systematically denied the blessings of liberty to Black and minority communities in undeniable ways. The peril to our planet comes from an atmosphere compromised and disrupted by climate change.

> Carbon dioxide levels are higher than they have been in three million years. Human influence on the climate is so great that we are probably moving into a new geological epoch, the Anthropocene. The effects of climate change – visible only to trained observers and in computer models several decades ago – are now apparent

5. Today, deans often face intense political pressure, which makes the protection of academic freedom more difficult and more important. While such pressure on deans and others in academia is not new, the extent of such external political pressure (particularly in state law schools) should not be overlooked. The ability of deans to speak candidly on matters of public importance and to encourage faculty to do so comes up against pressures to "stay quiet" or to "quiet down" faculty member who are writing about topics of importance. Influence from such political interests also threatens the idea of democracy itself.

6. Judge Aiken made this point clear in her opinion in Juliana v. United States. Her opinion noted that "Exercising my 'reasoned judgment,' [] I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

7. U.S. CONST. pmbl.

> everywhere. And the best available science tells us we need to reduce greenhouse gas emissions to net zero or below across the globe by 2050.[8]

This inventory of unprecedented peril to both our democracy and survival suggests that paradigm shifts in assumptions embedded in the law are overdue.[9] The question of our day is whether we can maintain the city on a hill[10] or are destined to witness its demise. Analysis of this question (and all big questions) demands a hard look at the problem from all angles. We must hold the question up toward the sun to examine it – squinting at it, turning it upside down and sideways, looking at the concept in a way that puts things in new perspective to each factor under consideration. Changes in the debate shift as the perspective tilts. You check proportions of threats and speculate on benefits and costs, and you consider whether the costs could be benefits. For example, environmental regulations carry costs, requiring the creation of new jobs, which, like jobs building dams and offshore oil rigs, are a benefit as well as a cost in the Cost-Benefit Analysis (CBA). Uncertainties present and drop away or reveal themselves as assumptions. Looking for the arresting detail or thread that could unify our thinking is the search for needles and sometimes for the haystack itself. Survival is the prize we seek, but not physical survival alone. We search for survival for ourselves and also for the manifestation of the blessings of equality and liberty that the founders declared and promised.[11]

LAWYER RESPONSIBILITIES

The Model Rules of Professional Responsibility endorse law reform as a respected role for lawyers. The first sentence of the Preamble to the Model Rules identifies lawyer roles in a tradition of commitment to society: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[12] The lawyer's "special responsibility for the quality of justice," is at the heart of law reform when the law is not protecting people. The Preamble of the Model Rules explains this concept and challenges lawyers to fulfill it.

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal

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8. John C. Dernbach, Irma S. Russell, & Matthew Bogoshian, *Advocating for the Future, Widener Law Commonwealth, Research Paper No. 21-6*, THE ENV'T F., https://ssrn.com/abstract=3786134.

9. *See generally* STEVEN LEVITSKY, HOW DEMOCRACIES DIE (2018).

10. *See* John Winthrop, *Dreams of a City on a Hill, 1630*, AMERICAN YAWP READER, https://www.americanyawp.com/reader/colliding-cultures/john-winthrop-dreams-of-a-city-on-a-hill-1630/ (last visited Feb. 19, 2022).

11. U.S. CONST. pmbl. (noting the purpose to "secure the Blessings of Liberty to ourselves and our Posterity"). *See also* Syed Mansoor Ali Shah, CJ, Asghar Leghari v. Federation of Pakistan (2018) (Likewise, deans, judges and other leaders need to "be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems.").

12. MODEL RULES OF PRO. CONDUCT, pmbl. 1 (A.B.A. 2020).

> profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.[13]

In 2009, when I began a term as dean of University of Montana School of Law, the term "survival" in the context of legal education immediately gave rise to the question whether individual law schools would survive the economic shifts of the time. For several years after 2009, a sharp downturn in the economy, constricted opportunities for lawyers, and a startling drop in law school applications meant many law schools were fighting for survival in a fierce market. Today's news delivers larger questions about survival, and the challenges uppermost in the minds of law school deans are, in significant part, on the minds of all leaders and all people. When will the pandemic go away? What new threats do COVID mutations portend? Will climate change destabilize the ice shelves? Will it destabilize governments? With such dire topics, it may be tempting for deans to demur on such discussions, observing that they have no particular expertise on the question. To my mind, that would be a mistake. Having been in the law as a lawyer and academic for over forty years, and having served as a dean for five of those years, I see the duty of deans and all legal leaders as expansive because challenges that threaten our society require expansive legal responses.[14] Reflecting on the central goal of the public good and challenges to the public good is a task worthy of deans, legal education, and the law generally.[15]

In 1994, I authored an essay in response to an invitation from the KU Law Review as part of its edition honoring Judge James K. Logan, the judge for whom I clerked and greatly admire. Judge Logan served many roles in the law. He was the dean of the University of Kansas School of Law from 1961 to 1968. He was a professor before becoming dean, and practiced law for a decade before his appointment to the bench. In writing that essay, I hoped to gain a better sense of how lawyers, judges, and deans advance the public good and fulfill the goal of an authentic life in the law.[16] In this essay, I return to that task in a time of great challenge, wondering whether my view has changed in response to the threats of our time. The conclusion I reach here surprised me, and it may surprise you. Despite my belief in the durability of fundamental principles, I conclude here that the challenges we face today demand more from lawyers than I foresaw in 1994. This essay offers my view that leaders in the law (including lawyers, professors,

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13. *Id.* at 6.

14. RONALD J. DANIELS, WHAT UNIVERSITIES OWE DEMOCRACIES 6-10 (2021).

15. *See, e.g.*, Adrian Vermuele, *Supreme Court Justices Have Forgotten What the Law is For*, N.Y. TIMES (Feb. 3, 2022), https://www.nytimes.com/2022/02/03/opinion/us-supreme-court-nomination.html (noting the absence of the common good and general welfare in today's discourse).

16. Defining the term "authentic life in the law" is a bit like explaining Kant's categorical imperative. It is a core idea, the thing that serves as the hard rock grounding of a philosophy of the good. My view is that serving the public interest is the core principle of practicing law. Likewise, it provides the justification and rationale for law generally. If a particular law is not in the public interest, why would the public respect or comply with that law? How would the legislature justify the law? Without thinking about it, we assume that our laws and the role of lawyers serve the public good. It is now time to make that relationship of law to the public good and public interest explicit.

and deans) must embrace law reform with new seriousness. It attempts to justify my conclusion to myself and to you, the reader, that an authentic life in the law demands service to the public good.

That essay about Judge Logan led me to study the life of a lawyer who was a dean and a judge.[17] By this study of the judge's life and work, I hoped to gain a sense of who I wanted to be – not a judge, but someone in Judge Logan's mold of service. He served in the law for decades, dedicated to the roles he occupied. By the time I wrote that essay, I had been practicing or teaching law for over a decade. Nonetheless, I had pressing questions about how to live a fulfilling life (an authentic life) in the law. In writing that essay, I hoped to gain a better sense of how to live that life. I wanted to "delve into (and thereby discover) my views on what constitutes a valuable life spent in the law."[18] Realizing that certitude about the law and the role of lawyers is not always possible, I sought to "assess my professional life in light of ethical goals and issues"[19] and to confront the "crisis in the American legal system" of reclaiming a respected place as a profession rather than merely a business.[20] My conclusion in that essay was that Judge Logan and other exemplary deans, lawyers, professors, and judges set aside personal ambition "to serve something larger" as members of a learned profession. That something is described as the principle of the public good. In concluding that Judge Logan applied the law "without defaulting to uncaring classifications,"[21] I saw a model for a well-lived life in the law.

> When he set his first goals, Jim Logan was a kid from a small town with big ambitions. His choice of a career in the law was motivated by idealism about the law, but also by ambition.... He believed that the law was an area in which intelligence and hard work would pay off. But at some point for Jim Logan – as attorney, as professor and as judge – ambition became dedication. What ennobles judges and attorneys is not money or power, winning the big case or winning the lottery that might put you on the Supreme Court. It is serving the community as part of a system of justice that protects individual and economic freedoms. It is doing the work of the next case.[22]

My admiration for the judge was for his steady work in doing what was needed for resolving the next case. Judge Logan viewed the law as the noblest of all callings, and, following my mentor, I did as well.

> The court, with its principles of fairness, ordered justice and protection of individual liberties, held an almost religious aura. Part of what I have learned is that, while the law may seem mystical, it does not happen by magic. The law is hard work. It is hard work for students, professors, attorneys and even judges. Knowing the law and

17. Irma S. Russell, *An Authentic Life in the Law: A Tribute to James K. Logan*, 43 U. KAN. L. REV. 609 (1995).
18. *Id.*
19. *Id.*
20. *Id.* at 617.
21. *Id.* at 623.
22. *Id.*

> possessing a trained legal mind does not make this work easy. For an appellate judge, transcripts of trial, the applicable statutes and controlling or persuasive cases must be studied and understood.[23]

Doing the work of the next case is admirable. At times it is sufficient to fulfill professional duties. When the law for resolving the next case is just, doing the work or the next case fulfills the lawyer's duty to society. Diligence and competence in applying and advising clients on the law is the lawyer's role. But when the law or legal tests are out of sync, when presumptions and foundational norms result in imperiling life or exploiting a segment of people, reassessment of the laws in light of the common good is needed. Today, lawyers must do more than simply applying existing law to the next case.[24] When the tests and law are out of sync with the public good, lawyers have a duty to reform the law, including the sometimes intricate presumptions and doctrines that determine legal outcomes.[25] Deans and academics are best situated to study and recommend legal reforms because of their specialized expertise and the fact that the public is their client.

Today this dedication is not enough because systemic threats require us to reform that system. The challenges we now face – climate disruption, threats to democracy, and systemic injustice, mean that business as usual is not good enough. While the term "unprecedented" seems pervasive these days, the challenges we face are, in fact, unprecedented. More than ever, lawyers, law schools, and law school deans must scrutinize the law, studying the reflection and impact on society. Applying the old test Qui Bono?, they must see how the concepts and systems in the law apply to today's challenges to see who the concepts help and whether they ensure or quell chaos. In addressing climate change at the 2021 COP26 climate summit in Glasgow, former President Barack Obama, who helped seal the Paris climate accord, was cheered by delegates. "We are nowhere near where we need to be," he stated at the summit meeting. He called on nations to heal the planet and spoke expressly to youth.

> You've been bombarded with warnings about what the future will look like if you don't address climate change. And meanwhile, you've grown up watching many of the adults who are in positions to do something about it either act like the problem doesn't exist or refuse to make the hard decisions necessary to address it. You are right to be frustrated. Folks in my generation have not done enough to deal with a potentially cataclysmic problem that you now stand to inherit. But I also want to share some advice from my mother used to give me. You know, if I was feeling anxious or

23. *Id.* at 622.

24. For an exploration of what lawyers can do to be sustainability leaders, see John C. Dernbach et al., *Building a Sustainable Law Practice*, A.B.A. (forthcoming 2022).

25. The lawyer's duties to clients and to society can create unresolvable dilemmas. When the interests of clients threaten people and society by creating threats to survival, law reform is necessary to resolve the issue. Environmental laws have sought to resolve the disastrous conflicts between individual freedom and the common good, but, to date, legislative reform and judicial oversight have failed to provide meaningful reform to combat the climate disruption threatening the world. For a deeper look at the conflicting duties of lawyers in a world of existential threat, see *id.*

> angry or depressed or scared – she'd look at me and she'd say, "Don't sulk. Get busy. Get to work. And change what needs to be changed."[26]

WHEN LEGAL REFORM IS NECESSARY

In August of 2021, John Kerry, the Special Presidential Envoy for Climate, called on lawyers to rise to the "challenge of our times," stating to lawyers: "[y]ou are all climate lawyers now,"[27] we know that our laws as well as business policies have an aggregate impact on the environment. Now it is clear that our climate and atmosphere are put at risk from the current and historic practices.

> Climate change is often seen as a global problem, one that is removed from the daily practice of lawyers and courts.... [A]ddressing climate change depends on responses on a small scale, and that any legal action which involves climate change issues will impact on climate change policy, gives rise to a responsibility on lawyers to be aware of climate change issues in daily legal practice.[28]

In January 2022, John Kerry renewed his warning about climate change, pointing out that the United States and other nations are failing to fight global warming sufficiently.[29] While the United States has pledged to cut its greenhouse gas emissions by fifty percent by the end of the decade, the climate bill is stuck in the Senate. Many members of the public and some lawyers may question why Kerry identified lawyers as having special responsibility to combat the climate crisis.[30] Lawyers are often part of Sierra Club and feel connected to nature and their communities. Lawyers may feel unfairly singled out by Kerry's exhortation. Undoubtedly, a segment of the public, however, regards Kerry's message with cynicism, thinking of lawyers as ones who chiefly maintain the status quo and keep the wheels of commerce (and greenhouse gases) moving.

Our lives and political rights are possible only because of the earth's systems for sustaining life. Lawyers must do more than the work of the next case. We must apply the law but also test it against the foundational goals of securing the blessings of liberty and the rule of law for all. When tests and presumptions operate within the law to deprive us of these protections, we must restructure those tests and

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26. Barack Obama, *Obama to Young People on Climate: 'You Are Right to Be Frustrated,'* N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/video/us/100000008066347/barack-obama-cop26-glasgow-activism-young-people.html (transcript available on the NYT website).

27. *See* Karen Sloan, *'You Are All Climate Lawyers Now,' John Kerry Tells ABA*, THOMSON REUTERS (Aug. 5, 2021), https://www.reuters.com/legal/litigation/you-are-all-climate-lawyers-now-john-kerry-tells-aba-2021-08-05/.

28. Brian Preston, *Climate Conscious Lawyering*, 95 AUSTL. L. REV. 51, 51 (2021).

29. *See* Jennifer A. Dlouhy, *World is Falling Behind in Climate Battle, John Kerry Warns*, BLOOMBERG LAW, (Jan. 27, 2022), https://www.bloomberg.com/news/articles/2022-01-27/world-is-falling-behind-in-climate-battle-john-kerry-warns.

30. *See, e.g.*, House of Delegates, *Resolution 111*, A.B.A., 1, 14 (Aug. 2019) https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf (recognizing the responsibility of attorneys to work to combat climate change). *See also* LAW STUDENTS FOR CLIMATE ACCOUNTABILITY, https://www.ls4ca.org/ (showing law student action to seek climate accountability).

presumptions to accord with the public interest of equal protection of laws and a country and planet that support people. Taking the task of law reform seriously requires study of the foundational role of lawyers in law reform and scrutiny of the central principles of legal ethics, such as the duty of confidentiality and central assumptions, like the business judgment rule and the shareholder primacy rule of corporate law.

Law reform is the safety valve for changing conditions, and the changing conditions presented by climate change are of a quantum and intensity that require reexamination of traditional rules and a reassessment of the evolution of rules. Law reform is necessary when the public good demands a recalibration of the threats and needs of the time.[31] To explore merely one example of the operation of legal presumptions, consider two important default presumptions that now operate without scrutiny: the lawyer's duty of confidentiality and the business judgment rule on corporate decision making. Both rules frame a decisionmaker's task in relation to a client. The formulation of the business judgment rule gives great discretion to the corporate decision maker, insulating that decision maker and the decision to a significant extent from judicial oversight. Substitution of the business judgment standard for the lawyer confidentiality rule would return the rule to earlier versions of the confidentiality rule and enhance the weight of the lawyer's advice.[32] The rule designed by lawyers for lawyers prefers a rigorous command structure in which the lawyer has little deference.

The first sentence of the Preamble to the Model Rules identifies lawyer roles in this tradition. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[33] Although the Rules do not define the precise meaning of "public citizen," the basic idea of this responsibility is a class of citizens who operate to effectuate the public good. This principle of serving the public good is durable, but what is needed to serve this goal changes with changed circumstances. Today, the tension between the existential threats in a carbon-based economy and the lawyer's duty to clients creates means lawyers are at the crux of the dilemma. Circumstances have changed as never before. In such circumstances, law reform is needed to resolve the tension. Lawyers, as public citizens, have a

31. An example of the need for legislation appears in the case of the regulatory structure that failed Florida residents of the Champlain Towers collapse. *See* Robert H. Jerry, II, *The Collapse of Champlain Towers South Was a Regulatory Failure*, THE REGULATORY REVIEW (Jul. 19, 2021), https://www.theregreview.org/2021/07/19/jerry-collapse-champlain-towers-south-regulatory-failure/.

32. The effect of the business judgment rule is to protect the discretion of the business officer or agent. *See* Andreas Engert & Susanne Goldlücke, *Why Agents Need Discretion: The Business Judgment Rule as Optimal Standard of Care*, REV. OF L. & ECON. 1, 22-24 (2016). The discretion of the lawyer, by contrast, is cabined by rules such as confidentiality as set forth in the modern version of Model Rule 1.6. Changing the weight and discretion accorded lawyer judgments on confidentiality would create a far different version of confidentiality. The version of the rule with enhanced lawyer discretion would create the relationship of lawyer and client that comports with agency law generally and the traditional judgement of lawyers. *See, e.g.*, Final Rep. of the Comm. on Code of Pro. Ethics, A.B.A. (1908), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf.

33. MODEL RULES OF PRO. CONDUCT, pmbl, para. 1 (A.B.A. 2020).

role to help find the balance in new laws to change the controlling factors that, despite past value for the public, now undermine the public good.

Seemingly mundane presumptions and configurations in the law systematically influence legal conclusions in dramatic ways. The formulation of the duty of confidentiality, the business judgment rule, and the primacy of shareholder rights name a few. Likewise, the norms applicable to lawyers affect more than the lawyers. They create a system for enforcement with effects that reach beyond lawyers themselves to clients and others. As merely one example of the risks to society from overly definitive norms, consider the duty of confidentiality. This duty has changed dramatically from agency law, the Canons of Professional Responsibility and the Model Code of Professional Responsibility, hardening the norm and rule of lawyer silence. The modern approach expanded the universe of information subject to the mandate of silence from "confidences and secrets" to any information about a client. The mandate "applies not only to matters communicated in confidence by the client but also to *all* information relating to the *representation, whatever its source*."[34]

Generalities about the role of lawyers and the outcomes of lawyer interaction with clients provides the justification of the rigorous rule on confidentiality. The rationale is presented as a positive heuristic thinking to support secrecy in all cases without regard for evidence of potential wrongdoing and without caution to the lawyer about her own risks of liability for client misconduct. Comment 2 to Model Rules 1.6 provides an example and states:

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.…This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. *Almost without exception*, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that *almost all clients follow the advice given, and the law is upheld.*[35]

This comment establishes strong default assumptions, which present essentially irrebuttable presumptions regarding the broad command of lawyer silence in relation to representations. These assumptions are: (1) that clients come to lawyers to determine their rights (as opposed to using lawyers to circumvent complex laws or using lawyers as gatekeepers to financial markets and other regulated fields), and (2) almost all clients follow the lawyer's advice to follow the law. Thus, the probabilistic syllogism concludes that the law is upheld. This heuristic concludes with legal compliance in almost all representations. This conclusion justifies the hard-edged rule of silence. The comment makes clear that lawyer discretion has

34. *Id.* r. 1.6 cmt. 3 (emphasis added).

35. *Id.* r. 1.6 cmt. 2 (emphasis added. Internal citation omitted).

no place in the vast majority of cases. It provides no counter example of necessary or beneficial disclosure. The absence of any acknowledgement that clients do commit crimes and frauds in the real world muddies a lawyer's ability to analyze her duties in a circumstance of exigency. It suggests that of the need for a strict rule constraining lawyer disclosure is justified without consideration of circumstances or risks.

By contrast, comments dealing with permitted disclosures frame the exceptions narrowly, make clear the extremely limited range of lawyer discretion to disclose. Lawyers receive permission to disclosure client information in carefully articulated exceptions, each of which reminds the reader that the general rule predominates and invoking an exception imposes a difficult burden of proof in difficult fact situations.[36]

The real world, on the other hand, includes sophisticated clients who perpetrate crimes and frauds of almost unimaginable scope. For example, the American Bar Association's Center for Professional Responsibility reports that the "U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimates that $300 billion is laundered every year in the U.S. alone."[37] This figure suggests that not all clients enter a representation to learn how to comply with complex laws, and the generalization that "*almost all clients follow the advice given*" presents a happy conclusion that does not comport with reality and may lead lawyers into some representations that present more than insignificant negative outcomes in terms of upholding the law. The report also describes the illegal system in this one corner of the market. It states:

> One common way criminals use lawyers to launder money is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate, equipment, or another transaction. After a period of time, the client asks the lawyer to return the funds because the 'transaction' has fallen apart. Upon return of the money to the client, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money.[38]

This critique of current rules and norms does not mean, of course, that bar associations or courts should use the climate crisis to make mincemeat of the principles of fair trial and due process or the lawyer's duties. Turning lawyers into officers of the state to police their clients will not advance true justice. On the other hand, our norms should not force or nudge lawyers into the role of subservient technicians or ignore willful ignorance as a way to insulate lawyers from liability for conduct that furthers criminal or fraudulent conduct. Such norms make lawyers the ex officio co-conspirators with unworthy clients, undermine the law, and

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36. *Id.* r. 1.6 cmt. 6-8.

37. ABA Comm. on Ethics & Pro. Resp., *Discussion Draft of Possible Amend. to Model Rules of Pro. Conduct Concerning Lawyers' Client Due Diligence Obligations* (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20211215-scpr-scepr-comment-draft-modrul-amendments-client-due-diligence-notice-of-public-roundtable.pdf (last visited Feb. 26, 2022).

38. *Id.*

damage society.[39] Like other legal questions, we look for a workable system that threads the needle between two extremes.

Presumptions inside the law impact the individual business decisions that cumulate to run the market. They keep the wheels of commerce (and the greenhouse gases) moving our economy. Each law, presumption, and default standard within the system requires scrutiny, and scrutiny occurs over time. In our time, the system of scrutiny requires enhanced attention and purpose to assure that the deep preferences driving the analysis tend ground business decisions, legal advice, and judicial oversight in a workable system that serves the public good. In this time of peril, we must consider whether environmentally sound outcomes are available within the operation of each cog in the system.

While changing existing legal standards seems to be a dramatic step, it is the standard adaptation or feedback loop of science.[40] When scientific advances in knowledge reveal perilous physical risks, regulation seeks to minimize the risks. Scientific studies show that government actions today, including its actions of authorizing greenhouse gas discharges and subsidizing fossil fuel extraction, development, consumption, and exportation, imperil plaintiffs' constitutional rights to life, liberty, and property. Federal and state policies and subsidies for fossil fuel threaten to push our climate system into catastrophe.[41] As established dangers of greenhouse gases and newly discovered dangers of chemicals present risks; the analytical cost of more transparent analysis may be necessary to combat the climate crisis. Traditional economic cost-benefit analysis has expanded to take account of a larger and growing spectrum of costs and benefits, including social and environmental effects society bears as result of particular decisions. In energy and infrastructure analysis, for example, economists routinely assess decisions using robust cost benefit analysis, such as increased CO2 emissions and the attendant social costs of health effects.[42] Such cost-accounting occurs at a variety of levels of decision making, including government analytics and trade industry associations.[43] The advancing science of CBA makes it at least conceivable that

39. For an exposition of this issue, *see generally* Lissa Griffin & Katrina F. Kuh, *Professional Responsibility and the Corporate Hoodwink: Using the Climate Disinformation Campaign to Examine the Ethical Responsibilities of Attorneys When Corporate Clients Mislead the Public to Avoid G-overnment Regulation*, ENV'T L. DISRUPTED (K. Hirokawa & Jessica Owley eds. 2021).

40. For an exploration of the evolution of the common to accommodate changing economic imperatives, see MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

41. Johannes Urpelainen and Elisha George, *Reforming Global Fossil Fuel Subsidies: How the United States Can Restart International Cooperation*, BROOKINGS REPORT (July 14, 2021), https://www.brookings.edu/research/reforming-global-fossil-fuel-subsidies-how-the-united-states-can-restart-international-cooperation/.

42. *See, e.g.*, Michiel de Nooij, *Social Cost-Benefit Analysis of Electricity Interconnector Investment: A Critical Appraisal*, 39 ENERGY POLICY 3096, 3096 (2011) (available at https://www.sciencedirect.com/science/article/abs/pii/S0301421511001418) (using social cost-benefit analysis to compare two different interconnector proposals to conclude that investment decisions available are likely not to maximize social welfare).

43. *See generally* Matthew D. Adler & Eric A. Posner, *Cost-Benefit Analysis: Legal, Economic and Philosophical Perspectives*, U OF PENN., INST. FOR L. & ECON., RESEARCH PAPER 01-22 (2001); Global Workplace Analytics, *Advantages of Agile Work Strategies for Companies*, https://globalwo

choices in legal policies can be assessed in terms of the costs in CO2, for example, of a hard-edged confidentiality rule compared with a softer version.

Likewise, legal principles and standards evolve to address new conditions and to correct old errors. Examples from history are dramatic as well. For example, it took a war between the states to adjust the definition of a person and recognize inherent and inalienable rights of people enslaved by the power of unjust law. Thus, the law needs the test of the public good and individual dignity. A law promoting racial discrimination or destroying the earth's capacity to support people undermines the public good and human dignity. The Declaration of Independence, the Bill of Rights, and the Fourteenth Amendment recognize our rights, but these documents did not create our rights. The framers recognized these rights as self-evident and inalienable, meaning they existed before the Constitution existed. The drafters of the Constitution denied the rights and status of women, African Americans, Native Americans, and children. It took generations for the law to recognition the fundamental rights and dignity of all people. Each group gained political, and property rights as "society began to understand" their "equal dignity."[44] The arc of logic and history compelled recognition of these inherent rights, and now that same arc of logic and history has given us scientific tools that identify violations of fundamental and inherent rights.

Deans have an obligation to lead. The best are servant-leaders, though defining that role can be difficult.[45] This term is overused, and overuse can sap words of vitality, pushing us to search for new terms. If the term "servant-leader" were fabric, it would be frayed and thin from wear – "rump-sprung" as my mother would say as she cut up an old skirt for quilt squares. If "servant-leader" were a stone, it would be smooth on every surface, like a talisman. As a cement stair, it is one in the high school gym on the way to the auditorium, worn smooth under its battleship gray paint. But the term is still real and still meaningful. We need to ration the term if using it will wear it out; we need to shout it if giving it voice will enhance its powers.

Recognizing that law reform is the key to the issue of global climate change and that collective action problems haunt legislative initiatives raises the suggestion that the debate needed on the issues is not only overwhelming but, in fact, doomed. The policies are controlled by statutory law of course, and the idea that deans should speak to influence legislation places an inordinate burden for change on deans, but deans do have a potent role to play. That role involves teaching students that they need to engage these issues as "citizen-lawyers" and as legislators. It also means that deans encourage student intuitions that may question

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rkplaceanalytics.com/resources/costs-benefits (last visited Feb. 26, 2022) (exploring factors in employer decisions regarding allowing or encouraging employees to work from home).

44. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015) ("As women gained legal, political and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.").

45. The term "servant leadership" has more than one meaning, of course. Like the term "public citizen," its content points us in the right direction. It points to duties to society and to the common good. It does not provide a basis for serving individual interests over group interests. *See, e.g.*, Robert H. Jerry II, *Reflections on Leadership,* 38 U. TOL. L. REV. 539, 540 N.2 (2007).

the fairness of a particular legal presumption or default in the law rather than accepting the system as a "given" or encouraging others to assume that our legal structures are set in stone. The decanal role of honoring inquiry is crucial. This includes the scrutiny of existing laws and existing paradigms that provide the skeletons within the law. If the enormity of the task leads some to cynicism, then another role for deans is to fight such cynicism. Deans have responsibilities, but they are not alone in these responsibilities. Deans are crucial in today's challenges in the way they were crucial for solving past challenges. They provide protective barriers to influence from powerful figures when their power undermines the public good, which includes the foundational good of academic inquiry.

In thinking about what made me become a dean and why others might be drawn to this job, I remembered one dean I particularly admire. She said more than once that she likes to solve problems. That made sense to me. Legal education leads us to the larger world of lawyering, in which we think of problem-solving as a way of life that serves the overall good – dispute resolution without violence. For example, the dean has a role in helping and encourage each faculty member find their "highest and best" way to serve society through teaching and scholarship and their own leadership. That role is essential to law, society, and the law school mission. Part of the dean's role is encouraging faculty members in their teaching and scholarship to reach their highest effectiveness. This incremental process serves each faculty member and the larger purposes discussed here. Each faculty member's voice adds to the marketplace of ideas in our society and potentially adds to the reputation of that faculty member and to his school or institution. Each faculty member is influenced and inspired by the voice of the dean and support from the dean. When deans respect the work of assessing existing law in the detail described above, that enterprise will be enhanced. Voicing respect for the idea of legal reform and scrutiny of the legal principles that brought us to this point is essential to effective legal reform, and deans – more than other leaders – influence the regard with which professors, students, and lawyers embrace law reform in situations of urgency such as climate change.

CONCLUSION

The point of this essay is that all lawyers, including law school deans, bear responsibility for necessary legal reform. In addition to real duties to clients, all lawyers have real duties to society. In times of real peril, aggregate thinking and assumptions that ignore the duty of lawyers to society can lead to perilous outcomes. Comfortable conclusions about levels of compliance with law and the assumption that lawyer discretion is an outmoded concept move us toward disastrous results. A system that suggests that the lawyer need only follow the rules laid down by bar associations overlooks the limits to sustainability in a finite world. Business as usual is not good enough. All need to work to challenge unjust or dangerous assumptions that imperil political rights, personal freedoms, and the survival of civilization.

This time of unprecedented peril requires renewed dedication and calls for an all-hands-on-deck approach. As John Kerry said, we must all be "climate lawyers

now."[46] Scientists recognize that science is corrigible, meaning they use newly recognized truths to adjust the next inquiry, and thus push the process of discovery and reevaluation to shift existing paradigms of science. Likewise, the law must consciously and conscientiously evaluate and adjust presumptions and assumptions (such as the business judgment rule and the contours of lawyer confidentiality) to address new and newly recognized perils. This process of law reform takes science and the physical world into account. Scrutiny of the law, including legal principles and defaults, sometimes require shifts in legal paradigms to serve the public good.

46. Karen Sloan, *"You Are All Climate Lawyers Now," John Kerry tells ABA*, THOMSON REUTERS (Aug. 5, 2021, 1:37 PM), https://www.reuters.com/legal/litigation/you-are-all-climate-lawyers-now-john-kerry-tells-aba-2021-08-05/.