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## Movement Lawyering in the Time of the Climate Crisis

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ARTICLE

MOVEMENT LAWYERING IN THE TIME OF THE  
CLIMATE CRISIS

CAMILA BUSTOS\*

ABSTRACT

*While climate litigation has emerged as a tool to tackle rising emissions and its devastating consequences, climate litigation as a strategy and movement has yet to be thoroughly analyzed through the lens of movement lawyering. Thus, this paper seeks to draw from existing literature on movement lawyering to explore the relationship between climate litigation and movement lawyering principles, addressing separate yet related questions: What does it mean to be a movement lawyer working on climate change? How do principles of climate justice shape movement lawyering and thus, climate litigation? How do lawyers think about accountability to their clients and the broader climate movement? What, if any, are the implications of having climate change litigation that is not grounded on a movement lawyering model?*

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## INTRODUCTION

Social movements have a critical role in changing normative understandings regarding what is legal or constitutional, while also shaping “cultural shifts that make durable legal change possible.”<sup>1</sup> Under this theory of change, social movements are “as much a source of law [as statutes or] judicial decisions.”<sup>2</sup> This article situates itself in the broader literature analyzing how social movements and lawyers engage the legal system to pursue climate justice. Purvi Shah describes the role of movement lawyers in U.S. history:

Lawyers throughout American history have used law as a sword and shield for advancing the causes of the most marginalized in our society. The work of all lawyers in this time is to walk the tightrope of doing our duty to engage valiantly and aggressively in the courts while simultaneously recognizing that law alone won’t solve our communities’ challenges. Understanding this contradiction and being able to take strategic action despite it, is what it means to be not only a movement lawyer—but an ethical lawyer in the twenty-first century.<sup>3</sup>

In the context of climate advocacy, litigation has emerged as a tool to tackle rising emissions and its devastating consequences. Advocates have leveraged litigation inside and outside the United States in order to hold corporations and governments accountable for their role in driving and/or failing to respond to the climate crisis. The landscape of climate litigation and climate litigators is diverse, with advocates leveraging different claims across jurisdictions to promote specific agendas. The term ‘climate litigation’ is now used to refer to distinct types of litigation, ranging from lawsuits that seek to promote a reduction of greenhouse gas

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<sup>1</sup> Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2743 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11, 18 (2018).

emissions to criminal defense work on behalf of activists engaging in civil disobedience.<sup>4</sup>

While climate litigation has emerged as a tool to tackle rising emissions and its devastating consequences, climate litigation as a strategy and movement has yet to be thoroughly analyzed through the lens of movement lawyering. Thus, this paper seeks to draw from existing literature on movement lawyering to explore the relationship between climate litigation and movement lawyering principles, addressing separate yet related questions: What does it mean to be a movement lawyer working on climate change? How do principles of climate justice shape movement lawyering and thus, climate litigation? How do lawyers think about accountability to their clients and the broader climate movement?

This paper is divided into five sections. Part I introduces the main questions motivating this paper, namely the relationship between the current wave of climate litigation and movement lawyering. Part II presents a literature review on movement lawyering, highlighting its underlying assumptions and key features. Part III presents an overview of recent climate litigation trends, briefly summarizing a few of the most iconic cases in the United States and abroad. Part IV explores the relationship between movement lawyering and the current landscape of climate litigation. Finally, Part V offers some concluding thoughts.

### C. UNPACKING THE CONCEPT OF MOVEMENT LAWYERING

The term movement lawyering has traditionally been used along with terms such as cause lawyering, progressive lawyering, or community lawyering to describe an alternative type of public interest advocacy that seeks to center the goals and objectives of a

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<sup>4</sup> See CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com/category/common-law-claims/> [https://perma.cc/CMA3-RSER] (exemplifying that while there is not one single definition of climate change litigation, the term used here draws from a common understanding among practitioners that climate litigation covers any lawsuit which seeks to either mitigate climate change, bolster climate change action, support adaptation efforts, or seek compensation on behalf of affected communities).

social movement or community.<sup>5</sup> Scholars and practitioners have theorized around the concept, offering a range of definitions to describe what movement lawyering entails.<sup>6</sup> I draw from the work of Shah and Chuck on community lawyering to develop a working definition of movement lawyering: a lawyer using legal advocacy “to build the power of communities to challenge and eradicate systems of inequality.”<sup>7</sup> I draw from Betty Hung’s work to highlight that “th[is] building and exercise of collective power” is in turn “led by the most directly impacted, to achieve systemic institutional and cultural change.”<sup>8</sup>

Movement lawyers often view the legal system in the United States as highly individualistic, designed to address disputes between a single plaintiff and a single defendant. This design often works against an organizing model by making it difficult to use litigation to achieve collective goals.<sup>9</sup> Movement lawyers have sought to overcome the disjuncture between “the legalism of conventional public interest law and the dynamism of emerging grassroots movements.”<sup>10</sup> Movement lawyering has also operated as an alternative to mainstream lawyering, which has been described as “the private army of corporations, the carceral state, and/or the elites who benefit from both.”<sup>11</sup> Under this

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<sup>5</sup> See Amna A. Akbar et al., *Movement Law*, 73 STANFORD L. REV. 821, 825–26 (2021) (“Movement law is not the study of social movements; rather, it is investigation and analysis with social movements. Social movements are the partners of movement law scholars rather than their subject.”).

<sup>6</sup> See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011). See, e.g., SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915* (2013); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); Guinier & Torres, *supra* note 1, at 2740.

<sup>7</sup> Joseph Phelan, Purvi & Chuck: Community Lawyering, COMMUNITY JUSTICE PROJECT (June 15, 2010), <http://communityjusticeproject.com/media/2014/9/24/purvi-chuck-community-lawyering> [https://perma.cc/54D2-FWAD].

<sup>8</sup> Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

<sup>9</sup> Phelan, *supra* note 7.

<sup>10</sup> Scott L. Cummings, *Movement Lawyering*, 5 UNIV. OF ILL. L. REV., 1645, 1648 (2017).

<sup>11</sup> Shah, *supra* note 3, at 12.

understanding of the legal field, traditional lawyers “are working to preserve injustice rather than transform it.”<sup>12</sup>

Movement lawyers may also critique the way in which law schools fail to train future lawyers in the history of social movements and the (limited) role of the law in advancing a progressive agenda.<sup>13</sup> A traditional legal education does not always equip students to grapple with questions of justice. In the words of Purvi Shah, lawyers have “substantial analytical gaps in understanding the nature of oppression, what causes it, and what transforms it,”<sup>14</sup> all of which ultimately shapes how lawyers are trained, acculturated, and incentivized. Another recurring barrier in the legal sector is a lack of imagination that stymies innovation in the field, which has resulted in litigation-centered strategies dominating legal organizations.

Legal scholars have critiqued the liberal legal approach to lawyering, arguing it has undermined movements by “diverting political challenges into legal channels.”<sup>15</sup> Critics argue that the liberal approach has emphasized individual over collective rights, conflated rule or legal changes for social changes, and empowered lawyers to make decisions without accountability to their constituencies.<sup>16</sup> These critiques can be broadly divided in two categories: (1) “the efficacy of law in producing social change” and (2) the accountability of a lawyer.<sup>17</sup>

Efficacy critiques question the impact of legal strategies, which often “discount the voices of the oppressed,” create backlash, and demobilize social movements.<sup>18</sup> This court-centered approach to social change has been extensively critiqued as a result.<sup>19</sup> Accountability critiques are concerned with lawyers being accountable to the constituencies they seek to represent when, by pursuing a vision of the public good—“in response to elite funders

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<sup>12</sup> *Id.*

<sup>13</sup> See Shah, *supra* note 3, at 13; see also Amna Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. OF LEGAL EDUC. 352, 355 (2015).

<sup>14</sup> Shah, *supra* note 3, at 13.

<sup>15</sup> *Id.*

<sup>16</sup> Cummings, *supra* note 10, at 1650–51.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1656.

<sup>19</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

and organizational supporters”—they oppose or undermine their clients’ vision.<sup>20</sup> In response to the deficiencies of traditional lawyering, movement lawyering attempts to provide “an alternative that aspires to be both client-centered and politically transformative.”<sup>21</sup> This begins with the lawyer’s decision to represent mobilized clients as a reflection of a strategy to influence social and policy outcomes<sup>22</sup>

In general, the values underlying movement lawyering should “disrupt the normal paradigm of professional responsibility. . .” and highlight concepts such as dignity, integrity, collectivity, and collaboration.<sup>23</sup> “In Lani Guinier and Gerald Torres’ terms, lawyering for movements is a ‘participatory, power-sharing process within the lawyer/client relationship,’ in which lawyers lend their support to nonelites to produce the ‘cultural shifts that make durable legal change possible.’”<sup>24</sup> In response to efficacy concerns, lawyers “use complex and coordinated legal strategies to achieve political goals: deemphasizing (though not abandoning) litigation.”<sup>25</sup> In response to accountability critiques, movement lawyers seek to be accountable to “politically-activated clients that have the power to set the agenda and execute campaigns.”<sup>26</sup> This approach ultimately fosters “client empowerment through the representation itself.”<sup>27</sup>

Under a movement lawyering framework, an attorney’s advocacy should be centered on the needs and goals of the particular movement the lawyer serves. This means that the lawyer should see litigation as part of a broader toolkit instead of as the ultimate solution to her clients’ challenges. In this way, lawyers are not saviors or bystanders, but ‘conscious tacticians’ supporting marginalized people seeking to transform their lives. In fact, movement lawyering promotes mobilized clients who are

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<sup>20</sup> Cummings, *supra* note 10, at 1655.

<sup>21</sup> *Id.* at 1657.

<sup>22</sup> *Id.* at 1691.

<sup>23</sup> Shah, *supra* note 3, at 16.

<sup>24</sup> Cummings, *supra* note 10, at 1658 (quoting Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; see also Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551, 565 (2011).

actively thinking about their liberation and engaging in active collaboration with their legal partners, as opposed to passive clients awaiting directions. Purvi Shah describes movement lawyers:

These lawyers creatively use legal tools to build the power of, make space for, validate, bolster, defend, and protect social movements and the activists and communities within them. Premised on the idea that lawyers and the law are but one piece of social change, this style of lawyering has many names—community lawyering, political lawyering, empowerment lawyering, movement lawyering.<sup>28</sup>

Movement lawyers are also accountable to their clients and the broader movements they serve.<sup>29</sup> This is essential to counterbalance the traditional lawyer-client relationship, which is characterized by power dynamics undermining the accountability of lawyers and limiting the role of clients in decision-making processes.<sup>30</sup>

Through representing politically disempowered communities and community members, lawyers tackle the power and knowledge asymmetries that traditionally haunt client-lawyer relationships. If legal work helps “to develop a sense of strength, an ability to fight back . . .,” lawyering is successful, even in the absence of a formal victory.<sup>31</sup> Thus, movement lawyers hope and work towards reducing dependency on lawyers, while transferring skills to organizers and clients, expanding the collective knowledge base.<sup>32</sup> Mobilized clients are able to hold lawyers accountable for the strategy decisions made to achieve the ends of the representation.<sup>33</sup>

Given the role of litigation in changing institutional behavior and potentially shaping public opinion, movement lawyers remain committed to impact litigation and the value in building favorable precedent but do so more critically, considering its limits.

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<sup>28</sup> Shah, *supra* note 3, at 14.

<sup>29</sup> Cummings, *supra* note 10, at 1652-53.

<sup>30</sup> Phelan, *supra* note 7.

<sup>31</sup> ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 57 (1983).

<sup>32</sup> Phelan, *supra* note 7.

<sup>33</sup> Cummings, *supra* note 10, at 1691-92.

Within the integrated advocacy framework, movement lawyers recognize that there are times when claiming rights in court is essential to challenge structural injustice: litigation may produce concrete short-term benefits that improve movement constituents' material conditions, force tangible changes in institutional behavior, or directly expand the possibility of political participation.<sup>34</sup>

Thus, movement lawyering strategies and objectives result in an integrated advocacy model, where lawyers are connected to movements through different types of organizational relationships like coalitions and partnerships.<sup>35</sup> This type of lawyering combines the use of tactics outside of the court and synchronizes litigation with a comprehensive movement strategy, diversifying the tactical arsenal. Other tactics include, "litigation, policy advocacy, research, community education, and infrastructure/institutional building."<sup>36</sup> Thus, "[o]rganizers rely on law and legal process not for justice, but as sites for democratic contestation and movement building in a larger battle to shift the balance of power."<sup>37</sup>

In sum, movement lawyering represents a distinct response by lawyers to changing political circumstances, whereby lawyers have "reoriented" themselves towards a range of problem-solving strategies.<sup>38</sup> This model views participation as a vehicle of *collective mobilization*, attempting to channel constituent grievances into organized challenges. Movement lawyering values participation as a way to build power to destabilize the status quo and help constituents gain "political voice and material gains."<sup>39</sup>

## CI. THE RISE OF CLIMATE CHANGE LITIGATION

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<sup>34</sup> *Id.* at 1707.

<sup>35</sup> *Id.* at 1695-96.

<sup>36</sup> Phelan, *supra* note 7; see also Cummings, *supra* note 10, at 1691 ("[M]ovement lawyers deploy law flexibly as part of problem solving repertoires, in which legal "skills" are construed broadly to include litigation competencies, like brief writing and oral advocacy, but also encompass educating community members about their rights, advising and defending protestors, researching and drafting policy language, writing legal opinions to support policy positions, counseling movement organizations on legal levers that may be pulled to exert pressure on policy makers or private actors in negotiating contexts, and devising mechanisms for monitoring the enforcement of policy.").

<sup>37</sup> Akbar, *supra* note 13, at 365.

<sup>38</sup> Cummings, *supra* note 10, at 1652.

<sup>39</sup> *Id.* at 1728.

Climate litigation has emerged as a strategy to broadly refer to litigation that deals with climate change's drivers or impacts. It encompasses a diversity of legal initiatives, varying by the specific goals of a particular case, the relevant parties, and the different sources of law, among other elements. While some scholars have applied the term to describe industry-led actions, this article focuses on public interest climate litigation brought to accelerate climate action.

Climate litigation can be classified across multiple categories: (1) cases seeking a remedy involving a reduction in emissions (mitigation cases); (2) lawsuits seeking a remedy to help compensate a community for the damages caused by climate-related harms (compensation or loss and damage cases); (3) cases where plaintiffs demand specific actions from defendants to help them adapt to climate change (adaptation cases); and (4) remaining cases that deal tangentially with climate change, but whose remedies do not directly involve mitigation, compensation, or adaptation.

Climate litigation also varies depending on the type of defendant involved. Typically, cases are brought against governmental entities or private companies. Byrnes and Setzer find that “[i]n terms of defendants, almost 75 percent of cases have been brought against governments, typically by corporations or individuals. An analysis of U.S. case statistics up to 2017 also showed that governments made up over 80 percent of defendants in the US.”<sup>40</sup> Similarly, cases vary depending on the underlying cause of action, which ultimately depends on the type of jurisdiction the case is brought in (e.g. civil or common law system). This paper will explore a few examples of high-profile climate litigation, including cases based on constitutional law, tort law, and international human rights law. The Sabin Center for Climate Change Law has identified “1,587 cases of climate litigation . . . between 1986” and mid-2020, with “1,213 cases in the United States and 374 cases in other 36 countries and regional or international jurisdictions.”<sup>41</sup> More than half of the cases in the Global South were brought between 2015 and 2019.<sup>42</sup>

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<sup>40</sup> JOANNA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 9 (2020).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 4.

Since the 2015 Paris Agreement on climate change, there has been an increase in both the number and the type of climate-related cases in the courts.<sup>43</sup> Climate litigation has emerged as a tool used by advocates to hold governments and corporations accountable for their role in the climate crisis. While measuring the impacts of climate litigation is beyond the scope of this paper, it is worth briefly describing some of the opportunities and limitations of climate litigation. Advocates have turned to climate litigation because it translates large, abstract problems into concrete conflicts. By presenting a narrative in which plaintiffs bring a legal action against a government or a company, climate litigation has made visible some of the key actors driving the crisis, the inaction of most governments around the world, and the disproportionate impacts that certain communities and localities are already facing. In addition, climate litigation has allowed advocates to engage the judiciary branch after widespread inaction by the executive and legislative branches. After all, litigation has the potential to change the status quo by “advanc[ing] climate policies, driv[ing] behavioral shifts . . . creat[ing] awareness[,] and encourage[ing a] public debate” on the solutions.<sup>44</sup>

Affirmative litigation can also support climate action by further pressuring campaign targets, seeking to overturn or amend an unjust law, or promote new legislation to advance the rights of marginalized communities. Scholars have found that approximately 42% of climate cases in the United States had favorable outcomes, in comparison with 58% of cases outside the United States.<sup>45</sup> Nonetheless, scholars generally agree that “[w]hile direct and indirect regulatory impacts can be observed among all types of climate litigation, questions about whether the outcomes of these cases actually help to address climate change in a meaningful way remain unanswered.”<sup>46</sup>

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<sup>43</sup> Setzer & Byrnes, *supra* note 40, at 7.

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 2.

To be sure, climate litigation is not a “magic bullet”<sup>47</sup> or the holy grail to solving the climate crisis.<sup>48</sup> Scholars have argued that most of these projects are far from radical, with many being deemed “business as usual.” For example, Kim Bouwer argues that many of the cases involving private law disputes “demand a focused analysis of foreseeability, reasonable standards of care, and acceptable social conduct. Far from being unsuited to tackle broader social issues, private law cases foster deeply normative [i]nquiries that shape our understanding of socially acceptable conduct, including what this might mean in a climate context.”<sup>49</sup>

In addition, lawsuits often span across several years, and the fight against climate change is precisely, a fight against the clock. Climate litigation may also suffer from some of the deficiencies raised by scholars critiquing “the myth of rights” and the idea that legal challenges are enough to vindicate people’s rights.<sup>50</sup> Furthermore, litigation requires significant resources, potentially drawing away time and money that could be devoted to more effective types of advocacy. On one of the most famous climate change cases,<sup>51</sup> Bouwer writes:

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<sup>47</sup> Kim Bouwer, *Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation*, 9 TRANSNAT’L ENV’T LAW 347, 354-55 (2020).

<sup>48</sup> *Id.* at 355 (quoting S.-L. Hsu) (“By targeting deep pocketed private entities that actually emit greenhouse gases. . . a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation . . . Importantly, to maximize the impact of this kind of litigation, the relief sought should be for damages, not injunctive relief. Injunctive relief in a successful lawsuit would have the positive effect of mandating some action to reduce emissions, but then as a substantive matter the suit takes on the character of just another form of regulation, and a considerably less informed and sophisticated one.”).

<sup>49</sup> *Id.* at 354; see also David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENV’T. L. 1, 6 (2003); see also David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1745 (2007); see also Eduardo M. Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RES. J. 563, 564 (1998).

<sup>50</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (Benjamin L. Page ed., 1991).

<sup>51</sup> Setzer & Byrnes, *supra* note 40, at 15-6 (explaining that first brought in 2015, the Urgenda case sued the Dutch government for failing to prevent dangerous climate change and exposing its’ citizens to danger. In December 2019, the Dutch Supreme Court ruled in favor of the plaintiffs and ordered the government to reduce its emissions. Observers have noted that “[t]he Urgenda case forms part of a rapidly evolving body of norms at the national, regional and international level regarding states’ human rights obligations to urgently mitigate climate

This heroic framing risks contributing to a sense of complacency, an interpretation that the job is done, the grail is found, the quest was successful. However, any ‘job done’ attitude to this decision would crowd out the potential for conversations about the inadequacy of the reductions prescribed by the [Dutch Supreme] Court and, indeed, the lack of effect this seems to have had on Dutch climate policy. It is perfectly possible to applaud the valour of Urgenda while cautioning that its result is not necessarily consistent with safe limits on warming. Despite the scale of the achievement, this decision was not radical or disruptive, but was a deeply ‘conservative’, business-as-usual outcome, which is as consistent with overshooting the temperature target as otherwise, even if the Dutch government had complied with the order.<sup>52</sup>

Climate litigation may also suffer from accountability critiques, questioning whether lawyers are being accountable to the constituencies they seek to represent. The concern can be more acute when litigation increases as a result of elite funders and organizational supporters. In particular, when non-profit organizations depend on external funding, there might be recurring pressure to innovate and propose creative legal strategies in order to mobilize funds. The next section will explore the question of accountability among others.

## CII. DISCUSSION

This section hopes to explore some of the ways in which climate litigation interacts with principles underlying climate justice and movement lawyering. The motivation driving this analysis stems from the idea that climate change advocacy ought

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change. Since the first decision in the Urgenda case was issued in 2015, individuals and communities around the world have initiated proceedings against states seeking to achieve similar rulings. There are ongoing legal proceedings regarding states’ human rights obligations to mitigate climate change in Ireland, France, Belgium, Sweden, Switzerland, Germany, the United States, Canada, Peru and South Korea. Arguments relied on by litigants in these cases often center on the idea that reducing emissions with the highest possible level of ambition amounts to a due diligence standard for complying with human rights obligations and that this is informed by the notion of ‘fair share’ or ‘common but differentiated responsibilities.’”).

<sup>52</sup> Bouwer, *supra* note 47, at 368.

to embody climate justice principles in its design and execution; it is not enough for climate litigation to reduce emissions or achieve compensation for a number of victims if these campaigns in themselves are not grounded in a critical approach to climate change as a social, political, and economic problem. Affirmative litigation ought to support the work of movements by pressuring campaign targets or “[seeking] to alter unjust laws . . . to advance the rights of marginalized communities.”<sup>53</sup> In this way, movement-driven litigation should be responsive to the needs and demands of activists and communities on the ground.

Climate litigation is far from monolithic and quite diverse. While this article focuses on some of the most iconic cases in recent years, it does not seek to analyze all types of climate litigation, particularly litigation brought by and on behalf of local communities resisting extractive projects. Furthermore, because social movements are diverse and thus, have conflicting interests, the way in which lawyers make client selection decisions and prioritize resources invariably involves choosing sides and positioning themselves in internal movement debates.<sup>54</sup> This may implicate the very questions about accountability to broader movement constituencies discussed earlier. As a result, “a movement lawyer's choice of client is a decision freighted with political significance.”<sup>55</sup>

The following section will analyze how different cases have applied movement lawyering principles, either through their lawyering model, remedy sought, or broader goal. First, the section looks at cases grounded on distributive justice principles, including cases bringing claims related to just compensation and intergenerational equity. Second, the section focuses on cases driven by groups within the climate justice movement, particularly by activists opposing existing and proposed fossil fuel

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<sup>53</sup> Betty I. Cant, *FIGURE OUT SPACING HERE* Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INT. L. J. 4, 9 (2008) (“In my conversations with organizers over the years, there are seven primary legal strategies that organizers have identified as being effective in advancing community organizing objectives such as those outlined above: affirmative litigation; legislative advocacy; community legal education; strategic counseling and advice; defensive litigation; direct legal services; and legal drafting of agreements or legislation.”).

<sup>54</sup> Cummings, *supra* note 10, at 1653-54.

<sup>55</sup> *Id.* at 1693.

infrastructure projects. Finally, the section analyzes cases arising from tort law, which seek damages for climate-related harms.

#### A. Litigation Inspired by Distributive Justice

Theories of distributive justice are concerned with the meaning of a just distribution of goods among members of society. Climate justice advocates have long called for adopting a justice lens to the climate crisis that considers the uneven sources of emissions and its disproportionate impacts. In response, climate lawyers have brought cases with distributive justice goals, asking that defendants clean-up after their historical contributions to emissions or pay for the consequences of their pollution. In this process, lawyers have designed cases whereby plaintiffs affected by climate harms ask courts to order a remedy for their injuries. As Guinier and Torres describe, one of the important functions of law (and litigation generally) is the “power to translate lived experience into a series of stories about individual and social fairness and justice.”<sup>56</sup> Relatedly, “the power of social movements stems from the ability” to challenge the status quo by “drawing on . . . common purposes and shared cultural frameworks.”<sup>57</sup> Even in the face of a particular loss, “social movements . . . help narrate new social meanings” about justice.<sup>58</sup> Climate advocates have created new narratives around justice and fairness by presenting legal challenges rooted in distributive justice. The cases described next will highlight how advocates have brought legal challenges on behalf of vulnerable populations to vindicate their rights vis-à-vis large, polluting countries or companies. The Inuit and Philippines cases highlight the disproportionate impact of climate change on certain populations in marginalized contexts, while the intergenerational equity cases are brought on behalf of youth and future generations who will face the greatest burden of climate change impacts.

##### 1. *Rights of vulnerable populations*

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<sup>56</sup> Guinier & Torres, *supra* note 1, at 2745.

<sup>57</sup> *Id.* at 2756.

<sup>58</sup> *Id.* at 2758.

One of the first cases raising rights claims related to climate change was brought on behalf of the Inuit people, whose livelihoods depend on the Arctic ice to “hunt, gather food, and communicate.”<sup>59</sup> In 2005, the Center for International Environmental Law (CIEL) and Earthjustice supported a petition to the Inter American Commission on Human Rights on behalf of more than 60 tribe members, alleging violations caused by the United States’ greenhouse gas emissions, which have resulted in climate impacts such as thinning ice shelves, shorter freeze periods, and an overall decrease in Arctic ice surface area. While the petition was unsuccessful, it was the first effort to reframe climate change as a human rights issue through the international legal system, helping establish the critical link between climate change and human rights.<sup>60</sup>

Since then, there have been several other cases brought by communities in the frontlines of climate change seeking to hold companies accountable for their historical responsibility in contributing to climate change. In 2022, the National Commission on Human Rights of the Philippines found that the Carbon Majors—the top fossil fuel companies emitting the bulk of industrial greenhouse gas emissions since 1850—have played a clear role in driving climate change and its impacts, finding that these companies could be found legally liable for human rights violations arising from climate change.<sup>61</sup> Filipino communities have disproportionately faced climate-related impacts, with a wave of extreme weather events in recent years including Typhoon Haiyan.<sup>62</sup> While it remains unclear whether there will be the equivalent to a legally binding order from a court as a result, the case has continued to create space for future challenges and raised the voices of Filipino communities demanding climate justice.

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<sup>59</sup> Inuit Petition and IACHR, CTR. FOR INT’L ENV’T L., <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=The%20petition%2C%20Violations%20Resulting%20from,climate%20control%20because%2C%20as%20exemplified> [https://perma.cc/7Z7F-XA5Y].

<sup>60</sup> *Id.*

<sup>61</sup> See generally COMMISSION ON HUMAN RIGHTS OF THE PHILIPPINES, NATIONAL INQUIRY ON CLIMATE CHANGE REPORT (2022), <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>.

<sup>62</sup> How is Climate Change Affecting the Philippines?, CLIMATE REALITY PROJECT (Jan. 19, 2016), <https://www.climateRealityProject.org/blog/how-climate-change-affecting-philippines> [https://perma.cc/N8QU-VVXF].

2. *Intergenerational equity*

*Juliana v. United States* is a groundbreaking case where a group of youth plaintiffs filed a constitutional climate lawsuit to challenge the federal government's actions causing climate change, alleging violations to their right to life, liberty, and property. *Juliana* was the first case to bring intergenerational equity principles to the forefront, elevating the voices of youth in the United States. While the Ninth Circuit reversed the case,<sup>63</sup> *Juliana* has sparked a national and international movement of youth using litigation as a tool to demand action on climate change. In many ways, *Juliana* created and empowered a movement of young people demanding that state and national governments secure their fundamental right to a stable climate. For instance, in Colombia, a group of youth and children inspired by *Juliana* brought and won a lawsuit against the Colombian government for their failure to stop deforestation in the Amazon forest. After having their case dismissed by the trial court, the Colombian Supreme Court of Justice not only ruled in the plaintiffs' favor, but also declared the Amazon basin an "entity subject of rights."<sup>64</sup> The case, along with others, has marked a turning point towards the rights of nature in Colombian jurisprudence.<sup>65</sup> Similar cases centering intergenerational equity have been brought in Peru and Korea.<sup>66</sup>

In this way, *Juliana* and its progeny have catalyzed social movements, similar to how movement lawyering in the civil rights

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<sup>63</sup> See *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

<sup>64</sup> See Camila Bustos, et al., *STANDING UP FOR A SUSTAINABLE WORLD*, pt. 18 at 166 (Claude Henry ed., 2020).

<sup>65</sup> See César Rodríguez-Garavito, Human Rights: The Global South's Route to Climate Litigation, in *TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH* 114 *AMER. J. INT'L L. UNBOUND* 40, 40-4 (2020).

<sup>66</sup> Setzer & Byrnes, *supra* note 40, at 15 ("One of the latest examples is Kim Yujin et al. v. South Korea, which was filed in March 2020 by 19 young people. They allege that South Korea's emissions reduction target for 2030 is inadequate to keep the rise in global average temperature to below 2°C, and that this violates their constitutional rights to life, to human dignity, to a healthy environment and to equality before the law and non-discrimination. The case has been filed in the Constitutional Court and, if successful, would potentially require the government to revise its national emissions reduction targets to bring them in line with the Paris Agreement's temperature goal.").

context fortified participatory democracy.<sup>67</sup> As Tomiko Brown-Nagin describes, “[t]he catalytic potential of movement lawyering did not turn on whether the litigator won or lost his case in court. Indeed, a loss might better facilitate a movement lawyer’s goals than a court victory.”<sup>68</sup> In this way, plaintiffs in *Juliana* and other cases have become politically empowered and thus, have gravitated towards and strengthened other forms of advocacy like community organizing throughout the litigation process. Focusing solely on “court victories [or] implementation” misses the importance of other success indicators such as “political empowerment and mobilization.”<sup>69</sup> Thus, even if climate change litigation like *Juliana* does not arise organically from grassroots movements, its value or impact is not necessarily diminished. Even if at first a social movement may be well organized or have an infrastructure in place, *Juliana* demonstrates how litigation and campaign work can help the movement coalesce together.<sup>70</sup> *Juliana* and its progeny have ignited a movement of young people fighting for a stable climate, inspiring action on multiple fronts and across national borders. Furthermore, scholars have noted that even though the case was dismissed, the court decisions in *Juliana* “included statements that recognize the risks imposed by climate change, and that do not close the door on future successes in different circumstances.”<sup>71</sup>

While the examples described above can be subject to criticism because of their “court-centric” approaches (and should not be immune from these critiques), climate litigation can have important symbolic effects, give individuals a sense of dignity, mobilize and inspire action, and provide a common agenda.<sup>72</sup>

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<sup>67</sup> See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Cummings, *supra* note 10, at 1721-22 (“The boundaries of movements are porous and contested, and there is particular disagreement about the role of organizations within movements . . . tempting to balance commitments to ‘participatory democracy’ with the need for structure and leadership to frame issues, plan strategy, and minimize internal conflict. Within this complex and fluid milieu are organizations with different degrees of funding, participation, and formality (some that are more professionalized and others more grassroots), which are associated with different ideological positions within movements.”).

<sup>71</sup> Setzer & Byrnes, *supra* note 40, at 1.

<sup>72</sup> Guinier & Torres, *supra* note 1, at 2748.

Particularly, in the intergenerational equity cases described earlier:

[B]y coming together as a group and networking with others, vulnerable individuals feel less isolated, and more empowered. Individuals begin to understand their problem as a common problem, one that affects dozens or hundreds in their community (and, perhaps, thousands nationally and internationally). The individual realizes that the obstacles she is facing are not the result of her own behavior or station but the result of a system or structure of society.<sup>73</sup>

As a result of the growing youth movement demanding accountability for climate change, sixteen youth have also brought a challenge before the United Nations Committee on the Rights of the Child, alleging that “their human rights are being violated by the failure” of countries around the world to “seriously address the climate crisis.”<sup>74</sup> While *Juliana* marked the first case to center intergenerational equity as part of the broader climate litigation movement, the youth movement has increasingly used legal tools in front of national and international courts to demand action on climate change and seek to affirmatively establish their rights.

### B. Movement-driven litigation

Movement lawyers often focus on bringing legal rights from the legal system to the ground level where they can be understood and mobilized by people, in order to raise the legal consciousness of movement actors so that “they can fight for their own rights and help others to do the same.”<sup>75</sup> Lawyers also ascribe to the importance of serving movements directly and shifting the power asymmetries in the client-lawyer relationship by uplifting the voices and decision-making processes of organizations and movements. Climate litigators applying some of these movement

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<sup>73</sup> LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 154-55 (Richard Delgado & Jean Stefancic, eds., 2001).

<sup>74</sup> See Ben Arnoldy, *Greta and 15 Kids Just Claimed Their Climate Rights at the UN*, EARTHJUSTICE (Sep. 23, 2019), <https://earthjustice.org/blog/2019-september/greta-thunberg-young-people-petition-UN-human-rights-climate-change#:~:text=Sixteen%20young%20people%20from%20around,seriously%20address%20the%20climate%20crisis> [https://perma.cc/K99W-W742].

<sup>75</sup> Cummings, *supra* note 10, at 1714.

lawyering principles have sought to be responsive to the demands of climate justice activists by launching defensive movement-driven litigation.

*1. Defensive litigation: Cases supporting protesters facing criminal charges*

The Climate Defense Project (CDP) is an example of an organization that has represented climate activists who engage in nonviolent civil disobedience to combat climate change. CDP addresses this need by providing legal support for activists, connecting attorneys with communities and campaigns, and pursuing climate impact litigation.<sup>76</sup> The legal team at CDP uses the climate necessity defense, a common technique used by climate activists, which states that a person's actions were justified by the climate emergency, or the need for drastic action to reduce the need for fossil fuels.

The organization as well as others doing similar work, like the Climate Disobedience Center, were created in response to climate activists using civil disobedience as another tactic to pressure politicians and other decision makers to address the climate crisis, particularly by tackling fossil fuel infrastructure.<sup>77</sup> For example, CDP represented protesters demonstrating against a liquid natural gas plant in Washington state built on indigenous land. The organization describes their strategy:

CDP spoke to a local indigenous elder, who served as an expert witness in the case. She gave a history of the land

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<sup>76</sup> See generally CLIMATE DEFENSE PROJECT (2021), <https://climatedefenseproject.org/about/> [<https://perma.cc/45M6-PGDM>] (last visited Apr. 12, 2022).

<sup>77</sup> See Joseph Rausch, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. OF ENVTL L. 553, 557 (2019) (“[C]ivil disobedience has been a popular avenue for climate change advocates. In fact, Kara Moss, an opinion writer for the Guardian, went so far as to claim that civil disobedience might be the only route left in the fight against climate change. Civil disobedience in the realm of climate change has been successful in stopping, or at least slowing down, particular projects. For example, the Keystone XL Pipeline, a pipeline that would transfer fuel from Canadian tar sands to the United States, has been a hotly debated political issue. One reason protests have erupted across the country to try and thwart the construction of the pipeline is the exacerbation this source of energy could have on climate change. Some activists even turned to civil disobedience in a last ditch effort to make their disagreement with the construction of the pipeline known.”).

and the violations of treaties over the land throughout the years. Her testimony, in addition to the fact that the indigenous group granted permission for the protestors to take action, helped the protestors to be cleared of the trespass and obstruction charges against them.<sup>78</sup>

In addition to this strategy, CDP and others have responded to a broader national trend of repression against protest across the country, whereby lawmakers with support of industry groups such as the American Legislative Exchange Council have tried to crack down on demonstrations. Seven states have enacted new laws restricting protests against pipelines and other “critical infrastructure,”<sup>79</sup> imposing harsh consequences for individuals, including increased penalties and jailtime. In response, climate litigators have sought to defend environmental activists and organizations affected by this legislation.

CDP also believes that even if lawyers cannot always secure victories for the activists they represent, the organization’s work assists in raising awareness and bolstering the legitimacy of climate action movements.<sup>80</sup> In addition, by supporting activists, lawyers can promote procedural safeguards and opportunities to vet information and can facilitate democratic deliberation on important social issues like climate change. One of the CDP co-founders, Alice Cherry explains that “[t]hrough jury verdicts, people get to be the voice of the community. They get to participate in a form of direct democracy at a time people are kind of shut out of other democratic institutions.”<sup>81</sup>

Another example of movement-driven litigation has been the work of advocates resisting SLAPP (Strategic Lawsuits

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<sup>78</sup> *Climate Defense Project Emphasizes Movement Lawyering to Empower and Protect Climate Activists*, HLS CLINICAL AND PRO BONO PROGRAMS (Oct. 29, 2018), <https://clinics.law.harvard.edu/blog/2018/10/climate-defense-project-emphasizes-movement-lawyering-to-empower-and-protect-climate-activists/> [https://perma.cc/KR4D-BAK9].

<sup>79</sup> Susie Cagle, *‘Protesters as terrorists’: growing number of states turn anti-pipeline activism into a crime*, THE GUARDIAN (July 8, 2019), <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say> [https://perma.cc/2J25-GH2T].

<sup>80</sup> *Climate Defense Project Emphasizes Movement Lawyering to Empower and Protect Climate Activists*, HLS CLINICAL AND PRO BONO PROGRAMS (Oct. 29, 2018), <https://clinics.law.harvard.edu/blog/2018/10/climate-defense-project-emphasizes-movement-lawyering-to-empower-and-protect-climate-activists/> [https://perma.cc/GPL8-6AKG].

<sup>81</sup> *Id.*

Against Public Participation) actions brought against activists and organizations working on climate action. These lawsuits have been brought to silence activists but also advocates who are deploying climate litigation<sup>82</sup> as a tool to hold the fossil fuel industry accountable. For example, Energy Transfer and the American Petroleum Institute have both brought lawsuits against Greenpeace, accusing them of racketeering and defamation with the aim of blocking the Dakota Access Pipeline.<sup>83</sup>

Outside the United States, lawyers have similarly followed suit to support protesters engaged in civil disobedience. After the emergence of Extinction Rebellion and mass protests across Europe, UK lawyers mobilized to support climate activists and broader democratic accountability on climate change.<sup>84</sup> These lawyers organized legal briefings before mass actions to educate protesters about the potential offenses and penalties they may face. Lawyers have also chosen to represent protesters in police stations and court.

### C. Tort litigation

Several municipalities and states across the United States have brought climate change-related lawsuits, alleging that fossil fuel companies have violated the law by deceiving the public about the risks their products create. The suits argue that these companies' emissions have caused concrete harms to local infrastructure, threatening public health, property, and lives. This wave of tort lawsuits began in 2017 with several California municipalities seeking compensation for climate-related harms.

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<sup>82</sup> *E.g.*, *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at \*3 (Tex. App. June 18, 2020).

<sup>83</sup> *Anti-SLAPP*, GREENPEACE, [HTTPS://WWW.GREENPEACE.ORG/USA/ISSUES/ANTI-SLAPP/](https://www.greenpeace.org/usa/issues/anti-slapp/) [https://perma.cc/AL2W-CEWR] (last visited Apr. 12, 2022).

<sup>84</sup> *See generally*, *What is Extinction Rebellion and what does it want?*, BBC NEWS (Oct. 14, 2021), <https://www.bbc.com/news/uk-48607989#:~:text=In%20the%20UK%2C%20Extinction%20Rebellion,formed%20to%20%22oversee%20the%20changes%22> [https://perma.cc/Z2HZ-UYC4]; *see The Network for Police Monitoring*, NETPOL <https://netpol.org/> [https://perma.cc/9FR9-VG3J] (last visited Apr. 12, 2022) (illustrating Exile Legal and the Network for Police Monitoring are examples of organizations working on defending protesters but there are also several independent lawyers).

The claims draw from state tort law including nuisance, strict liability, and negligence.<sup>85</sup>

While these lawsuits had not necessarily mentioned the disproportionate impact of climate harms on low income and communities of color—partly because some of the original municipalities bringing these lawsuits are primarily white and upper-class—a new wave of lawsuits has sought to integrate climate justice concerns in their complaints.<sup>86</sup> For instance, attorney generals in Minnesota and Washington D.C. recently filed lawsuits against major fossil fuel companies, describing the disproportionate impact that climate change is having on low-income communities and communities of color. . The Minnesota complaints reads, “[w]arming will continue with devastating economic and public-health consequences across the state and, in particular, disproportionately impact people living in poverty and people of color.”<sup>87</sup> Similarly, the D.C. complaint reads, “the District will continue to experience flooding, extreme weather, and heat waves exacerbated by climate change, with particularly severe impacts in low-income communities and communities of color.”<sup>88</sup>

A similar lawsuit brought by County of Maui against multiple fossil fuel companies to hold them liable for the impacts of climate change on Maui devotes an entire section of the complaint to the impacts of climate change on Native Hawaiian communities and cultural resources. The complaint states that “low-income communities, communities of color, and Native Hawaiian communities are and will continue to be the hardest hit by the physical and environmental consequences of Defendants’ actions,” highlighting specific communities like those living on Moloka‘i who “are especially vulnerable to sea level rise, as

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<sup>85</sup> See *U.S. Climate Change Litigation Common Law Claims*, CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com/case-category/common-law-claims/> [https://perma.cc/CMA3-RSER] (listing different types of climate litigation in the United States (including tort litigation)).

<sup>86</sup> Karen Savage, *Newest Climate Liability Suits: Climate Justice Is Racial Justice*, THE CLIMATE DOCKET (June 30, 2020), <https://www.climatedocket.com/2020/06/30/climate-liability-lawsuits-racial-justice/> [https://perma.cc/VP8G-G9PC].

<sup>87</sup> Complaint at 2, *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 3711072 (D. Minn. June 24, 2021).

<sup>88</sup> Complaint at 44, *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C. June 25, 2020).

increased flooding, erosion, and destruction of coastal roads, homes, businesses, and beaches,” which is predicted over the coming decades.<sup>89</sup> While initial lawsuits were brought by coastal communities in California, these new lawsuits are being brought by local governments in more socially and economically diverse places, while also integrating a more justice oriented narrative.

It is worth noting that the evolution of constitutional and civil rights law in the United States has severely limited the way in which these claims can be framed, especially when compared with other jurisdictions. Rarely if ever a case in U.S. federal court can center and frame its claims solely around the differentiated impacts of climate change on vulnerable populations. Often, there is some sort of procedural right or administrative law cause of action: courts are very unlikely to entertain climate justice claims, even when these are part of the broader case theory and the language in plaintiff declarations or the complaint.

#### D. Accountability to clients and the broader movement

One of the principal tenets of movement lawyering is accountability to clients and movements. Guinier and Torres introduce the concept of ‘demosprudence’ as a lawyering practice that transforms “the lawyer/client relationships to build sites of democratic accountability,” which ultimately depends on a participatory, power-sharing process. The question of accountability may seem daunting in climate litigation cases because, similar to class action lawsuits or cases seeking a preliminary injunction, affected individuals may include a much broader group beyond the named plaintiffs in the case. After all, climate change is a global phenomenon.

Unfortunately, climate litigation strategies can often replicate the power hierarchies inherent in the lawyer/client relationship. Litigators may undermine or neglect accountability questions as a result of a narrow focus to secure a legal victory. More often than not, the climate crisis is used as an excuse to follow an ‘end justifies the means’ approach, where client interests can potentially be sidelined. The gravity of the climate crisis and

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<sup>89</sup> Complaint at 114-115, *County of Maui v. Sunoco*, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020).

the massive momentum behind the climate litigation movement has resulted in a “rush to the courts” to demand justice for climate-related harms. However, practitioners ought to think critically about how to engage their constituency and what role they ought to play in the development of the case. Illustratively, a panel participant at an online webinar on climate litigation asked members of Urgenda’s legal team the following question:

Urgenda basically claims to protect the interests of all of the world’s present and future generations, but without consulting them first. How do you know that you actually have the support of those on whose behalf you litigate, i.e., all people in this world? This is important, because your “opponent” is a democratically elected government.<sup>90</sup>

Related to this question and describing the NAACP efforts during the U.S. civil rights movement, Cummings writes:

The lawyer-client relationship can be formed either at the initiative of the clients, who seek out lawyers in specific interest-advancing cases, or by the lawyers, who develop a plan of law reform and then seek out the cases and clients that might maximize the chance for a positive outcome. This latter, lawyer-driven approach is associated with the famous “test case” strategy pioneered by the NAACP in its desegregation campaign and adopted by other legal groups. The lawyer’s decision-making power vis-a-vis specific clients in the test case context is the central accountability concern raised by critics of legal liberalism.<sup>91</sup>

As seen from the brief overview of high-profile climate litigation, not all cases have a grassroots group or constituency pushing for strategic litigation. However, if there is one, how should lawyers relate to the frontline communities facing the impacts of the climate crisis? And if lawyers carefully select their plaintiffs, what are the implications of this strategic approach? Many of the climate litigation cases that tend to be high profile are crafted by lawyers with a clear agenda, which may or may not coincide with the interests of a particular community. Often, the ‘right’ plaintiffs are selected for the case, once the legal team has crafted the

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<sup>90</sup> Annalisa Savaresi, WEBINAR SERIES: Human Rights Strategies in Climate Change Litigation, THE GLOB. NETWORK FOR HUM. RTS. AND THE ENV’T. (June 2, 2020), <https://gnhre.org/2020/06/02/webinar-series-human-rights-strategies-in-climate-change-litigation-what-is-it-all-about/> [https://perma.cc/RJR3-QZQ9].

<sup>91</sup> Cummings, *supra* note 10, at 1717.

appropriate remedy. One challenge in meaningfully involving clients throughout a case is the highly technical nature of climate science, particularly as it relates to governmental ambition and nationwide emission targets. Often, the legal team has the discretion to decide on the particular cause of action, legal arguments, and remedy sought, with clients more likely than not deferring to lawyers on these questions. What are the downsides of having lawyers or other advocates at sophisticated nonprofit organizations determine the main features of a particular case? Do claims to climate justice lose legitimacy because a group of lawyers orchestrated the case in the first place? Not necessarily. As discussed earlier, litigation can support the emergence and development of movements by creating spaces for activists to frame climate justice demands through the legal system. In this way, lawyers may be seen as “translators” of justice-oriented claims into legally digestible ones.

Nonetheless, the one element that continues to be central from a movement lawyering perspective is accountability. Who are climate lawyers accountable to? Their clients in a particular case or the broader climate justice movement? Answering this question is challenging in any impact litigation case, but it is particularly challenging in the context of the climate crisis. While other social justice issues are also systemic, the dynamic of climate change does stand out as somewhat unusual in public interest lawyering when we think about the global nature of climate impacts. Naturally, this raises questions about accountability: should lawyers be accountable only to the named plaintiffs in a case or class? If the case is brought in the Global North, should lawyers consider the rights of vulnerable communities in the Global South? These are pressing questions practitioners ought to consider when bringing future climate litigation cases. Otherwise, lawyers run the risk of trying to address one very specific climate injustice, while reinforcing other injustices. We must ask whether the legal strategies advocates deploy in the name of climate action are taking away power away from the people directly impacted. Perhaps the instances in which climate litigation resembles movement lawyering the most is when the underlying battle is not really about climate, but when it is linked to the more immediate and localized impacts of a particular project like a coal plant or an incinerator in the environmental justice context. At a minimum, litigators should not undermine the demands of other groups—

from youth or indigenous movements to communities across the ocean. As public interest lawyers, regardless of whether litigators identify as movement lawyers or not, legal teams ought to conduct an honest analysis of the implications of a particular case or set of arguments and whether there can be formal or informal accountability channel to frontline communities.

Climate justice principles dictate that our approach to climate solutions incorporates an analysis of power asymmetries and inequality. As Bouwer posits, we must ask “what message do the[se cases] convey about who is deserving of compensation and restoration from fossil fuel companies and other major emitters?”<sup>92</sup> In turn, this requires lawyers and advocates to focus on how litigation may serve the needs of vulnerable populations by achieving symbolic or material victories. Cummings recognizes that although it sometimes “makes sense to judge lawyers for their political choices about where to locate themselves within movements . . . it may be less true to the complex reality of social movements to suggest that some of those choices “count” as movement lawyering more than others.”<sup>93</sup> In other words, the question we should be asking is *to whom* are lawyers accountable within movements rather than *whether* they are accountable or not. In the context of climate change litigation, Vanhala writes:

It is also useful to consider the democratic and social legitimacy of these cases: whose voices are heard in courts and whose are excluded? How accountable are some of the collective actors bringing these cases and is this the best use of their resources in tackling the climate crisis? What implications does this form of mobilization have for democratic governance? Historically, critiques of legal mobilization come from both the right and the left. Those on the right decry the “anti-democratic” nature of the phenomenon of “regulation through litigation” and use the language of “activist judiciaries”. Critics on the left tend to focus on the ways in which the legal system can be seen as a small-c conservative force that embeds and upholds structural and social inequalities and that meaningful justice—including climate justice—isn’t going to be achieved through litigation. These normative concerns are

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<sup>92</sup> Bouwer, *supra* note 47, at 376.

<sup>93</sup> Cummings, *supra* note 10.

worth bearing in mind both for practitioners in the way they make decisions about whether, how, and where to litigate and for researchers in how we decide to empirically evaluate whether climate change litigation is really making the difference we hope it will make.<sup>94</sup>

Furthermore, cases seeking specific remedies that may bind a broader class of people raise their own series of accountability-related questions: are existing climate change cases ambitious enough for the most vulnerable? Are we undermining the demands of other groups of people by bringing and legitimizing a particular analysis of the climate crisis in court? Underlying these questions exists a reality that critical scholars have raised for decades: are courts the appropriate platform to adjudicate justice claims? Legal institutions play a key role in society, but that does not immediately make them ideal institutions to deliver climate justice. After all, it is unlikely that climate justice claims will be vindicated in the courts. As Bouwer and others have observed, current demands in climate cases are conservative and ignore what a real climate justice remedy or solution might entail: largescale transfers of climate finance at the very least. The demands in strategic litigation cases can rarely reflect the demands from grassroots coalitions because of the inherent limitations of the legal system to deal with questions of equity and justice.

Climate litigation may certainly help achieve a number of climate justice objectives like shed light on the unethical behavior of companies or erode the license of fossil fuel companies to continue operating without scrutiny. Some cases can also help build a broader narrative calling for climate justice and accountability. However, even when these cases are shaking the status quo and pushing for higher climate ambition, the remedies can rarely seek structural change. The remedies sought are often quite specific, especially in cases dealing with corporate accountability where plaintiffs hope to shift the business practices of a single company. Rarely can the legal system accommodate broader demands to meet the immediate needs of communities facing severe climate impacts. In abstract, asking a company to

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<sup>94</sup> Lisa Vanhala, *Why ideas and identity matter in climate change litigation*, OPENGLOBALRIGHTS (June 28, 2020), <https://www.openglobalrights.org/why-ideas-and-identity-matter-in-climate-change-litigation/> [https://perma.cc/GXB3-QRSP].

align its goals with a specific climate objective or to disclose its risks to its shareholders does indeed seem far away from movement lawyering. But again, this reflects the limitations of litigation and not necessarily of climate advocacy as a whole. Lawyers and the legal system are often characterized by incremental approaches to social problems.

Finally, an additional layer of complexity in these cases is the role that foundations may play in shaping the agenda of non-profit organizations bringing these cases. While lawyers have a professional responsibility to their clients, funders that support specific litigation projects can impose certain expectations on the outcomes of campaigns and litigation. Thus, even when lawyers have a particular client they represent, what happens when supporters or other third parties exert pressure on legal teams given that their funding is premised on a broader impact? While a funder is not the client, these interpersonal relationships certainly impact the organizations' goals and long-term sustainability. Questions of conflicts of interest may arise, especially during settlement negotiations or when deciding to appeal a particular outcome or not. In addition, the increasing professionalization of movement lawyering can be another factor preventing climate litigation movement from fully embracing some aspects of movement lawyering as conceived in the literature.

## CONCLUSION

This paper has sought to explore whether current climate litigation can be understood as movement-led litigation and whether this distinction matters. In other words, what, if any, are the implications of having climate change litigation that is not necessarily grounded on a movement lawyering model. Climate litigation has already proven effective in pressuring some national governments and corporations to take their climate-related obligations seriously. Litigation has also boosted the climate movement's impact by shaping the broader narrative around the climate crisis. In many ways, litigation has made climate change a much more visible and concrete problem. Some commentators observe that climate litigation is quite rich and prolific, hinting at the idea that not all cases may need to incorporate climate justice principles as long as some do. In this manner, advocates can use legal action to push for better governance in wealthy countries and

also seek remedies for those most vulnerable. Perhaps, the power of climate change advocacy comes precisely from the diversity of perspectives and actors involved.

Regardless of the short term and long-term impacts of climate lawsuits, the recent wave of climate litigation seems to be here to stay. But in order for climate litigation to have both sustainable and compelling results, legal victories must be “connected to remedies” and the “lived experience[s]” of the populations these suits seek to represent.<sup>95</sup> The declaration of a new right or legal victory alone is neither self-enforcing nor culture shifting. Decisions do not implement themselves, and even when they articulate a set of goals or vision, they do not necessarily create or establish enforceable policies. Climate litigators should reflect on climate justice principles and the broader interests of vulnerable communities, who may or may not coincide with who their particular clients are. While there is a professional responsibility to advocate for individual clients, litigating a structural issue like climate change requires reflection on a more systemic scale.

In closing, “movement lawyering is not just an empirically grounded model, but a prescriptive theory connecting legal means to social change ends. Its fundamental normative claim is that *how* legal advocacy is conducted affects *what* it may achieve.”<sup>96</sup> This paper has sought to explore the relationship between climate litigation and movement lawyering, asking difficult questions about the methods, assumptions, and legal strategies advocates have deployed to push for greater climate ambition. I hope it informs future discussions on how lawyers can use legal tools to tackle the climate crisis and incentivizes more critical thinking with respect to the power asymmetries inherent in the lawyer-client relationship. Finally, I hope climate litigators can be guided and be inspired by the rich history of movement lawyering, which has taught us to:

- (i) ... [R]ecognize lawyering as but one of multiple strategies necessary to advance a social movement; (ii) to act from a place of love that affirms the intersectional humanity of the whole person and entire communities in order to build movements together; and (iii) to practice courage and be

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<sup>95</sup> Guinier & Torres, *supra* note 1, at 2759.

<sup>96</sup> Cummings, *supra* note 10, at 1716.

willing to relinquish our privileges in order to act and stand up for justice.<sup>97</sup>

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<sup>97</sup> Hung, *supra* note 8, at 664.