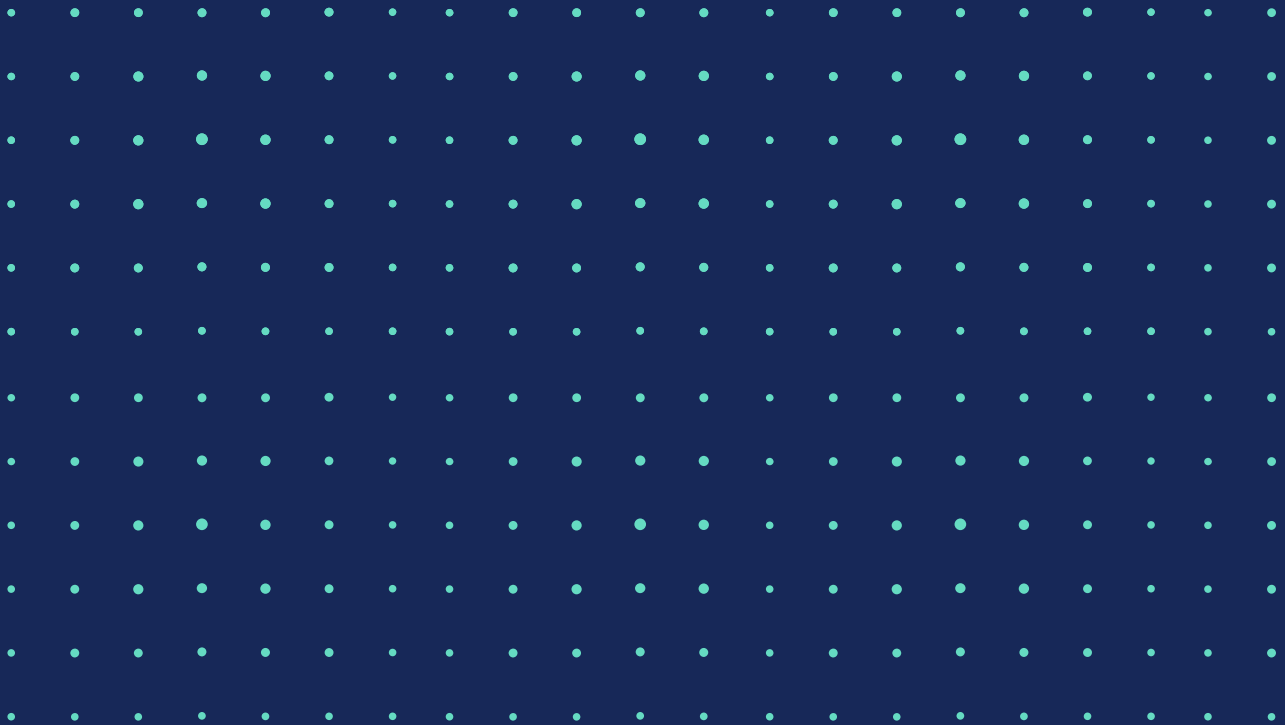


# Climate Homicide:

## Corporate Liability for Climate-Related Death

### Event Recap



## Event Recap | September 3, 2024

On September 3rd, the Berkeley Center for Law and Business hosted its third webinar in “The Buzz w/ BCLB” series diving into the topic of Climate Homicide: Corporate Liability for Climate-Related Death. The webinar discussed whether corporations should face criminal charges for deaths caused by climate disasters and the potential challenges and consequences of these claims.

### Understanding Climate Homicide

Speakers Frank Partnoy, Professor of Law at University of California, Berkeley, Julia Lisztwan, Partner of Burnet, Duckworth & Palmer LLP, and Aaron Regunberg, Senior Climate Policy Counsel of Public Citizen, shared their insights on the subject.

“The climate crisis is here today”, said Regunberg. “Families and communities are devastated by climate-related disasters... and they are caused mainly by fossil fuel companies.” These corporations not only contributed to the majority of current greenhouse gas emissions but have also deceived the public about the danger of it, he emphasized. This is the main drive behind the idea of climate homicide, an attempt to use the criminal law system to protect people from actors who pose a significant threat to public safety.

### Understanding Climate Homicide

Theoretically speaking, a climate homicide trial would apply the legal theory of a typical homicide trial. To establish a case of climate homicide, a prosecutor would have to prove that there is both a culpable mental state and an illegal act that caused the homicide.

While it is hard to prove that fossil fuel companies have acted with a premeditated intent to harm people, Regunberg argued that firms have acted with recklessness and extreme indifference to human lives, which would be sufficient to satisfy the mental state requirement in a second-degree murder trial. “Starting in the 1960s, big oil companies and their executives were on clear notice that their activities...would cause great irreversible damage to the planet.” Nevertheless, these companies continued to expand their practices while building offshore oil plants to make sure that their activities would not be affected by the rising sea level.



In terms of causation, a prosecutor would need to first prove that extreme weather caused a victim's death; second, that the extreme weather event was substantially attributable to climate change; and third, that certain fossil fuel companies substantially caused climate change. The first prong can be readily demonstrated through current knowledge of human physiology, which can say if a specific death was caused by heat, for example. Additionally, climate attribution science is a new field that can demonstrate certain weather events would be virtually impossible but for human activities. Regarding the third prong, Regunberg argued that fossil fuel companies substantially contributed to climate change because they were the main source of greenhouse gas emissions and because they engaged in massive campaigns of climate deception and disinformation, which delayed market and policy responses that would have minimized climate disasters.

But this view is far from consensual. Lisztwan explained that implementing the idea of climate homicide is not that easy. Climate litigation in general is still rare in practice, despite its growth in the past few years. There are only about 2600 cases worldwide and most of them involve a government defendant that did not follow international agreements and protocols. Among the about 200 cases against corporations, most of them accuse firms of greenwashing. Even analogous civil claims that accuse corporations of causing climate change are at best in the discovery phase. "So, we are still in the world of theories," she said.

Moreover, criminal charges are harder than civil charges, particularly because there is a heightened burden of proof in the former. A prosecutor must prove that it is beyond reasonable doubt that a company has caused climate change that eventually killed people, which is a very big step from the current practice, Lisztwan explained.

### **At the Intersection of Business and Criminal Law**

The history of corporate criminal liability also underlines some challenges. Early scholars did not use criminal law to so punish corporate behavior because there was not one individual to blame for criminal law to apply. Cases became more prevalent in the 1990s but none in the environmental context. One remote instance is the ValuJet crash in 1996 that led to an attempt to establish culpability at the recklessness level.

Expert at the intersection of business and criminal law, Partnoy cautioned that theorists must figure out what they seek to accomplish through climate homicide cases, "whether is to attack or engage the boards of companies in their attempts to deal with this crisis, and whether or not we want the incentives to be for boards to recognize we're running risks to human life here." Another complication arises as it is difficult to hold shareholders who contributed to corporate actions accountable in the modern economic system when so many exchanges happen so quickly in the secondary market.



## Policy Disputes Around Climate Homicide

The debate went on to explore an important policy question around climate homicide: is this the most effective method to bring about changes in corporate behavior and the much-desired energy transition?

Regunberg took a positive view. The social stigma attached to criminal offenses will deter companies to an extent. In some jurisdictions, it may be possible to target certain officers and hold them responsible for corporate actions as there is a lessened burden of proof. Even the remote possibility of being criminally charged would effectively regulate corporate officers' actions. Moreover, the wide range of penalties under criminal law, such as restitution statutes, will allow courts to demand that corporations pay for the damages caused by climate change once the former is convicted. Courts could also take away licenses from corporations as a punishment for their behavior. These are all "sticks" that a prosecutor may use to encourage desirable corporate behavior. Regunberg gave the example of the DOJ's settlement with Purdue Pharma to say that it may even be possible to restructure a fossil fuel company to support a green energy transition.

On the other hand, Lisztwan listed three reasons that stated the opposite. First, prosecutors have an obligation to only bring claims that have a good chance of succeeding. They need to identify, among the increased death tolls due to an extreme weather event, which deaths are directly caused by this event. As there could be multiple reasons contributing to a person's death, this chain of causation is difficult to prove. Second, it is not in the public's interest to suddenly stop oil and gas production. "They are still the only safe and affordable source for billions of people around the world," she said. Therefore, it's better to gradually shift to using clean energy, which is a policy and not a legal solution, she explained. Lastly, prosecutors might have very little experience and expertise in climate change topics. Therefore, they should not be entrusted to regulate an industry with billions of stakeholders worldwide.

Companies are already under significant pressure in dealing with pressing environmental charges. They face demands from investors, non-governmental organizations, and regulators, besides the litigation. Partnoy stated that corporate officers should consider many governance aspects when navigating this landscape. One is about using governance for safety, more specifically as a potential tool in anticipation of these kinds of criminal cases. "At a minimum, if any company has a takeaway from the threat of these prosecutions is that they want to have a safety committee or some kind of a committee dedicated to sort of address the mental state issue head on, but also just to do the right thing," Partnoy said. Moreover, the criminal law system must find a way to encourage cooperation from corporate officers who are willing to do the right thing.



## International Landscape for Climate Homicide

A climate homicide claim was recently filed in France by a government prosecutor. Similar conversations are also happening around the world. As climate change causes deaths globally, it is very important to not be just focused on the conversations within the US.

To make things worse, domestic prosecutions may not effectively handle international problems. In *Milieudefensie et al. v. Royal Dutch Shell*, while the Netherlands government ordered Shell to reduce its emissions by 45%, the company moved its headquarters to the UK. Imaginably, courts will have increasing difficulty dealing with cases against international companies in the future.

