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Intended Injury: Transferred Intent and Reliance in Climate Change Fraud

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INTENDED INJURY: TRANSFERRED INTENT AND RELIANCE IN CLIMATE CHANGE FRAUD

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I. INTRODUCTION

"For an intended injury the law is astute to discover even very remote causation."

— Justice Thurgood Marshall[1]

ExxonMobil, the world's largest oil company,[2] misled the public about climate change for at least two decades.[3] Several states' attorneys general have opened investigations into the potential criminality of the company's conduct.[4] The Securities and Exchange Commission (SEC) has opened its own investigation.[5] Criminal or not, however, ExxonMobil's conduct closely resembles schemes carried out by the tobacco,

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1. Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925).

2. In 1998, the Exxon Corporation and Mobil Oil Corporation signed a $80 billion merger agreement forming a new company called ExxonMobil Corporation, the largest company in the world at the time. *See* Allen R. Myerson, *Big Oil: The Overview; Exxon and Mobil Announce $80 Billion Deal to Create World's Largest Company*, N.Y. TIMES (Dec. 2, 1998), [https://perma.cc/4JU8-XEMY]; *see also* Lauren Debter, *The World's Largest Oil and Gas Companies 2016: Exxon Is Still King*, FORBES (May 26, 2016), [https://perma.cc/JZM9-PUZU]. This article will refer to the company post-merger as "ExxonMobil," and pre-merger as "Exxon."

3. Ivan Penn, *California to Investigate Whether Exxon Mobil Lied About Climate-Change Risks*, L.A. TIMES (Jan. 20, 2016), [https://perma.cc/X2DL-9LBY]; John Schwartz, *Exxon Mobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. TIMES (Aug. 19, 2016), [https://perma.cc/EC5J-D79T].

4. Penn, *supra* note 3; Schwartz, *supra* note 3.

5. Clifford Krauss, *S.E.C. Is Latest to Look into Exxon Mobil's Workings*, N.Y. TIMES (Sept. 20, 2016), [https://perma.cc/NM8E-RUU9].

asbestos, opioid, sugar, and leaded gasoline industries, among others.[6] The scheme is always the same: there is a product that is both profitable and destructive, but its destructiveness is not readily apparent because the causal connection between the product and the harm it causes can only be bridged with scientific knowledge. Moreover, companies selling the product tell the public that the science linking the product to the harm it causes is unsettled when, in fact, the science is well-enough established to warrant regulation of the product and imposition of liability for harm caused by it.[7] The corporate message of

6. *See, e.g.*, PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 14-18 (1985); NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 14, 24, 33 (2010); James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. REV. 67, 70 (2010); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 35, 41 (2003); Martha McCabe, *Pesticide Law Enforcement: A View from the States*, 4 J. ENVTL. L. & LITIG. 35, 51 (1989); William R. Freudenburg et al., *Scientific Certainty Argumentation Methods (SCAMs): Science and the Politics of Doubt*, 78 SOC. INQUIRY 2, 16 (2008); Jerome O. Nriagu, *Clair Patterson and Robert Kehoe's Paradigm of "Show Me the Data" on Environmental Lead Poisoning*, 78 ENVTL. RES. 71, 73 (1998); Lynne Peeples, *Fracking Industry Distorts Science to Deceive Public and Policymakers, Says Watchdog Group*, HUFFINGTON POST (Feb. 21, 2015), [https://perma.cc/LFS3-NSAA]; Jamie Lincoln Kitman, *The Secret History of Lead*, THE NATION (Mar. 2, 2000), [https://perma.cc/22ZT-GW97].

7. Recently, other such schemes have come to light. *See, e.g.*, Cristin E. Kearns et al., *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, JAMA INTERNAL MED. (Nov. 1, 2016), [https://perma.cc/3DJX-KNNL]. For instance, the sugar industry paid Harvard-affiliated researchers to publish papers downplaying the link between sugar and heart disease and obesity, directing blame instead to saturated fat. *Id.* The sugar industry's misinformation campaign shaped fifty years of health policy in the United States. Anahad O'Connor, *How the Sugar Industry Shifted the Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), [https://perma.cc/ELJ2-75PE]. Similarly, a 2016 New York Times article revealed that Coca-Cola paid millions of dollars for research downplaying the link between sugary drinks and obesity. Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES (Aug. 9, 2015), [https://perma.cc/44AQ-42KL]. Even more recently, the Missouri Attorney General filed a lawsuit against three opioid drug manufacturers, seeking hundreds of millions of dollars in damages and alleging that the companies funded a "campaign of fraud and deception" by misleading doctors and consumers about opioids' addictiveness and adverse health effects. Katie Mettler, *In Lawsuit, Missouri Says Big Pharma Caused Opioid Crisis with 'Campaign of Fraud and Deception,'* WASH. POST (June 22, 2017), [https://perma.cc/CYW8-6CBV]. Similar lawsuits have been filed in Mississippi and Ohio. Jerry Mitchell, *Mississippi Sets Tone as Opioid Drugmakers Face Rising Tide of Lawsuits*, CLARION-LEDGER (June 10, 2017), [https://perma.cc/L4WV-9RKE]; Efthimios Parasidis, *A Look Inside Ohio's Lawsuit Against Opioid Manufacturers*, SALON (July 7, 2017), [https://perma.cc/UH6A-8AYG].

scientific doubt, in other words, does not square with what scientists know, making the assertion misleading, if not illegal.

These false assertions are also terrifyingly harmful. The damages caused by the tobacco, opioid, and sugar industries' deceptions are well-documented.[8] This is not yet the case with regard to the fossil fuel industry's deceptions. But that is rapidly changing.

A growing number of individuals and communities are coming forward with claims to redress damages caused by global warming.[9] This growing body of climate litigation includes, to date, more than 1,000 cases, including more than 800 in the United States alone, and more than 250 cases in 25 other countries.[10] Based on the nature of the global warming threat, however, the number of climate litigation suits will likely balloon in the coming years and decades, particularly "private climate litigation"[11] lawsuits against greenhouse gas (GHG) emitters and energy companies. Many more plaintiffs will be harmed in the next hundred years by sea level rise, heatwaves, extreme weather events, stronger storm surges, coastal and inland flooding, drought, more frequent and devastating wildfires, and population displacement, among other effects.[12]

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8. *See* Kearns, *supra* note 7 (sugar); Mettler, *supra* note 7 (opioid); Henderson & Twerski, *supra* note 6, at 70 (tobacco).

9. *See* 3 ENVTL. INS. LITIG.: L. & PRAC. § 27:16 (2019) ("There are, thus far, three distinct, basic types of global warming litigation: statutory global warming litigation, common law tort based global warming litigation, and preemption global warming litigation.").

10. Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 843 (2018). U.S. and non-U.S. cases are listed in the Climate Litigation Database maintained by the Sabin Center for Climate Change Law. *Climate Change Litigation Databases*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/K3QS-WBJC]. Non-U.S. cases can also be found in the Climate Change Laws of the World database maintained by the Grantham Research Institute on Climate Change and the Environment, at the London School of Economics and Political Science, jointly with the Sabin Center. *Climate Change Laws of the World*, GRANTHAM RES. INST. ON CLIMATE CHANGE & ENV'T, [https://perma.cc/9F5X-8V5T]. These databases are comprehensive but may not contain all climate litigation cases.

11. Private climate litigation comprises lawsuits against corporations, while public climate litigation comprises lawsuits against governments. *See* Ganguly et al., *supra* note 10, at 843.

12. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 65-67 (Rajendra K. Pachauri et al. eds., 2014) [hereinafter CLIMATE CHANGE 2014].

Current tort law provides no viable avenue for such plaintiffs to seek redress for climate change damages against those responsible for causing the harm.[13] A number of private climate litigation claims have been brought under nuisance,[14] and a handful of plaintiffs have brought fraud claims.[15] Although a nuisance claim has survived the pleading stage in one case in Germany,[16] American courts have, to date, dismissed these kinds of tort claims on standing grounds.[17] This is not, of course, the end of the story for tort claims against fossil fuel companies or GHG emitters. If the history of tobacco litigation is any guide, and a number of authors have asserted it

13. Some progress is being made on this front, however. For instance, in the case of *Urgenda Foundation v. the State of the Netherlands*, the plaintiffs argued that by not regulating and curbing Dutch GHG emissions, the State committed the tort of negligence against its citizens. *See* Rb. Den Haag 24 juni 2015, 2015, 7196 m.nt. (Urgenda Foundation/Kingdom of the Netherlands) (Neth.), [https://perma.cc/4459-3F46]. For a discussion of the case, see Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 525, 533-36 (2018) (discussing the human rights components of the *Urgenda* case and briefly mentioning its torts components); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 331-41 (2017) (discussing duty, breach, causation, and damages under *Urgenda*). In the U.S., a handful of Californian cities sued five major fossil fuel companies for public nuisance in September 2017. *See* Complaint, People v. BP P.L.C., No. CGC-17-561370 (Super. Ct. S.F. Cty. Sept. 19, 2017) (San Francisco); Complaint, People v. BP P.L.C., No. RG-17875889 (Super. Ct. Alameda Cty. Sept. 19, 2017) (Oakland). Similarly, San Mateo and Marin Counties, as well as the City of Imperial Beach, sued thirty-seven fossil fuel companies for their roles in sea-level rise in July 2017, bringing claims for public nuisance and negligence. *See* Complaint, Cty. of San Mateo v. Chevron Corp., No. 17-CIV-03222 (Super. Ct. San Mateo Cty. July 17, 2017). It is uncertain at this time what, if any, relief the plaintiffs in these lawsuits will be awarded.

14. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012); Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009); Order, OLG, Nov. 30, 2017, 2 O 285/15, [https://perma.cc/RQ7Q-8BDW]. For a summary of *Lliuya v. RWE AG*, see *Lliuya v. RWE AG*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/92NV-EVDS].

15. *See, e.g.*, *Comer*, 585 F.3d at 859-60, 869.

16. Order, OLG, Nov. 30, 2017, 2 O 285/15, [https://perma.cc/RQ7Q-8BDW]; *Lliuya v. RWE*, GRANTHAM RESEARCH INST. ON CLIMATE CHANGE & ENV'T, [https://perma.cc/NPX6-XREQ] ("While the facts of this case must still be adjudicated, the court's recognition that a private company could potentially be held liable for the climate change related damages of its greenhouse gas emissions marks a significant development in law.").

17. *See, e.g.*, *Native Vill. of Kivalina*, 696 F.3d at 869; *Comer*, 585 F.3d at 879-80; *see also* Elizabeth Dubats, *An Inconvenient Lie: Big Tobacco Was Put on Trial for Denying the Effects of Smoking; Is Climate Change Denial Off-Limits?*, 7 NW. J. L. & SOC. POL'Y 510, 520-25 (2012).

most certainly is,[18] tort claims against fossil fuel companies will be allowed to move forward only after the deceptive practices of the fossil fuel companies are finally recognized as criminally fraudulent. It was not until 2006 that the tobacco industry was found to have conspired to carry out a scheme to defraud the public and consumers in *United States v. Philip Morris USA, Inc.*[19] Up to then, no plaintiff had succeeded in bringing a fraud claim against a tobacco company in U.S. court.[20] Since 2006, there have been a number of fraud claims, some of them successful.[21]

Standing is undoubtedly an important issue for climate change tort plaintiffs. However, although it has been explored by a handful of authors,[22] the fast pace of development in this area means it is anyone's guess as to how courts will view this issue in ten or twenty years. At present, the picture looks bleak for private climate litigation tort plaintiffs, at least in the short-term. The Supreme Court in *American Electric Power Co. v. Connecticut* (*AEP*)[23] ruled that common law claims were displaced by the Environmental Protection Agency's (EPA) authority to regulate GHG emissions under the Clean Air Act (CAA).[24] The Ninth Circuit in *Native Village of Kivalina v.*

18. *See, e.g.*, Dubats, *supra* note 17, at 512; Angela Lipanovich, *Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation Is Feasible*, 35 GOLDEN GATE U. L. REV. 429, 431 (2005) ("The principles learned from the tobacco litigation may be used to recoup private and public expenditures from the petro industry for harm caused by use of their products.").

19. *See* United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 852 (D.D.C. 2006).

20. Dubats, *supra* note 17, at 512, 514.

21. *See, e.g.*, Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 355 (E.D.N.Y. 2000); Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 298-99 (Fla. 2017); CHARLES J. NAGY, JR., AM. L. PROD. LIAB. 3d § 88:16 (2019).

22. *See, e.g.*, Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of* AEP v. Connecticut, 46 VAL. U. L. REV. 447, 452 (2012); Michael B. Gerrard, *'American Electric Power' Leaves Open Many Questions for Climate Litigation*, N.Y. L.J. (July 14, 2011), [https://perma.cc/X82U-MX9J] (stating that the standing portion of the *AEP* case "did not set precedent in the technical sense"); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 870-71 (2012).

23. Am. Elec. Power Co., Inc. v. Connecticut (*AEP*), 564 U.S. 410, 424 (2011).

24. *See id.*; Hari M. Osofsky, AEP v. Connecticut *'s Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 102 (2011), [https://perma.cc/MBZ7-ZU5R] ("In *AEP*, the Court shape[d] the path of climate change litigation by reinforcing the appropriateness of regulatory actions while limiting federal

ExxonMobil Corp. (*Kivalina*)[25] held that the CAA displaced public nuisance claims.[26] According to one author, collectively *AEP* and *Kivalina* "might spell the end of climate change tort litigation in the federal courts."[27] But while this may very well be the case today, tomorrow is another day. There are myriad ways the picture could change for private climate litigation plaintiffs. Given the growing global movement to take action on climate change, it is conceivable, perhaps even highly likely, that communities and individuals harmed by climate change will soon be given the opportunity to seek redress in the common law for their harms. One way this could happen would be by Congress removing the EPA's authority to regulate GHG emissions. Were that to happen, common law claims would no longer be displaced under *AEP* and *Kivalina*.[28]

When this happens—for I believe this to be a question not of *if* but *when*—plaintiffs suing corporations for climate change fraud will face obstacles far greater than those suing in nuisance.[29] This is a problem. In climate damages litigation, nuisance is an inadequate substitute for fraud. Nuisance seeks

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common law public nuisance ones.").

25. Native Vill. of Kivalina v. ExxonMobil Corp. (*Kivalina*), 696 F.3d 849 (9th Cir. 2012).

26. *Id.* at 858.

27. *See* Quin M. Sorenson, Native Village of Kivalina v. ExxonMobil Corp.*: The End of "Climate Change" Tort Litigation?*, ABA (Jan. 1, 2013), [https://perma.cc/K4CC-CJDA].

28. *See, e.g.*, HARI M. OSOFSKY & LESLEY K. MCALLISTER, CLIMATE CHANGE LAW AND POLICY 118 ("The Court's decision in *AEP* left open the door to federal common law nuisance suits in a scenario in which Congress eliminates the EPA's regulatory authority over greenhouse gas emissions under the Clean Air Act."); LONDON SCH. ECON. & POLITICAL SCI. DEP'T LAW, *Climate Change Litigation: Courts to the Rescue?*, YOUTUBE (Mar. 23, 2017), [https://perma.cc/RU7S-MTWL] ("The nuisance pathway in the United States has not been successful to date, in part because of the Supreme Court decision in *AEP v. Connecticut*. But this also potentially changes under the Trump administration, depending on what our Congress does. . . . [T]he *AEP v. Connecticut* decision . . . always left a door open, that if the EPA's authority to regulate under the Clean Air Act ever gets taken away, that pathway potentially reopens.") [hereinafter LSE LAW].

29. The obstacles faced by climate-change-fraud plaintiffs include the fact that "the First Amendment seemingly shields these distorters and misinformers." James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 ENVTL. L. REP. 11098, 11099 (2013). A handful of authors have explored this issue. *See, e.g.*, James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 369-71 (2018); Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 450-51 (2018). The focus of this article, however, is on tort law. The First Amendment aspects need not, and will not, be addressed.

redress for only one component of the bad behavior of fossil fuel companies and other GHG emitters—namely, the act of emitting CO_2 into the atmosphere.[30] Although it is important that GHG emitters be held accountable for their CO_2 emissions, nuisance ignores the misrepresentations by the fossil fuel industry and its allies, which manipulated the public into allowing the emissions in the first place.

Those harmed by global warming, like those harmed by tobacco, should be allowed to bring a civil fraud action against those whose misrepresentations caused their harm. But plaintiffs alleging fraud against fossil fuel companies, even if allowed to do so,[31] would face insurmountable hurdles that typical fraud plaintiffs do not. First, because the existence, causes, and ramifications of global warming are matters of scientific knowledge, plaintiffs in climate change fraud cases face enormous difficulties establishing the falsity of the defendant's misrepresentations.[32] My prior scholarship addressed this shortcoming in the law.[33]

Falsity is only the beginning of plaintiffs' problems in these cases, however. Intent, reliance, causation, and damages are other elements that also present significant obstacles for plaintiffs. This article addresses intent and reliance, each a required element of fraud.[34] Plaintiffs suing fossil fuel companies for fraud can almost never establish these elements.[35] Part of the problem is the panoply of difficulties faced by plaintiffs bringing any kind of climate litigation action.[36] But one problem unique to climate change fraud plaintiffs is the fact that companies like ExxonMobil, who led the campaign of

30. 1 KAREN A. GOTTLIEB, TOXIC TORTS PRAC. GUIDE § 6:4 (2019) (public nuisance elements); 17A CHRISTINE M. G. DAVIS ET AL., CARMODY-WAIT 2d § 107:44 (2019) (private nuisance elements).

31. *See supra* note 21 and accompanying text.

32. *See* Wes E. Henricksen, *Scientific Knowledge Fraud*, 97 OR. L. REV. 307, 310-12 (2019) [hereinafter Henricksen, *Scientific Knowledge Fraud*]; Wes E. Henricksen, *Peddling Ignorance: A New Falsity Standard for Scientific Knowledge Fraud Cases*, 86 UMKC L. REV. 295, 319 (2017) [hereinafter Henricksen, *Peddling Ignorance*].

33. *See, e.g.*, Henricksen, *Scientific Knowledge Fraud*, *supra* note 32.

34. Gutierrez v. Cayman Islands Firm of Deloitte & Touche, 100 S.W.3d 261, 273 (Tex. App. 2002); 37 C.J.S. *Fraud* § 50 (2019).

35. *See* Parker-Flynn, *supra* note 29, at 11107.

36. These include, for instance, cumulative emissions since the Industrial Revolution, multiple emitters, scientific uncertainty, diffuse impacts, deferred impacts, and social and political factors. LSE Law, *supra* note 28.

climate change denial, made its misrepresentations to the public at large.[37] The vast majority of those harmed by global warming misrepresentations are not harmed as a result of personally relying on those misrepresentations.[38] This is true even though the exact kind of injury suffered by the plaintiff may very well have been foreseen, or even intended, as the end result of the misrepresentations.[39] This is because the misrepresentations are meant to sway public opinion and political action in a way that allows avoidance of government regulation and court liability.[40] Those harmed are effectively barred from seeking redress in fraud.[41]

The result? Although the fossil fuel industry purposefully misled the public about global warming for at least two decades, resulting in massive and widespread reliance on their misrepresentations and omissions by political leaders, government agencies, and courts,[42] any individual who suffers

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37. One author aptly described the bind climate change fraud plaintiffs face with regard to the reliance element:

> For private plaintiffs, this is a philosophically impassible roadblock. How could a climate change victim show that he or she relied on the misrepresentations of a think tank or scientist? Would the victim first have to prove that he or she actually heard the misrepresentation, and then changed his or her actions accordingly? Moreover, what kind of changes in behavior would suffice to establish reliance? Would voting or purchasing habits suffice? What if the person had always voted for politicians that support action on climate change, and had never bought from the underlying source of emissions, but for completely unrelated reasons? Could the victim be said to have relied on the misrepresentation? Indeed, the challenge of establishing both causation and reliance would likely bar any possible recovery for fraudulent misrepresentation of climate science. Because fraud has stringent reliance, causation, damages, and falsity requirements, it simply does not provide a valuable framework in which to address climate science distortion.

Parker-Flynn, *supra* note 29, at 11107.

38. *See id.* at 11100.

39. *See id.* at 11104.

40. In the case of the fossil fuel industry, the end goal of the campaign of climate change doubt was to avoid regulation of fossil fuel extraction, production, sales, and use, as well as to avoid liability for any harm caused by global warming. *See, e.g.*, ORESKES & CONWAY, *supra* note 6; Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), [https://perma.cc/5P6X-ANW7].

41. Parker-Flynn, *supra* note 29, at 11107.

42. The scale of the political reliance on the fossil fuel industry's misrepresentations is staggering. To give a recent example, in the 2016 election, $70 million of "outside group" money was spent to help elect Republican Senate candidates in Ohio, Indiana, and

damage as a result of global warming ends up effectively barred from bringing a fraud claim against the fossil fuel companies and other industry groups to hold them accountable for the deception.[43] Fraud, also called deceit or intentional misrepresentation, developed precisely to provide redress in a civil action for damages suffered as a result of intentional deceit.[44] Those harmed by climate change deception schemes are squarely within the class of individuals fraud laws were intended to protect.[45] Under the current fraud laws, however, these plaintiffs are left without an opportunity to seek compensation for damages caused by the companies whose deception caused global warming and, therefore, the plaintiffs' injury.[46] This gap in the law has been noted by other authors.[47]

This article posits that one way to close this gap, though certainly not the only way,[48] would be to apply a transferred

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Wisconsin, ensuring Republicans retained control of the chamber. Sheldon Whitehouse, *Time to Wake Up: 2018 Year in Review*, MEDIUM (Jan 10, 2019), [https://perma.cc/WV6R-WFKU]. Of that total, at least $46 million was directly traceable to fossil fuel industry groups. *Id.* Another $12 million in "dark money" appears to be tied to fossil fuel interests as well. *Id.* These contributions, in addition to the lobbying campaign aimed at Congress and propaganda campaign aimed at the public, have, to date, allowed fossil fuel companies to avoid government regulation and court liability.

It is worth noting, as well, that many members of the public also rely on the fossil fuel industry's deceptive messages. Many have relied on the oil industry's representations and omissions by purchasing property, building homes, and choosing where to live, as well as by voting for political candidates that parrot, and work to further, the fossil fuel industry's climate change denial message and agenda.

43. Parker-Flynn, *supra* note 29, at 11107.

44. 37 AM. JUR. 2d *Fraud and Deceit* § 28 (2013).

45. *See* Pasley v. Freeman (1789), 100 Eng. Rep. 450, 451 (KB).

46. Parker-Flynn, *supra* note 29, at 11105, 11109.

47. *See, e.g., id.* at 11099 (advocating that "the United States should adopt a narrowly tailored civil cause of action for the fraudulent misrepresentation of climate science"); Weinstein, *supra* note 29, at 374 (arguing that the First Amendment would, with proper safeguards, permit sanctions for commercial harms resulting from ExxonMobil's alleged disinformation campaign); Dubats, *supra* note 17, at 510, 536 (arguing that there is no legally relevant difference between the tobacco fraud and climate change fraud claims that would justify justiciability in one instance and not the other); *see also* William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 ECOLOGY L. Q. 831, 832, 836 (2012) (examining whether climate change denial "can be regarded as a crime based not just upon the unethical motives of its perpetrators, but on its effects").

48. One other possible solution would be Parker-Flynn's suggestion of a new tort cause of action for misrepresentation of climate change science. Parker-Flynn, *supra* note 29, at 11099. Another possible solution would be to treat public deceptions the way securities law treats fraud on the market, by inferring reliance by the fact that the representation was made to the public. *See* John C.P. Goldberg & Benjamin C. Zipursky,

intent doctrine to climate change fraud cases. Such a doctrine would kill two birds with one stone by allowing plaintiffs to establish intent and reliance where the plaintiff's injury arose not on account of her own reliance on the misrepresentation, but on account of the reliance by others from whom the defendant intended to induce action. This proposal, though novel, is supported by the well-established tort policy.[49]

The article proceeds in three parts. In Part I, I discuss the intent and reliance elements and how their application in climate change fraud cases would result in injustice if a such a fraud claim were to be addressed on its merits in court. In Part II, I describe how the transferred intent doctrine developed to provide for redress in cases where tort law traditionally left plaintiffs empty handed. I also draw parallels between the gap in the law of trespassory torts filled by the transferred intent doctrine and the current gap in the fraud law with regard to climate change deception claims. In Part III, I propose that a doctrine based on transferred intent be applied to climate change fraud cases. I also address counterarguments to the proposal.

This transferred intent and reliance doctrine, if applied in climate change fraud cases, would be a substantial step toward holding companies like those in the fossil fuel industry liable for misrepresentations made to the public that resulted in actual or threatened harm to individuals who did not necessarily themselves rely on the misrepresentations but were nonetheless foreseeably injured by them. Climate change fraud claims are almost certainly going to increase significantly in the coming few decades, for instance, by those whose property has been damaged or destroyed by sea level rise or other climate-change-caused phenomena resulting from global warming. As many other industries have also carried out similar schemes,[50] the application of the proposed doctrine reaches far beyond cases against the fossil fuel industry.

The Fraud-on-the-Market Tort, 66 VAND. L. REV. 1755, 1761-62 (2013) (exploring the role of fraud-on-the market in the context of "impersonal deceits" in tort).

49. *See infra* Section III.0.

50. Parker-Flynn, *supra* note 29, at 11103; Nic Fleming, *Why Is Asbestos Still Killing People?*, PAC. STANDARD (June 14, 2017), [https://perma.cc/ZG33-T5HJ].

II. INTENT AND RELIANCE IN CLIMATE CHANGE FRAUD

A. The Role of Intent in Commercial Public Deception

Intent, a required fraud element, normally requires that a fraud plaintiff prove the defendant intended to induce reliance by the plaintiff specifically.[51] The RESTATEMENT (SECOND) states that a defendant "who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through justifiable reliance."[52] This intent requirement is echoed in jurisprudence throughout the United States.[53]

The intent requirement reflects the one-on-one nature of fraud, traditionally. It is a cause of action that arose largely out of one-on-one deceptions.[54] However, the scope of the intent requirement has not been well-explored. Interestingly, the very same RESTATEMENT (SECOND) provision that provides that hornbook definition of the intent element also provides a caveat: "The Institute expresses no opinion on whether the liability of the maker of a fraudulent representation may extend beyond the rule stated in this Section *to other persons or other types of transactions, if reliance upon the representation in acting or in refraining from action may reasonably be foreseen*."[55]

Notwithstanding this caveat, however, most courts have interpreted the intent element as requiring either specific intent to induce a particular person or class of persons to rely on the misrepresentation, or knowledge to a substantial certainty that such reliance will occur.[56]

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51. *See* Bd. Of Educ. of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 591 (Ill. 1989); 37 AM. JUR. 2d *Fraud and Deceit* § 28 (2013).

52. RESTATEMENT (SECOND) OF TORTS § 531 (AM. LAW INST. 1977).

53. *See id.* ("One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation.").

54. *See infra* note 78 and accompanying text.

55. RESTATEMENT (SECOND) OF TORTS § 531 (emphasis added).

56. *See, e.g.*, Bank of Valley v. Mattson, 339 N.W.2d 923, 927 (Neb. 1983) (noting that one who made a fraudulent misrepresentation was liable to the class of persons on whom he intended to induce reliance); MEGA Life & Health Ins. Co. v. Superior Court, 92

This interpretation of the intent element works perfectly well for one-on-one deceptions. For commercial public deceptions, however, such as those by the tobacco, opioid, and sugar industries, requiring intent to induce reliance by a particular individual or class of individuals becomes more problematic. A plaintiff suing the sugar industry, for instance, would almost certainly not be able to prove intent because the sugar manufacturers and industry representatives did not direct their misrepresentations and omissions at any particular member of the public. And being a member of the public harmed by a product is very commonly grounds to dismiss a fraud claim.[57] Plaintiffs suing tobacco, opioid, and other industry defendants that have carried out commercial public deceptions face similar high hurdles on the intent element. As will be discussed below, plaintiffs in climate change fraud claims face far greater obstacles than do plaintiffs suing other kinds of commercial public deception fraud defendants.[58]

B. The Role of Reliance in Commercial Public Deception

Reliance, like intent, is also a required fraud element.[59] To prevail in a fraud claim, a plaintiff must prove not only that the defendant made a material, factual misrepresentation intended to deceive, but also that that plaintiff reasonably relied on the apparent truthfulness of the misrepresentation.[60] Accordingly, the absence of reliance is grounds for dismissal of a fraud claim, even if there is a causal connection between the defendant's misrepresentation and the plaintiff's injury.[61]

Cal. Rptr. 3d 399, 405 (Cal. Ct. App. 2009) (holding that a fraud defendant owed no duty to a person who was not the prospective party to the transaction in which fraud was alleged).

57. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855, 867-68 (5th Cir. 2009) (holding that landowners failed to identify a particularized injury that would affect them in a personal and individual way and that claims presented generalized grievances common to all citizens or litigants in United States); Pub. Citizen, Inc. v. Bomer, 274 F.3d 212, 219 (5th Cir. 2001) (holding that "no matter how well intended, Plaintiffs have done little more than present a generalized grievance, common to all citizens or litigants in Texas, and as such, lack standing").

58. *See infra* Sections I.0 and I.0.

59. Hunt v. U.S. Tobacco Co., 538 F.3d 217, 226 (3d Cir. 2008); Bd. of Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 591 (Ill. 1989).

60. *A, C & S, Inc.*, 546 N.E.2d at 591.

61. *See, e.g.*, Khan v. CitiMortgage Inc., 975 F. Supp. 2d 1127, 1139, 1141 (E.D. Cal.

Reliance, however, presents a far more complex conundrum for climate change fraud plaintiffs than does intent, in part because the reliance element is something of an enigma even to tort scholars.[62] To understand how reliance fits into the climate change fraud picture, it is first necessary to explore, at least briefly, where reliance came from and what its purpose is. The question is, given that the fossil fuel industry's climate change deceptions are made to the public rather than to any particular individual and cause harm primarily to individuals who did not rely directly on the deceptions, does the existence of the reliance element mean such deceptions can never subject the speaker to fraud liability by those harmed by the deceptions?

1. How Reliance Developed in the One-on-One Fraud Context

Present-day fraud traces its origins back to a writ on the case dating to 1201, which was available against only those who misused the legal system to the plaintiff's detriment.[63] Over the next few centuries, the writ was expanded to cover fraudulent transactions, a branch of deceit termed "breach of warranty."[64] However, prior to 1789, this tort never broadened beyond the bounds of contractual relations.[65] Breach of warranty claims were available only to individuals deceived by someone with whom they had entered into a contract.[66] Accordingly, the breach of warranty action was closer to what we today call breach of contract.

Because of its strong link to contractual relations, deceit was not recognized as a distinct tort until the 1789 case of

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2013).

62. *See, e.g.*, John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1001-04 (2006).

63. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 726-27 (5th ed. 1984); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685 (4th ed. 1971) (noting that the writ of deceit was originally narrow, permitting only an action against a defendant who manipulated legal procedure to defraud another).

64. 10 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32:3 (2012) (citing Mother Earth, Ltd. v. Strawberry Camel, Ltd., 390 N.E.2d 393, 400 (Ill. App. Ct. 1979)).

65. KEETON ET AL., *supra* note 63, § 105, at 685; *see also* 2 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 7.1 (3d ed. 2006).

66. KEETON ET AL., *supra* note 63, § 105, at 685.

Pasley v. Freeman.[67] There, the plaintiff and defendant were not in contractual privity with one another, and the King's Bench court recognized that no tort existed to hold the defendant liable.[68] Chief Justice Lord Kenyon noted, however, that "the defendant's conduct was highly immoral, and detrimental to society."[69] The court went on to invent the tort we now call fraud by holding the defendant nevertheless liable.[70]

The ruling in the *Pasley* case by the King's Bench has been quoted, cited, followed, and approved in numerous modern American cases that fully implement the basic principle that deceit was, and is, a distinct tort.[71] This marked a fork in the development of the law, with breach of warranty actions going in the direction of contract law,[72] and deceit going in the direction of tort.[73] "Thereafter, the two actions followed a generally divergent evolution, the distinction being that, in the tort action for deceit, knowledge or some equivalent of knowledge of the falsity of the statement is required as well as

67. Pasley v. Freeman (1789) 100 Eng. Rep. 450, 450, 453, 457-58 (KB). There, John Pasley, the owner of a store, received a large order for goods on credit by a customer he did not personally know. *Id.* at 450. Pasley spoke with Joseph Freeman, an individual acquainted with the customer, to ask whether the customer was creditworthy. *Id.* Freemen knew the customer could not be trusted to pay for the goods, but he nevertheless urged Pasley to sell the goods to the customer and falsely asserted that the customer was trustworthy. *Id.* Pasley delivered the goods to the customer and the customer never paid. *Id.* Upon the default, Pasley brought an action at law for deceit against Freeman. *Id.* at 450-51. The majority held, for the first time, that purposefully misleading another to the other's financial detriment creates a valid cause of action by the one harmed against the one who misled. *Id.* at 457-58. No contractual relationship needs to exist between them. *Id.* at 451. Tellingly, however, the interplay between fraud and contract law continued for at least another 120 years. *See* 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 374 (1906). As recently as 1906, some authors still considered fraud to be a part of contract law. *See, e.g., id.* For a brief overview of the *Pasley* case, see Cullen Goretzke, *The Resurgence of Caveat Emptor: Puffery Undermines the Pro-Consumer Trend in Wisconsin's Misrepresentation Doctrine*, 2003 WIS. L. REV. 171, 178 (2003).

68. *Pasley*, 100 Eng. Rep. at 451.

69. *Id.* at 457.

70. *Id.* at 450, 457-58.

71. 10 SPEISER ET AL., *supra* note 64, § 32:3, at 29.

72. The assumpsit action which subsumed breach of warranty was set forth in Stuart v. Wilkins (1778) 99 Eng. Rep. 15, 15-16 (KB); *see also* 10 SPEISER ET AL., *supra* note 64, § 32:3, at 29.

73. 10 SPEISER ET AL., *supra* note 64, § 32:3, at 29.

an intent to mislead, whereas the contract action on a warranty has no such requirements."[74]

This fork in the law is important for understanding the reliance element, and how it would apply to a climate change fraud claim. Although the tort of fraud parted ways with contract law two and a half centuries ago, the two actions, fraud and warranty, trace their roots to the same place: one-on-one transactions whereby one party misled another with regard to the transaction, either as a party to the deal or a third party to it. Fraud grew out of personal deceptions, beginning with *Pasley*.[75] Interestingly, reliance was not discussed at all in *Pasley*.[76] It was, nevertheless, present because the plaintiff there relied on the defendant's misrepresentation.[77]

Was reliance considered an element of fraud under the *Pasley* decision? The answer is not clear. What is clear is that American fraud actions throughout the nineteenth century, during which fraud became established as a common law tort action in all fifty states, centered almost exclusively on one-on-one deceptions whereby Person A sought to deceive Person B to Person B's detriment.[78] In such claims, of course, the intent element as well as the reliance element play clear key roles.

The reliance element is a product of the context in which most early fraud cases were addressed: one-on-one deceptions whereby the injured party relied on the misleading statement or

74. Mother Earth, Ltd. v. Strawberry Camel, Ltd., 390 N.E.2d 393, 400 (Ill. App. Ct. 1979); *see also* KEETON ET AL., *supra* note 63, § 105, at 685; Leon Green, *Deceit*, 16 VA. L. REV. 749, 767 (1930).

75. *Pasley*, 100 Eng. Rep. at 450.

76. *See generally Pasley*, 100 Eng. Rep. 450.

77. *Id.* at 450.

78. *See* Goldberg & Zipursky, *supra* note 48, at 1756, 1758 (noting that the law of deceit "first developed in a world of face-to-face transactions," but "reject[ing] the notion that deceit is a wrong that belongs to a bygone era of face-to-face transactions"); 10A HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, INT'L CAP. MARKETS & SEC. REG. § 15:16 (2019) ("The common law of deceit grew out of face-to-face transactions in which information is furnished by one party to the other."); Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 MD. L. REV. 348, 349 (2007) (noting that "the modern-day fraud-on-the-market securities class action bears little factual resemblance to its common law predecessors, deceit and misrepresentation, which provided conventional contract-based remedies for fraud in face-to-face dealings"). It should be noted that there is no data available on precisely what percentage of the total fraud cases in the past two centuries were personal deceptions as opposed to deceptions on the public, but my review of more than 300 cases revealed almost all of them to involve personal deception.

omission of the defendant.[79] Today, reliance is nearly universally required,[80] though some exceptions have been carved out.[81]

2. How Reliance Applies in Fraud Claims Involving Commercial Public Deception Schemes

When it comes to commercial public deception schemes, the reliance element works counter to the purpose and spirit of deceit. Generally speaking, reliance plays dual roles within the tort of fraud that are often misunderstood. On one hand, the element stands in for actual and proximate causation, at least to some extent.[82] On the other hand, reliance also plays an important part in establishing the requisite tort duty in fraud cases.[83] Again, these are the roles the element fulfills in one-on-one deceptions.

The fact that several courts today list the fraud elements without including causation,[84] however, has caused some to question whether reliance is just a causation element by another name.[85] To establish actual cause, tort plaintiffs must generally show a cause-effect relationship between the defendant's wrongful conduct and the injury suffered.[86] The reliance requirement arguably forces plaintiffs to make this showing because it ensures that the loss resulted from reasonable reliance on the defendant's misleading statement or omission.[87] Reliance

79. *See* 10A BLOOMENTHAL & WOLFF, *supra* note 78, § 15:16; *see also* Bailey v. Glover, 88 U.S. 342, 343-44 (1874).

80. 10 SPEISER ET AL., *supra* note 64, § 32:18, at 7-9.

81. *See, e.g.*, Kaufman v. i-Stat Corp., 754 A.2d 1188, 1195 (N.J. 2000).

82. *See In re* King, 68 B.R. 569, 572 (Bankr. D. Minn. 1986) ("Civil fraud and actionable civil fraud are not the same. Actionable civil fraud requires a nexus between the act or omission and the alleged loss to the defrauded party. That nexus is reliance. Civil fraud without reliance is merely descriptive of conduct, is 'fraud in the air', and is not actionable.").

83. *See* Goldberg et al., *supra* note 62, at 1013.

84. *See, e.g.*, Elworthy v. First Tennessee Bank, 391 P.3d 1113, 1124 (Wyo. 2017); Cornelison v. TIG Ins., 376 P.3d 1255, 1270 (Alaska 2016) (citing Shetata v. Salvation Army, 225 P.3d 1106, 1114 (Alaska 2010)).

85. Merritt B. Fox, *Demystifying Causation in Fraud-on-the-Market Actions*, 60 BUS. LAW. 507, 507-08 (2005).

86. City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 113-14 (Mo. 2007).

87. *See* Fox, *supra* note 85, at 507-08.

is also sometimes considered to function as an excessive-liability filter that proximate cause provides in negligence actions.[88]

However, in exploring the role of reliance in fraud, John C.P. Goldberg and his coauthors noted that "the requirement of reliance is linked to a more general feature of tort law, namely, the relational structure of tort duties."[89] "To commit a tort," Professor Goldberg goes on to state, "is to breach a duty that is owed by an actor to a class of potential victims. Thus to prevail, a tort plaintiff must establish not merely that wrongful conduct has resulted in harm to her, but that conduct wrongful *as to a person in her position* has harmed her."[90] According to Professor Goldberg, then, a fraud plaintiff's reliance—at least in a one-on-one fraud claim— "is essential to establishing that the defendant's conduct was wrongful as to her."[91] This interpretation of the reliance element identifies it as a central keystone necessary to hold the rest of the edifice up.[92] Without reliance, there is no fraud.[93]

Placed in its proper historical context, Goldberg's conclusion makes perfect sense. In a one-on-one deception, a fraud claim must necessarily include reliance by the defendant because it is that very reliance that completes the fraudulent act.

However, should this no-reliance-no-fraud principle apply with equal force to those areas of common law fraud that have been expanded to recognize forms of indirect[94] or implicit reliance?[95] Professor Goldberg argues the answer is yes.[96] Or

88. *See In re* Mounce, 390 B.R. 233, 247 (Bankr. W.D. Tex. 2008) (noting that "Texas fraud jurisprudence requires proof of reliance to establish proximate cause of the plaintiff's injury").

89. Goldberg et al., *supra* note 62, at 1003.

90. *Id.* (emphasis in original).

91. *Id.*

92. *See id.* at 1002-03.

93. *Id.*

94. "Indirect reliance allows a plaintiff to prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from that party's agent or from someone to whom the party communicated the false statement with the intention that the victim hear it, rely on it, and act to his or her detriment." Kaufman v. i-Stat Corp., 754 A.2d 1188, 1195 (N.J. 2000).

95. *See generally* Karen Sandrik, *Overlooked Tool: Promissory Fraud in the Class Action Context*, 35 FLA. ST. U. L. REV. 193 (2007) (examining "the theory of implicit reliance in promissory fraud and argu[ing] that, if used in conjunction with the economic tort strategy, it will enable courts to forego individualized determinations of reliance and

rather, he and his coauthors argue the answer *must* be yes because the issue in a fraud case "is whether the defendant has actually succeeded in harming the plaintiff by virtue of *defrauding the plaintiff*, as opposed to having harmed the plaintiff by deceiving others."[97]

While this general proposition holds true with regard to private deceptions, the conclusion the authors draw from it is too broad if applied to certain public deceptions, like the fossil fuel industry's campaign of climate change misinformation aimed at the public, policymakers, and courts rather than at any particular individual. Any serious analysis of the role and purpose of reliance in fraud must take into account the nature of the deceptive practice to which the fraud law is being applied. One important component of such analysis is whether the deceptive practice was private or public, a distinction rarely discussed in the case law or the literature.

"Private deception," which I sometimes refer to as one-on-one deception, as these terms are used in this article, is where Person A misleads Person B to Person B's detriment. Here, Person B must reasonably rely on Person A's misleading representation in order to recover. By contrast, "public deception," as the term is used in this article, is where Person A makes a misleading representation to a large number of people, or even to the public at large, intending that someone, though not necessarily any particular person, rely on it to Person A's advantage, and someone does rely on it to Person A's advantage. From here, there are different ways public deception can play out. Among the myriad different public deception schemes, climate change fraud is unique in several ways. To understand just how it is different, it is worth summarizing some of the common public deception schemes (securities, accounting, and consumer fraud) to juxtapose them against climate change fraud.

Securities fraud. Securities fraud, also known as stock fraud and investment fraud, is a deceptive practice in the stock or commodities markets that induces investors to make purchase or sale decisions on the basis of false information, frequently

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damages").

96. *See* Goldberg et al., *supra* note 62, at 1003.

97. *Id.* at 1009 (emphasis in original).

resulting in losses, in violation of securities laws.[98] Investors harmed by such violations can sue defendants for civil damages.[99] There are also criminal statutes imposing penalties for securities law violations.[100] One instructive example is the lawsuits arising out of the Bre-X matter.[101] There, a Canadian mining company, Bre-X Minerals, Ltd., reported its Indonesian gold property contained more than 200 million ounces of gold, which would have made it the richest gold mine ever.[102] The stock price for Bre-X skyrocketed to a high of $280 (split adjusted), making millionaires out of many of its shareholders.[103] At its peak, Bre-X had a market capitalization of $4.4 billion.[104] When, in 1997, the public learned the gold mine contained little to no viable gold deposits, stock tanked, and fell to mere pennies.[105] Investors lost nearly all, if not all, money they'd invested in the company.[106] Bre-X was sued civilly and charged criminally.[107] Its deceptive practices are representative of securities fraud generally: a materially misleading representation or omission is made to the public, i.e., the market, and one or more investors purchases or sells stock in reliance on that misrepresentation and, as a result, the investor

98. 2 JOEL M. ANDROPHY, WHITE COLLAR CRIME § 12:16, at 12-41 to -42 (2019); *How Can Investors Get Money Back in a Fraud Case Involving a Violation of the Federal Securities Laws?*, U.S. SEC. & EXCH. COMM'N: FAST ANSWERS, [https://perma.cc/4ZXZ-5HSL] (last visited Oct. 23, 2019).

99. 15 U.S.C. § 78i(f) (2010).

100. 18 U.S.C. § 1348 (2009).

101. *See, e.g.*, Ann Morales Olazábal, *Analyst and Broker-Dealer Liability Under 10(b) for Biased Stock Recommendations,* 1 N.Y.U. J.L. & BUS. 1, 42-47 (2004); McNamara v. Bre-X Minerals Ltd., 256 F. Supp. 2d 549, 551-53 (E.D. Tex. 2002); Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. 3d 441 (Can. Ont. Gen. Div.); Janet Walker, *Crossborder Class Actions: A View from Across the Border,* 2004 MICH. ST. L. REV. 755, 798 (2004).

102. McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 402, 413 (E.D. Tex. 1999).

103. Lauren Snider, *Corporate Economic Crimes*, *in* CORPORATE AND WHITE-COLLAR CRIME 39, 45 (2008).

104. Will Kenton, *Bre-X Minerals Ltd.*, INVESTOPEDIA, [https://perma.cc/RG8E-WWLC] (last updated Apr. 28, 2018); *Bre-X*, WIKIMILI, [https://perma.cc/3UYS-4FPU] (last updated Sept. 20, 2019).

105. Snider, *supra* note 103, at 45-46.

106. For instance, the Quebec Public Sector Pension fund lost $70 million, the Ontario Teachers' Pension Plan lost $100 million, and the Ontario Municipal Employees' Retirement Board lost $45 million. *Id.* at 46.

107. *Id.*

loses money.[108] Reliance in such cases is generally presumed because publicly available information is deemed to be incorporated into the stock price under the fraud-on-the-market doctrine.[109] Accordingly, no first-party reliance is generally required to be proved.[110]

Accounting fraud. "Accounting fraud is intentional manipulation of financial statements to create a facade of a company's financial health."[111] These fraudulent records are often used to seek investment in the company's bond or stock issues.[112] Showing these false entries, companies may also attempt to submit fraudulent loan applications as a final attempt to obtain money fraudulently.[113] Through accounting fraud, a company can hide serious financial problems.[114] Accordingly, accounting fraud is not its own distinct area of law; rather, it is closely tied to securities fraud and is usually addressed under that umbrella.[115] However, some accounting fraud schemes have also been the subject of common law fraud claims.[116]

Consumer fraud. "Consumer fraud is commonly defined as deceptive business practices that cause consumers to suffer financial or other losses."[117] Similar to securities and accounting fraud, consumer fraud involves schemes whereby Person A makes misleading or false representations or omissions

108. McNamara v. Bre-X Minerals Ltd., 57 F. Supp. 2d 396, 403 (E.D. Tex. 1999).

109. *Id.*

110. *Id.*

111. Steven Nickolas, *What Is Accounting Fraud*, INVESTOPEDIA, [https://perma.cc/S3QB-UDU5] (last updated Nov. 19, 2018).

112. *See* Todd Tresidder, *The Top 16 Types of Securities Fraud You Must Avoid*, FIN. MENTOR, [https://perma.cc/3RX9-D6BV] (last visited Oct. 23, 2019).

113. *See id.*

114. *See* James A. Kaplan, *Why Corporate Fraud Is on the Rise*, FORBES (June 10, 2010), [https://perma.cc/R6S8-MJV4].

115. *See, e.g.*, Alaska Elec. Pension Fund v. Adecco S.A., 371 F. Supp. 2d 1203, 1212 (S.D. Cal. 2005) ("[T]o properly state a claim for accounting fraud, securities fraud plaintiffs must plead facts sufficient to support a conclusion that defendant prepared the fraudulent financial statements and that the alleged financial fraud was material."); Knox v. Yingli Green Energy Holding Co. Ltd., 242 F. Supp. 3d 950, 971-74 (C.D. Cal. 2017) (holding that investors failed to state a securities fraud claim based on accounting fraud) (internal quotations omitted).

116. AUSA Life Ins. Co. v. Ernst & Young, 991 F. Supp. 234, 252 (S.D.N.Y. 1997), *rev'd*, 206 F.3d 202 (2d Cir. 2000).

117. *What Is the Definition of Consumer Fraud?*, WINSTON & STRAWN, [https://perma.cc/2LQN-UZC7] (last visited Oct. 23, 2019).

to the public rather than to any particular individual.[118] Thus, consumer fraud is another species of public deception. Fraud against consumers is "often related to false promises or inaccurate claims made to consumers," failing to warn customers of dangers posed by a product, or "practices that directly cheat consumers out of their money."[119] The fraud is accomplished when a consumer or a third person is harmed by the product or transaction.[120] There are federal and state consumer protection laws that provide civil penalties for consumer fraud.[121] Consumer fraud schemes have also been the subject of claims under common law fraud and Racketeer Influenced and Corrupt Organizations Act (RICO).[122] One particularly relevant and instructive consumer deception claim was the tobacco industry's deception of the public regarding the addictiveness and harmfulness of smoking cigarettes.[123]

There are important parallels between commercial public deception[124] by the tobacco, opioid, sugar, and baby powder industries, on the one hand, and the fossil fuel industry, on the other.[125] Of the former group of public deceptions, the tobacco

118. *Consumer Fraud*, DEBT.ORG, [https://perma.cc/6EXQ-YH7T] (last visited Oct. 23, 2019).

119. *What Is the Definition of Consumer Fraud?*, *supra* note 117.

120. *Id.*

121. One such law is the Federal Trade Commission Act. *See* 15 U.S.C. §§ 41-58 (2006). It created the Federal Trade Commission. 15 U.S.C. § 41. The FTC's Bureau of Consumer Protection fights fraudulent business practices. 15 U.S.C. § 45. It collects complaints, conducts investigations, and sues companies that have broken the law. 15 U.S.C. § 46. Federal laws have also been passed to protect the public in specialized areas, such as against deceptive real estate transactions. 15 U.S.C. §§ 41-58; *see also* 815 ILL. COMP. STAT. 505/1 to /12 (1973); MINN. STAT. §§ 325F.68-.695 (2005).

122. *In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig., 295 F. Supp. 3d 927, 957 (N.D. Cal. 2018).

123. *See infra* note 135 and accompanying text.

124. "Commercial public deception," as the term is used in this article, refers to any public deception scheme carried out with the aim of covering up or misleading the public about dangers posed by a product, with the end goal, in whole or in part, of making profit off of selling the product to the public.

125. *See, e.g.*, Dubats, *supra* note 17, at 512 ("From the bench, climate change fraud looks a lot like a tobacco fraud case, and decades of tobacco litigation may hold some strategic insight for approaching a fraud case with comparably complex causal chains. Tobacco plaintiffs struggled for many years to obtain tort compensation for wrongful deaths and other injuries caused by smoking-related disease."); Angela Lipanovich, *Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation Is Feasible*, 35 GOLDEN GATE U. L. REV. 429, 431-32 (2005) (examining tobacco litigation as a model for litigation addressing environmental harms caused by vehicle and

industry's public deception is both the most well-known[126] and the most extensively litigated.[127] It therefore serves as a particularly well-suited representative example of the way in which this kind of public deception is carried out.[128]

Tobacco manufacturers misled the public for decades. They did this by, among other things, claiming tobacco was not addictive and insisting the health problems it allegedly caused (including death from cancer, heart disease, and other terminal conditions) were instead caused by other environmental and genetic factors that had nothing to do with smoking.[129] This misinformation campaign was both incredibly successful and incredibly destructive. It made the tobacco industry billions in profits over the course of several decades and resulted in the deaths of millions of people.[130] Today, tobacco still kills seven million people per year worldwide.[131]

Smokers and their surviving relatives began suing the tobacco companies under many theories, including fraud, in the 1950s.[132] Almost every one of them lost.[133] The tobacco

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power generation emissions respect to issues of standing, preemption, and products liability).

126. *See* Robert E. Wagner, *Mortal Democracy: When Corporations Bribe*, 13 N.Y.U. J. L. & BUS. 193, 226 (2016) ("A well-known example of wrongdoing intimately tied to the character and culture of the corporations involved was the tobacco companies' longstanding pattern of fraudulently misleading regulators and the public about the health risks related to smoking."); *see generally* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999).

127. *See* Henderson & Twerski, *supra* note 6, at 70 (providing an overview of the history of tobacco litigation); *see generally* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992) (providing further overview).

128. Another reason the tobacco industry's commercial public deception is a well-suited representative example is because of the striking parallels between it and the campaign of climate change doubt carried out by the fossil fuel industry. *See, e.g.*, Dubats, *supra* note 17, at 512, 518; Lipanovich, *supra* note 125, at 431-32.

129. *See* David Heath, *Contesting the Science of Smoking*, ATLANTIC (May 4, 2016), [https://perma.cc/9FEB-CQ9Z].

130. *See Health Consequences of Smoking, Surgeon General Fact Sheet*, U.S. DEP'T HEALTH & HUM. SERVS. (Jan. 16, 2014), [https://perma.cc/C4JC-GHGN]; Jennifer Maloney & Saabira Chaudhuri, *Against All Odds, the U.S. Tobacco Industry Is Rolling in Money*, WALL ST. J. (April 23, 2017), [https://perma.cc/QX82-WUUE].

131. *Tobacco*, WORLD HEALTH ORG. (July 26, 2019), [https://perma.cc/D2RZ-6CWR].

132. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, [https://perma.cc/6WEF-56UM] (last visited Oct. 19, 2019).

133. *Id.*

industry famously paid not a single penny in damages or settlement to any tobacco liability case from 1954 to 1996.[134] Leaving aside other claims like products liability, negligence, and battery, the fraud claims against the tobacco industry were no more successful than any other theory during six decades that comprised phase one and phase two of the tobacco litigation story. Why did this happen and how does reliance fit into the picture?

To begin with, fraud plaintiffs suing tobacco companies faced a gauntlet of hurdles, only one of which was reliance. Plaintiffs' cases were ruled against, dismissed, and settled based on Big Tobacco defenses such as lack of scientific proof that cigarette smoking causes cancer, lack of evidence tobacco is addictive, a redirection of the public's attention to other risk factors, and consumers' assumption of the risk.[135] Reliance, however, was always a high burden for these plaintiffs, and cases have been dismissed based on lack of reliance.[136] Courts have rarely even reached the question of whether the reliance element was met in such cases, dismissing the cases instead by ruling the reliance element *could not* be met.[137] It's true smokers saw ads, marketing, and promotional materials, and could therefore argue they relied on those, and that that reliance caused their damages. But such commercial speech is given far greater leeway in framing and describing a product, including exaggerated claims and puffery,[138] than would noncommercial kinds of representations. Once warning labels were required to be affixed to tobacco products, beginning in 1965, this threw yet

134. Richard A. Draynard et al., *Tobacco Litigation Worldwide*, 320 BMJ 111, 111 (2000).

135. Sharon Milberger et al., *Tobacco Manufacturers' Defence Against Plaintiffs' Claims of Cancer Causation: Throwing Mud at the Wall and Hoping Some of It Will Stick*, 15 TOBACCO CONTROL iv17, iv19-20 (Supp. 2006).

136. Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 353 (6th Cir. 2000); Valle-Ortiz v. R.J. Reynolds Tobacco Co., 385 F. Supp. 2d 126, 133 (D.P.R. 2005).

137. Tompkin v. Am. Brands, Inc., 10 F. Supp. 2d 895, 906, 909-10 (N.D. Ohio 1998), *aff'd in part, rev'd in part sub nom.* Tompkin v. Am. Brands, 219 F.3d 566 (6th Cir. 2000).

138. *See In re* Cable & Wireless, PLC, 332 F. Supp. 2d 896, 900-01 (E.D. Va. 2004) (holding that a corporation's "soft" statements concerning its financial condition and prospects were mere puffery and therefore not actionable as securities fraud).

another wrench into plaintiffs' attempt to hold the tobacco manufacturers and their allies liable for fraud.[139]

At the same time, there is the complicating factor that the key deception by Big Tobacco was not necessarily the deception of the public at large, but the deception of government regulators and Congress, which resulted in tobacco continuing to be sold to the public unregulated and, for decades, without even warning labels.[140] Not surprisingly, members of the public actually harmed by tobacco industry deceptions were, for decades, effectively barred from suing in fraud based on these deceptions because plaintiffs in such cases could not satisfy the reliance element.[141]

Only very recently, after the landmark RICO case against the tobacco industry, *United States v. Philip Morris USA, Inc.*,[142] have courts begun to countenance fraud claims by those harmed or killed by cigarettes against the tobacco companies whose deceptions caused the plaintiffs' harm.[143] In *Philip Morris*, the court held that the defendants "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises."[144] The tobacco industry defendants were convicted of conspiring to perpetrate a

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139. *2000 Surgeon General's Report Highlights: Warning Labels*, CTR. DISEASE CONTROL & PREVENTION, [https://perma.cc/WQB2-NU6B] (last visited Oct. 19, 2019).

140. *See* Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 954 (1988) (noting that, prior to 1965, when warning labels were first required to be placed on tobacco products, the tobacco companies knew the risks of smoking but represented to the public that smoking was safe); Philip J. Hilts, *Tobacco Company Was Silent on Hazards*, N.Y. TIMES (May 7, 1994), [https://perma.cc/EJC4-H6TM] (discussing internal tobacco company documents that had come to light showing that tobacco industry executives chose to remain silent and keep their research results secret).

141. *See* Sarah Roshanne Anchors, *Mass Market Fraud Theory: Dispensing with Individual Reliance in Class Actions Where Plaintiffs Allege Pervasive Misrepresentations to the Public*, 43 TORT TRIAL & INS. PRAC. L.J. 221, 225 (2008).

142. United States v. Philip Morris USA, Inc., 787 F. Supp. 2d 68, 71 (D.D.C. 2011), *aff'd*, 686 F.3d 832 (D.C. Cir. 2012).

143. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 219 (2d Cir. 2008); Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1254 (Fla. 2006); R.J. Reynolds Tobacco Co. v. Whitmire, 260 So. 3d 536, 537 (Fla. Dist. Ct. App. 2018); Frankson v. Brown & Williamson Tobacco Corp., 67 A.D.3d 213, 215 (N.Y. App. Div. 2009).

144. *Philip Morris USA, Inc.*, 787 F. Supp. 2d at 71 (quoting United States v. Phillip Morris USA, Inc., 449 F. Supp. 2d 1, 852 (D.D.C. 2006)) (internal quotation marks omitted).

fraud on the public.[145] As an eventual result of that decision, courts began to allow fraud claims to proceed against tobacco industry defendants.[146] Some have even succeeded.[147]

Thus, although plaintiffs in fraud cases against the tobacco industry have enjoyed some recent successes, these came only after decades of failure. The reliance element was one of the major impediments to such claims. The public nature of the deception made it nearly impossible for harmed plaintiffs to seek redress in tort, generally, and under fraud, specifically.

The nature of the public deceptions carried out by the opioid, sugar, and baby powder industries fall into this same general category of fraud. In each case, a company sells a product that poses a nonapparent danger to consumers and to others, and it is most typically the consumer's reliance on the seller's misrepresentations that misleads him or her into purchasing the dangerous product and thereby causing the harm.

As difficult as it is to satisfy the reliance element in such public deception fraud cases, the challenge is far greater in cases of climate change fraud. Although the nature of the deception from the perspective of the fossil fuel industry is very similar to the nature of the deception from the perspective of the tobacco industry—in each case, the campaign of misinformation playbook was nearly identical—the reliance component from the perspective of the harmed plaintiff is very different. The reliance bridge is far more difficult to cross in climate change fraud cases.

C. How Climate Change Deception Differs from Other Kinds of Commercial Public Deception

Saúl Luciano Lliuya, a Peruvian farmer, does not smoke cigarettes. Nor is he addicted to opiate painkillers. He does not

145. Philip Morris USA, Inc., 449 F. Supp. 2d 1, *aff'd in part, vacated in part, and remanded*, 566 F.3d 1095 (D.C. Cir. 2009), *and order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011); Myron Levin, *Big Tobacco Is Guilty of Conspiracy*, L.A. TIMES (Aug. 18, 2006), [https://perma.cc/M7F4-J3GL].

146. *See High Court Ruling Paves Way for Fraud Suit over Light Cigarettes*, 25 ANDREWS TOBACCO INDUS. LITIG. REP. 3, at 1 (2009).

147. *See* R.J. Reynolds Tobacco Co. v. Mathis, 233 So. 3d 1224, 1224 (Fla. Dist. Ct. App. 2017); Meghan Gourley, *Jury Hits R.J. Reynolds for $5M in Widow's Suit over Fatal Cancer*, COURTROOM VIEW NETWORK (Aug. 16, 2016), [https://perma.cc/M4H3-XF9L].

binge on American fast food or soft drinks, and he has apparently never been exposed to cancer-causing asbestos. He is, however, a victim of corporate deception, the result of which is a daily threat to his life, his home, and the community he has lived in his whole life. He is a victim of global warming. The fossil fuel industry caused the now ever-present threat.

Saúl lives in Huaraz, a town high in the Andes Mountains. Huaraz made international news a few years ago because it was at high risk of a glacial lake outburst flood, or GLOF, due to the swelling of Lake Palcacocha, which lies a few miles up a narrow valley from the town, to forty times its usual volume over the past few decades.[148] Studies have concluded the swelling of the lake is directly due to global warming.[149] A single GLOF, which could be caused by just one piece of glacial ice calving off and falling into the lake, could wipe out the homes of 50,000 people, including Saúl's.[150]

The basic causal connection with CO_2 emissions is simple. The excess CO_2 emissions pumped into the atmosphere since the industrial revolution has raised temperatures worldwide.[151] Those rising temperatures have shrunk the glaciers in Peru—a country which contains seventy percent of the world's tropical glaciers—to half their former size.[152] They continue to shrink at a shocking pace.[153] The glacier above Lake Palcacocha poured hundreds of thousands of cubic meters of meltwater into the lake, swelling it to unprecedented levels.[154] The threat of a GLOF is real,[155] highly likely,[156] and terrifying to those in the flood path.

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148. *See* Ciara Nugent, *Climate Change Could Destroy This Peruvian Farmer's Home. Now He's Suing a European Energy Company for Damages,* TIME (Oct. 5, 2018), [https://perma.cc/YAM6-LQRL].

149. *Id.*

150. *Id.*

151. *The Causes of Climate Change*, NASA, [https://perma.cc/63LZ-62A6] (last visited Oct. 20, 2019).

152. Jeremy Hinsdale, *Vanishing Glaciers: The Future of Water in Peru's High Andes*, EARTH INST., COLUM. UNIV. (June 12, 2018), [https://perma.cc/2YH6-44N7].

153. *Id.*

154. Ines Perez, *Meltwater Catastrophes Are Forming High in the Andes*, E&E NEWS (Mar. 14, 2013), [https://perma.cc/XR64-PRC2].

155. Adam Emmer, *Glacier Retreat and Glacial Lake Outburst Floods (GLOFs)*, OXFORD RES. ENCYCLOPEDIA, NAT. HAZARD SCI. (Apr. 2017), [https://perma.cc/SBZ8-MM5V]; Yvonne Schaub, Outburst Floods from High-Mountain Lakes: Risk Analysis of Cascading Processes under Present and Future Conditions (2015) (unpublished

Although sea-level rise and extreme weather events like hurricanes, droughts, and wildfires have been the global warming effects that have gotten the most attention, Saúl's case clearly shows that those harmed by global warming need not live on the coast or in a desert. There are global warming victims everywhere. Ironically, those who suffer the most from global warming tend to be those least responsible for causing it.[157] The class of victims from global warming is growing and will likely balloon in the coming decades.[158]

Saúl sued the largest GHG emitter in Europe, German energy firm RWE, to recover damages to compensate him and his community for the harm caused by the threat from Lake Palcacocha.[159] The case is called *Lliuya v. RWE AG.*[160] In his lawsuit, Saúl alleged that RWE, which is responsible for 0.5% of all CO_2 ever emitted by humans,[161] should pay for 0.5% of the cost of making safe a glacial lake that has swollen to a dangerous volume as a result of anthropogenic CO_2-induced global warming.[162] Saúl brought his claim under German Civil Code Section 1004, a nuisance statute.[163] Like American nuisance law, Section 1004 prohibits using one's own property in a way that impairs someone else's use of his or her property.[164] Saúl made no fraud claim.[165] Like innumerable

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dissertation, University of Zurich) (on file with the Zurich University Library).

156. Amanda D. Cuellar & Daene C. McKinney, *Climate Change Adaptation Decision Making for Glacial Lake Outburst Floods from Palcacocha Lake in Peru*, AM. GEOPHYSICAL UNION (Dec. 2014), [https://perma.cc/U55P-T5D9].

157. Chris Mooney, *The People Who'll Be Hurt Most by Climate Swings Did the Least to Cause Them, Study Says*, WASH. POST (May 2, 2018), [https://perma.cc/GV54-RA2X]; *Climate Change: Small Island Developing States*, CLIMATE CHANGE SECRETARIAT, at 5 (2005), [https://perma.cc/TNE2-DS2X] ("Although small island developing States are among the least responsible of all nations for climate change, they are likely to suffer strongly from its adverse effects and could in some cases even become uninhabitable.").

158. CLIMATE CHANGE 2014, *supra* note 12, at 67, 69 (2014).

159. Decision, Landgericht Essen [LG] [District Court Essen] Dec. 15, 2016, 2 O 285/15 (Ger.), [https://perma.cc/SCU4-8RYE].

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164.

> The owner has especially two claims which result from his real right of ownership: (i) the action of delivery of the res against the possessor, whereby the possessor has not or no longer a right to possession vis-à-vis the owner

other plaintiffs in climate change damages cases against GHG emitters and fossil fuel companies, his only tort claim was in nuisance.[166] The long record of plaintiffs choosing this path—or being forced into it—demonstrates that fraud is not, or at least not seen as, a viable option for such plaintiffs.

The point of discussing Saúl's story here is not to weigh in on whether he could possibly prevail in any kind of fraud claim against, say, ExxonMobil or against any other fossil fuel company. Rather, it is to highlight that although individuals are being damaged on account of deceptions by the fossil fuel industry, there is no current U.S. law basis for pursuing tort claims against those responsible for the deceptions because, in part, the reliance element as applied in most fraud cases makes the claim unwinnable. Yes, Saúl can, and has, sued a major GHG emitter for pumping CO_2 into the atmosphere, which no doubt was a major cause of the global warming that put his town at risk of a GLOF.

GHG emitters would never have been allowed to pump CO_2 into the atmosphere without the fossil fuel industry's campaign of climate change doubt, along with campaign donations and political posturing. This convinced the United States and international governments to continue allowing oil to be extracted from the ground and burned as an energy source, thereby releasing CO_2.[167] The fossil fuel industry's misinformation and political action campaign was, and is, the root cause of the global warming now threatening the entire

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> (Eigentumsherausgabeanspruch, rei vindicatio, § 985 BGB); and (ii) a claim against interference with the enjoyment of the ownership right, whereby the interference does not amount to a dispossession of the owner. This latter claim against interference with ownership (Eigentumsstörungsanspruch, actio negatoria, § 1004 BGB), thus something which English lawyers would associate with a kind of owner's remedy against nuisance or trespass, is particularly important in respect of land, but also applies to moveables.

Andreas Rahmatian, *A Comparison of German Moveable Property Law and English Personal Property Law*, GER. L. ARCHIVE, [https://perma.cc/K9V4-N3GM] (last visited Oct. 16, 2019).

165. Decision, Landgericht Essen [LG] [District Court Essen] Dec. 15, 2016, 2 O 285/15 (Ger.), [https://perma.cc/SCU4-8RYE].

166. *Id.*

167. *See* Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), [https://perma.cc/527S-UZNN] (reporting that Exxon's tactics prevented the United States from signing an international treaty to control the emission of greenhouse gases).

globe. Yet their misrepresentations and other deceptive practices cannot fit the current definition of fraud because, in part, those most harmed by them never relied directly on the misrepresentations to their detriment. The actual causal connection is clearly visible, and perhaps the proximate causal connection as well. But reliance remains an absolute bar to such claims.

This is where climate change fraud breaks off from other similar commercial public deceptions whereby companies mislead the public into purchasing destructive products. In other major commercial public deceptions, like those by the tobacco, sugar, opioid, and talcum powder industries, the ones primarily harmed by the destructive product were those who purchased or used the product, or those who interacted with purchasers or users.[168] This provides a tenuous but tangible avenue for plaintiffs to establish reliance in fraud cases against the manufacturers of the product. That does not mean such claims are likely to prevail, but they are at least possible.

Recent fraud claims against tobacco companies have proven this to be true.[169] It is possible, though by no means easy, to establish reliance in such cases because the ones harmed relied on the commercial public deceptions to purchase or use the product, or otherwise come into contact with those who did.[170]

Climate change damages, and the deceptions that cause them, are quite different. Fossil fuel companies like ExxonMobil misled the public for decades, but it was not the public's or the consumers' reliance that mattered most, but rather the reliance of political leaders, government regulators, and courts, which allowed oil and other fossil fuels to avoid government regulation and court liability. These decisionmakers allowed the dangerous product to continue to be

168. *See* Christine P. Bump, *Close but No Cigar: The WHO Framework Convention on Tobacco Control's Futile Ban on Tobacco Advertising*, 17 EMORY INT'L L. REV. 1251, 1254 (2003).

169. *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1255-56 (Fla. 2006) (allowing individuals who smoked cigarettes and later suffered medical consequences as a result to bring suit against tobacco companies who fraudulently presented products); Engle v. RJ Reynolds Tobacco, No. 94-08273, 2000 WL 33534572, at *3 (Fla. Cir. Ct. 2000); Tuttle v. Lorillard Tobacco Co., 377 F.3d 917, 927 (8th Cir. 2004).

170. *See Id.*

extracted from the ground, refined, sold, and burned for fuel, releasing excess CO_2 and raising global temperatures.[171] The ones harmed by these deceptions are not the congresspeople, senators, agency regulators, judges, and justices that relied on them to ExxonMobil's advantage, but those members of the public who suffer harm from sea level rise, heatwaves, droughts, wildfires, and other extreme weather events, as well as other environmental threats like GLOFs.[172] People like Saúl. As many have observed, the ones who suffer most from global warming are those who did least to cause it.[173]

Of course, Saúl's case represents just one possible climate change fraud plaintiff. Other possible plaintiffs include coastal communities whose homes, businesses, or infrastructures are damaged or destroyed by sea level rise;[174] property owners whose property is damaged by extreme weather events;[175] individuals displaced by coastal flooding or erosion;[176] and individuals whose occupations become less profitable or unprofitable on account of increasing temperatures, sea level rise, ocean acidification, and extreme weather events, like farmers and fishing professionals.[177]

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171. *Oil: When We Drill, We Spill*, GREENPEACE, [https://perma.cc/8NTP-9KSQ] (last visited Oct. 21, 2019).

172. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009); Decision, Landgericht Essen [LG] [District Court Essen] Dec. 15, 2016, 2 O 285/15 (Ger.), [https://perma.cc/SCU4-8RYE]; Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (Pak.); Dellinger, *supra* note 13, at 537-38.

173. *See, e.g.*, Mooney, *supra* note 157; Martin Wolf, *Why Climate Change Puts the Poorest Most at Risk*, FIN. TIMES (Oct. 17, 2017), [https://perma.cc/3VDJ-J3YP]; Suzanne Goldenberg, *Climate Change: The Poor Will Suffer Most*, GUARDIAN (Mar. 30, 2014), [https://perma.cc/7EUX-XREP].

174. CLIMATE CHANGE 2014, *supra* note 12, at 65.

175. Virginia Murray et al., *Case Studies*, *in* MANAGING THE RISKS OF EXTREME EVENTS & DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION 487, 489, 523-24 (2012).

176. Warren Cornwall, *As Sea Levels Rise, Bangladeshi Islanders Must Decide Between Keeping the Water Out—or Letting It In*, SCI. MAG. (Mar. 1, 2018), [https://perma.cc/WD2C-N2HD] (e.g., Bangaladesh will likely cause huge humanitarian crisis because millions of people live at or near sea level, and there are few places for people there to go.).

177. *Id.*

D. Imposing the Traditional Intent and Reliance Requirements in Climate Change Fraud Cases Frustrates Justice

"The law of fraud is pervasive."[178] What does this mean? It means the laws prohibiting and punishing fraudulent behavior are not in any one spot. Misrepresentation is not confined to a single category of actions walled off from other torts like, say, assault or false imprisonment. Rather, "[m]isrepresentation runs all through the law of torts as a method of accomplishing various types of tortious conduct which, for reasons of historical development or as a matter of convenience, usually are grouped under categories of their own."[179]

A number of different torts can be, and often are, accomplished through misrepresentation. For instance, "a battery may be committed by feeding the plaintiff poisoned chocolates or inducing his consent to a physical contact by misrepresenting its character."[180] Likewise, "[f]alse imprisonment may result from a pretense of authority to make an arrest, a trespass to land from fraudulent statements inducing another to enter, or a conversion from obtaining possession of goods by fraudulent representations."[181]

While fraud law may be pervasive, it is far from perfect. Numerous fraudulent schemes slip easily through the loopholes in the current fraud law.[182] One of them is climate change fraud.

What *is* climate change fraud? One clear example is ExxonMobil, and its predecessor, Exxon, purposefully spreading false representations that global warming is not happening, that it is not caused primarily by burning fossil fuels, and that curbing or capping fossil fuel use would not greatly reduce the effects of global warming in the coming decades.[183] This campaign of climate change doubt included, as well, hiding the

178. PETER A. ALCES, LAW OF FRAUDULENT TRANSACTIONS § 2:1 (2019).

179. RESTATEMENT (SECOND) OF TORTS div. 4, ch. 22, scope note (AM. LAW INST. 1977).

180. *Id.*

181. *Id.*

182. David B. Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 B.C. L. REV. 131, 201 (2012).

183. Amy Lieberman & Susanne Rust, *Big Oil Braced for Global Warming While It Fought Regulations*, L.A. TIMES (Dec. 31, 2015), [https://perma.cc/2GDS-8Y8Y].

scientific truths the company knew regarding these topics from the public.[184] This commercial public deception was done purposefully and with absolute disregard to the dire consequences that it would have on millions, if not billions, of people.

The size, scope, and effect of this commercial public deception can be compared only to the leaded gasoline industry's deception of the public resulting in global lead poisoning, which persists to today, and the tobacco industry's deception that has killed more than twenty million Americans since 1964.[185] That is, the fossil fuel industry's deception is on par with the largest and most destructive commercial public deception campaigns in history.

Today, we are just beginning to get a glimpse of the actual effects it is having on our climate and people. These effects, including sea level rise and extreme weather events, were predicted in the 1970s and 1980s by none other than Exxon's own scientists.[186] Global warming's existence, causes, and likely effects were well known then.[187] They were nearly universally acknowledged by the climate science community by the late 1980s.[188] Yet all throughout the nineties and early 2000s, Exxon and ExxonMobil actively misled the public to its detriment.

The fraud laws to date, however, provide no avenue whatsoever for those harmed by global warming to sue ExxonMobil or other fossil fuel companies for the deception that caused their damages. Again, fraud grew out of the one-on-one deception context, going back to *Pasley*. This is undoubtedly one of the reasons it is tailored in a way that makes it unduly difficult for those harmed by public deception to sue in fraud. While those harmed by smoking cigarettes also face this

184. *See* Hall, *supra* note 167.

185. *See* Lawrence M. Ward, *Lead Poisoning: Environmental Epidemic*, 24 MD. B. J. 14, 15 (1991); *see generally* U.S. DEP'T HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (2014).

186. *See* Hall, *supra* note 167; Benjamin Franta, *Shell and Exxon's Secret 1980s Climate Change Warnings*, GUARDIAN (Sept. 19, 2018), [https://perma.cc/G5J8-BZBW].

187. *See* Hall, *supra* note 167.

188. *See* Lisa Song et al., *Exxon Confirmed Global Warming Consensus in 1982 with In-House Climate Models*, INSIDECLIMATE NEWS (Sept. 22, 2015), [https://perma.cc/6XV3-HSUH].

difficult fraud hurdle, those harmed by climate change fraud face not a hurdle but an impenetrable wall: the reliance element.

A plaintiff harmed by global warming, whether because her seaside home is flooded or because her crops have been destroyed by higher temperatures and drier air, has no recourse in fraud because she cannot establish that her damages arose out of her reliance on the false statement or omission. This is why Saúl Luciano Lliuya cannot sue ExxonMobil for fraud.

The result? On one hand, those harmed by global warming—which, again, were those who least contributed to causing it—cannot be compensated for the deceptive messages and actions taken by the fossil fuel industry that caused the global warming in the first place. On the other hand, those fossil fuel companies not only evade liability and regulation, which was the purpose of their deceptive messages and actions in the first place, but they are indeed rewarded for the deceptions. Their misrepresentations paid off and continue to pay off. They reap billions in profits as a direct result of the false statements and omissions they made to mislead the public on global warming.

Those who acted in a wrongful manner by deceiving the public are rewarded and those who did nothing wrong are punished by being barred from even seeking legal redress against those whose misrepresentations caused their harm.

III. HOW TRANSFERRED INTENT ADDRESSES A SHORTCOMING IN TORT LAW SIMILAR TO THAT NOW POSED BY CLIMATE CHANGE FRAUD

A. Origin of Transferred Intent

When deciding the case of *Scott v. Shepherd*[189] two and a half centuries ago, judges on the King's Bench in England faced a conundrum. The facts of the case were clear. How the law should be applied was not. A boy, Shepherd, had tossed a lighted firecracker into a market and it landed on a vendor's stand near Willis, a customer.[190] Willis quickly picked up the firecracker and threw it across the market where it landed next

189. Scott v. Shepherd (1773) 96 Eng. Rep. 525 (KB).

190. *Id.* at 525-26.

to one of the vendors, Ryal.[191] Ryal picked it up and threw it once again.[192] The firecracker exploded just as it hit a nearby bystander in the face.[193] That bystander, Scott, lost an eye in the explosion.[194] He sued Shepherd for damages.[195]

The conundrum was this: Scott sued Shepherd in trespass, a tort action for injuries caused by the defendant's direct force to the plaintiff, yet Shepherd, although he had certainly *caused* the resulting injury, had not directed any force at Scott.[196] In fact, Shepherd had not directed force at any particular person at all, instead simply—and mischievously—throwing the lit firecracker into a crowded market.[197] Moreover, Willis's and Ryal's independent intervening acts of throwing the firecracker made the resulting injury to Scott even less the result of any direct force by Shepherd.[198] Under the law of trespass at the time, Scott had no valid claim against Shepherd, at least not in trespass.[199]

The judges, however, did not follow the law. They instead found the throws by Willis and Ryal, although volitionally moving the firecracker ultimately to Scott's face, were not voluntary acts but reflexive reactions done without purpose or intent.[200] The court found that all liability for Scott's injury rested with the original thrower, Shepherd.[201] From that case forward, defendants that applied such indirect force could be liable.[202] This expansion of the law to allow trespass actions for the application of indirect force became, under later trespassory tort cases in both England[203] and the United States,[204] the doctrine of transferred intent.[205]

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191. *Id.* at 526.
192. *Id.*
193. *Id.*
194. *Scott*, 96 Eng. Rep. at 526.
195. *Id.* at 525.
196. *See id.* at 525-26.
197. *See id.*
198. *See id.* at 526.
199. *Scott*, 96 Eng. Rep. at 526-27.
200. *See id.* at 528.
201. *See id.* at 528-29.
202. *See id.* at 529.
203. *See* James v. Campbell (1832) 172 Eng. Rep. 1015, 1015 (KB); *see also* William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 654 (1967).
204. *See, e.g.*, Lopez v. Surchia, 246 P.2d 111, 113 (Cal. Ct. App. 1952); Smith v. Moran, 193 N.E.2d 466, 468 (Ill. App. Ct. 1963); Tuttle v. Forsberg, 73 N.E.2d 861, 863-

B. Applying Transferred Intent

To be liable for an intentional tort, the defendant must have acted with intent to cause a certain kind of result.[206] This usually means the defendant acted with the purpose or object of causing the result.[207] This includes, for example, pulling a chair out from someone about to sit down for the purpose of making them fall down, or throwing a rock at a neighbor's dog with the intention of hitting and hurting it. However, a defendant can also be considered to act with the requisite intent if the defendant knows to a substantial certainty that his act will result in the harm done.[208] This includes, for instance, pulling a chair out from under someone about to sit down or throwing a rock at a neighbor's dog without wanting or meaning to harm the person or the dog, but knowing to a substantial certainty the resulting harm could occur.

Accordingly, "intentional tort liability requires that the defendant have intended the type of interference with the plaintiff's legally protected interests that is the basis of the plaintiff's claim."[209] Liability for assault requires that the defendant have acted with an intent to cause a reasonable

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64 (Ill. App. Ct. 1947); Anderson v. Arnold, 79 Ky. 370, 373 (1881); Murphy v. Wilson, 44 Mo. 313, 318 (1869); Morrow v. Flores, 225 S.W.2d 621, 624 (Tex. Civ. App. 1949); Carnes v. Thompson, 48 S.W.2d 903, 904 (Mo. 1932); Davis v. Collins, 48 S.E. 469, 471 (S.C. 1904); Bannister v. Mitchell, 104 S.E. 800, 801 (Va. 1920); Singer v. Marx, 301 P.2d 440, 443 (Cal. Ct. App. 1956); Peterson v. Haffner, 59 Ind. 130, 133 (1877); Talmage v. Smith, 59 N.W. 656, 657 (Mich. 1894); McKeon v. Manze, 157 N.Y.S. 623, 625 (N.Y. Sup. Ct. 1916); Keel v. Hainline, 331 P.2d 397, 399 (Okla. 1958).

205. Prosser, *supra* note 203, at 654.

206. *See* RESTATEMENT (THIRD) OF TORTS §§ 102, 105 (AM. LAW INST., Tentative Draft No. 1, 2015). However, under the old common law in place at the time of *Scott v. Shepherd*, and up through the nineteenth century, it was considered "sufficient intent for trespass liability" if a defendant merely "engaged in an intentional act, such as throwing an object or driving a vehicle." Peter B. Kutner, *The Prosser Myth of Transferred Intent*, 91 IND. L. J. 1105, 1107 (2016). "There was no requirement that the [defendant] act with an intent to cause what happened to the plaintiff or any other specific consequence." *Id.*

207. *See* RESTATEMENT (THIRD) OF TORTS § 1 (AM. LAW INST. 2010); KEETON ET AL., *supra* note 63, § 8, at 34.

208. RESTATEMENT (THIRD) OF TORTS § 1; RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965); DAN B. DOBBS, THE LAW OF TORTS 48 (2000).

209. Kutner, *supra* note 206, at 1107; *see also* KEETON ET AL., *supra* note 63, § 8, at 36; Jerome J. Atrens, *Intentional Interference with the Person*, *in* STUDIES IN CANADIAN TORT LAW 378, 379 (Allen M. Linden ed., 1968); Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1168-69 (2001).

apprehension of imminent harmful or offensive contact to the plaintiff's person.[210] Liability for battery, on the other hand, requires that the defendant have acted with an intent to cause harmful or offensive contact to the plaintiff's person.[211] Liability for the other trespassory torts likewise requires that the defendant have acted with the intent to bring about the resulting harm that actually occurred.[212]

Transferred intent expands the scope of intentional tort liability to encompass certain defendants that lack the requisite intent to harm the victim that is actually harmed.[213] It does this in three primary ways. First, where a defendant intends to harm Person A but instead harms Person B, the defendant is held liable in intentional tort for the harm to Person B.[214] For instance, if the defendant shoots a gun aiming at Person A, but misses and hits Person B, then the defendant can be liable for a battery for the harm to Person B.[215] This is true even if the defendant was unaware of Person B. As stated by one court, "intent follows the bullet."[216]

The second primary way transferred intent expands liability is where a defendant intends Tort A but actually carries out Tort B.[217] Such a defendant is held liable for Tort B even though he never intended to carry out Tort B.[218] For instance, where a

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210. RESTATEMENT (SECOND) OF TORTS § 21.

211. RESTATEMENT (SECOND) OF TORTS § 13.

212. *See* RESTATEMENT (SECOND) OF TORTS §§ 35, 217, 158.

213. *See* RESTATEMENT (SECOND) OF TORTS § 16.

214. DOBBS, *supra* note 208, at 75-77. For example, in *In re White v. White*, the defendant shot at a third party, but the bullet hit the plaintiff, who was a bystander, instead. *In re* White v. White, 18 B.R. 246, 249 (Bankr. E.D. Va. 1982). Similarly, in *Baska v. Scherzer*, the plaintiff was injured when trying to break up a fist fight between two high school boys. Baska v. Scherzer, 156 P.3d 617, 626-27 (Kan. 2007). The Kansas Supreme Court held that transferred intent applied, rendering the boys liable for battery. *Id.* ("Each defendant intended to strike at the other in order to cause harm. . . . The fact that the punches in question hit the plaintiff rather than the defendants is immaterial to the analysis.").

215. RESTATEMENT (SECOND) OF TORTS § 16 cmt. b, illus. 3.

216. Poe v. State, 652 A.2d 1164, 1168 (Md. Ct. Spec. App. 1995).

217. DOBBS, *supra* note 208, at 76.

218. *See, e.g.*, Labadie v. Semler, 585 N.E.2d 862, 864 (Ohio Ct. App. 1990) (holding that the defendant was liable for battery when he attempted to scare the plaintiff by throwing a snowball at her, and the snowball hit the plaintiff in the face); Nelson v. Carroll, 735 A.2d 1096, 1097 (Md. 1999) (holding that the defendant was liable for battery when, although he attempted to strike plaintiff in the head with a loaded gun, the gun accidentally fired and caused plaintiff injury).

defendant throws a rock intending it to land several feet clear of someone standing nearby, so as only to scare them, instead accidently hits the person with the rock, the defendant in fact only intended an assault but can be held liable for a battery.[219]

The third kind of transferred intent is where a defendant intends only to offend, but harm results, or vice versa.[220] For instance, if the defendant kisses the plaintiff against the plaintiff's will, intending no physical harm, but the plaintiff suffers an allergic reaction to the defendant's touch, the defendant is liable for the harm as well as for the intended offense.[221] The same principle imposes liability "if the defendant intends a harmful touching but succeeds only in imposing an offensive one."[222]

These three kinds of transferred intent can be mixed and matched.[223] For instance, if a person throws a rock intending only to scare Person A but in fact hits Person B, the rock thrower intended an assault on Person A but can be held liable for a battery to Person B.[224]

C. Policy Justifications for Transferred Intent

As one would expect with a doctrine that imposes intentional tort liability for unintended acts, transferred intent has detractors.[225] cEven its opponents, however, recognize the doctrine's well-established place in modern American tort law.[226] The leading critics of the doctrine oppose its expansion, but none call for its elimination.[227] Transferred intent, as every

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219. RESTATEMENT (SECOND) OF TORTS § 20 cmt. a, illus. 2.

220. DOBBS, *Supra* note 208, at 75.

221. *Id.*; *see also* Bettel v. Yim (1978) 20 O.R. 2d 617 (Ont. Co. Ct.); RESTATEMENT (SECOND) OF TORTS § 16 cmt. a.

222. DOBBS, *supra* note 208, at 75; *see also Bettel*, 20 O.R. 2d 617; RESTATEMENT (SECOND) OF TORTS §§ 18, 20.

223. DOBBS, *Supra* note 208, at 76.

224. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. b, illus. 3 (AM. LAW INST., Tentative Draft No. 1, 2015).

225. Kutner, *supra* note 206, at 1136; Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 918 n.52 (2004); Osborne M. Reynolds, Jr., *Transferred Intent: Should Its "Curious Survival" Continue?*, 50 OKLA. L. REV. 529, 531-32 (1997).

226. Kutner, *supra* note 206, at 1140; Johnson, *supra* note 225, at 908; Reynolds, Jr., *supra* note 225, at 529.

227. Kutner, *supra* note 206, at 1107; Johnson, *supra* note 225, at 908, 918 n.52;

torts professor knows, is widely applicable today in most, if not all, American jurisdictions.

Few, however, have seriously probed the question of *why*. Why did the judges in *Scott v. Shepherd* and other early English cases expand trespass to include indirect application of force? Why was that doctrine imported to America and applied to intentional tort cases in U.S. courts? Why do American courts continue to apply the transferred intent doctrine notwithstanding decades of attacks lobbied at it by scholars and jurists? And why is this doctrine worth all the trouble it stirs up?

In short, transferred intent's benefits far outweigh its drawbacks. Yes, it is less than ideal to hold a wrongdoer liable in intentional tort for a thing he did not intend to do. But, given the two alternatives of either holding him liable or letting him off the hook, the former is preferable to the latter for at least five reasons. Each of these five is a policy justification underpinning the doctrine's proliferation and application.[228]

First, it is fairer to make the intentional wrongdoer shoulder the loss than it is to make the innocent victim bear it.[229] Remember, for transferred intent to apply, the wrongdoer must have intended some intentional tort to someone, just not necessarily the particular tort that resulted or to the particular victim harmed.[230] One held liable under transferred intent, then, is not free from blame.[231] According to Prosser, "[a]s between the innocent plaintiff struck by the bullet and the guilty defendant who fired it with intent to kill another man, [transferred intent] put the loss upon the one upon whom it ought in obvious justice to fall."[232]

Second, the expansion of liability permitted by the doctrine "is broadly consistent with the policy of holding intentional tortfeasors responsible for a wider range of consequences than

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Reynolds, Jr., *supra* note 225, at 531-32.

228. *See* Reynolds, Jr., *supra* note 225, at 531 ("In the United States, the [transferred intent] rule has been justified, not so much on the basis of the shaky English precedents, as on the basis of policy.").

229. *See* Prosser, *supra* note 203, at 661; Johnson, *supra* note 225, at 911-12, 918.

230. *See* Kutner, *supra* note 206, at 1106.

231. *See, e.g.*, Reynolds v. Pierson, 64 N.E. 484, 485 (Ind. App. 1902) (applying the transferred intent doctrine and holding, "Plaintiff was injured through no fault of his own. His right to be secure in person was violated. The appellant was responsible therefor. His act was the primary cause of the plaintiff's injury.").

232. *See* Prosser, *supra* note 203, at 661.

negligent tortfeasors."[233] This "can be justified either on the basis of the possible violation of the criminal law involved or simply on the antisocial and immoral nature of a defendant's behavior."[234] Thus, where the defendant intended to hit one person but struck another instead, liability to the unintended victim can be justified on the basis of the "strong social policy" of encouraging "obedience to the criminal law by imposing an absolute civil liability to anyone who is physically injured as a result of an intentional harmful contact or a threat thereof directed either at him or a third person."[235] Under this policy, intentional wrongdoers are not considered allowed to invoke the defense that the harm they caused was a mere unintended accident.[236] In other words, although actual causation is basically the same in intentional tort and negligence cases, courts, as a matter of policy, refuse to impose proximate causation requirements in intentional tort cases as is done in negligence, greatly expanding the scope of liability in intentional tort cases.[237] In short, there is a "general principle of intentional torts that there is liability for all the direct and natural consequences of the defendant's act."[238]

Why? Because one who commits an intentional tort is considered morally blameworthy and is, accordingly, held to a higher degree of accountability than is one whose conduct unintentionally causes harm.[239] This idea is encapsulated in a

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233. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. c (AM. LAW INST., Tentative Draft No. 1, 2015); *see also* Reynolds, Jr., *supra* note 225, at 531; Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152-53 (N.H. 1925); KEETON ET AL., *supra* note 63, § 8, at 37.

234. Reynolds, Jr., *supra* note 225, at 531 (citing Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588-89 (1933)); *see generally The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362 (1962) (suggesting a combination of a direct-result test and a foreseeability test to determine the extent of liability for intentional torts) [hereinafter *The Tie That Binds*].

235. *See* Manning v. Grimsley, 643 F.2d 20, 22 (1st Cir. 1981); *see also* Reynolds, Jr., *supra* note 225, at 531.

236. Reynolds, Jr., *supra* note 225, at 531; *see also* Bauer, *supra* note 234, at 588.

237. Reynolds, Jr., *supra* note 225, at 531; *see also* LEON GREEN, RATIONALE OF PROXIMATE CAUSE 170-71 (1927).

238. Reynolds, Jr., *supra* note 225, at 535.

239. Bauer, *supra* note 234, at 596; *see also* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. c (AM. LAW INST., Tentative Draft No. 1, 2015) ("[E]mploying transferred intent to extend the scope of liability for intentional tortfeasors is entirely appropriate given the greater culpability of those who act with

century-old maxim that has, over the years, been quoted by AMERICAN JURISPRUDENCE, PROSSER & KEETON ON TORTS, and the U.S. Supreme Court: "For an intended injury the law is astute to discover even very remote causation."[240]

Third, expanding liability through transferred intent is consistent with the deterrent tort principle.[241] "The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents."[242] According to this principle, "tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage."[243] The idea is that transferred intent liability incentivizes good behavior by providing a civil punishment for bad behavior in addition to any criminal penalties.[244] Of course, punishment as deterrence is normally a criminal consideration, rather than a civil one,[245] and at least one author has questioned whether this policy has any real world effect.[246] Nevertheless, this provides one more justification for transferred intent.

Fourth, expanding liability through transferred intent is in line with the principle, applied most often in transferred intent battery cases, that if an act violates a criminal law there should also be civil liability for its consequences even if the defendant lacked the specific intent to cause the harm that occurred.[247] For instance, where a young boy hurled a rock at a little girl and hit another girl instead, the court based liability on the unlawfulness

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malicious intent and the policy behind scope of liability to avoid imposing liability out of proportion to the culpability of the defendant.").

240. Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925); 136 CATHERINE PALO, AM. JUR. PROOF OF FACTS 3d 175, § 16 (2013); KEETON ET AL., *supra* note 63, § 43, at 293 n. 6.

241. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (2d ed. 1999); Reynolds, Jr., *supra* note 225, at 531; *see also The Tie That Binds*, *supra* note 234, at 364-65 (citing Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1174 (1931)).

242. JOHNSON & GUNN, *supra* note 241, at 7.

243. *Id.*; *see also* Johnson, *supra* note 225, at 918 n. 52.

244. JOHNSON & GUNN, *supra* note 241, at 7; Reynolds, Jr., *supra* note 225, at 531; Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1174 (1931).

245. *See* Reynolds, Jr., *supra* note 225, at 531.

246. *Id.* ("Do potential wrongdoers really stop to consider the scope of *civil* liability?") (emphasis in original).

247. *Id.* at 534.

of the defendant's conduct.[248] Similarly, where the defendant had fired a gun multiple times at a waitress in a crowded restaurant and wounded both his intended victim and the plaintiff, another waitress, the court came to the same result for the same reason.[249] Thus, the unlawfulness of conduct justifies both criminal and civil liability under transferred intent.

Fifth, and finally, courts have stressed that where multiple persons participated in the harm-producing conduct, all of the participants should be held jointly and severally liable to those injured, without regard to whether a particular defendant had any intent to harm, or even cause contact with, a particular plaintiff.[250] Accordingly, where a number of persons were engaging in combat with pistols when an innocent passerby was wounded by a shot, the court found that all of those taking part in the gunfight may be held liable to the passerby.[251] Likewise, where a defendant merely aids, abets, or encourages the commission of a tort, the defendant can be held culpable by courts and liable for intentional torts through transferred intent.[252]

These five policy justifications have fortified the transferred intent doctrine against what otherwise would likely be a barrage of attacks. Indeed, given the doctrine's direct contradiction of the intent element, allowing it to be satisfied

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> The true rule is that intent is the gist of the action only where the battery was committed in the performance of an act not otherwise unlawful. If the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. In other words, if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequence which directly and naturally resulted from the conduct, even though he did not intend to do the particular injury which followed.

Singer v. Marx, 301 P.2d 440, 442-43 (Cal. Dist. Ct. App. 1956) (quoting Lopez v. Surchia, 246 P.2d 111, 114 (Cal. Dist. Ct. App. 1952)).

249. Smith v. Moran, 193 N.E.2d 466, 468 (Ill. App. Ct. 1963) ("It seems abundantly clear to us that if the act of the defendant in the instant case was unlawful, Count I properly alleges, and the evidence establishes, a cause of action in the plaintiff.").

250. Reynolds, Jr., *supra* note 225, at 535.

251. Murphy v. Wilson, 44 Mo. 313, 315-16 (1869); *see also* Reynolds, Jr., *supra* note 225, at 535.

252. Keel v. Hainline, 331 P.2d 397, 400-01 (Okla. 1958) (finding that all defendants who aided, abetted, encouraged or instigated a blackboard eraser throwing fight, including those who never threw an eraser, could be liable for assault and battery where an eraser hit a bystander in the eye, rendering it blind).

where in fact no specific intent lies, one would expect far more pushback than one sees in the literature. Even the doctrine's most vigorous advocate, Prosser, called it an "arrant, bare-faced fiction."[253] Notably, the authors of the RESTATEMENT (THIRD) took issue with this characterization, pointing out that the doctrine is not only well-established but also "justified by valid reasons of principle and policy."[254]

Fiction or not, however, transferred intent fills an important gap in the law that, were it to be removed, would allow wrongdoers to evade liability for harm they cause others. Although negligence could partially fill in any gap left open by the removal of transferred intent, it would not be anywhere near an adequate replacement. Take, for instance, Person A throws a rock at Person B, intending to harm Person B, but the rock misses and instead hits and harms a hidden innocent bystander, Person C, who Person A did not see, was unaware of, and had no way of knowing that any person other than Person B could be present. Transferred intent imposes liability for the harm. But what result under negligence? Negligence, of course, always means a lack of reasonable care under the circumstances,[255] and a lack of such care is often hard to establish under a wide range of circumstances, including this one.

The scope of liability for negligence is far narrower than it is for intentional torts.[256] This is unsurprising since intentional harmful acts are deemed more culpable and deserving of greater

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253. Prosser, *supra* note 203, at 650.

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> The transferred-intent doctrine is often denigrated as a legal "fiction." In one sense this characterization is accurate: the doctrine treats the actor as possessing an intent that, as a matter of fact, the actor does not (or need not) have. But in another sense the characterization is false. Insofar as the constructive intent that the doctrine permits is justified by valid reasons of principle and policy, the negative connotation that flows from characterizing it as a "fiction" is undeserved.

RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110C (AM. LAW INST., Tentative Draft No. 1, 2015). Of course, calling any legal doctrine a "fiction" is redundant since all laws exist only on paper and in our minds—what Professor Yuval Noah Harari calls "fictional webs." *See* YUVAL NOAH HARARI , HOMO DEUS 155-56 (2016) (pointing out that nations, corporations, money, and other human-made concepts are mere fictional stories).

255. *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

256. *See* Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925); Reynolds, Jr., *supra* note 225, at 535; *see also* GREEN, *supra* note 237, at 170.

liability.[257] This is an important nuance even in tort where the underlying purpose is always to compensate the victim. There is, no doubt, a difference between being harmed by someone's intentionally tortious acts and by someone's unintentional lack of care. Transferred intent recognizes this qualitative difference between an intent to do bad and an innocent mistake.

That was why the doctrine was first employed in English courts two and a half centuries ago.[258] It closed a gap in the law, ensuring that the loss that occurred is shouldered by the wrongdoer whose intentional acts brought about the loss rather than by the innocent victim who suffered the loss through no fault of her own.

IV. LEVELING THE PLAYING FIELD IN CLIMATE CHANGE FRAUD BY APPLYING TRANSFERRED INTENT

In the case of *Lliuya v. RWE AG*, the appellate court found that Saúl Luciano Lliuya could, as a matter of law, prove the causal connection between the defendant's CO_2 emissions in Germany and the global warming-caused GLOF threat his community faces in the high Andes of Peru.[259] This opening took many by surprise, and caused a minor sensation, particularly in the European[260] and South American media,[261] as

257. Kenneth Simmons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1088 (2006).

258. Prosser, *supra* note 203, at 654.

259. *Lliuya v. RWE AG*, SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 14. The court in *Lliuya*, which reversed the trial court's dismissal of the case, based its decision in part on a study that detailed which energy companies were responsible for all CO_2 emissions emitted since the mid-1800s, at the dawn of the Industrial Revolution. Decision, Landgericht Essen [LG] [District Court Essen] Dec. 15, 2016, 2 O 285/15 (Ger.), [https://perma.cc/SCU4-8RYE]. The study concluded that RWE AG was responsible for 0.5% of all CO2 emissions. *Id.* Saúl's claim, then, sought for RWE to pay its pro-rata share of the total amounts awardable (0.5%) on account of the global warming-caused GLOF threat to his community. *Lliuya v. RWE AG*, SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 14; *New Report Shows Just 100 Companies are Source of Over 70% of Emissions,* CARBON DISCLOSURE PROJECT GLOBAL (July 10, 2017), [https://perma.cc/K2AW-6ZCD].

260. *See* Agence France-Presse, *German Court to Hear Peruvian Farmer's Climate Case Against RWE*, THE GUARDIAN (Nov. 30, 2017), [https://perma.cc/BK6C-FLMJ]; Kristin Kruthaup, *Peru Farmer Wins Appeal in Climate Case Against German Energy Giant*, DEUTSCHE PRESSE-AGENTUR INT'L (Nov. 13, 2017), [https://perma.cc/XMQ8-6P6Q]; Roxana Baldrich & Christoph Bals, *RWE Lawsuit: First Test Case in Europe to*

well as in the climate change law community.[262] The ruling's reach went far beyond the parameters of Saúl's case. It was seen as having vast potential ramifications for numerous other claims, filed and unfiled, against GHG emitters and fossil fuel companies.[263] After all, if you can causally connect the harm (e.g., a threat from GLOF caused by global warming) to the cause (emissions of CO_2 from burning fossil fuels) then the nail is in the coffin for those causing global warming, right?

Not so fast. To prevail on any legal theory, of course, the plaintiff must prove all the elements of the claim. Saúl, again, is suing RWE AG in nuisance.[264] The court has not, as of this writing, ruled on whether Saúl's claim will prevail.[265] What is clear, however, is that even if Saúl were to prevail in nuisance against RWE, a coal-burning energy producer, such a victory would leave untouched the parties most responsible for Saúl's harm in the first place: the fossil fuel companies whose deception of the public resulted in oil, coal, gas, and other fossil fuels from being regulated or prohibited.

The fossil fuel industry has, for several generations now, been insulated against regulation and tort liability by political structures that permit most—indeed, virtually all—commercial public deceptions because they are perpetrated by the wealthy elite (large corporations owned and managed by ultrawealthy shareholders and officers).[266] One result of this unjust and

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Clarify Responsibilities of Carbon Majors for Climate Change, GERMANWATCH (Nov. 8, 2018), [https://perma.cc/427E-S7LH].

261. *See, e.g.*, Marcelo Leite & Lalo de Almeida, *Peruvian Farmer Sues German Energy Company, Seeks Compensation for Shrinking Glaciers*, FOLHA DE S.PAULO (May 29, 2018), [https://perma.cc/CY6L-3UCF]; *Saúl Lliuya, el Peruano que Ganó su Primera Batalla en Alemania*, LA REPÚBLICA (Mar. 29, 2018), [https://perma.cc/4Z3T-HK3N].

262. *See, e.g.*, Dellinger, *supra* note 13, at 528-29; Kirsten Davis & Thomas Riddell, *The Warming War: How Climate Change is Creating Threats to Peace and Security*, 30 GEO. ENVTL. L. REV. 47, 70-71 (2017); Calvin Bryne, *Climate Change and Human Migration*, 8 UC IRVINE L. REV. 761, 786 (2018); *Lliuya v. RWE AG*, SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 14; *Lliuya v. RWE*, GRANTHAM RES. INST. ON CLIMATE CHANGE AND THE ENV'T, *supra* note 16.

263. Brooke Jarvis, *Climate Change Could Destroy His Home in Peru. So He Sued an Energy Company in Germany.*, N.Y. TIMES (Apr. 9, 2019), [https://perma.cc/UGC9-5AN3]; Nugent, *supra* note 148.

264. Jarvis, *supra* note 263.

265. *Lliuya v. RWE AG*, SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 14.

266. David Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 6, 28 (2003).

lopsided system is the focus of this paper: the fact that fraud laws do not touch such deceptions. Public commercial deceptions, and particularly those that cover up slowly destructive products like tobacco, asbestos, sugar, opioids, and fossil fuels, almost always fall outside the bounds of how fraud is interpreted and applied today. The fossil fuel industry's deceptive practices and representations, as discussed in the Introduction and in Section I.B, are completed in such a way that virtually no harmed plaintiff could ever, under the current law, establish reliance.

If Saúl were to sue ExxonMobil for fraud in a U.S. court, the case would likely be dismissed on the pleadings. He would be unable to plead, much less prove, that he personally relied to his detriment on the fossil fuel industry's misrepresentations, and that his harm arises directly as a result of that reliance. He could not establish actual reliance. Why? Because climate change deception is different. The fossil fuel industry's deceptions harm innocent victims who (1) were not targeted by the misrepresentations, and (2) their harm flowed not from their own reliance on the misrepresentations, but from the reliance of others.

This is where tort law was two and a half centuries ago, but with the action of trespass. Then, there was a large class of culpable defendants whose intentional acts caused the plaintiff's harm, but while the plaintiff could prove intentional tortious conduct, the plaintiff could not prove that the defendant had specific intent to (1) commit the particular tortious conduct that resulted, (2) cause the particular harmful result that occurred, and/or (3) harm or offend the plaintiff, as opposed to harming or offending a third person. This was a gap in the law filled, first by expanding the scope of liability for trespass cases, and later in American law by transferred intent applied to what are now termed the trespassory torts.[267]

Today, we face a gap in the tort law just as wide as that one filled in by transferred intent. The fossil fuel industry has been misleading the public for decades about global warming. The massive, multimillion dollar campaign of misinformation was not merely a ploy to sell a product, but a calculated plan to close

267. Prosser, *supra* note 203, at 654-55.

the public's eyes to the destruction of the climate while the very industry causing it reaped trillions in profit. Like tobacco, asbestos, sugar, and opioid companies, the fossil fuel companies' commercial public deception was the central keystone of its business; its profits were directly tied to its ability to mislead the public into ignoring the destructiveness of its product. ExxonMobil was one of the most profitable companies in the world from 1917 to 2017, if not *the* most profitable during this period.[268]

The problem is clear. ExxonMobil and other fossil fuel companies were able to do on a global scale the very thing that is prohibited in one-on-one dealings: make false claims about the product it is selling in order to sell it and reap profits. This is one of the ironies of commercial public deceptions to sell slowly destructive products: if you sell one product to one person that harms them, you are liable and possibly even guilty of a crime, but sell billions of gallons of a product that poisons the entire planet, like leaded gasoline in the twentieth century or fossil fuels over the past half century, and you not only escape all liability, but you are richly rewarded. You gain vast wealth.[269]

The gap in the law is clear. How to fill it is less so. One option, however, is to adopt a transferred intent and reliance doctrine in commercial public deception cases like that of the fossil fuel industry. Why intent *and* reliance? In short, because the two elements are interrelated in fraud. The intent required of a defendant is the specific intent to mislead the intended victim.[270] The victim, in turn, must prove that she relied on the defendant's false statement or omission to her detriment, and that her harm flows from that reliance.[271]

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268. *See* Jeff Kauflin & Michael Noer, *America's Top 50 Companies 1917-2017*, FORBES (Sep. 19, 2017), [https://perma.cc/GH74-XEAK] (showing that Exxon was the only company to rank in the top ten most profitable companies in each of three ranking lists, for 1917, 1967, and 2017).

269. The applicability of Jean Rostand's famous quote cannot be overlooked here: "Kill one man, and you are a murderer. Kill millions of men, and you are a conqueror. Kill them all, and you are a god." JEAN ROSTAND, PENÉES D'UN BIOLOGISTE [THOUGHTS OF A BIOLOGIST] 116 (1939) (quotation translated from the original French to English).

270. *See* Exxon Mobil Corp. v. Attorney Gen., 94 N.E.3d 786, 792 (Mass. 2018).

271. *See id.* at 792-93.

A. Policy Support for Applying the Doctrine

Transferred intent has never, to my knowledge, been applied in a fraud case.[272] But up until a number of decades ago, it had never been applied in any tort case at all.[273]

The question whether transferred intent *should* be applied to climate change fraud cases is, of course, a subjective judgment no individual has a monopoly over. There is no right or wrong answer. There is, however, ample policy support for the proposition, as the very policy justifications for transferred intent generally each apply with equal validity to the proposition that the doctrine be applied in climate change fraud.

First, it is unquestionably fairer to make those who purposefully deceived the public in order to sell and propagate CO_2-producing fossil fuels shoulder the losses caused by the resulting global warming than it is to put the loss on global warming's victims who did nothing to cause, and could not have done anything to avoid, the resulting harm.[274] As between an innocent plaintiff and a guilty defendant, applying transferred intent would "put the loss upon the one upon whom it ought in obvious justice to fall."[275]

Second, applying transferred intent and reliance to climate change fraud cases would further the aim of tort to hold intentional tortfeasors responsible for a wider range of consequences than negligent tortfeasors.[276] That the campaign of deception carried out by the fossil fuel industry was immoral is the easiest of calls to make. If destroying the habitable

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272. *See* Prosser, *supra* note 203, at 656 n. 51 (noting where courts have refused to extend the transferred intent doctrine to "cases of pecuniary loss from deceit, where the defendant intends to mislead one person and another relies instead"); Mark Gergen, *A Wrong Turn in the Law of Deceit*, 106 GEO. L.J. 555, 618 (2018) (suggesting that perhaps a transferred intent rule could be adopted and applied to fraud law "to allow an unintended victim of an intended fraud to recover").

273. Johnson, *supra* note 225, at 912-13.

274. *See* Prosser, *supra* note 203, at 661; Johnson, *supra* note 225, at 911-13, 918.

275. Prosser, *supra* note 203, at 661.

276. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 (AM. LAW INST., Tentative Draft No. 1, 2015); *see also* Reynolds, Jr., *supra* note 225, at 531; Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925); KEETON ET AL., *supra* note 63, § 8, at 37.

environment of Earth to get rich is not immoral, it would beg the question of what activity could, then, possibly be immoral? The fossil fuel industry has been, and is now, actively engineering the destruction of the global climate, something that has triggered a massive global extinction and is now widely considered one of the greatest threats to the human race's existence.[277] Because many fossil fuel companies did this purposefully, as it is clear ExxonMobil did, imposing liability on them through transferred intent and reliance would further the "general principle of intentional torts that there is liability for all the direct and natural consequences of the defendant's act."[278]

Third, the deterrence of further corporate public deceptions also justifies imposing transferred intent and reliance liability.[279]

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277. *See, e.g.*, C.J. Polychroniou, *Global Warming and the Future Of Humanity: An Interview with Noam Chomsky and Graciela Chichilnisky*, ROZENBERG Q. (Sept. 2016), [https://perma.cc/X3ZV-T4JJ].

> [Noam Chomsky:] As for climate change, it's by now widely accepted by the scientific community that we have entered a new geological era, the Anthropocene, in which the Earth's climate is being radically modified by human action, creating a very different planet, one that may not be able to sustain organized human life in anything like a form we would want to tolerate. There is good reason to believe that we have already entered the Sixth Extinction, a period of destruction of species on a massive scale, comparable to the Fifth Extinction 65 million years ago, when three-quarters of the species on earth were destroyed, apparently by a huge asteroid. Atmospheric CO2 is rising at a rate unprecedented in the geological record since 55 million years ago. There is concern—to quote a statement by 150 distinguished scientists—that "global warming, amplified by feedbacks from polar ice melt, methane release from permafrost, and extensive fires, may become irreversible," with catastrophic consequences for life on Earth, humans included—and not in the distant future. Sea level rise and destruction of water resources as glaciers melt alone may have horrendous human consequences.
>
> Graciela Chichilnisky: The consensus is that climate change ranks along with nuclear warfare as the top two risks facing human civilization. If nuclear warfare is believed to be somewhat controlled, then climate change is now the greatest threat.
>
> As difficult as it is to eliminate the risk of nuclear warfare, it requires fewer changes to the global economy than does averting or reversing climate change. Climate change is due to the use of energy for industrial growth, which has been and is overwhelmingly based on fossil fuels.

Id.

278. Reynolds, Jr., *supra* note 225, at 535.

279. JOHNSON & GUNN, *supra* note 241, at 7; Reynolds, Jr., *supra* note 225, at 531; *see also The Tie That Binds*, *supra* note 234, at 364-65 (citing Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1174 (1931)).

Companies have been working to actively deceive the public to sell destructive products for at least a hundred years, and it is clear such companies feel free to carry out these deceptions with impunity. Imposing tort liability on such behavior would disincentivize other corporate actors from continuing this deceptive practice.

Fourth, the possible criminal nature of the commercial public deception campaign, which mirrors to a staggering degree the tobacco industry's campaign of misinformation found to violate RICO as a conspiracy to defraud the public,[280] provides a further justification for imposing the transferred intent and reliance expansion of liability in climate change fraud cases.[281]

Finally, the tort policy of holding jointly and severally liable all participants who take part in, aid, abet, or encourage harm-producing conduct applies particularly well to the deceptive practices of the fossil fuel industry.[282] It is not one actor but a conspiracy of bad actors who work together to bring about the resulting harm, global warming and all its effects.[283]

One more justification for applying a transferred intent and reliance doctrine to climate change fraud cases can be found in the securities fraud realm, where fraud claims can prevail without establishing reliance.[284] Federal securities fraud claim plaintiffs are *presumed* to rely on all public representations by the defendant through the doctrine of fraud on the market.[285] Although this presumption can be rebutted, it is a very high bar on defendants attempting to do so.[286] All public statements by a publicly-owned company are deemed to be reflected in the price of its securities at any given moment, and therefore reliance is

280. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1105 (D.C. Cir. 2009).

281. *See* Reynolds, Jr., *supra* note 225, at 534; Singer v. Marx, 301 P.2d 440, 442-43 (Cal. Dist. Ct. App. 1956); Smith v. Moran, 193 N.E.2d 466, 468 (Ill. App. Ct. 1963).

282. *See* Reynolds, Jr., *supra* note 225, at 535; *see also* Murphy v. Wilson, 44 Mo. 313 (1869) (providing a general discussion on the doctrine of joint and several liability); Keel v. Hainline, 331 P.2d 397, 400-01 (Okla. 1958) (further explaining joint and several liability).

283. Correspondence Between the Director of the Institute for Applied & Professional Ethics and Former Exxon Employee Lenny Bernstein, OHIO UNIV., [https://perma.cc/VE4R-6NTF] (last visited Oct. 19, 2019).

284. Hildes v. Arthur Andersen LLP, 734 F.3d 854, 856 (9th Cir. 2013).

285. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 263 (2014).

286. *Id.*

presumed and very often satisfied without the plaintiff having to make any affirmative showing at all of first-party reliance.[287]

New York's Martin Act,[288] which is their blue skies securities anti-fraud law, goes even further, at least with regard to criminal fraud claims. It provides for criminal fraud liability in total absence of reliance,[289] though civil actions under the Martin Act do require plaintiffs establish reliance.[290]

B. Application of a Transferred Intent and Reliance Doctrine

The transferred intent doctrine could, and I advocate *should*, be applied to the intent and reliance element in climate change fraud cases. Doing so would not only further numerous tort policy aims and right injustice, but also, and perhaps more importantly, update the law to reflect current society and issues. There is no question the fossil fuel companies like ExxonMobil purposefully misled the public about climate change, and that they did so with the purpose of increasing sales and adding shareholder value. There is also no doubt about the consequences of these deceptions. Global warming is now one of the most urgent problems we—the global *we*—face.[291]

We also face a choice. What will we do about those who caused our present predicament? Will we allow those who poisoned the planet to evade liability? That was what we did

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287. *See* Basic Inc. v. Levin, 485 U.S. 224, 246-47 (1988); *Halliburton*, 573 U.S. at 267-68.

288. N.Y. GENERAL BUSINESS LAW § 352 (McKinney 2019).

289. *See* People v. Credit Suisse Sec. (USA) LLC, 145 A.D.3d 533, 539 (N.Y. App. Div. 2016) (Andrias, J., dissenting) ("[T]he fraudulent practices targeted by the statute need not constitute fraud in the classic common-law sense, and reliance need not be shown in order for the Attorney-General to obtain relief.").

290. *See* People v. Essner, 479 N.Y.S.2d 127, 131 (N.Y. Sup. Ct. 1984) ("[I]n a private civil action for damages, reliance is an element of the charge, for otherwise a defendant could be held liable under [the Martin Act] even to purchasers whose damage could not be traced to his wrongdoing.") (internal quotation marks omitted).

291. *See, e.g.*, Matthew Moore, *Climate "Sceptic" Bjørn Lomborg Now Believes Global Warming Is One of World's Greatest Threats*, TELEGRAPH (Aug. 31, 2010), [https://perma.cc/GB5L-TU7J]; Case T-263/07, Estonia v. Comm'n, para. 49 (Ct. First Instance, Sept. 23, 2009) (noting that global warming "represents one of the greatest social, economic and environmental threats which the world currently faces"); Nick Bisher, *New Car Emissions Feared to Increase Global Temperatures, State Standing:* Massachusetts v. EPA, 59 MERCER L. REV. 1011, 1025 (2008) ("Global warming has grown to become regarded as the single greatest environmental threat to mankind.").

with regard to the leaded gasoline industry's public deceptions about the lead it released into the environment.[292] That is one course of action, and based upon historical precedent, it may very well be the most likely one.

Another option is looking closely at the laws we have and ensuring we apply them in a way as to bring about the most just and fair result, to protect those harmed and hold liable those intentional wrongdoers whose acts caused the harm. Though some advocate that this would require establishing an entirely new tort,[293] I posit here it can be accomplished by applying the tort law already on the books, pursuant to well-established tort policy and principles.

1. Intent

In climate change deceptions by the fossil fuel industry, and in other commercial public deceptions like them, the intent by the wrongdoer is nothing less than to defraud the public and those responsible for protecting the public. Defrauding the general public, as opposed to targeting a single individual, has been held more morally culpable and deserving of a greater award of damages, or even punitive damages.[294] Moreover, schemes to defraud the public are commonly the criminal act bases of RICO claims, including the successful RICO claim against the tobacco industry.[295]

If such defendants are considered to have intended to defraud the public at large, this also raises important standing questions. *Can* a defendant defraud the public? Is a fraud claim by one harmed by such a fraudulent scheme viable? Two courts recently held that plaintiffs bringing fraud claims against GHG emitters for climate change damages lacked standing to bring

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292. Kat Eschner, *Leaded Gas Was a Known Poison the Day It Was Invented*, SMITHSONIAN (Dec. 9, 2016), [https://perma.cc/PE5C-5FLZ].

293. *See generally* Parker-Flynn, *supra* note 29 (suggesting how a new cause of action would be appropriate for cases involving emissions deception).

294. *See* Gale v. Kessler, 461 N.Y.S.2d 295, 296 (N.Y. App. Div. 1983) ("To recover punitive damages in an action for fraud, it must appear that the fraud was upon the general public, that is, aimed at the public generally, is gross and involves a high degree of moral culpability.") (internal quotation marks omitted).

295. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1105 (D.C. Cir. 2009); *see also* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 652 (2008) (confirming the connection between RICO claims and schemes to defraud).

the claims.[296] The court in *Comer v. Murphy Oil USA*[297] held that the fraud plaintiffs there lacked standing because the fraud claim was "a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public."[298] The court in *Native Village of Kivalina v. ExxonMobil Corp.*,[299] a case where the plaintiffs did not aver common law fraud but did aver nuisance and civil conspiracy to defraud the public, dismissed the claims as nonjusticiable political questions.[300]

The question of standing, although important, is beyond the scope of this article. My focus here is on the question of how intent should be applied in the case a plaintiff has standing in a climate change fraud case against a fossil fuel company or a GHG emitter. In short, my proposal is that courts apply transferred intent as has been done with several trespassory torts for hundreds of years. Transferred intent should apply to climate change fraud cases.

This will, of course, increase the number of potential fraud plaintiffs in such cases (as well it should). However, even if fraudulent representations are considered to be aimed at the general public, and thereby allowing claimants to satisfy this element by transferred intent, that does not mean the class of possible plaintiffs has no limit. There should be limits to the scope of possible plaintiffs with regard to any individual climate change fraud case. But it is clear from the global nature of the campaign of misinformation and the global effects of climate change that such limits could, and *should*, be difficult for a defendant to establish. For instance, Saúl Luciano Lliuya, the Peruvian farmer suing RWE AG, clearly would be within the scope of the foreseeable plaintiffs in a climate change fraud case because his damages flow directly from global warming due to

296. Comer v. Murphy Oil USA, 585 F.3d 855, 868 (5th Cir. 2009); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863, 883 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

297. *Comer*, 585 F.3d at 868.

298. *Id.* The court in *Comer* further noted, "'[N]o matter how well intended, Plaintiffs have done little more than present a generalized grievance, common to all citizens or litigants in [the United States], and as such, lack standing.'" *Id.* (quoting Public Citizen, Inc. v. Bomer, 274 F.3d 212, 219 (5th Cir. 2001)).

299. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 868.

300. *Id.* at 877-78.

CO_2 emissions. Not only does this consist of personalized harm to him, but he is clearly a foreseeable plaintiff. ExxonMobil's own internal documents from a decade or more *before* it launched its campaign of climate change denial show the company was aware of "potentially catastrophic events that must be considered" with regard to how global warming would affect the planet and human populations all around it.[301]

It is is long overdue for the law to recognize the nature of the deception carried out by fossil fuel companies and others. Their intent is to defraud the public. When any member of the public is harmed, and can satisfy the other elements of the claim, those who intended to deceive the public should be held liable for those damages.

2. Reliance

Reliance should be, under the principles discussed above, deemed satisfied in climate change fraud cases where (1) any person targeted by the deception relies on it, and (2) that person's reliance was intended or could reasonably have been foreseen by the defendant. In the case of climate change fraud, this would include, for instance, members of Congress and administrators in government agencies. It was the reliance by these individuals that ensured fossil fuels would remain unregulated and for sale to the general public. Their reliance, as much as if not more than that of individual members of the public, was the primary aim of the fossil fuel industry's campaign of climate change doubt.

Like the tobacco and sugar industries' public deception campaigns, the fossil fuel industry depended not only on the public remaining in the dark about the true dangers posed by its

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301. *See* Memorandum of M.B. Glaser, Manager of Exxon Environmental Affairs Programs, to Various Exxon Executives, at 11, 13 (Nov. 12, 1982), [https://perma.cc/34CU-M3WP].

> In addition to the effects of climate on global agriculture, there are some potentially catastrophic events that must be considered. For example, if the Antarctic ice sheet which is anchored on land should melt, then this could cause a rise in sea level on the order of 5 meters. Such a rise would cause flooding on much of the U.S. East Coast, including the state of Florida and Washington, D.C.

Id.

product but also, and most importantly, on avoiding government regulation and court liability. Reliance by these intended targets—i.e., government officials—should be enough.

One of the primary purposes of the reliance element is to provide a nexus between the fraudulent acts of the defendant and the harmful results to the plaintiff.[302] In this way, reliance plays a similar role in fraud as the intent element in intentional torts. It draws the line of liability from the defendant to the plaintiff. Courts have, to date, been reluctant to dispose of this normally-required nexus in climate change fraud cases.[303] But, as discussed above, imposing this required nexus in commercial public deception cases like climate change fraud results in harmed plaintiffs being left without recourse while intentional wrongdoers avoid liability.

Applying this transferred reliance doctrine in climate change fraud cases, in addition to the transferred intent doctrine described above, would help level the playing field. It might also, in the very near future, help avert disaster. While it is the fossil fuel industry misleading the public about climate change today, who knows what commercial public deceptions will be carried out in the future. It is unknown what the next destructive product will be. We don't know if it will harm our health or denigrate our environment. All we know is there will be another destructive product, and those running the company selling it will be willing to enrich themselves by selling it at the expense of the rest of us. It will happen again. Will the law allow it?

V. CONCLUSION

Today, some of the biggest companies in the world make their money by misleading the public. This article takes particular aim at ExxonMobil. But this particular company is far from alone in utilizing lobbying and propaganda to misleadingly sell destructive products; at the end of the day, ExxonMobil is not the problem. The law is. Companies like

302. *See In re* King, 68 B.R. 569, 572 (Bankr. D. Minn. 1986) ("Civil fraud and actionable civil fraud are not the same. Actionable civil fraud requires a nexus between the act or omission and the alleged loss to the defrauded party. That nexus is reliance.").

303. *See In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., No. 2672 CRB (JSC), 2018 WL 1142884, at *1 (N.D. Cal. 2018) (dismissing a complaint involving fraudulent emissions reports due to lack of reliance).

ExxonMobil owe a duty to their shareholders to maximize profits and shareholder value.[304] This duty, imposed on them not only by the economic system but also by law,[305] ignores externalities. It is not ExxonMobil's job to protect the environment or human health. Perhaps it should be, but it's not.

The problem is us. We need to ask, and more importantly *answer*, what kind of world we want. Are we okay with companies knowingly causing rising sea levels and stronger and more frequent extreme weather events while at the same time lying to us about what they are doing and evading liability for the harms caused? Do we want to allow companies to kill our friends and relatives, and *us*, with cancer and other maladies by selling poisonous products? Is it acceptable to us that those whose actions cause misery, destruction, and death not only evade liability but, indeed, grow enormously wealthy in the process of doing these things?

I pose these questions in a way that reveals my own bias on the subject. I, for one, prefer that harmful and destructive actions be grounds for civil liability for any harm caused by those actions. I prefer that those harmed by such conduct be able to seek compensation for their loss. Like many others today watching the global warming catastrophe unfold, I want to see justice on this issue. That justice has so far evaded us. The fossil fuel companies continue to enrich themselves at the expense of current and future generations all over the globe. They know very well what they're doing. How long will we let this go on?

304. *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013).
305. *Id.*

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