CORPORATE CRIMINAL ESG

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As social norms around climate change shift rapidly, and the U.S. Supreme Court requires federal regulation to retreat, regulation at the state and local levels fracture into increasingly aggressive, and often diametrically opposed, enforcement. Meanwhile, business representations regarding environmental, social, and corporate governance (ESG) initiatives are being policed by traditional charges of fraud that are civil, and, increasingly, criminal. These tensions create massive uncertainties for business. On a global issue like climate change, U.S. businesses, and the people who run them, need political and regulatory stability.

This Article makes three important contributions. First, it demonstrates how out-of-step with the rest of the world U.S. federal courts are, and how the country's failure to adopt ESG standards in line with international developments hurts U.S. businesses. Second, it highlights for the first time the growing potential within the U.S., due to its lack of such standards, for corporate criminal ESG liability based on fraud. Third, it flags potential similar individual civil and criminal liability for businesses' agents and directors.

The Article concludes with the important, timely, and novel argument that U.S. businesses should start to see it as in their best interests for the U.S. to adopt protective international ESG standards.

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INTRODUCTION

As the European Union implements its Corporate Sustainability Reporting Directive (CSRD), there is a hue and cry from Wall Street that U.S. businesses might be extraterritorially subject to the CSRD's provisions.[1] What is ironic about Wall Street's protest is that U.S. businesses should understand it to be in their long-term best interest to be covered by international standards and guidance on environmental,

[1] *See, e.g.,* Laura Noonan, *Opinion: Global Scope of EU's Greenwashing Crackdown Spooks Wall Street*, FIN. TIMES, Aug. 22, 2022.

social, and corporate governance (ESG) initiatives to protect themselves from volatile potential civil, and now-looming criminal, liability for fraud and other misconduct in the United States.

The U.S. Supreme Court, which is often thought of as pro-business,[2] is actually hurting the stability of the U.S. business climate by hampering the federal government's ability to standardize the country's regulations in line with international developments.

What has not been discussed or considered elsewhere is that U.S. businesses should ultimately *want* the CSRD's disclosures to apply to their operations as a safe harbor. If the United States adopted the CSRD, or its own version of uniform standards around climate change, U.S. businesses would have better-defined lines around climate disclosures that might protect them from domestic litigation, including potential corporate criminal liability for ESG initiatives.

The developed world outside the United States is solidifying around climate change reporting and responsibility standards for businesses. In the summer of 2022, the United Nations General Assembly declared by 161 votes in favor, eight abstentions, and no votes against, that access to a clean, healthy and sustainable environment is a universal human right.[3] The UN Secretary-General urged member states, in the wake of the overwhelming vote for the declaration, to "accelerate the implementation of their environmental and human rights obligations and commitments."[4]

That same summer, the final version of the CSRD was approved by joint agreement of the EU Commission, the EU Council, and the EU Parliament.[5] The CSRD will set uniform accounting standards for

[2] *See, e.g.,* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 127 (2021) ("[T]he current Court is arguably the most pro-business and anti-union in history."); Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 223 (2021) ("[W]hether one takes a quantitative or qualitative approach to the question, ...corporations and business litigants have often succeeded in their claims before the Court and in shaping the direction of the law."); Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920-2020*, Virginia Pub. L. and L. Theory Res. Paper No. 2022-55, Virginia L. and Econ. Res. Paper No. 2022-16 at 2 (Aug. 3, 2022), https://papers.ssrn.com/abstract=4178504 ("[T]he Roberts Court may be the most pro-business Court in a century. The win rate for business in the Roberts Court, 63.4%, is 15 percentage points higher than the next highest rate of business wins over the past century (the Rehnquist Court, at 48.3%).").

[3] *See* Press Release, UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right, UN NEWS, July 28, 2022, https://news.un.org/en/story/2022/07/1123482.

[4] *Id.* (paraphrasing the Secretary-General).

[5] *See* Directive Modifiant les Directives 2013/34/UE, 2004/109/CE et 2006/43/CE Ainsi que le Règlement (UE) nº 537/2014 en ce Qui Concerne la Publication d'Informations en Matière de Durabilité par les Entreprises - Lettre du Président du COREPER à la Présidence de la Commission JURI du Parlement Européen, Bruxelles, le 30 juin 2022, https://www.consilium.europa.eu/media/57644/st10835-xx22.pdf.

measuring and disclosing businesses' impact on climate change.[6] It builds on substantive definitions such as that "sustainable investment" must "contribute[] to an environmental objective" as measured by "key resource efficiency indicators," such as "use of energy, renewable energy, raw materials, water and land, . . . the production of waste, ..." etc.[7] Non-financial information will have to be verified by an external auditor,[8] and reported in a digital form that can be easily compared with the reports of other entities.[9] The European Parliament describes the CSRD's aim as "to end greenwashing[[10]] and lay the groundwork for sustainability reporting standards at global level."[11] Its standards should protect companies within the EU that abide by them.[12]

The CSRD will become law in 2024.[13] Despite their protests, most U.S. companies will be only tangentially subject to the law, as the CSRD eventually covers large companies with operations in Europe that meet at least two of the following criteria: that they employ over 250 people; that they turn over assets of more than €40 million; or that they possess total assets of at least €20 million.[14]

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[6] *See generally* Julian Toth, *Another Milestone: Agreement on the Corporate Sustainability Reporting Directive (CSRD)*, ISFC, June 27, 2022, https://www.isfc.org/en/blog/corporate-sustainability-reporting-directive.

[7] *See, e.g.*, Regulation (EE) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317/1) 8. Additional text *infra* at n. 37.

[8] *See* Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/Eu, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, As Regards Corporate Sustainability Reporting, at Art.1 ¶10, Art.2 ¶2, Art.3 *passim*, Art. 4 ¶1-2, COM/2021/189 (amending previous standards to require third-party assurance audits of non-financial information).

[9] *See id.* at ¶48 (requiring that management reports be in European Single Electronic Format ("ESEF"/"XHTML"), and present sustainability information in a digital classification with "tags," eventually supporting a searchable open European database).

[10] "Greenwashing" is generally "conveying a false impression or providing misleading information about" how "environmentally sound" a "company's products are." Will Kenton, *What Is Greenwashing? How It Works, Examples, and Statistics*, INVESTOPEDIA (2022), https://www.investopedia.com/terms/g/greenwashing.asp.

[11] *New Social and Environmental Reporting Rules for Large Companies*, EUROPEAN PARLIAMENT, June 21, 2022, https://www.europarl.europa.eu/news/en/press-room/20220620IPR33413/new-social-and-environmental-reporting-rules-for-large-companies.

[12] *Cf.* Eur. Comm'n, Press Release: Questions and Answers: Corporate Sustainability Reporting Directive Proposal (April 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806 ("The Commission's proposal is an opportunity for an orderly, cost-efficient solution to the problems posed by this increase in demand [for reliable ESG information], based on building consensus around the essential information that companies should disclose" and promising a better future for companies that conform).

[13] *See id.*

[14] *See* Katie Chin et al., *EU Corporate Sustainability Reporting Directive—What Do Companies Need to Know*, THE HARV. L. SCH. FORUM ON CORP. GOVERNANCE, Aug. 23, 2022, https://corpgov.law.harvard.edu/2022/08/23/eu-corporate-sustainability-reporting-directive-what-do-companies-need-to-know/.

More significant long-term liability for U.S. companies stems from their home in the United States. The U.S. Securities and Exchange Commission (SEC) already sees warning signs for U.S. business fraud liability in their ESG, and specifically climate-change-related, disclosures. In 2021, the SEC created a new Climate and Environmental, Social, and Governance Task Force (Task Force) within the Division of Enforcement.[15] In explaining the focus of the Task Force, Acting Deputy Director Kelly L. Gibson highlighted "greenwashing" as a particular priority. She wanted to target behavior "exaggerating" a "commitment to, or achievement of climate . . . related goals."[16]

More and more money is pouring into the ESG investing sector, which equates to opportunities for fraud. Worldwide in 2020, the amount of money being allocated through ESG integration[17] was U.S.$25.2 trillion,[18] or about thirty percent of the global economy.[19]

In 2022, the U.S. Inflation Reduction Act[20] provided an additional $369 billion for climate and clean-energy provisions.[21] The Act has been described as "all carrots, no sticks," meaning that it tries to influence changes in the private sector by subsiding behaviors that may reduce climate change—but not actually to make formal regulations of behavior more coherent.[22] We have seen disastrous failures of this approach already when it comes to fraud, both civil and criminal. For example, similar U.S. pandemic spending in 2020-21 lead to an estimated $45.6 billion in new unemployment fraud alone, as well as the

[15] Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues, SEC.GOV (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[16] *The Enforcement Angle: SEC's Kelly Gibson*, PEOPLE PLACES PLANET PODCAST (Nov. 3, 2021), https://share.transistor.fm/s/305db9c7.

[17] ESG integration is "[t]he systematic and explicit inclusion by investment managers of environmental, social and governance factors into financial analysis." 2020 Global Sustainable Investment Review 7, GSIA, http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf.

[18] *See id.* at 10.

[19] *See, e.g.*, *Global Gross Domestic Product (GDP) at Current Prices from 1985 to 2027*, STATISTA (April 2022 release), https://www.statista.com/statistics/268750/global-gross-domestic-product-gdp/ (estimating 2020 global GDP at approximately U.S.$85.24 trillion).

[20] *See* The Inflation Reduction Act of 2022, Pub. L. No. 117–169, *passim* (2022).

[21] *See* Emma Newburger, *Schumer-Manchin Reconciliation Bill Has $369 Billion to Fight Climate Change — Here Are The Details*, CNBC, as updated Aug. 22, 2022, https://www.cnbc.com/2022/07/27/inflation-reduction-act-climate-change-provisions.html.

[22] *See, e.g.*, Robert Reich, *America Used to Regulate Business. Now Government Subsidises It*, THE GUARDIAN, Aug. 21, 2022, https://www.theguardian.com/commentisfree/2022/aug/21/america-used-to-regulate-business-now-government-subsidises-it; Robinson Meyer, *The EPA Just Quietly Got Stronger*, THE ATLANTIC, Aug. 24, 2022, https://www.msn.com/en-us/money/markets/the-epa-just-quietly-got-stronger/ar-AA112B16 (documenting how U.S. legislation has become "all carrots, no sticks" for businesses).

initiation of over one-thousand new criminal cases for misuse of the money.[23]

Meanwhile, on climate-change issues, the SEC has increased its enforcement efforts through an "all agency" approach, infusing ESG enforcement into many of the agency's actions.[24] Even before formation of the Task Force, in February, April, and March 2021, the SEC's Divisions of Examinations and Corporation Finance made announcements that they would focus on climate-change related risks, as the agency was concerned about "deficiencies and internal control weaknesses from examinations of investment advisers and funds regarding ESG investing."[25]

On the civil front, in May 2022, the SEC charged BNY Mellon Investment Adviser, Inc. for "misstatements and omissions about Environmental, Social, and Governance (ESG) considerations in making investment decisions for certain mutual funds that it managed."[26] The company has agreed to pay $1.5 million to settle the charges.[27] In June 2022, the SEC was investigating Goldman Sachs for potentially misrepresenting ESG claims about its funds.[28]

On the criminal front, it commanded market attention in December 2021 when the DOJ informed Deutsche Bank AG that the bank may have violated a criminal settlement for failing to inform prosecutors of its failures to live up to ESG disclosures.[29] In March 2022, Deutsche Bank admitted that it had violated its criminal settlement, and the company agreed to extend the term of its outside compliance monitor on this basis.[30] Responding to U.S. developments, German authorities raided DWS and Deutsche Bank offices for evidence to

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[23] *See* Tony Romm, *U.S. Watchdog Estimates $45.6 Billion in Pandemic Unemployment Fraud*, WASH. POST, Sept. 22, 2022, https://www.msn.com/en-us/news/us/us-watchdog-estimates-24456-billion-in-pandemic-unemployment-fraud/ar-AA128lbY.

[24] *SEC Response to Climate and ESG Risks and Opportunities*, SEC.GOV, https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities.

[25] U.S. SEC. AND EXCH. COMM'N, *The Division of Examinations' Review of ESG Investing* 2 (April 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

[26] Press Release, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations, SEC.GOV (May 23, 2022), https://www.sec.gov/news/press-release/2022-86.

[27] *See id.*

[28] Patrick Temple-West & Joshua Franklin, *SEC Investigating Goldman Sachs for ESG Claims*, FIN. TIMES, June 10, 2022.

[29] Dave Michaels & Patricia Kowsmann, *Justice Department Told Deutsche Bank Lender May Have Violated Criminal Settlement*, WALL ST. J., Dec. 8, 2021, https://www.wsj.com/articles/justice-department-told-deutsche-bank-lender-may-have-violated-criminal-settlement-11638993595.

[30] Patricia Kowsmann & Dave Michaels, *Deutsche Bank Violates DOJ Settlement, Agrees to Extend Outside Monitor*, WALL ST. J., March 11, 2022, https://www.wsj.com/articles/deutsche-bank-violates-doj-settlement-agrees-to-extend-outside-monitor-11647016959.

support greenwashing allegations.[31] The next day, the head of DWS resigned.[32]

The SEC has tried to introduce standards around ESG, and especially climate change disclosures. In 2022, the SEC released three model ESG rules for comment.[33] The first rule would have companies disclose their climate-change risks, their greenhouse gas emissions, and potentially those of their suppliers and customers.[34] The second rule proposed a tiered system of increasing quantitative and qualitative disclosures depending on how focused a fund's investment is in ESG.[35] The agency's third rule sought to rationalize ESG fund names by disclosing how a company defines the terms in its fund's name and how it selects investments to be consistent with the name.[36]

Unfortunately, the SEC's ESG approach, very much in line with an overall contrast between the U.S. and European approaches toward business regulation, attempts merely to have companies better articulate disclosure for their funds, not actually to define what qualifies as ESG investing and what should not.[37] U.S. reliance on enforcing ESG standards through policing what companies *say* instead of what they *do* may not only discourage U.S. business investment in pro-social climate-

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[31] Owen Walker & Joe Miller, *German Police Raid DWS and Deutsche Bank Over Greenwashing Allegations*, FIN. TIMES, May 31, 2022, https://www.ft.com/content/ff27167d-5339-47b8-a261-6f25e1534942.

[32] Julie Steinberg & Ed Frankl, *CEO of Deutsche Bank's DWS Resigns After Police Raid on Offices*, WALL ST. J., June 1, 2022, https://www.wsj.com/articles/dws-group-ceo-resigns-after-german-police-raid-on-offices-11654073889.

[33] *See SEC Proposed Rules,* SEC.GOV, https://www.sec.gov/rules/proposed.shtml.

[34] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed April 11, 2022) (to be codified at 17 CFR 210, 229, 232, 239, and 249).

[35] *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 CFR 200, 230, 232, 239, 249, 274, and 279) (delineating proposed expectations for low-level "integration funds," mid-level "ESG-focused funds," and high-level "impact funds").

[36] *See* Investment Company Names, 87 Fed. Reg. 36594 (proposed June 17, 2022) (to be codified at 17 CFR 230, 232, 239, 270, and 274).

[37] *Compare, e.g.*, Regulation (EE) 2019/2088, *supra* note 7, at 8 (defining a "sustainable investment" to mean "an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance."), *with* Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n, Address at Harvard's Reimagining the Role of Business in the Public Square: Multistakeholder Engagement on ESG Commitments, Metrics, and Accountability (Sept. 15, 2022) (repeatedly describing the SEC as "not a merit regulator").

change initiatives, but lead to prosecutions for fraud as the U.S.'s major mechanism for disciplining behavior in the markets.[38] Without better substantive standards, U.S. businesses face destructive uncertainty.[39]

The largest impediment for U.S. businesses, however, to be guided by what stability the country has in standards appears to be the U.S. federal courts. Climate change is a global issue that transcends borders and demands broad coordinated action, rather than fragmented, disjointed, and even contradictory regulation at the level of U.S. states and municipalities.[40] But U.S. federal courts continue to curtail federal agencies' ability to act without additional help from an often-paralyzed Congress. On the last day of June 2022, the U.S. Supreme Court decided *West Virginia v. Environmental Protection Agency*,[41] which vitiated the Environmental Protection Agency's (EPA) national ability to regulate climate change as pollution.[42] *West Virginia* fully embraced the "major questions" doctrine, which the Court's conservative supermajority describes as requiring a higher standard of "clear congressional authorization"[43] for federal agencies to regulate questions of economic "magnitude and consequence" such as pollution and climate change.[44]

Within days of the *West Virginia* ruling, Republican State Attorneys General had threatened legal action against the SEC for its proposed climate change rules, and twenty-four state officials submitted comments to the SEC alleging that the agency lacked power to enact regulation on climate change under the major questions

[38] *See id.*; *cf. also* Amanda Shanor & Sarah E. Light, *Greenwashing & the First Amendment*, (2022) (forthcoming in the COLUM. L. REV.), https://papers.ssrn.com/abstract=4178318 (describing potential First Amendment problems with regulating environmental speech, but concluding that regulation should pass them).

[39] *Cf., e.g., Economic Cost of Climate Change Could be Six Times Higher than Previously Thought*, UCL NEWS, Sept. 6, 2021, https://www.ucl.ac.uk/news/2021/sep/economic-cost-climate-change-could-be-six-times-higher-previously-thought (citing global numbers that, "by 2100, global GDP could be 37% lower than it would be without the impacts of warming, when taking the effects of climate change on economic growth into account.").

[40] U.S. states and local governments are taking wildly divergent approaches to climate change across the country, leading to further instability and potential liability for businesses. *See, e.g.*, Maxine Joselow, *Supreme Court's EPA Ruling Upends Biden's Environmental Agenda*, WASH. POST, June 30, 2022, https://www.washingtonpost.com/climate-environment/2022/06/30/epa-supreme-court-west-virginia/ (noting that "[a]bout 4 in 10 Americans live in a state, city or territory that has committed to reaching 100 percent clean electricity by 2050 at the latest," and that "24 [state] governors have pledged to cut greenhouse gas emissions in half by 2030 and to reach net-zero emissions by 2050") (citing the League of Conservation Voters and the U.S. Climate Alliance).

[41] 597 U. S. ____, 2022 WL 2347278 (June 30, 2022).

[42] *See id.*, slip op. at 31 (announcing the decision of the Court).

[43] *Id.*, slip op. at 19.

[44] *Id.*, slip op. at 31.

doctrine.[45] U.S. businesses are firmly on the firing line for new penalties over ESG initiatives in Texas, Florida, and other states.[46] European companies were caught up in the U.S. actions as well.[47]

In its 2022-23 term, the U.S. Supreme Court heard another case on the Clean Water Act that may further illuminate the reach of its supermajority's new doctrine and set additional guidance for the SEC.[48] The SEC's proposed rules on climate change, and other parts of the Biden Administration's climate change policies, appear to be on precarious legal ground.[49]

The academic debate around these issues has largely focused on whether the SEC has the power or will to enact its modest definitional rules[50]—although comments by thirty law professors on this question were submitted before *West Virginia* was decided,[51] and federal agencies' power is likely to be narrowed again with the Clean Water case. Additional scholarship has debated whether ESG funds and initiatives are functional investments,[52] and whether stakeholder

[45] *See, e.g.,* Jeremy Beaman, *GOP Warns SEC to Drop Climate Rule After Supreme Court Ruling on EPA*, WASH. EXAMINER, July 14, 2022, https://www.washingtonexaminer.com/policy/energy-environment/republican-states-promise-legal-action-on-sec-rule; *see also* David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES, May 27, 2022, https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html.

[46] *See, e.g.,* Patrick Temple-West & Brooke Masters, *Texas Accuses BlackRock of Energy Company Boycott in ESG Clampdown*, FIN. TIMES, Aug. 24, 2022 (describing legal penalties against at least ten companies in Texas and Florida); *see also* Brooke Masters & Patrick Temple-West, *BlackRock Labels Texas 'Anti-competitive' Over ESG Blacklisting*, FIN. TIMES, Aug. 25, 2022 (quoting BlackRock as suggesting that the penalties were politically motivated).

[47] *See, e.g.,* citations *supra* note 46 (describing impacts on nine European companies as well).

[48] *See* Sackett v. Env't Prot. Agency, 8 F.4th 1075 (9th Cir. 2021), cert. granted Jan. 24, 2022.

[49] *Accord* Joselow, *supra* note 40; Anna Todd, *Sackett v. EPA and the Definition of Waters of the United States*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (2022), https://eelp.law.harvard.edu/2022/06/sackett-v-epa-and-the-definition-of-waters-of-the-united-states/. In August 2022, the Inflation-Reduction Act defined greenhouse gases as pollution to aid the EPA in regulating them, but it is unclear whether that change could strengthen the SEC's legal footing to address climate change under the major questions doctrine. *See generally, e.g.*, Inflation Reduction Act of 2022, H.R.5376, 117th Congress § 132(D)(4) (2021-2022).

[50] *See, e.g.*, Donna M. Nagy & Cynthia A. Williams, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453 (2021).

[51] *See* Jill E. Fisch et al., *Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure*, (2022), https://papers.ssrn.com/abstract=4129614.

[52] *See, e.g.*, Quinn Curtis, Jill E. Fisch & Adriana Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 418-42 (2021) (demonstrating that ESG-labeled funds empirically behave differently than other funds); *but see* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1926 (2020) (noting that "not all ESG funds are distinguishable from non-ESG funds"); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1410, *et passim* (2020) (arguing, based on interviews, that companies have no choice but to act on ESG initiatives); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 453 (2020) (determining that "risk-return ESG investing is permissible by a trustee on the same terms as any other active investing strategy").

governance and market pressures will eventually produce changes by themselves.[53] This Author and Article argue that, when at stake is potential criminal fraud, effective market mechanisms are being frustrated, and the fractionalization of legal rules means that U.S. businesses will suffer.

This Article creates a new understanding of the U.S. Supreme Court's pro-business paradox that Professor Elizabeth Pollman describes in the *Harvard Law Review*.[54] She explains her effect to be that, "as the [Chief Justice] Roberts Court has expanded corporate rights and narrowed pathways to liability, many shareholders and stakeholders have become vocal participants, putting pressure on corporations to rein in the use of their rights, to mitigate risks generated by their externalities, and to take account of environmental, social, and governance (ESG) concerns."[55]

This Article argues, however, that another strain of empirical "pro-business" findings should receive more attention in thinking about the future of ESG liability. The headline in Professors Lee Epstein and Mitu Gulati's 2022 study of cases before the U.S. Supreme Court over the last century has been that U.S. businesses win overwhelmingly in cases against other parties,[56] but they also document how increasingly seldom the federal government intervenes against U.S. businesses.[57]

U.S. businesses may think that the retreat of the federal government is a "win" for them, but it portends the long-term dissolution of a stable legal—as well as natural—environment upon which they depend. The Court's hostility to federal standards may significantly impede U.S. business progress and investment on the international stage.[58] These ironies are a new paradox of U.S. business

[53] *See, e.g.,* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CALIF. L. REV 1467, 1475, 1521-24 (2021) (presenting data that corporate leaders are not generally negotiating for other interests, including the environment); Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 97-100 (2021) (expressing hope for renewed pro-social results from business stakeholder engagement during Covid-19); Andrew Johnston et al., *Corporate Governance for Sustainability* (2019), https://papers.ssrn.com/abstract=3502101 (arguing that improvements to corporate governance should result in better business environmental sustainability practices, and signed by seventy-two professors) . *Cf. also* Ofer Eldar & Gabriel V. Rauterberg, *Is Corporate Law Nonpartisan?*, WISC. L. REV. (forthcoming 2023), *available a*t https://papers.ssrn.com/abstract=4125863 (arguing that corporate law and courts function best when insulated from partisanship).

[54] *See* Pollman, *supra* note 3.

[55] *Id.* at 225.

[56] *See* Epstein & Gulati, *supra* note 2, at 6-11 (presenting U.S. businesses' win-loss record).

[57] *See id.* at 18-19 (using filings by the Office of the Solicitor General as a proxy for political conditions).

[58] This Author would argue in the ESG context, more as Professor Noah Feldman has in the abortion context, that, by striking down federal standards, companies will be subject to increasing political battles and potential damage. *Cf.* Noah Feldman, *Opinion: The Supreme*

liability in the shadow of coming ad-hoc corporate criminal ESG. We focus on climate change response as an especially fast-moving set of developments within ESG initiatives.[59]

This Article demonstrates how out-of-step U.S. federal courts are with international approaches to climate change, and it is the first to argue that the courts' approach is a particular hazard for U.S. businesses because it leaves our businesses without good guidance—or safe harbors—for increasing climate change initiative liability. The rising threat of penalties from state and local-level activism *against* climate change has been well-covered.[60] What may particularly surprise U.S. businesses is how much liability they may incur in *any* direction for whatever they say and do on climate change without the safe harbors of federal and international standardization.[61]

The bottom line is that U.S. businesses need stability and guidelines to address the challenges that climate change will bring. As business professors at Wharton and elsewhere have explained in the context of why businesses support uniform standards for automobile emissions, even if the standards are higher than a national average would be, merely "[h]aving more than one. . . standard in the U.S. puts automakers in a bad position in terms of planning investments and adopting new technologies."[62] Businesses recognize that where international standards lead in international markets, they must follow.[63] Even more urgently, U.S. businesses should welcome substantive standardization of ESG disclosures in the United States to protect them from both volatile political pressures and potential corporate criminal liability.

I
CURRENT STATE OF THE ESG SPACE

There is complete scientific establishment consensus that climate change is real,[64] and almost all reputable scientists agree that

Court Has a Nasty Surprise in Store for Business, BLOOMBERG.COM, June 9, 2022, https://www.bloomberg.com/opinion/articles/2022-06-09/supreme-court-abortion-reversal-would-give-companies-a-nasty-surprise.

[59] *See* Stephen Kim Park, *Legal Strategy Disrupted: Managing Climate Change and Regulatory Transformation*, 58 AM. BUS. L. J. 4, 711, 713 (2021).

[60] *See, e.g.*, sources in text *supra* and nn. 46–47.

[61] *See, e.g.*, text *supra* and n. 40.

[62] Eric Orts & John Paul MacDuffie, *Why Automakers Are Driving for Uniform Fuel Efficiency Standards*, KNOWLEDGE AT WHARTON, June 14, 2019, https://knowledge.wharton.upenn.edu/article/end-california-emissions-standards/.

[63] *See id.*

[64] *See, e.g.*, James Powell, *Scientists Reach 100% Consensus on Anthropogenic Global Warming*, 37 BULL. OF SCI., TECH. & SOC'Y 183 (2017); NASA, *Scientific Consensus: Earth's Climate is Warming*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, https://climate.nasa.gov/scientific-consensus (listing major scientific organizations and their public statements on climate change) .

the climate change we are witnessing is human-driven.[65] The United Nations' Intergovernmental Panel on Climate Change has concluded that human-driven climate change may already be on course to cause catastrophes so significant that humanity may not be able to adapt to them.[66]

A. Rapidly Changing Norms

Given the scientific consensus, social norms around climate change and other important ESG subjects appear to be changing faster, and to be under more pressure, than many of our other social behaviors. Although it is true that millennials between the ages of roughly thirty-three to forty may be driving much of the most urgent response to climate change, with seventy-six percent of them saying that climate change represents a serious risk to society,[67] concerns about the impact of climate change are broadening and deepening across U.S. society. In 2019, seventy-two percent of investors expressed at least a modest interest in sustainable investing to help prevent climate change, with not much of a significant distinction among generations.[68]

Changing norms around ESG make ESG initiatives an area around which we should most expect to find rapid movement in the law.[69] ESG issues also become more volatile as a small percentage of the population debates the science and engages in a backlash against addressing it.[70]

In thinking about developments in the criminalization of corporate behaviors, there will always be goals and priorities that the government balances in choosing its criminal prosecutions. For the government, the harm of white collar crime is that it "undermines the rule of law, defrauds victims, and disrupts the marketplace." [71]

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[65] *See* Mark Lynas, Benjamin Z. Houlton & Simon Perry, *Greater Than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, 16 ENV'T RES. LETTERS 114005 (2021).

[66] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 1-3–1-4 (March 2022).

[67] *See* Alicia Adamczyk, *Millennials Spurred Growth in Sustainable Investing for Years. Now, All Generations are Interested in ESG Options*, CNBC, May 21, 2021 (citing March 2021 CNBC/Harris Poll).

[68] *See id.* (citing Morningstar numbers).

[69] *See generally* David Skeel, *Shaming in Corporate Law*, 149 U. PENN. L. REV. 1811, 1821-22 (2001).

[70] *See generally* "culture wars" backlash against ESG investing in Texas and Florida, *supra* note 46, and the recent movie parodying our denial of science, *Don't Look Up*, that was nominated for four Oscars. *See Don't Look Up*, IMDB.com (2021).

[71] Thomas L. Kirsch II & David E. Hollar, *Prosecution of Individuals in Corporate Criminal Investigations*, 66 DOJ JOURNAL OF FED. L. AND PRAC. (SPECIAL EDITION ON CORPORATE CRIME) 3, 4 (2018) (quoting Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the Bloomberg Law and Leadership Forum in New York (May 23, 2018)).

Academics and others studying patterns in white collar crime have noted that behavior that may have previously triggered civil liability has been increasingly criminalized.[72] Shaming and norms—including the changing of norms in society over time—are closely intertwined.[73] Many academics, including Professor Samuel Buell, have written about the social value of labeling certain corporate behaviors as criminal, in that it ascribes an important blameworthiness available in that label, which is not present the same way in the civil law.[74] In 2021, at least one scholar was calling for the reintroduction and broadening of explicit corporate shaming.[75]

The line between U.S. civil and criminal liability is also thin, particularly in the area of fraud. The essential difference between federal civil and criminal law in the U.S. is not necessarily the acts to be proven, but the degree of motivation ("intent") necessary for the acts. When intent is not as hard a thing to prove, in areas we will talk about such as fraud, the remaining difference is in the level of proof required, from civil "preponderance of the evidence" to criminal "beyond a reasonable doubt."[76]

Ultimately, when the factual case for intent against a defendant is strong—many fraud cases may rely, for example, on extensive written documentation—the practical issues determining whether the U.S. government pursues a civil or criminal prosecution are how strongly the government feels that it should signal its condemnation of the behavior and what remedies it seeks.[77] The U.S. Supreme Court has explicitly approved of the government's ability to choose whether it wants to

[72] *See, e.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477–78 (1996); *see also generally* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833–867, 833 (1994).

[73] *See* Skeel, *supra* note 69, at 1820 ("Shaming sanctions are so integrally connected to social norms that it is not entirely clear where one leaves off and the other begins. A norm cannot survive unless it is enforced and, loosely speaking, norms are enforced in one or more of three different ways: guilt, shunning, and shaming…. When we talk about norm enforcement, we therefore are often talking about shaming.").

[74] *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 INDIANA L. J. 473, 491 (2006).

[75] *See* W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 391, 424–29 (2021); *see also generally* Miranda Forsyth & Valerie Braithwaite, *From Reintegrative Shaming to Restorative Institutional Hybridity*, 3 INT'L J. RESTORATIVE JUST. 10–22 (2020).

[76] *See generally Policy Background; Burdens of Proof*, 21B FED. PRAC. & PROC. EVID. (WRIGHT & MILLER) § 5122 (2d ed., April 2021 Update).

[77] The DOJ's own Journal makes this point about how the same actions can form the basis of various prosecutions, including civil and overlapping criminal ones. For example, in healthcare fraud, "the same conduct—for example, paying kickbacks to secure health care referrals—can form the basis of a variety of government actions: a civil claim under the False Claims Act, a criminal charge of health care fraud, or an administrative action for exclusion from participation in federal health care programs." Benjamin Greenberg & Susan Torres, *Parallel Proceedings in Health Care Fraud*, 66 DOJ JOURNAL OF FED. L. AND PRAC. (SPECIAL EDITION ON CORPORATE CRIME) 15, 16 (2018).

pursue a civil or criminal case based on the same underlying course of conduct.[78]

These pressures and conditions set the stage for potential changes in corporate criminal liability regarding ESG initiatives. This Article describes in several parts why we may see movement on ESG initiatives from civil to emerging corporate criminal liability, especially for fraud. First, the Article notes how imprecise ESG is as a term, and how strong economic pressures surround companies that want to announce ESG initiatives. Second, it describes patterns in ESG enforcement outside the United States that have moved from actions against governments to actions against private corporations, especially for not meeting their climate obligations or overpromising their corporate actions through "greenwashing." Third, the Article considers developments in the United States that may not follow international patterns, but that flash other warning signs for corporate liability. Fourth, it focuses on why fraud prosecutions for ESG are most likely to cross the line from civil to criminal liability in the United States. The Article concludes with why increasing pressure on U.S. businesses may make them want to adopt uniform standards that could protect them across state, national, and international jurisdictions.

B. Why ESG for Expanded Corporate Criminal Liability

There are three main reasons why ESG initiatives may draw prosecutors into expanding criminal corporate liability in the United States.

First, the current language and standards around ESG in the U.S. remain imprecise, and that makes it easy to mislead investors and the market.[79] One of the core competitive advantages of the United States on the international stage is the perceived stability, transparency, and

[78] *See, e.g.*, United States v. Kordel, 397 U.S. 1, 11 (1970). There may still be a double jeopardy issue in the government's pursing the same behavior twice, but that is not the same as the government's freedom to choose how it will pursue behavior that could be either civil or criminal.

[79] *See, e.g.*, George Serafeim, *ESG: Hyperboles and Reality* 1, Harv. Bus. Sch. Res. Paper Series, No. 22-031 (Dec. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966695 ("ESG has rapidly become a household name leading to both confusion about what it means and creating unrealistic expectations about its effects."); Elizabeth Pollman, *The Making and Meaning of ESG* 6, ECGI Working Paper Series in L., No. 659/2022 (Sept. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 ("[T]he combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for its success as a global phenomenon, but also its challenges such as… understood purposes of the term.").

accountability of its markets.[80] Part of the U.S. government's mission is to protect the country's financial position and power by upholding those values.[81]

Meanwhile, accountants and other financial professionals find ESG a wildly frustrating term because it is both ill-defined and overly inclusive.[82] Even amongst people who assume that they are committed to the same things, there may, for example, be direct conflicts in the outcome of "ESG" initiatives in the short-term interests of labor and the environment.[83] But, insofar as ESG has become an umbrella term, it tends to be associated with environmental concerns as one of many forms of social-justice initiatives.

Second, despite how imprecise ESG is as a term, companies are making concrete promises around it. Companies and others have made promises in the environmental context, for example, that have been at times precise and potentially verifiable. In the 2021 Deutsche Bank example, it was a significant development in the business community for the DOJ to inform Deutsche Bank AG that it may have violated a criminal settlement when it failed to inform prosecutors of its failures to live up to ESG disclosures.[84]

As this Article will show, see *infra* at Part IV, the type of behavior that Deutsche Bank engaged in may be much more widespread than commonly understood. As the *Wall Street Journal* describes the problems with ESG disclosures at Deutsche Bank, "Deutsche Bank AG's DB asset management arm, DWS Group, tells investors that environmental, social and governance concerns are at the heart of everything it does and that its ESG standards are above the industry average."[85] In its 2020 annual report, DWS Group promises that more than half of its assets under management—some U.S.$540 billion—are evaluated on ESG criteria.[86] But its own 2021 internal assessment

[80] *See, e.g.*, John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 641-53 (1999) (noting the role of legal protections, including transparency and redress, for the minority holders of shares in dominant financial markets).

[81] *See* U.S. Dep't of the Treasury, *Role of the Treasury,* https://home.treasury.gov/about/general-information/role-of-the-treasury (describing how its mission "highlights [the Treasury's] role as the steward of U.S. economic and financial systems, and as an influential participant in the world economy").

[82] *See, e.g.*, *ESG Ratings and Data: How to Make Sense of Disagreement*, PAUL WEISS, Jan. 29, 2021; Glenn Fitzpatrick, Jonathan Neilan & Peter Reilly, *Time to Rethink the S in ESG*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, June 28, 2020.

[83] *See also generally* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 430-33 (2020) (listing many such ESG contradictions in terms of fiduciary duties as well).

[84] *See* Dave Michaels & Patricia Kowsmann, *Justice Department Told Deutsche Bank Lender May Have Violated Criminal Settlement*, WALL ST. J., Dec. 8, 2021.

[85] Patricia Kowsmann & Ken Brown, *Fired Executive Says Deutsche Bank's DWS Overstated Sustainable-Investing Efforts*, WALL ST. J., August 1, 2021.

[86] *Id.*

admits that "only a small fraction of the investment platform" applies ESG criteria,[87] and that the company has "no quantifiable or verifiable ESG-integration for key asset classes."[88]

Although the potential criminal penalties that Deutsche Bank may face would result most immediately from failure to communicate with prosecutors about its ESG failures, this outcome would still be a step to making failed ESG commitments ground for criminal liability.

As this Article discusses in more detail, *infra* at Part V, because the U.S. has moved increasingly over time away from direct regulation of businesses to incentivizing them with programs that help buy their compliance,[89] one of the last ways that the U.S. has of disciplining businesses that abuse the public trust is through fraud prosecutions.[90] And, in fraud prosecutions, parties are most likely to see criminal culpability triggered in how they represent a topic. The U.S. enforces white collar crime largely on the basis of disclosure.[91] Fraud, and particularly fraud on investors in the securities context, is already a place in which the line between civil and criminal culpability is very thin.

Third, an important reason why the line between civil and criminal culpability for fraud is likely to blur regarding ESG is that there is so much economic pressure on companies to assert their role in this area to investors. There is money to be made from saying what investors want to hear, even if it is not true. Movement in ESG investing is already estimated, according to Morningstar data, to be worth U.S.$3 billion a day.[92]

II

SOLIDIFYING ESG LIABILITY STANDARDS OUTSIDE OF THE UNITED STATES

Internationally, efforts to impose liability on companies for ESG initiatives appear to follow two main routes. More substantive regulation may be emerging primarily in Europe based on corporate duties to address climate change, in addition to disclosure-based regulation such as in the U.S.

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[87] *Id.* (quoting the company's report).
[88] *Id.* (summarizing the report's findings).
[89] *See, e.g.*, Reich, *supra* note 22; Meyer, *supra* note 22.
[90] *See, e.g.,* J.S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1494–1504 (2019) (describing the dangers of overly relying on corporate disclosure rules without substantive regulation of businesses); J. S. NELSON, *"Don't Ask, Don't Tell" Corporate Crime*, (2017), https://papers.ssrn.com/abstract=2979728 (illustrating the role of overly relying on disclosure-based regulation in the Volkswagen emissions scandal).
[91] *See* Nelson, *Disclosure-Driven Crime, supra* note 90; Nelson, *"Don't Ask, Don't Tell" Corporate Crime, supra* note 90; J. S. Nelson, *The Corruption Norm*, 26 J. OF MGMT. INQUIRY 3, 280 (Nov. 2016).
[92] *See* Patricia Kowsmann & Ken Brown, *Fired Executive Says Deutsche Bank's DWS Overstated Sustainable-Investing Efforts*, WALL ST. J., Aug. 1, 2021 (citing Morningstar numbers).

In thinking about climate change as a global problem, European approaches to hold corporations substantively responsible for ESG initiatives appear to be a more intuitive approach for a problem that may require coordinated corporate and governmental responses. Courts there seem to be focusing more on outcomes, rather than on merely what corporations say they will do.

In these areas, emerging civil liability for climate change seems based on an argument that corporations have duties to humanity which require them to change their behavior insofar as it contributes to the excessive warming of the planet. We will have to see if these civil liabilities, backed with urgent and sweeping language, are later enforced with criminal cases.[93]

A. Arguing Against Governments First

The nascent movement for ESG liability in Europe and elsewhere seems to be first successful against governments before being used against corporations. The most significant corporate precedents, as of this Article's writing, have been under Dutch law (see Dutch discussion *infra* at Part IIB). Plaintiffs also appear to have won final judgments in suits against governments on duty of care and/or related protection of fundamental rights grounds in Pakistan, Colombia, Nepal, Germany, and Belgium.[94] They have won more limited cases to have existing promises enforced against governments in New Zealand,[95] Ireland,[96] and France.[97] Plaintiffs had been less successful to date in suits against the European

[93] Criminal liability for corporations is often not available or more rare in some of these European and other systems than in the United States. But pressure may emerge to change that if violations are particularly egregious and if governments start turning to criminal law should civil enforcements fail. There is certainly pressure building on these issues and the law continues to evolve.

[94] See descriptions of cases and citations *infra*.

[95] Sarah Thomson v. Minister for Climate Change Issues [2017] NZHC 733, 2015-485-919, Nov. 2, 2017 (N.Z.).

[96] *See* Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney [2020], General Judgment of Mr. Justice Clarke, Chief Justice, delivered the 31st of July, 2020, Supreme Court of Éire (SC), (Ir.).

[97] Tribunal Administratif (TA) Paris (4ème section – 1ère chambre), civ., Feb. 3, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1; *see also* Conseil d'État (CE Sect.) (Le Conseil d'Etat statuant au contentieux (Section du contentieux, 6 ème et 5ème chambres réunies), Sur le rapport de la 6ème chambre de la Section du contentieux), civ., July 1, 2021, N° 427301.

Union,[98] India,[99] Switzerland,[100] the United Kingdom,[101] and the United States (see U.S. discussion *infra* at Part III).

As of 2022, additional suits were pending against governments in Australia, Canada, the Czech Republic, Italy, Mexico, Peru, Poland, South Korea (Republic of Korea), and Spain.[102] Academics' Oslo Principles[103] were urging courts to mandate climate action on the part of governments, despite the limitations of their existing agreements. These and other efforts have been "part of a larger trend of citizens seeking action from the courts on climate issues."[104]

The cases in the category of finding established separate rights would seem to pose the most potential for future civil and criminal liability for corporations in those countries. These cases broadly recognized some form of the duty of care, right to a healthy

[98] As of March 2021, this case appears to have been dismissed on procedural ground by the European Court of Justice. Court of Justice of the European Union, Press Release No 51/21, *The Court of Justice Confirms That the Action Brought by Families from the European Union, Kenya and Fiji Against the EU 'Climate Package' of 2018 is Inadmissible*, Judgment in Case C-565/19 P. Armando Carvalho and Others v. Parliament and Council, Luxembourg, Mar. 25, 2021.

[99] *See* Order Dismissing Application, Ridhima Pandey v. Union of India & Ors., No. 187/2017, Nat'l Green Trib. Principal Bench, New Delhi, at ¶ 3 (Jan. 15, 2019) (India) (finding "no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances").

[100] In May 2020, Switzerland's Federal Supreme Court had decided against the plaintiffs. As of March 2021, the case was on appeal before the European Commission on Human Rights. *See* Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications, Federal Supreme Court, Public Law Division I Judgment 1C_37/2019, May 5, 2020 (Switzerland); Communication of Case to Swiss Federal Government, Application no. 53600/20, Verein KlimaSeniorinnen Schweiz and others v. Switzerland, European Comm'n on Human Rights, Mar. 25, 2021.

[101] In January 2019, the United Kingdom's Court of Appeal declined to overturn a High Court ruling against the plaintiffs. In its rejection of the appeal, the Court of Appeals noted that five of the six plaintiffs' grounds had "no real prospect of success." These included its allegations that the U.K. government was not understanding or not fulfilling its obligations, as well as that there was a public sector equality duty that had been violated. *See* Permission to Appeal Refused, Plan B Earth v. Secretary of State for Business and Energy and Industrial Strategy, Court of Appeal, Civil Division, C1/2018/1750, Jan. 25, 2019 (U.K.).

[102] For additional updates, see, e.g., *Global Climate Litigation*, URGENDA (linking to cases and sources).

[103] *See* EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS, OSLO PRINCIPLES ON GLOBAL CLIMATE OBLIGATIONS (2015)*; see also Oslo Principles on Global Climate Change Obligations*, GLOBAL SOCIAL JUSTICE PROGRAM (explaining the origin of the principles and containing updates about their progress).

[104] John Schwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES, Dec. 20, 2019.

environment, or human rights in Pakistan,[105] Columbia,[106] Nepal,[107] Germany,[108] and Belgium.[109] If such a right is being established, and may be protected independently, it is more likely that courts may protect such rights against encroachment by corporations as well. Although it is true that some rights may remain enforceable against a government when they are not enforceable against private actors, these first jurisdictions seem to be the most dynamic places to watch for pending corporate liability such as eventually emerged in the Netherlands, and this Article discusses in Part IIB.

i. Broad Rights Against Governments

Important examples of duties of care, right to a healthy environment, or human rights, have recently emerged from courts in Pakistan, Columbia, Nepal, Germany, and Belgium. In practical terms, amongst this group, the German and Belgium courts may have the most power over large-scale corporate interests.

In 2015, Pakistan's Green Bench of the Lahore High Court issued a "clarion call" to protect what it described as "fundamental rights" being impacted by climate change.[110] As the Green Bench explained, "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system."[111] The citizens of Pakistan's "fundamental rights" were being violated, including their "[r]ight to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice[,

[105] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Pak.) at ¶ 6.

[106] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. Apr. 5, 2018, M.P: Louis Armando Tolosa Villabona, Expediente STC4360-2018, Radicacion n.o 11001-22-03-000-2018-00319-01, at 1–2 (Colom.) (original in Spanish).

[107] Advocate Padam Bahadur Shrestha v. Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others, Supreme Court of Nepal, 074-WO-0283, 10th Day of Month of Poush of the Year 2075 BS (Dec. 25, 2018).

[108] Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 & 1 BvR 288/20 (collectively "Climate Change"), dated Mar. 24, 2021, released Apr. 29, 2021, (Ger.) (official English translation).

[109] Civ. [Tribunal of First Instance] Brussels, Tribuna I de première instance francophone de Bruxelles, Section Civile -2015/4585/A, June 17, 2021, at 2.3.1 (Conclusions) (official document in French; unofficial computer translation into English provided by the Climate Litigation Network).

[110] Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Pak.) at ¶ 6, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf ("On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.")

[111] *Id.*

which] provide the necessary judicial toolkit to address and monitor the Government's response to climate change."[112]

In April 2018, Colombia's Supreme Court ruled against the country's federal government regarding the deforestation of the Amazon, and the protection of 'supra-legal' ("supralegales") rights such to a normal environment, life and health ("... 'ambiente sano,' vida y salud").[113]

In December 2018, the Nepalese Supreme Court held that the government of Nepal had a parental duty toward its citizens to limit climate change.[114] As the Court wrote, "climate change mitigation and adaptation by protecting the environment is the responsibility of the state according to the principle of *parens patriae.*"[115]

In April 2021, Germany's highest court on constitutional questions unanimously found that the country's climate protection law, which had set merely a fifty-five-percent reduction in greenhouse emissions by 2030, violated the fundamental rights of young people and future generations by insufficiently protecting the environment.[116] According to the Federal Constitutional Court, "Art. 20a GG places the legislat[ure] under a permanent obligation to adapt environmental law to the latest scientific developments and findings."[117] Existing federal law was inadequate,[118] and "it is imperative under constitutional law that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future . . . . These developments must begin soon in order to avoid future freedom being curtailed suddenly,

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[112] *Id.* at ¶ 7.

[113] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. Apr. 5, 2018, M.P: Louis Armando Tolosa Villabona, Expediente STC4360-2018, Radicacion n.o 11001-22-03-000-2018-00319-01, at 1–2 (Colom.), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf (original in Spanish).

[114] Advocate Padam Bahadur Shrestha v. Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others, Supreme Court of Nepal, 074-WO-0283, 10th Day of Month of Poush of the Year 2075 BS (Dec. 25, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181225_074-WO-0283_judgment-1.pdf (no Bluebook form provided in 21st edition).

[115] *Id.* at ¶ 5, p. 13.

[116] Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 & 1 BvR 288/20 (collectively "Climate Change"), dated Mar. 24, 2021, released Apr. 29, 2021, (Ger.) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-1.pdf (official English translation).

[117] *Id.* at ¶ 211.

[118] As the BVerfG explained, "§ 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 are unconstitutional insofar as they lack provisions that satisfy the requirements of fundamental rights (see para. 251 ff. above) on the updating of reduction targets from 2031 until the point when climate neutrality is reached as required by Art. 20a GG." *Id.* at ¶ 266.

radically and with no alternatives."[119] The day after the Court's decision was promulgated, the German government announced that it would comply with the decision.[120]

In June 2021, a Court of First Instance in Brussels, Belgium found the Belgium federal government and three of its regional governments jointly and individually responsible for protecting their citizens from climate change. In "finding a breach of the duty of care," the court held that "the Belgian public authorities were fully aware of the certain risk of dangerous climate change for the country's population. . . .[, which] makes it possible to establish that neither the federal State nor any of the three Regions acted with prudence and diligence within the meaning of Article 1382 of the Civil Code."[121] Additionally, the court found that "in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR [European Convention on Human Rights], by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy."[122] As of when this Article was written, the Belgium case was on appeal.

ii. More Narrowly Holding Governments to Promises

Courts are following a more restrained version of solely holding a government to its own promises in New Zealand, Ireland, and France. The technique of enforcing a promise against an entity that makes it could, of course, be used against corporations for their promises too.

In 2017, New Zealand's Supreme Court found the country's 2002 Climate Change Response Act legally insufficient to meet the country's announced obligations under its national and international commitments.[123] As the Court wrote, the country's obligations "collectively . . . underline the pressing need for global action, that global action requires all Parties individually to take appropriate steps to meet the necessary collective action, and that Parties should do so in light of

[119] *Id.* at ¶ 253.

[120] *Germany Pledges to Adjust Climate Law After Court Verdict*, AP NEWS, Apr. 30, 2021, https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8.

[121] Civ. [Tribunal of First Instance] Brussels, Tribuna I de première instance francophone de Bruxelles, Section Civile -2015/4585/A, June 17, 2021, at 2.3.1 (Conclusions), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-2.pdf (official document in French; unofficial computer translation into English provided by the Climate Litigation Network) .

[122] *Id.* at IV (Decision).

[123] Sarah Thomson v. Minister for Climate Change Issues [2017] NZHC 733, 2015-485-919, Nov. 2, 2017 (N.Z.), https://img.scoop.co.nz/media/pdfs/1711/fileDecision_13.pdf.

relevant scientific information and update their individual measures in light of such information."[124]

In 2020, Ireland's Supreme Court found that the country's government was legally required to do more to alleviate climate change under its own legislative commitments.[125] As the Court wrote, the country's National Climate Change "Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act."[126] The Court was careful, however, to limit its ruling to the government's existing legal obligations, and not find a "so-called unenumerated right to an environment consistent with human dignity."[127] As Court explained, although "[c]limate change is undoubtedly one of the greatest challenges facing all states[,]. . . the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require."[128]

Similarly, in February 2021, France's Administrative Court of Paris held the French government legally responsible for its announced obligations under its international commitments on climate change.[129] The Court held that the federal government's failure to reduce its greenhouse gas emissions as promised, "contributes to dangerous climate change, causing environmental harm in France (*préjudice écologique*), and is therefore unlawful." In July 2021, the highest administrative court of France (the Conseil d'État) also ruled in favor of the Municipality of Grande-Synthe and its mayor to increase the French

[124] *Id.* at ¶ 91.

[125] *See* Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney [2020],General Judgment of Mr. Justice Clarke, Chief Justice, delivered the 31st of July, 2020, Supreme Court of Éire (SC), (Ir.), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf (unofficial copy of decision).

[126] *Id.* at 9.3. The "2015 Act" is Ireland's "Climate Action and Low Carbon Development Act" of 2015. *Id.* at 4.1.

[127] *Id.* at 5.4.

[128] *Id.* at 1.1.

[129] Tribunal Administratif (TA) Paris (4ème section – 1ère chambre), civ., Feb. 3, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210203_NA_decision-1.pdf (official document in French); http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210203_NA_decision-2.pdf (unofficial translation in English provided by plaintiffs); final administrative decision rendered Oct. 21, 2021. As the court wrote: "in view of the State's wrongful failure to implement public policies enabling it to achieve the greenhouse gas emission reduction targets it has set itself, the applicant associations may claim compensation from the State for those wrongful failings, subject to demonstrating the existence of direct and certain harm resulting therefrom for the associations." *Id.* at ¶ 41 (unofficial translation of February 2021 decision).

federal government's response to climate change targets for 2030, given the government's own promises on the subject.[130]

B. Arguments Against Governments Moving into Liability for Corporations

The most significant corporate precedents to date have been in the Netherlands under Dutch law. Those developments deserve some discussion as a potential map for how international ESG liability for governments starts to translate into substantive and predictable enforcement for corporations in the private sector.

In 2019, the Netherland's Supreme Court ordered the Dutch government to drastically reduce its greenhouse gas emissions.[131] According to the Court, it could so rule because "the risk of dangerous climate change . . . can also seriously affect residents of the Netherlands in their right to life and well-being."[132] These protections, according to the Court, were "pursuant to art. 2 and 8 ECHR," such that it "can and may rule that the State is obliged to achieve this reduction."[133]

The Court acknowledged that legislating is typically a political process, but it had to intervene to review the government's action to protect citizens' established right. Generally, "[i]n the Dutch constitutional system, the decision-making process about the reduction of greenhouse gas emissions falls to the government and parliament[,] . . . [and] [t]hey have a great deal of freedom to make the necessary political considerations."[134] However, the Court wrote that "[i]t is up to the judge to assess whether the government and parliament have kept their decision-making within the bounds of the law to which they are bound."[135] Accordingly, the Netherlands had "to reduce greenhouse gas emissions by at least 25% by the end of 2020 compared to 1990."[136]

The Dutch Supreme Court's strong statements seem to have encouraged the country's lower courts to find climate change liability against a corporation.

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[130] *See* Conseil d'État (CE Sect.) (Le Conseil d'Etat statuant au contentieux (Section du contentieux, 6 ème et 5ème chambres réunies), Sur le rapport de la 6ème chambre de la Section du contentieux), civ., July 1, 2021, N° 427301, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210701_Not-Yet-Available_decision.pdf (original document in French).

[131] *See* The State of The Netherlands (Ministry of Economic Affairs and Climate) v. Urgenda Foundation, Supreme Court of The Netherlands, 19/00135, Dec. 20, 2019 (author using Google Translate to quote official document).

[132] *Id.* at Conclusion.

[133] *Id.*

[134] *Id.* at "Judge and political domain."

[135] *Id.*

[136] *Id.* at Conclusion (upholding the order of the lower court, as well as the judgment of the court of appeal).

In May 2021, a panel of three judges for the district court in The Hague ruled under Dutch law that the Royal Dutch Shell (RDS) oil company must reduce its group's carbon dioxide emissions—including the emissions of its suppliers and customers—by forty-five percent from its 2019 levels by 2030.[137] The court based its decision in "the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code on the basis of the relevant facts and circumstances. . . and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights."[138] The "standard of care ensues that[,] when determining the Shell group's corporate policy, RDS must observe the due care exercised in society."[139] The court explained that this standard of care compelled RDS to have a "reduction obligation" that "relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions."[140] The entire Shell group was bound by RDS's obligations because RDS determined its policies.[141] The group's "significant best-efforts obligation with respect to the business relations of the Shell group" included its "end-users" as well.[142]

The environmental group suing Shell had included more limited arguments that Shell should at least be bound to fulfill its own promises, and it had documented how Shell's lofty language did not describe the company's actual conduct.[143] RDS itself had objected that "the solution should not be provided by a court, but by the legislat[ure] and politics."[144] The *Shell* court swept away both arguments, explaining that it had to rule on the case because determining a party's "alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court."[145] Although, "[i]t is up to RDS to design the reduction obligation," the company's current plan was in danger of being inadequate "taking account of its current obligations and other relevant circumstances."[146]

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[137] *See* Vereniging Milieudefensie, et al. v. Royal Dutch Shell PLC, The Hague District Court, C/09/571932 / HA ZA 19-379, May 26, 2021 (official English translation published by the court).

[138] *Id.* at 4.1.3.

[139] *Id.* at 4.4.1.

[140] *Id.* at 4.1.4.

[141] *See id.* at 4.4.4 ("RDS determines the general policy of the Shell group. The companies in the Shell group are responsible for the implementation and execution of the policy, and [they] must comply with applicable legislation and their contractual obligations. The implementation responsibility of the Shell companies does not alter the fact that RDS determines the general policy of the Shell group.").

[142] *Id.* at 4.1.4.

[143] *See generally id.* at 2.6.1, 2.6.2 (citing correspondence between the parties).

[144] *Id.* at 4.1.2.

[145] *Id.* at 4.1.3.

[146] *Id.* at 4.1.4; *see also id.* at 4.5.5, 4.5.6, 4.5.7, 4.5.8 (not finding Shell's current CO2 emission unlawful, but holding that "[t]he order is for RDS to meet its reduction obligation and [ensure that the group] is sufficiently in line with [its] obligation.").

In addition, RDS had objected that it should not be bound to the unwritten duty of care to protect human rights the same way that a government would. The court directly addressed RDS's argument and dismissed it. As the court explained, first, in "its interpretation of the unwritten standard of care," that the court was following "the UN Guiding Principles (UNGP)." According to the court, "[t]he UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights."[147]

The court next explained that "no inevitable tension needs to exist" between "the different responsibilities for states and businesses."[148] As the court describes,

> [t]he responsibility of business enterprises to respect human rights, as formulated in the UNGP [United Nations Guiding Principles on Business and Human Rights], is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility.[149]

Finally, the Dutch court included ringing language that could be picked up and echoed elsewhere on the broad obligation of the rights at issue. As the court explained,

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate. …[T]his responsibility of businesses exists independently of states' abilities and/or willingness to

[147] *Id.* at 4.4.11.
[148] *Id.* at 4.4.13.
[149] *Id.* at 4.4.13 (internal citations omitted).

> fulfil their own human rights obligations, and does not diminish those obligations. It is not an optional responsibility for companies. It applies everywhere, regardless of the local legal context, and is not passive.[150]

The *Shell* court's ruling is remarkable for U.S. lawyers for several reasons beyond its language about business ethics and human rights.

First, it binds the entire "Shell group," regardless of where those companies are in the world.[151] As the court had noted, although the "RDS has been the top holding company of the Shell group," the Shell group "is further composed of intermediate parents, Operating Companies and Service Companies."[152] This makes "RDS. . . the direct or indirect shareholder of over 1,100 separate companies established all over the world."

Second, it holds RDS responsible for the emissions of its suppliers and customers, who are even farther outside of the company's legal shell, and possibly its influence.[153] The Dutch court explained that its holding bridged all Scope 1, 2, and 3 emissions.[154] As the decision details, the scopes included are the same ones that dominate international standards:

- *Scope 1*: direct emissions from sources that are owned or controlled in full or in part by the organization;
- *Scope 2*: indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam, or heating for its operations;
- *Scope 3*: all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas.[155]

Third, the company is not limited by what it had described about its own efforts. It is, instead, bound by a "significant best-efforts

[150] *Id.* at 4.4.15 (internal citations omitted).
[151] *See Milieudefensie v. Royal Dutch Shell*, *supra* note 137, at 4.4.4, 4.4.23, 4.4.55.
[152] *See id.* at 2.2.2.
[153] *Id.* at 2.5.4; *see also id.* at 4.4.23 (holding that Shell had a "significant best-efforts obligation" regarding the end-users of its products).
[154] *See id.*
[155] *Id.* at 2.5.4.

obligation" to produce *results* in line with what might be necessary to protect human rights and the planet.[156]

Shell has already announced that it will appeal the ruling.[157] It has promised to accelerate its own energy transition plans in response to the decision, but the company wants to "stick to its own climate timetable."[158] The company's appeal may take two or three years, and news media warn (without irony) that, especially "[i]n the current climate, there's no guarantee that Shell will successfully overturn the verdict."[159]

The more muscular Dutch legal approach against a company directly may echo first in the other countries that have found the existence of a fundamental right regarding climate change. In Germany, for example, in September 2021, a group of German activists initiated lawsuits against BMW and Daimler to cut emissions, and, in November 2021, Greenpeace sued Volkswagen to end the production of combustion-engine cars and cut total emissions by 2030.[160]

The lawyer who primarily litigated the case against Shell predicts a coming "avalanche of cases against the fossil fuel industry and related industries like the car industry."[161] He argues that "[o]ne of the big reasons for the judiciary to exist is to bring balance in society and to protect us from human rights violations from our governments and other large entities that dictate our world and our wellbeing."[162] He believes that "[i]t is just a matter of time [before] the same kind of approaches will also be successful in other countries."[163] Interestingly, he anticipates first, copycat legal action against other oil companies, then companies in other sectors of the economy, and eventually against "individual directors."[164]

Importantly, the Dutch fundamental rights approach may dovetail with a local disclosure-based enforcement strategy as well. For example, in August 2021, the Netherlands' Advertising Code Committee found that Royal Dutch Shell's advertising campaign promising that consumers could offset their cardon emissions by paying more for

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156 S*ee id.* at 4.4.23 (holding that Shell had a "significant best-efforts obligation" regarding even the end-users of its products).

157 *See* Laura Hurst & Diederik Baazil, *Shell to Appeal Landmark Dutch Court Ruling on Climate Goals*, BLOOMBERG, July 20, 2021, https://www.bloomberg.com/news/articles/2021-07-20/shell-to-appeal-landmark-climate-case-in-the-netherlands.

158 *Id.*

159 *Id.*

160 *See* Tom Wilson, *Lawyer Who Defeated Shell Predicts 'Avalanche' of Climate Cases*, FIN. TIMES, Dec. 17, 2021, https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef.

161 *Id.* (quoting attorney Roger Cox).

162 *Id.* (same).

163 *Id.* (same).

164 *See id.*

gasoline from Shell was misleading.[165] By November 2021, Royal Dutch Shell Plc had announced that it would drop "Royal Dutch" from its name, and that it would move the company's headquarters out of the Netherlands.[166]

But the Dutch courts are not the only sources of concern for the company. In December 2021, a South African court ordered Shell to temporarily halt its nearby off-shore seismic survey for oil and gas.[167] In a blend of the substantive concerns that have fueled objections in Europe, and the more procedural approach in the U.S., the South African court enjoined Shell's activity because the company allegedly had not fully disclosed the hazards the activity posed to wildlife, and therefore permission for the work had been "awarded on the basis of a substantially flawed consultation process."[168]

C. International Legal Backlash Against "Greenwashing"

Continuing with the theme of potential liability for company promises internationally, so-called "greenwashing" cases for untruthful or misleading disclosures are being pursued against fossil-fuel companies as well in other countries.

In December 2019, ClientEarth filed with the United Kingdom's National Contact Point for the OECD Guidelines for Multinational Enterprises to allege that "BP's global corporate advertising misled the public in the way that it presented BP's low-carbon energy activities including their scale relative to the company's fossil fuel extraction business."[169] In that case, the agency did not follow through because BP's campaign had already ended.[170]

In February 2020, the UK's Advertising Standards Authority (ASA), a self-regulating industry group, concluded that budget-airline Ryanair's assertions that it was "Europe's…Lowest Emissions Airline"

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[165] *See* Laura Hurst & Diederik Baazil, *Dutch Ad Watchdog Tells Shell to Pull 'Carbon Neutral' Campaign*, BLOOMBERG.COM, Aug. 27, 2021, https://www.bloomberg.com/news/articles/2021-08-27/dutch-ad-watchdog-tells-shell-to-pull-carbon-neutral-campaign.

[166] *See* Laura Hurst, *Shell Ditches 'Dutch' From Name and Makes Britain Its HQ (2)*, BLOOMBERG NEWS (DAILY TAX REPORT), Nov. 15, 2021, https://news.bloomberglaw.com/daily-tax-report/shell-to-drop-the-dutch-from-name-end-dual-share-structure?context=search&index=2.

[167] *See* Paul Burkhardt, *Shell Ordered to Temporarily Halt Seismic Survey in South Africa*, BLOOMBERG.COM, Dec. 28, 2021, https://www.bloomberg.com/news/articles/2021-12-28/shell-ordered-to-temporarily-halt-seismic-survey-in-south-africa.

[168] *South Africa Court Blocks Shell's Oil Exploration*, BBC NEWS, Dec. 28, 2021, https://www.bbc.com/news/world-africa-59809821 (quoting High Court Judge Gerald Bloem's ruling).

[169] Decision: Initial Assessment: ClientEarth Complaint to the UK NCP about BP, GOV.UK, June 16, 2020, https://www.gov.uk/government/publications/client-earth-complaint-to-the-uk-ncp-about-bp/initial-assessment-clientearth-complaint-to-the-uk-ncp-about-bp.

[170] *See id.*

and its operations had "low CO2 emissions" were misleading, and the claims had to be removed.[171]

In August 2021, the Australasian Centre for Corporate Responsibility filed in Australian federal court against the country's oil-and-gas producer Santos Ltd. The Centre alleged that the company had engaged in misleading or deceptive conduct by claiming to have a "clear and credible" path to net-zero carbon emissions in its operations.[172]

In December 2021, a case was filed in South Korea against the country's largest private gas provider, SK E&S Co., for allegedly false advertising regarding the green credentials of a foreign project.[173] The action is "the first claim in South Korea against a company [regarding] its emissions."[174]

III
DEVELOPMENTS IN THE UNITED STATES

As U.S. courts do not seem particularly receptive to the fundamental rights arguments that have prevailed in Europe and elsewhere, potential U.S. corporate liability for ESG issues is more likely to develop through public nuisance or fraud cases.

This Article argues that the major movement in corporate criminal liability will come through charges of fraud. Private climate change securities litigation cases to-date mainly have been tag-on suits to these other claims.[175] Such suits thus act to magnify U.S. corporate liability for successful charges of fraud.[176]

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[171] ASA Ruling on Ryanair Ltd t/a Ryanair Ltd., at 4 (Feb. 5, 2020), .

[172] James Thornhill, *Gas Producer's Net Zero Pledge Challenged in Court by Activist*, BLOOMBERG.COM, August 26, 2021, https://www.bloomberg.com/news/articles/2021-08-26/gas-producer-s-net-zero-pledge-challenged-in-court-by-activist; *see also* Australasian Centre For Corporate Responsibility v Santos Limited (In House Counsel), Federal Court of Australia, New South Wales Registry, NSD858/2021, Aug. 25, 2021, https://www.comcourts.gov.au/file/FEDERAL/P/NSD858/2021/order_list.

[173] *See* Heesu Lee, *Gas Giant in Korea Accused by Activists of Greenwashing*, BLOOMBERG.COM, Dec. 22, 2021, https://www.bloomberg.com/news/articles/2021-12-22/gas-giant-in-korea-accused-by-activists-of-greenwash-advertising (noting that case will be pending before the Korea Fair Trade Commission and the Korean Ministry of Environment).

[174] *Id.*

[175] *See, e.g.,* Emily Strauss, *Climate Change and Shareholder Lawsuits* 4, 39-41 (2022), https://papers.ssrn.com/abstract=4174681 (finding, in its data set of climate-related shareholder lawsuits, that "most existing climate-related shareholder litigation consists of follow-on lawsuits" in the wake government or other market-disclosure action for misleading behavior). In addition, the current Article answers Strauss's paper's question "Where Are the 'Riverkeepers?,'" *id.* at 36, by showing why most other non-profit direct enforcement actions, such as in *Juliana*, *infra* at Part IIIA, have been unsuccessful.

[176] *See* Strauss, *supra* note 175, at 39; *see also* William B. Rubenstein, *On What A "Private Attorney General" Is-and Why It Matters*, 57 VAND. L. REV. 2129, 2149–50 (2004) (describing one of the functions of private suits as "increasing the intensity of the penalty wrongdoers must pay").

A. U.S. Courts' Reluctance to Acknowledge New Rights

U.S. courts are unlikely to follow the international pattern of finding ESG climate requirements to be enforced as fundamental rights. Indeed, U.S. courts seem reluctant to find the development of such new rights in general. For example, in the 2015 climate change case of first impression, *Juliana v. United States*,[177] U.S. Court of Appeals for the Ninth Circuit Judge Andrew Hurwitz objected to lead counsel that he was uncomfortable with the plaintiffs' arguments because "[y]ou're arguing for us to break new ground."[178]

Juliana had been filed on behalf of a group of young people who sued the U.S. federal government, President Obama, and executive agencies, alleging that the "defendants' actions violate [the plaintiffs'] substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations."[179] In 2020, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded *Juliana* on standing ground for failing to "establish[] that the specific relief [plaintiffs] seek is within the power of an Article III court."[180] Fundamentally, the appellate court objected that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan."[181] In 2021, the Ninth Circuit rejected rehearing of the case en banc.[182]

The *Juliana* case was brought under the public trust doctrine against the federal government to compel protective action. This set of arguments was similar internationally to the Nepalese Supreme Court case on *parens patriae* or the Belgium and Dutch cases on a breach of a government's duty of care.[183] But public trust arguments unavailing in a case against the government in the U.S. would be even more legally tenuous against a private company.

More common in the United States has been public nuisance tort suit against companies such as those that marketed tobacco and opiates (see *infra* at Part IIIB). The *Juliana* case had tried to make a similar case against the federal government in saying that it had ignored the danger of climate change impacts for years, failing either under a duty of care to the public or in the enforcement of international obligations. A fundamental problem, however, in compelling federal government

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[177] 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).
[178] Ricker, *supra* note 198 (quoting Judge Hurwitz on oral argument in 2019).
[179] *Juliana*, 217 F. Supp. 3d at 1233, *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).
[180] Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020), *re'hng denied en banc*, 986 F.3d 1295 (Feb. 10, 2021).
[181] *Id.*
[182] 986 F.3d 1295 (9th Cir., Feb. 10, 2021) (rejecting rehearing en banc).
[183] See discussion *supra* at Part II.

action according to any international obligations is that the United States has been cagey about putting its environmental commitments into legally enforceable form.

In addition, standing for civil plaintiffs to bring these cases has been a major problem in U.S. courts. According to a district court regarding a case modeled on *Juliana*, but filed in the Eastern District of Pennsylvania, despite plaintiffs' citing in "[a]pproximately half [of their] Amended Complaint . . . a recitation of domestic and international treaty provisions, studies, declarations, and administrative actions effected over the last fifty years addressing air pollution and climate change,"[184] plaintiffs lacked an enforceable claim under U.S. law for standing in federal court. Indeed, the court in *Clean Air Council v. United States*[185] seemed incredulous that the plaintiffs would want it to intervene to challenge government action on climate change.[186] The court cited solely the U.S. Supreme Court for its authority, and international commitments and violations of human rights from climate change seemed far from its consideration. As it wrote, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute."[187]

The *Clean Air Council* court was further harsh in its outright dismissal that fundamental climate change interest might be protected by U.S. law. In regard to the U.S. Constitution, although plaintiffs "argue that that their fundamental right to a life-sustaining climate system stems is such a liberty interest," the court wrote that "I do not agree."[188] Point-black, "[t]he Third Circuit has held that 'there is no constitutional right to a pollution-free environment.'"[189]

The court was reluctant to intervene in what it considered to be a "political" matter involving other branches of government. As it explains, "[b]ecause I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants' Motion [to dismiss the suit]."[190] Moreover, "I decline to arrogate to the Courts the authority to direct national environmental policy."[191]

Finally, the district court was dismissive of any alleged tie between government inaction and the plaintiffs' damages from climate change. As it wrote, "[p]lainly, the challenged actions have nothing to do

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[184] Clean Air Council v. United States, 362 F. Supp. 3d 237, 243–44 (E.D. Pa. 2019).
[185] 362 F. Supp. 3d 237 (E.D. Pa. 2019).
[186] *See id.* at 242.
[187] *Id.* at 244 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).
[188] *Id.* at 250.
[189] *Id.* (quoting Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1238 (3d Cir. 1980), *vacated on other grounds sub nom.*, Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).
[190] *Id.* at 242.
[191] *Id.* at 254.

with Plaintiffs' allergies and asthma."[192] And, later, about the plaintiffs' causal argument: "This is absurd."[193] The largest disconnect for the court was that the government was not primarily *emitting* greenhouse gases, according to the plaintiffs' arguments, private actors were.[194] For the court, this was simply a step too far: "Plaintiffs simply ignore that Defendant agencies and officers do not produce greenhouse gases, but act to regulate those third parties that do: innumerable businesses and private industries."[195] Generally, in U.S. federal law, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[196]

B. The Public Nuisance Tort Suit Approach

Although there may come a future wave of public nuisance tort suits against private industries,[197] many of the same standing issues as in *Juliana* and *Clean Air Council* will apply if plaintiffs cannot persuade U.S. courts to accept the basis of their claims, and to recognize that their damages are addressable. An American Bar Association publication has noted that, as of 2019, there were "a dozen major public nuisance climate change lawsuits pending in the United States."[198] At the time, '[m]ore than 1,300 climate cases have been brought in 29 nations around the world—more than 1,000 of them in the U.S."[199]

Among the most prominent of the public nuisance cases is the one filed in 2018 by the Mayor and City of Baltimore in Maryland state court against 26 multinational oil and gas companies alleging that they are partly responsible for climate change and should have to compensate the City in tort for the City's costs in responding to it.[200] What is interesting about the tort claim as expressed by the City is how much it actually sounds like a claim regarding misinformation or

[192] *Id.* at 248.
[193] *Id.* at 248.
[194] *See id.* at 249.
[195] *Id.*
[196] *Id.* at 251 (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 199–200 (1989)). Plaintiffs' arguments also failed to establish a "state-created" danger. *Id.* (noting that state-created danger and prison-created danger are two exceptions to this general rule).
[197] *But see* Strauss, *supra* note 175, at 36, *passim* (quantifying that these have not materialized in large numbers). In addition, this Article provides an explanation for why such suits may not materialize at the rate that might be otherwise expected, *infra* at Part IIIB.
[198] Darlene Ricker, *Lawyers Are Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change*, ABA JOURNAL, Nov. 2019.
[199] *Id.*
[200] *See* Plaintiff's Compl., Mayor & City Council of Balt. v. BP P.L.C., et al., Circuit Court for Baltimore City, Case No. 24-C-18-004219, July 20, 2018.

fraud.[201] In 2021, the U.S. Supreme Court overruled the Fourth Circuit's decision on removal to federal court, but it did not address the underlying allegations against the oil and gas companies.[202]

Another practical problem with public nuisance suits in torts is that they must show, as in the tobacco, opiate, and other litigation, that the companies involved fully understood how dangerous their actions were at the time, and they proceeded anyway. This knowledge may have been fully present in the fossil-fuel industry, for example, but it is harder to argue that most other sectors of the economy fully understood the dangers from climate change internally much before there was a public scientific consensus about it—and there still is, arguably, not a political public consensus on the issue in the United States with the repeated failure of most proposed climate change legislation at the federal level.[203]

However, U.S. law has been retreating from substantive regulation of many industries, and now primarily, in white collar crime, it polices what parties *say* instead of what they *do*. We turn next to show how, in this context, U.S. ESG cases may first cross the line into potential corporate criminal liability in the area of fraud.

IV.
CROSSING THE U.S. LINE INTO CRIMINAL PROSECUTION FOR FRAUD

When there is pressure to please the market and investors to make money, and companies are not honest about their products and processes to chase profits, fraud is likely to result. What is particularly interesting are recent developments in U.S. charges of criminal fraud for representations to investors.

In 2021-22, prosecutors tried high-profile criminal fraud cases against Elizabeth Holmes and Ramesh "Sunny" Balwani, Theranos's chief executive and its chief operating officer. The pair were charged with nine counts of fraud, and two counts of conspiracy to commit fraud—one against Theranos investors, and one against Theranos

[201] *See, e.g.,* Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020), *overruled on question of removal by* 141 S. Ct. 1532 (2021) ("Baltimore alleges that, despite knowing about the direct link between fossil fuel use and global warming for nearly fifty years, Defendants have engaged in a 'coordinated, multi-front effort' to conceal that knowledge; have tried to discredit the growing body of publicly available scientific evidence by championing sophisticated disinformation campaigns; and have actively attempted to undermine public support for regulation of their business practices, all while promoting the unrestrained and expanded use of their fossil fuel products.").

[202] *See* Mayor & City Council of Balt. v. BP P.L.C., 141 S. Ct. 1532 (2021).

[203] *See, e.g.*, Josh Lederman, *What the Collapse of Build Back Better Would Mean for Climate Change*, NBC NEWS, Dec. 19, 2021; Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR, Oct. 27, 2021.

doctors and patients.[204] The indictment cited the company's statements about its product and processes that were untrue, such as that it had "eliminat[ed] the need for larger needles and numerous vials of blood" in serving its customers.[205] The harm to investors was that "after receiving false and misleading statements, misrepresentations, and omissions from [the defendants]… Investors… initiated electronic wire transfers for the purpose of investing money in Theranos."[206]

Previous civil securities fraud charges had been brought against Holmes and the company, but they had been settled with the U.S. Securities and Exchange Commission (SEC).[207] The civil charges were similarly based on the defendants' raising money based on deceptive claims. As the SEC describes, they raised "$700 million from late 2013 to 2015 while deceiving investors…. They deceived investors by, among other things, making false and misleading statements to the media, hosting misleading technology demonstrations, and overstating the extent of Theranos' relationships with commercial partners and government entities, to whom they had also made misrepresentations."[208]

It is interesting that the government felt so strongly on these points that it pursued a criminal case with essentially the same arguments, even after achieving the civil settlement.[209] That decision is a forceful signal of how norms may be shifting around such behavior in misrepresenting information to investors.

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[204] *See* Indictment, United States v. Elizabeth A. Holmes and Ramesh "Sunny" Balwani, CR 18-00258 (N.D. Cal. June 14, 2018).

[205] *Id.* at 3.

[206] *Id.* at 6.

[207] *See* Complaint, United States v. Elizabeth Holmes and Theranos, Inc., No. 5:18-cv-01602 (N.D. Cal. March 14, 2018). "Sunny" Balwani did not settle with the SEC in his case. The Holmes and Theranos indictment alleges violations of Section 10(b) of the Exchange Act and Rule 10b-5, as well as violations of Sections 17(a)(1), (2), and (3) of the Securities Act.

[208] *Id.* at 2.

[209] Generally, we have thought of civil law as supplementing penalties provided by the criminal law, even as the criminal law expands. *See, e.g.*, Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions Symposium: Punishment*, 101 YALE L.J. 1895, 1895 (1992) ("The criminal law is now being used not only to imprison offenders but also to provide the basis for financial remedies, such as forfeiture, profit-fines, and restitution. Probation is being used to impose conditions on businessmen and corporations, making it the functional counterpart of injunctive remedies. And civil damage actions are being brought to supplement criminal cases-sometimes for treble damages or for punitive damages."). The blurring of the civil and criminal line continues, but it is interesting to see the government move in 'reverse' order of settling the civil action before pursuing a criminal one. Typically, it would be easiest to pursue the civil action *after* the criminal one, as the criminal one has the higher burden of proof and would make the civil action easier to follow as the second case. Trying the criminal case before a civil settlement would also give the government effectively a 'second bite at the apple' if it had any doubts about its ability to win the criminal case. Pursuing the criminal case after settling the civil case then appears to be more about sending a signal to the market and desire to label the underlying behavior as being criminal.

In 2022, the jury controversially found Holmes guilty on four of the counts regarding investors, but not on any of the counts regarding patients.[210] It may be that, under arguments regarding fraud, it is simply easier to show that the Holmes had communicated directly with investors as opposed to patients. Even though we may think that patients would have the more compelling emotional stories, it seems to be the cases to protect investors against fraud in the criminal context that may be easier for the government to win. Accordingly, in thinking about potential ESG criminal corporate liability for fraud, we should be thinking about the government bringing cases regarding investors first.

A. Potential Misrepresentations to ESG Investors

We do seem to see potentially serious misrepresentations to investors regarding ESG. As has been the pattern for other frauds that have been pursued criminally, there is a lot of money to be made, and significant potential lies about what people are doing to make that money.

i. Ratings Such as MSCI Across the Market

The facts supporting a prosecution for the use of misleading metrics,[211] such as the MSCI ratings used across the market, seem striking. In 2021, for example, news broke that one of the largest investment firms in the country, BlackRock, was driving investment into so-called "ESG" funds by "inserting its primary ESG fund into popular and influential model portfolios offered to investment advisers, who use them with clients across North America. The huge flows from such models mean many investors got into an ESG vehicle without necessarily choosing one as a specific investment strategy, or even knowing that their money has gone into one."[212]

Most importantly, for investors who think that their money is being channeled into an ESG fund, "the ratings BlackRock cites to justify

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[210] *See* Erin Griffith & Erin Woo, *Elizabeth Holmes Found Guilty of Four Charges of Fraud*, N.Y. TIMES, January 4, 2022, https://www.nytimes.com/live/2022/01/03/technology/elizabeth-holmes-trial-verdict. In July 2022, Ramesh "Sunny" Balwani was found guilty of two counts of conspiracy and ten counts of wire fraud. *See* U.S. Dep't of J., Press Release: Theranos Chief Operating Officer Ramesh "Sunny" Balwani Found Guilty of Conspiracy, Wire Fraud, July 8, 2022, https://www.justice.gov/usao-ndca/pr/theranos-chief-operating-officer-ramesh-sunny-balwani-found-guilty-conspiracy-wire.

[211] *See also* Virginia Harper Ho, *Sustainable Investment & Asset Management: From Resistance to Retooling* 26-28, *in* INVESTMENT MANAGEMENT, STEWARDSHIP AND SUSTAINABILITY (Iris Chiu & Hans-Christoph Hirt, eds., 2022) (noting how many ESG ratings and information disclosures are less than transparent and helpful to investors).

[212] Cam Simpson & Saijel Kishan, *How BlackRock Made ESG the Hottest Ticket on Wall Street*, BLOOMBERG.COM, December 31, 2021.

the fund's sustainable label have almost nothing to do with the environmental and social impact companies in the fund have on the world."[213] In fact, the ratings BlackRock is using were "primarily. . . designed to measure the opposite: the potential harm government regulations and other factors might cause to the companies' bottom line, especially when it relates to addressing climate change."[214]

The ratings firm MSCI, Inc., whose material dominates the world of sustainable investing, makes some forty cents out of every dollar spent in the market on ESG ratings,[215] and counts BlackRock as its largest customer. It has used its ratings to open "the door to [ESG-advertised funds] owning companies that have been among those considered the worst offenders by some investors focused on environmental and social responsibility."[216] Such companies that the funds have invested in include "fossil-fuel giants Chevron and ExxonMobil, along with Facebook (now called Meta Platforms), Amazon, McDonald's, and JP Morgan Chase, which is the biggest financier of fossil-fuel projects since the 2015 Paris [Climate] Accords."[217]

MSCI's rating system for ESG investments, according to MSCI—but not to BlackRock and the other companies that use it—is *not* supposed to "measure a company's impact on the Earth and society. In fact, [it] gauge[s] the opposite: the potential impact of the world on the company and its shareholders."[218] The rating company "doesn't dispute this characterization," and it "defends its methodology as the most financially relevant for the companies it rates."[219] Financial relevance here seems to mean overall profit, not the financial relevance of the ESG goals for which the ratings are being sold.

The misrepresentation of BlackRock's ESG-advertised fund based on MSCI's ratings as investing in companies that combat climate change is so significant that, in fact, BlackRock's "ESGU fund holds a heavier weighting in 12 fossil-fuel stocks than the S&P 500 does."[220]

BlackRock's ESGU fund (whose formal name is iShares ESG Aware MSCI USA), advertises that it provides exposure to "U.S. stocks

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[213] *Id.*

[214] *Id.*

[215] Cam Simpson, Akshat Rathi & Saijel Kishan, *The ESG Mirage*, BLOOMBERG.COM (quoting investment bank UBS Group AG's analysis).

[216] Simpson and Kishan, *supra* note 213.

[217] *Id.*

[218] Simpson, Rathi, and Kishan, *supra* note 215.

[219] *Id.* Mr. Henry Fernandez, chairman and chief executive of MSCI, fully admits that neither customers nor many portfolio managers using the company's ratings may understand how MSCI is defining "ESG" investments:

"No, they for sure don't understand that. . . . I would even say many portfolio managers don't totally grasp that. Remember, they get paid . . . . They're not as concerned about the risk to the world." *Id.* (quoting Mr. Fernandez).

[220] Simpson and Kishan, *supra* note 213 (citing Bloomberg Intelligence, the research arm of Bloomberg).

with favorable environmental, social, and governance (ESG) practices."[221] As reporters have noted, BlackRock "doesn't tell anyone what 'favorable practices' actually means."[222] On climate change, BlackRock's posted 2022 guidance does define "net zero" as "an economy that emits no more greenhouse gas than it removes from the atmosphere."[223]

A motivation for companies pushing ESG-advertised funds is that they typically generate higher fees for investment companies than non-ESG funds.[224] However, while customers may be paying these higher fees because they believe that they are helping the planet through their investment choices, their money is, in fact, instead often funding "emissions [to] continue to climb and social ills [to] grow."[225]

The reality of what is happening with money invested in so-called ESG funds may be a far cry from the language used to promote it. In 2018, Mr. Larry Fink, BlackRock's CEO had announced in his letter to investors that BlackRock was taking a higher moral ground.[226] As the *NYTimes* summarized, he "inform[ed] business leaders that their companies need to do more than make profits—they need to contribute to society as well if they want to receive the support of BlackRock."[227] The advertising has worked: in 2021, BlackRock was approaching U.S.$10 trillion assets under management, with a large part of its growth from ESG funds.[228] As one source explained, "[t]o put that number in perspective," as of 2020, "consider that only two countries—the U.S. and China—boast [a] higher GDP than $10 trillion."[229]

As BlackRock's former chief investment officer for sustainable investing describes, inside the company, the materials he received to promote ESG funds were simple, "even if that meant glossing over how it directly contributed to fighting climate change, which was always hard to explain and at best a bit uncertain."[230] As he explains a basic truth: "there's always money to be made from telling people what they want to hear."[231] In 2021, ESG-advertised funds were "the fastest-

[221] Simpson, Rathi, and Kishan, *supra* note 216.
[222] *Id.*
[223] Gargi Pal Chaudhuri, *iShares 2022 Outlook and ETF Investment Guide*, BLACKROCK, December 13, 2021, https://www.ishares.com/us/insights/ishares-2022-outlook-and-etf-investment-guide.
[224] *See* Simpson and Kishan, *supra* note 131 (citing Tariq Fancy, BlackRock's former chief investment officer for sustainable investing).
[225] *See id.* (same).
[226] *See* Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES, Jan. 16, 2018.
[227] *See id.*
[228] *See* Palash Ghosh, *No End In Sight To BlackRock's Growth as It Approaches $10 Trillion*, PENSIONS & INVESTMENTS, Nov. 19, 2021.
[229] *Id.* (citing World Bank data).
[230] Fancy, *supra* note 233.
[231] Tariq Fancy, *The Secret Diary of a 'Sustainable Investor'—Part 2*, MEDIUM, Nov. 8, 2021.

growing segment of the global financial-services industry, thanks to marketing built on dire warnings about the climate crisis, wide-scale social unrest, and the pandemic."[232]

The hypocrisy of that misrepresentation to investors has turned BlackRock's former chief investment officer for sustainable investing into a fierce critic of current ESG investing.[233] He explains that his "thinking [has] evolved from evangelizing 'sustainable investing' for the world's largest investment firm to decrying it as a dangerous placebo that harms the public interest."[234]

The MSCI and BlackRock ESG story may be one of the many examples that draw regulators to consider pursuing fraud charges, and potentially charges for criminal fraud, for the differences between what the companies represent that they are doing with investors' money, and what they have actually been doing with those funds.

ii. Consumer Products

Additional issues around advertising of consumer products have already drawn potential civil liability for misrepresenting information to consumers, but they could draw more serious sanctions if direct investor cases prove successful.

One example of misrepresentation to consumers regarding ESG is fast-fashion brand H&M's promotion of its "Conscious" clothing line that was criticized in 2019 by the Norwegian Customer Authority for giving the "misleading" impression that it had environmental benefits.[235] H&M had promised customers that "every piece in the collection is made from a sustainably sourced material, such as 100 per cent organic cotton, Tencel or recycled polyester," and that its premium Conscious Exclusive collection "explore[s] the healing power of nature, while also embracing innovation with sustainable materials and processes for a more sustainable fashion future."[236] According to the Norwegian Authority, H&M's marketing was "misleading" because it "contain[ed] false information and is therefore untruthful." It found H&M to be in violation of Norwegian marketing laws, and it was in consultation with the company about the information that H&M needed to provide to be in compliance.[237]

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[232] Simpson, Rathi, and Kishan, *supra* note 216.
[233] *See, e.g.,* Tariq Fancy, *The Secret Diary of a 'Sustainable Investor'—Part 1*, MEDIUM, Aug. 20, 2021.
[234] *See, e.g., id.*
[235] *See* Natashah Hitti, *H&M Called Out for "Greenwashing" in Its Conscious Fashion Collection*, DEZEEN, August 2, 2019, https://www.dezeen.com/2019/08/02/hm-norway-greenwashing-conscious-fashion-collection-news/.
[236] *Id.*
[237] *See id.*

Another example from the U.S. is the June 2021 Earth Island Institute's case against Coca-Cola for "false and deceptive marketing representing itself as a sustainable and environmentally friendly company."[238] By 2020, Coca-Cola had been ranked the worst plastic polluter on the planet three years in a row, and, in that year, it had eclipsed the combined plastic pollution of the next two companies, combined.[239] In August 2021, Earth Island Institute filed a similar lawsuit against BlueTriton Brands, formerly Nestlé Waters North America.[240]

B. Warnings About Individual Liability

Corporate liability is often easier to prove than individual liability,[241] so it is significant that the people being asked to make ESG statements or set policy on behalf of companies are particularly concerned. The U.S. Department of Justice has a general policy that it will attempt to pursue individual cases of wrongdoing in addition to attempting to impose corporate liability.[242] The individual Theranos verdicts against Holmes and Balwani are also evidence of this trend.[243]

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[238] Complaint, Earth Island Institute v. The Coca-Cola Company, Superior Court of the District of Columbia, 2021 CA 001846B at 1, June 8, 2021, https://www.earthisland.org/images/uploads/suits/Earth.Island_.v_._Coca-Cola_.Complaint_.(stamped)_.pdf.

[239] *See* Tanuvi Joe, *Earth Island Sues Coca-Cola Over Greenwashing Claims & False Advertisement*, GREEN QUEEN, June 11, 2021, https://www.greenqueen.com.hk/earth-island-sues-coca-cola-over-greenwashing-claims-false-advertising/ (citing data from the Break Free From Plastic Global Cleanup and Brand Audit).

[240] *See* Complaint, Earth Island Institute v. BlueTriton Brands, Superior Court of the District of Columbia, 2021 CA 003027B, Aug. 27, 2021, https://www.earthisland.org/advocates/EarthIslandInstitute-v.BlueTritonComplaintPacket.pdf; *see also generally* Deena Robinson, *10 Companies and Corporations Called Out For Greenwashing*, EARTH.ORG (2021), https://earth.org/greenwashing-companies-corporations/.

[241] *See generally, e.g.*, John C. Coffee, Jr., *Does Unlawful Mean Criminal: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193–246, 195 (1991) ("Essentially, corporate criminal liability [at least as recognized in the United States] is a species of vicarious criminal liability; that is, the principal is held liable for the acts of its agent—even when the principal makes a substantial good faith attempt to monitor the agent and prevent the illegality.").

[242] *See, e.g.*, U.S. Dep't of J., Justice Manual, Tit. 9: Criminal, 9-28.210–Focus on Individual Wrongdoers, A. General Principle, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210 ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation…. Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.") (current as of 2022).

[243] *See* discussion *supra* at Part IV and nn. 204-208.

i. Compliance Officers

Given the increasing volatility around ESG, some compliance officers and in-house counsel are concerned about their personal involvement.

U.S. businesses have been asking their compliance officers to be the face and enforcement personnel for ESG initiatives.[244] As one sustainability director who used to work in the oil-and-gas industry explains, "[a] compliance officer is viewed as a leader in ethics, in good corporate practices…. Right there, they have a role in disclosing internally to employees and to the market about why they are a responsible corporation."[245]

In a 2021 Stanford-Law-School-based survey of corporate general counsel and senior legal officers, over three-quarters (seventy-eight percent) of respondents report that they have been under increasing pressure in the last three years to grow ESG efforts.[246] Up to half of respondents, however, fear that increasing ESG efforts may lead the company to incur legal or regulatory harms.[247] That result could put their jobs at risk.

In 2022, a Harvard Law School and EY joint survey of over one thousand general counsel finds similar concerns about the changing nature of their jobs, with respondents placing fears of pressure from investors and regulators at the top of their lists.[248] They are most worried about the amorphous nature of regulation around ESG. Ninety percent of law departments are concerned about "creating policies where there are no specific regulations connected to environmental issues."[249]

Compliance officers' concerns center on enforcement of the securities laws—which would include their statements about ESG initiatives.[250] In 2021, the New York City Bar Association asked the SEC

[244] *See, e.g.*, Dylan Tokar, *Compliance Officers Play Growing Role in Corporate Sustainability Efforts*, WALL ST. J., May 4, 2021, https://www.wsj.com/articles/compliance-officers-play-growing-role-in-corporate-sustainability-efforts-11620136800.

[245] *Id.* (quoting Taylor Pullins, former sustainability director for Noble Energy Inc.).

[246] *See* MICHAEL CALLAHAN, DAVID F. LARCKER & BRIAN TAYAN, *The General Counsel View of ESG Risk* 2 (2021), https://papers.ssrn.com/abstract=3923913. It is interesting to see a breakdown in the survey about where this pressure is coming from. It seems to be often a combination of employees, institutional investors, customers, and third-party advocacy groups, as well as ESG ratings firms. *See id.* (providing breakdown numbers).

[247] *See id.* at 2.

[248] *See* EY & CTR. ON THE LEGAL PROF., HARV. L. SCH., 2022 GENERAL COUNSEL SUSTAINABILITY STUDY 5-6 (2022), https://www.ey.com/en_gl/law/how-the-law-department-is-key-in-unlocking-your-sustainability-strategy (download study at link).

[249] *Id.* at 9.

[250] *See* Mengqi Sun, *Proposed Framework Aims to Guide Regulators in Decisions to Charge Chief Compliance Officers*, WALL ST. J., June 4, 2021, https://www.wsj.com/articles/proposed-framework-aims-to-guide-regulators-in-decisions-to-charge-chief-compliance-officers-11622850144.

to adopt a framework to quell members' fears "in deciding whether to charge chief compliance officers for conduct relating to their job-related duties under federal securities laws."[251]

ii. Corporate Directors

Professor Cynthia Williams and lawyers for the Commonwealth Climate and Law Initiative make the case in their 2021 report that failure to adequately address climate change risks could eventually also be the foundation for individual suits against directors for violations of their fiduciary duties.[252] They argue that, under U.S. Delaware law, directors should be concerned about a potential breach of the duty of loyalty if the corporation that they serve "were to suffer harm due to climate-related risks and the director or officer had failed to adequately consider relevant issues. . . or acted impermissibly in respect to a conflict of interest."[253] In addition, directors should be concerned about being "exposed to liability for a breach of their duty of care if they made a decision regarding climate change risks or opportunities in a grossly negligent, or uninformed, manner."[254]

They argue that the emergence of these potential liabilities for directors is yet another reason why companies should understand it to be good corporate governance to be proactive in addressing the risks of climate change.[255]

Other countries, however, such as Singapore, appear to be far ahead of the United States in enforcing potential individual liability for climate change against directors, including personal criminal liability. According to a 2021 legal opinion, "various statutes that impact on climate change specifically provide that directors are criminally liable if their respective companies are guilty of breaching the provisions of those laws."[256] The report lists "the Carbon Pricing Act (Act 23 of 2018) ("CPA")), the Energy Conservation Act (Cap92C, 2014 Rev Ed), the Transboundary Haze Pollution Act (Act 24 of 2014), and the Resource Sustainability Act of 2019 (Act 29 of 2019)."[257] It advises that "[m]any provisions in these legislative instruments criminalize various activities which may adversely affect the environment and directly or indirectly

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[251] *Id.*

[252] *See* Sarah Barker, Cynthia Williams & Alex Cooper, *Fiduciary Duties and Climate Change in the United States*, COMMONWEALTH CLIMATE AND LAW INITIATIVE, 4 (2021).

[253] *Id.*

[254] *Id.*

[255] *See id.* at 10–11, 45–47.

[256] JEFFREY W T CHAN ET AL., *Legal Opinion on Directors' Responsibilities and Climate Change Under Singapore Law*, 5 (2021), https://www.pdlegal.com.sg/wp-content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-Under-Singapore-Law-1.pdf.

[257] *Id.* at 14.

contribute to climate change."[258] Such violations are "punishable with substantial fines and/or imprisonment."[259]

To show how far Singapore has developed in the direction of personal criminal liability for climate change, the net for sweeping in responsible officers is very broad. Personal criminal liability may rest on any "officer of the corporation or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation."[260] It may be triggered when such a person "knew or ought reasonably to have known that the offense by the corporation . . . would be or is being committed, and failed to take all reasonable steps to prevent or stop the commission of that offense."[261] The person would then be "guilty of the same offense as the corporation."[262]

Singapore's "increasingly strict stance on potential criminal liability" allows the imposition of liability from "even [an] *omission* by directors in a situation where they only *ought reasonably to have known* that an offense was being committed."[263] Along these lines, directors can be personally criminally liable in Singapore "if they fail to ensure that their companies have in place principles and systems for compliance" with climate change laws.[264]

V.
WHY IT MIGHT BE FRAUD PROSECUTIONS THAT MOVE FASTEST IN THE U.S.

Insofar as the U.S. advances business liability for climate change, it may be through prosecutions for fraud. This Part discusses the nature of federal prosecutions for fraud, the doctrinally slippery slope in fraud between civil and criminal enforcement, recent political and economic pressures around fraud as it relates to climate change, and finally, signs of movement on fraud prosecutions against U.S. corporations.

A. The Nature of Fraud Prosecutions

Although there are good arguments that the U.S. in particular does not have a credible system of white collar criminal enforcement,[265]

[258] *Id.*
[259] *Id.*
[260] *Id.* at 20–21.
[261] *Id.* at 21 (quoting CPA section 62(2)(b)(iii); italics in original redacted).
[262] *Id.*
[263] *Id.* (emphasis in original).
[264] *Id.* (emphasis in original).
[265] *See, e.g.*, Mihailis Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 43 J. CORP. L. (forthcoming 2022) (arguing that "[t]he biggest corporate criminals

what the country does tend to have is built around what entities *say* instead of what they *do*.

The practical issue is that we tend not to pass new statutes that contain substantive regulation of business behavior—for example, outlawing the actual use of production techniques that damage the environment.[266] That would take consensus on banning a practice, which industry and labor may fight, and the hiring of inspectors and other personnel who would have to enforce it.[267]

Instead, what we tend to do, as with the 2022 Inflation Reduction Act,[268] is either use "carrots" to change the relative price of practices by flooding the market with subsidies[269]—or we insist that companies disclose their practices on an issue, with the assumption that the market will discipline companies and punish them through their reputations.[270] But flooding the market with subsidies without many controls, as the U.S. did with pandemic spending, leads to large amounts of fraud.[271] In addition, the consensus of empirical work on market disclosures to enforce ethical behavior shows that they do not work to protect others from corporate misbehavior.[272]

In the U.S., merely enforcing disclosures on climate change becomes a political dodge for Congress not to have to set actual goals for business emissions reductions.[273] This allows politicians to side-step arguments that businesses continue to make about the validity of the science—and fail to acknowledge that businesses have funded science to deny climate change to extract profits by taking advantage of political

routinely side-step all criminal procedure and any possibility of conviction by cutting deals with prosecutors, trading paltry fines and empty promises of reform for government press releases praising their cooperation"); John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, J. CORP. L. (2021) (arguing that corporate criminal liability creates "an extremely expensive and wasteful compliance industry that serves no useful purpose").

[266] *See, e.g.*, discussion of the U.S.'s "all carrots, no sticks" approach toward business regulation, *supra* at Part IA and nn. 89–91.

[267] *See id*.

[268] *See* discussion *supra* at Introduction and nn. 20-22.

[269] *See id*.

[270] *See, e.g.*, Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 395 (2004) (describing how "the traditional law and economics model of corporate disclosure" posits that "firms have strong incentives to disclose information in order to distinguish themselves from poorly performing rivals," and that "[f]ear of negative sanctions" should prevent "firms from misrepresenting their corporate performance.").

[271] *See, e.g.*, David A. Fahrenthold, *Prosecutors Struggle to Catch Up to a Tidal Wave of Pandemic Fraud*, N.Y. TIMES, Aug. 16, 2022, https://www.nytimes.com/2022/08/16/business/economy/covid-pandemic-fraud.html ("[The pandemic] dollars came with few strings and minimal oversight. The result: one of the largest frauds in American history, with billions of dollars stolen by thousands of people.").

[272] It is an important, though separate, discussion that the market does not discipline companies as we imagine that it should. *See, e.g.*, Nelson, *Disclosure-Driven Crime*, *supra* note 90, at 1523-24 (describing and citing research from finance and other disciplines).

[273] *See, e.g.*, discussion of the U.S.'s "all carrots, no sticks" approach toward business regulation, *supra* at Part I.A, Part V.A and nn. 89–91, 269.

paralysis.[274] Limiting arguments to disclosure also enables businesses to refrain from doing a key part of company management in the rest of the world: determining what efforts the business can implement for itself to meet global goals.[275]

So, for both performative purposes and short-term profit, U.S. businesses have an incentive to lie.[276] It is often cheaper to tell the government and other oversight organizations that companies have made changes, than for them to make such changes. A classic example is the 2015-17 Volkswagen emissions cheating scandal. Even when the company was held liable for lying about its compliance with emissions standards, it never developed so-called "clean diesel" technology, and it escaped liability for the estimated 12,000 additional deaths that its violation of diesel emissions standards may have caused each year.[277]

Furthermore, businesses recognize that there has been a hollowing out of U.S. regulatory resources, and a decision since at least the 1990s that the U.S. government effectively permits companies to regulate themselves.[278] U.S. regulators largely police compliance by disciplining companies that do not do what they say that they do. That approach polices what such entities *say*, rather than spending resources to find out what they actually *do*.

Another serious problem with this approach is that it overly relies on whistleblowers and the media to reveal corporate misconduct. Data show that local media across the United States are disappearing, with thousands of local media companies being bought up.[279] Often,

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[274] *See, e.g.*, Robinson Meyer, *It Wasn't Just Oil Companies Spreading Climate Denial*, THE ATLANTIC, Sept. 7, 2022; *see also* discussion of ExxonMobil's efforts *infra* at Part VD.

[275] *See* Jennifer Howard-Grenville et al., *Climate Change and Management*, 57 ACAD. OF MGMT. J. 615 (2014) (describing in the premier journal of the Academy of Management the broad significance of climate change on the world of management and managers); *cf.*, Lisa Friedman, *Executives Call for Deep Emission Cuts to Combat Climate Change*, N.Y. TIMES, Apr. 13, 2021, https://www.nytimes.com/2021/04/13/climate/business-executives-climate-change.html (noting that more than three hundred corporate leaders asked the Biden administration to nearly double the emission reduction targets set by the Obama administration); Andrew Winston, *What 1,000 CEOs Really Think About Climate Change and Inequality*, HARV. BUS. REV., 2019, https://hbr.org/2019/09/what-1000-ceos-really-think-about-climate-change-and-inequality (describing, as part of the study of CEOs, that "94% feel a personal responsibility for laying out their company's core purpose and role in society").

[276] *See generally, e.g.,* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 1 (2021).

[277] *See* Nelson, *supra* note 23 at 1495; Sarah Knapton, *Volkswagen Scandal: Nearly 12,000 Deaths Could Be Avoided If Industry Met Emissions Targets*, TELEGRAPH, Sept. 22, 2015.

[278] *See, e.g., Arguments for Various Models*, COMPLIANCENET CONFERENCE (June 29, 2021), https://www.compliancenet.org/2021. As a former Managing Director of Goldman Sachs, Robert Mass, explained "I remember talking to a regulator, and saying 'this looks to me like you're taking an obligation that was traditionally the government's obligation and basically saying you now have to do it.' And she said 'Absolutely. We've written the rules precisely to put it on you.'" *Id.* at 23:19.

[279] *See* PENELOPE MUSE ABERNATHY, *News Deserts and Ghost Newspapers: Will Local News Survive?* (2020).

among the first services not to be funded after acquisition of a local media company is investigative reporting, which is vital to holding entities accountable for their actions in a community.

Meanwhile, the SEC and other agencies encourage whistleblowing by employees and parties with knowledge of misconduct, but whistleblowers' careers are often destroyed—a particularly dangerous outcome when they may be among the most ethical people in the company or industry.[280] Whistleblowers face financial hardships with little reasonable possibility of winning an award in a timely way or at all.[281]

Terror of whistleblowing also prompts companies to treat employees as potential enemies, and poisons relationships in the workplace. Consider, for example, in 2021, after whistleblower Frances Haugen disclosed tens of thousands of documents showing that Facebook knew that its products caused harm and that the company had misrepresented itself to the public, one of the first things that Facebook (now Meta) did was to cut off other employees' access to similar information inside the company.[282] In 2022, Meta disbanded the unit entirely.[283]

Although imposing corporate criminal fraud liability for what businesses say they will do should theoretically make U.S. companies less willing to announce initiatives to address climate change, there is so much money to be made in the market for ESG investments that companies seem to be making these statements on climate change anyway.[284]

On the international stage, U.S. businesses may make less progress by holding themselves to weaker standards on reducing pollution. There is market pressure, however, to out-do others by boasting big.[285] What we can see are the outcomes: although the U.S. appears closer to its promised emission reductions through other

[280] *See, e.g.*, Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 668-69 (2018) (describing multiple impacts of discrimination on whistleblowers' careers).

[281] *See, e.g.*, Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2217 (2017) (documenting that "the percentage of tips that result in a financial recovery warranting a whistleblower reward. . . registers just below 0.2%").

[282] *See* Deepa Seetharaman, *Facebook Limits Employee Access to Some Internal Discussion Groups*, WALL ST. J., Oct. 14, 2021, https://www.wsj.com/articles/facebook-limits-employee-access-to-some-internal-discussion-groups-11634171786. Facebook's justification was that "[l]eaks decrease the effectiveness, efficiency, and morale of the teams working every day to address the challenges that come with operating a platform for billions of people." *Id.*

[283] *See* Jeff Horwitz, *Facebook Parent Meta Platforms Cuts Responsible Innovation Team*, WALL ST. J., Sept. 8, 2022, https://www.wsj.com/articles/facebook-parent-meta-platforms-cuts-responsible-innovation-team-11662658423.

[284] *See, e.g.*, discussion of the money to be made from ESG-labeled investments, *supra* at Part IA, and nn. 85–92.

[285] *See, e.g.*, discussion of BlackRock's market strategy, *supra* at Part IVA, and nn. 226–234.

economic factors, which tend to be global, such as the Covid-19 pandemic and the relative price of energy markets, as of 2022, its efforts will fall short of the Paris Agreement to stay under a one-and-a-half-degree-warming cap.[286]

Corporate prosecutions have become "unbound," as Professor Miriam Baer notes, in that prosecutors, faced with corporate misrepresentations and little substantive law, try to use what law exists to go after misstatements and other poor behavior.[287] Professor John Coffee, Jr. is also correct that U.S. prosecutors have similarly distorted the boundaries of tort and criminal law to prosecute behavior as criminal that may previously have been civilly fraudulent.[288] And Professors Mihailis Diamantis and W. Robert Thomas are correct when they say in 2021 that the mess of this system means that the U.S. does not have a principled corporate criminal law.[289]

Despite the fact that criminal penalties continue to increase, shfiting criminal law to rely on statements in the ESG context is weakening the coherent impact of the law. The traditionally stronger substantive prohibitions of criminal law have become obfuscated by smokescreens of disclosure and ad-hoc application.

Disclosure in civil law is the abdication of values by the state and the delegation of those values to the marketplace. Disclosure used to be one of the features that distinguished civil regimes from criminal ones. As Professor Kevin Davis writes in the context of debates around the passage of the Foreign Corrupt Practices Act, civil "[d]isclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large. What disclosure does not entail is explicit denunciation by the state; under a disclosure regime, denunciation is outsourced to society as a whole."[290]

Academics criticize the collapse of distinctions in the law for criminalizing what would otherwise have been civil actions.[291] But this

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[286] *See, e.g.*, USA, CLIMATE ACTION TRACKER, https://climateactiontracker.org/countries/usa/ (last visited Sep 7, 2022). *Cf. also generally* Virginia E. Harper Ho & Stephen Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PENN. J. OF INT'L L. (2019) (articulating frustration with the ultimate limits of private ordering without substantive regulation).

[287] Miriam Baer, *Corporate Criminal Law Unbounded*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 475, 476 (Wright et al., eds., 2021).

[288] *See* Coffee, *supra* note 241, at 194.

[289] Diamantis & Thomas, *supra* note 245, at 3.

[290] Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 500 (2012).

[291] *See, e.g.*, Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. 1483, 1516 (2022) (disapproving that "[e]ven a non-authoritarian observer might be tempted to say that criminal defendants—not because of but regardless of their race or class—are by and large guilty of a crime and thus are rule breakers against whom obedience can justifiably be

is a weakening and destabilization of the criminal law, even with its larger penalties—not a sign of its strength. In continuing to emphasize the disclosure approach of civil law, criminal law is increasingly diminished in its substantive prohibitions.[292] Especially as relates to ESG, criminal law is being limited in its reach to cover what used to be primarily civil. This is a sad reverse implication of Professor Coffee's observation about "the disappearance of any clearly definable line between civil and criminal law."[293]

B. Doctrinally Slippery Fraud Prosecutions

As many other parts of white collar law fail to retain their bite, fraud—based largely on statements—remains a malleable concept in white collar crime, and an easier basis for prosecutions than many other grounds.[294] As Professor Buell describes, "[i]f malfeasance in the business world has a single concept at its core, it is fraud."[295] Fraud, he concludes after a survey of its origins and applications, "is deception, with the getting of something from another as the object of the deception."[296] In the "intentional and wrongful deception worked upon the fraud victim—either a lie or the concealment of important information that the seller was obligated to disclose"—the lie or omission is key.[297]

The DOJ's own journal provides a nice summary of the dilemmas that prosecutors often find themselves in when prosecuting white collar cases. It is not an accident that its general discussion of white collar

enforced."); Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 720 (2013) (raising concerns when "the penal code regulates too much conduct that is beyond the common law definitions of crimes or that is not inherently blameworthy"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (protesting that "criminal law [has] come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over"); *cf.* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1196 (2015) (theorizing that "[o]vercriminalization increases criminal behavior by lessening the legitimacy of the criminal law, which fuels offender rationalizations").

[292] *Cf., e.g.*, Stuntz, *supra* note 291, at 509 (noting in 2001 that "[t]he end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments. We have not reached that point yet; substantive criminal law has not wholly ceased to operate. But we are closer than we used to be—the movement is very much in that direction.").

[293] Coffee, *supra* note 241, at 193.

[294] *Cf. also generally* Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022) (noting the weakening of white collar crime across the board).

[295] SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 32 (2016) [hereinafter CAPITAL OFFENSES].

[296] *Id.* at 44.

[297] *See id.* at 60.

crime continually refers to standards and strategy for fraud—in some places, four times within a few sentences.[298]

Professor Ellen Podgor's research on criminal fraud reveals how imprecise the charge is. As she writes, although "[t]he focus of many white collar criminal offenses is fraud[,] . . . fraud is not a crime with prescribed elements."[299] Fraud is instead a "'concept' at the core of a variety of criminal statutes."[300] Application of fraud charges has been growing as "generic statutes such as mail fraud and conspiracy to defraud [are] being applied to an ever-increasing spectrum of fraudulent conduct."[301]

Turning to common-law precedent as a source to understand fraud in U.S. federal law, Professor Podgor concludes: "The 'classic definition' of fraud in English law focuses on 'deceit' or 'secrecy.' In United States federal criminal law[,] the term is often synonymously used with the term 'deceit.' Deception is also the focus of [U.S.] civil fraud."[302] As long as the term has focused on falsehoods—lies and, at times, omissions[303]—"the law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."[304]

There are distinctions to be made between the prosecution of the corporation versus individuals within the corporation. As Professor Buell notes, it "is the nature of the corporation . . . to divide and diminish responsibility."[305] That division and diminishment of responsibility includes not only the protection of investors behind limited liability for loss of their assets in the corporation, but also the division and diminishment of responsibility for misconduct by agents of the corporation on the corporation's behalf.[306] Abuse of the corporate form has evolved for large-scale entities.[307] Rather than a single person hiding abuse through his control of the entire corporate form, the corporation hides its abuse by delegating to its agents pieces of abusive behavior.[308]

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[298] Kirsch II and Hollar, *supra* note 7, at 7–8.

[299] Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 730 (1999).

[300] *Id.* (citing ANTHONY ARLIDGE ET AL., ARLIDGE & PARRY ON FRAUD 33 (2d ed. 1996)).

[301] *Id.* at 730-31.

[302] *Id.* at 737 (internal citations omitted).

[303] *See* BUELL, CAPITAL OFFENSES, *supra* note 295, at 60.

[304] Podgor, *supra* note 299, at 739 (quoting Judge Holmes in *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)).

[305] BUELL, CAPITAL OFFENSES, *supra* note 295, at 24.

[306] *See* J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L. J. 871, 892-93, 898-99 (2017) [hereinafter *Paper Dragon Thieves*]; *accord* Peter J. Henning, *Why It is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503 (2017).

[307] Nelson, *Paper Dragon Thieves*, *supra* note 306, at 884; *id.* at 901-08 (providing examples); *id.* at 909-21 (describing resulting problems with application of conspiracy law).

[308] *Id.* at 884, 901-02. There is also an interesting note in the DOJ's Journal that "*Pinkerton*

Even in attempted prosecutions of top executives, the former U.S. Deputy Attorney General describes how "[b]lurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme."[309]

In regard to the corporation itself, Professor Jennifer Arlen notes that "a rule of 'pure strict vicarious criminal liability' best approximates the existing law governing corporate criminal liability, especially for those crimes which are of particular concern, such as securities fraud, government procurement fraud, and antitrust violations."[310] As Professor Vikramaditya Khanna refines the rule's impact for management, "[u]nder respondeat superior, top management's involvement does not influence whether the corporation will be liable, but it does influence for *how much* the corporation will be liable."[311] Moreover, he notes, "top management's involvement in wrongdoing also increases the prospect of liability for regulatory violations."[312]

Regarding individuals, although Professor Buell does not believe that "individual criminal liability, in its basic structure . . . fit[s] the problem of bad management that produces corporate crime,"[313] to the degree that representatives of the corporation may be individually liable, he returns to the tool of fraud.[314] He notes that, "[i]n cases of fraud by affirmative misrepresentation, this requirement generally includes that the defendant knew she was uttering falsehood," although "[s]ome federal cases have suggested recklessness as to falsity might be sufficient for criminal liability."[315] Meanwhile, "[l]aws that police honesty in dealings with the government usually authorize criminal

instructions are particularly useful in corporate conspiracy cases, because they allow decision-makers to be held responsible for the reasonably foreseeable actions of their subordinates." Kirsch II & Hollar, *supra* note 4, at 11 (citing *United States v. Sullivan*, 522 F.3d 967, 977 (9th Cir. 2008) for "upholding advertising agency CEO's fraudulent concealment conviction based on Pinkerton theory").

[309] Sally Q. Yates, Deputy Attorney Gen., Remarks at the N.Y.C. Bar Ass'n White Collar Crime Conference, May 10, 2016.

[310] Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUDIES 833, 840 (1994) [hereinafter *Potentially Perverse Effects*].

[311] Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1220 (2003).

[312] *Id.* at 1222.

[313] Samuel W. Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 59, 85 (Jennifer Arlen ed., 2018) [hereinafter *Criminally Bad*].

[314] *See* BUELL, CAPITAL OFFENSES, *supra* note 295, at 16; *see id.* at 51; Buell, *Criminally Bad*, *supra* note 313, at 71 (citing 18 U.S.C. §§ 201, 666 (2018); United States v. Bonito, 57 F.3d 167 (2d Cir. 1995)).

[315] Buell, *Criminally Bad*, *supra* note 313, at 71.

sanctions only upon proof that an individual knew of the falsity of, for example, a regulatory filing."[316]

Finally, there are a growing number of cases being brought by federal prosecutors under 18 U.S.C. § 1348, which is modeled on the bank fraud statute[317] but penalizes securities and commodities fraud.[318] The importance of Section 1348 being modeled on the bank fraud statute, and not on mail, wire, or traditional securities fraud, is that appellate courts are holding that it reaches securities and commodities schemes in which there is no evidence of direct misrepresentations or material omissions with a duty to disclose.[319] This provides prosecutors more flexibility to charge fraud criminally as a basic concept in relations with investors.

C. Political and Economic Pressures Around Fraud

By 2018, government prosecutions against white collar crimes had fallen to their lowest level in twenty years.[320] During the first year of the Trump administration, DOJ's fines against corporations fell off ninety percent.[321] In addition, Professor Brandon Garrett notes that "most of the cases with large penalties in the first twenty months of the Trump Administration were legacy cases that had been initiated and investigated under the Obama Administration."[322]

What should make us think that government prosecutions of white collar crime should pick up, especially in the area of fraud as a low-hanging fruit?

First, there is increasingly realization that asking corporations to police themselves is not working particularly well. According to Professor Eugene Soltes in 2021, if we measure the pervasiveness of illegal conduct from the likelihood that a large, publicly traded firm "would be criminally sanctioned by the Department of Justice (DOJ) or face a civil enforcement action for accounting matters by the Securities and Exchange Commission (SEC)," those numbers would be "0.5 per

316 *Id.*

317 *See* 18 U.S.C. § 1344 (2021).

318 *See, e.g.*, Sandra Moser & Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, 66 DOJ JOURNAL OF FED. L. AND PRAC. (SPECIAL EDITION ON CORPORATE CRIME) 111, 111–12 (2018).

319 *See id.* at 113–19. (describing federal court decisions around the country). As the statute's legislative history records, it was passed to "provide needed enforcement flexibility in the context of publicly traded companies to protect shareholders and prospective shareholders against all the types of schemes and frauds which inventive criminals may devise in the future." 148 Cong. Rec. S7421 (daily ed. July 26, 2002), https://www.congress.gov/crec/2002/07/26/CREC-2002-07-26.pdf.

320 *White Collar Prosecutions Fall to Lowest in 20 Years*, TRAC REPORTS.

321 Jamiles Lartey, *Corporate Penalties Dropped as Much as 94% Under Trump, Study Says*, GUARDIAN, July 25, 2018.

322 Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 47, 115 (2020).

cent and 1.1 per cent, in a given year."[323] The likelihood that such a firm is civilly sued for alleged misconduct is under five percent per year.[324]

Meanwhile, benchmarking data from the internal reports of large firms indicate that they have around 124 substantive reports of legally actionable misconduct per year, or, on average, once every three days.[325] Using all available public data sources, this would indicate on the order of merely one-out-of-nearly-thirteen (12.8) incidents being reported, or ninety-two percent of incidents not being reported.[326] In 2018, using another data set of 608 firms, Professors Paul Healy and George Serafeim record that only seventeen percent of firms (104 in 608) reported internal violations to regulators at all.[327]

Similarly, although it is difficult to collect accurate statistics on precisely how much white collar crime occurs each year, according to victimization studies, people and businesses are far more likely to be victims of white collar crime than of either traditional property crime or violent crime. In a 2018 publication, thirty-five percent of businesses, and twenty-five percent of households, reported that they have been victims of white collar crime.[328] Victimization rates for property crime and violent crime, by contrast, are eight percent and a little over one percent.[329] Accordingly, nearly four-and-a-half times as many businesses have been victims of white collar crime as of general property crime, and nearly twenty-five times as many households have been the victims of white collar crime as of violent crime.

Second, damages from fraud seem to be growing. Fraud may be among the fastest-growing forms of white collar crime. According to a 2020 report from accounting firm PwC, in a survey of more than 5,000 respondents across ninety-nine territories, nearly half had suffered losses from fraud over the past twenty-four months, with an average of six times per company.[330] Healthcare fraud alone is estimated to cost

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[323] Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 924 (2019).

[324] *See id.*

[325] *See id.*

[326] *See id.* (indicating that a "back-of-the-envelope" calculation on all public sources would find report of an act of substantive misconduct "every 1,586 days per company on average," versus a more accurate rate of once every three days).

[327] Paul M. Healy & George Serafeim, *Agency Costs and Enforcement of Management Controls: Analyzing Punishments for Perpetrators of Economic Crimes* Tbl. 6 (2018); *see also* Paul Healy & George Serafeim, *Who Pays for White-Collar Crime?,* HARV. BUS. SCH. WORKING PAPER (June 2016).

[328] *See* Gerald Cliff & April Wall-Parker, *Statistical Analysis of White-Collar Crime*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY 7 (2018) (citing statistics from a series of sources).

[329] *See id.*

[330] PRICEWATERHOUSECOOPERS, *2020 Fighting Fraud: A Never-ending Battle, PwC's Global Economic Crime and Fraud Survey* 3 (2020).

between three and ten percent of health care expenditures, which could total more than $300 billion a year.[331]

Third, there is new, tough talk on white collar crime from the U.S. DOJ, and the lowest-hanging fruit may be prosecutions for fraud. In 2021, as Deputy Attorney General Lisa Monaco explained in her keynote policy address to the American Bar Association, the Biden administration is "going to find ways to surge resources to the department's prosecutors" combatting white collar crime.[332] Her specific example was a dedication of resources to combat criminal fraud with "a new squad of FBI agents… embedded in the Department's Criminal Fraud Section."[333] She also noted that, as part of the Biden administration's new aggressiveness on white collar crime, "[w]e also have our prosecutors preparing for more trials right now than at any time in the last decade."[334]

In addition, pursuing ESG misrepresentations comports with the advice that federal prosecutors give each other about what makes the best white collar cases. As the DOJ's internal journal advises, in thinking about pursuing cases that "will stick," "Look for the Big Lie."[335] As the Appellate Chief of the United States Attorney's Office for the District of Oregon writes, "[t]hat seemingly simple advice is a sound guiding principle for any white collar case. These cases are generally complex, and they involve highly paid, often aggressive defense counsel who will leave no stone unturned."[336] In such cases, "[t]he common tactic [is to] create a dust storm of confusion, blame underlings, express a lack of business acumen and sophistication, and the like."[337] Meanwhile, a federal prosecutor's "most effective response stays true to that simple theme: there was a big lie, and this defendant cannot explain it, hide from it, or ultimately, defend it."[338] The prosecutor should be able to prove that the defendant "wrote it, said it, posted it, or all three."[339] In legal terms, "[i]t was false, it was material, and it formed the backbone of his scheme. Everything else is just white noise."[340]

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[331] The Challenge of Health Care Fraud—NHCAA, https://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care-fraud/.

[332] Dep'ty Attn'y Gen. Lisa O. Monaco, Keynote Address at ABA's 36th Nat'l Inst. on White Collar Crime (2021).

[333] *Id.*

[334] Sadie Gurman, *Deputy Attorney General Lisa Monaco Underscores DOJ's Tougher Line on Corporate Crime*, WALL ST. J., Dec. 7, 2021 (see embedded video for Deputy AG Monaco's original remarks to *Wall St. J.* CEO Council at 1:23).

[335] Kelly A. Zusman, *Making it Stick: Protecting Your White Collar Convictions on Appeal*, 66 DOJ JOURNAL OF FED. L. AND PRAC. (SPECIAL EDITION ON CORPORATE CRIME) 65, 65 (2018) (capitalization in original).

[336] *Id.* at 65.

[337] *Id*.

[338] *Id*.

[339] *Id*.

[340] *Id*.

As more information emerges about climate change, denial of facts about climate change, and the lack of responsible action from corporations to address it, may start to look like a more and more attractive "big lie" for prosecutors to pursue.

D. Movement on Fraud Prosecutions Against Corporations

Finally, there are signs of movement on ESG fraud prosecutions against corporations in the U.S. for their statements to investors. These have been civil to date, except for the 2021 action against Deutsche Bank mentioned at the start of this Article (see *infra* at Part I), but criminal charges may follow, such as in the example of BlackRock's advertised ESG fund.

In 2018, the Attorney General of the State of New York brought a high-profile case against ExxonMobil Corp. ("Exxon"), alleging that the company had committed fraud against its investors by misleading them about the risks to the company posed by climate change.[341] The reason why the 2018 case failed is because, although Exxon was maintaining two sets of accounting books—one inside the company that accounted for costs from climate change, and an external one that did not—it had not made "material misrepresentations that 'would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available" because the company was not required to share its internal calculations with outside investors.[342] As the court noted, "[i]t is undisputed that ExxonMobil does not publish the details or the economic bases upon which ExxonMobil evaluates investment opportunities due to competitive considerations."[343] The court found nothing wrong with Exxon's practice in this regard. Again, in a U.S. court, the company was being judged solely on what it did *say* to investors, rather than on the duplicity of its actions in keeping two separate sets of books.

But there may be further progress toward liability for fraud, even against the same corporate defendant. In 2019, the Massachusetts Attorney General filed a similar case against Exxon, which the company quickly sought to remove to federal court, and the Commonwealth contested.[344] In 2020, the federal court permitted the case to be

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[341] *See* Summons and Compl., People of the State of N.Y. v. ExxonMobil Corp., No. 452044/2018 (N.Y. Sup. Ct., Oct. 24, 2018). The claims of equitable fraud and common-law fraud were later dropped. *See* Decision After Trial, People of the State of N.Y. v. ExxonMobil Corp., No. 452044/2018, at 3 (N.Y. Sup. Ct., Dec. 10, 2019).

[342] *Decision After Trial*, *supra* note 341, at 3 (quoting in part *TSC Industries, Inc. v. Northway*, Inc., 426 U.S. 438 (1976)).

[343] *Id.* at 2.

[344] *See generally* Mem. of Law of The Commonwealth of Massachusetts In Support of Its Motion for Remand to the Massachusetts Superior Court for Suffolk County, Commonwealth of Massachusetts v. ExxonMobil Corp., No. 19-12430-WGY (D. Mass., Dec. 26, 2019).

remanded to state court with an interesting decision that went much farther than commenting on the case's jurisdictional issues.[345]

In sections headed "Greenhouse Gases and Climate Change," "ExxonMobil's Campaign of Deception," "ExxonMobil's Misrepresentations to Investors," and "ExxonMobil's Misrepresentations to Consumers," the federal *Exxon* court appeared to find well-pleaded allegations of fraud on the part of the company to multiple external audiences.[346] According to the court, "Our Earth is plainly getting hotter, and scientists have reached a consensus that this is largely due to rising carbon dioxide concentrations and other greenhouse gas emissions . . . . This fact threatens our planet and all its people, including those in Massachusetts, with intolerable disaster."[347] ExxonMobil may have been in a privileged position to have known about this danger for a long time. As the court writes, "[n]early forty years ago, the Commonwealth asserts, ExxonMobil already "knew that climate change presented dramatic risks to human civilization and the environment as well as a major potential constraint on fossil fuel use."[348]

As part of ExxonMobil's alleged deception, "[d]espite this knowledge, '[a]n August 1988 Exxon internal memorandum, captioned 'The Greenhouse Effect,' captures Exxon's intentional decision to misrepresent both its knowledge of climate change and the role of Exxon's products in causing climate change.'"[349] The court notes the coordination of ExxonMobil's attempts to influence public perception—including, of course, the "'total mix' of information made available"[350]—to push "a false narrative that climate science was plagued with doubts."[351] In a reference to another time in which corporate misinformation brought significant liability, the court described ExxonMobil and its allies as "in cahoots with a veteran of Philip Morris' tobacco-misinformation campaign."[352]

Specifically, in regard to investors, the court notes that "the Commonwealth alleges that 'ExxonMobil has repeatedly represented to investors . . . that ExxonMobil used escalating proxy [in the sense of disguised or substitute] costs' as a way to estimate the financial dangers of climate change to the corporation, yet often "ExxonMobil was not actually using proxy costs in this manner.'"[353] Instead, "[d]ocuments

[345] *See* Mem. of Decision, Commonwealth of Massachusetts v. ExxonMobil Corp., No. 19-12430-WGY (D. Mass., May 28, 2020).
[346] *Id.* at 6–11.
[347] *Id.* at 6 (internal citations omitted).
[348] *Id.* at 7 (internal citations omitted).
[349] *Id.* (quoting Commonwealth's complaint).
[350] *Cf. Decision After Trial*, *supra* note 341, at 3 (quoting in part *TSC Industries, Inc. v. Northway*, Inc., 426 U.S. 438 (1976)).
[351] *Mem. of Decision*, *supra* note 345, at 8.
[352] *Id.* at 8.
[353] *Id.* at 9 (quoting Commonwealth's complaint).

disclosed through other litigation revealed that ExxonMobil was internally using a lower proxy carbon cost than what it told investors, or that it failed entirely to use a proxy cost of carbon across many sectors of its business."[354] Ultimately, "[b]y not internally applying the proxy cost as it publicly claimed to do, ExxonMobil avoided 'project[ing] billions of dollars of additional climate-related costs'" in its disclosures to investors.[355]

The *Exxon* federal court opinion in Massachusetts sounds much more like the cases making sweeping statements about business liability for climate change coming out of other countries. In addition, although the formal case of fraud against Exxon is still, as of when this Article is written, proceeding in Massachusetts,[356] Exxon is already feeling pressure from investors regarding its attempts to deny the impacts of climate change. In 2020, shareholder suits against the company alleging violations of securities laws were consolidated in Texas.[357] In May 2021, a group of activist investors, led by Engine No. 1, was able to elect to the board a slate of directors who promised reform on accounting for climate change.[358] By November 2021, Exxon's formal disclosures to investors had altered course significantly, describing a large percentage of its fossil-fuel assets as potentially "impaired," due to issues around climate change.[359]

CONCLUSION

As the science has become indisputable and norms around ESG change, U.S. businesses should seek stability in adopting international standards in the United States. As this Article has described, developments around international corporate ESG liability standards have been accelerating, while U.S. businesses experience economic pain from the U.S. Supreme Court's hostility to federal regulation and the protective standardization that it could bring.[360]

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[354] *Id.* at 9 (same).
[355] *Id.* at 9–10 (same).
[356] *See* Nate Raymond, *Exxon Must Face Massachusetts Climate Change Lawsuit, Court Rules*, REUTERS, May 24, 2022, https://www.reuters.com/business/energy/exxon-must-face-massachusetts-climate-change-lawsuit-court-rules-2022-05-24.
[357] *See* Opinion and Order on Transfer to the Northern District of Texas, In re ExxonMobil Corp. Derivative Litigation, 2:19-CV-16380-ES-SCM, at 11 (D. N.J., Sept. 15, 2020).
[358] *See* Svea Herbst-Bayliss, *Little Engine No. 1 Beat Exxon With Just $12.5 Million*, REUTERS, June 29, 2021.
[359] *See* Sabrina Valle, *Exxon Warns Some Assets May Be at Risk for Impairment Due to Climate Change*, REUTERS, Nov. 3, 2021.
[360] *Cf.* Satya Nadella, Chairman and Chief Executive Officer, Microsoft Corp., Comments at Harvard's Reimagining the Role of Business in the Public Square: Multistakeholder Engagement on ESG Commitments, Metrics, and Accountability (Sept. 15, 2022) (describing ESG regulation as not "cohesive" and looking to the U.S. federal government to lead changes).

The New York Bar Association is already asking for regulation and guidance to help protect its members.[361] Some of the most potentially egregious misrepresentations to investors are in the ESG space, and they could trigger liability first.

Increasing scientific, political, and economic pressures may push prosecutors over the thin line from civil liability into potential criminal liability. A direct criminal ESG case for corporate fraud—and potentially individual liability for its agents or directors—may appear in U.S. courts soon.

Ultimately, U.S. businesses and individuals should want relief from increasing volatility in their liabilities and from whip-sawing political pressures. They need to plan, predict, invest, and rely on a stable business—and well as natural—environment in which to operate. To protect themselves, U.S. businesses should shift their perspective to request standardization with international developments. That shift toward ESG standardization could build momentum for further changes to come.

[361] See text *supra* at Part IVB and nn. 250–251; *cf. also id.*