**Unjust Enrichment**

### Solves Aff – 1NC

**Unlike damages for rights violations, unjust enrichment forces wrongdoers to disgorge ill-gotten gains, solving better than the plan.**

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The Ninth Circuit recently issued an opinion that addressed the National Labor Relations Board’s decision in Thryv Inc., regarding the scope of remedies available for victims of unfair labor practices. In Thryv, the Board held that in addition to backpay, workers should be able to recover for “direct or foreseeable pecuniary harms” that flow from losing their jobs. In Int’l Union of Operating Engineers, Local 39 v. NLRB, a divided Ninth Circuit panel ruled that the Thryv remedies were within the Board’s authority. Judge Patrick Bumatay, a Trump appointee dissented, arguing that any remedy must focus on the wrongdoer’s gain or benefit rather than the harm to the victim. Whether or not he’s correct on the law, his suggested approach could actually lead to stronger remedies.

When workers are unemployed as a result of an employer’s violation of the National Labor Relations Act (typically because the employer fired them, but the Operating Engineers case involved an unlawful lockout), the Board’s standard remedy has long been to award backpay, less any interim earnings, with additional deductions for any periods when the worker did not actively look for work. This remedy does not make workers whole because when workers lose their paychecks, they predictably suffer a range of additional monetary losses. These losses will vary from case to case, but they may include interest payments and late fees on credit cards, penalties for early withdrawals from retirement accounts, medical expenses that would have been covered by insurance, and moving expenses to find a less expensive home. In Thryv, the Board finally agreed that workers should be able to recover the “direct and foreseeable pecuniary harms” they suffer when an employer illegally throws them out of work.

The remedies that the Board authorized in Thryv are still far less than the remedies available in an employment discrimination case or in many other wrongful discharge cases. Most notably, workers are not entitled to recover for pain and suffering, emotional distress, or harm to reputation. In addition, the Board ruled that any questions about what counts as “direct and foreseeable pecuniary harms” will be deferred to the compliance stage, and it has yet to rule on whether any particular harms meet that test. The Board has stated that it will not award damages for any harms that are “unquantifiable, speculative, or non-specific.”

In Operating Engineers, the Ninth Circuit majority held that the Thryv remedies are within the Board’s statutory authority because they are merely an attempt to remove or avoid the consequences of a violation and to restore the situation to that which would have occurred if not for the violation. Judge Bumatay dissented, arguing that the Thryv remedies are barred by the Seventh Amendment.

Bumatay asserted that to avoid the need for a jury trial, any relief sought by the Board must be “equitable” rather than “legal,” as those terms were understood in the 18th century. As he put it, “equitable relief should ask only what the employer has unjustly gained,” rather than focusing on what the worker has lost. I say, let’s take that and run with it. We know that when employers make a decision to fire a union activist, or to engage in other illegal tactics to stop a union organizing drive or defeat an incumbent union, the employers are likely making at least an informal cost-benefit analysis. The “union avoidance” industry wouldn’t be a multi-billion dollar enterprise if employers didn’t think they would profit by preventing their employees from organizing. Of course employers are unjustly enriched when they engage in illegal anti-union conduct. And, the enrichment likely far exceeds the harms suffered by an individual union activist who the employer fired in order to defeat the organizing drive. Perhaps the best part of focusing on the employer’s unjust enrichment is that it opens the door for substantial discovery regarding the extent of any unjust enrichment. So, if the employer had conducted some analysis about how much a union contract might eat into its profits, that should become a matter of public record.

I’m not suggesting that Bumatay is right about the Seventh Amendment. But, I recognize that on a practical level, “right” just means whatever five Justices are willing to go along with. So, if the turn back the clock crowd wants us to use unjust enrichment as the measure of damages under the NLRA, I will gladly take it.

### Solves Climate – 1NC

**Solves climate change---extinction.**

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I. THE CLIMATE CRISIS

There is broad scientific consensus that climate change has become the "defining issue of our time,"39 a "super wicked" issue,40 or a problem "from hell."41 [\*1048] Decades of research have led to the clear conclusion that human activity is the primary driver of many of the effects of climate change around the world.42 Climate change substantially disrupts natural systems,43 which, in turn, inevitably disrupts social and economic systems.44 Among the damages of climate change documented in scientific evidence are shifts in seasonal timing,45 loss of species,46 severe crises in food supply and water scarcity,47 and more frequent gastrointestinal infections due to higher temperatures and increased rain and flooding.48 The social harms of the crisis include increased risk of displacement and involuntary migration,49 [\*1049] exacerbated global income inequality,50 and greater risk of violence.51

While some climate change harms are already taking place, many are estimated to occur far into the future with high probability.52 The 2022 Intergovernmental Panel on Climate Change (IPCC)53 report predicts high levels of global warming by the end of the twenty-first century in certain scenarios.54 The following Sections describe three prominent, interconnected, future harms of climate change: temperature changes (and in particular climate heat waves), sea level rise, and marine-species extinction.55 The purpose of this Article is to call attention to a key, common theme: the fact that the harms of climate change are dispersed, difficult to quantify and attribute to specific actors, and carry substantial effects mostly observable in the medium-to-far future. For all these reasons, tort law, insisting on a clear showing of specific harm, is largely ill-equipped to serve as a doctrinal framework for climate litigation. At the same time, the perpetuation of the climate crisis is immensely profitable for strong commercial actors.56

A. TEMPERATURE CHANGES

Recent scientific assessments suggest that the global average temperature increased by about 1.0°C from 1901 to 2016.57 Evidence points to human activity, [\*1050] and in particular emission of greenhouse gases (GHGs), as the dominant cause of global warming.58 Emission of carbon dioxide, methane, nitrous oxide, and fluorinated gases contribute to warming the atmosphere59 "by absorbing energy and slowing the rate at which the energy escapes to space."60 Carbon dioxide and methane released from thawing permafrost contribute to the warming of the atmosphere as well.61 The fossil fuel industry, responsible for the bulk of GHG emissions, is now more profitable than ever.62

According to recent assessments, without a significant reduction in these emissions, the increase in average global temperatures could reach 5.7°C and higher by the end of this century.63 Global warming resulting from current emissions will continue to affect future generations, leaving "a multi-millennial legacy, with a substantial fraction of the warming persisting for more than 10,000 years."64

Among the worrying influences of the climate-driven rise in temperature is its expected negative effect on human health and well-being.65 Studies have found connections between higher temperatures and increases in the occurrence of diarrheal diseases, including cholera and other gastrointestinal infections.66 The increase in heatwave intensity67 is expected to significantly increase mortality [\*1051] rates globally.68 Temperature rise is also associated with many other potentially devastating outcomes, such as droughts69 and tropical storms.70 Temperature increases also cause sea level rise. We turn to discuss this issue next.

B. SEA LEVEL RISE

Studies show that between 1902 and 2020, sea levels rose by more than 6.3 inches.71 As GHG emissions increase and global temperatures climb, sea levels will continue to rise.72 Some projections indicate that by the end of this century, sea levels may rise by more than 6.5 feet.73 The scientific community perceives the rise of sea [\*1052] levels as a pressing threat,74 with one estimate indicating that by the year 2100, over one billion people will be exposed to environmental and climatic risks caused by rising sea levels.75 Perhaps the most pressing problem related to sea level rise is the existential threat to low-lying island states, whose land area will be rendered uninhabitable or overrun by seawater.76 Many coastal areas will similarly disappear under water,77 and their inhabitants will lose their homes, causing them to become climate refugees.78 Currently, this problem has no clear legal solution.79

The devastating impact of sea level rise will not affect all people equally. Despite their relatively "infinitesimal contributions to the causal drivers of climate change," it is low-lying island states such as Tuvalu, Kiribati, or the Maldives that are most vulnerable to sea level rise.80 The problem of climate refugees is also expected to influence states and regions in which refugees will [\*1053] eventually resettle,81 as those regions will need to provide their fast-growing populations with increasing amounts of housing, food, and jobs.82

C. SPECIES EXTINCTION

Not only humans are expected to suffer from climate change. Research shows that climate change is likely to lead to catastrophic outcomes for many other species as well. A recent study indicates the potential collapse of marine and amphibian populations as a result of temperature changes.83 Such species cannot escape heat events and are therefore more sensitive to heat failure.84 In addition to rising temperatures, sea level rise may also cause immense harm to animals, on top of the harm to humans.85 In particular, sea level rise may cause flooding of intertidal areas, putting the existence of various species who reside in those areas at risk.86

Adding these projections to the declines in different marine species due to the expansion and overcapacity of many industrial fisheries,87 some climate models show that by the year 2100, local species of fish and invertebrates will lose more than fifty percent of their animal population in many regions.88

[\*1054]

I. STATE OF THE LAW

The immense harms of the climate crisis, as described in Part I, give rise to a tragic puzzle. Namely, if overwhelming scientific evidence so strongly suggests the harmful nature of current production and consumption activities, why have existing legal frameworks failed to stop the foreseeable adverse outcomes described above?

This Part reviews existing legal frameworks currently used in the governance of the climate crisis, with an emphasis on domestic regulation, international treaties, and tort litigation. It shows that existing legal tools fail to offer effective solutions for two main reasons. First, short-term monetary incentives, coordination problems, and free-rider effects make climate change particularly difficult to regulate, thereby contributing to its status as a "super wicked" problem.89 Second, the harms associated with the climate crisis are mostly future harms with complicated causal histories,90 while incentives to profit are immense, immediate, and direct.91 By clarifying these points, this Part serves as a background for our argument in Parts III and IV, where we show the promising potential of the doctrine of unjust enrichment as a response to the tragic puzzle of the current legal treatment of the climate crisis.

A. REGULATION

Current legal responses to the climate crisis are focused on regulatory schemes and public law solutions through national law as well as public international law.92 At first glance, this focus seems obvious from an economic perspective. Climate stability is a classic case of a "public good"93: it is non-excludable (no single entity can prevent others from enjoying the benefits of a stable climate) and non-rivalrous (a stable climate benefits everyone simultaneously).94 Classic examples of public goods are national security, public broadcasting, public parks, and clean air.95 It is well-known that private markets tend to undersupply public [\*1055] goods96 because of the free-rider problem involved in supplying them: every beneficiary prefers that the goods are supplied but no one wants to invest private resources to supply them.97 In the context of the climate crisis, everyone prefers that GHG emissions would be lowered, but each country or firm wishes to avoid the costs this goal entails and prefers that others bear them.

Since markets tend to undersupply public goods, a common solution is to supply them through a public authority, which (hopefully) takes into account the public interest.98 In the case of climate change, a public authority could take various measures, including engaging in enforcement (for example, by prosecuting polluters under criminal law),99 subsidizing private litigation,100 imposing a tax on production, or regulating production (for example, intervening in the actions of polluters more directly).101 Such endeavors may take place at both the national and international levels.

1. Domestic Regulation in the United States

Until the 1960s, responsibility for climate change policies in the United States resided with the states rather than with the federal government, leading to jurisdictional variation in the degrees of environmental protection between states.102 [\*1056] The Clean Air Act (CAA), enacted in 1963,103 was first established as a federal framework for air pollution control and is now administered by the Environmental Protection Agency (EPA).104 The fundamental problem with this regulatory framework is that the CAA has not been amended since the 1990s and did not explicitly authorize the EPA to regulate GHG emissions. In response, in 2007, the Supreme Court decided the landmark case of Massachusetts v. EPA, holding that the EPA not only has the authority to regulate GHG emissions, but has an obligation to do so.105 In 2021, the EPA issued a set of new GHG emission standards involving cars and light trucks.106 However, the Supreme Court severely limited the ability of the EPA to regulate GHG emissions in the recent case of West Virginia v. EPA.107 In response to this decision, Congress strengthened the ability of the EPA to regulate GHG emissions,108 although scholars debate whether or not this response effectively repealed West Virginia v. EPA.109

As this brief review illustrates, the history of environmental regulation in the United States has been rocky and likely will continue to be so. So far, the EPA has had little success in reducing GHG emissions sufficiently to satisfy the United States' climate obligations.110 Politicization of the issue together with increasing polarization hinder decisive regulatory action, and lobbying efforts seem all too effective in preventing a consistent regulatory response.

[\*1057] More broadly, public choice theory readily explains the inability of national regulatory frameworks to offer effective solutions to the climate crisis.111 Public officials, including regulators, strive to maximize their own utility,112 and the pursuit of selfish interests often interferes with the choice of an optimal policy for society as a whole.113 Thus, lobbying by polluters may hinder the effectiveness of reaching coordinated environmental regulations.114 In the context of climate change, even if regulators faithfully represent the interests and wishes of their constituencies, regulatory policy greatly diverges from the social optimum. Regulators, guided by elected public officials, respond to interests and problems that concern and affect the constituents in their jurisdiction.115 There is no reason to believe that the interest of future generations and the long-term sustainability of environmental systems are fully represented within this framework. Future generations, by definition, are at a disadvantage in the political field and cannot express their interests in the political system.116 It is therefore unsurprising that the interests of future generations are underrepresented in current political and regulatory systems.

Regulatory focus on short-term goals may also be driven by behavioral effects, such as overoptimism and myopia, or "present bias."117 Specifically, regulators may be overconfident in their ability to solve the climate crisis quickly and therefore do not feel the need to consider the fate of future generations, mistakenly assuming that these generations will not face the problem at all.118 Moreover, behavioral economics literature has repeatedly shown that individuals are "myopic" and may systematically prefer short-term benefits over long-term gains.119 This [\*1058] might be caused by "hyperbolic discounting," where individuals place extremely low weights on future outcomes.120 The problem is further exacerbated in the context of the climate crisis, due to people's systematic tendency to underestimate exponential growth.121 Policymakers and regulators are not immune to such cognitive biases and are therefore prone to ignore or downplay the risks associated with the climate crisis.122

2. Regulation at the International Level

The climate crisis is difficult to tackle at the level of individual countries. In a classic free-rider dynamic, each country has a strong incentive to allow corporations to pollute, rather than adopt restricting environmental regulations. Supposedly, the solution can be found in international coordination, allowing countries to jointly commit to battling the crisis.

Indeed, a series of international treaties have been established as a framework for cooperation in the fight against climate change. The United Nations Conference on the Human Environment was held in 1972 in Stockholm, Sweden, and was the first world conference to focus primarily on environmental issues.123 This conference yielded the Stockholm Declaration, a document containing twenty-six principles on safeguarding the earth and the environment for the benefit of mankind and future generations.124 The Declaration was accompanied by an "Action Plan" and led to the establishment of the United Nations Environmental Programme (UNEP).125 Alas, the declaration proved largely ineffective.126 Twenty years later, a climate-focused convention took place as part of the United Nations Conference on Environment and Development (UNCED), colloquially known as the "Earth [\*1059] Summit," in Rio de Janeiro, Brazil.127 Following this conference, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) was established.128 The UNFCCC strived for a more modest goal stabilizing GHG concentrations by lowering emissions and focusing on industrialized countries.129 These countries accepted a nonbinding commitment to reduce emissions by the year 2000,130 yet it quickly became apparent that this goal was not to be achieved. In 1997, another UNFCCC conference took place in Kyoto, Japan, and yielded the Kyoto Protocol.131 The Kyoto Protocol sets binding emission reduction goals for industrialized countries, but has also been heavily criticized and widely considered to be a failure.132 Over the following years, meetings of the parties to the UNFCCC-the Conference of the Parties (COP) continued taking place.133 A high-profile convention took place in Paris in 2015, yielding the Paris Agreement.134 The Paris Agreement, adopted [\*1060] by 196 parties,135 is a legally binding agreement that strives to limit global warming by keeping temperature rise to well below 2°C, and preferably only 1.5°C, compared to preindustrial levels.136 It is not yet clear whether this framework is effective.137 The Paris Agreement has been criticized as "a dangerous form of incrementalism" because it "repackages existing rules that have already proven inadequate."138

Recent attempts at international consensus can be found in the COP meetings in Glasgow, Scotland, and Sharm el-Sheikh, Egypt, in 2021 and 2022, respectively. The "Glasgow Climate Pact" focuses on work programs, agendas, and dialogue,139 with some new provisions such as a call for countries to reduce the use of coal power and to avoid inefficient subsidies for fossil fuels.140 More importantly, in the more recent Sharm el-Sheikh meeting, general drafts of decisions were released concerning "loss and damage" for vulnerable countries that are hit the hardest by climate disasters.141 However, these decisions do not seem to have concrete content at the moment, so it remains unclear who needs to compensate whom and under what conditions. John Kerry, who currently serves as the United States Special Presidential Envoy for Climate, has already declared publicly that the United States would not accept an "imposed standard of liability" that [\*1061] generates a legal duty to help countries vulnerable to climate change.142 Furthermore, the "loss and damage fund" agreed upon in Sharm el-Sheikh could "take years to pay out."143

More broadly, this review illustrates the continuous inability to achieve consensus and an effective legal response to the climate crisis at the international level. Countries, even when coordinating under international law, struggle to give up the competitive advantage and short-term benefits of environmentally harmful policies.144 Thus, the same difficulties that hinder regulation at the national level are also present at the international level.

A prime example of this dynamic can be found in Donald Trump's decision in 2017 to withdraw from the Paris Agreement145 because it supposedly imposes unfair environmental standards on American businesses (a decision later overturned by President Biden, who rejoined the Agreement).146 Trump's actions perfectly reflect the free-rider problem: environmental policies are costly at the country level, so there is insufficient incentive to adopt them. In other words, so long as pollution remains immensely profitable,147 the failure of regulatory efforts to reduce it is unsurprising.

B. TORT LITIGATION

Faced with a dead end at the regulatory level, private citizens have been attempting to battle the climate crisis through the courts, using private litigation.148 Turning to litigation is a sensible response to regulatory and political deadlock. When regulators fail to act, private individuals and organizations can call for legal action by approaching the courts. Even if most courts reject the claim, it is enough that some courts accept it to create significant pressure on relevant industry players. Thus, even if governmental consensus on environmental policies cannot be reached due to regulatory and legislative capture, litigation can provide a push in the right direction.

[\*1062] Litigation can also offer inroads when political deadlock hinders effective legal action at the international level. For instance, an American citizen can sue a foreign company (say a Chinese corporation) in an American court. If the foreign company operates in the United States or if its actions affect American nationals, a decision by the American court, based on American law, will be binding against the Chinese company as a matter of conflict of law rules, or private international law. This is true even if on the level of international treaty law, the American and Chinese governments cannot agree on desired levels of GHG emissions. Finding the correct doctrinal hook for climate litigation is therefore important to unlock the institutional advantages of this legal course of action.

Unfortunately, current litigatory attempts, focusing on tort law claims,149 have largely proven unsuccessful. As Douglas Kysar observed more than a decade ago,

[T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible.150

In what follows, we demonstrate the difficulties in advancing climate litigation based on the four traditional elements of tort law: duty, breach, harm, and causation.151 The purpose of this demonstration is not to provide a general review of the intersection of tort law and environmental litigation;152 rather, it is intended to serve as background for our proposal in Part III, highlighting the structural advantages of unjust enrichment doctrine as a vessel for climate litigation.

1. Duty and Breach

As John Goldberg and Benjamin Zipursky rightly observe, tort law is not just the law of harms, but is more accurately understood as the "law of wrongs."153 That is, a successful tort claim must demonstrate some wrongful conduct, or a breach of duty by the defendant, as defined under tort doctrine.154

[\*1063] In the case of climate litigation, however, the conduct causing the harm is often not wrongful in the sense required under tort doctrine. Admittedly, in some instances, contribution to global warming can be characterized as a wrong, for example, if a producer violates environmental regulations or otherwise creates a "'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law."155 Yet, this is not always the case, and climate change is also caused through activities entailing high levels of GHG emissions that do not necessarily violate existing regulatory standards. Thus, heavy reliance on fossil fuels, even to the degree currently legal, is known to be the chief cause of the crisis.156 The centrality of the duty and breach requirements, therefore, make tort claims a relatively ineffective legal response to the climate crisis.

2. Harm

Tort law compensates for harms.157 If no harm was caused, a tort remedy is unavailable.158 This is a major challenge in the context of climate litigation, which is primarily concerned with future harms that is, estimated harms that have not yet occurred and that may not occur at all.159 Tort damages are meant to place the injured party "as nearly as possible in the condition he would have occupied if the wrong had not occurred."160 This conceptual legal mechanism loses much of its internal coherence in cases in which the harms in question are primarily future harms.161

The recent litigation in the matter of Conservation Law Foundation, Inc. v. Shell Oil Co. demonstrates this incompatibility of compensatory damages to [\*1064] climate litigation.162 This case was brought by an environmental group claiming that the defendant oil company did not protect its fuel terminals located in New Haven, Connecticut, from risks of climate change in violation of the Clean Water Act and the Resource Conservation and Recovery Act.163 In the case, the federal court explicitly acknowledged the fundamental incompatibility of the remedy of compensatory damages with the types of claims brought before it, focusing on future harms.164

This incompatibility between the remedy of compensatory damages and the unique characteristics of climate litigation is not merely conceptual or theoretical but has immediate practical implications. First, future harms are difficult to prove. Once the plaintiff cannot show that future harm will indeed occur, the force of a harm-based claim is incredibly diminished. This is a tragic and paradoxical outcome. Scientific evidence shows that global warming is a major threat and horrifically harmful.165 But these future harms are too abstract and insufficiently clear for tort doctrine, with its focus on harms and compensation. These conceptual difficulties alone may spell the failure of tort-based climate litigation.

Future harms are not only difficult to prove; they are also difficult to measure accurately. For instance, ample scientific evidence projects catastrophes resulting from expected heat waves, such as enhanced mortality rates of humans and animals, droughts, and tropical storms.166 Yet, putting an exact dollar sum on such future harms, even if we can prove they will indeed occur, is nearly impossible. As the magnitude of the harm is impossible to determine, it is also impossible to offer a convincing measure for compensatory damages. Such difficulties in determining remedy measures are important. If damages are set too low, defendants receive a free pass for polluting, and the legal regime provides insufficient incentives to avoid high GHG emissions.

3. Causation

To establish a tort claim, it is not enough to show that the defendant acted wrongfully and that some harm occurred; it must also be shown that the harm is a but-for result of the defendant's actions, meaning a plaintiff is required to preponderantly prove that its harm would not have occurred absent the defendant's [\*1065] wrongdoing.167 The nature of climate litigation makes it difficult for plaintiffs to overcome the tort requirements of causation.168 It is difficult to attribute the future harms of global warming to specific defendants in terms of proving a causal link.169

Climate change is not a result of any single polluting activity, but rather a complex result of actions taken over years by multiple entities. Douglas Kysar points out the following difficulties: first, some climate events (such as hurricanes and droughts) do occur irrespective of climate change;170 second, the "extraordinary numerosity of greenhouse gas emitters" might give rise to a tort defense of "consequentialist alibi" by showing that any polluter's emissions are so small in comparison to total emissions that the effect is negligible.171

To illustrate these difficulties, consider a recent case in which the city of Hoboken, New Jersey, filed a lawsuit against a group of oil and gas companies, led by Exxon Mobil Corp., demanding compensation for harms caused by sea [\*1066] level rise.172 In its decision, the New Jersey district court stated that "[a]lthough it is more than plausible that fossil fuels ... led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."173 This statement shows that not much has changed in the way courts approach the difficulties in establishing the requirement of causation in climate litigation, as there exist "daunting evidentiary problems for anyone who undertakes to prove ... the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming."174 The problem that these statements address is straightforward. Even if all scientists generally agree that GHG emissions cause global warming in the long run, it is very difficult to identify the amount that each specific emitter contributes to, for example, the global processes of melting glaciers and resulting sea level rise.175 This is especially true given that many of these massive losses are expected to materialize in the far future. Tort doctrine and compensatory damages, with their strong emphasis on harms, cannot overlook these difficulties and therefore fail to provide a remedy when the causal link to a concrete harm cannot be established. Proposals for more relaxed theories of causation176 have not been accepted in climate litigation and are largely considered controversial by tort scholars.177

[\*1067] Against this backdrop, it is unsurprising that courts have been reluctant to accept climate litigation claims based in tort law, at times even considering climate change as lying outside the scope of adjudication given its complexity.178 Note that these difficulties are not only applicable for negligence, but also for strict liability, which also requires proof of causation and harm.179

III. FROM TORT TO UNJUST ENRICHMENT

This Part explores the use of unjust enrichment doctrine as a basis for climate litigation. In this Part, we focus on introducing only the core concept of climate enrichment; further doctrinal details, including remedy measures, are introduced in Part IV. This Part is divided into two Sections. The first offers a general overview of the elements of a claim of unjust enrichment. The second Section then explains why these elements might fit the structure of climate litigation claims. We also explain the outer boundaries of liability in unjust enrichment to avoid overly broad application of the doctrine.

A. THE LAW OF UNJUST ENRICHMENT

A person unjustly enriched at the expense of another must make restitution of any undeserved benefits.180 Subject to some interjurisdictional variation,181 this is [\*1068] the general maxim of the law of unjust enrichment, at times also referred to as the law of restitution.182 This maxim is typically divided into three key elements: (1) the defendant's benefit or enrichment, (2) the key normative requirement of the injustice of that enrichment, and (3) the fact that the enrichment is at the expense of another.183

The legal categories associated with the law of unjust enrichment allow for some degree of judicial discretion, as this area of law is often considered a flexible residual category,184 meant to provide equitable solutions where more established legal categories run out.185 In particular, there is some flexibility in the factors that can render the defendant's enrichment "unjust" in different situations.186 This flexibility makes the law of unjust enrichment a promising avenue for climate litigation, as we discuss below.187

In preparation for this argument, we first introduce the two central lanes through which a plaintiff can establish a claim of unjust enrichment. One requires the plaintiff to show that the defendant obtained their benefit through committing a wrong, while the other does not include such a requirement. Through this analytical juxtaposition, we further explain the different doctrinal elements of an unjust enrichment claim.

[\*1069]

1. Unjust Enrichment Through a Wrong

In some restitutionary claims, the doctrinal requirement of the "injustice" of the defendant's enrichment can be satisfied by the finding that this enrichment was obtained through the defendant's crime or wrong188 -for example, securities fraud;189 patent190 or copyright infringements;191 and, under certain conditions, opportunistic breach of contract.192 This makes intuitive sense. After all, if a benefit is obtained through a civil wrong or a crime, it would seem bizarre to consider such a benefit justly obtained. The role of unjust enrichment doctrine in such cases is primarily remedial. Thus, other areas of law inform us that the defendant is a wrongdoer (or a criminal), and the law of unjust enrichment simply introduces an additional remedy. This type of restitutionary remedy, often termed "disgorgement of profit," is designed to strip the wrongdoer of any gains obtained through the wrong in order to remove perverse incentives and ensure that wrongdoing and crime are not profitable endeavors.193

[\*1070] A paradigmatic example of enrichment through a wrong comes from the infamous Riggs v. Palmer case, which incorporates both criminal and private law aspects.194Riggs v. Palmer is an all-time classic, fundamental to any study of unjust enrichment law and theory. The defendant in this case, Elmer Palmer, was to receive the bulk of his grandfather's estate.195 Elmer feared his grandfather might change his will, and decided to poison him preemptively.196 After he was caught and prosecuted, Elmer was facing prison time,197 but state law still permitted Elmer to inherit his grandfather's estate.198 Following a civil lawsuit, the New York Court of Appeals saw this outcome as offensively unjust and "an offense against public policy."199 The court therefore decided that Elmer's share of the estate constituted unjust enrichment and must be given to his two aunts, the plaintiffs in the case.200 Primarily, this outcome was deemed necessary to prevent Elmer from benefiting from his crime.201Riggs is illustrative of a core principle in the law of unjust enrichment, according to which a person cannot be allowed to retain gains obtained through their wrongdoing.202

In Riggs, both the defendant's enrichment and its injustice are easy enough to show, as the defendant benefited through a horrific crime. The doctrinal element of the enrichment being at the expense of the plaintiff merits further attention. Thus, in this case, there was no clear showing of harm to the plaintiffs (the defendant's aunts), or of a causal link between any harm and the wrong, as would be required in a tort claim.203 The reason for this is that there was no proof in this case that but for Elmer's crime, his aunts would actually have inherited the estate: it was not proven the will would have been changed but for the murder, and in what way.204 In this sense, the court considered the defendant's enrichment to be "at the expense" of the plaintiff, but not because the benefit correlated with some identifiable loss to the plaintiff. Rather, Elmer's enrichment in this case was considered to be at the expense of his aunts since his abhorrent actions violated their rights or were wrongful towards them (even if not directly harmful in the monetary sense).205 In actuality, the plaintiffs in Riggs serve as "an imputed beneficiary" [\*1071] who are allowed to bring forth a claim for unjust enrichment.206 The court allowed the aunt's monetary recovery in order to achieve the public policy goal of stripping the defendant of the profits obtained through his crime.207 The "imputed" plaintiff in such cases is allowed access to the court not because they were directly harmed, but because they are the closest private actor to the wrong that was committed.208 Such plaintiffs are allowed to recover from the wrongdoer and are entrusted with the task of pursuing a sanction against the wrongdoer through civil liability in unjust enrichment.209 This is meant to achieve the goal of ensuring that wrongdoing is not profitable.

This important point can be further illustrated through another case, Olwell v. Nye & Nissen Co.210 Compared to Riggs, Olwell offers a mundane set of facts but is nevertheless an unjust enrichment classic. In this case, the defendant took machinery belonging to the plaintiff out of storage and used it in its manufacturing process.211 The defendant argued that even if it was indeed enriched, and even if this enrichment was unjust and wrongful (as it was derived from the knowingly unauthorized use of another's asset), it was not at the expense of the plaintiff.212 The reason for this was that the plaintiff kept the machine in storage, had not used it for years, and had no use for it or intention to use it.213 Therefore, the defendant reasoned that the plaintiff suffered no harm, and the defendant's enrichment was not at its expense. The court rejected this claim, explaining that the defendant's enrichment must be considered at the plaintiff's expense even absent a specific monetary harm to the plaintiff, simply because it came through the defendant's wrong, which was directed at the plaintiff and was in violation of the plaintiff's rights.214

More broadly, both Riggs and Olwell illustrate a general principle, according to which enrichment can be considered "at the expense" of the plaintiff even absent a clear showing of monetary or physical harm to the plaintiff when it can be shown that the enrichment was derived through a wrong directed at the plaintiff and that violated the plaintiff's rights.215 This fundamental doctrinal structure [\*1072] will prove crucial below when we turn to discuss climate enrichment and the use of unjust enrichment doctrine as a basis for climate litigation.

2. Unjust Enrichment Without a Wrong

The defendant's enrichment can be considered unjust for a wide variety of factors216 and not necessarily owing to the defendant's wrongdoing.217 Thus, a payment made by mistake is typically considered unjust enrichment,218 and the recipient of such payment is under a duty to return it to the payer,219 subject to some defense rules.220 This is the case even if the mistake was caused by the negligence of the payer and through no fault of the recipient.221 Liability in such cases does not signify any wrongful conduct by the recipient, but simply the fact they received a benefit they had no right to receive.222 Note that in such a case, the requirement for the enrichment being "at the expense" of the plaintiff is simply satisfied by the fact the defendant's gain correlates to the plaintiff's loss the payment.223 Thus, the "at the expense" requirement can be satisfied by the fact that the enrichment comes from the plaintiff's loss; yet, as explained above, it can also be satisfied in other ways.224

[\*1073] The case of emergency medical services is another similar example and a core category of liability in unjust enrichment. A patient can be considered unjustly enriched if they received life-saving treatment while unconscious in an emergency for which they did not pay. The seminal case of Cotnam v. Wisdom demonstrates this rule.225 In this classic case, two physicians provided medical aid (surgery) to an unconscious person thrown out of a streetcar without receiving payment for the service they provided.226 The Supreme Court of Arkansas awarded restitution.227 The ruling in Cotnam has been reaffirmed and has become the general rule when physicians provide emergency services to unconscious patients.228 In such cases, restitution is available without any type of wrongdoing by the defendant, simply because the defendant was enriched, at the expense of the plaintiff, with no justification.

In other types of cases, a defendant might be considered unjustly enriched if they derived benefits from a valid court decision, such as a preliminary injunction,229 that was later reversed.230 Again, even if the enrichment is not obtained through a wrong and is not in this sense unlawful, the principles of the law of unjust enrichment require the restitution of such benefits.

[\*1074] In all of these cases, enrichment is unjust simply because the defendant enjoyed a benefit that did not belong to them and not because the defendant's conduct was in some way wrongful or illegal.231 Thus, in the mistaken payment scenario, the recipient's enrichment is unjust because the mistaken payer had no intention to make a payment.232 In the case of emergency medical services, the patient is unjustly enriched because they enjoyed a windfall;233 the recipient of a preliminary injunction that was later reversed is considered unjustly enriched for the benefits "obtained at the expense of the defendant as a result of the wrongfully-issued preliminary injunction."234

In conclusion of this very brief review, unjust enrichment doctrine offers two key doctrinal advantages that are worth exploring in the context of climate litigation. First, when enrichment is obtained through a wrong, liability may be available even when harm cannot be clearly attributed to specific actions (as would be required under tort doctrine). Plaintiffs can bring claims even if they cannot show they suffered a direct and clear harm, as long as they can show they are, in some other way, the targets of the defendant's wrongful conduct. Second, liability in unjust enrichment can be available also absent a wrong (which is, again, not the case in tort law) when a defendant enjoyed a benefit not properly owed to them.

A. CLIMATE ENRICHMENT

This Section outlines the use of unjust enrichment as a doctrinal basis for climate litigation. The motivation for this move is simple: while the harms of climate change are future abstract harms, profits exist in the here and now.235 These profits are easier to identify and measure and can serve as the basis for a claim of unjust enrichment. It is crucial to have such profits taken away. As long as global warming remains profitable for strong commercial actors,236 we can expect it to persist (and even escalate). Therefore, to offer effective legal solutions, we must develop the legal tools to ensure that global warming does not remain profitable.

In what follows, we develop the concept of climate enrichment in the two charters of liability described above: unjust enrichment through a wrong and unjust enrichment without a wrong. In discussing each of the two categories, we further detail the operation of the three key elements of unjust enrichment doctrine in the context of climate litigation.

[\*1075] Note that the analysis offered here should not be taken to mean that all profitable activities can be a cause of civil action. A key point in developing our proposal, therefore, lies in offering criteria for determining when enrichment, in specific cases, is unjust. We outline several such possibilities below, offering categories of cases in which polluters' profits can be considered unjust enrichment.

1. Climate Enrichment Through a Wrong

In some cases, defendants contribute to the climate crisis through activities and conduct that can be classified as wrongful. This can be the case when defendants: (1) benefited while acting in violation of environmental regulations; (2) benefited while operating in an environmentally unreasonable manner, thereby committing a tort of gross negligence; or (3) benefited while maliciously circumventing regulatory efforts or deceiving regulators. We detail these categories below.

Note that in all such cases, sanctions from other areas of law, including regulatory fines or tort damages, are supposedly available, since the requirement of "wrong" is satisfied.237 Yet, these sanctions often prove insufficient.238 Thus, pollution in violation of regulatory standards is often profitable for companies because regulatory penalties for such violations are set too low.239 An added remedy coming from the law of unjust enrichment can therefore be beneficial. In particular, a sanction based on the disgorgement of profits can prove helpful in such cases to eliminate the monetary incentive to violate regulatory standards. Similarly, tort suits can also be based on a scenario in which commercial actors acted in violation of environmental regulations. Despite the clear wrongfulness of the action, in such cases, the resulting harm may be difficult to measure and attribute to the specific action. Therefore, a tort action is very likely to prove ineffective due to a failure at the causation stage.240 Enrichment-based liability can sometimes overcome these hurdles.

If the defendant acted while violating environmental regulations, any gain made through that activity can be considered unjust.241 Such gains exist in the present and are therefore relatively easy to measure. Taking away such gains is necessary to ensure deterrence. Note that in such cases, the reason the defendant's activity is considered unjust is probably related in some indirect way to its [\*1076] harmfulness.242 Yet it is not required as part of a claim of unjust enrichment to prove a specific harm, as would be required under a tort action.243 Similarly, a showing of harm is not required to establish the "at the expense" element. To see why, recall the Riggs case described above.244 In Riggs, restitution was available because the wrongdoer benefited from a wrong and the court needed to decide upon "an imputed beneficiary" who could have a valid legal action for this benefit.245 Likewise, suppose a polluter benefited while violating environmental regulations. In this case, any citizen or governmental body that can be construed as having its rights violated (such as local communities246 or municipalities247 ) may have a cause of action against the polluter, even if it is not possible to identify and measure concrete harms and attribute them to the violation of environmental regulations. More generally, recall that in cases of wrongful enrichment, disgorgement can be available even if the defendant's benefit is different from the plaintiff's harm,248 and even if no harm to the plaintiff can be proven.249 Of course, this type of liability has its natural limits. Specifically, it will depend on the court's willingness to recognize, in a specific case, that the plaintiff's right was violated through the defendant's violation of environmental regulations.

In other cases, the defendant's enrichment can be considered wrongful not because it violates some explicit environmental regulation, but because it is grossly unreasonable or negligent, meaning that the defendant was able to operate its business in a way that is less environmentally harmful without incurring high costs for doing so. In such cases, again, the injustice of the defendant's action closely relates to its harmfulness. Yet a tort claim may not be available under such circumstances: Even though it is clear that the defendant's conduct was unreasonable and unnecessarily harmful, it is difficult to preponderantly prove the magnitude of the harm when its occurrence or magnitude can only be assumed at the time of litigation. Such proof is, however, required to sufficiently [\*1077] establish a tort action.250 However, it is not required for a claim of unjust enrichment.251 Thus, if the defendant's conduct is wrongful, any gain obtained through this conduct can be considered unjust enrichment, even if the future harms caused by this conduct are yet to materialize and are currently unknown.

Yet in other cases, the defendant's enrichment can be considered wrongful because they acted to hide the environmental harms they caused.252 This form of liability might prove especially relevant in the case of key industry players in the energy sectors, as those are increasingly being blamed for hiding information regarding the climate crisis from both regulators and the public.253 If such allegations prove credible, a remedy based on unjust enrichment can offer an important venue for recovery and sanction, since despite the immense harm represented by such deceptive practices, it is not clear what other legal response is available.

The common thread in the three aforementioned categories violation of environmental regulations, clearly unreasonable levels of precautions, and attempts to conceal environmental harms is that wrongful conduct is identifiable, and yet a harm-based remedy or sanction may be insufficient. In all such cases of enrichment through a wrong, the tortious conduct needed to establish a tort is usually easily recognized. However, a full tort action may not be possible since the elements of harm and causation might be difficult to prove. In such cases, where tort law may fail to provide a remedy and yet the enrichment of the defendant can be much more easily proved, the law of unjust enrichment offers an important avenue for plaintiffs in climate litigation through the remedy of disgorgement of profit.254

To see why this is a dramatic difference, consider the 2021 claim filed by a group of nongovernmental organizations (NGOs) representing Indigenous people in the Amazon against Casino, a French supermarket chain.255 The standing lawsuit is based on Casino's connection to slaughterhouses that are linked to illegal [\*1078] deforestation in the Amazon256 and is formally based on violations of human rights and environmental laws257 rather than unjust enrichment. The plaintiffs demanded compensation in the sum of $ 3.7 million for "damages done to their customary lands and the impact on their livelihoods,"258 but the revenues of Casino in 2020, according to Joana Setzer and Catherine Higham, were a staggering $ 15 billion just in Latin America.259 Even if a small fraction of this amount can be credibly attributed to unjust enrichment, it is clear why disgorgement of profits in this case would be far more meaningful in terms of deterrence rather than compensation for the harm.260 Compensation measured according to harms will be ineffective as a deterrent, as the defendant will continue the socially wrongful activity in the future as long as it is privately profitable.261

The straightforward doctrinal analysis we propose here, if adopted by courts, can lead to more just litigation outcomes. Consider, for example, the recent decision in the matter of State v. Tobin.262 In this case, the defendant was criminally charged for illegally harvesting crab and geoduck.263 Along with restitution for the authorities' expenses in surveying the illegal harvest and documenting evidence, the state also claimed a remedy measured according to the profit the defendant made from selling the illegally harvested crab and geoduck.264 The state presented evidence indicating that it may take thirty-nine years (and possibly more) for the geoduck population to recover from the defendant's excessive harvest.265 The Supreme Court of Washington determined that the defendant must only pay for the state's expenditures, but that he may keep his additional [\*1079] profits.266 As the defendant's profit was higher than the portion of the state's direct expenditure he was required to pay,267 this unfortunate decision sends a clear signal to other potential wrongdoers: climate crime pays.268 We argue not only that this decision is objectionable as a matter of policy but also that a correct application of unjust enrichment doctrine could obtain a better outcome.

2. Climate Enrichment Without a Wrong

Some commercial activities greatly contribute to global warming without constituting a wrong under current definitions. That is, some profitable undertakings entail high levels of GHG emissions even when they involve no violation of any specific environmental regulation or standard. Can gains obtained through such activities be considered unjust enrichment, and if so, under what circumstances?

As explained above, the law of unjust enrichment recognizes the possibility of liability even when the defendant committed no wrong.269 Such liability attaches in cases in which the defendant enjoyed a windfall they did not pay for or held assets that did not rightfully belong to them.270 This applies, for instance, in the cases of mistaken payment,271 medical treatment in an emergency,272 and a temporary injunction that was ultimately reversed.273 In all of these cases, the defendant unjustly benefited at the expense of others, even though they did not act in violation of any specific legal standard.274

This mode of liability may prove applicable, in some circumstances, to climate enrichment. This may be the case when a particular defendant enjoys resources that rightfully belong to others. This form of legal argument can be advanced in relation to the resource of climate stability.

As explained above, climate stability is a global public good.275 Resources such as breathable air, reasonable temperature, and inhabitable environments [\*1080] belong to all people.276 Yet in practice, through a series of practical limitations, the distribution of these resources does not reflect the rights of all stakeholders in those resources.277 Due to obvious limitations, future generations cannot act to secure their part of the asset for themselves. In this vacuum, some current stakeholders, with strong commercial interests, enjoy assets that rightfully belong to others.

This means that we are currently witnessing unjust enrichment through massively disproportional consumption of climate stability.278 Climate stability is a finite resource in the sense that the atmosphere can only absorb a limited amount of GHG emissions without climate conditions being irrevocably destabilized. Currently, a small number of large firms strong commercial actors in the energy sector benefit immensely through activities involving extremely high GHG emissions.279 This limited resource, the environmental capacity to absorb GHG emissions, is being depleted to the benefit of specific, identifiable actors, with nothing left for subsequent stakeholders. This type of enrichment is unjust, as future generations also have an entitlement to the common good of climate stability,280 which is a necessary condition to a peaceful and safe existence.

Doctrinally, climate enrichment can only be established in cases in which plaintiffs can show that profits are concentrated in the hands of a select few. Conversely, if everyone is benefiting, it cannot be said that a particular plaintiff is enriched at the expense of another. Therefore, the fact that climate winners and climate losers can be identified281 is crucial for any claim based on unjust [\*1081] enrichment. Without committing to the analysis of any specific case, it seems that this type of doctrinal pattern can be found in contemporary markets, where strong commercial interests benefit immensely through activities that perpetuate the climate crisis.282

Based on this analysis, we propose that a defendant's enrichment be considered unjust, absent wrongdoing, under the following conditions, together manifesting the idea of unjust climate enrichment283: when (1) the defendant's activity makes an oversized contribution to climate change, meaning that it is related to a significant share of worldwide GHG emissions, (2) the same activity is highly profitable for the defendant, and (3) the defendant is an exceptional profits center, in the sense that the gains from its activity are not equally enjoyed by the population as a whole. When these conditions are met, climate enrichment is both "at the expense of another" and "unjust," as a select few profit at the expense of the many through activities that render future prosperity virtually impossible.

These three conditions fit well with the internal logic of a claim in unjust enrichment and also ensure a limited and narrow scope of liability. Under the conditions we delineate, consumers, small and medium firms (manufacturers and service providers), employees, etc., will never be held liable for contributions to climate change, as they are not making exceptional profits and are not acting as concentrated profit centers of climate enrichment. Rather, this form of liability may pertain, if at all, only to the clearest examples of large multinational corporations that make immense profit through activities that are responsible for large shares of worldwide GHG emissions.284 This outcome is also normatively appealing. If the biggest winners of the climate crisis are made to forgo their profits, or some significant part of those profits, this may finally pave the way for the systematic changes necessary for addressing the crisis.

**Spillover – 1NC**

**When disconnected from an underlying right, the CP sets precedent that unjust enrichment can establish freestanding liability.**

Henry E. **Smith 9**, Professor of Law, Harvard Law School, "Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman," Virginia Law Review In Brief, vol. 95, 04/01/2009, pp. 9-17

But is copyright the only alternative to decentralized norms? In this Response, I will argue that Oliar and Sprigman's case for cautious endorsement of the norm system and lack of legal protection is impressive but incomplete. They may well be correct that the current system is the best, considering the alternatives, but they have not [\*11] considered all the alternatives. In particular, the nature of the norms involved and the types of misappropriation they target suggest that some version of misappropriation law and unjust enrichment may be a candidate to add to the institutional mix of devices to deal with joke thieves. Although the dangers of an overexpansive law of misappropriation are well known and counsel caution in any extension into the sphere of stand-up comedy, a more equitable approach--as opposed to the formal law that Oliar and Sprigman take as their baseline and foil--may avoid some of the problems with copyright, mitigate some of the problems with the norm system itself, and do less damage to the systems of norms than would an extension of copyright. Finally, and in a more speculative vein, I will consider the possibility that the expansion of intellectual property law--which partly motivates Oliar and Sprigman to seek a nonlegal alternative--might in part be driven by a lack of any way station between formal in rem property rights on the one hand and community or occupational norms on the other.

CUSTOM VERSUS COPYRIGHT

At every turn, Oliar and Sprigman compare the system of norms with formal copyright law. 6 In this they are well within the usual practice of the law and norms literature. 7 It is certainly most striking when norms supplement, as here, or even contradict formal law, as they do among lobster gangs in Maine in delineating their territories, or among Chicagoans claiming shoveled parking spots on the Windy City's snowy streets. But the fascination with norms as an alternative to law has displaced an older question: when and how should law incorporate norms? Or in an older formulation: when is custom law?

For custom to be enforceable as law--or in a more modern vein, to be adopted into the law--it must possess certain features. To take one oft-cited formulation, Blackstone set out seven requirements for custom to have legal force: antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency. 8 It is instructive to look at the norms of stand-up comedy through this lens. [\*12] Antiquity could be a problem for the norms of comedy: certainly they do not date back to 1189 or even for a very long time in the United States. They may, however, date to the beginning of the current era in stand-up comedy (that is, the era following Oliar and Sprigman's "post-vaudeville"), and the norms have probably been around long enough to know they are here to stay and are serving a purpose. Continuity and peaceable use both seem to be satisfied, notwithstanding the occasional fracas like that between Joe Rogan and Carlos Mencia, which are really examples of enforcement actions. Comics feel compelled to follow the norm, as Oliar and Sprigman amply document. As for reasonableness, Oliar and Sprigman have made a strong case that the norm serves the purpose of fostering creativity in stand-up comedy by protecting investments in developing material. Whether the norm is consistent with the law in general turns on questions of preemption and possible conflict with copyright--issues to which I return in a moment. Blackstone's remaining requirement is certainty.

As I have argued elsewhere, part of the certainty requirement involves communication of the norm to the relevant duty holders. 9 Customs can be vague, and this problem only worsens when a custom might be enforced outside its community of origin: what makes a spot subject to exclusive rights to work may be obvious to fellow miners in a given area but not so obvious to outsiders or to courts. Something very similar is going on here with the comics' norms. Oliar and Sprigman express concern that the norm against joke theft is too vague and might chill behavior. 10 The norm certainly approaches the outer reaches of copyright near the idea/expression dichotomy, the importance of which in copyright law reflects similar worries. But we would need more empirical evidence to determine whether the norm is all that vague to the participants themselves. To take an example closer to home, academics probably have a clearer sense for what is plagiarism than others do, even though it might be a little hard to articulate to a nonexpert.

So whether the norm of stand-up comedy is appropriate for incorporation into the law is really an open question, subject to further empirical work. Militating in favor of limited enforcement is that the norm itself arose in an intermediate-knit group in which the amount of background knowledge is less than among a smaller, more close-knit group. Consistent with this character of the community, the norm itself [\*13] is somewhat formal. The authors rightly point out that the norm shows a strong numerus clausus-like standardization and simplicity, 11 with a view towards ease of enforcement: if a joke cannot be co-owned and two people are using it, one of them is a thief. Simple priority rules interact with a more complicated social sense of working things out and getting along. There is a danger of enforcing the surrounding relationship-preserving norms in litigation, where relations have broken down. But it is the simplicity in the delineation of the entitlement itself that makes it even a candidate for some kind of enforcement.

THE MISAPPROPRIATION ALTERNATIVE

Another reason that custom is not as welcome at the table as it once was is that the customs that reflected commercial morality mainly have entered the law (or equity) through doctrines of misappropriation and unjust enrichment. These areas of the law are both underappreciated and regarded with suspicion these days. For one thing, the seeming danger of using misappropriation to deal with the appropriation of ideas makes people nervous because of its potential for overexpansion. In this Part, I call this reflexive distaste into question and even suggest that overreaction against it may have contributed to the overexpansiveness of the formal intellectual property rights that Oliar and Sprigman take as the main alternative to the norms of stand-up comics.

The cautionary tale here conventionally starts with International News Service v. Associated Press, 12 in which the Supreme Court held that the use of a competing news service's stories in one's own news service and newspapers is a misappropriation enjoinable by a court of equity. Aware of the criticism that it might be creating a property right in news, the Court declared the protected interest to be quasi-property rather than an in rem right. In his famous dissent, Justice Brandeis criticized the majority for doing precisely what it claimed not to be doing--creating new property rights--in an area in which legislatures are better judges of the situation. Perhaps more importantly for present IP debates, Justice Brandeis also made a strong case for a presumption that information exists in the public domain, such that where the limited IP protections provided by Congress (and to a lesser extent state law) do [\*14] not apply, information is "free as the air to common use." 13 Brandeis' dissent has been taken as a clarion call for IP skeptics ever since. 14

Although unfair competition is treated as an adjunct to trademark law these days, at other times and in other legal systems it has been closely associated with unjust enrichment. 15 Some commentators have also seen an implicit theme of unjust enrichment in intellectual property law itself. 16 The problem becomes how to prevent this theory from becoming too broad, both in order to protect the public domain and to avoid preemption by copyright or patent law. 17 Although the doctrine of misappropriation can be viewed as preventing a competitor from reaping where he has not sown, there needs to be a limit to this principle. 18 Such concerns apply to unjust enrichment more broadly, so that although one can speak in general terms of how one who is unjustly enriched at another's expense is liable in restitution, 19 the problem lies in defining what enrichment is unjust. Some see unjust enrichment as a substantive and expansive concept, while others see it as merely an organizing principle for thinking about liability, the main sources of which come from other branches of law. 20

Misappropriation also connects with custom. Richard Epstein has argued that because news organizations had a norm of respecting hot news and would only use it as a tip for independent investigation, the result in International News Service is correct for being in accord with custom. 21 Whether Epstein's conclusion follows turns in part on the informational demands that the custom makes in light of the set of duty [\*15] holders. Limiting the duty holders to direct competitors helps. If anything, the custom among stand-up comics is less vague than the one in International News Service governing "hot news." The anti-joke-stealing norm does not require defining what is hot (or what is funny, for that matter). But it is much more expansive, because it has no time limit at all, although some temporal limitation might appropriately be grafted onto a misappropriation claim, whether under the doctrine of laches or otherwise.

My purpose here is not to argue for extending International News Service to jokes. Indeed, Oliar and Sprigman advert to some of the problems such an approach could present. One, just noted, is that the custom may be too expansive, and this is always a concern with incorporating industry customs into IP law. 22 Too expansive use of custom, particularly as the set of duty holders grows, would pose large information costs and subvert the numerus clausus. 23 Would such a misappropriation claim in the realm of stand-up comedy derogate from the public domain more or less than copyright? The set of duty holders is far smaller than in copyright, which is in rem. Would misappropriation threaten to displace the existing norm and its informal enforcement mechanism as much as copyright would? It is hard to say, but unlike copyright, a misappropriation regime would dovetail substantively with the comedians' norm because a large amount of the content of the misappropriation regime would derive from the norm itself. Would use of equity-style judicially-managed misappropriation law invite less rent seeking than would industry-specific statutory IP regimes, which Oliar and Sprigman rightly view as rife with rent-seeking possibilities? 24 Finally, would use of the norm in the law make it less certain than would informal enforcement or arbitration within the stand-up world? The fact that, at least in contractual disputes, parties in the same business often prefer what appear to the outsider as formal bright line rules should give us pause. 25 But although Oliar and Sprigman very convincingly argue that the norm system is probably [\*16] better than any version of formal copyright, they leave unaddressed the question whether the norm should be supplemented with an equity-style misappropriation theory based on unjust enrichment.

The larger question here is whether an ex post equity-style standard based on morality and existing norms would be better or worse than formal law and norms alone. This is a difficult question in general but might be easier to assess in a given business like stand-up comedy. At the very least, misappropriation and the law of equity do pass the laugh test.

LAW AND EQUITY IN INTELLECTUAL PROPERTY

Finally, we might entertain a hypothesis about the nature of law and equity in intellectual property. What if our fears of equity and the "Chancellor's foot" 26 and of expansive readings of International News Service--which was itself an equity case--have led to the kind of overexpansiveness in the formal law of IP that troubles Oliar and Sprigman (and many others)? There has always been a suspicion of equity and the need to keep it cabined (for example, only acting in personam, and only when the legal remedy is inadequate and not in derogation of property rights) but after the fusion of law and equity, our view of formalism versus context-based discretion has become polarized. Some want to banish judicial discretion and others want contextualized decisionmaking to be available at all times.

In IP there has been, in reaction to International News Service, a tendency to use formal IP law where once misappropriation might have served. Might some of the impetus for business method patents and expansive uses of copyright have been somewhat dulled if the most egregious problems of freeriding in violation of existing industry custom could have been addressed through suits for misappropriation and unjust enrichment? Again, it is hard to say because it has hardly been tried. The dangers inherent in International News Service should not rule out misappropriation as a safety valve that might prevent even worse approaches. It is a testament to the richness of their study of stand-up [\*17] comedy that Oliar and Sprigman cast these long-buried issues in such sharp relief.

**AT: Perm: Do CP---2NC**

**Do the CP severs, which is a voting issue for deterrence:**

**2. Collective bargaining rights are statutorily wedded to monetary damages. That makes those rights ‘legal in nature’.**

Casey Warren **Baker et al. 24**, Baker, McInerney, and Knotts are affiliated with Marshall University, "More Questions than Answers: NLRB Enforcement Actions in a Post-Jarkesy World," American Bar Association, 10/14/2024, https://www.americanbar.org/groups/business\_law/resources/business-law-today/2024-october/nlrb-enforcement-actions-post-jarkesy-world/

Jarkesy Framework, Part 1: The Nature of the Remedy

The Seventh Amendment to the U.S. Constitution provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .” As explained in Jarkesy, the initial question is whether an internal administrative adjudication falls within the Seventh Amendment as a “suit at common law.” According to the Court, despite the amendment’s phrasing, the right to a jury is not strictly limited to claims arising under common law: a statutory claim is subject to the amendment if the claim is “legal in nature”—that is, not arising under equity, admiralty, or maritime jurisprudence.

According to the Court, in making such an assessment, the nature of the remedy is the most important consideration. Monetary damages, especially when imposed to punish or deter wrongful conduct, are within the scope of legal remedies. In contrast, remedies designed to restore the status quo are more likely to be considered equitable in nature.

As discussed above, the relief typically imposed by the NLRB is equitable in nature, with remediation of harm the primary objective. In the 1937 case of National Labor Relations Board v. Jones & Laughlin Steel Corp., the Court held that NLRB awards of money damages incident to equitable relief (such as back pay) are not subject to the Seventh Amendment. But awards of back pay serve not merely a remedial purpose—they also act as a deterrent against wrongful conduct. Jarkesy’s emphasis on the purpose of the remedy calls into question whether Jones & Laughlin Steel should be revisited to determine whether the dual purposes of such relief render back pay damages subject to the Seventh Amendment.

Jarkesy Framework, Part 2: The Public Rights Exception

Even if the NLRB’s monetary awards are legal in nature, the agency may nevertheless be able to claim an exception to the Seventh Amendment’s jury requirement. As the Jarkesy majority recognized, under the so-called public rights exception, if a cause of action has historically been determined by the executive or legislative branches, the judicial branch does not have exclusive jurisdiction over the claim. This exception typically extends to various types of administrative actions including revenue collection, immigration, relations with Indian tribes, administration of public lands, and the granting of public benefits.

In looking at the claim in Jarkesy—fraud—the majority considered whether the cause of action was substantially the same as one that might have arisen under traditional English common-law customs circa the late eighteenth century. The Court had little difficulty determining that the exception did not apply, as fraud was well-known in traditional common-law courts.

However, the majority distinguished the fraud claim at issue from an earlier decision, Atlas Roofing Co. v. Occupational Safety & Health Review Commission, involving workplace safety regulations. Since the regulations at issue in Atlas Roofing were not founded in common law, the Jarkesy majority found the case inapplicable to its consideration.

Therefore, determining whether unfair labor practice claims are within the public rights exception requires a review of the history of labor rights and whether the unfair labor practices policed by the NLRB have historical common-law analogs or are creations of modern legislative and executive functions.

There is at least one example of an English court in the 1700s relying on common-law criminal conspiracy principles to restrict the collective rights of organized workers. However, scholars debate whether the decision was truly based on common-law doctrines or a statute passed the preceding year. The leading early American case considering the question expressly rejected the English precedent as a common-law rule because of the existence of statutory prohibition. Essentially, in the absence of a statute making the collective action unlawful, a conspiracy to engage in the action cannot be considered criminal under the common law.

Thus, there is a historical American legal tradition of looking to statute to define lawful and unlawful collective bargaining rights and duties. The Act does just that, assigning the adjudication of such rights and duties to the NLRB as permitted by the public rights exception. But the Jarkesy majority cautioned that the public rights exception is an exception, with Article III courts presumptively the appropriate forum even where an argument can be made in support of the exception’s application.

**3. Damages are distinct from non-legal restitution awards for unjust enrichment, which scale with wrongdoer benefit instead of victim harm.**

Dylan B. **Carp et al. 24**, Attorneys for Petitioner/Cross-Respondent/Intervenor MACY'S INC., "Supplemental Brief on Impact of Supreme Court's Decision in SEC v. Jarkesy, 144 S. Ct. 2117 (2024)," United States Court of Appeals for the Ninth Circuit, Case Nos. 23-124, 23-150, and 23-188, 2024

Under SEC v. Jarkesy, 144 S. Ct. 2117 (2024), the Seventh Amendment prohibits the National Labor Relations Board (“NLRB” or the “Board”) from seeking to impose on Macy’s, Inc. the remedies discussed in Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022) (enforcement denied other grounds by Thryv Inc. v. NLRB, 102 F.4th 727 (5th Cir. 2024)). (ECF No. 89.1). In Jarkesy, the Supreme Court held that an administrative agency violates the Seventh Amendment’s right to a jury trial when it brings a statutory claim that is “legal in nature” through an administrative proceeding. Because the NLRB has used its in-house administrative hearing process to impose Thryv type damages that are purely “legal in nature” against Macy’s—in this case (remote) compensatory monetary damages—it has deprived Macy’s of its constitutional right to a jury trial. The Board’s decision, therefore, cannot stand under Jarkesy. And because Macy’s was entitled to a jury trial, this Court should not enforce the Board’s decision and order.

II. Jarkesy held the SEC’s administrative proceeding seeking money damages for a statutory claim of securities fraud violated the Seventh Amendment.

In Jarkesy, the Securities and Exchange Commission charged George Jarkesy and his firm with securities fraud. After an evidentiary hearing, an SEC Administrative Law Judge found respondents liable and levied a $300,000 civil penalty against them. See Jarkesy, 144 S. Ct. at 2127. On appeal, the Supreme Court held that the SEC’s actions violated the Seventh Amendment. The Court first reiterated that the right to a jury trial is “‘of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right’ has always been and ‘should be scrutinized with the utmost care.’” Id. at 2128 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)). From that starting point, the Court explained that the Seventh Amendment guarantees the right to jury trial for all “Suits at common law.” U.S. Const. amend. VII. That phrase, according to the Court, encompasses all suits “which are not of equity or admiralty jurisdiction, whatever the peculiar form which they may assume.” Id. (citation omitted).

The phrase also encompasses statutory claims brought by administrative agencies that are “legal in nature.” Id. (citing Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 53 (1989)). Jarkesy explained that to determine whether a suit is legal in nature, courts should consider both the cause of action and the remedy that it provides, although the remedy is the “more important consideration” in making that evaluation. Id. at 2129 (internal citation omitted). In Jarkesy, the remedy was “all but dispositive.” Id. at 2129. “For respondents’ alleged fraud, the SEC [sought] civil penalties, a form of monetary relief.” Id. “While monetary relief can be legal or equitable, money damages are the prototypical common law remedy.” Id. As to the cause of action, “[t]he close relationship between the causes of action in [Jarkesy] and common law fraud” confirmed the conclusion that the claims were legal in nature because both targeted “the same basic conduct: misrepresenting or concealing material facts.” Id.

III. Under Jarkesy, the Board’s administrative proceeding seeking Thryv remedies for a statutory claim of a wrongful lockout violated the Seventh Amendment.

A. Thryv remedies are compensatory damages that are legal in nature and thus covered by the Seventh Amendment.

As in Jarkesy, the Board’s Thryv remedies are “all but dispositive” of the result here. Jarkesy, 144 S. Ct. at 2122. Those remedies are plainly legal in nature, meaning that Macy’s must have the opportunity to present its defenses in a jury trial. In Thryv, the Board declared that it had authority to award money “to compensate affected employees for all direct or foreseeable harms that these employees suffer as a result of the [employer’s] unfair labor practices.” Thryv, 372 NLRB No. 22, at \*1. These monetary awards may include:

 credit card debt, including interest and late fees;

 retirement account early withdrawal penalties to cover living expenses;

 compensation for loss of a car or home based on inability to make monthly loan payments;

 increased transportation costs; and

 increased childcare costs.

Thryv, 372 NLRB No. 22 at \*9-10. (citation omitted). According to the Board’s General Counsel, Thryv damages may also include monetary awards for “specialty tool costs,” “legal representation costs in eviction proceedings,” and “expenses resulting from a change in immigration status.” Memorandum GC 24-04 (April 8, 2024) (available online at https://apps.nlrb.gov/link/document.aspx/ 09031d4583ce3de3).

These remedies are compensatory and thus legal because they look to “what has the owner lost, not what has the taker gained.” Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999). Here, Thryv damages focus on what the “owner,” (i.e., the alleged discriminatee) has lost. They do not focus on any gains by the company. These remedies are plainly compensatory since they seek to compensate through monetary damages for harm purported to have resulted, however tangentially, from violations of the National Labor Relations Act (“NLRA”). As this Court has held, claims that seek compensatory damages, such as the ones brought in Monterey, are legal ones because “compensation is a purpose traditionally associated with legal relief.”). Tamosaitis v. URS, Inc., 781 F.3d 468, 486 (9th Cir. 2014) (internal citations omitted); see also Mertens v. Hewitt Assoc., 508 U.S. 248, 255 (1993) (“Compensatory damages” or “monetary relief for all losses … sustained as a result of the alleged breach of duties,” are “the classic form of legal relief”); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) (the “general rule” is that “monetary relief is legal”) (citation omitted).

That these damages are compensatory—and thus legal in nature—is further shown by the treatment of damages under Title VII before its 1991 amendments. As explained in more detail in Macy’s Opening Brief, the remedial scheme under Title VII of the Civil Rights Act of 1964 was directly modeled after the NLRA’s remedial scheme. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 419 n. 11 (1975). The Supreme Court’s proclamations on Title VII therefore should apply with equal force to the NLRA. And when the Supreme Court evaluated the damage remedies available under Title VII, it explained that “make-whole relief,” which the Board unconvincingly claims to only seek, consists of “restoring victims, through backpay awards and injunctive relief” to wage and employment positions they would have had even without the unlawful discrimination. United States v. Burke, 504 U.S. 229, 239 (1992). Yet the Court also made clear that compensatory damages such as “pain and suffering, emotional distress, harm to reputation, or other consequential damages (e.g., a ruined credit rating)” were not part of make-whole relief. Id.

The Supreme Court’s Burke decision, although issued in 1992, evaluated the pre-1991 version of Title VII. In 1991, Congress amended Title VII to allow a plaintiff to recover compensatory and punitive damages for violations of that civil rights law. Yet, “to protect the rights of all persons under the Seventh Amendment,” Congress also amended the law to provided that “any party may demand a trial by jury” when such damages are sought. See EEOC v. Bass Pro Outdoor World, LLC, 826 F.3d 791, 796 (5th Cir. 2016) (citations omitted); see also 42 U.S.C. § 1981a(c).

The Board now seeks monetary damages under Thryv for “ruined credit rating” and many other types of damages that allegedly can be remedied through payments. But Congress recognized that remedy expansion under Title VII, whose remedial scheme mirrored that of the NLRA, required Seventh Amendment compliance. The Board, in contrast, has deemed to grant itself the right to award such damages by ignoring the text of the NLRA, relevant precedent such as Burke, and, most problematically, the Constitution. It cannot do so. In fact, the dissent in Thryv pointed out that the Board’s expansive remedial scheme went “well beyond the remedies available under Title VII” even though the Seventh Amendment required jury trials for Title VII’s compensatory damages. Thryv, 372 NLRB No. 22, at \*19 (Members Kaplan and Ring, concurring in part and dissenting in part).

**It’s a totally different paradigm for remedies, even if it results in the same money transfers.**

Patrick J. **Bumatay 25**, Judge of the United States Court of Appeals for the Ninth Circuit, Yale University BA, Harvard University JD, "International Union of Operating Engineers, Stationary Engineers, Local 39 v. National Labor Relations Board," United States Court of Appeals for the Ninth Circuit, No. 23-124, 01/21/2025

First, consider the remedies the Board seeks to impose—arguably the most important concern. Recall, under its make-whole authority, the Board believes that it may make employers pay for any foreseeable pecuniary harm that employees experience because of an unfair labor practice. This includes such attenuated harms as babysitting fees, credit card late fees, car payments, and attorneys’ fees to sue landlords. But all this exceeds the purely equitable remedies that the Board may order.

Without question, the Board has the equitable powers to restore employees to the status quo through monetary relief. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937) (the Board may order a monetary recovery as “an incident to equitable relief”); Leviton Mfg. Co., 111 F.2d at 621 (the Board’s authority to order payments “must . . . be confined to restitution for the wrong done”). But it has no authority to award money damages as a tort remedy. See Jarkesy, 603 U.S. at 123 (“[M]oney damages are the prototypical common law remedy”); Teamsters v. Terry, 494 U.S. 558, 570 (1990) (“Generally, an action for money damages was ‘the traditional form of relief offered in the courts of law.’”) (simplified).

To be sure, sometimes equitable restitution and money damages can look the same. In some cases, they can even lead to the same dollar award against a party. See Dan B. Dobbs, 1 Dobbs Law of Remedies 280 (2d. ed. 1993). Even so, they are distinct. And this distinction is significant:

[T]hey are often triggered by different situations and always measured by a different yardstick. Damages always begins with the aim of compensation for the plaintiff . . . . Restitution, in contrast, begins with the aim of preventing unjust enrichment of the defendant. To measure damages, courts look at the plaintiff’s loss or injury. To measure restitution, courts look at the defendant’s gain or benefit.

Id. In other words, when distinguishing ordinary money damages at law from “equitable restitution and other monetary remedies available in equity,” “the question is what has the owner lost, not what has the taker gained.” City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999) (simplified). And so, as a corollary, the question for equitable remedies is only the unjust gain of the taker or employer—not the loss to the owner or employee.

Explaining the difference between equitable monetary relief and monetary damages should illuminate the problem here. The Board wants to measure monetary relief from the perspective of the employee’s loss—not the employer’s gain. The Board’s foreseeable-damages regime asks: What did the employee lose? What fees did the employee incur because of the unfair labor practice? What opportunities did the employee forgo because of the proscribed conduct? But this would be inappropriate under equity. Equitable relief should ask only what the employer has unjustly gained. When employers withhold pay from employees based on unlawful employment actions, employers unjustly keep the employees’ wages and so equitable relief equates to back pay—exactly as contemplated by § 160(c). On the other hand, the award of broad foreseeable damages goes beyond equitable restitution and crosses into the tort remedy of money damages.

**4. The CP’s agent competes:**

**a. CBRs are legislative, not courts**

Thomas **Waterman 19**, Justice, Supreme Court of Iowa, "AFSCME Iowa Council 61 v. State," no. 17-1841, 5/17/2019

"We reiterate that the scope of collective bargaining rights of public employees "is a matter for the legislature, not the courts." State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970); see also Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989) ("The right to public employment is not a fundamental right."). House File 291 does not prohibit or restrict unions from soliciting members, disseminating materials, engaging in political activities, or expressing their views. As the State argues, "There is a fundamental distinction between the right to associate and whether someone must listen when you do. Declining to collectively bargain over certain topics does not inhibit the ability to associate." We agree and apply rational basis review to this challenge. Nothing in House File 291 prohibits public employees from joining AFSCME or any other union.…" AFSCME Iowa Council 61 v. State, 928 N.W.2d 21, 41.

**b. Resolved is legislative**

**Louisiana State Legislature 5**, Governing body of the state of Louisiana, "Legislative Glossary," https://www.legis.la.gov/legis/Glossary.aspx

Resolution

A legislative instrument that generally is used for making declarations, stating policies, and making decisions where some other form is not required. A bill includes the constitutionally required enacting clause; a resolution uses the term "resolved". Not subject to a time limit for introduction nor to governor's veto. (Const. Art. III, §17(B) and House Rules 8.11, 13.1, 6.8, and 7.4 and Senate Rules 10.9, 13.5 and 15.1)

**5. Prefer it:**

**a. GROUND---infinite affs that tweak the NLRA framework mean we must be allowed to test NLRA key to get back in the game.**

**b. LIMITS---if NLRA’s only a baseline, they could build literally anything on top of it so long as they call it a CBR.**

**c. PRECISION---our ev’s from cases applying the legal nature of the NLRA to labor disputes. That’s the only predictable basis of reference.**

Anne **Mayerson et al. 16**, Attorneys, "Amicus Curiae Brief for the Amalgamated Transit Union (ATU) in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment," United States District Court Eastern District of California, Cadse No. 2:13-CV-02069-KJM-DAD, 04/05/2016, Lexis

When Congress enacted Section 13(c)(2) in 1964, it obviously did not draw the term “collective bargaining rights” out of thin air; rather, it had something specific in mind. And, considering the circumstances that led Congress to enact Section 13(c)(2) in 1964 to provide for the “continuation” of “collective bargaining rights”—viz., a trend towards public acquisitions of private sector transit companies whose employees and their unions would continue to be covered by and enjoy the protections of the National Labor Relations Act (“NLRA”) but for such public acquisitions—that something specific could only have been “collective bargaining rights” of the kind historically made available to private sector employees under the NLRA. See generally ATU v. Donovan, supra, 767 F.2d at 948-49. Accordingly, in its determinations on remand, the DOL was right to look to “[t]he prevailing [case] law” under the NLRA “when section 13(c) was enacted” in determining what Congress meant when it used the term “collective bargaining rights” in Section 13(c)(2). See SacRTD Determination, at 11-13.

**6. NORMAL MEANS---it’s labor law, not new categories. Normal means competition is good---based in the literature, expands neg ground, and forces specific solvency evidence.**

**Solvency---AT: Certainty – 2NC**

**2. THE CP IS CERTAIN. The basic principle might be vague, but no more so than the basic principles of statutory law. The CP’s specific applications clarifies the doctrine in the plan’s area.**

**Harvard Law Review 20**, "The Intellectual History of Unjust Enrichment," Harvard Law Review, vol. 133, 04/01/2020, p. 2077

C. Attempted Fusion Across Law and Equity

Given unjust enrichment's development in both common law and equity, it became a compelling candidate for fusion. This section traces the history of this attempt, arguing that the fusion of law and equity in the United States plays an explanatory role in unjust enrichment's relative lack of popularity. A bridge between equitable remedies and the common law doctrine of quasi-contract was underway in the late-nineteenth century within U.S. courts. Scholars built on early decisions to fashion a theory of unjust enrichment that straddled both common law and equity, culminating in the 1937 First Restatement of Restitution. The timing coincided with the realist-driven fusion of common law and equity in federal and state courts, which may have contributed to a mischaracterization of unjust enrichment as primarily an equitable doctrine. Unjust enrichment came to be seen as a product of the judge's conscience, rather than a source of interpersonal obligations equally as rooted in our law as contract and tort.

There is much at stake in deciding whether to treat unjust enrichment as an equitable or legal principle. In many ways the merger of law and equity remains elusive in the United States, and equity is still viewed as "subordinate, extraordinary, or unusual." 127Equitable doctrines gained a reputation as too expansive, ill-defined, and discretionary, and equity stopped being taught as a required course in American [\*2090] law schools. 128The law is also littered with "remnants of equitable tests that continue to operate as prerequisites for access to certain remedies." 129The irreparable injury rule is sometimes applied to deny plaintiffs a remedy for unjust enrichment. 130The irreparable injury test "commands that no equitable remedy will flow if adequate legal remedy exists." 131But applying the irreparable injury rule makes little sense in the context of unjust enrichment if unjust enrichment was itself a "legal remedy" stemming from common law. Misclassification has further consequences given that only litigants with common law claims have a right to a jury trial. 132

The bridge between equitable remedies and common law quasi-contract began in the nineteenth century with American courts, which responded in varying degrees to legislative mergers of law and equity. 133In an 1885 Indiana Supreme Court case, Peirce v. Higgins, 134the court provided an equitable remedy for a quasi-contractual claim. 135First the court explained that subrogation, the requested remedy, is an equitable one: "[T]he right results more from equity than from contract or quasi contract." 136Nevertheless, "[T]he principles of equity entered into that contract as a silent but potent factor . . . . [The] parties in contracting assume that the law is one of the elements of their contract." 137Another early example of attempted fusion is a federal case from 1887 in which the court viewed the equitable remedy for mistaken improvers as an equitable defense to an action at law. 138The court explained it had the power to combine equity and common law because the state legislature had "obliterated the line between equitable and legal defenses." 139

Despite the scholarship of Ames and Keener, twentieth-century scholarship and case law most often considered unjust enrichment in quasi-contract and equity separately; even so, scholars increasingly [\*2091] noted similarities in the subjects. 140In 1937, the American Law Institute officially recognized the unity between contracts implied in law and equitable remedies based on the principle of unjust enrichment in the First Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts. 141The original name included the "Law of Restitution and Unjust Enrichment," but this was considered too long of a title. 142The name has been almost universally disparaged. Professor Peter Birks critiqued it best:

The series 'contract (or, larger, consent), wrongs, unjust enrichment, and other causative events' is on its face a well-dressed series in which every term is of the same kind. It is a classification of the events which generate legal rights and duties. When we substitute restitution for unjust enrichment, we appear to have invited a cuckoo into the nest. One term now refers, not to a cause, but to an effect. 143

Despite the blunder in name, the First Restatement was an important advancement and had a tremendous impact in the United States and abroad. The choice of organization separated quasi-contract from the Restatement on Contracts, and separated constructive trusts from the Restatement on Trusts. 144Sitting side by side, these two fields represented the law of "restitution," straddling both common law and equity. The Reporters, Professors Austin Scott and Warren Seavey, explained this unification thus: "In bringing these situations together under one heading, the Institute expresses the conviction that they are all subject to one unitary principle which heretofore has not had general recognition. In this it has recognized the tripartite division of the law into contracts, torts and restitution . . . ." 145The Reporters were attuned to criticism that unjust enrichment was "so broad as to be meaningless." 146They responded that tort law turns on the definition of broad terms such as "wrong" that have been defined through an extensive set of rules, many of which are attributed more to history than to logic. 147The same could be said for "unjustified" within the law of unjust enrichment. As for unclear doctrinal boundaries such as cases where facts could give rise to a claim in both contract and unjust enrichment or in [\*2092] both tort and unjust enrichment, 148they argued that the plaintiff could choose which claim to bring based on what elements could be proven or the remedies available. 149

### Solvency – AT: Certainty – They Link – 2AC Card

**The CP dooms journalism --- it makes journalists uncertain about whether they’ll be liable for violating antitrust law, which chills their speech.**

**Kendrick 13** – Professor of Law at the University of Virginia School of Law.

Leslie Kendrick, “Speech, Intent, and the Chilling Effect,” William & Mary Law Review, 04/2013, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3481&context=wmlr

2. How Chilling Works

The question arises why legal rules not directed at protected speech might nevertheless chill such speech. Chilling may arise from different sources, foremost among which is uncertainty in the legal process.91 Uncertainty may stem from ambiguous rules or erroneous applications. Either of these may make a speaker fear that he will be held liable for speech that should properly be protected. The closer his speech is to the line between protected and unprotected, the more pronounced this uncertainty will be.92 Given the existence of both ambiguity and error, would-be speakers of marginal statements might well decide that they would prefer not to speak rather than to risk liability. Speech that is actually protected will therefore be chilled.93

It is worthwhile to examine this description in more detail. The mechanisms of chilling are diverse, and some so distinct as to have their own labels. The most prominent examples are vagueness and overbreadth.94 The doctrine of void-for-vagueness is partly explained on chilling grounds.95 A vague law creates uncertainty as to its scope; speakers who would otherwise engage in protected speech accordingly self-censor. Although vagueness is a general due process issue, its special significance in the First Amendment area is consistent with the conception of free speech as an affirmative value.96

Similarly, one chief explanation for the First Amendment doctrine of overbreadth rests on the chilling effect. An overbroad law is invalid not because it incidentally chills protected expression but because it directly reaches protected expression: hence the term “overbroad.” The chilling effect comes in as one explanation for why unprotected speakers—those who would have been reached by a properly drawn law—nevertheless may challenge the overbroad law.97 They may do so, according to this account, because the law is chilling would-be speakers of protected expression who stay silent to avoid prosecution but thereby lose the opportunity to challenge the law.98 The overbroad law essentially exerts a chilling effect on its own appropriate judicial review, the remedy to which is a special standing rule.99

But chilling also arises outside the context of these doctrines. A law that is not void for vagueness may still contain ambiguities, and even the clearest rule may be applied in error. These circumstances may make speakers uncertain of a law’s application. This uncertainty may translate into a variety of risks, any of which may cause a speaker to remain silent. For example, a speaker may be deterred • by the risk of wrongful criminal conviction and sanction;100 • by the risk of wrongful liability in tort for damages or other civil remedies;101 • by the risk of losing benefits to which he is entitled;102 • by the litigation costs of defending himself in criminal, civil, or administrative procedures, regardless of their outcomes;103 • by the personal and reputational costs of defending against a criminal, civil, or administrative proceeding, regardless of its outcome;104 • by the costs of obtaining legal advice prior to speaking;105 or • by the threat of investigation or surveillance, whether or not it results in legal proceedings.106

**AT: Perm: Do Both---2NC**

**1. Doing both doesn’t solve. Our entire net benefit is about saying that unjust enrichment can create obligations in the absence of corresponding tort, contract, or statutory law. The perm retains the doctrine’s default setting, which links money awards to an underlying legal right infringement---that’s Smith.**

<<FOR REFERENCE>>

But is copyright the only alternative to decentralized norms? In this Response, I will argue that Oliar and Sprigman's case for cautious endorsement of the norm system and lack of legal protection is impressive but incomplete. They may well be correct that the current system is the best, considering the alternatives, but they have not [\*11] considered all the alternatives. In particular, the nature of the norms involved and the types of misappropriation they target suggest that some version of misappropriation law and unjust enrichment may be a candidate to add to the institutional mix of devices to deal with joke thieves. Although the dangers of an overexpansive law of misappropriation are well known and counsel caution in any extension into the sphere of stand-up comedy, a more equitable approach--as opposed to the formal law that Oliar and Sprigman take as their baseline and foil--may avoid some of the problems with copyright, mitigate some of the problems with the norm system itself, and do less damage to the systems of norms than would an extension of copyright. Finally, and in a more speculative vein, I will consider the possibility that the expansion of intellectual property law--which partly motivates Oliar and Sprigman to seek a nonlegal alternative--might in part be driven by a lack of any way station between formal in rem property rights on the one hand and community or occupational norms on the other.

CUSTOM VERSUS COPYRIGHT

At every turn, Oliar and Sprigman compare the system of norms with formal copyright law. 6 In this they are well within the usual practice of the law and norms literature. 7 It is certainly most striking when norms supplement, as here, or even contradict formal law, as they do among lobster gangs in Maine in delineating their territories, or among Chicagoans claiming shoveled parking spots on the Windy City's snowy streets. But the fascination with norms as an alternative to law has displaced an older question: when and how should law incorporate norms? Or in an older formulation: when is custom law?

For custom to be enforceable as law--or in a more modern vein, to be adopted into the law--it must possess certain features. To take one oft-cited formulation, Blackstone set out seven requirements for custom to have legal force: antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency. 8 It is instructive to look at the norms of stand-up comedy through this lens. [\*12] Antiquity could be a problem for the norms of comedy: certainly they do not date back to 1189 or even for a very long time in the United States. They may, however, date to the beginning of the current era in stand-up comedy (that is, the era following Oliar and Sprigman's "post-vaudeville"), and the norms have probably been around long enough to know they are here to stay and are serving a purpose. Continuity and peaceable use both seem to be satisfied, notwithstanding the occasional fracas like that between Joe Rogan and Carlos Mencia, which are really examples of enforcement actions. Comics feel compelled to follow the norm, as Oliar and Sprigman amply document. As for reasonableness, Oliar and Sprigman have made a strong case that the norm serves the purpose of fostering creativity in stand-up comedy by protecting investments in developing material. Whether the norm is consistent with the law in general turns on questions of preemption and possible conflict with copyright--issues to which I return in a moment. Blackstone's remaining requirement is certainty.

As I have argued elsewhere, part of the certainty requirement involves communication of the norm to the relevant duty holders. 9 Customs can be vague, and this problem only worsens when a custom might be enforced outside its community of origin: what makes a spot subject to exclusive rights to work may be obvious to fellow miners in a given area but not so obvious to outsiders or to courts. Something very similar is going on here with the comics' norms. Oliar and Sprigman express concern that the norm against joke theft is too vague and might chill behavior. 10 The norm certainly approaches the outer reaches of copyright near the idea/expression dichotomy, the importance of which in copyright law reflects similar worries. But we would need more empirical evidence to determine whether the norm is all that vague to the participants themselves. To take an example closer to home, academics probably have a clearer sense for what is plagiarism than others do, even though it might be a little hard to articulate to a nonexpert.

So whether the norm of stand-up comedy is appropriate for incorporation into the law is really an open question, subject to further empirical work. Militating in favor of limited enforcement is that the norm itself arose in an intermediate-knit group in which the amount of background knowledge is less than among a smaller, more close-knit group. Consistent with this character of the community, the norm itself [\*13] is somewhat formal. The authors rightly point out that the norm shows a strong numerus clausus-like standardization and simplicity, 11 with a view towards ease of enforcement: if a joke cannot be co-owned and two people are using it, one of them is a thief. Simple priority rules interact with a more complicated social sense of working things out and getting along. There is a danger of enforcing the surrounding relationship-preserving norms in litigation, where relations have broken down. But it is the simplicity in the delineation of the entitlement itself that makes it even a candidate for some kind of enforcement.

THE MISAPPROPRIATION ALTERNATIVE

Another reason that custom is not as welcome at the table as it once was is that the customs that reflected commercial morality mainly have entered the law (or equity) through doctrines of misappropriation and unjust enrichment. These areas of the law are both underappreciated and regarded with suspicion these days. For one thing, the seeming danger of using misappropriation to deal with the appropriation of ideas makes people nervous because of its potential for overexpansion. In this Part, I call this reflexive distaste into question and even suggest that overreaction against it may have contributed to the overexpansiveness of the formal intellectual property rights that Oliar and Sprigman take as the main alternative to the norms of stand-up comics.

The cautionary tale here conventionally starts with International News Service v. Associated Press, 12 in which the Supreme Court held that the use of a competing news service's stories in one's own news service and newspapers is a misappropriation enjoinable by a court of equity. Aware of the criticism that it might be creating a property right in news, the Court declared the protected interest to be quasi-property rather than an in rem right. In his famous dissent, Justice Brandeis criticized the majority for doing precisely what it claimed not to be doing--creating new property rights--in an area in which legislatures are better judges of the situation. Perhaps more importantly for present IP debates, Justice Brandeis also made a strong case for a presumption that information exists in the public domain, such that where the limited IP protections provided by Congress (and to a lesser extent state law) do [\*14] not apply, information is "free as the air to common use." 13 Brandeis' dissent has been taken as a clarion call for IP skeptics ever since. 14

Although unfair competition is treated as an adjunct to trademark law these days, at other times and in other legal systems it has been closely associated with unjust enrichment. 15 Some commentators have also seen an implicit theme of unjust enrichment in intellectual property law itself. 16 The problem becomes how to prevent this theory from becoming too broad, both in order to protect the public domain and to avoid preemption by copyright or patent law. 17 Although the doctrine of misappropriation can be viewed as preventing a competitor from reaping where he has not sown, there needs to be a limit to this principle. 18 Such concerns apply to unjust enrichment more broadly, so that although one can speak in general terms of how one who is unjustly enriched at another's expense is liable in restitution, 19 the problem lies in defining what enrichment is unjust. Some see unjust enrichment as a substantive and expansive concept, while others see it as merely an organizing principle for thinking about liability, the main sources of which come from other branches of law. 20

Misappropriation also connects with custom. Richard Epstein has argued that because news organizations had a norm of respecting hot news and would only use it as a tip for independent investigation, the result in International News Service is correct for being in accord with custom. 21 Whether Epstein's conclusion follows turns in part on the informational demands that the custom makes in light of the set of duty [\*15] holders. Limiting the duty holders to direct competitors helps. If anything, the custom among stand-up comics is less vague than the one in International News Service governing "hot news." The anti-joke-stealing norm does not require defining what is hot (or what is funny, for that matter). But it is much more expansive, because it has no time limit at all, although some temporal limitation might appropriately be grafted onto a misappropriation claim, whether under the doctrine of laches or otherwise.

My purpose here is not to argue for extending International News Service to jokes. Indeed, Oliar and Sprigman advert to some of the problems such an approach could present. One, just noted, is that the custom may be too expansive, and this is always a concern with incorporating industry customs into IP law. 22 Too expansive use of custom, particularly as the set of duty holders grows, would pose large information costs and subvert the numerus clausus. 23 Would such a misappropriation claim in the realm of stand-up comedy derogate from the public domain more or less than copyright? The set of duty holders is far smaller than in copyright, which is in rem. Would misappropriation threaten to displace the existing norm and its informal enforcement mechanism as much as copyright would? It is hard to say, but unlike copyright, a misappropriation regime would dovetail substantively with the comedians' norm because a large amount of the content of the misappropriation regime would derive from the norm itself. Would use of equity-style judicially-managed misappropriation law invite less rent seeking than would industry-specific statutory IP regimes, which Oliar and Sprigman rightly view as rife with rent-seeking possibilities? 24 Finally, would use of the norm in the law make it less certain than would informal enforcement or arbitration within the stand-up world? The fact that, at least in contractual disputes, parties in the same business often prefer what appear to the outsider as formal bright line rules should give us pause. 25 But although Oliar and Sprigman very convincingly argue that the norm system is probably [\*16] better than any version of formal copyright, they leave unaddressed the question whether the norm should be supplemented with an equity-style misappropriation theory based on unjust enrichment.

The larger question here is whether an ex post equity-style standard based on morality and existing norms would be better or worse than formal law and norms alone. This is a difficult question in general but might be easier to assess in a given business like stand-up comedy. At the very least, misappropriation and the law of equity do pass the laugh test.

LAW AND EQUITY IN INTELLECTUAL PROPERTY

Finally, we might entertain a hypothesis about the nature of law and equity in intellectual property. What if our fears of equity and the "Chancellor's foot" 26 and of expansive readings of International News Service--which was itself an equity case--have led to the kind of overexpansiveness in the formal law of IP that troubles Oliar and Sprigman (and many others)? There has always been a suspicion of equity and the need to keep it cabined (for example, only acting in personam, and only when the legal remedy is inadequate and not in derogation of property rights) but after the fusion of law and equity, our view of formalism versus context-based discretion has become polarized. Some want to banish judicial discretion and others want contextualized decisionmaking to be available at all times.

**That specifically can’t solve climate change, where harms are distant, indirect, incalculable, and stem from legal behavior, making a standalone doctrine of unjust enrichment key---that’s Gilboa.**

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This Part reviews existing legal frameworks currently used in the governance of the climate crisis, with an emphasis on domestic regulation, international treaties, and tort litigation. It shows that existing legal tools fail to offer effective solutions for two main reasons. First, short-term monetary incentives, coordination problems, and free-rider effects make climate change particularly difficult to regulate, thereby contributing to its status as a "super wicked" problem.89 Second, the harms associated with the climate crisis are mostly future harms with complicated causal histories,90 while incentives to profit are immense, immediate, and direct.91 By clarifying these points, this Part serves as a background for our argument in Parts III and IV, where we show the promising potential of the doctrine of unjust enrichment as a response to the tragic puzzle of the current legal treatment of the climate crisis.

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A person unjustly enriched at the expense of another must make restitution of any undeserved benefits.180 Subject to some interjurisdictional variation,181 this is [\*1068] the general maxim of the law of unjust enrichment, at times also referred to as the law of restitution.182 This maxim is typically divided into three key elements: (1) the defendant's benefit or enrichment, (2) the key normative requirement of the injustice of that enrichment, and (3) the fact that the enrichment is at the expense of another.183

The legal categories associated with the law of unjust enrichment allow for some degree of judicial discretion, as this area of law is often considered a flexible residual category,184 meant to provide equitable solutions where more established legal categories run out.185 In particular, there is some flexibility in the factors that can render the defendant's enrichment "unjust" in different situations.186 This flexibility makes the law of unjust enrichment a promising avenue for climate litigation, as we discuss below.187

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Note that in all such cases, sanctions from other areas of law, including regulatory fines or tort damages, are supposedly available, since the requirement of "wrong" is satisfied.237 Yet, these sanctions often prove insufficient.238 Thus, pollution in violation of regulatory standards is often profitable for companies because regulatory penalties for such violations are set too low.239 An added remedy coming from the law of unjust enrichment can therefore be beneficial. In particular, a sanction based on the disgorgement of profits can prove helpful in such cases to eliminate the monetary incentive to violate regulatory standards. Similarly, tort suits can also be based on a scenario in which commercial actors acted in violation of environmental regulations. Despite the clear wrongfulness of the action, in such cases, the resulting harm may be difficult to measure and attribute to the specific action. Therefore, a tort action is very likely to prove ineffective due to a failure at the causation stage.240 Enrichment-based liability can sometimes overcome these hurdles.

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Some commercial activities greatly contribute to global warming without constituting a wrong under current definitions. That is, some profitable undertakings entail high levels of GHG emissions even when they involve no violation of any specific environmental regulation or standard. Can gains obtained through such activities be considered unjust enrichment, and if so, under what circumstances?

As explained above, the law of unjust enrichment recognizes the possibility of liability even when the defendant committed no wrong.269 Such liability attaches in cases in which the defendant enjoyed a windfall they did not pay for or held assets that did not rightfully belong to them.270 This applies, for instance, in the cases of mistaken payment,271 medical treatment in an emergency,272 and a temporary injunction that was ultimately reversed.273 In all of these cases, the defendant unjustly benefited at the expense of others, even though they did not act in violation of any specific legal standard.274

**2. The perm reiterates that unjust enrichment law can create remedies, but not freestanding substantive obligations. That means it can’t solve the net benefit.**

William **Montgomery 22**, J.D. 2022, Tulane University Law School; A.B. 2015, Harvard University, "Polluter Disgorges: Climate Accountability and the Law of Unjust Enrichment," Tulane Environmental Law Journal, vol. 35, Summer 2022, p. 165

I. INTRODUCTION

A new wave of litigation brought by local governments seeks to hold major oil and gas companies liable for ongoing and imminent harms they are experiencing as a result of a changing climate. The plaintiffs, in large part, are pursuing familiar toxic tort claims like nuisance and trespass in a (somewhat) novel context. In contrast to an earlier wave of nuisance litigation, which tended to target greenhouse gas emissions from major sources like power plants, these lawsuits instead target the production, [\*166] marketing, and sale of large volumes of fossil fuels with full knowledge of their harmful effects as the actionable "wrong." Assuming these plaintiffs are eventually able to argue their cases on the merits, how would they go about tying this wrong to specific harms, which are potentially unlimited in scope? This Comment explores how the law of unjust enrichment might be able to provide a way out of this issue by reframing the lawsuits as an occasion to seek restitution of the defendants' calculable, finite gains rather than compensation for the plaintiffs' incalculable, and in some sense infinite, losses.

Unjust enrichment has deep roots in the common law, but it remains a slippery concept for judges, practitioners, and academics alike. The principle developed in parallel in courts of law and equity before American commentators developed a unified theory of unjust enrichment as the legal basis entitling claimants to restitution, or gain-based remedies. After a period of relative dormancy, unjust enrichment has enjoyed a revival in the past few decades in scholarship and in practice, where litigants have invoked the concept in efforts to obtain reparations for slavery and reimbursement of public medical expenses from tobacco companies. Part II traces this history in an attempt to distinguish the "narrow" view of unjust enrichment currently favored in American law from its aspirational "broad" form, which would demand restitution of any enrichment that is unjust. Taking the narrow view as a starting point, Part III then discusses two ways the concept might be leveraged by local government plaintiffs in climate litigation against so-called carbon majors.

II. A BRIEF HISTORY OF RESTITUTION AND UNJUST ENRICHMENT

A. Broad and Narrow Conceptions of Unjust Enrichment

Though the principle of unjust enrichment can be traced back to Roman law (most directly through its modern analogues in civil law jurisdictions), 1commentators generally regard Lord Mansfield's decision in the English case Moses v. Macferlan 2as the seminal common law case articulating the doctrine of unjust enrichment. 3In that case, Moses had [\*167] endorsed several promissory notes for Macferlan on the condition that Macferlan would not sue to enforce the endorsements. 4When Macferlan sued anyway and won, Moses brought a new action to recover the money Macferlan got from the judgment on the grounds that he should not be able to keep it because he broke his agreement not to sue. 5Moses creatively pleaded his case as an action for "money had and received" - one of the old "common counts" for recovering payment for goods or services given at the defendant's request in the absence of an express contractual provision 6- but Mansfield noted that the facts of the case would not support such a claim. 7Nevertheless, Mansfield found for Moses on the basis that it would be unjust for Macferlan to keep the money: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (quasi ex contractu, as the Roman law expresses it)." 8

The pronouncement that a plaintiff could be entitled to recovery simply because "natural justice" demanded it was "shockingly out of place" in a court of law at the time. 9Open-ended appeals to a sense of justice were supposed to be the province of separate courts of equity (or "chancery"), which had the discretion to "step in" and provide special relief in situations where the rigid, inflexible rules of the common law yielded an unjust outcome. 10But here, at least on one reading, Mansfield used the broad, open-ended principles of justice and equity as the basis for granting a legal remedy (through the fiction of an "implied in law" or "quasi-" contract), likening the situation to one of failure of consideration or mistaken payment where the law would step in to prevent a defendant from unjustly retaining a benefit. 11Mansfield even characterized the action as an " equitable action, to recover money, which ought not in justice [\*168] to be kept," one that "lies only for money which, ex aequo et bono, the defendant ought to refund." 12

The ambiguities of Mansfield's opinion embody the debates that courts and commentators continue to struggle through centuries later. 13Is unjust enrichment a hard-and-fast legal rule or a general principle allowing a court to invoke its equitable discretion? Is it an independent source of obligation (akin to contract and tort) or a rationale underlying remedies aimed at reversing the defendant's enrichment? For what it's worth, Mansfield's contemporaries were at best skeptical of the idea that unjust enrichment could constitute its own freestanding source of liability. 14Nevertheless, the concept of unjust enrichment found its way across the pond and into eighteenth and nineteenth-century American court decisions, both on the legal side in cases of mistaken payment and part performance of employment contracts as well as on the equity side as a basis for granting restitution for mistaken improvement to property. 15Indeed, the outcome of some of those cases could not have been explained by principles of contract or tort, implying the existence of a third source of obligation which demanded restitution in certain circumstances. 16

Beginning in the late nineteenth century, scholars attempted to organize these concepts into a coherent body of law called "restitution." 17This effort reached its apex with the publication of the Restatement of Restitution in 1937, which argued that seemingly disparate restitutionary obligations and remedies, from the "quasi-contract" of Macferlan to equitable remedies like constructive trusts and subrogation, were all animated by the singular concern of preventing unjust enrichment. 18Thus, the Restatement authors submitted, "[a] person who has been unjustly [\*169] enriched at the expense of another is required to make restitution to the other." 19

Some commentators found this approach misguided. 20Simply put, their criticism was that the law of restitution - in the sense of gain-based recovery (as contrasted with compensation or loss-based recovery) 21- was bigger than the law of unjust enrichment. 22On this view, not every restitution necessarily proceeds from an instance of unjust enrichment. Peter Birks, a prominent scholar of the subject, argued that cases of unjust enrichment were properly viewed as those concerning some form of mistaken payment (e.g., accidentally paying double on a debt), where a plaintiff does not assert a wrong but still demands that the enrichment should be retuned, separate from instances where the obligation to make restitution flows from the breach of a contractual obligation or a general duty of care. 23In fact, he maintained that the Macferlan decision was correctly understood as a case of restitution for a breach of contract: not of the implied contract that Mansfield described in his opinion, but of the agreement that Macferlan initially made not to sue on the endorsements. 24Moreover, it could not be "unjust" in itself for Macferlan to keep the money because it was obtained by way of a lawful judgment, which was a thoroughly sound and legal basis for the enrichment. 25

Birks's view could be characterized as a "narrow" conception of unjust enrichment - a principle that demands restitution of a benefit whose retention would be unjust, but only in those cases of mistaken payment where the source of the enrichment cannot otherwise be tied to a breach in contract or tort. The "broad" conception embodied in the First Restatement - that unjust enrichment demands restitution of any benefit whose retention would be unjust - held some appeal for mid-century scholars and judges, but they primarily described it as an equitable [\*170] principle guiding the crafting of remedies in novel cases. 26A survey of twentieth century law school curricula similarly indicates little interest in the broad conception among American lawyers, with no schools offering standalone courses in unjust enrichment or restitution. 27The possibility of unjust enrichment standing alongside contract and tort as an independent source of private obligation in American law appeared dim.

B. The Third Restatement and the Modern "Restitution Revival"

Amid renewed scholarly interest in the subject, 28the American Law Institute published a Third Restatement of Restitution and Unjust Enrichment in 2011. 29It carried forward the central organizing principle of the First Restatement that the law of restitution is the law of preventing unjust enrichment: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." 30It emphasized, however, that "the tradition from which we receive the modern law of restitution authorizes a court to remedy

unjust enrichment wherever it finds it, but not to treat as "unjust enrichment' every instance of enrichment that it regards as unjust." 31Pointing to Mansfield's statements in the Macferlan decision, it criticizes the view of unjust enrichment as something "identifiable ... by the exercise of a moral judgment anterior to legal rules[,]" expressing concern that in this understanding the concept is "at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability." 32"Notwithstanding the potential reach of the words, and Lord Mansfield's confident reference to "natural justice[,]'" the authors argue, "the circumstances in which American law has in fact identified an unjust enrichment resulting in legal liability have been those and only those in which there might also be said [\*171] to be unjustified enrichment, meaning the transfer of a benefit without adequate legal ground." 33

In other words, the Restatement came down firmly on the narrow conception. Enrichments were only "unjust" if they lacked an adequate legal explanation, regardless of whether they were "unjust" in some broader natural law sense. Unjust enrichment would therefore look to other areas of the law to identify those instances where an enrichment lacked an "adequate legal ground." For example, benefits acquired by tort (e.g., nuisance or trespass) or breach of a fiduciary duty are unjust enrichments entitling the claimant to "Restitution for Wrongs" (the title of Chapter Five) because the acquisition does not have a lawful explanation. 34Similarly, opportunistic breach of a contract will also entitle a claimant to disgorgement of the defendant's profits, here relying on the law of contract to label the enrichment unjust and without lawful explanation. 35Where the Restatement imposes liability for unjust enrichment without relying on the law of tort or contract for the source of the obligation, it does so in limited, well-defined circumstances. These include Birks's paradigmatic example of the mistaken payment (e.g., § 6 "Payment of Money Not Due" or § 7 "Mistaken Performance of Another's Obligation"), performance rendered under an unenforceable contract ( § 31), and emergency interventions to protect another's life or property (§§20 and 21). In sum, unjust enrichment "fills in the space around consensual transfers of wealth," but the measure of consent depends on principles of tort and contract except in certain well-worn, uncontroversial situations like mistaken payment. 36Under the Restatement's conception of unjust enrichment, a claimant is not entitled to restitution simply because the transfer was unfair or unconscionable. 37

Despite this trend toward a restrictive view of unjust enrichment in American jurisprudence, a number of litigants have invoked the broad conception in asserting novel claims to restitution that do not neatly fit within the narrow categories provided by the Restatement. One notable example lies in cases involving shared assets between non-married domestic partners, where courts have extended the principle to allow for [\*172] cohabitants to "raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both." 38The broad conception has also been invoked in search of remedies for vast social and historical injustices in the United States. In the early 2000s, a group of plaintiffs descended from people enslaved during the antebellum era filed suit against eighteen private companies whose predecessors they alleged profited from slavery and the slave trade, in part on a theory of unjust enrichment. 39On this count, the plaintiffs argued that the defendants' failure to pay for the enslaved workers' labor allowed them "to retain a benefit at the expense of plaintiffs and their ancestors" and sought a "constructive trust on all profits Defendants gained from slavery [and] restitution in the value of Plaintiffs' ancestors' slave labor and Defendants' corresponding unjust enrichment." 40Though the case was dismissed on statute of limitations and justiciability grounds, 41the potential connections between reparations for slavery and the law of restitution and unjust enrichment continue to be the subject of intense scholarly interest. 42

The broad conception arguably played a pivotal role in the tobacco litigation of the 1990s, which is often viewed as an obvious framework for climate litigation against oil and gas companies. 43In particular, it was a central feature of Mississippi's lawsuit that ultimately resulted in the first settlement obtained by any state, totaling $ 3.3 billion. 44Mississippi brought the claim precisely because tort actions by private parties had failed, instead arguing that the tobacco companies were unjustly enriched at the State's expense by forcing the medical costs of their addictive and harmful product off their own books and onto Mississippi's Medicaid, [\*173] welfare, and employee benefit programs. 45The State explicitly relied on an expansive, Mansfield-ian theory of unjust enrichment: it did not assert any wrongdoing or substantive breach of duty or contract, but merely that justice and equity entitled it to restitution of the costs the defendants saved by not having to pay for the known health consequences of their product. 46While we will never know what role the broad unjust enrichment theory played in the companies' ultimate decision to settle - and some commentators have expressed great skepticism over whether it would have succeeded at trial 47- the "restitution for externalities" argument that Mississippi advanced is undeniably a compelling one. And one that is readily applicable to the climate context.

III. TWO PATHS TO RESTITUTIONARY REMEDIES IN CLIMATE LITIGATION

American law has generally shied away from the "broad" conception of unjust enrichment as a principle forbidding any unjust transfer of benefits at the expense of another. While some commentators have attempted to revive this broad view as an independent source of obligation in the common law on par with contract and tort 48- undoubtedly a worthwhile and important project - in this Comment, I work within the "narrow" conception as a starting point for exploring the doctrine's potential applicability to the emerging "second wave" of state-level lawsuits brought by public entities against carbon majors. 49More specifically, in this Part I examine two potential paths to restitution that appear conceivable under the narrow conception: (A) "freestanding" unjust enrichment claims, where plaintiffs confer a benefit on defendants by undertaking emergency interventions to protect life and property from the effects of fossil fuel-driven climate change; and (B) "parasitic" unjust enrichment claims, where the unjust enrichment flows from the defendants' tortious conduct.

## Case – AT: Journalism

### AT: Democracy Solves Warming – Unjust Enrichemnt Key

**Solves climate change---extinction.**

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I. THE CLIMATE CRISIS

There is broad scientific consensus that climate change has become the "defining issue of our time,"39 a "super wicked" issue,40 or a problem "from hell."41 [\*1048] Decades of research have led to the clear conclusion that human activity is the primary driver of many of the effects of climate change around the world.42 Climate change substantially disrupts natural systems,43 which, in turn, inevitably disrupts social and economic systems.44 Among the damages of climate change documented in scientific evidence are shifts in seasonal timing,45 loss of species,46 severe crises in food supply and water scarcity,47 and more frequent gastrointestinal infections due to higher temperatures and increased rain and flooding.48 The social harms of the crisis include increased risk of displacement and involuntary migration,49 [\*1049] exacerbated global income inequality,50 and greater risk of violence.51

While some climate change harms are already taking place, many are estimated to occur far into the future with high probability.52 The 2022 Intergovernmental Panel on Climate Change (IPCC)53 report predicts high levels of global warming by the end of the twenty-first century in certain scenarios.54 The following Sections describe three prominent, interconnected, future harms of climate change: temperature changes (and in particular climate heat waves), sea level rise, and marine-species extinction.55 The purpose of this Article is to call attention to a key, common theme: the fact that the harms of climate change are dispersed, difficult to quantify and attribute to specific actors, and carry substantial effects mostly observable in the medium-to-far future. For all these reasons, tort law, insisting on a clear showing of specific harm, is largely ill-equipped to serve as a doctrinal framework for climate litigation. At the same time, the perpetuation of the climate crisis is immensely profitable for strong commercial actors.56

A. TEMPERATURE CHANGES

Recent scientific assessments suggest that the global average temperature increased by about 1.0°C from 1901 to 2016.57 Evidence points to human activity, [\*1050] and in particular emission of greenhouse gases (GHGs), as the dominant cause of global warming.58 Emission of carbon dioxide, methane, nitrous oxide, and fluorinated gases contribute to warming the atmosphere59 "by absorbing energy and slowing the rate at which the energy escapes to space."60 Carbon dioxide and methane released from thawing permafrost contribute to the warming of the atmosphere as well.61 The fossil fuel industry, responsible for the bulk of GHG emissions, is now more profitable than ever.62

According to recent assessments, without a significant reduction in these emissions, the increase in average global temperatures could reach 5.7°C and higher by the end of this century.63 Global warming resulting from current emissions will continue to affect future generations, leaving "a multi-millennial legacy, with a substantial fraction of the warming persisting for more than 10,000 years."64

Among the worrying influences of the climate-driven rise in temperature is its expected negative effect on human health and well-being.65 Studies have found connections between higher temperatures and increases in the occurrence of diarrheal diseases, including cholera and other gastrointestinal infections.66 The increase in heatwave intensity67 is expected to significantly increase mortality [\*1051] rates globally.68 Temperature rise is also associated with many other potentially devastating outcomes, such as droughts69 and tropical storms.70 Temperature increases also cause sea level rise. We turn to discuss this issue next.

B. SEA LEVEL RISE

Studies show that between 1902 and 2020, sea levels rose by more than 6.3 inches.71 As GHG emissions increase and global temperatures climb, sea levels will continue to rise.72 Some projections indicate that by the end of this century, sea levels may rise by more than 6.5 feet.73 The scientific community perceives the rise of sea [\*1052] levels as a pressing threat,74 with one estimate indicating that by the year 2100, over one billion people will be exposed to environmental and climatic risks caused by rising sea levels.75 Perhaps the most pressing problem related to sea level rise is the existential threat to low-lying island states, whose land area will be rendered uninhabitable or overrun by seawater.76 Many coastal areas will similarly disappear under water,77 and their inhabitants will lose their homes, causing them to become climate refugees.78 Currently, this problem has no clear legal solution.79

The devastating impact of sea level rise will not affect all people equally. Despite their relatively "infinitesimal contributions to the causal drivers of climate change," it is low-lying island states such as Tuvalu, Kiribati, or the Maldives that are most vulnerable to sea level rise.80 The problem of climate refugees is also expected to influence states and regions in which refugees will [\*1053] eventually resettle,81 as those regions will need to provide their fast-growing populations with increasing amounts of housing, food, and jobs.82

C. SPECIES EXTINCTION

Not only humans are expected to suffer from climate change. Research shows that climate change is likely to lead to catastrophic outcomes for many other species as well. A recent study indicates the potential collapse of marine and amphibian populations as a result of temperature changes.83 Such species cannot escape heat events and are therefore more sensitive to heat failure.84 In addition to rising temperatures, sea level rise may also cause immense harm to animals, on top of the harm to humans.85 In particular, sea level rise may cause flooding of intertidal areas, putting the existence of various species who reside in those areas at risk.86

Adding these projections to the declines in different marine species due to the expansion and overcapacity of many industrial fisheries,87 some climate models show that by the year 2100, local species of fish and invertebrates will lose more than fifty percent of their animal population in many regions.88

[\*1054]

I. STATE OF THE LAW

The immense harms of the climate crisis, as described in Part I, give rise to a tragic puzzle. Namely, if overwhelming scientific evidence so strongly suggests the harmful nature of current production and consumption activities, why have existing legal frameworks failed to stop the foreseeable adverse outcomes described above?

This Part reviews existing legal frameworks currently used in the governance of the climate crisis, with an emphasis on domestic regulation, international treaties, and tort litigation. It shows that existing legal tools fail to offer effective solutions for two main reasons. First, short-term monetary incentives, coordination problems, and free-rider effects make climate change particularly difficult to regulate, thereby contributing to its status as a "super wicked" problem.89 Second, the harms associated with the climate crisis are mostly future harms with complicated causal histories,90 while incentives to profit are immense, immediate, and direct.91 By clarifying these points, this Part serves as a background for our argument in Parts III and IV, where we show the promising potential of the doctrine of unjust enrichment as a response to the tragic puzzle of the current legal treatment of the climate crisis.

A. REGULATION

Current legal responses to the climate crisis are focused on regulatory schemes and public law solutions through national law as well as public international law.92 At first glance, this focus seems obvious from an economic perspective. Climate stability is a classic case of a "public good"93: it is non-excludable (no single entity can prevent others from enjoying the benefits of a stable climate) and non-rivalrous (a stable climate benefits everyone simultaneously).94 Classic examples of public goods are national security, public broadcasting, public parks, and clean air.95 It is well-known that private markets tend to undersupply public [\*1055] goods96 because of the free-rider problem involved in supplying them: every beneficiary prefers that the goods are supplied but no one wants to invest private resources to supply them.97 In the context of the climate crisis, everyone prefers that GHG emissions would be lowered, but each country or firm wishes to avoid the costs this goal entails and prefers that others bear them.

Since markets tend to undersupply public goods, a common solution is to supply them through a public authority, which (hopefully) takes into account the public interest.98 In the case of climate change, a public authority could take various measures, including engaging in enforcement (for example, by prosecuting polluters under criminal law),99 subsidizing private litigation,100 imposing a tax on production, or regulating production (for example, intervening in the actions of polluters more directly).101 Such endeavors may take place at both the national and international levels.

1. Domestic Regulation in the United States

Until the 1960s, responsibility for climate change policies in the United States resided with the states rather than with the federal government, leading to jurisdictional variation in the degrees of environmental protection between states.102 [\*1056] The Clean Air Act (CAA), enacted in 1963,103 was first established as a federal framework for air pollution control and is now administered by the Environmental Protection Agency (EPA).104 The fundamental problem with this regulatory framework is that the CAA has not been amended since the 1990s and did not explicitly authorize the EPA to regulate GHG emissions. In response, in 2007, the Supreme Court decided the landmark case of Massachusetts v. EPA, holding that the EPA not only has the authority to regulate GHG emissions, but has an obligation to do so.105 In 2021, the EPA issued a set of new GHG emission standards involving cars and light trucks.106 However, the Supreme Court severely limited the ability of the EPA to regulate GHG emissions in the recent case of West Virginia v. EPA.107 In response to this decision, Congress strengthened the ability of the EPA to regulate GHG emissions,108 although scholars debate whether or not this response effectively repealed West Virginia v. EPA.109

As this brief review illustrates, the history of environmental regulation in the United States has been rocky and likely will continue to be so. So far, the EPA has had little success in reducing GHG emissions sufficiently to satisfy the United States' climate obligations.110 Politicization of the issue together with increasing polarization hinder decisive regulatory action, and lobbying efforts seem all too effective in preventing a consistent regulatory response.

[\*1057] More broadly, public choice theory readily explains the inability of national regulatory frameworks to offer effective solutions to the climate crisis.111 Public officials, including regulators, strive to maximize their own utility,112 and the pursuit of selfish interests often interferes with the choice of an optimal policy for society as a whole.113 Thus, lobbying by polluters may hinder the effectiveness of reaching coordinated environmental regulations.114 In the context of climate change, even if regulators faithfully represent the interests and wishes of their constituencies, regulatory policy greatly diverges from the social optimum. Regulators, guided by elected public officials, respond to interests and problems that concern and affect the constituents in their jurisdiction.115 There is no reason to believe that the interest of future generations and the long-term sustainability of environmental systems are fully represented within this framework. Future generations, by definition, are at a disadvantage in the political field and cannot express their interests in the political system.116 It is therefore unsurprising that the interests of future generations are underrepresented in current political and regulatory systems.

Regulatory focus on short-term goals may also be driven by behavioral effects, such as overoptimism and myopia, or "present bias."117 Specifically, regulators may be overconfident in their ability to solve the climate crisis quickly and therefore do not feel the need to consider the fate of future generations, mistakenly assuming that these generations will not face the problem at all.118 Moreover, behavioral economics literature has repeatedly shown that individuals are "myopic" and may systematically prefer short-term benefits over long-term gains.119 This [\*1058] might be caused by "hyperbolic discounting," where individuals place extremely low weights on future outcomes.120 The problem is further exacerbated in the context of the climate crisis, due to people's systematic tendency to underestimate exponential growth.121 Policymakers and regulators are not immune to such cognitive biases and are therefore prone to ignore or downplay the risks associated with the climate crisis.122

2. Regulation at the International Level

The climate crisis is difficult to tackle at the level of individual countries. In a classic free-rider dynamic, each country has a strong incentive to allow corporations to pollute, rather than adopt restricting environmental regulations. Supposedly, the solution can be found in international coordination, allowing countries to jointly commit to battling the crisis.

Indeed, a series of international treaties have been established as a framework for cooperation in the fight against climate change. The United Nations Conference on the Human Environment was held in 1972 in Stockholm, Sweden, and was the first world conference to focus primarily on environmental issues.123 This conference yielded the Stockholm Declaration, a document containing twenty-six principles on safeguarding the earth and the environment for the benefit of mankind and future generations.124 The Declaration was accompanied by an "Action Plan" and led to the establishment of the United Nations Environmental Programme (UNEP).125 Alas, the declaration proved largely ineffective.126 Twenty years later, a climate-focused convention took place as part of the United Nations Conference on Environment and Development (UNCED), colloquially known as the "Earth [\*1059] Summit," in Rio de Janeiro, Brazil.127 Following this conference, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) was established.128 The UNFCCC strived for a more modest goal stabilizing GHG concentrations by lowering emissions and focusing on industrialized countries.129 These countries accepted a nonbinding commitment to reduce emissions by the year 2000,130 yet it quickly became apparent that this goal was not to be achieved. In 1997, another UNFCCC conference took place in Kyoto, Japan, and yielded the Kyoto Protocol.131 The Kyoto Protocol sets binding emission reduction goals for industrialized countries, but has also been heavily criticized and widely considered to be a failure.132 Over the following years, meetings of the parties to the UNFCCC-the Conference of the Parties (COP) continued taking place.133 A high-profile convention took place in Paris in 2015, yielding the Paris Agreement.134 The Paris Agreement, adopted [\*1060] by 196 parties,135 is a legally binding agreement that strives to limit global warming by keeping temperature rise to well below 2°C, and preferably only 1.5°C, compared to preindustrial levels.136 It is not yet clear whether this framework is effective.137 The Paris Agreement has been criticized as "a dangerous form of incrementalism" because it "repackages existing rules that have already proven inadequate."138

Recent attempts at international consensus can be found in the COP meetings in Glasgow, Scotland, and Sharm el-Sheikh, Egypt, in 2021 and 2022, respectively. The "Glasgow Climate Pact" focuses on work programs, agendas, and dialogue,139 with some new provisions such as a call for countries to reduce the use of coal power and to avoid inefficient subsidies for fossil fuels.140 More importantly, in the more recent Sharm el-Sheikh meeting, general drafts of decisions were released concerning "loss and damage" for vulnerable countries that are hit the hardest by climate disasters.141 However, these decisions do not seem to have concrete content at the moment, so it remains unclear who needs to compensate whom and under what conditions. John Kerry, who currently serves as the United States Special Presidential Envoy for Climate, has already declared publicly that the United States would not accept an "imposed standard of liability" that [\*1061] generates a legal duty to help countries vulnerable to climate change.142 Furthermore, the "loss and damage fund" agreed upon in Sharm el-Sheikh could "take years to pay out."143

More broadly, this review illustrates the continuous inability to achieve consensus and an effective legal response to the climate crisis at the international level. Countries, even when coordinating under international law, struggle to give up the competitive advantage and short-term benefits of environmentally harmful policies.144 Thus, the same difficulties that hinder regulation at the national level are also present at the international level.

A prime example of this dynamic can be found in Donald Trump's decision in 2017 to withdraw from the Paris Agreement145 because it supposedly imposes unfair environmental standards on American businesses (a decision later overturned by President Biden, who rejoined the Agreement).146 Trump's actions perfectly reflect the free-rider problem: environmental policies are costly at the country level, so there is insufficient incentive to adopt them. In other words, so long as pollution remains immensely profitable,147 the failure of regulatory efforts to reduce it is unsurprising.

B. TORT LITIGATION

Faced with a dead end at the regulatory level, private citizens have been attempting to battle the climate crisis through the courts, using private litigation.148 Turning to litigation is a sensible response to regulatory and political deadlock. When regulators fail to act, private individuals and organizations can call for legal action by approaching the courts. Even if most courts reject the claim, it is enough that some courts accept it to create significant pressure on relevant industry players. Thus, even if governmental consensus on environmental policies cannot be reached due to regulatory and legislative capture, litigation can provide a push in the right direction.

[\*1062] Litigation can also offer inroads when political deadlock hinders effective legal action at the international level. For instance, an American citizen can sue a foreign company (say a Chinese corporation) in an American court. If the foreign company operates in the United States or if its actions affect American nationals, a decision by the American court, based on American law, will be binding against the Chinese company as a matter of conflict of law rules, or private international law. This is true even if on the level of international treaty law, the American and Chinese governments cannot agree on desired levels of GHG emissions. Finding the correct doctrinal hook for climate litigation is therefore important to unlock the institutional advantages of this legal course of action.

Unfortunately, current litigatory attempts, focusing on tort law claims,149 have largely proven unsuccessful. As Douglas Kysar observed more than a decade ago,

[T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible.150

In what follows, we demonstrate the difficulties in advancing climate litigation based on the four traditional elements of tort law: duty, breach, harm, and causation.151 The purpose of this demonstration is not to provide a general review of the intersection of tort law and environmental litigation;152 rather, it is intended to serve as background for our proposal in Part III, highlighting the structural advantages of unjust enrichment doctrine as a vessel for climate litigation.

1. Duty and Breach

As John Goldberg and Benjamin Zipursky rightly observe, tort law is not just the law of harms, but is more accurately understood as the "law of wrongs."153 That is, a successful tort claim must demonstrate some wrongful conduct, or a breach of duty by the defendant, as defined under tort doctrine.154

[\*1063] In the case of climate litigation, however, the conduct causing the harm is often not wrongful in the sense required under tort doctrine. Admittedly, in some instances, contribution to global warming can be characterized as a wrong, for example, if a producer violates environmental regulations or otherwise creates a "'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law."155 Yet, this is not always the case, and climate change is also caused through activities entailing high levels of GHG emissions that do not necessarily violate existing regulatory standards. Thus, heavy reliance on fossil fuels, even to the degree currently legal, is known to be the chief cause of the crisis.156 The centrality of the duty and breach requirements, therefore, make tort claims a relatively ineffective legal response to the climate crisis.

2. Harm

Tort law compensates for harms.157 If no harm was caused, a tort remedy is unavailable.158 This is a major challenge in the context of climate litigation, which is primarily concerned with future harms that is, estimated harms that have not yet occurred and that may not occur at all.159 Tort damages are meant to place the injured party "as nearly as possible in the condition he would have occupied if the wrong had not occurred."160 This conceptual legal mechanism loses much of its internal coherence in cases in which the harms in question are primarily future harms.161

The recent litigation in the matter of Conservation Law Foundation, Inc. v. Shell Oil Co. demonstrates this incompatibility of compensatory damages to [\*1064] climate litigation.162 This case was brought by an environmental group claiming that the defendant oil company did not protect its fuel terminals located in New Haven, Connecticut, from risks of climate change in violation of the Clean Water Act and the Resource Conservation and Recovery Act.163 In the case, the federal court explicitly acknowledged the fundamental incompatibility of the remedy of compensatory damages with the types of claims brought before it, focusing on future harms.164

This incompatibility between the remedy of compensatory damages and the unique characteristics of climate litigation is not merely conceptual or theoretical but has immediate practical implications. First, future harms are difficult to prove. Once the plaintiff cannot show that future harm will indeed occur, the force of a harm-based claim is incredibly diminished. This is a tragic and paradoxical outcome. Scientific evidence shows that global warming is a major threat and horrifically harmful.165 But these future harms are too abstract and insufficiently clear for tort doctrine, with its focus on harms and compensation. These conceptual difficulties alone may spell the failure of tort-based climate litigation.

Future harms are not only difficult to prove; they are also difficult to measure accurately. For instance, ample scientific evidence projects catastrophes resulting from expected heat waves, such as enhanced mortality rates of humans and animals, droughts, and tropical storms.166 Yet, putting an exact dollar sum on such future harms, even if we can prove they will indeed occur, is nearly impossible. As the magnitude of the harm is impossible to determine, it is also impossible to offer a convincing measure for compensatory damages. Such difficulties in determining remedy measures are important. If damages are set too low, defendants receive a free pass for polluting, and the legal regime provides insufficient incentives to avoid high GHG emissions.

3. Causation

To establish a tort claim, it is not enough to show that the defendant acted wrongfully and that some harm occurred; it must also be shown that the harm is a but-for result of the defendant's actions, meaning a plaintiff is required to preponderantly prove that its harm would not have occurred absent the defendant's [\*1065] wrongdoing.167 The nature of climate litigation makes it difficult for plaintiffs to overcome the tort requirements of causation.168 It is difficult to attribute the future harms of global warming to specific defendants in terms of proving a causal link.169

Climate change is not a result of any single polluting activity, but rather a complex result of actions taken over years by multiple entities. Douglas Kysar points out the following difficulties: first, some climate events (such as hurricanes and droughts) do occur irrespective of climate change;170 second, the "extraordinary numerosity of greenhouse gas emitters" might give rise to a tort defense of "consequentialist alibi" by showing that any polluter's emissions are so small in comparison to total emissions that the effect is negligible.171

To illustrate these difficulties, consider a recent case in which the city of Hoboken, New Jersey, filed a lawsuit against a group of oil and gas companies, led by Exxon Mobil Corp., demanding compensation for harms caused by sea [\*1066] level rise.172 In its decision, the New Jersey district court stated that "[a]lthough it is more than plausible that fossil fuels ... led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."173 This statement shows that not much has changed in the way courts approach the difficulties in establishing the requirement of causation in climate litigation, as there exist "daunting evidentiary problems for anyone who undertakes to prove ... the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming."174 The problem that these statements address is straightforward. Even if all scientists generally agree that GHG emissions cause global warming in the long run, it is very difficult to identify the amount that each specific emitter contributes to, for example, the global processes of melting glaciers and resulting sea level rise.175 This is especially true given that many of these massive losses are expected to materialize in the far future. Tort doctrine and compensatory damages, with their strong emphasis on harms, cannot overlook these difficulties and therefore fail to provide a remedy when the causal link to a concrete harm cannot be established. Proposals for more relaxed theories of causation176 have not been accepted in climate litigation and are largely considered controversial by tort scholars.177

[\*1067] Against this backdrop, it is unsurprising that courts have been reluctant to accept climate litigation claims based in tort law, at times even considering climate change as lying outside the scope of adjudication given its complexity.178 Note that these difficulties are not only applicable for negligence, but also for strict liability, which also requires proof of causation and harm.179

III. FROM TORT TO UNJUST ENRICHMENT

This Part explores the use of unjust enrichment doctrine as a basis for climate litigation. In this Part, we focus on introducing only the core concept of climate enrichment; further doctrinal details, including remedy measures, are introduced in Part IV. This Part is divided into two Sections. The first offers a general overview of the elements of a claim of unjust enrichment. The second Section then explains why these elements might fit the structure of climate litigation claims. We also explain the outer boundaries of liability in unjust enrichment to avoid overly broad application of the doctrine.

A. THE LAW OF UNJUST ENRICHMENT

A person unjustly enriched at the expense of another must make restitution of any undeserved benefits.180 Subject to some interjurisdictional variation,181 this is [\*1068] the general maxim of the law of unjust enrichment, at times also referred to as the law of restitution.182 This maxim is typically divided into three key elements: (1) the defendant's benefit or enrichment, (2) the key normative requirement of the injustice of that enrichment, and (3) the fact that the enrichment is at the expense of another.183

The legal categories associated with the law of unjust enrichment allow for some degree of judicial discretion, as this area of law is often considered a flexible residual category,184 meant to provide equitable solutions where more established legal categories run out.185 In particular, there is some flexibility in the factors that can render the defendant's enrichment "unjust" in different situations.186 This flexibility makes the law of unjust enrichment a promising avenue for climate litigation, as we discuss below.187

In preparation for this argument, we first introduce the two central lanes through which a plaintiff can establish a claim of unjust enrichment. One requires the plaintiff to show that the defendant obtained their benefit through committing a wrong, while the other does not include such a requirement. Through this analytical juxtaposition, we further explain the different doctrinal elements of an unjust enrichment claim.

[\*1069]

1. Unjust Enrichment Through a Wrong

In some restitutionary claims, the doctrinal requirement of the "injustice" of the defendant's enrichment can be satisfied by the finding that this enrichment was obtained through the defendant's crime or wrong188 -for example, securities fraud;189 patent190 or copyright infringements;191 and, under certain conditions, opportunistic breach of contract.192 This makes intuitive sense. After all, if a benefit is obtained through a civil wrong or a crime, it would seem bizarre to consider such a benefit justly obtained. The role of unjust enrichment doctrine in such cases is primarily remedial. Thus, other areas of law inform us that the defendant is a wrongdoer (or a criminal), and the law of unjust enrichment simply introduces an additional remedy. This type of restitutionary remedy, often termed "disgorgement of profit," is designed to strip the wrongdoer of any gains obtained through the wrong in order to remove perverse incentives and ensure that wrongdoing and crime are not profitable endeavors.193

[\*1070] A paradigmatic example of enrichment through a wrong comes from the infamous Riggs v. Palmer case, which incorporates both criminal and private law aspects.194Riggs v. Palmer is an all-time classic, fundamental to any study of unjust enrichment law and theory. The defendant in this case, Elmer Palmer, was to receive the bulk of his grandfather's estate.195 Elmer feared his grandfather might change his will, and decided to poison him preemptively.196 After he was caught and prosecuted, Elmer was facing prison time,197 but state law still permitted Elmer to inherit his grandfather's estate.198 Following a civil lawsuit, the New York Court of Appeals saw this outcome as offensively unjust and "an offense against public policy."199 The court therefore decided that Elmer's share of the estate constituted unjust enrichment and must be given to his two aunts, the plaintiffs in the case.200 Primarily, this outcome was deemed necessary to prevent Elmer from benefiting from his crime.201Riggs is illustrative of a core principle in the law of unjust enrichment, according to which a person cannot be allowed to retain gains obtained through their wrongdoing.202

In Riggs, both the defendant's enrichment and its injustice are easy enough to show, as the defendant benefited through a horrific crime. The doctrinal element of the enrichment being at the expense of the plaintiff merits further attention. Thus, in this case, there was no clear showing of harm to the plaintiffs (the defendant's aunts), or of a causal link between any harm and the wrong, as would be required in a tort claim.203 The reason for this is that there was no proof in this case that but for Elmer's crime, his aunts would actually have inherited the estate: it was not proven the will would have been changed but for the murder, and in what way.204 In this sense, the court considered the defendant's enrichment to be "at the expense" of the plaintiff, but not because the benefit correlated with some identifiable loss to the plaintiff. Rather, Elmer's enrichment in this case was considered to be at the expense of his aunts since his abhorrent actions violated their rights or were wrongful towards them (even if not directly harmful in the monetary sense).205 In actuality, the plaintiffs in Riggs serve as "an imputed beneficiary" [\*1071] who are allowed to bring forth a claim for unjust enrichment.206 The court allowed the aunt's monetary recovery in order to achieve the public policy goal of stripping the defendant of the profits obtained through his crime.207 The "imputed" plaintiff in such cases is allowed access to the court not because they were directly harmed, but because they are the closest private actor to the wrong that was committed.208 Such plaintiffs are allowed to recover from the wrongdoer and are entrusted with the task of pursuing a sanction against the wrongdoer through civil liability in unjust enrichment.209 This is meant to achieve the goal of ensuring that wrongdoing is not profitable.

This important point can be further illustrated through another case, Olwell v. Nye & Nissen Co.210 Compared to Riggs, Olwell offers a mundane set of facts but is nevertheless an unjust enrichment classic. In this case, the defendant took machinery belonging to the plaintiff out of storage and used it in its manufacturing process.211 The defendant argued that even if it was indeed enriched, and even if this enrichment was unjust and wrongful (as it was derived from the knowingly unauthorized use of another's asset), it was not at the expense of the plaintiff.212 The reason for this was that the plaintiff kept the machine in storage, had not used it for years, and had no use for it or intention to use it.213 Therefore, the defendant reasoned that the plaintiff suffered no harm, and the defendant's enrichment was not at its expense. The court rejected this claim, explaining that the defendant's enrichment must be considered at the plaintiff's expense even absent a specific monetary harm to the plaintiff, simply because it came through the defendant's wrong, which was directed at the plaintiff and was in violation of the plaintiff's rights.214

More broadly, both Riggs and Olwell illustrate a general principle, according to which enrichment can be considered "at the expense" of the plaintiff even absent a clear showing of monetary or physical harm to the plaintiff when it can be shown that the enrichment was derived through a wrong directed at the plaintiff and that violated the plaintiff's rights.215 This fundamental doctrinal structure [\*1072] will prove crucial below when we turn to discuss climate enrichment and the use of unjust enrichment doctrine as a basis for climate litigation.

2. Unjust Enrichment Without a Wrong

The defendant's enrichment can be considered unjust for a wide variety of factors216 and not necessarily owing to the defendant's wrongdoing.217 Thus, a payment made by mistake is typically considered unjust enrichment,218 and the recipient of such payment is under a duty to return it to the payer,219 subject to some defense rules.220 This is the case even if the mistake was caused by the negligence of the payer and through no fault of the recipient.221 Liability in such cases does not signify any wrongful conduct by the recipient, but simply the fact they received a benefit they had no right to receive.222 Note that in such a case, the requirement for the enrichment being "at the expense" of the plaintiff is simply satisfied by the fact the defendant's gain correlates to the plaintiff's loss the payment.223 Thus, the "at the expense" requirement can be satisfied by the fact that the enrichment comes from the plaintiff's loss; yet, as explained above, it can also be satisfied in other ways.224

[\*1073] The case of emergency medical services is another similar example and a core category of liability in unjust enrichment. A patient can be considered unjustly enriched if they received life-saving treatment while unconscious in an emergency for which they did not pay. The seminal case of Cotnam v. Wisdom demonstrates this rule.225 In this classic case, two physicians provided medical aid (surgery) to an unconscious person thrown out of a streetcar without receiving payment for the service they provided.226 The Supreme Court of Arkansas awarded restitution.227 The ruling in Cotnam has been reaffirmed and has become the general rule when physicians provide emergency services to unconscious patients.228 In such cases, restitution is available without any type of wrongdoing by the defendant, simply because the defendant was enriched, at the expense of the plaintiff, with no justification.

In other types of cases, a defendant might be considered unjustly enriched if they derived benefits from a valid court decision, such as a preliminary injunction,229 that was later reversed.230 Again, even if the enrichment is not obtained through a wrong and is not in this sense unlawful, the principles of the law of unjust enrichment require the restitution of such benefits.

[\*1074] In all of these cases, enrichment is unjust simply because the defendant enjoyed a benefit that did not belong to them and not because the defendant's conduct was in some way wrongful or illegal.231 Thus, in the mistaken payment scenario, the recipient's enrichment is unjust because the mistaken payer had no intention to make a payment.232 In the case of emergency medical services, the patient is unjustly enriched because they enjoyed a windfall;233 the recipient of a preliminary injunction that was later reversed is considered unjustly enriched for the benefits "obtained at the expense of the defendant as a result of the wrongfully-issued preliminary injunction."234

In conclusion of this very brief review, unjust enrichment doctrine offers two key doctrinal advantages that are worth exploring in the context of climate litigation. First, when enrichment is obtained through a wrong, liability may be available even when harm cannot be clearly attributed to specific actions (as would be required under tort doctrine). Plaintiffs can bring claims even if they cannot show they suffered a direct and clear harm, as long as they can show they are, in some other way, the targets of the defendant's wrongful conduct. Second, liability in unjust enrichment can be available also absent a wrong (which is, again, not the case in tort law) when a defendant enjoyed a benefit not properly owed to them.

A. CLIMATE ENRICHMENT

This Section outlines the use of unjust enrichment as a doctrinal basis for climate litigation. The motivation for this move is simple: while the harms of climate change are future abstract harms, profits exist in the here and now.235 These profits are easier to identify and measure and can serve as the basis for a claim of unjust enrichment. It is crucial to have such profits taken away. As long as global warming remains profitable for strong commercial actors,236 we can expect it to persist (and even escalate). Therefore, to offer effective legal solutions, we must develop the legal tools to ensure that global warming does not remain profitable.

In what follows, we develop the concept of climate enrichment in the two charters of liability described above: unjust enrichment through a wrong and unjust enrichment without a wrong. In discussing each of the two categories, we further detail the operation of the three key elements of unjust enrichment doctrine in the context of climate litigation.

[\*1075] Note that the analysis offered here should not be taken to mean that all profitable activities can be a cause of civil action. A key point in developing our proposal, therefore, lies in offering criteria for determining when enrichment, in specific cases, is unjust. We outline several such possibilities below, offering categories of cases in which polluters' profits can be considered unjust enrichment.

1. Climate Enrichment Through a Wrong

In some cases, defendants contribute to the climate crisis through activities and conduct that can be classified as wrongful. This can be the case when defendants: (1) benefited while acting in violation of environmental regulations; (2) benefited while operating in an environmentally unreasonable manner, thereby committing a tort of gross negligence; or (3) benefited while maliciously circumventing regulatory efforts or deceiving regulators. We detail these categories below.

Note that in all such cases, sanctions from other areas of law, including regulatory fines or tort damages, are supposedly available, since the requirement of "wrong" is satisfied.237 Yet, these sanctions often prove insufficient.238 Thus, pollution in violation of regulatory standards is often profitable for companies because regulatory penalties for such violations are set too low.239 An added remedy coming from the law of unjust enrichment can therefore be beneficial. In particular, a sanction based on the disgorgement of profits can prove helpful in such cases to eliminate the monetary incentive to violate regulatory standards. Similarly, tort suits can also be based on a scenario in which commercial actors acted in violation of environmental regulations. Despite the clear wrongfulness of the action, in such cases, the resulting harm may be difficult to measure and attribute to the specific action. Therefore, a tort action is very likely to prove ineffective due to a failure at the causation stage.240 Enrichment-based liability can sometimes overcome these hurdles.

If the defendant acted while violating environmental regulations, any gain made through that activity can be considered unjust.241 Such gains exist in the present and are therefore relatively easy to measure. Taking away such gains is necessary to ensure deterrence. Note that in such cases, the reason the defendant's activity is considered unjust is probably related in some indirect way to its [\*1076] harmfulness.242 Yet it is not required as part of a claim of unjust enrichment to prove a specific harm, as would be required under a tort action.243 Similarly, a showing of harm is not required to establish the "at the expense" element. To see why, recall the Riggs case described above.244 In Riggs, restitution was available because the wrongdoer benefited from a wrong and the court needed to decide upon "an imputed beneficiary" who could have a valid legal action for this benefit.245 Likewise, suppose a polluter benefited while violating environmental regulations. In this case, any citizen or governmental body that can be construed as having its rights violated (such as local communities246 or municipalities247 ) may have a cause of action against the polluter, even if it is not possible to identify and measure concrete harms and attribute them to the violation of environmental regulations. More generally, recall that in cases of wrongful enrichment, disgorgement can be available even if the defendant's benefit is different from the plaintiff's harm,248 and even if no harm to the plaintiff can be proven.249 Of course, this type of liability has its natural limits. Specifically, it will depend on the court's willingness to recognize, in a specific case, that the plaintiff's right was violated through the defendant's violation of environmental regulations.

In other cases, the defendant's enrichment can be considered wrongful not because it violates some explicit environmental regulation, but because it is grossly unreasonable or negligent, meaning that the defendant was able to operate its business in a way that is less environmentally harmful without incurring high costs for doing so. In such cases, again, the injustice of the defendant's action closely relates to its harmfulness. Yet a tort claim may not be available under such circumstances: Even though it is clear that the defendant's conduct was unreasonable and unnecessarily harmful, it is difficult to preponderantly prove the magnitude of the harm when its occurrence or magnitude can only be assumed at the time of litigation. Such proof is, however, required to sufficiently [\*1077] establish a tort action.250 However, it is not required for a claim of unjust enrichment.251 Thus, if the defendant's conduct is wrongful, any gain obtained through this conduct can be considered unjust enrichment, even if the future harms caused by this conduct are yet to materialize and are currently unknown.

Yet in other cases, the defendant's enrichment can be considered wrongful because they acted to hide the environmental harms they caused.252 This form of liability might prove especially relevant in the case of key industry players in the energy sectors, as those are increasingly being blamed for hiding information regarding the climate crisis from both regulators and the public.253 If such allegations prove credible, a remedy based on unjust enrichment can offer an important venue for recovery and sanction, since despite the immense harm represented by such deceptive practices, it is not clear what other legal response is available.

The common thread in the three aforementioned categories violation of environmental regulations, clearly unreasonable levels of precautions, and attempts to conceal environmental harms is that wrongful conduct is identifiable, and yet a harm-based remedy or sanction may be insufficient. In all such cases of enrichment through a wrong, the tortious conduct needed to establish a tort is usually easily recognized. However, a full tort action may not be possible since the elements of harm and causation might be difficult to prove. In such cases, where tort law may fail to provide a remedy and yet the enrichment of the defendant can be much more easily proved, the law of unjust enrichment offers an important avenue for plaintiffs in climate litigation through the remedy of disgorgement of profit.254

To see why this is a dramatic difference, consider the 2021 claim filed by a group of nongovernmental organizations (NGOs) representing Indigenous people in the Amazon against Casino, a French supermarket chain.255 The standing lawsuit is based on Casino's connection to slaughterhouses that are linked to illegal [\*1078] deforestation in the Amazon256 and is formally based on violations of human rights and environmental laws257 rather than unjust enrichment. The plaintiffs demanded compensation in the sum of $ 3.7 million for "damages done to their customary lands and the impact on their livelihoods,"258 but the revenues of Casino in 2020, according to Joana Setzer and Catherine Higham, were a staggering $ 15 billion just in Latin America.259 Even if a small fraction of this amount can be credibly attributed to unjust enrichment, it is clear why disgorgement of profits in this case would be far more meaningful in terms of deterrence rather than compensation for the harm.260 Compensation measured according to harms will be ineffective as a deterrent, as the defendant will continue the socially wrongful activity in the future as long as it is privately profitable.261

The straightforward doctrinal analysis we propose here, if adopted by courts, can lead to more just litigation outcomes. Consider, for example, the recent decision in the matter of State v. Tobin.262 In this case, the defendant was criminally charged for illegally harvesting crab and geoduck.263 Along with restitution for the authorities' expenses in surveying the illegal harvest and documenting evidence, the state also claimed a remedy measured according to the profit the defendant made from selling the illegally harvested crab and geoduck.264 The state presented evidence indicating that it may take thirty-nine years (and possibly more) for the geoduck population to recover from the defendant's excessive harvest.265 The Supreme Court of Washington determined that the defendant must only pay for the state's expenditures, but that he may keep his additional [\*1079] profits.266 As the defendant's profit was higher than the portion of the state's direct expenditure he was required to pay,267 this unfortunate decision sends a clear signal to other potential wrongdoers: climate crime pays.268 We argue not only that this decision is objectionable as a matter of policy but also that a correct application of unjust enrichment doctrine could obtain a better outcome.

2. Climate Enrichment Without a Wrong

Some commercial activities greatly contribute to global warming without constituting a wrong under current definitions. That is, some profitable undertakings entail high levels of GHG emissions even when they involve no violation of any specific environmental regulation or standard. Can gains obtained through such activities be considered unjust enrichment, and if so, under what circumstances?

As explained above, the law of unjust enrichment recognizes the possibility of liability even when the defendant committed no wrong.269 Such liability attaches in cases in which the defendant enjoyed a windfall they did not pay for or held assets that did not rightfully belong to them.270 This applies, for instance, in the cases of mistaken payment,271 medical treatment in an emergency,272 and a temporary injunction that was ultimately reversed.273 In all of these cases, the defendant unjustly benefited at the expense of others, even though they did not act in violation of any specific legal standard.274

This mode of liability may prove applicable, in some circumstances, to climate enrichment. This may be the case when a particular defendant enjoys resources that rightfully belong to others. This form of legal argument can be advanced in relation to the resource of climate stability.

As explained above, climate stability is a global public good.275 Resources such as breathable air, reasonable temperature, and inhabitable environments [\*1080] belong to all people.276 Yet in practice, through a series of practical limitations, the distribution of these resources does not reflect the rights of all stakeholders in those resources.277 Due to obvious limitations, future generations cannot act to secure their part of the asset for themselves. In this vacuum, some current stakeholders, with strong commercial interests, enjoy assets that rightfully belong to others.

This means that we are currently witnessing unjust enrichment through massively disproportional consumption of climate stability.278 Climate stability is a finite resource in the sense that the atmosphere can only absorb a limited amount of GHG emissions without climate conditions being irrevocably destabilized. Currently, a small number of large firms strong commercial actors in the energy sector benefit immensely through activities involving extremely high GHG emissions.279 This limited resource, the environmental capacity to absorb GHG emissions, is being depleted to the benefit of specific, identifiable actors, with nothing left for subsequent stakeholders. This type of enrichment is unjust, as future generations also have an entitlement to the common good of climate stability,280 which is a necessary condition to a peaceful and safe existence.

Doctrinally, climate enrichment can only be established in cases in which plaintiffs can show that profits are concentrated in the hands of a select few. Conversely, if everyone is benefiting, it cannot be said that a particular plaintiff is enriched at the expense of another. Therefore, the fact that climate winners and climate losers can be identified281 is crucial for any claim based on unjust [\*1081] enrichment. Without committing to the analysis of any specific case, it seems that this type of doctrinal pattern can be found in contemporary markets, where strong commercial interests benefit immensely through activities that perpetuate the climate crisis.282

Based on this analysis, we propose that a defendant's enrichment be considered unjust, absent wrongdoing, under the following conditions, together manifesting the idea of unjust climate enrichment283: when (1) the defendant's activity makes an oversized contribution to climate change, meaning that it is related to a significant share of worldwide GHG emissions, (2) the same activity is highly profitable for the defendant, and (3) the defendant is an exceptional profits center, in the sense that the gains from its activity are not equally enjoyed by the population as a whole. When these conditions are met, climate enrichment is both "at the expense of another" and "unjust," as a select few profit at the expense of the many through activities that render future prosperity virtually impossible.

These three conditions fit well with the internal logic of a claim in unjust enrichment and also ensure a limited and narrow scope of liability. Under the conditions we delineate, consumers, small and medium firms (manufacturers and service providers), employees, etc., will never be held liable for contributions to climate change, as they are not making exceptional profits and are not acting as concentrated profit centers of climate enrichment. Rather, this form of liability may pertain, if at all, only to the clearest examples of large multinational corporations that make immense profit through activities that are responsible for large shares of worldwide GHG emissions.284 This outcome is also normatively appealing. If the biggest winners of the climate crisis are made to forgo their profits, or some significant part of those profits, this may finally pave the way for the systematic changes necessary for addressing the crisis.

### AT: Democracy Solves Warming – 2NC

**Existential warming is inevitable AND causes a collapse into extreme authoritarianism---only transitioning from democracy solves**

Dr. Chien-Yi **Lu 21**, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 1-2

The fact that the scientific knowledge on the human contribution to climate change entered human society through the most advanced democratic societies should have been a cause for celebration. Given the congruence of climate mitigation and public interests, the problem of climate change should have been considered solved decades ago. Several decades of inaction later, however, arguments are proliferating that democracy is exactly the reason for inaction.

In The Collapse of Western Civilization, historians Naomi Oreskes and Erik Conway travel to the future to look back and offer a forensic analysis on the climate-induced Great Collapse of Western Civilization of 2074 (2014: 63). The future historians’ forensic report states that “[a]s the devastating effects of the Great Collapse began to appear, the nation-states with democratic governments… were at first unwilling and then unable” to deal with the crisis. These democratic governments realized that they had no “infrastructure and organizational ability to quarantine and relocate people” as “food shortages and disease outbreaks spread and sea level[s] rose.” In China, where there was centralized government, the crisis was handled much more adequately, leading to survival rates exceeding 80%, a development that “vindicated the necessity of centralized government” (2014: 51–2). The gist of The Collapse of Western Civilization is not about critiquing democracy per se but a warning against the stubborn inaction mandated by market fundamentalism that has hijacked Western democracies.1 In their previous book, Merchants of Doubt, Oreskes and Conway documented the way that climate deniers sowed the seeds of doubt about climate change and successfully staved off implementations of mitigation measures. For the authors, the anticommunist ideology that had kept actors vigilant about government encroachment in the marketplace occupied a central place in climate denial (2014: 69). Ironically, this sort of ideology-informed calculation meant that preventative action was blocked, increasing the risk that disruptive climate disasters would eventually necessitate the suspension of democracy and legitimating the sort of heavy-handed authoritarian interventions that the conservatives most abhorred (2014: 52; 69).

An appeal to suspend democracy for the sake of survival can be found in The Climate Change Challenge and the Failure of Democracy, where Shearman and Smith argue that liberal democracy is incompatible with the urgent necessity to prevent catastrophic climate change. The vested interests of politicians, corporations, and media lie in continuing with business as usual and in keeping the public ignorant. Instead of bottom-up reforms to improve democracy and bring about sensible climate policies, Shearman and Smith see a transformation into authoritarian regimes as the only responsible way forward when faced with the extreme ecological stress of climate change. They point out that, as Plato foresaw, those in power in a democracy are seldom able to resist the demands of the populace for long, but as a mass, the populace is seldom able to focus on complex problems and to perceive threats that lie over the horizon. Hence, those able to see further—scientists, experts, and the knowledgeable— should be entrusted with steering the course while there is still time to avoid disaster. It is only under a benign authoritarian rule of the knowledgeable that a saner, fairer, and more rational means of weighing social goods against evils can be introduced (Shearman and Smith, 2007).