

Polluter Disgorges: Climate Accountability and the Law of Unjust Enrichment

William Montgomery*

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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,

* © 2022 William Montgomery. J.D. 2022, Tulane University Law School; A.B. 2015, Harvard University. The author would like to thank Professor Adam Babich and the *TELJ* editors for their thoughtful guidance and comments on this piece.

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),¹ commentators generally regard Lord Mansfield’s decision in the English case *Moses v. Macferlan*² as the seminal common law case articulating the doctrine of unjust enrichment.³ In that case, Moses had

1. See generally Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605 (1962) (discussing the evolution of unjust enrichment doctrines in Germany and France and their origins in Roman law).

2. 97 Eng. Rep. 676; 2 Burr. 1005 (K.B. 1760).

3. See W.M.C. Gummow, *Moses v. Macferlan 250 Years On*, 68 WASH. & LEE L. REV. 881, 882 (2011). Modern common law notions of unjust enrichment arguably have some roots in Roman law as well, as Mansfield possessed a “wide knowledge of continental law” and was likely

endorsed several promissory notes for Macferlan on the condition that Macferlan would not sue to enforce the endorsements.⁴ When 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.⁵ Moses 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 provision⁶—but Mansfield noted that the facts of the case would not support such a claim.⁷ Nevertheless, 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.⁹ Open-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.¹⁰ But 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.¹¹ Mansfield even characterized the action as an “*equitable*” action, to recover money, which ought not in justice

influenced by Scottish thinkers operating in its mixed civil and common law system. See *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2080-81 (2020).

4. Gummow, *supra* note 3, at 882.

5. *Id.*

6. The four common counts were money had and received, money paid, *quantum meruit*, and *quantum valebant*. See ANDREW KULL & WARD FARNSWORTH, *RESTITUTION AND UNJUST ENRICHMENT: CASES AND NOTES* 129-31 (2018).

7. Gummow, *supra* note 3, at 883-84.

8. *Moses v. Macferlan*, 97 Eng. Rep. 676, 678; 2 Burr. 1005, 1008 (K.B. 1760).

9. KULL & FARNSWORTH, *supra* note 6, at 5.

10. See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2092-93 (2001).

11. *Macferlan*, 97 Eng. Rep. at 1012. See also *The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2083.

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.¹³ Is 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.¹⁴ Nevertheless, 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.¹⁵ Indeed, 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.”¹⁷ This 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.¹⁸ Thus, the Restatement authors submitted, “[a] person who has been unjustly

12. *Macferlan*, 97 Eng. Rep. at 1012 (emphasis added).

13. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011) (“It is by no means obvious, as a theoretical matter, how ‘unjust enrichment’ should be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system.”).

14. See KULL & FARNSWORTH, *supra* note 6, at 4; Peter Birks, UNJUST ENRICHMENT 14 (2d ed. 2005).

15. See *The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2084-86, 2084 n.71 (compiling cases).

16. See Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 257 (1897) (“[T]he ‘restitution theory’ will not apply to those instances of ‘quasi-contract,’ which are many, where there is no obligation broken or no tort.”).

17. *The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2086-89; Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1192 (1995).

18. Kull, *supra* note 17, at 1192.

enriched at the expense of another is required to make restitution to the other.”¹⁹

Some commentators found this approach misguided.²⁰ Simply 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.²² On 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 returned, separate from instances where the obligation to make restitution flows from the breach of a contractual obligation or a general duty of care.²³ In 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.²⁴ Moreover, 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

19. RESTATEMENT (FIRST) OF RESTITUTION § 1 (AM. LAW. INST. 1937).

20. See, e.g., BIRKS, *supra* note 14, at 3-5.

21. However, American lawyers tend to speak of restitution both as a gain-based set of remedies and as a source of liability authorizing those remedies. See KULL & FARNSWORTH, *supra* note 6, at 1-2; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011) (speaking of “liability in restitution”). To make things even more confusing, “restitution” in American law can also refer to a kind of criminal sanction, but this has a different genealogy and is a separate concept from restitution in the civil context.

22. BIRKS, *supra* note 14, at 4.

23. *Id.* at 5-9, 11-13.

24. *Id.* at 14.

25. *Id.*

principle guiding the crafting of remedies in novel cases.²⁶ A 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.²⁷ The 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,²⁸ the American Law Institute published a Third Restatement of Restitution and Unjust Enrichment in 2011.²⁹ It 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.”³⁰ It emphasized, however, that “[t]he 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.”³¹ Pointing 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 “[N]otwithstanding 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

26. *The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2095; Sherwin, *supra* note 10, at 2089-90 (discussing *Sharp v. Kosmalski*, 351 N.E.2d 721 (N.Y. 1976) and *Kossian v. Am. Nat’l Life Ins. Co.*, 254 Cal. App. 647 (1967)).

27. *See The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2092-93.

28. *See* Caprice Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1040-42 (2011).

29. An effort to publish a second restatement was abandoned after two drafts. *See* Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 489 n.6 (2007).

30. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011) [hereinafter RESTATEMENT (THIRD)].

31. *Id.* at § 1 cmt. a.

32. *Id.* at § 1 cmt. b.

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.³⁴ Similarly, 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.³⁵ Where 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.³⁶ Under 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

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

34. *See id.* at §§ 40-46.

35. *Id.* at § 39.

36. *The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2099.

37. *See* RESTATEMENT (THIRD), *supra* note 30, at § 1 cmt. b (“The law’s potential for intervention in transactions that might be challenged as inequitable is narrower, more predictable, and more objectively determined than the unconstrained implications of the words ‘unjust enrichment.’”).

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.”³⁸ The 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.³⁹ On 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.”⁴⁰ Though the case was dismissed on statute of limitations and justiciability grounds,⁴¹ the 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.⁴³ In 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.⁴⁴ Mississippi 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,

38. *Watts v. Watts*, 405 N.W.2d 303, 314 (Wisc. 1987). *See also* *Sharp v. Kosmalski*, 351 N.E.2d 721, 724 (N.Y. 1976); *Salzman v. Bachrach*, 996 P.2d 1263, 1266 (Colo. 2000).

39. *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1039-43 (N.D. Ill. 2004).

40. *Id.* at 1043, 1056.

41. *Id.* at 1075.

42. *See, e.g.*, A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255 (2020); Kaimipono David Wegner, “*Too Big To Remedy? Rethinking Mass Restitution for Slavery and Jim Crow*,” 44 LOY. L.A. L. REV. 177 (2010).

43. *See, e.g.*, Martin Olszynski, Sharon Mascher, and Meinhard Doelle, *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENV’T L. REV. 1 (2017); Maxine Joselow, *Big Tobacco Had To Pay \$206B. Is Big Oil Next?*, E&E NEWS (Mar. 10, 2021), <https://www.eenews.net/stories/1063727023>.

44. *See* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 848 (1999).

welfare, and employee benefit programs.⁴⁵ The 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.⁴⁶ While 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 trial⁴⁷—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 tort⁴⁸—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.⁴⁹ More 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.

45. *See id.* at 851, 853.

46. *See id.* at 874, 885.

47. *See id.* at 898-911. *But see* *City of St. Louis v. Am. Tobacco Co., Inc.*, 70 F. Supp. 2d 1008, 1016-17 (E.D. Mo. 1999) (remanding on the grounds that municipal plaintiff had stated a claim for restitution of Medicaid funds from tobacco products distributor under Missouri law).

48. *See, e.g., The Intellectual History of Unjust Enrichment*, *supra* note 3, at 2099-100.

49. I use “carbon majors” in this sense to refer to large corporate fossil fuel producers that account for the lion’s share of cumulative historic greenhouse gas emissions as measured by emissions from the downstream combustion of their products (as well as their own operational emissions, but these obviously dwarf the “end user” downstream emissions). *See* PAUL GRIFFIN, *THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017* 5 (2017), <https://bit.ly/3rThrE2>.

A. *Background: The “Second Wave” of Climate Nuisance Litigation*

1. The First Wave

The so-called second wave of climate nuisance litigation⁵⁰ follows an earlier wave brought under federal common law that located the nuisance or similar wrong in the defendants’ direct emission of greenhouse gases. To take one notable example, the State of California sued six auto manufacturers for public nuisance on the grounds that emissions from their vehicles accounted for over twenty percent of anthropogenic carbon dioxide emissions in the U.S.⁵¹ In a common fate for any type of climate litigation in federal court, the court did not reach the merits of the claim and instead granted dismissal on justiciability grounds, in this case under the political question doctrine.⁵² But perhaps the most well-known and consequential member of this crop of lawsuits was *American Electric Power Co., Inc. v. Connecticut*, in which New York City and various states sued four private utilities and the Tennessee Valley Authority to obtain an abatement order on the grounds that the defendants’ carbon dioxide emissions created a public nuisance by contributing significantly to global warming.⁵³ The case eventually reached the Supreme Court, which in a unanimous decision held that Congress had displaced any private right to seek abatement of greenhouse gas pollution under federal common law by passing the Clean Air Act, even if the EPA declined to use its authority under that statute to regulate that pollution.⁵⁴ Notably, however, the Court declined to answer whether the Clean Air Act would have preempted the plaintiffs’ state-law nuisance claims—leaving open a window for future plaintiffs to pursue nuisance claims under state law.

Other nuisance lawsuits from this first wave targeted oil and gas companies, but they mainly pointed to the companies’ own “operational” emissions from the production, distribution, and refining processes as the actionable wrong (rather than all emissions traceable to the sale of their products). For example, in *Comer v. Murphy Oil, U.S.A.*, a group of landowners in coastal Mississippi filed suit in federal court against various fossil fuel and petrochemical companies in the wake of Hurricane Katrina

50. See Albert C. Lin, *The Second Wave of Climate Change Public Nuisance Litigation*, AM. BAR ASS’N (Sept. 1, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/september-october-2019/the-second-wave/.

51. *California v. Gen. Motors Corp.*, No. C06–05755, 2007 WL 2726871 at *1 (N.D. Cal. 2007).

52. *Id.* at *6–*16.

53. 564 U.S. 410, 415, 418–19 (2011).

54. *Id.* at 424–28.

alleging that their “operation of energy, fossil fuels, and chemicals industries in the United States caused the emission of greenhouse gases that contributed to global warming,” which added to the intensity of the storm that destroyed their private property and public property they frequently used.⁵⁵ In their complaint, the landowners claim that the nuisance was committed when the defendants “used their property and conducted their business to mine, drill, manufacture, release, vent, and/or combust substances in such a way as to produce massive amounts of greenhouse gases[,]”⁵⁶ and elsewhere they point to fugitive emissions of methane from drilling operations and of “halocarbons” (a class of extremely potent GHGs like hydrofluorocarbons) from chemical manufacturing as evidence that the defendants’ activities “substantially contribute” to global warming.⁵⁷ Though the case was resolved before the Supreme Court’s *AEP* decision, it alleged nuisance under Mississippi law (not federal common law), and a Fifth Circuit panel reversed a district court dismissal to find that the plaintiffs did have standing to bring the nuisance claims and that those claims did not present a nonjusticiable political question.⁵⁸ But the Fifth Circuit vacated that decision by granting a rehearing *en banc* before losing its quorum to actually hold the hearing due to the last-minute recusal of an eighth circuit judge, effectively reinstating the initial district court decision granting dismissal⁵⁹—a suspicious turn of events that has been heavily criticized.⁶⁰

Native Village of Kivalina v. ExxonMobil Corp. is perhaps the better-known example of this first wave-type suit.⁶¹ In that case, a small Inupiat city on the Alaskan coast above the Arctic Circle filed suit against various fossil fuel and utility companies, alleging that their greenhouse gas emissions created a nuisance by substantially contributing to global warming, which threatened to devastate the city by interfering with the formation of sea ice that normally protected it from wave erosion and

55. 585 F.3d 855, 859 (5th Cir. 2009).

56. Third Amended Complaint, *Comer v. Murphy Oil U.S.A.*, No. 1:05-cv-00436-LTS-RHW, 2006 WL 1474089 at ¶ 28 (S.D. Miss. Filed Apr. 19, 2006).

57. *Id.* at ¶¶ 8, 44-46.

58. *Comer*, 585 F.3d at 859, 864-65, 875-76.

59. See *Comer v. Murphy Oil U.S.A.*, 598 F.3d 208 (5th Cir. 2010) (granting rehearing *en banc*), *appeal dismissed* 607 F.3d 1049, 1055 (5th Cir. 2010) (*en banc*) (holding that the court had no authority to reinstate the vacated panel opinion without a quorum).

60. See, e.g., Henry Weaver and Douglas Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 323-24 (2017); Nan Aron, *The Corporate Courts: Fifth Circuit Judges Are Marinating in Oil*, HUFFPOST (July 7, 2010), https://www.huffpost.com/entry/the-corporate-courts-fift_b_638591.

61. 696 F.3d 849 (9th Cir. 2012).

storm surges.⁶² Here, too, the plaintiffs' complaint zeroed in on the oil company defendants' operational emissions as the source of their substantial contribution to global warming, including fugitive methane emissions from drilling and "venting," GHG emissions from "combustion of fossil fuels to produce electricity for their own facilities and operations," and emissions from "downstream" activities like refining, processing, and distribution.⁶³ And though plaintiffs alleged public and private nuisance under federal common law, they sought money damages from defendants as opposed to injunctive relief in the form of abatement orders like the plaintiffs in *AEP*, potentially avoiding the Supreme Court's concern in that case about "individual district judges issuing ad-hoc, case-by-case injunctions" without the "scientific, economic, and technological resources an agency can utilize[.]"⁶⁴ Nevertheless, in upholding the district court's dismissal of the case, the Ninth Circuit held that "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement[]" and that the *AEP* holding extended to every federal common law nuisance action, not just those seeking abatement orders.⁶⁵

2. The Second Wave

In an attempt to avoid these pitfalls, the second wave of climate nuisance lawsuits made two important innovations. First, these plaintiffs filed in state court under state common law to avoid challenges on Congressional displacement and justiciability grounds.⁶⁶ Many were successful in defeating oil companies' initial attempts to remove the cases to federal court.⁶⁷ But in one of those cases, *B.P. v. Mayor and City Council*

62. See *id.* at 853-54.

63. Complaint for Damages and Demand for Jury Trial, Native Vill. of Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138-SBA, 2008 WL 594713 at ¶¶ 163-69 (filed Feb. 26, 2008). The complaint also cites the "marketing of oil and gas products" as another source of downstream GHG emissions, but it's unclear if this in fact refers to post-sale, "end user" combustion of fossil fuel products or another part of the downstream/refining process where the emissions are still being emitted "directly" by the defendants themselves. See *id.* at ¶ 163 (emphasis in original). The latter explanation seems more likely given that the complaint takes care to state the amount of carbon dioxide-equivalents each defendant emitted annually from their own facilities and operations in its description of the parties. See, e.g., *id.* at ¶¶ 23, 29.

64. See *Kivalina*, 696 F.3d at 857; *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 428 (2011).

65. *Id.*

66. See Dino Grandoni, *States and Cities Scramble To Sue Oil Companies Over Climate Change*, WASH. POST (Sept. 14, 2020), <https://www.washingtonpost.com/climate-environment/2020/09/14/states-cities-scramble-sue-oil-companies-over-climate-change/>.

67. See, e.g., *Bd. of Cty. Commrs. Of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); *Rhode Island v. Shell Oil Products*

of *Baltimore*, the Supreme Court vacated those decisions by siding with the oil majors in endorsing their favored reading of the statutes governing appellate review of remand orders.⁶⁸ Resolving a circuit split on the issue, the Court held that 18 U.S.C. § 1447(d), which prohibits review of a remand order unless a party seeks to remove a case pursuant to sections 1442 (cases involving federal officers) or 1443 (civil rights cases), permits an appellate court to review an *entire* remand order and not just the parts of the order examining the federal officer and/or civil rights removal grounds (as some circuits had previously interpreted the statute).⁶⁹ Although some speculated that the decision could make it harder for these local government plaintiffs to stay out of federal court,⁷⁰ circuit courts reviewing these cases anew in light of the *Baltimore* decision have so far continued to find that removal to federal court is not appropriate.⁷¹

But even if other circuits decide to keep future cases in federal court, other local government plaintiffs may have a compelling argument that their state law nuisance claims are not preempted by the Clean Air Act because of a second innovation they made—identifying the nuisance in the companies’ continued production, promotion, and sale of fossil fuels “at levels sufficient to alter the climate” (or in one plaintiff’s shorthand, the companies’ “fossil fuel activities”), rather than in the companies’ own operational emissions.⁷² Some commentators have argued that the new wave of state law nuisance claims are preempted by the Clean Air Act,⁷³ but they misunderstand what these plaintiffs are alleging in order to arrive at that conclusion. Based on the Supreme Court’s holding in *International Paper Co. v. Ouellette* that the Clean Water Act preempts state law

Co., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); Mayor and City Council of Balt. v. BP, plc, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S.Ct. 1532 (2021). All three decisions upheld a district court’s remand order.

68. See *B.P. v. Mayor and City Council of Balt.*, 141 S. Ct. 1532, 1537-38 (2021).

69. See *id.*

70. See, e.g., John Schwartz, *Supreme Court Gives Big Oil a Win in Climate Fight with Cities*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/climate/supreme-court-baltimore-fossil-fuels.html>.

71. See *Cty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); Mayor and City Council of Balt., 31 F.4th 178 (4th Cir. 2022); *Bd. of Cty. Commrs. Of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, 25 F.4th 1238 (10th Cir. 2022).

72. See, e.g., Amended Complaint and Jury Demand, *Bd. of Cty. Commrs. Of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, No. 2018-CV-030349 at ¶¶ 445, 484 (Colo. Dist. Ct. filed June 11, 2018), <https://bit.ly/3vzgrax> [hereinafter *Boulder Complaint*].

73. See, e.g., Damien Schiff and Paul Beard, *Preemption at Midfield: Why the Current Generation of State Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENV’T L. 853 (2019).

nuisance claims against an out-of-state source⁷⁴—and subsequent circuit court decisions applying the same logic to state law nuisance claims for air pollution⁷⁵—they argue that the plaintiffs’ claims run afoul of precedent because they would apply state nuisance law to out-of-state emissions of greenhouse gases.⁷⁶ In-state emissions attributable to defendants’ products have an insignificant impact on climate change overall, the argument goes, so plaintiffs must necessarily rely on out-of-state emissions to create a strong enough causal link between the defendants’ products and their climate injuries—precisely the kind of action federal pollution control statutes impliedly preempt under *Ouellette*.⁷⁷ But these suits do not seek to impose liability for greenhouse gas emissions. They seek to impose liability for the continued production, promotion, and sale of “enormous amount[s]” of fossil fuels that “were used, are used and will continue to be used by their consumers in the intended, foreseeable and natural way: combustion.”⁷⁸ These are lawsuits over an industry’s relentless push to “encourage and constantly suppl[y]” the ever-increasing use of a product they know to be harmful rather than the greenhouse gas emissions themselves.⁷⁹ Insofar as the Clean Air Act only regulates emissions from specific sources, and not the production, promotion, or sale of oil and gas, the plaintiffs have a strong argument that their state law nuisance claims are not preempted.⁸⁰

This central theme of these lawsuits—that the defendants continue to push for growth in the use of their products with full knowledge of the attendant dangers—is precisely what makes them well suited for unjust enrichment claims. So far, only the Boulder Complaint has alleged unjust enrichment as a cause of action,⁸¹ and I use the general framework

74. 479 U.S. 481, 493-94 (1987).

75. See, e.g., *Her Majesty the Queen v. City of Detroit*, 874 F.3d 332, 342-43 (10th Cir. 1989) (holding that the Clean Air Act did not preempt Ontario’s nuisance claim under source-state law); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196-97 (3rd Cir. 2013) (“[W]e conclude that the Supreme Court’s decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the pollution is located.”).

76. See Schiff and Beard, *supra* note 73, at 875-77.

77. *Id.*

78. *Boulder Complaint*, *supra* note 72, at ¶ 322.

79. *Id.* at ¶ 127.

80. See Rachel Rothschild, *State Common Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV’T L.J. 412, 448-49 (2019).

81. *Boulder Complaint*, *supra* note 72, at ¶¶ 483-88. Another recent climate lawsuit has also alleged unjust enrichment, but it belongs to a different family of cases than the local government nuisance suits. It was brought as a shareholder derivative action against corporate officers of ExxonMobil for violating their fiduciary duties by misrepresenting the impact that climate change will have on its reserve valuations and long-term business prospects generally (and

advanced there to explore how local government plaintiffs might use this doctrine in their lawsuits against carbon majors.

B. “Freestanding” Unjust Enrichment: Emergency Intervention

On its face, the Boulder Complaint seems to assert a claim for “freestanding” unjust enrichment. It plainly states that “Plaintiffs have conferred a benefit upon defendants by bearing the costs of the impacts of climate change while Defendants have not borne those costs, increasing the profits to Defendants[]” and that “it would be unconscionable and contrary to equity for Defendants to retain those benefits obtained at the expense of Plaintiffs.”⁸² The plaintiffs here are appealing to a third source of obligation outside of tort and contract, arguing that the defendants were unjustly enriched by letting plaintiffs incur the costs of dealing with changes in the climate caused by their products and that they are entitled to restitution of those gains. In other words, plaintiffs’ argument smacks of the “broad” view of unjust enrichment that has become largely disfavored in American law, as we saw in the first section.

But the plaintiffs may yet have an argument that their claim belongs in one of the narrow categories still recognized in American law where unjust enrichment does not look to torts or contracts to determine whether a transfer of benefits lacks a lawful explanation—those situations akin to that of a mistaken payment.⁸³ In particular, the facts of the Boulder case and other similar local government nuisance suits appear to fit within a category of cases that the First Restatement referred to as “Perform[ing] Another’s Duty to the Public.”⁸⁴ The basic principle of these decisions is that when a plaintiff “perform[s] the duty of another by supplying things or services . . . without the other’s knowledge or consent,” she is entitled to restitution so long as “the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.”⁸⁵ The most straightforward illustrations of this principle involve cases where a private plaintiff performs the duty of a governmental entity, such as when a person makes repairs to a dangerous city road or abates a “serious public nuisance” like a beached whale.⁸⁶

thereby unjustly enriching themselves at the expense of the corporation). *See* Verified Shareholder Derivative Complaint, Exxon Mobil Corp. v. Woods, No. 3:19-cv-01067 (N.D. Tex. filed May 2, 2019), <https://bit.ly/3s6vExS>.

82. *Id.* at ¶ 486.

83. *See supra* notes 22-25 and accompanying text.

84. RESTATEMENT (FIRST) OF RESTITUTION § 115 (AM. LAW. INST. 1937).

85. *Id.*

86. *Id.* at § 115 cmt. b.

Nevertheless, governments have found some success suing private plaintiffs for the costs of abatement under this theory. One notable example is *Wyandotte Transport Co. v. United States*, a Supreme Court case which involved a sunken barge carrying more than two million tons of liquid chlorine that its owners abandoned at the bottom of the Mississippi River, refusing to salvage it.⁸⁷ Acting quickly to prevent a catastrophic release of chlorine gas into nearby communities, the United States raised and removed the barge itself and then sought reimbursement for the costs of the operation from the barge's owners, over \$3 million.⁸⁸ Citing § 115 of the Restatement for support, the Court held that the government was entitled to this restitution because it had performed the owner's duty in a "classic case" where "rapid removal by someone was essential [to public safety]."⁸⁹ To put it another way, the government's cleanup constituted a mistaken payment to the defendants that resulted in their unjust enrichment, entitling the government to restitution.⁹⁰

Similarly, in *United States v. Healy Tibbitts Construction Co.*, which again involved an abandoned barge leaking oil that the U.S. remediated after the owners refused to do anything, a district court relied on § 115 to characterize the government's attempts to have the cleanup costs reimbursed as one of "quasi-contract"⁹¹ subject to a longer statute of limitations than a tort claim.⁹² The court took care to note that, "The portrait of a polluter indifferently standing idle while its oil spill is neutralized at public expense—and thereafter spiritedly disavowing any responsibility for recompensing the United States—offers as compelling an example of unjust enrichment as has lately been brought before the Court."⁹³

It is worth noting here that the Third Restatement, with its overriding concern about unjust enrichment becoming "a potentially unprincipled charter of liability[,]"⁹⁴ attempted to significantly narrow the applicability of this "emergency assistance" doctrine. In particular, the authors emphasized that there could be no unjust enrichment by performing

87. 389 U.S. 191, 194-95 (1967).

88. *Id.* at 195.

89. *Id.* at 204.

90. See Allan Kanner, *Unjust Enrichment in Environmental Litigation*, 20 J. ENV'T L. & LITIG. 111, 152-53 (2005) (noting that this is one of two ways to explain the result in the case).

91. Which can be equated to a "freestanding" unjust enrichment claim because the source of the obligation to make restitution cannot be explained by principles of tort or contract. See *supra* note 16 and accompanying text.

92. 607 F. Supp. 540, 542 (N.D. Cal. 1985).

93. *Id.* at 542-43.

94. See RESTATEMENT (THIRD), *supra* note 30, at § 1 cmt. b.

another's duty "except insofar as the claimant's intervention has relieved the defendant of an otherwise enforceable obligation," i.e., an independent legal duty for the defendant to act imposed by statute or by tort.⁹⁵ There are, however, ample examples of courts declining to follow this requirement and continuing to impose "freestanding" liability for unjust enrichment, particularly in cases involving pollution or environmental contamination. In 2009, a New York appeals court denied summary judgment to defendant property owners on New York City's "common-law restitution" claim against them, which sought reimbursement for the costs of cleaning up hazardous construction waste that the owners refused to clean up despite repeated Department of Sanitation orders.⁹⁶ Relying on one of their earlier decisions in a lead paint lawsuit interpreting § 115, the court stressed that the restitution obligation arose out of the city incurring remedial expenses in fulfillment of "its general duty to protect the public from potential health or safety hazards[.]" and that "no additional privity or duty need[ed to] exist between the [defendants] and the City."⁹⁷ This line of reasoning is particularly common in asbestos removal cases, where courts have recognized that liability in restitution can be imposed on manufacturers on the grounds that they have "been unjustly enriched to the extent the plaintiff is required to abate a hazard created by [the] defendant[.]" which "constitutes no less of an 'emergency' because abatement will require an extended amount of time[.]"⁹⁸

Local governments may be able to extend this same logic to "emergency abatements" they have been forced to undertake as a result of changes in local climate driven by carbon majors' products. They would likely be entitled to restitution only for costs they have *already* incurred in dealing with climate change⁹⁹ and would also probably be limited to the reasonable costs of the "abatement" as opposed to the amount actually incurred.¹⁰⁰ But such claims could still yield significant recoveries.

95. *Id.* at § 22(3) & cmt. i.

96. *City of New York v. Coll. Point Sports Ass'n, Inc.*, 876 N.Y.S.2d 409, 421-22 (N.Y. App. Div. 2009).

97. *Id.* at 422 (following *City of New York v. Lead Indus. Ass'n*, 644 N.Y.S.2d 919, 923 (N.Y. App. Div. 1996)).

98. *Indep. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 304 (D. Minn. 1990). *See also* *Unified Sch. Dist. No. 500 v. U.S. Gypsum Co.*, 788 F. Supp. 1173, 1176 (D. Kan. 1992); *Drayton Public Sch. Dist. No. 19 v. W.R. Grace & Co.* 728 F. Supp. 1410, 1414-15 (D.N.D. 1989).

99. *See, e.g., Univ. of Vt. v. W.R. Grace & Co.*, 565 A.2d 1354, 1356 n.2 (Vt. 1994) (noting that restitution claim was premature because plaintiff had not removed any of the asbestos).

100. *See, e.g., State v. Schenectady Chemicals, Inc.*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984).

To return to our representative example, the Boulder plaintiffs are careful to note precise costs they have incurred to protect the public from emergencies created by climate change: wages for 900 firefighters responding to a 2010 wildfire, \$24.6 million for a county-run flood buyout program, \$170 million for capital improvements to flood control infrastructure, \$100 million for rebuilding roads destroyed in a 2013 flood, and \$37.7 million for air conditioning systems in schools where they have historically not been needed.¹⁰¹ Plaintiffs may have a compelling argument that these costs are akin to acting decisively to remediate a shipwreck site or to remove asbestos from a public building in order to protect the public's safety, and that carbon majors would be unjustly enriched if they were permitted to avoid footing the bill. Under the authorities described above, plaintiffs may be able to impose this liability in restitution without having to prove that the defendants had a statutory or tort duty to abate these climate hazards.

C. *"Parasitic" Unjust Enrichment: Restitution for Wrongs*

The above section discussed one way that local government plaintiffs might be able to pursue "freestanding" unjust enrichment claims against carbon majors, without having to simultaneously prove liability in tort. But these plaintiffs may also seek restitutionary remedies for tort violations that they *are* able to prove. This theory of action was once referred to as "waiving the tort"—i.e., opting for recovery in restitution as an alternative to seeking compensatory damages.¹⁰² The Third Restatement tends to refer to it as "Restitution for Wrongs," or a duty to make restitution for "[g]ains realized . . . in violation of another's legally protected rights."¹⁰³ In this sense, unjust enrichment claims are "parasitic" on the law of tort for the conclusion that the plaintiff's rights were violated (and that they are entitled to restitution of the defendant's wrongful gains).

Perhaps the most famous example of this principle in action is *Edwards v. Lee's Administrator*.¹⁰⁴ In that case, a cave ran under both plaintiff's and defendant's property, but the only entrance was on the defendant's side.¹⁰⁵ As the site was only a few miles away from the famous

101. *Boulder Complaint*, *supra* note 72, at ¶¶ 222, 223, 239, 248, 304.

102. See KULL & FARNSWORTH, *supra* note 6 at 307 (criticizing the expression as "misleading and best avoided" since the plaintiff is merely advancing a different legal theory as opposed to actually "waiving" a right).

103. See RESTATEMENT (THIRD), *supra* note 30, at ch. 5, intro. note.

104. 96 S.W. 2d 1028 (Ky. 1936).

105. *Id.* at 1028-29.

Mammoth Cave, defendant was able to turn the cave into a profitable tourist attraction.¹⁰⁶ The plaintiff filed suit in equity for the profits gained from defendant's trespass onto his land, and the chancellor at first instance awarded one-third of the defendant's profits from the tourist attraction, which roughly corresponded to the portion of the cave running underneath the plaintiff's property.¹⁰⁷ The defendant appealed, arguing that the cave was useless to the plaintiff without an entrance and that he suffered no real harm as a result of his operating the attraction, but the Court of Appeals upheld this award on the grounds that "a wrongdoer shall not be permitted to make a profit from his own wrong[.]" citing a draft version of the First Restatement.¹⁰⁸ In other words, the defendant was unjustly enriched by trespassing onto plaintiff's property and therefore had a duty to make restitution. The enrichment was "unjustified" or "without adequate legal ground" (to use the Third Restatement's language) because it stemmed from a tort committed by the defendant, in this case trespass.

This sort of restitution for wrongs can be extremely valuable in toxic tort litigation because it directly "confronts the profitability of pollution."¹⁰⁹ According to the Third Restatement, invasion of someone's legally protected interest entitles a claimant to the "market value" of the benefit obtained by that invasion (e.g., a piece of property's rental value), but a "conscious wrongdoer" who acts "with knowledge of the underlying wrong to the claimant" opens the door to disgorgement, or restitution of all "net profit attributable to the wrong."¹¹⁰ For example, in *Branch v. Mobil Oil Co.*, a district court held that the plaintiffs stated a claim for unjust enrichment by alleging that the defendant oil company used their land to dispose of pollutants, committing a nuisance and entitling the plaintiffs to restitution of the costs the company saved by not disposing of the waste properly.¹¹¹ Similarly, in *N.C. Corff Partnership, Ltd. v. OXY U.S.A., Inc.*, an Oklahoma appeals court held that plaintiffs had stated a claim for unjust enrichment against another oil company whose drilling operations caused contaminant to migrate into their groundwater so long as the defendant's enrichment was "coupled with a resulting injustice[.]" in this case, nuisance and trespass.¹¹²

106. *Id.*

107. *Id.* at 1029.

108. *Id.* at 1030, 1032.

109. Kanner, *supra* note 90, at 112.

110. See RESTATEMENT (THIRD), *supra* note 30, at § 51(2)-(4).

111. 778 F. Supp. 35, 35-36 (W.D. Okla. 1991).

112. 929 P.2d 288, 294-95 (Okla. App. 1996).

In this way, where an underlying trespass or nuisance can be proven, the door is opened to restitutionary remedies based on the amount a defendant saves by acting unlawfully. In the above two cases, that amount would have been readily measurable by the costs of either disposing of the byproducts properly or by properly plugging the wells and otherwise cleaning up their drilling operations, respectively. But how would local governments measure the defendants' gains in climate nuisance cases? The Boulder Complaint meticulously notes the astronomical profitability of its two named fossil fuel defendants and their subsidiaries, to the tune of hundreds of billions of dollars since 1988—the year the United Nations formally endorsed the creation of the Intergovernmental Panel on Climate Change.¹¹³ Thus, the “saved costs” in this case that allowed the defendants to make those profits could arguably be the costs associated with changing their business model to focus on producing and selling “cleaner” and less lucrative energy products (rather than continuing to produce and sell fossil fuels). On another, more restrained view, the defendants' saved costs could be measured by their failure to deploy carbon capture and storage (CCS) solutions that could have abated the climactic effects of emissions from their products, perhaps in terms of foregone research and development expenses. The technology is still unproven at scales large enough to make a significant dent in carbon emissions, but the federal government has provided billions of dollars in support for CCS research as well as for specific projects.¹¹⁴ Plaintiffs in these cases could argue that every carbon major had an obligation to make those kinds of large investments themselves given their unwillingness to wind down fossil fuel production, regardless of the current state of the technology.

But no matter how these saved costs are measured, the plaintiffs will have to develop a compelling argument about what share of the defendants' profits they are entitled to. They could take a cue from toxic tort cases, where it is often difficult to tie one plaintiff's injuries to one specific defendant's actions, and devise a statistical formula to identify their city or county's share of the aggregate national “climate risk” created by the defendants.¹¹⁵ The Boulder Complaint suggests a similar approach by carefully alleging the amount of revenue each defendant has generated

113. *Boulder Complaint*, *supra* note 72, at ¶¶ 69, 84.

114. See Kate Aronoff, *Corporate America Is Irrationally Enthusiastic About Carbon Capture*, NEW REPUBLIC (Sept. 24, 2020), <https://newrepublic.com/article/159473/corporate-america-irrationally-enthusiastic-carbon-capture>.

115. See Michael Burger, Jessica Wentz, and Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. OF ENV'T L. 57, 199-200 (2020).

within the state.¹¹⁶ Perhaps they included much of that information to lay a solid foundation for the court's personal jurisdiction over the companies, but one can also imagine a restitutionary argument that the defendants are obligated to disgorge the profits they earned from conducting business in the plaintiffs' communities—in order to prevent them from being unjustly enriched by saddling those communities with the costs of dealing with the fallout from widespread use of their products.

IV. CONCLUSION

There is certainly no guarantee that courts would be willing to extend principles from cases involving sunken ships or unplugged oil wells to cases seeking restitution from carbon majors for the costs of climate change. Victory for these plaintiffs will be an uphill battle no matter how they plead their cases. As tort scholar Douglas Kysar has observed:

Built as it is on a paradigm of harm in which *A* wrongfully, directly, and exclusively injures *B*, tort 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.¹¹⁷

These observations apply equally to doctrines of unjust enrichment or really any part of the common law, which arose to address the problems of an earlier era, certainly an era before phrases like “collective action” and “anthropogenic greenhouse gas” had entered anyone's vocabulary. But a key feature of the common law is its flexibility, and to the extent that the federal government refuses to rein in fossil fuel use, local governments should be able to make arguments in court as to why oil companies should not be permitted to profit off of a profoundly harmful product that is incurring actual costs to the plaintiff-governments, even if one cannot directly and fully lay the responsibility for climate change at a single company's feet. There could be great value in forcing courts to wrestle with these questions and confront them squarely, regardless of the outcome.

116. See, e.g., *id.* at ¶ 91.

117. Douglas Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. 1, 3-4 (2011).