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Benefiting at the Expense of Climate Change

> *'For this by nature is equitable, that no one be made richer through another's loss.'*[2]
> *'One cleans another's shoes; what can the other do but put them on?'*[3]

This paper discusses the problem of what to do, if anything, about the profits of activities that drive climate change. Should benefits created 'at the expense of' climate change be 'disgorged' to those who missed out and now face the adverse costs of the activities from which these benefits were created? The paper sets out to clarify the basis for disgorgement duties in private law and normative ethics and, in doing so, distinguishes between 'unjust enrichment' and 'wrongful enrichment.' It argues that the existence of the two tracks of unjustified enrichment is an established insight in the legal and ethical theory, but the significance of the distinction has yet to be fully explored in climate change justice. It is argued that neither approach generates a plausible case for legal recovery of unjust enrichments arising from climate change, but the wrongful enrichment track nonetheless serves as the basis of a powerful normative account of duties to disgorge profitable exploitations of the atmospheric commons.

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[2] Pomponius, cited in Gergen 2001: 1927.

[3] Baron Pollock, cited in Ripstein 2007: 1994n.

1. Introduction

Global climate change will impose significant costs on existing and future generations whatever measures are undertaken for its management.[4] Much of the normative literature on climate change has therefore addressed the important question of how these costs should be distributed amongst populations with contrasting needs, interests and responsibilities. What I want to focus on in this paper, however, is the 'benefiting side of the equation.'[5] What should be done, if anything, about the profits of activities that change the Earth's climate? According to one view, profits of injustice should be 'disgorged' to the victims of this injustice.[6] Could it be that those who profit from activities that drive climate change have a moral duty to disgorge this profit to the victims of unjustly imposed changes in climate?[7]

In this paper, I draw upon recent work in private law and normative ethics in order to explore disgorgement duties in the context of global climate change.[8] The paper seeks to make four main contributions. First, I clarify the structure and content of claims of unjustified enrichment in private law and to show that such claims can be developed in two senses (or 'tracks'): 'unjust enrichment' and 'wrongful enrichment.' The existence of these two tracks is an established insight in the literature on restitution in private law and normative ethics[9] but I hope to show that scholars have yet to explore its true significance for applied ethical debates such as global climate change. Second, I set out to show that neither track generates a plausible case in private law for recovery of unjust enrichments arising from climate change. Third, I argue that 'wrongful enrichment' may serve as the plausible starting point for a normative account of disgorgement duties in the context of climate change that is nonetheless independent of private law in justificatory terms. Fourth, I defend this account – which I call 'immoral enrichment' – from four objections.

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[4] Greatly simplified, these costs are a combination of the cost of unprevented climate change combined with the cost of any measures undertaken to adapt to, or mitigate, climate changes that were regarded by policymakers as preventable.

[5] This phrase is taken from Wonnell 1996: 154.

[6] See Haydar and Øverland 2014; Goodin and Barry 2014; Butt 2009, 2014; Barry and Kirby 2017.

[7] Duties to disgorge benefits made at the expense of climate change have been proposed by Heyd 2017, Gosseries 2004, Page 2012, Lawford-Smith, 201, and Heyd 2017. Critics have responded equally forcefully, see Heyward 2014, Huseby 2015, 2018; Knight 2013; Lippert-Rasmussen 2017, 2022; Lindstad 2019.

[8] In what follows, I will refer to 'plaintiffs and defendants' (when discussing the law of unjustified enrichment) and 'victims, perpetrators and beneficiaries' (when discussing the normative ethics of unjustified enrichment).

[9] See Page 2012; Heyd 2017; Truccone-Borgogno 2023; Gilboa, Kaplan and Sarel 2024.

2. Unjustly benefiting from climate change

In private law, unjust enrichment involves 'an enrichment at the expense of another that has to be given up to that other for a reason, that reason being neither a contract nor a wrong.'[10] Assets are transferred from a plaintiff to a defendant in a way that renders the transaction defective and so reversible through a 'disgorgement' by the defendant directed to the plaintiff.[11] A paradigmatic example in many legal systems is a payment made in error, such as paying the same debt twice, but a wide range of other instances arise such as when emergency treatment is provided to someone who can only pay for this benefit at a later date or when a higher court reverses a lower court's enrichment from the funds of another. The core idea is that, where assets are defectively transferred from plaintiff to defendant it would be unjust for the defendant to resist disgorging the gain back to the plaintiff. Since the transfers of value in question do not involve a breach of a primary legal duty, the basis for disgorgement is merely 'the receiver was not entitled to it, nor intended to have it.'[12]

Unjust enrichment, as outlined above, can be analysed in terms of a five stage process: (1) a defendant is enriched (2) at the claimant's expense (3) in a manner that is unjust (4) thereby imposing a legal duty on the defendant to disgorge the benefit back to the plaintiff (5) subject to defences that limit their legal liability.[13] Below, I explain each step and explore how an unjust enrichment claim could conceivably be extended to climate change.

Enrichment. An enrichment in private law is usually understood as a 'restorable transfer of value'[14] that produces a 'favourable effect' on the recipient's interests.[15] The defendants in unjust enrichment are typically the initial, and direct, recipients of transfers of resources that the plaintiff believes should not have occurred or should not have occurred without a fair exchange of value. Usually, there is no question of a third party (or 'secondary defendant'[16]) acquiring a duty to disgorge but unjust enrichment law can be extended to indirect (or 'secondary') beneficiaries if their gains arose from integral features of the original unjustified transfer of value[17]

[10] Birks 2002: 497.

[11] In what follows, I will refer to 'plaintiffs and defendants' (when discussing the law of unjustified enrichment) and 'victims, perpetrators and beneficiaries' (when discussing the normative ethics of unjustified enrichment).

[12] Parke B, quoted in Birks 2005: 6. See also Birks (2001: 1789).

[13] See Birks 2001: 1791-93; Birks 2005:39-40; Barker 2008: 60–3; Burrows 2002: 15–51.

[14] Weinrib 2010: 655. See also Gergen (2001:1945n) and Birks (2005: 50-5).

[15] Gergen 2001: 1945–6.

[16] Häcker 2015: 50.

[17] Consider the case where D^1 (a bank) transfers a sum of money from P to D^2 by mistake.

or if the gains made by an immediate beneficiary were passed on intact to the current beneficiary after the fact.[18]

Turning to climate change, a climatic enrichment can be seen as a restorable transfer of value that owes its existence to climate change. Typically, the literature has focused on enrichments with origins in the acts and policies that drive changes in climate, but it is worth noting that a climatic enrichment could conceivably be created by a change in climate or from an act or policy that attempts to control climate change. What is required is to show that there has been a transfer of value between two parties mediated by climate change. Compared to simple cases of enrichments created by mistaken bank transfers, unpaid emergency services, or court mandated transfers of funds later ruled invalid, it is difficult to isolate the enrichments that different sorts of agents might not currently enjoy 'but for' climate change. But it is tolerably clear that huge benefits have arisen since the beginning of the industrial revolution that could not have arisen without climate change arising as a by-product. Although much of the total historical gain from climate changing activities may have been lost through consumption or waste – and much benefit may be so widely dispersed that a specific set of unjustly enriched defendants is difficult to identify – it is also tolerably clear that huge profits have been made by legal persons, such as large corporations, that have business models that rely on fossil fuels as their primary energy source. Individuals, households, and small and medium sized enterprises, by contrast, may be less suited as potential defendants since the benefits they derive will not stand out from other agents sufficiently for them to be named in court as an unjust beneficiary of climate change.[19]

At the expense of. In its most basic form, to benefit 'at the expense of another' involves one agent gaining 'from' another which usually involves a discernible transaction ('a nexus of exchange') through which wealth is transferred.[20] A transfer, in its most basic sense, is 'any action between persons.' The plaintiff must suffer some disruption (or 'normative loss'[21]) in their transaction with the defendant for a transaction to be said to be creating a benefit at the plaintiff's expense, but the plaintiff need not be made worse off materially through an unjustly enriching transaction. It is the unjust gain that is the focus of the plaintiff's demand for recovery and not any unjust losses they have experienced.[22]

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[18] Consider the case where P drops his wallet by accident in the park. Later that morning D^1 picks it up and then the next day gives it later to his son, D^2, as a present.

[19] See Heyd 2017: 37; Weinbaum 2011: 450; Truccone-Borgogno 2023: 208; Gilboa, Kaplan, and Sarel 2024: 43.

[20] Birks 2005: 74-5; Smith, L. 2001: 2161.

[21] See Weinrib 1994: 283-4; Smith, L. 2001: 2141; Smith, S. 2001: 2188–90.

[22] Edelman and Bant 2016: 92; Smith, L. 2001: 2141.

Turning to climate change, if we can find a legal person that has profited distinctively and disproportionately from the activities that drive climate change, then it might be obvious that these profits were received 'as the expense of climate change' but, of course, since 'climate change' is not the plaintiff, the real question is at whose expense (if anyone's) have benefits from climate change been made? This is a far trickier question than I think has been recognized in the literature, but there seem to be three promising explanations. I do not think any of these is decisive but, together, they suggest that the critical question is whether these benefits are unjust and not whether they were made 'at the expense of' a potential plaintiff.

First, a victim of an impact of climate change residing in any nation or generation might link this experience to the profits of others by pointing out that those profits could not have been made without triggering the source of their misery.[23] If I face the negative consequences of your profitable activities then it does seem intuitive to say that 'I paid for your gain!' There is a doubt here that this causal ('but for') linkage of a benefit and a harm is strong enough to pass the 'at the expense of' test of private law but, in support of the idea, this test is not one of justice versus injustice but rather of establishing a basic sense of an enriching transfer obtaining between victim and beneficiary.

Second, we might think that these benefits were intercepted in a more direct sense from the assets of others. David Heyd, for example, argues that unjust enrichments have accrued as a result of the unequal use of the finite capacity of the atmosphere to absorb greenhouse gases. If everyone has an equal claim to the value of the greenhouse sink capacity of the atmosphere then those who profit from its unauthorised overuse can be seen as the beneficiaries of a mistaken transfer of value from those who have not benefited (or benefited less) from its exploitation.[24] It is worth noting that the accumulated gains of climate change are indeed distributed highly unevenly so it cannot be reasonably maintained that the plaintiffs and defendants in an unjust climatic enrichment analysis are one and the same. This means that it cannot reasonably be claimed that those benefits were not made at anyone's expense because all have equally benefited from climate change at each other's expense.

Third, and most radically, the defendants might be members of current generations who enjoy the valuable resource of climate stability that has been transferred to them from members of future generations. The idea is that large corporations and states operating in earlier generations are making windfall profits from activities that degrade climate stability and this amounts to a non-consensual transfer of

[23] Weinbaum 2011: 450.

[24] Heyd 2017: 38. See also Duus-Otterström 2014: 458; Page 2012: 315-6; Truccone-Borgogno (2022: 204–5).

value from the future to the present. Gilboa, Kaplan, and Sarel (2024: 42) model this account of 'at the expense of' on the valid enrichment of the defendant by a lower court that is later reversed by a higher court. This is an innovative solution but more intuitive is probably Heyd's interceptive enrichment idea which appeals to the same basic idea of the atmosphere being co-owned but lacks the somewhat strained appeal to court decisions that never occurred.[25]

The enrichment is unjust. It is vital to separate permissible from impermissible enrichments to avoid an implausible, and unworkable, account of the law of unjust enrichment. The paradigmatic example of a permissible benefit gained at the expense of another is a 'by benefit.' As Klimchuk (2007: 815) writes: 'If you live in the apartment above me, then, owing to the fact that heat rises, you will be enriched at my expense if I keep my apartment well heated through the winter. But you are not unjustly enriched.' Legal theorists are divided on how to separate unjust enrichments from 'by-benefits' but they are largely in agreement that there are two distinct, but generally converging, methods of doing so.[26] The first approach is to establish the presence of an 'unjust factor' that explains why an unjustly enriching transaction is defective in a way a by-benefiting transaction is not.[27] Such factors are 'all the possible matters between the plaintiff and defendant by which the plaintiff's intention to make a transfer is imperfect.'[28] In other words, the transaction between victim and beneficiary was legally impaired in a way that would justify its reversal that would not arise for a by-benefit.[29] The second approach is to determine whether or not the current holder can show why they have a legal basis to retain the enrichment and thereby resist the demand for restitution mounted by the plaintiff. Although the two approaches are based on contrasting rationales (the former starts on the basis that the enriching transfer was justified and attempts to impugn it, the latter starts on the basis that the enriching transfer is unjust until it can be justified), they are probably best seen as complements.[30]

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[25] A separate problem with appealing to the legal rights of members of future generations to recover profits associated with past destabilisation of climate stability is the non-identity problem. Had these profitable activities not occurred then many, if not all, of the potential pool of defendants would likely never have existed. So it seems that arguing on behalf of future generations that current firms and states should not profit from exploiting existing climate stability at the expense of future individuals makes little sense. I believe that this problem can be solved if we assume that people coming into existence have a right not to be born in a state impaired by lack of access to a stable climate, but this is not a solution open to a private law approach given that the relevant rights do not yet exist in any legal sense that would make their future holders valid plaintiffs in a present-day court of law. See Caney 2006:474-6 and Page 2012: 319–20 for further discussion.

[26] See, for example, Birks 2005: 102-8; Klimchuk 2004: 1262–4.

[27] Smith 2001, L: 2163.

[28] Edelman and Bant 2006: 138 – original emphasis.

[29] See McBride and McGrath 1995: 36–7; Smith(S) 2001: 2122.

[30] See Klimchuk 2004: 1264; Edelman and Bant 2016: 130.

In the climate change context, there are at least three 'unjust factors' that have been explored in the literature.[31] I will argue that none of these factors corresponds to established bases of recovery of gains for the plaintiff[32] and all of them raise internal problems of coherence that question their use as legal grounds for recovery.

First, we might think that current agents enjoying climatic benefits should give up these benefits to compensate the victims who are harmed by the process(es) through which the benefits were created. All, or nearly all, people may end up being harmed by climate change but some benefit so much that their net losses are eliminated while the net losses of others are left in place. We may think it unfair to let the latter suffer while the former are allowed to profit. The problem with this line of reasoning is essentially the mirror image of the 'by benefits' problem noted above. Those gaining innocently from processes that cause harm may have gained 'at the expense of' others but they have not been unjustly enriched merely because their fortuitous gain is causally linked to the victims' impoverishment. If the defendants, meanwhile, can be held legally accountable for harming the plaintiffs, then this would transform the claim into one of compensation for wrongful harm and not restitution for unjust enrichment. Put differently, some may gain from processes that do not enrich (and may actively harm) others, but the former do not receive a transfer of value from the latter just because they gained more, or were harmed less, from a common activity.

Second, the injustice of retaining climatic benefits might be based on some populations involuntarily missing out on a fair share of benefits linked to the use of the capacity of the atmosphere to absorb greenhouse gas.[33] This is the corollary of Heyd's description of how agents benefit at the expense of others when they profit from their use of the atmospheric commons while bearing little or none of the associated costs imposed on others. Large corporations, for example, have boosted their profits by using fossil fuel energy sources at the cost of running up a debt of restitution to other atmospheric users whose own exploitation of the sink capacity of the atmosphere is now highly constrained. Of course, the exploitation of the resource cannot be 'given up' but the value created can be disgorged so that all benefit from the exploitation. Although I think this idea is broadly correct, the problem in this context is that it is only plausible as an account of wrongful, not unjust enrichment, since, if it does not appeal to wrongdoing in the production of the benefit, it is effectively an appeal to fairness or solidarity that does not supply a legal reason why this was a defective transfer of value at the time the transfer(s) occurred. The law of unjust enrichment, in this sense, is rigidly corrective in being

[31] See, for example, Truccone-Borgogno 2023: 205; Heyd 2017; Page 2012: 315–6.

[32] See Heyward (2014: 418n).

[33] See Heyd 2017: 38–9 and Page 2012: 315.

concerned with major disruptions in legal relationships caused by error and not about putting new arrangements in place. It may be the case that if there were a global legal rule in place that guaranteed all an equal share of the value of the absorptive capacity of the atmosphere then the profits of using more than your fair share should be redistributed. But this is not currently the case and the plausible claim that it is a mistake that this legal rule does not yet exist cannot deliver the conclusion that the imbalance of benefits derived from the resource arises from a mistaken transfer of value that legal authorities must reverse.

Third, the unjust factor may be that especially prosperous states and corporations operating earlier in history profit from activities that degrade climate stability at the expense of members of later generations who will inherit neither the climate stability of the present nor the benefit earlier gained from its degradation (Gilboa, Kaplan, and Sarel (2024: 42-3)). The idea is that the benefits gained by large corporations in the present amount to windfalls created by the mistaken decision of current legal authorities not to prohibit activities that threaten the birth-right of each generation to a stable climate. Much of the damage is already done but the element of this egregious intergenerational transfer of value concerning the profit of degrading climate stability can still be recovered by reversing the flow of profit that the lack of regulation of greenhouse gas emissions permitted. The problem with this ingenious account is that, even putting aside the problem of conceiving the unjust enrichment involved as if it were a valid but mistaken intergenerational transfer of value, the purported injustice done by profiteering corporations does not fit the logic of a claim of unjust enrichment. First, the plaintiffs do not yet exist and have no direct relationship with the defendants that could be the basis of a claim in private law. Second, since the identities of members of future generations are not fixed, but rather highly sensitive on actions and events leading up to their conception. It makes little sense to talk about a fiduciary making a claim on behalf of a plaintiff whose unjust windfall was a necessary condition of the defendant coming into existence. Third, the 'windfall' gained by the prospective defendants arises fundamentally because of the passage of time. Exploiting current climate stability for profit does not disrupt any current property rights that might be sensitive to changes in climate stability; and it is unclear what unjust factor would explain why the defendant ought not to retain the profit it makes from being lucky enough to operate in an earlier period in history where climate stability still obtains. Fourth, the claim seems not to be one of unjust enrichment at all. Instead, the idea seems to be that existing legal persons of a certain size are profiting disproportionately by wrongfully exploiting a resource in an analogous way to an agent benefiting from an unintended, yet highly profitable, trespass. The problem with this reasoning is not its internal coherence but rather, to borrow Birks (2002: 497) phrase, it invokes a

gain at the expense of a wrong rather than a gain from a defective transfer of value that it would be unjust not to reverse.

Remedy. Demonstrating that an enrichment arose in a transaction between plaintiff and defendant at the former's expense in an unjust manner does not specify a remedy for correcting this injustice. In the absence of an argument for a specific remedy, it could be that the unjust enrichment should be left where it lies. The remedy accepted by most legal theorists, and applied by case law in several countries, is that unjust enrichments should be restored ('given back') to the plaintiff. Although we cannot recreate the world as it would have been had the unjustly enriching transaction never happened, the plaintiff disgorging the gain to the victim makes it 'as if' the injustice between them had never arisen by making its effects the same as they would have been had the transaction been consensual. The defendant, who has done no wrong, is not liable for compensation for any loss endured by the plaintiff but they are liable to return what was the plaintiff's back to them. This is a two-step process: first, they disgorge and, second, that which is disgorged is directed to the plaintiff.[34] The exact nature of the disgorgement may vary with the account given of enrichment, at the expense of, and injustice in that case, but a common assumption is that the defendant must disgorge up to the point where they no longer benefit from the plaintiff and this means that they may be compensated for any costs they incurred in receiving, holding or improving the benefit.[35] What unjust enrichment does not do is scale the action required of defendants to any direct costs, or harms, associated with the activities that generated the unjust benefit and so responding to the harms imposed by climate change lies outside the claim. This reflects the structure and justification of unjust enrichment as one of corrective, and not distributive, justice. Correcting unjust climate enrichment will involve the defendants giving up to plaintiffs the total value of the former's enrichment at the latter's expense minus costs incurred and not the total value required to compensate the latter for loss and damage caused by climate change.

Defences. The above steps are integral parts of the cause of action in unjust enrichment. If navigated successfully, a prima facie liability arises on the part of a defendant to return the value of an unjust enrichment to the plaintiff. The final step concerns the assessment of any defences that reduce the liability of defendants to provide restitution. This strongly differentiates the last stage of unjust enrichment from its predecessors since showing that the defendant was in fact not enriched – or it was not at the expense of (or unjust to) the plaintiff – dispenses altogether with the need for the beneficiary to offer a defence against disgorgement. There are two

[34] Birks 2005: 17–18.

[35] Ripstein 2007: 19943–4.

such defences available to a defendant seeking to resist a restitution of unjust enrichment in the climate context. First, 'change of position' is a defence where the defendant argues that, through no fault of their own, they are no longer in possession of the enrichment made at the expense of the plaintiff and hence any disgorgement they might otherwise have owed is nullified. The manner of this dis-enrichment must have been a lawful activity (whether a holiday, a gift, or some other service) that would not have occurred 'but for' the defendant being enriched by the plaintiff.[36] The logic of the change of position defence is that reversing their enrichment to the benefit of the plaintiff cannot make the defendant worse off than they would have been had they not been unjustly enriched. Given that many unjust climatic enrichments will have accrued to agents who relied upon these enrichments in good faith to undertake lawful activities that they would not otherwise have undertaken, this defence seems very wide-ranging in the climate case. Second, 'bone fide exchange of value' is a defence where the defendant argues that, since they paid fair value for the good alleged to have been unjustifiably transferred to them from the plaintiff, they do not exist in a state of unjust enrichment that needs to be reversed through a disgorgement to the plaintiff. This defence is important since, while the original beneficiary of a defective transfer might not have access to this defence since they indeed received something for nothing, any subsequent recipient of a climatic enrichment may have exchanged fair value for it and so will not be duty bound to disgorge the enrichment. This suggests that making a case for disgorgement of profits accumulated in industries with many steps will be very difficult indeed since each subsequent beneficiary will have greater access to the 'exchange of value' defence.[37]

3. Wrongful enrichment

As we have seen, the 'unjust' track of unjustified enrichment can conceivably be applied to climate change but it is weakened considerably by problems of identifying the unjust factor in the creation of climate change benefits and the strength of defences that defendants would likely be able to mount against disgorgement. This gives us reason to consider the alternative, 'wrong', sense of unjustified enrichment. In private law, wrongful enrichment (or 'enrichment by wrong'[38]) focuses on the recovery of gains arising from profitable breaches of duty.[39] Unlike unjust enrichment, it is the benefit creating features of the wrong, and not the unjustified transfer

[36] See Birks 2001: 1786-87; Birks 2005: 207-64; Edelman and Bant 2016: 332–48.

[37] See Birks 2002: 525.

[38] Klimchuk 2004: 1261. See also Birks 2001: 1782.

[39] See Birks 2001: 1783-86; Burrows 2002: 455–62; Klimchuk 2004: 1259–61; Wonnell 1996: 160–1;

of assets from plaintiff to defendant, that is at the heart of the plaintiff's cause of action.[40] A paradigmatic example of wrongful enrichment is when a defendant uses without authorisation the plaintiff's property or person for profit making purposes that do not harm the plaintiff materially. In these cases, the wrongful gains of the defendant are not generated directly by a defective transfer of assets between the two parties, so there has been no obvious gain made 'at the victim's expense.' Instead, the gain has been made at the expense of a breach of duty owed to the victim.

A claim of wrongful enrichment is, in the above respects, more conceptually economical, but also more demanding, than unjust enrichment. It is more economical because identifying a profitable wrong replaces the more complex process of identifying an enrichment and then explaining how this was made at the plaintiff's expense such that it would be unjust not to reverse. All that is required in wrongful enrichment is to demonstrate that a gain is a product of a wrong committed by the defendant against the plaintiff and to combine this fact with a core normative principle of corrective justice that wrongs should be defeated as a second best for them not being violated in the first place.[41] It is more demanding in two ways. First, a breach of legal duty must be identified, and this excludes all forms of unjustified enrichment that do not involve wrongdoing. Second, the wrongly enriched, on most accounts, have more extensive duties of disgorgement than the unjustly enriched since they are not reversing a faulty transfer of value but rather giving up the value of all of their profit despite this never being held by the plaintiff.[42]

The stages of the wrongful enrichment claim can thus be summarized as follows: (1) there is an enrichment on the part of the defendant (2) arising from a breach of duty owed to the plaintiff (3) that creates a liability on the part of the defendant to surrender the enrichment in favour of the plaintiff (4) subject to defences that mitigate this liability.

Enrichment. An enriching wrong must involve a material benefit arising for a defendant that can, in principle, be taken from them for the purpose of defeating the wrongdoing through which it was created. The benefit must be directly (that is, immediately) connected to the wrong in the sense that it was an intended – or, if not intended, then a constitutive element – of the breach of duty committed against the plaintiff.[43] Wrongful enrichments may involve money or other assets that are taken, exploited, or sold without the permission of the owner. They could also involve profits gained from exploiting or selling assets where a legal duty owed to the

McInnes 2015: 250–2.

40 Birks 2005: 74; Burrows 2002: 455; Virgo 2006: 425–8.

41 See Gergen 2001: 1931; Smith 2001: 2116.

42 See Gergen 2001: 1933–38.

43 Virgo 2006: 448–9.

plaintiff restricts the exploitation of these assets. Wrongful enrichments generally only arise for the immediate beneficiaries of wrongdoing and functionally become unjust enrichments when they are passed on to subsequent beneficiaries.

In terms of climate change, wrongful and unjust enrichment raise similar issues of application with the common point being that much of the wealth created by successive generations of atmospheric users would not have arisen 'but for' the activities that drive climate change. The difference in the analysis is whether it must be shown that these enrichments are generated from impaired transfers and exploitations of assets owned by the plaintiff (unjust enrichment) or from wrongs committed against the plaintiff (wrongful enrichment). An enrichment could arise from a direct profiting from wrongdoing (as when a firm makes a financial gain from violating its legal duty to mitigate or adapt to climate change) or from an indirect profiting from wrongdoing (as when a firm makes a financial gain from a transaction made possible by another firm profiting from violating its legal duty to mitigate or adapt to climate change). As with indirect unjust enrichment, the move from a direct to indirect wrongful enrichment may or may not be a more promising fit for the climate problem, all things considered, since the enrichments in question may or may not be best conceived as the accumulated gains of wrongdoers or those that do profitable business with wrongdoers.

Wrongdoing. Showing a breach of a legal or moral duty has occurred effectively replaces two stages in the unjust enrichment framework because it eliminates the need to show an enrichment arose (1) at the expense of the plaintiff and (2) an unjust factor (such as impaired consent) was present in the creation of the enrichment. In the wrongful enrichment framework, it is the connection between wrongdoing and a gain from this wrongdoing which triggers a claim for restitution. Typical examples of enriching wrongs are when someone deceives another into transferring money to them, or when someone is paid to assault someone, or when someone sets out to profit from another person's image or property without consent. All these cases clearly involve an enrichment (money) gained at the expense of an intentional wrong committed against another agent. But they are not best understood as defective transfers of value from plaintiff to defendant since the benefits concerned were never in the possession of the plaintiff.

In the climate change context, wrongful enrichment only covers gains from climate changing activities that were in breach of a legal duty and this seems to reduce the scope of the account considerably since it is obvious that the profits of most activities that drive climate change did not originate in a breach of any specific legal duty.[44] Some response to this concern arises from the consideration that the

[44] Duus-Otterström 2014: 458.

breaches of legal duty are not limited to intentional breaches of environmental regulations but may also be unintentional breaches of customary law (such as profitable trespasses). So the wrongful enrichment track may still have considerable scope if it can be shown that profits have been made in breach of such norms. Gilboa, Kaplan and Sarel (2024: 39-40) usefully list three avenues of wrongful climatic enrichment that could meet the breach-of-legal-duty test: profitable violations of an 'explicit environmental regulation' (e.g. gains made from deliberately exceeding a legal emissions limit), acting in a 'grossly unreasonable or negligent' manner (e.g. gains made from carelessly emitting more greenhouse gas than was needed for the activity concerned), and profiting from corrupt behaviour (e.g. hiding environmental impacts through falsifying environmental performance). However, despite the existence of duties matching these three duty types in many states – and the evolving UNFCCC legal architecture where developed states have agreed to act 'as if' they were bound by legal mitigation duties – the scope of legal duties that would ground claims of wrongful enrichment is very limited indeed. Nevertheless, the prospect of more explicit legal norms against climatic enrichment in the future means that the breach-of-legal-duty test may become more easily met in the future even though plaintiffs may struggle to identify specific enrichments that would not exist 'but for' the breach of legal duty of the defendant.

Remedy. The remedy specified by wrongful enrichment is subtly different to that of unjust enrichment and may result in quite different remedial demands being made on beneficiaries. This is due to the presence of the tortious, or wrongful, element in the transaction that creates the defendant's enrichment. We can say that the approaches diverge in two main respects in terms of the remedies recommended. First, since there are many types of legal wrongs, the question must be asked what remedy is required to correct the injustice between the parties. Some profitable wrongs (such as profitable but unintentional trespasses) may require less extensive restitution than other profitable wrongs (such as intentional misuse of intellectual property) since making it as if the wrongful enrichment never happened (the primary purpose of recovery of wrongful enrichments) may require less extensive restitution in the former case because the breach of duty to the plaintiff is less serious.[45] Second, and more importantly, it is natural to conceive the correction of the forms of unjustified enrichment as diverging in their general approach to how defendants can make their unjustified enrichments right again. Put simply, the wrongfully enriched should give up all of the profits of their wrongdoing whereas the unjustly enriched should give up only as much as would simulate the alternate world where the unjust transfer had never happened and this usually means deducting

[45] See Birks 2001: 1792–3; 1961–65; Rotherham 2007: 190–3; Burrows 2002: 461–2.

from the disgorgement a reasonable approximation of the defendant's costs in receiving the enrichment.[46] The idea is that, in restitution for wrongful enrichment, we are not merely reversing a transfer of value that should not have happened but also eliminating any trace of the defendant profiting from wrongdoing committed against the plaintiff.[47] Where this is relevant for climate change justice is that recovery of wrongful enrichments from breaches of legal duty would seem to reach beyond the initial value of the enrichment a state or firm gained from activities emitting greenhouse gas into the atmosphere to encompass all profits later derived from these activities.

Defences. In general, defences to liability in wrongful enrichment are far less extensive than those of unjust enrichment. The 'change of position' defence is not available to the most important category of wrongfully enriched (law breakers) since they cannot argue that they relied in good faith upon a wrongful enrichment to undertake an activity or discharge a debt; and it is only open in a limited way to the intended beneficiaries of wrongdoers who are in a similar position to those who unknowingly receive stolen goods.[48] Subsequent beneficiaries (those that benefit innocently from later transactions with the wrongdoers) will have access to additional defences. These secondary beneficiaries, who enjoy a considerable proportion of the profit of activities that drive climate change, will be able to appeal to a 'change of position' defence (an example might be shareholders of oil companies who relied upon dividends to pay debts) or a 'fair value' defence (an example might be contractors of oil companies that charged a market rate for corporate services). The wide scope for defences of this sort on behalf of secondary beneficiaries of climate change appears to restrict the usefulness of the private law of wrongful enrichment considerably in the climate context even if it could be shown that those who exploit the finitude of the atmospheric sink for profit violate a legal duty in so doing.

4. Immorally benefiting from climate change

To sum up the paper so far, both unjust enrichment and wrongful enrichment are promising approaches to the 'benefit side of the question' but the legal wrongdoing required is not generally present to ground claims of wrongful climatic enrichment and, whatever is unjust about profiting from activities that drive climate change, this is not readily explained in terms of a mistaken payment or court ordered

[46] Gilboa, Kaplan, and Sarel 2024: 34.

[47] For more on this, see Ripstein 2007.

[48] See Birks 2001: 1787. For a detailed discussion of defences to disgorgement of unjust and wrongful enrichments, see Edelman and Bant 2016: 363-403.

transfer subsequently reversed. This does not necessarily mean we need to give up on unjustified enrichment as being a part of climate change justice since this doctrine can be developed as a normative doctrine that lacks the restrictions, and is justified independently, of private law. According to the proposed normative account, which I call 'immoral climatic enrichment', moral agents acquire disgorgement duties when they benefit from wrongdoing in the way the absorptive capacity of the atmosphere is exploited. The wrongdoing involved is essentially that large corporations and states profit disproportionately from unauthorised exploitations of the earth's capacity to absorb greenhouse gas without fully compensating those who have been excluded from these profits. This account is broadly compatible with the accounts of profitable exploitation of the atmospheric commons proposed by Page (2012), Heyd (2017) and Gilboa et al (2024) but is based on correcting violations of a moral duty not to profit from unilateral exploitations of resources that others rely upon to pursue their ends rather than the reversal of mistaken transfers of value in absence of wrongdoing.

The four stages of immoral enrichment

Benefit. The currency of immoral enrichment is similar to that of its legal corollaries – a restorable transfer of value equivalent to a cost saved or a debt paid. The benefit, in more concrete terms, is the financial value of any exploitation of the absorptive capacity of the atmosphere that was not shared fairly with other atmospheric users. Agents may immorally benefit from climate change in three ways. First, they may intentionally, or unintentionally, benefit disproportionately from their own climate changing behaviour ('direct enrichment'). Second, they may be the beneficiaries, intentionally or unintentionally, of the climate changing behaviour of another agent ('constitutive enrichment'). Third, they may benefit from an initial enrichment, in either of these two ways, after it is passed to them in a subsequent transaction ('sequential enrichment'). When so they benefit, subject to certain defences, the enriched should give up profits in favour of those excluded from these profits.

Wrongdoing. The benefits described above were made at the expense of a wrong committed against other agents who were excluded from sharing in the profitable exploitations of the absorptive capacity of the atmosphere that were not compatible with long-term climate stability. What made it wrong was the agents involved, best conceived as large states and corporations, continued to profit from excess greenhouse gas emissions even though they were aware of the science of climate change and endorsed the normative goal of limiting climate change. At some point in the recent past, it ceased to be reasonable to treat these agents as behaving non-wrongfully in respect of activities that made profits by degrading a valuable resource that

they ought not to treat as their own. Essentially, these agents exploit location at a fortuitously earlier moment of time where profits may still be legally internalized, and costs externalized, through use of the atmospheric sink due to lack of regulation that is widely known to be necessary to protect the climate system. This explains the lack of a legal wrong in unjust climatic enrichment since the excess profit taking involved is enabled by the lack of legal regulation and not in violation of the regulations that do exist. Nevertheless, there is still an injustice present in such behaviour that we can correct by defeating the wrongdoing associated with exploiting the lack of legal regulation currently protecting use of the atmospheric commons for profit. Put slightly differently, valuable means have been intercepted from others who have been excluded from the profits made from their means. Whilst the degradation of the atmospheric sink might have been unintended, the creation of profit from the activities that degraded the atmosphere was intentional. In this sense, the wrongdoing involved is analogous to profiting from selling a dwindling supply of drinking water from a lake located on public property that one is aware is relied upon by others who had equal access rights but is not regulated in any other way.

Remedy. The remedy for immoral enrichment is the corrective one of making it as if the injustice between the parties to the enrichment had never happened which can also be seen as the state of affairs where wrongdoing is no longer present in that transaction.[49] This is achieved by simulating the alternate reality where all parties had benefited as they should have from profitable use of the means to which they had equal claims. It is, in another description, to transform the immorally enriched into an agent of all through disgorgement so that the immoral enrichment never happened in the sense that no one is now wrongfully enriched. This is achieved by disgorging the profit to all moral agents that can claim to have an equal right to use and profit from the atmospheric sink, which would more than likely include the unjustly enriched as well as those excluded from any profit. It is probably most useful to imagine this correction being carried out by an international restitution scheme funded by a windfall tax on large corporations. This would dispense with the costs and difficulties of court-based recovery and the billions of potential plaintiffs and defendants who might be involved. The justification for the fund would be that it turns the situation into one where nobody does wrong in respect of profiting from climate change if the profits are disgorged to an international fund tasked with redistributing these profits as if they had been created non-wrongfully.

Defences. Much of the benefit created by activities that cause climate change has been consumed by the original beneficiaries. Other benefits were indirectly

[49] As Ripstein puts it, '[i]f I use what is yours, without your consent, I wrong you. The problem is coming up with the way in which that wrong can be righted, and the only way it can be righted is turning it into a situation in which nobody does wrong after all' (2007: 1994n).

received by agents who have transformed, or added to, these benefits in good faith. The immoral enrichment account, despite not being grounded in private law, inherits the idea that benefits like the above need not, or cannot, be enriched. Despite moral norms around the permissible exploitation of the atmospheric sink becoming clearer in recent decades, some agents may maintain they were excusably ignorant of the duty not to profit from degrading the atmospheric sink so profits accumulated in the past may lie beyond the account. Other beneficiaries of the depletion of the capacity of the atmosphere to absorb greenhouse gas may have relied upon their profits in good faith to pay off debts or discharge other legal duties that would not have arisen but for the activities from which they were enriched. It is worth noting, however, that the remaining profit will be substantial given the upper baseline for recovery is all future profit from activities that deplete the atmospheric sink until the climate system is returned to a safe equilibrium. So the account seems to have considerable scope despite the defences of 'change of position' or 'fair exchange of value.' Even if the reduction in liability is total, there is still the potential to require those profiting from climate change to undertake non-material actions of restitution familiar to accounts of transitional justice such as apologies or participation in truth and reconciliation processes.

Four objections

I have space, here, to consider four objections to the immoral enrichment account which are finely balanced between objections to the way the account justifies disgorgement duties in any context and objections to the way the account has been applied to climate change.

First, one might not contest the validity of the immoral enrichment account, especially in small scale cases, but instead contest its value as an approach to the problem of climate change justice. The account, as with its legal analogues, rests on a sharp separation between enrichment ethics and impoverishment ethics that may seem unsettling if the hope was for the account to take a leading role in the task of justly allocating the costs of responding to climate change. In response, it is worth noting the immoral enrichment account is compatible with more distributive accounts (concerned with allocating costs of responding to climate change) as well as torts (concerned with compensating for wrongful losses). Moreover, those who secure restitution for immoral climatic enrichment – perhaps in the form of payouts from a global restitution fund – would have a reasonable complaint that it would be unjust if these restitutions were made on condition that they replace sources of finance for tackling climate change.

Second, the immoral enrichment account requires wrongdoing on the part of the

agent that initiates an enrichment through this wrongdoing. However, the account also includes within the scope of disgorgement benefits held by agents who have benefited indirectly from wrongdoing. In the climate change context, this means the proposed disgorgement can reach benefits enjoyed by agents who have not changed the climate in any meaningful way or directly violated any primary moral duty not to profit from climate change. This seems to treat the innocent beneficiaries of wrongdoing as if they were the perpetrators of wrongdoing and this seems unfair. In response, the idea is that remote beneficiaries, although they have committed no breach of moral duty in the production of a wrongful benefit themselves, would be breaching a duty of corrective justice if they fail to play their special role in reversing the transaction that left them in possession of this benefit. As a non-wrongdoer, however, they have no duty to step into the shoes of the perpetrator; and not being party to the primary transaction between perpetrator and victim, they cannot reverse that transaction. They can, however, reverse one of that transaction's key unjust effects, namely, the creation of a benefit for them that is tainted through wrong done to the victim. They do this by transferring the enrichment to the victim.

Third, the inclusion of sequential immoral enrichments in the account might seem problematic for a further, conceptual, reason since it is a revision to standard accounts of corrective justice that typically assume there is only one correctible transaction at the heart of a corrective injustice: the transaction between victim (plaintiff) and perpetrator (defendant). In immoral enrichment, this is the transaction between someone who benefits from their own wrongdoing and the person who demands disgorgement of benefits made from the wrong done to them.[50] The objection, here, is essentially that, whereas it may make sense in the abstract to talk of a secondary transaction where the beneficiary is not the initial wrongdoer, this insight cannot be accommodated within the correlative structure of corrective justice and the mere possibility we can conceive of things this way does not generate any duty independent of corrective justice.[51] In response, corrective justice concerns the righting of transactions that it would be wrong to leave intact and a transaction is, in essence, 'any action between persons.'[52] The primary transaction in immoral enrichment (the wrong done by perpetrator to victim) clearly fits this understanding and it is a vital ingredient to a corrective analysis of what has gone wrong in immoral enrichment. Nevertheless, the secondary transaction that arises in cases of constitutive enrichment (the enriching of a beneficiary as a direct product of the wrong done to the victim) and sequential enrichment (the enriching of beneficiary by perpetrator after the wrongdoing) is no less of a transaction merely

[50] See Barker 1995: 469; Weinrib 2010.

[51] McBride 2015: 260-2; Smith, L. 2001.

[52] Edelman and Bant 2016: 92 – original emphasis.

because it is secondary. There is 'action' between the victims and beneficiaries in these latter cases that can be corrected. First, a benefit has been transferred between these parties in the sense that one agent is now in possession of value created by a wrong done to another. Mere possession of the wrongful benefit puts the beneficiary in a position where they can either assist in defeating the wrongdoing or contribute to its continuing existence. Second, if a sequential or constitutive beneficiary refuses to transfer the benefit to the victim, they in effect create a new wrongful transaction between themself and the victim since any further profit they make will be knowingly made from a wrong that was never corrected.

Fourth, in response to a common objection that corrective justice crowds out distributive justice, it is frequently responded that, in only seeking to reserve space for the reversal of wrongful gains and losses, corrective justice leaves virtually unlimited space for distributive interventions motivated by egalitarian and other ideals.[53] The problem arises that, if the corrective account is indeed limited to the reversal of very specific transactional failures, then the immoral enrichment account would be redundant. The objection may be put like this: since every restitution of immoral enrichment will be subsequently checked against the preferred pattern of distribution, it is surely this pattern of distribution and not the operation of corrective justice that will ever determine how people finally fare.[54] In the climate context, the idea is that any conceivable distributive solution will sweep away any limited redistributions of immoral gains between specific atmospheric users thus raising the question of what the point might be of identifying and enforcing disgorgement duties? In response, the application of many distributive ideals will leave the application of corrective justice intact if the realization of the preferred distributive pattern is not threatened by the correction in question. Much, of course, will depend on the ideal of distribution but those with close ties to human rights, basic needs, and maintaining decent lives, will all leave significant room for corrections of wrongdoings such as immoral enrichments. Suppose, however, that the distributive ideal endorsed did, in every case of immoral enrichment, leave the final distribution of entitlements with no trace of prior operations of corrective justice. It would be known that these corrections would have been made had they not been overruled by our distributive ideals and the parties to the flawed transaction would be aware the injustice to which they were linked was taken seriously as a corrective injustice. In such circumstances, it is not as if the correction had never happened but rather the correction reversed an injustice between parties that was subject to a further intervention on distributive grounds.[55]

[53] See Page and Duus-Otterström 2023: 20–1.

[54] See Lippert-Rasmussen 2017: 80–1; Knight 2013: 585–6; Parr 2016: 992.

[55] See Klimchuk 2003: 63–4.

5. Conclusion

In this paper, I drew upon recent work in ethics and private law to clarify the doctrine of unjustified enrichment, and explore how this doctrine might be applied to global climate change. I argued that neither of the two main tracks of unjustified enrichment law is promising as a justification for disgorgement duties in the climate context. I then argued that the idea of 'wrongful enrichment' could be adapted as an independent normative account in a way that addresses an important and neglected dimension of the injustice posed by climate change. This is that moral agents that continue to profit from climate changing activities with wrongful origins should, subject to defences, disgorge these profits to moral agents excluded from these benefits. I developed this argument more fully through an analysis of complex transactions of immoral climate enrichment and the four stages of an immoral climate enrichment claim. I then defended this account from four objections. The argument defended suggests that the near exclusive focus of international organisations on avoiding (or, if unavoidable, compensating for) losses and damages arising from anthropogenic climate change may have blinded us to an independent and no less egregious injustice: profiting from anthropogenic climate change in a way that wrongly excludes others.

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