MAKING WAY FOR UNJUST ENRICHMENT IN ENVIRONMENTAL JUSTICE LITIGATION

Zora Djenohan

TABLE OF CONTENTS

INTRODUCTION 223
I. ENVIRONMENTAL JUSTICE: NATIONAL AND LOCAL IMPLICATIONS 225
II. THE LEGAL THEORY OF UNJUST ENRICHMENT 234
A. HISTORICAL ROOTS OF UNJUST ENRICHMENT 234
B. UNJUST ENRICHMENT IN THE ENVIRONMENTAL LITIGATION CONTEXT 237
III. MAKING A PATH FOR THE POLLUTION EASEMENT: UNJUST ENRICHMENT IN LOUISIANA 240
PROPOSAL 250
CONCLUSION 253

INTRODUCTION

For centuries, extractive industries have ravaged Louisiana's Black communities, beginning with slave plantations and continuing with petrochemical plants, the time for making amends for these historical and ongoing harms is long overdue. Communities of color bear a disproportionate burden of environmental hazards throughout the United States.[1] Few places illustrate this disproportionate impact of environmental injustice more starkly than Louisiana's Cancer Alley. As one local resident put it, "today, we're

1. JULIANA MAANTAY ET AL., PROXIMITY TO ENVIRONMENTAL HAZARDS: ENVIRONMENTAL JUSTICE AND ADVERSE HEALTH OUTCOMES 74 (Prepared for the U.S. Environmental Protection Agency).

living through a nightmare of industrial pollution and disease."[2] The COVID-19 pandemic has only heightened the need for redress, as air pollution in Cancer Alley, the state's industrial corridor, has rendered Black communities especially vulnerable to the disease. Louisiana's law governing unjust enrichment claims must change to accommodate the dire need for redress, to deter harmful industrial pollution, and to create ongoing accountability for environmental racism in Cancer Alley.

The doctrine of unjust enrichment embodies the basic principle that one person should not profit at the expense of another without some form of compensation.[3] The doctrine is based on the theory that a person who has been unjustly enriched at the expense of another is liable to the impoverished party in restitution.[4] Enrichment may take various forms; the relevant example in the context of environmental litigation is one where the defendant acquires benefits by wrongful interference with the claimants' rights, often through tortious misconduct. For example, by improperly disposing of waste on a claimant's property, a defendant may save money on waste disposal costs at the expense of the claimant.

This Comment will demonstrate why the underlying theory of unjust enrichment is particularly well-suited to environmental claims where there is misconduct by the fossil fuel industry or other actors. Further, this Comment will explore the role of unjust enrichment in Louisiana's civil law system as it currently exists and suggest alterations which would reduce the unduly prohibitive nature of the action. Part I of this Comment addresses environmental racism and environmental justice, before exploring why the doctrine of unjust enrichment could be particularly useful to Louisiana communities in their ongoing struggles against fossil fuel interests. Part II will reveal the underlying theory of unjust enrichment, establish why the theory is particularly applicable to environmental justice issues, and address potential hurdles to viable claims of unjust enrichment. Next, Part III will analyze the claim for unjust enrichment under Louisiana's civil law framework. Finally, Part IV will propose alterations to the Civil Code to

---

2. *Hearing on "Building a 110 Percent Clean Economy: The Challenges Facing Frontline Communities" Before the H. Comm. on Energy & Com.*, 116th Cong. 1 (2019)(written testimony of Sharon Lavigne, Founder and President, RISE St. James).

3. RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

4. *Id.*

reduce the overly prohibitive nature of unjust enrichment claims under Louisiana law and hew a path for environmental claims of unjust enrichment moving forward.

I. ENVIRONMENTAL JUSTICE: NATIONAL AND LOCAL IMPLICATIONS

Environmental racism is pervasive across Louisiana and the U.S. Our legal system has consistently failed to meaningfully address this systemic issue, highlighting the need for innovative legal remedies. The term environmental racism was coined to describe policies, practices, and directives with disparate negative impacts on individuals and communities of color, regardless of whether the disparate negative impacts are intentional.[5] The environmental justice movement emerged from the struggles of communities across the U.S. and beyond, as they began to organize against manifestations of environmental racism. One of the watershed moments of the environmental justice movement occurred in 1982, during the Warren County protests.[6] During the protests, African-Americans organized against state driven efforts to site a hazardous waste landfill in their community.[7] Unfortunately, the landfill construction moved forward despite the efforts of protestors, about 500 people were arrested throughout the protests.[8] However, the protests garnered national media attention, which helped to catalyze the movement for environmental justice and led to the first ever nationwide study correlating waste facility sites to both race and poverty.[9]

As the environmental justice movement continues to gain traction, subsequent studies have continued to uncover the pervasive nature of environmental racism in the U.S. Race is still the most potent indicator when predicting proximity to hazardous waste facilities and subsequent negative health outcomes.[10] For example, a 2005 study found Black people "79 percent more likely than whites to live in neighborhoods where industrial pollution is

5. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT 445, 451 (1994).

6. *See* Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters after all of These Years,* 38 ENV'T L. 371, 373 (2008).

7. *Id.*

8. *Id.*

9. *Id.* The report summarizing the results of that study was released in 1987 under the name Toxic Wastes and Race. *Id.*

10. Bullard et al., *supra* note 6, at 407.

suspected of posing the greatest health danger."[11] Since 1965, commercial hazardous waste facilities in the U.S. "have been built in neighborhoods that were disproportionately minority at the time of siting."[12] For decades exposure to hazardous waste has been correlated with race, yet the disparate exposure and resulting negative health outcomes continue, despite the efforts of environmental justice organizers and advocates. These harsh realities that disproportionately impact Black, Brown, and Indigenous communities across the U.S. underscore the need for meaningful legal remedies.

Louisiana is especially in need of creative means to address its racialized environmental crisis, which is largely driven by the state's massive petroleum and petrochemical industries. The beautiful bayou state outranks nearly every other state in the U.S. when it comes to toxic waste production and the noxious discharge of hazardous chemicals.[13] The state's record-breaking environmental degradation and subsequent health impacts are disproportionately borne by Black communities, particularly those living in the industrialized corridor, colloquially known as "Cancer Alley."[14]

Louisiana's Cancer Alley spans about 100 miles of the Mississippi River from Baton Rouge to Chalmette, encompassing New Orleans, the state's most populous city.[15] The banks of the river are lined with upwards of 150 industrial polluters, mostly oil refineries and petrochemical plants that have helped the region earn the grim name of Cancer Alley.[16] In 2001, Louisiana placed second

---

11. *See* David Pace, *More Blacks Live with Pollution*, ASSOCIATED PRESS, Dec. 14, 2005.

12. Based on demographic composition of the areas surrounding the 413 facilities examined in the case study. Bullard et al., *supra* note 6, at 374.

13. Merrill Singer, *Down Cancer Alley: Lived Experience of Health and Environmental Suffering in Louisiana's Cancer Corridor*, 25 MED. ANTHROPOLOGY Q. 142, 142 (2011) (citing Barbara Allen, *Uneasy Alchemy: Citizens and Experts*, *in* LOUISIANA'S CHEMICAL CORRIDOR DISPUTE (2003)).

14. *See* Kimberly Terrell & Wesley James, *Racial Disparities in Air Pollution Burden and COVID-19 Deaths in Louisiana, USA, in the Context of Long-Term Changes in Fine Particulate Pollution*, ENV'T JUST., at 1 (Sept. 2, 2020), https://www.liebertpub.com/doi/pdf/10.1089/env.2020.0021; Abigail D. Blodgett, *An Analysis of Pollution and Community Advocacy in 'Cancer Alley': Setting an Example for the Environmental Justice Movement in St James Parish, Louisiana*, 11 LOC. ENV'T 647, 659 (2006).

15. U.S. CENSUS BUREAU, GUIDE TO 2010 STATE AND LOCAL CENSUS GEOGRAPHY: LOUISIANA (JUNE 25, 2018), https://www.census.gov/geographies/reference-files/2010/geo/state-local-geo-guides-2010/louisiana.html.

16. James Pasely, *Inside Louisiana's Horrifying 'Cancer Alley,' an 85-mile Stretch of Pollution and Environmental Racism that's Now Dealing with Dome of the Highest*

in the nation in state cancer deaths, with African-Americans representing a disproportionately high number of those fatalities.[17] Since then, Louisiana has moved down in the rankings to number four, trailing Mississippi, Kentucky, and West Virginia.[18] St. John the Baptist Parish, located in the heart of the cancer corridor, had the highest lifetime risk of cancer from air pollution in the country.[19] To illustrate, the lifetime risk of cancer from air pollution in a census tract in St. John the Baptist Parish is more than 800 times the national average.[20] Consistent with nationwide trends, these shocking health risks are not shared equally among residents of Cancer Alley, instead risks are disproportionately shouldered by Black residents.[21]

In neighboring St. James Parish, polluting industries are concentrated in areas with the highest percentages of African-American residents and the lowest average household incomes.[22] Some local activists refer to the corridor as "Death Alley," because the term Cancer Alley fails to capture the breadth of adverse health outcomes resulting from petrochemical industry pollution.[23] In addition to elevated rates of cancer, studies have documented many other abnormal health threats in the region, including skin inflammation and respiratory problems.[24] Industries in Cancer Alley have continuously been enabled by the state to profit at the expense of community health, land, and water.

Coronavirus Death Rates in the Country, BUS. INSIDER (April 29, 2020, 7:42 PM), https://www.businessinsider.com/louisiana-cancer-alley-photos-oil-refineries-chemicals-pollution-2019-11.

17. Singer, *supra* note 13, at 147.

18. Sharon Lerner, *The Plant Next Door*, THE INTERCEPT (Mar. 1, 2017, 9:56 AM), https://theintercept.com/2017/03/24/a-louisiana-town-plagued-by-pollution-shows-why-cuts-to-the-epa-will-be-measured-in-illnesses-and-deaths/.

19. Jamiles Lartey & Oliver Laughland, *Cancer Town: a Year-Long Series from Reserve, Louisiana*, THE GUARDIAN (May 6, 2019, 6:00 AM), https://www.theguardian.com/us-news/ng-interactive/2019/may/06/cancertown-louisana-reserve-special-report.

20. Lerner, *supra* note 18.

21. *See* Terrell & James, *supra* note 14, at 2.

22. *See* Blodgett, *supra* note 14, at 647(Finding that polluting industries tend to locate in areas of St. James Parish with the highest Black populations and lowest wages).

23. *See* Coalition Against Death Alley, Who We Are, https://www.enddeathalley.org/our-coalition.

24. Singer, *supra* note 13, at 147.

The COVID-19 pandemic has further exposed how industrial pollution renders Black residents of Cancer Alley more vulnerable to health risks. Particulate matter 2.5, or PM2.5, describes a cocktail of up to hundreds of chemicals in the form of tiny inhalable particles that are often emitted by industrial sources.[25] The EPA has linked PM exposure to respiratory problems, decreased lung function, aggravated asthma, chronic bronchitis, irregular heartbeat, heart attack, and even premature death.[26] A recent study of industrial pollution in Cancer Alley found that increased COVID-19 death rates we typically associated with higher long-term exposure to PM2.5.[27] Specifically, the study illustrated that increased levels of PM2.5, and its related health risks, were associated with larger percentages of African-Americans, higher unemployment rates, and higher poverty rates.[28] In contrast, pollution burdens were lower in census tracts that contained higher percentages of white residents.[29] Finally, of the ten parishes with the highest death rates from COVID-19, six of those parishes were located in Cancer Alley.[30] For comparison, of the fifty-three parishes located outside of Cancer Alley, only four parishes made the top ten.[31] While COVID-19 has only recently increased the particular risks facing Cancer Alley's Black residents, longstanding questions remain: how did these already marginalized communities come to bear a disproportionate share of the harms caused by industrial polluters in Louisiana? How much longer will Black residents be forced to absorb the lion's share of hazardous pollution and the associated health risks?

Throughout the U.S., toxic facilities are concentrated in areas with percentages of people of color and low-income residents that are higher than national averages.[32] Consistent with the national trend of entrenched environmental racism, petroleum, chemical, and natural gas industries target predominantly Black, minority,

---

25. *See* U.S. ENV'T PROT. AGENCY, PARTICULATE MATTER EMISSIONS 1 (2018).

26. *Health and Environmental Effects of Particulate Matter (PM)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (Apr. 13, 2020).

27. *See* Terrell & James, *supra* note 14, at 2.

28. Terrell & James, *supra* note 14, at 3.

29. *Id.* at 5.

30. *Id.* at 6.

31. *Id.*

32. Bullard et al., *supra* note 6, at 383.

and low-income communities for siting plants in Cancer Alley.[33] Of the top ten "super-emitters," (facilities with the potential to impact the most people) in the U.S., half are located in Louisiana, and four are located in Cancer Alley alone.[34] In 2018, the Sasol Lake Charles Chemical Complex released the second highest amount of toxicity-weighted air pollution in the nation.[35] Several parishes located in Cancer Alley have more than one super-emitter, compounding the potential health risks from air pollution.[36] Four of these parishes have Black populations that range from approximately two to four times higher than the national average.[37] As the pattern of disproportionate harm inflicted on Black communities becomes more evident through increased investigation, the underlying causes are still widely disputed. However, at least one underlying cause is clear: Louisianans suffer from industrial pollution because Louisiana has such lax environmental regulations and implementation regimes. The amount of industrial pollution and the severity of the resulting harms correlate with the stringency of local and state enforcement regimes. Thus, one company with different manufacturing locations may exhibit different rates of pollution at each location, relative to the enforcement regimes in each area.[38] When it comes to industrial pollution, companies often act like kids getting into a cookie jar: they'll take as much as they can get away with. One formaldehyde factory manager illustrated this point in an internal corporate memo by stating, "substitution of [an alternative process] has invariably increased manufacturing costs[.] . . . My impression is that paying [formaldehyde] odor complaints is cheaper than the use of [an alternative process]." [39] In conducting cost-benefit analyses like the factory manager above,

---

33. *See* COURTNEY BERNHARDT ET AL., "BREATH TO THE PEOPLE" SACRED AIR AND TOXIC POLLUTION, at 9 (2020).

34. BERNHARDT ET AL., *supra* note 33 at 7 tbl.A. .

35. *Id.*

36. This includes Ascension Parish, St. John the Baptist Parish, East Baton Rouge Parish, and St. Charles Parish. *Id.* at 8.

37. U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US,eastbatonrougeparishlouisiana,ascensionparishlouisiana,stcharlesparishlouisiana,stjohnthebaptistparishlouisiana/RHI225219 (last visited Nov. 4, 2020).

38. *See* Alan Kanner, *Unjust Enrichment in Environmental Litigation*, 20 J. ENV'T L. & LITIG. 111, 112 (2005) ("Polluters' opportunistic behavior is revealed by evidence that states with different enforcement regimes exhibit different rates of pollution, even from the same companies, indicating that polluters tailor their pollution control efforts to the minimum standards required by law.").

39. Alan Kanner, *Equity in Toxic Tort Litigation*, 26 LAW & POL'Y 209, 216 (2004) (bracketed text in original).

industrial pollution sources often prioritize profit margins over environmental and health impacts, especially where those impacted are not protected by the relative privilege afforded by whiteness or socioeconomic status.

Louisiana has a particularly lax air toxicity program, which "lacks the specificity and actual monitoring found in other state programs."[40] According to a 2011 EPA inspector general report, Louisiana is one of the worst enforcers of federal environmental law in the country, due in part to its state enforcement agency's cozy relationship with the petrochemical industry.[41] For example, a Formosa Plastics[42] petrochemical plant in Baton Rouge was noncompliant with federal environmental laws for three consecutive years.[43] Instead of reprimanding the plant, the St. James Parish Council recently granted Formosa Plastics a permit for a new facility, in a majority Black district which is already inundated with petrochemical plants.[44] The plant's sited location is already "more toxic with cancer-causing chemicals than 99.6% of industrialized areas of the country."[45] The new complex would also be one of the largest in the U.S., spanning an area the size of eighty football fields, and could amount to 37% of increases in local toxic air levels.[46]

The environmental justice movement has stepped in to demand accountability where regulation regimes have failed communities, like St. James Parish, by allowing their continued

40. Tristan Baurick et al., *Welcome to "Cancer Alley"*, PROPUBLICA (Oct. 30, 2019, 12:00 PM), https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse (internal quotation marks omitted).

41. U.S. ENV'T PROT. AGENCY, OFFICE OF INSPECTOR GEN., EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT NO. 12-P-0113, 16 (2011).

42. Formosa Plastics Corporation is a Taiwanese company that manufactures and produces petrochemicals and resins that are used to make throwaway plastics like plastic bags and cups. *See* Polly Mosendz, *The Plastic Mega-Factory Is a $10 Billion Bet on a Single-Use Future*, BLOOMBERG GREEN (June 22, 2020, 11:32 AM), https://www.bloomberg.com/news/features/2020-06-08/formosa-plastics-new-factory-is-a-big-bet-on-a-single-use-future.

43. Lylla Younes, *What Could Happen if a $9.4 Billion Chemical Plant Comes to "Cancer Alley",* PROPUBLICA (Nov. 18, 2019, 12:00 PM), https://www.propublica.org/article/what-could-happen-if-a-9.4-billion-chemical-plant-comes-to-cancer-alley.

44. Parish officials in St. James blocked two industrial developments near White communities but have failed to offer the same protection to their Black counterparts. RISE ST. JAMES, A PLAN WITHOUT PEOPLE: WHY ST. JAMES PARISH 2014 LAND USE PLAN MUST BE CHANGED 12 (2019).

45. Younes, *supra* note 43.

46. Younes, *supra* note 43.

exploitation by corporations like Formosa. St. James residents are not taking this threat lightly. In the spirit of the environmental justice movement, residents are organizing to advocate for their families, communities, and the surrounding ecosystems. Groups like RISE St. James have employed tactics of peaceful protest, civil disobedience, and legal action in their effort to stop the Formosa plant.[47] RISE St. James is part of a broader coalition of local and international organizations demanding a halt to any new petrochemical projects in the river parishes of Cancer Alley and payment of healthcare costs incurred due to pollution exposure.[48] These communities are employing the full spectrum of tools at their disposal, from organizing to legal action; however, they still bear the disproportionate share of exposure to cancer-causing pollutants. Residents of Cancer Alley should have access to legal claims, such as unjust enrichment, that have the power to realize their demands by deterring continued harmful pollution practices while also securing restitution for past harms.

Like many of the petrochemical plants in the area, Formosa's roots are intertwined with the regional legacy of slavery. Formosa plans to build on the antebellum Buena Vista plantation, and seeks to build structures on or around a burial site where those enslaved on the plantation were laid to rest.[49] Descendants of those enslaved peoples still live and attend school or church within a mile of planned Formosa plant, and already suffer from inhalation of some of the most carcinogenic air in the country.[50]

Formosa plastics is not an isolated example of exploitative practices in the region. The history of Cancer Alley as a whole is also inextricably connected to Louisiana's history of slavery. By the nineteenth century, about 300 sugar plantations dotted the landscape from New Orleans to Baton Rouge, congregating around the

---

47. Jarvis DeBerry, *Rise St. James Fights Formosa, but Elected Officials Don't*, LA ILLUMINATOR (Aug. 14, 2020), https://lailluminator.com/2020/08/14/rise-st-james-fights-formosa-without-support-from-any-elected-officials/.

48. *Our Demands*, THE COAL. AGAINST DEATH ALLEY, https://www.enddeathalley.org/demands (last visited Nov. 2, 2020).

49. Sarah Sneath, *St. James Residents Can Visit Possible Slave Cemetery on Formosa Plastics Property, Judge Says*, THE TIMES-PICAYUNE/THE NEW ORLEANS ADVOCATE (June 16, 2020 6:15 PM), https://www.nola.com/news/environment/article_3383b97a-b019-11ea-a1ce-cb8fc3e170fe.html.

50. Sharon Lerner, *New Chemical Complex Would Displace Suspected Slave Burial Ground in Louisiana's "Cancer Alley"* THE INTERCEPT, (Dec. 18, 2019, 10:29 AM), https://theintercept.com/2019/12/18/formosa-plastics-louisiana-slave-burial-ground/.

Mississippi River. As one of the state's long-serving democratic lawmakers, Robert Faucheux Jr., fondly described it:

> The early 1800s was the era of fabulous plantation life in St. James. Acreage was counted by thousands and slaves by hundreds. It was the day of luxurious living, of sumptuous entertainment, of delightful ease. Sugar was gold; the planters were sugar barons; St. James was the Gold Coast. In 1844 the parish had twenty-eight plantations on the right bank of the Mississippi River and thirty-nine on the left bank – and some were large enough to be called agricultural empires.[51]

While some folks like Mr. Faucheux wax nostalgic for that bygone era, an exploitative empire is still thriving in the region. However, instead of the "fabulous" sugar plantations, Louisiana now has petroleum and petrochemical plants. Beginning in the early twentieth century, the former plantations clustered around the Mississippi River were sold to the budding fossil fuel industry.[52] Often, the neighboring communities were peopled with the descendants of the formerly enslaved.[53] "In this way, the region's plantation past has been transposed onto the toxic geographies of today."[54] With its roots so deeply entangled in the regional slave trade, it is no surprise that today's petrochemical industry continues to bear strange and bitter fruit for Black residents. Petrochemical plants continue to supplant plantations, and the connection between racial demographics and environmental degradation in the region illustrates a disturbing pattern of continued exploitation of African-Americans.

Black residents have been deemed disposable by the region's extractive industries for centuries. Before the Civil War, labor was extracted from enslaved Black people to support the "fabulous plantation life"[55] and booming economy. Now, that same land and even some of the descendants of those enslaved people are

---

51. S. CENT. PLAN. & DEV. COMM'N, ST. JAMES PARISH COMPREHENSIVE PLAN 3 (2011) (quoting a letter written by Mr. Robert Faucheux, Jr., who served as a state representative for Louisiana House of Representatives District 57, which , at the time, included parts of St. John the Baptist and St. James Parishes, from 1998-2008).

52. Dr. Thom Davies, *Toxic Geographies: Chemical Plants, Plantations, and Plants that Will not Grow*, TOXIC NEWS (Nov. 7, 2017), https://toxicnews.org/2017/11/07/toxic-plants-in-the-deep-south-chemical-plants-plantations-and-plants-that-will-not-grow/.

53. Dr. Davies, *supra* note 51.

54. *Id.*

55. S. CENT. PLAN. & DEV. COMM'N, *supra* note 50 (internal quotation marks omitted).

experiencing the deadly effects of the extractive fossil fuel industry. In Louisiana, the fossil fuel industry reigns supreme, the petroleum industry alone comprises 6% of the state's total revenue and the energy industry as a whole comprises 6% of the workforce.[56] Just seventeen of the state's oil refineries produce nearly one-fifth of all refining capacity in the U.S.[57] Louisiana is also one of the top three energy consumers nationwide, due in part to its "energy-intensive chemical, petroleum, and natural gas industries."[58] Black gold has replaced sugar.[59] Instead of the antebellum agricultural empires,[60] the banks of the Mississippi are now home to the fossil fuel fiefdoms, where the lords and barons of industry pollute with relative impunity, showing about as much respect for Black residents' lives as the sugar barons had for the lives of their ancestors.

Communities in Cancer Alley have been continually marginalized by polluting industries and ignored by environmental enforcement efforts; they need a diverse array of legal actions to fight ongoing harms and seek restitution for past harms. In the abstract, a successful claim for unjust enrichment looks like poetic justice; it forces the wrongdoer to take any profits made at the expense of those he harmed and return it directly to them. For too many years the environmental and physical well-being of these communities has been sacrificed to protect profit margins for polluting and extractive industries. As such, unjust enrichment should be added to the growing arsenal of legal tools utilized by communities fighting the manifestations of environmental racism and climate catastrophe.

---

56. *History of Oil & Gas in Louisiana and the Gulf Coast Region*, LA. DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/assets/TAD/education/BGBB/6/la_oil.html (last visited Feb. 7, 2021); Draven Coleman, *Opinion: Louisiana Needs to Transition Away from Fossil Fuels to Renewable Energy*, LSU REVEILLE (Sept. 9, 2019), https://www.lsureveille.com/opinion/opinion-louisiana-needs-to-transition-away-from-fossil-fuels-to-renewable-energy/article_01102e1a-cc99-11e9-937e-57f13b204a19.html.

57. LOUISIANA STATE PROFILE AND ENERGY ESTIMATES, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/state/?sid=LA (Mar. 19, 2020).

58. U.S. ENERGY INFO. ADMIN., *supra* note 57.

59. Dr. Davies, *supra* note 52.

60. S. CENT. PLAN. & DEV. COMM'N, *supra* note 51 (internal quotation marks omitted).

II. THE LEGAL THEORY OF UNJUST ENRICHMENT

Unjust enrichment and restitution are two distinct sides of the same coin. Unfortunately, the two corresponding terms are often used interchangeably.[61] Here, "unjust enrichment" is used to describe the substantive cause of action and "restitution" to describe its corresponding remedy. The organizing principle of unjust enrichment is that one person should not be allowed to unjustifiably enrich himself at the expense of another.[62] The corresponding remedy of restitution provides that the party who was unjustifiably enriched at the other person's expense, owes the impoverished party a duty to return the enrichment.[63] While, unjust enrichment often overlaps with both tort and contract law, its underlying principle of preventing unjustifiable enrichment and the powerful remedy of restitution may make it a particularly useful vehicle for addressing the harms of environmental racism.

A. HISTORICAL ROOTS OF UNJUST ENRICHMENT

The principle of unjust enrichment is deeply ingrained in the U.S. legal system.[64] For centuries, the common law writ system was so rigid that there was no action to recover in situations where performance was rendered without a predetermined price if the recipient of the performance failed to pay.[65] For example, before unjust enrichment was established, if a chef delivered a meal to a customer without agreeing upon a price beforehand, and the customer accepted the meal but refused to pay, the chef would have had no legal remedy available to her and would be stuck with costs of materials and labor. The strict writ system gradually gave way to the English law of implied assumpsit, or quasi-contracts, to allow for a remedy even when no contract existed between the parties, or when a contract was void for lack of some key element such

---

61. The restatement takes the opposite approach, using the term "restitution" to describe the cause of action, while "unjust enrichment" is used to describe the underlying principle that restitution seeks to redress. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011).

62. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

63. *Id.* at cmt. a.

64. James Stevens Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 61-62 (2007).

65. *See* Paolo Gallo, *Unjust Enrichment: A Comparative Analysis*, 40 AM. J. COMPAR. L. 431, 432 (1992).

as consideration.[66] For example, one early quasi-contract case involved an innkeeper who cared for a horse left at his inn without a predetermined agreement on costs.[67] In 1609, an English court found that the innkeeper was entitled to be compensated for the services he provided despite the lack of agreement between the parties.[68] The court in Warbrook bridged a longstanding gap to allow for restitution so that the horse's owner did not unjustly benefit at the innkeeper's expense.[69] This was one of the first informal applications of the doctrine of unjust enrichment in the common law courts.[70]

Around the same time, the power of chancery courts was growing and developing the body of law called 'equity' as a flexible response to the rigidity of the common law courts. In 1937, the first Restatement of Restitution sought to gather these complimentary legal constructions to create a cohesive principle of restitution or unjust enrichment, covering "situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss."[71] Thus, unjust enrichment developed in response to gaps in the law that previously allowed potential defendants to retain some kind of benefit unjustifiably amassed at the expense of others. The first Restatement of Restitution has since been replaced by the second and third, giving cohesive shape to the growing body of law that is unjust enrichment and its correlative remedy in restitution.

The theory of unjust enrichment establishes that a person who has been unjustly enriched at the expense of another is liable to the impoverished party in restitution.[72] Hence, a prima facie claim for unjust enrichment generally requires an enrichment, an impoverishment, and that it would be unjust not to require restitution for the enrichment under the circumstances.[73] The

66. *Id.* at 432-33.

67. Warbrook v. Griffin (1609) 2 Brownl. 254 (Eng.).

68. Warbrook v. Griffin (1609) 2 Brownl. 254 (Eng.).

69. *Id.*

70. *See* Gallo, *supra* note 65.

71. RESTATEMENT (FIRST) OF RESTITUTION: GEN. SCOPE NOTE (AM. L. INST. 1937).

72. *Id.*

73. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. d (AM. L. INST. 2011) (acknowledging that, while the claim cannot be reduced to a formula, it commonly requires an enrichment, an impoverishment or interference with claimant's rights, a relation between the enrichment and impoverishment, and an absence of justification).

enrichment may be direct, like the example above, in which the chef enriched her customer by supplying goods and labor for which she was not compensated. The customer did not pay a penny and left with a belly full of gourmet food. The chef was impoverished, she lost the costs of ingredients and the time that went in to preparing the meal, and neither can be recouped. In this example, the enrichment, the impoverishment, and the connection between the two are easy to discern because they appeal to our sense of injustice. To allow the customer to retain the benefit without providing some form of restitution would be unjust. What remains to be determined is the appropriate remedy. Here, it is unlikely that the chef wants the meal back or that it would even be possible to get the meal back. More likely, she would like some form of compensation that accurately reflects what the meal would be worth to a more faithful customer.

In the context of unjust enrichment, the remedy of restitution is based on the principle of disgorgement, which compels wrongdoers to disgorge their wrongfully acquired gains. Theoretically, this means that "[t]he essence of unjust enrichment and its correlative remedy of restitution is the recovery of the benefit realized by the defendant not the harm or injury sustained by the plaintiff."[74] Rather than focusing on the loss of the plaintiff, restitution for unjust enrichment focuses on the benefit received by the defendant. Thus, once a legitimate claim for unjust enrichment has been established, the defendant must either return the benefit to its source, or "pay money in the amount necessary to eliminate [the] unjust enrichment."[75] For example, if I stole a bike worth $50 and sold it for $100, I would be liable to the bike's owner in restitution to the tune of $100. Though the remedy may result in a net gain to the plaintiff, it will not exceed the defendant's unjust gains. The remedy is not punitive in nature, it merely seeks to limit the profitability of the misconduct.[76] One court colorfully described the remedy, stating: "Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to 'disgorge' his gains."[77]

---

74. JAMES FISCHER, UNDERSTANDING REMEDIES 303 (1999).

75. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT: GEN. PRINCIPLES § 1 cmt. a (AM. L. INST. 2011).

76. Nat'l Merch. Corp. v. Leyden, 348 N.E.2d 771, 775 (Mass. 1976) (holding that using defendant's profits as the basis for damages was appropriate to deter potential tortfeasors).

77. Warren v. Century Bank Corp., 741 P.2d 846, 852 (Okla. 1987).

The proverbial cloaked dagger of disgorgement has the potential to undermine the profitability of harmful polluting practices by forcing industrial plants to disgorge the profits they unjustly gained by emitting harmful pollutants and disposing of hazardous waste with impunity.

B. UNJUST ENRICHMENT IN THE ENVIRONMENTAL LITIGATION CONTEXT

Unlike the examples of the innkeeper or the chef above, not all unjust enrichment claims present a direct transactional relationship between the enriched and impoverished parties. Generally, in the environmental litigation context, the defendant acquires benefits by wrongful interference with the claimants' rights, often through tortious misconduct.[78] This variation, sometimes known as negative or indirect enrichment, occurs "when a defendant uses something belonging to the Plaintiff in such a way as to effectuate some kind of savings which results in or amounts to a business profit."[79] For example, an industrial plant could be indirectly enriched by dumping hazardous waste on neighboring property because in doing so they would be saving costs on proper waste disposal. Meanwhile, the neighboring property owner would likely be impoverished by harm to land, physical health, or both. In the context of environmental litigation, indirect or negative enrichment has earned another name: the pollution easement.[80] Environmental lawyer, Allan Kanner, has labeled this type of indirect enrichment a "pollution easement,"[81] because the polluter who makes use of a plaintiff's land to dispose of waste without consent is in effect receiving a benefit in the form of a right of way to use plaintiff's property without proffering any compensation. The pollution easement theory of unjust enrichment is particularly applicable for those seeking to redress environmental harms.

Unjust enrichment claims based on the pollution easement theory could potentially be raised by communities situated near hazardous waste-producing facilities. In this context, the enrichment could be quantified through corner cutting measures taken

78. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT: GEN. PRINCIPLES § 40 (AM. L. INST. 2011).

79. Schwan v. CNH America LLC, No. 4:04CV3384, 2006 WL 1215395, at *34 (D. Neb. May 4, 2006).

80. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT: GEN. PRINCIPLES § 1 cmt. b (AM. L. INST. 2011).

81. Kanner, *supra* note 38 at 122.

by industrial plants in their pollution and hazardous waste disposal practices. For example, the Formosa Plastics Corporation has illegally discharged tiny plastic pellets and powders into waterways near one of its plants located in Texas.[82] Conceivably, nearby property owners could bring a suit seeking restitution for Formosa's unjust enrichment. Formosa's enrichment would be measured by what it would have cost the company to properly dispose of the pellets, and the plaintiffs' impoverishment would likely be based on property damage.

While still not widely accepted, some courts have recognized that the theory of unjust enrichment is particularly applicable in circumstances where the defendant has claimed a pollution easement. One federal court in Nebraska, while acknowledging that the claim was atypical, denied a motion to dismiss for an unjust enrichment claim based on a pollution easement theory.[83] In that case, the industrial manufacturer allegedly discharged contaminants onto the plaintiffs' land, and into the air, soil, and water supply, rather than expending resources to properly dispose of the contaminants or remediate the contamination.[84] The court held that the class action could proceed, effectively acknowledging the pollution easement theory.[85]

In a parallel case in California, a state appeals court concluded that the plaintiffs were entitled to restitution for unjust enrichment.[86] In that case, defendants injected wastewater into a large oil, gas, and mineral field, resulting in damage to the entire wellfield.[87] The court awarded damages based on the amount that the defendants would have paid to dispose of wastewater properly.[88] The court affirmed the lower court's focus on the defendants' enrichment, rather than the plaintiffs' injuries, because the manner of wastewater disposal made it too difficult to trace all

---

82. *See* Waterkeeper v. Formosa Plastics Corp., Tex., No. 6:17-CV-0047, 2019 WL 2716544, at *2 (S.D. Tex. June 27, 2019).

83. *See Schwan*, No. 4:04CV3384, 2006 WL 1215395, at *34 (recognizing pollution easement theory); *but see* Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006) (abrogating district court decision and declining to extend Nebraska law to recognize pollution easement theory under unjust enrichment).

84. *See Schwan*, 2006 WL 1215395, at *34.

85. *See Schwan*, 2006 WL 1215395, at *34.

86. Cassinos v. Union Oil Co., 14 Cal. App. 4th 1770, 1776 (Cal. Ct. App. 1993).

87. *Id.*

88. *Id.* at 1778.

the injuries to the wellfield.[89] The unjust enrichment claim allowed the court to avoid complicated damage calculations by focusing on the defendant's enrichment rather than trying to quantify the harms suffered by the plaintiff, illustrating the key advantage of disgorgement.

In *Branch v. Mobil Oil Corp*., a federal district court in Oklahoma explicitly recognized "negative," or indirect, unjust enrichment as a legitimate basis for seeking restitution under a pollution easement theory.[90] The defendants used the plaintiffs' property to dispose of pollutants, saving expenses that should have gone to proper waste disposal.[91] The court held that the claim could move forward, reasoning that the enrichment need not be direct and could instead consist of "some kind of savings which results in or amounts to a business profit."[92]

In addition to pollution easement claims for unjust enrichment, there is recent wave of climate change related unjust enrichment claims. These claims have shown promise, although their viability remains unclear because they are still in the early stages of litigation. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.)*, *Inc*., contains a climate change related unjust enrichment claim that provides a helpful roadmap for unjust enrichment claims in the context of environmental litigation.[93] The plaintiffs were local governmental entities and the defendants were manufacturers and distributors of fossil fuel products.[94] The defendants allegedly contributed to climate change and profited from their climate change-causing activities, while avoiding the costs of mitigation measures necessary to avoid the harmful impacts caused by the manufacture and distribution of fossil fuels.[95] The plaintiffs asserted that they conferred a benefit on the defendants by bearing the costs and impacts of climate change to their

89. California courts have limited the permissibility of unjust enrichment claims to situations where the plaintiffs' damages are not readily calculable. *Id.* at 1789-90.

90. Branch v. Mobil Oil Corp., 778 F. Supp. 35, 36 (W.D. Okla. 1991).

91. *Id.*

92. *Id.* at 35.

93. *See* Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 798 (10th Cir. 2020).

94. *See id*. at 798.

95. *Id.*

properties and communities.[96] The plaintiffs demanded that the defendants pay their pro rata share of the mitigation costs.[97]

The *Suncor* plaintiffs' assertion embodies indirect enrichment, "[f]or decades, Defendants have largely internalized the benefits of fossil fuel use, i.e., their profits, and externalized its costs, i.e., the impacts of climate change."[98] Unfortunately, the *Suncor* plaintiffs will likely fail on their claim for unjust enrichment because they may run into trouble overcoming standing requirements.[99] Many other climate justice litigants that have attempted to bring claims based on the globalized harms of climate change have run into similar hurdles. Courts often find that either the harm is not traceable to defendants or is not redressable by the judiciary.[100]

There is still hope for communities seeking to utilize unjust enrichment to challenge industrial pollution on a local level. As the pollution easement theory continues to gain traction, plaintiffs may overcome causation hurdles by narrowing their focus from the global harms caused by the fossil fuel industry to the acutely felt harms caused by the fossil fuel industry's pollution in their communities. Before at-risk communities in Cancer Alley can move forward with unjust enrichment claims, they must also overcome the unnecessary hurdles created by Louisiana's codification of unjust enrichment.

III. MAKING A PATH FOR THE POLLUTION EASEMENT: UNJUST ENRICHMENT IN LOUISIANA

In Louisiana's civilian tradition, unjust enrichment is also known as the actio de in rem verso[101] or "legal action over

96. *See* Board of Cnty. Comm'rs of Boulder Cnty. V. Suncor Energy (USA), Inc., 965 F. 3d 792, 798 (10th Cir. 2020).

97. *Board of Cnty. Comm'rs*, 405 F.Supp.3d at 955.

98. Complaint at 93-94, *Board of Cnty. Comm'rs*, 405 F.Supp.3d 947(No. 18-cv-01672).

99. Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment*, AM. BAR ASS'N (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol—19—-issue-1/standing—who-can-sue-to-protect-the-environment-/.

100. *See* Juliana v. U.S., 947 F.3d 1159 (9th Cir. 2020) (finding that plaintiffs did not meet standing requirement of redressability because of the global scale of the harms at issue and the logistical problems with administering large-scale remedial plans).

101. The *actio de in rem verso* will be referred to as unjust enrichment throughout this section.

something converted to the benefit (of the principal in the law of agency)."[102] In 1967, the seminal case *Minyard v. Curtis*, cemented the requirements for unjust enrichment in Louisiana's jurisprudence.[103] In 1995, the elements adopted in *Minyard* were codified in Article 2298 of the Civil Code:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.
>
> The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.
>
> The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.[104]

While the underlying legal theory of preventing unjustified enrichment remains intact, under the Civil Code the action for unjust enrichment and its corresponding remedy are unique in some key respects that both limit the availability of the action and the strength of the remedy.

Given that *Minyard* laid the framework for the codification of article 2298, *Minyard* is a good place to begin breaking down the elements of the action for unjust enrichment under the Civil Code. Minyard, the plaintiff, was a subcontractor who was held liable to a general contractor for the cost of replacing defective caulking compound that he had unwittingly installed for a client.[105]

---

102. *See actio de in rem verso*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/actio%20de%20in%20rem%20verso (last visited Mar. 20, 2020).The action is a descendant of the Roman *Actio de in Rem Verso*, which was created to make a party whole who had contracted with an enslaved person, when that person's master profited from the contract. Interestingly, no general remedy for unjust enrichment existed in the early French code or the Louisiana Civil Code of 1870. Cheryl L. Martin, *Louisiana State Law Institute Proposes Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL.L.REV. 181, 201 (1994).

103. Minyard v. Curtis, 205 So.2d 422, 433 (La. 1967).

104. LA. CIV. CODE ANN. art. 2298 (2020).

105. *Minyard*, 205 So.2d at 424.

Minyard then filed an action for indemnity against Curtis, a successor in interest to the manufacturer of the caulking compound.[106] Curtis alleged that the product liability claim had already prescribed.[107] The Louisiana Supreme Court found that since there was no buyer-to-seller relationship between Minyard and Curtis, the prescriptive period for product liability suits was inapplicable.[108] This seemingly left Minyard without an applicable remedy, even though he had paid the contractor for damages caused by the manufacturer's faulty caulking compound.[109] However, the court did not leave Mr. Minyard without a remedy.[110] Instead, the court identified the principle of unjust enrichment as the basis for recovery and supplied its foundational elements:

> (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of 'justification' or cause' for the enrichment and impoverishment, and finally (5) the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature.[111]

Here, the fourth element will be referred to as 'lack of cause' and the fifth element as "subsidiarity."[112] The first three elements established in *Minyard* are consistent with the legal theory of unjust enrichment as discussed in Part III; however, elements four and five are distinguishable and merit further discussion.

The fourth element, lack of cause, broadly encompasses any legal justification for the enriched party's retention of the enrichment.[113] Under the lack of cause element, if a contract or a law explicitly permits the enrichment, then there is no claim for unjust enrichment.[114] As stated by the Louisiana Civil Code, "'without

---

106. *Id.* at 426.

107. *Id.*

108. *Minyard*, 205 So.2d at 433.

109. *Id.*

110. *Id.*

111. *Id.* at 432.

112. Also referred to as "lack of remedy."

113. Lionel Smith, *Properties, Subsidiarity, and Unjust Enrichment*, OXFORD U. COMPAR. L.F. 6 (2000) https://ouclf.law.ox.ac.uk/property-subsidiarity-and-unjust-enrichment/ (last visited Mar. 20, 2020).

114. Nikolaos A. Davrados, *Demystifying Enrichment Without Cause*, 78 LA. L. REV. 1223, 1275 (2018).

cause' is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law."[115] A common example arises where a tenant fixes a building defect without giving notice to the landlord, then the tenant tries to claim unjust enrichment to recover for the costs spent improving the landlord's property.[116] In this hypothetical, there is an existing law requiring tenants to give notice to the landlord before making any improvements. Thus, the landlord would have a legal justification to retain the enrichment with no obligation to compensate the tenant. Allowing a claim for unjust enrichment in such circumstances would undermine the purpose of the legislation's notice requirement. Additionally, any valid juridical act, such as a contract between the parties, will preempt an unjust enrichment action where the enrichment falls within the scope of the contract.[117] Where the enrichment falls outside the scope of the contract, a claim for unjust enrichment may be viable, assuming there is no other legal justification for the enrichment.

Second, the subsidiarity element requires that an action for unjust enrichment be barred so long as there is any other available remedy at law. "Subsidiarity is a relationship between different types of claims such that one type of claim is disallowed by the presence of another claim."[118] The concept of subsidiarity is similar to that of federal preemption, where the existence of a federal law pertaining to a specific subject supersedes conflicting state law on the same subject.[119] Under Article 2298, the mere existence of another remedy at law bars the action for unjust enrichment, even where that remedy is inaccessible or unlikely to succeed.[120] In other words, subsidiarity establishes that if a law addresses an

115. LA. CIV. CODE ANN. art. 2298 (2020).

116. *See, e.g.*, Woodward Jackson Co. v. Crispens, 414 So. 2d 855 (La. App. 4th Cir. 1982); Smith, *supra* note 112.

117. *See* Davrados, *supra* note 114, at 1271.

118. Smith, *supra* note 113. There is a wide range of treatment of subsidiarity in different civilian jurisdictions, though all adopt some form of the requirement. "stronger idea of subsidiarity, which denies the availability of a claim in unjustified enrichment due to the applicability of some other set of legal principles, even if, according to those principles, no claim will lie . . . . Weak subsidiarity, as discussed in the previous paragraph, only directs a plaintiff to the correct claim; strong subsidiarity can deny the plaintiff any claim."*Id. See also* Nicholas Barry, *Unjustified Enrichment in the Civil Law and Louisiana Law,* 36 TUL. L. REV. 605, 640 (1962).

119. Bruce V. Schewe &Vanessa Richelle, *Obligations*, 56 LA. L. REV. 663, 667 (1996).

120. *See, e.g.*, Walters v. MedSouth Record Mgmt., LLC, 2010-0353 (La. 6/4/10); 38 So.3d 243, 244 ("Having pled a delictual action, we find plaintiff is precluded from seeking to recover under unjust enrichment.").

issue without providing for a legal remedy, litigants cannot utilize unjust enrichment as a form of relief. In this way, subsidiarity imputes intent and authority to legislative silence, reasoning that the legislature addressed that specific area of law and intentionally chose not to offer a remedy in the relevant circumstances.[121]

Since *Minyard* adopted the separate elements of lack of cause and subsidiarity, and the subsequent codification of both elements, courts have confused whether or not an unjust enrichment claim can be pled in the alternative.[122] "In such cases, the requirement of subsidiarity is redundant because justification of the enrichment or the existence of more special legal rules will exclude the action anyway."[123] The confusion about subsidiarity and lack of cause is warranted as they are nearly identical where there is legal justification for the enrichment.[124]

Applying both elements to the same hypothetical helps to elucidate the overlap between the two. In the example above, the tenant sought compensation for improvements he made to the landlord's property but was barred from compensation for failure to give notice before implementing the improvements. Applying the subsidiarity principle to this example, the unjust enrichment claim would be barred because, if the legislature intended tenants in similar circumstances to be compensated, it would have provided for a remedy in the relevant section of the Civil Code. Applying the lack of cause element would deliver the same result: the law requiring tenants to give notice before improving a landlord's property would serve as a cause, or legal justification, for the landlord to retain the enrichment. Thus, in many circumstances lack of cause and subsidiarity are independently capable of delivering the same results. When codified, these two elements were intended to restrict the number of cases in which unjust enrichment would be viable. In that respect, the elements were all too successful, and may even be considered unduly prohibitive.

---

121. Schewe & Richelle, *supra* note 119, at 668.

122. *See* Perez v. Util. Constructors, Inc., No. 15-4675, 2016 WL 5930877, at *2 n.5 (E.D. La. Oct. 12, 2016) ("The Court acknowledges that there appears to be a degree of confusion on this issue. Some sections of this Court have held that unjust enrichment can never be pled in the alternative, while other sections have held that alternative pleading is permissible.")

123. Davrados, *supra* note 114, at 1280.

124. *Id.* at 1281.

Understandably, application of these overlapping elements has presented an ongoing challenge. The dispute in *Jim Walter Homes, Inc., v. Jessen*, underscored the relationship between the lack of cause and subsidiarity requirements.[125] The plaintiff, Jim Walter Homes, chose to bring a claim for unjust enrichment, even though it may have been able to assert a claim for breach of contract, a lien, or recovery of its security interest.[126] The court stated that because the plaintiff had another remedy available, "to provide [a remedy] under unjust enrichment would be tantamount to allowing any plaintiff who let his cause of action prescribe, or any plaintiff who knowingly wrote a bad contract, to recover under an enrichment theory."[127] Contrary to the court's analysis, eliminating the subsidiarity element would not open the proverbial floodgates because the hypothetical plaintiffs proffered by the court would also be barred from bringing an unjust enrichment claim under the lack of cause requirement. Both the "bad contract" and the law prescribing the action would provide adequate legal justification for the retention of the enrichment. Therefore, by eliminating the subsidiarity requirement, there would not be a flood of unjust enrichment claims because the lack of cause requirement would sufficiently bar meritless claims.

The late Louisiana Supreme Court Justice Tate asserted that the subsidiarity requirement was included within the lack of cause requirement, and thus was not in itself a separate requirement.[128] In *Minyard*, the court qualified the subsidiarity requirement, stating that "[t]he fifth requirement, that there be no other remedy available at law, is simply an aspect of the principle that the action must not be allowed to defeat the purpose of a rule of law directed to the matter at issue."[129] The court in *Minyard* appears to be in accord with Justice Tate's approach. Justice Tate expressed that while unjust enrichment should not be used to contradict or undermine existing laws, the subsidiarity principle should not be so strictly construed as to prevent an action for unjust enrichment in every case where another legal action might be available to the

125. Jim Walter Homes, Inc., v. Jessen, 98-1685 (La. App. 3 Cir. 3/31/99); 732 So.2d 699, 705-07.

126. *Id.* at 706.

127. *Id.*

128. Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment*, 50 TUL. L. REV. 883, 888-89 (1976).

129. Minyard v. Curtis, 205 So.2d 422, 433 (La. 1967).

plaintiff.[130] The true spirit of Article 2298 is that an action for unjust enrichment should not subvert existing law directed at the matter at issue, and this principle is sufficiently embodied within the lack of cause requirement.[131]

The limitation on damages is another key element which distinguishes Article 2298 from the *Minyard* decision and from the underlying theory of unjust enrichment. The codification of unjust enrichment further undermined the utility of the action because the language as codified limits courts' abilities to compel defendants to disgorge unjustly received benefits. Article 2298 states that "the amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less."[132] This limitation appears to directly contradict the purpose of disgorgement, which is to force the wrongdoer to return wrongfully acquired gains to the impoverished party while undermining the profitability of the problematic behavior.

Returning to the example of the stolen bike may prove useful for illustrating the problem with Article 2298's limitation on damages. If I stole your bike, worth $50, and sold it for $100, I would be enriched by $100 and you impoverished by $50. A successful unjust enrichment claim brought under Article 2298 would force me to return the lesser of the two sums. Therefore, I would retain $50 while compensating you $50. In this way, the limitation on damages has the potential to preserve the profitability of problematic behavior. By removing the limitation on damages, I would be forced to pay you the entire $100 from the sale of your bike. Left empty handed, I might be discouraged from further bike theft.

The limitation on damages was also the focus *in Gulfstream Service, Inc. v. Hot Energy Services, Inc.*, in which two companies negotiated for the rental and use of storage tanks.[133] The parties

---

130. Albert Tate, Jr., *The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process* , 51 TUL. L. REV. 446, 458 (1977).

131. *See id.* at 460-61 ("The unavoidable conclusion is that no real end is served by a subsidiarity principle that defeats the action because the plaintiff could recover as well against *the enriched defendant* upon a different action or ground." Emphasizing that where an enrichment is justified by law or contract, the subsidiarity principle is unnecessary because the action will be dismissed based on the legal justification for the enrichment).

132. LA. CIV. CODE ANN. art. 2298 (2019) (emphasis added).

133. Gulfstream Service, Inc. v. Hot Energy Services, Inc., 2004-1223 (La. App. 1 Cir. 3/24/05); 907 So.2d 96, 102-03.

had not negotiated a contract or lease agreement.[134] Hot Energy received and used the storage tanks, but when they returned the tanks, Hot Energy refused to pay Gulfstream.[135] The court found that Gulfstream satisfied the impoverishment requirement because it had a reasonable expectation of being financially compensated for providing its rental services.[136] The court also found that Hot Energy had been enriched by not paying for the rental costs of the storage tanks.[137] Finally, the court found there was a connection between the enrichment and the impoverishment.[138] However, the court also enforced the limitation on damages, stating that "claimant's recovery for his impoverishment may not exceed the defendant's enrichment."[139] As a result, Hot Energy had to pay for the rental services it had used but was allowed to retain any excess profits amassed through use of the storage tanks.[140] Like the example of the stolen bike, the limitation on damages here provides little incentive for companies like Hot Energy to change their problematic behavior.

Again, Article 2298 codified two major hurdles to environmental unjust enrichment claims: the overlapping relationship between lack of cause and subsidiarity; and the limitation of damages. In *Corbello v. Iowa Production*, the underlying actions were for trespass and breach of lease.[141] Applying the theory of unjust enrichment to the facts and the court's reasoning illustrates how unjust enrichment could potentially be used to disincentivize harmful pollution and hazardous waste disposal through use of disgorgement.[142] In *Corbello*, Shell held a mineral lease on the plaintiffs' property.[143] The property owners in *Corbello* were fortunate to have the lease with Shell which protected their ability to collect

134. *Id.* at 98-99.

135. *Id.* at 99.

136. *Id.* at 102.

137. *Gulfstream Servs., Inc.*, 907 So.2d at 102.

138. *Id.*

139. *Id.*

140. *See id*. at 103.

141. Corbello v. Iowa Prod., 2002-0826 (La. 2/25/03); 850 So. 2d 686, 690-91, *superseded by statute*, LA. STAT. ANN. § 30:2015.1, *as recognized in* State v. Louisiana Land & Expl. Co., 2012-0884 (La. 1/30/13); 110 So.3d 1038, 1049 (noting that *Corbello* was superseded by statute for a holding unrelated to the unjust enrichment analysis herein).

142. *Corbello*, 850 So.2d at 694-95.

143. *Id.* at 691.

significant damages.[144] Landowners without a preexisting agreement with industrial polluters, like Shell, would have to resort to tort remedies, where damages would be limited by the fair market value of the property.[145] Here, Shell's behavior far exceeded the scope of the lease by dumping wastewater from other drilling locations on the plaintiffs' property, a right specifically barred by the lease.[146] Shell also failed to vacate the premises for months after the lease ended, while continuing to dump wastewater on the land, threatening nearby aquifers, and wreaking havoc on the plaintiffs' property.[147] Shell dumped a total of 1,629,723 barrels of wastewater on the plaintiffs' property.[148] The plaintiff's expert witness testified that, normally, it would cost Shell about $1 per barrel to properly dispose of the wastewater.[149] Thus, Shell was enriched by saving at least $1,629,723, and the plaintiff was impoverished by the property damage that Shell inflicted in the process.[150] Had the plaintiffs brough an action for unjust enrichment, the first three elements would have been satisfied as there was an enrichment, an impoverishment, and the causal connection between the two was clearly established.

The next element that distinguishes restitution claims for unjust enrichment under Louisiana law is lack of cause. As noted above, there was a lease governing the relationship between the parties in *Corbello*.[151] A lease is a juridical act,[152] so if it is valid, and the defendants' actions were within the scope of the lease, the lease would serve to bar a claim for unjust enrichment. To avoid this bar, the plaintiffs could have asserted that the defendant's behavior exceeded the scope of that lease, and so, there was no legal

144. *Id.* at 693.

145. *Corbello*, 850 So.2d at 694.

146. *See id.* at 694-95.

147. *Id.* at 708.

148. *Id.* at 705.

149. *Id.*.

150. *Id.*

151. *Id.* at 691.

152. "The general notion of a juridical act is uniform across civil law systems. It is predicated on the idea that any change in a person's legal position—which includes the acquisition, exercise, modification, transfer, or loss of a right—is produced either by that person's lawful volitional act (juridical act) or directly by operation of law (juridical fact)." Nikolaos A. Davrados, *A Louisiana Theory of Juridical Acts*, 80 LA. L. REV. 1119, 1162 (2020).

justification for retaining the enrichment.[153] This argument could have been successful given that the defendant disposed of over a million barrels of wastewater from its other mineral leases on the plaintiffs' property, where the lease explicitly barred that behavior.[154] Assuming no other legal justification for retaining that benefit, the plaintiffs could have potentially passed the lack of cause hurdle contained in Article 2298.

Next, the plaintiffs would face the subsidiarity requirement. Under the subsidiarity requirement, courts must deny restitution for unjust enrichment where another remedy is available to the plaintiff.[155] The *Corbello* plaintiffs sought remedies in tort and for breach of the lease and would have therefore been barred from bringing a claim for unjust enrichment.[156] By limiting the plaintiffs' abilities to choose between remedies, the subsidiarity rule contained in Article 2298 assumes that the actions serve the same purpose, "[that] any remedy provided by an action de in rem verso [unjust enrichment] would be identical in substance and relief to an action in tort."[157] This assumption ignores the core difference that distinguishes unjust enrichment from other claims: that "[t]he purpose of the tort action is to compensate [the] plaintiff for damage suffered, regardless of any benefit to defendant; the purpose of the actio de in rem verso [unjust enrichment] is to give to plaintiff restitution of any benefit to defendant, but only to extent of plaintiff's impoverishment."[158] By barring plaintiffs from unjust enrichment where another remedy is available, plaintiffs may be compensated for damages suffered, however, defendants may also be allowed to retain ill-gotten profits, thereby preserving the profitability of their problematic behavior.

---

153. *See, e.g.*, Woodward Jackson Co. v. Crispens, 414 So. 2d 855 (La. App. 4th Cir. 1982); Smith, *supra* note 112.

154. Corbello v. Iowa Prod., 2002-0826 (La. 2/25/03); 850 So. 2d 686, 704 (Finding that the lease limited Shell's disposal rights, such that it could only dispose of saltwater produced either on plaintiff's property, or other property within the Iowa Field). Where the lease limited Shell's disposal rights, such that it could only dispose of saltwater produced either on plaintiff's property, or other property within the Iowa Field).

155. Smith, *supra* note 113.

156. "The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule." LA. CIV. CODE ANN. art. 2298 (2020).

157. Aetna Life & Cas. Co. v. Dotson, 346 So.2d 762, 765 (La. App. 1 Cir. 1977).

158. Barry Nicholas, *The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched*, 6 & 7 TUL. CIV. L.F. 3, 15 (1991/1992).

Without a favorable lease like the one in *Corbello*, or where no contract exists between the polluter and landowner, many landowners and residents who are forced to deal with industrial pollution and hazardous waste will not have access to such a powerful remedy. As mentioned above, Shell saved about $1,629,723 by dumping wastewater on the plaintiffs' property.[159] Without a lease governing the relationship between the parties, damages in tort would have been tied to the fair market value of the property which was only $108,000.[160] Without some change to Article 2298, recovery for future plaintiffs will be tethered either to the terms of the contract, or to the fair market value of their property, as required by state tort laws limiting damages.

Between the immensity of costs saved by polluting, and the pittance of fair market value, there lies a windfall profit that provides the Shells of the world ample incentive to breach contracts and engage in tortious misconduct. The limitation on recovery under Article 2298 directly contradicts the purpose of restitution damages for unjust enrichment. "The essence of unjust enrichment and its correlative remedy of restitution is the recovery of the benefit realized by the defendant not the harm or injury sustained by the plaintiff."[161] That is, if the teeth of the unjust enrichment claim is the power to disgorge ill-gotten profits, the limitation on damages has effectively rendered the claim toothless. Under the current iteration of Article 2298, even if a plaintiff clears the huge hurdles of lack of cause and subsidiarity, both the ability to recover and the deterrent power of disgorgement are severely diminished.

PROPOSAL

Louisiana should alter Article 2298 to better reflect the principles of unjust enrichment. To that end, first, Louisiana should eliminate the subsidiarity requirement because in practice it is overly prohibitive. Removing the subsidiarity rule would make way for potential environmental litigation, where there is no legal justification for polluters to take advantage of marginalized communities as hazardous waste dumping grounds. Second, Louisiana should remove the limitation on recovery, which would restore the deterrent qualities of the claim. Thus, the Code would more

159. Corbello v. Iowa Prod., 2002-0826 (La. 2/25/03); 850 So. 2d 686, 705.

160. *Id.* at 692.

161. FISCHER, *supra* note 74.

accurately reflect the principles of unjust enrichment and properly disincentivize polluters.

To address issues of subsidiarity and damages inherent in Article 2298, I would propose the following alterations:

> Art. 2298. Enrichment without cause; compensation
>
> A person who has been enriched without cause at the expense of another person is bound to compensate that person and to disgorge the full amount of the enrichment. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law~~. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.~~ The remedy here should not be allowed to defeat the purpose of any rule of law directed to the matter at issue. However, the mere fact that additional remedies apply to a case does not mean that a remedy for enrichment without cause does not also apply. A remedy for enrichment without cause may apply in addition to other remedies when justice requires. Justice will always require the full disgorgement of an enrichment without cause, even when the amount of the enrichment exceeds the damage to other parties.
>
> The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, ~~whichever is less~~.
>
> The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.[162]

The above changes would rehabilitate unjust enrichment under the Civil Code, allowing for disgorgement while also removing the unduly prohibitive subsidiarity requirement.

Removing the subsidiarity requirement would allow for recognition and proper redress of many potential environmental justice claims. The facts of *Corbello* provide an example of how this could work in practice. The plaintiffs in *Corbello* had a valid lease with the defendants.[163] However, they would likely be able to overcome

---

162. Words that are ~~struck through~~ are deletions from existing law; words underscored are additions.

163. *Corbello*, 850 So.2d at 693.

the lack of cause requirement because Shell's misconduct far exceeded the bounds of the lease; Shell had continued dumping wastewater on plaintiffs' property long after the lease expired.[164] Unfortunately, the availability of other remedies under tort or contract law would bar the action for unjust enrichment due to the restrictive nature of the subsidiarity requirement. Even if the other remedies would not provide comparable redress, their availability would act as a bar to unjust enrichment. Thus, removing the subsidiarity requirement would restore the purpose of unjust enrichment and allow for similarly situated plaintiffs to seek proper redress under Article 2298.

The facts of *Corbello* also illustrate the need to eliminate the limitation on damages. Without the limitation on damages, Shell could have been forced to disgorge the profits it amassed by avoiding proper disposal of wastewater. In his dissent in *Corbello*, Justice Knoll argued that as a policy matter, similarly situated plaintiffs should be able to recover under unjust enrichment, because the remedy applied in *Corbello*:

> sends the wrong message to those, who like Shell, choose to break a contract. It may be that driven by the savings and the investment of those savings, Shell may have made a business decision that it is more profitable to breach a contract than to abide by its terms.[165]

Here, Justice Knoll astutely points out how the existing limitation on damages creates an environment that incentivizes exploitative behavior.

Limiting this remedy, as the legislature has done, gives polluters the incentive to continue harmful waste disposal procedures, with the comforting knowledge that they will be allowed to retain windfall profits. As a policy matter, instead of granting the lesser between the impoverishment and the enrichment, Louisiana courts should be able to award restitution for unjust enrichment by applying the principle of disgorgement. Disgorgement is one of the essential properties that distinguishes unjust enrichment from other actions and remedies. By limiting recovery under Article 2298, the legislature undermined the purpose of the action. However, by requiring polluters to disgorge profits made at the expense

164. *Id.* at 708.

165. *Corbello*, 850 So. 2d at 712 (Knoll, J., dissenting).

of another party, an action for unjust enrichment can be a strong deterrent to predatory polluting behavior.

CONCLUSION

By altering the subsidiarity rule and allowing restitution damages, unjust enrichment will be restored to its proper role: preventing bad actors from enriching themselves at the expense of others. For too long Black residents of Cancer Alley have seen the health of their land and communities sacrificed to protect the profit margins of the polluting and extractive industries that have dominated the shores of the Mississippi river, from Baton Rouge to New Orleans. Utilizing the pollution easement theory of unjust enrichment and the corresponding remedy of restitution has the potential to deter harmful hazardous waste disposal practices by disgorging the profits made in the process. This change could provide communities in Cancer Alley that are inundated with industrial pollution with another tool to fight for environmental justice utilizing the deterrent power of unjust enrichment.