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DEVELOPMENTS IN THE LAW  
UNJUST ENRICHMENT

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INTRODUCTION

In American law schools, first-year students learn about the basic obligations of private law through two required classes: contracts and torts.<sup>1</sup> For the most part, those students do not learn about a third source of obligation: unjust enrichment. This obligation rests on a simple premise — that “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.”<sup>2</sup> While money damages in tort actions seek to make plaintiffs whole for *losses* suffered as the result of a defendant’s wrongdoing, restitution for unjust enrichment imposes liability based on the defendant’s *gain* — regardless of a defendant’s blameworthiness.<sup>3</sup> These principles are relatively straightforward on their face. But unjust enrichment has struggled to establish a consistent place for itself within American legal thought. This is a missed opportunity for judges, practitioners, and litigants, for whom taking unjust enrichment seriously could have dramatic consequences. In this edition of *Developments in the Law*, we make a case for reviving this forgotten principle, both as a worthy subject of legal scholarship and as a valuable addition to the advocate’s toolkit.

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We are not the first to champion unjust enrichment as a private law obligation on par with contract and tort.<sup>4</sup> Scholarly work on restitution for unjust enrichment has appeared on and off in the pages of the *Harvard Law Review* since its founding. In fact, the *Law Review*’s very

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<sup>1</sup> See Survey of First-Year Curricula of 50 ABA-Accredited Law Schools (Feb. 24, 2020) (on file with the Harvard Law School Library); see also AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 50–52 (Catherine L. Carper ed., 2012).

<sup>2</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

<sup>3</sup> See *id.* cmts. e, f.

<sup>4</sup> Some scholars suggest that there are actually four, not three, categories of private law obligation: contract, tort, unjust enrichment, and “others.” See Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTL. L. REV. 1, 8 (1996). Rather than clarifying the taxonomy of private law obligation, “[t]he category ‘others’ is a sort of cheat. It virtually ensures the correctness of the classifications . . . only because a huge and various assortment of rights find their origin in that open-ended category.” *Id.* at 9–10.

first published article concerned the principle that “a court . . . will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another’s expense.”<sup>5</sup> Following on this precedent, many early scholarly discussions of unjust enrichment appeared in the pages of this journal.<sup>6</sup> In the intervening decades, restitution and unjust enrichment have enjoyed moments of intermittent attention in American legal thought more broadly. Publication of the confusingly named First Restatement on the Law of Restitution in the 1930s marked one high point.<sup>7</sup> The early years of the twenty-first century also saw a bumper crop of scholarship on unjust enrichment,<sup>8</sup> culminating in the publication of Professor Andrew Kull’s Restatement (Third) of Restitution and Unjust Enrichment (Third Restatement).<sup>9</sup> Yet despite two Restatements<sup>10</sup> and intermittent popularity, unjust enrichment has been underused and undertheorized in American legal practice. Even those scholars engaged in the project of defining restitution and unjust enrichment admit that neither its terms nor its underpinnings have ever achieved consensus.<sup>11</sup>

We offer this issue as an attempt to build on these foundations and clarify the doctrine and its possibilities. Like the scholars before us who have championed unjust enrichment, we hope to see the doctrine firmly established as an essential facet of private law.

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First, a note on terms. There is a fair amount of ongoing disagreement about how best to define “unjust enrichment” and “restitution” —

<sup>5</sup> See J.B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1, 3 (1887).

<sup>6</sup> See, e.g., Everett V. Abbot, *Keener on Quasi-Contracts I*, 10 HARV. L. REV. 209 (1896); Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249 (1897).

<sup>7</sup> RESTATEMENT (FIRST) OF THE LAW OF RESTITUTION (AM. LAW INST. 1937); see *infra* ch. I, p. 2089. The First Restatement was an attempt by Harvard Law Professors Warren A. Seavey and Austin W. Scott to draw together apparently distinct principles of private law under a coherent theoretical umbrella. See Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29, 29–31 (1938). Perhaps as a result, some scholars remain skeptical of whether “unjust enrichment” can be properly understood as a concept with positive content, rather than as a catchall label applied to those situations where the law has determined that restitution is owed. See Peter B.H. Birks, *A Letter to America: The New Restatement of Restitution*, 3 GLOBAL JURIST FRONTIERS, no. 2, art. 2, 2003, at 10.

<sup>8</sup> See, e.g., Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

<sup>9</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2011); see also Symposium, *A Conference on Restitution and Unjust Enrichment*, 92 B.U. L. REV. 763 (2012).

<sup>10</sup> Although the American Law Institute solicited a Second Restatement in the late 1970s, no such Restatement was ever published. See Andrew Kull, *Three Restatements of Restitution*, 68 WASH. & LEE L. REV. 867, 873 (2011).

<sup>11</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011).

the terms that lie at the heart of this area of law.<sup>12</sup> For the purposes of this issue, we understand “unjust enrichment” as a *source of an obligation*.<sup>13</sup> In other words, the term describes circumstances in which the private law finds that an individual owes something to another party. We use “restitution” to refer to the gain-based remedy that can attach to this obligation.<sup>14</sup> Many scholars use “restitution” to describe both the claim of unjust enrichment and its remedy.<sup>15</sup> In this issue, we use “unjust enrichment” as the label for this body of law.<sup>16</sup> Throughout, we follow the definition of “unjust enrichment” given in the Third Restatement: an unequal transfer of value without an adequate legal basis.<sup>17</sup>

Scholars unsurprisingly diverge in their understanding of what constitutes the kind of “adequate legal basis” the Third Restatement requires. Although the concept has no single definition, the idea of consent is one touchstone for evaluating whether an adequate legal basis exists.<sup>18</sup> Consent is often defined with reference to contract law,<sup>19</sup> as a contract, trust, will, or gift can provide evidence that a transfer is based on consent and therefore does not constitute unjust enrichment. Where consent is lacking — if a party to a transaction, for example, confers benefits on the other party before getting her consent — an adequate legal basis is likely absent.<sup>20</sup> But while a *lack* of consent may signal that no adequate legal basis exists, *evidence* of positive consent isn’t the end of the matter. Under a theory of unjust enrichment, even cases involving valid contracts might demand a “second look” if a contract involves a transfer

<sup>12</sup> See generally *Introduction: Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763, 1763–64 (2001).

<sup>13</sup> We adopt these definitions because they strike us as the clearest versions also in line with the agreement between the Restatements. But they do not represent a consensus. Throughout its history, scholarship of restitution and unjust enrichment has struggled to define principles and core terms, leaving scholars to speculate about the underlying theory of the doctrine (and its basic coherence). See, e.g., Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2084–86 (2001).

<sup>14</sup> We do not propose here that the term “restitution” can refer *only* to a gain-based remedy. Rather, we use the term in this way for the purposes of this issue to avoid unnecessary confusion.

<sup>15</sup> See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011) (adopting the term “restitution” to refer to both cause of action and remedy, “despite the problems this usage creates”).

<sup>16</sup> This usage follows the lead of Professor Peter Birks and other scholars of European law. See, e.g., Birks, *supra* note 7, at 4–5.

<sup>17</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011).

<sup>18</sup> See *id.* (“Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. Broadly speaking, an ineffective transaction for these purposes is one that is *nonconsensual*.”).

<sup>19</sup> Cf., e.g., Stephen A. Smith, *Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement*, 115 L.Q. REV. 245, 245–46 (1999).

<sup>20</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 2, topic 2, intro. note (AM. LAW INST. 2011).

of value that a court finds to be vastly unequal or unfair.<sup>21</sup> Consider, for instance, a family that sells a valuable painting at a steep discount in order to raise funds to flee the Holocaust.<sup>22</sup> While the sale of the painting in that case would be based on an otherwise valid contract, a court applying the principles discussed here could find that, under the circumstances, the buyer was unjustly enriched by the transfer.

Unjust enrichment can also overlap with torts that result in an enrichment of the tortfeasor. Indeed, just as a controversy in private law might involve obligations rooted in both contract and tort, acquisitive wrongs can often produce fact patterns that meet the requirements of both tort and unjust enrichment. A victim of a Ponzi scheme fraud, for instance, would have a legal claim both in tort, for damages, and in unjust enrichment, for restitution of the wealth unjustly accrued to the wrongdoer.<sup>23</sup> But the two sources of obligation differ in a crucial way: under unjust enrichment, the plaintiff's right to recovery is not necessarily based on the wrongdoing of the defendant.<sup>24</sup> A plaintiff need not prove that a wrong was done in order to succeed in a claim rooted in unjust enrichment.<sup>25</sup> In these cases, proof of wrongdoing by the defendant may be *sufficient* to show unjust enrichment — especially if proof of the wrong simultaneously proves the lack of legal basis for the transfer of wealth — but it is not *necessary* to do so.<sup>26</sup> Unjust enrichment can just as easily be based on mistake<sup>27</sup> or an imperfection in title.<sup>28</sup> Unjust enrichment therefore complements, but is not parasitic to, the law of torts.<sup>29</sup>

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<sup>21</sup> See Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 7–8 (Harvard Pub. Law Working Paper No. 15-13, 2015), <https://ssrn.com/abstract=2617413> [<https://perma.cc/5FMS-6GEV>] (characterizing equitable standards as a tool for combating opportunistic exploitation of law by more sophisticated actors).

<sup>22</sup> This example, which is based on *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019), is illustrative only. That case, which concerned the sale of a Picasso painting, *see id.* at 190–91, was not brought under an unjust enrichment theory and was dismissed on laches grounds, *see id.* at 197. Cases alleging unjust enrichment arising out of Nazi art looting have been allowed to proceed in other circuits. *See, e.g.,* *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416–18 (D.C. Cir. 2018).

<sup>23</sup> *See infra* ch. II, p. 2101.

<sup>24</sup> *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. f (AM. LAW INST. 2011).

<sup>25</sup> *See id.*

<sup>26</sup> Andrew Tettenborn, *Misnomer: A Response*, in *RESTITUTION PAST, PRESENT AND FUTURE* 31, 33–34 (W.R. Cornish et al. eds., 1998).

<sup>27</sup> *See generally* Hanoeh Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1820–25 (2001).

<sup>28</sup> *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 12 (AM. LAW INST. 2011).

<sup>29</sup> *Cf.* James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 62–66 (2007).

Once we are equipped with a basic understanding of the principles of unjust enrichment, we begin to see missed opportunities everywhere. A recent California Supreme Court case, *Voris v. Lampert*,<sup>30</sup> provides a useful example. Brett Voris, a former employee of three startup business ventures, brought suit against his former employer under a theory of tortious conversion.<sup>31</sup> Voris had joined the businesses on the understanding that he would be compensated in wages and stock at a later date; after over a year of employment, however, he was terminated without the promised pay.<sup>32</sup> Voris brought, inter alia, successful breach of contract and quantum meruit claims against the companies, but because they had no assets, Voris was unable to collect his damages award.<sup>33</sup> He subsequently brought suit against his former business partner, Greg Lampert, in his personal capacity, alleging that Lampert had intentionally run down the business accounts in order to avoid paying out Voris's settlement and arguing that failure to pay wages constituted common law conversion.<sup>34</sup> The California Supreme Court found that failure to pay wages did "not fit easily with the traditional understanding" of the tort of conversion<sup>35</sup> and affirmed the lower court's summary judgment ruling against Voris.<sup>36</sup>

This case may have come out differently had Voris's attorneys thought to bring a claim under unjust enrichment. Both the majority opinion and the dissent took pains to emphasize that rectifying wage theft is a fundamental goal of California's policy scheme.<sup>37</sup> But, as Justice Cuéllar pointed out in his dissenting opinion,<sup>38</sup> the majority worried that allowing Voris to recover unpaid wages via a conversion theory risked "blurring the common law distinction between contract and tort"<sup>39</sup> by attaching tortious liability to employers "even in cases of good-

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<sup>30</sup> 446 P.3d 284 (Cal. 2019).

<sup>31</sup> See *id.* at 286. Conversion is "the tortious deprivation of another's property without his authorization or justification." *Conversion*, BARRON'S LAW DICTIONARY (6th ed. 2010).

<sup>32</sup> See *Voris*, 446 P.3d at 286.

<sup>33</sup> See *id.* at 287.

<sup>34</sup> See *id.* at 286, 289.

<sup>35</sup> *Id.* at 289.

<sup>36</sup> See *id.* at 287, 299.

<sup>37</sup> See *id.* at 299; see also *id.* at 300–01 (Cuéllar, J., dissenting).

<sup>38</sup> Justice Cuéllar was joined by Justice Liu. The majority opinion was authored by Justice Kruger and was joined by Chief Justice Cantil-Sakauye and Justices Chin, Corrigan, and Groban.

<sup>39</sup> *Voris*, 446 P.3d at 300 (Cuéllar, J., dissenting). This concern was rooted in the majority's assessment that wages are not traditionally the type of property at issue in a conversion claim. See *id.* at 292–94 (majority opinion) (concluding that to remedy wage theft via tortious conversion would "collapse the well-established distinction between a contractual obligation to pay and the tortious conversion of monetary interests," *id.* at 292).

faith mistake.<sup>40</sup> Neither opinion considered that Voris's prayer for relief could be satisfied by a private claim sounding in neither contract nor tort.

Because Voris did not contract with Lampert in Lampert's personal capacity,<sup>41</sup> and because Lampert was able to deplete the assets of the contracting entity, Voris was not able to recover under contract.<sup>42</sup> And because unpaid wages are not traditionally considered an employee's property for the purposes of conversion, the majority was uncomfortable recognizing Voris's tort claim.<sup>43</sup> But *Voris* presents a nearly paradigmatic case for unjust enrichment. The facts *do* betray an unequal transfer of value from Voris to Lampert — in the form of unpaid labor — without adequate legal basis. Wage theft may fit uneasily within the common law tradition of tortious conversion, but courts *have* historically recognized uncompensated labor as a form of unjust enrichment.<sup>44</sup>

An unjust enrichment claim also manages to sidestep some of the concerns voiced in both the majority and dissenting opinions. The majority worried that ruling for Voris under a tortious conversion theory would extend tort liability, and the attendant specter of punitive damages, to defendants who had not knowingly committed any wrong.<sup>45</sup> To the dissent, this concern was secondary to the questions of substantive justice because “[f]or the workers who aren't being paid what they earned, it hardly matters whether the nonpayment or underpayment was the product of deliberation or mistake — the financial hit . . . is a heavy burden either way.”<sup>46</sup> A claim in unjust enrichment alleviates both of these worries. As a theory that centers on the defendant's gain, rather than on wrongdoing or consent, unjust enrichment is able to satisfy Justice Cuéllar's call for relief to unpaid workers regardless of wrongdoing, without exposing innocent defendants to punitive remedy.

*Voris* helps to show how unjust enrichment could be invoked to provide a remedy in situations of injustice to which tort or contract theories do not extend. But even in cases where tort or contract theories *do* offer relief, unjust enrichment can still be useful: for plaintiffs, restitution might offer a more satisfactory remedy, even where contract and tort remedies are available. An ongoing case, *Swinomish Indian Tribal Community v. BNSF Railway Co.*,<sup>47</sup> is indicative. In that action, the

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<sup>40</sup> *Id.* at 298–99 (majority opinion).

<sup>41</sup> *See id.* at 286–87.

<sup>42</sup> *See id.* at 289.

<sup>43</sup> *See id.* at 298–99.

<sup>44</sup> *See, e.g.,* *Duncan v. Baker*, 21 Kan. 99, 104–05, 108–09 (1878) (awarding a contract worker who quit before completing the contract, *see id.* at 104, restitution on a pro rata basis for the labor performed, *see id.* at 108–09).

<sup>45</sup> *See Voris*, 446 P.3d at 298–99.

<sup>46</sup> *Id.* at 303 (Cuéllar, J., dissenting).

<sup>47</sup> 228 F. Supp. 3d 1171 (W.D. Wash. 2017), *aff'd*, No. 18-35704 (9th Cir. Mar. 4, 2020).

Swinomish Tribe brought suit against BNSF, a rail carrier.<sup>48</sup> BNSF's predecessors in interest had constructed a rail line over tribal land in the late nineteenth century, in violation of the tribal nation's treaty with the United States.<sup>49</sup> Commercial rail carriers continued to use the line — over express objection from the Tribe and against the advice of the federal government<sup>50</sup> — for nearly one hundred years.<sup>51</sup> After lengthy litigation, the Swinomish nation negotiated an easement agreement that limited the amount of train traffic traversing the reservation.<sup>52</sup> When BNSF began running trains carrying crude oil across the reservation in excess of the agreed limitations, the Tribe brought suit in federal court, alleging breach of contract and trespass and seeking both injunctive relief and damages.<sup>53</sup> The district court granted summary judgment to the Tribe.<sup>54</sup>

The Ninth Circuit affirmed and remanded for determination of appropriate remedy.<sup>55</sup> A key issue on appeal was whether injunctive relief was preempted by federal statute; in finding that it was not, the court of appeals cleared a path for the district court to enjoin enforcement of the easement agreement.<sup>56</sup> The appellate court did not address the Swinomish Tribal Community's prayer for damages.<sup>57</sup> Although the district court allowed the Tribe to seek damages,<sup>58</sup> it is not typical for courts to award monetary relief in breach of easement cases.<sup>59</sup> Should this case turn out to be an exception to that standard, any damage award would likely be small: the plaintiffs in this case have not alleged that BNSF's

<sup>48</sup> See *id.* at 1175–76.

<sup>49</sup> See *id.* at 1174.

<sup>50</sup> See Brief for Swinomish Indian Tribal Cmty. at 5–6, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 18-035704 (9th Cir. Jan. 7, 2019) [hereinafter *Swinomish Brief*].

<sup>51</sup> See *Swinomish*, 228 F. Supp. 3d at 1174.

<sup>52</sup> See *id.* at 1175–76; *Swinomish Brief*, *supra* note 50, at 9–10.

<sup>53</sup> See *Swinomish*, 228 F. Supp. 3d at 1175–76. That BNSF breached the easement agreement was uncontested as a matter of fact. See *id.* at 1176.

<sup>54</sup> The court initially granted summary judgment only on the breach of contract claim for damages, denying injunctive relief on the grounds that an injunctive remedy under state law was preempted by federal statutes regulating railway operations. See *id.* at 1179, 1183. The Tribe subsequently moved for reconsideration, arguing that its suit arose out of its treaty with the United States and therefore involved questions of *federal*, rather than *state*, common law. See Order Granting Plaintiff's Motion for Reconsideration, *Swinomish*, 228 F. Supp. 3d (No. 15-0543), 2017 WL 2483071, at \*1. The court agreed on reconsideration and granted the Tribe's motion for summary judgment in full. *Id.* at \*1–2.

<sup>55</sup> *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 18-35704, slip op. at 5, 37 (9th Cir. Mar. 4, 2020).

<sup>56</sup> See *id.* at 36–37.

<sup>57</sup> See *id.* at 5.

<sup>58</sup> See *Swinomish*, 228 F. Supp. 3d at 1183.

<sup>59</sup> See Lee J. Strang, *Damages as the Appropriate Remedy for "Abuse" of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law*, 15 GEO. MASON L. REV. 933, 934, 936–37 (2008) (characterizing injunction as the "American rule" for remedying abuse of easement).

breach has caused material harm to tribal land,<sup>60</sup> so the potential for compensatory damages is minimal.<sup>61</sup> In cases like this, the monetary relief awarded as a result of a breach of easement claim is generally limited to nominal damages.<sup>62</sup>

Unjust enrichment, by contrast, could yield a substantial remedy. As in *Voris*, the plaintiffs here have a straightforward claim for unjust enrichment: the parties had a contract that allowed BNSF to run a maximum of 350 train cars per week over the easement.<sup>63</sup> When litigation commenced, BNSF was running more than 1200 cars over Swinomish land each week.<sup>64</sup> Despite the existence of a contract, in other words, BNSF was taking more than the Swinomish nation had consented to. This is precisely the sort of breach that the law of unjust enrichment is well suited to address. To the extent that BNSF profited from its activity in excess of the limits of the easement agreement, the company violated the basic tenet that “[a] person is not permitted to profit by his own wrong.”<sup>65</sup> In cases like this, where “damages afford inadequate protection,” restitution for unjust enrichment entitles the plaintiff to “the profit realized by the [defendant] as a result of the breach,”<sup>66</sup> or “disgorgement.”<sup>67</sup> BNSF apparently violated its easement agreement with

<sup>60</sup> See Complaint at 12–13, *Swinomish*, 228 F. Supp. 3d 1171 (No. 15-cv-00543).

<sup>61</sup> In the past, the Ninth Circuit has considered the possibility of awarding damages equal to the “reasonable rental value” of the burdened property. *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1444 (9th Cir. 1987); see also *Hammond v. County of Madera*, 859 F.2d 797, 803–04 (9th Cir. 1988) (same). It is unclear how this rule would apply to the present case, wherein the defendant already pays rent to the plaintiff for use of the burdened property. See *Swinomish*, 228 F. Supp. 3d at 1175.

<sup>62</sup> See, e.g., *Smith v. Carbide & Chems. Corp.*, 298 F. Supp. 2d 561, 566 (W.D. Ky. 2004) (When “injury to the property rights of a plaintiff resulted in no decrease in the property’s fair market value . . . the plaintiff is entitled to nominal damages.” (quoting *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 71 (Ky. 2000))), *rev’d on other grounds*, 507 F.3d 372 (6th Cir. 2007). But see *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165–66 (Wis. 1997) (allowing punitive damages to attach to a trespass claim in a case involving “egregious conduct,” *id.* at 165).

<sup>63</sup> See Complaint at 4, *Swinomish*, 228 F. Supp. 3d 1171 (No. 15-cv-00543).

<sup>64</sup> See *id.* at 5. BNSF did not contest these facts. See *Swinomish*, 228 F. Supp. 3d at 1176.

<sup>65</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (AM. LAW INST. 2011).

<sup>66</sup> *Id.* § 39 (Profit from Opportunistic Breach); see, e.g., *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 676 (E.D. Pa. 2015) (“[T]he ‘opportunistic breach’ theory of restitution . . . supports a claim for relief when ‘a deliberate breach of contract results in profit to the defaulting promisor . . .’” (quoting *In re 400 Walnut Assocs., L.P.*, 506 B.R. 645, 668 (Bankr. E.D. Pa. 2014) (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011))); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011) (Enrichment by Misconduct; Disgorgement; Accounting).

<sup>67</sup> See *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) (“[D]isgorgement is a form of [r]estitution measured by the defendant’s wrongful gain.” (second alteration in original) (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (AM. LAW INST. 2011))). *Kokesh* concerned a statutory claim for restitution. *Id.* at 1639. There is some ongoing scholarly debate about whether “disgorgement” as a distinct remedy existed at common

the Tribe in order to contract with Tesoro, an oil refinery — the excess train cars were filled with crude oil.<sup>68</sup> In 2014, BNSF's crude-oil operations reportedly generated \$2.8 billion in revenue.<sup>69</sup> Had the Tribe raised an unjust enrichment claim alongside its claims for breach of contract and trespass, therefore, it might have found itself positioned to receive a significant monetary remedy — which could, in turn, have proven an effective deterrent of future breach.

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*Voris* and *Swinomish* present just two examples of recent disputes that might have had markedly different outcomes had the parties considered unjust enrichment as a legitimate legal claim. Yet despite a surfeit of overlooked opportunities, unjust enrichment is not totally absent from American jurisprudence. In the wake of the 2009 financial crisis, borrowers attached unjust enrichment claims to wrongful foreclosure actions.<sup>70</sup> Litigants have attempted to use unjust enrichment claims to hold tobacco companies to account for deceptive marketing tactics,<sup>71</sup> and states have deployed a similar tactic in litigation against the drug manufacturers responsible for the ongoing opioid crisis.<sup>72</sup> In an ongoing case, a Colorado county alleges as part of a suite of private law claims that energy companies have been unjustly enriched by selling fossil fuels “while concealing and misrepresenting their dangers.”<sup>73</sup> Recent cases

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law. See, e.g., Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 87–88, 88 n.115 (2018).

<sup>68</sup> See *Swinomish*, 228 F. Supp. 3d at 1176.

<sup>69</sup> Jarrett Renshaw, *Crude Oil Joins Rail Industry Staples as Key Revenue Producer*, REUTERS (Mar. 16, 2015, 2:06 PM), <https://www.reuters.com/article/us-railway-crude-bnsf-railway/crude-oil-joins-rail-industry-staples-as-key-revenue-producer-idUSKBN0MC21O20150316> [<https://perma.cc/57D7-MZGQ>]. Unfortunately, precise figures aren't available regarding BNSF's profits from the Tesoro contract or from its operations on Swinomish land specifically.

<sup>70</sup> See, e.g., *Fannie Mae v. LaRuffa*, No. CV-12-0301-TUC-RCC, 2013 WL 979418, at \*4, \*7 (D. Ariz. Jan. 25, 2013); *Koker v. Aurora Loan Servicing, LLC*, 915 F. Supp. 2d 51, 69 (D.D.C. 2013). For a summary of the type of lender conduct that could give rise to a claim for restitution, see Peter Linzer & Donna L. Huffman, *Unjust Impoverishment: Using Restitution Reasoning in Today's Mortgage Crisis*, 68 WASH. & LEE L. REV. 949, 963–64 (2011).

<sup>71</sup> See *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 513 (7th Cir. 2011). The unjust enrichment claim was dismissed in part on the grounds that “[u]njust enrichment is not a separate cause of action,” *id.* at 516 (emphasis omitted) (quoting *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 928 (Ill. App. Ct. 2009)), but rather is parasitic on the law of tort and contract, *see id.* This edition of *Developments in the Law* respectfully rejects this framing.

<sup>72</sup> See Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2302–03 (2017) (collecting cases).

<sup>73</sup> *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, No. 18-CV-01672, 2019 WL 4926764, at \*1 (D. Colo. Oct. 7, 2019); *see also* Matthew G. Lawson, *Climate Change Lawsuits Brought by Coastal Municipalities and States Against the Fossil Fuel Industry: Trends in Climate Change Litigation, Part 3*, JENNER & BLOCK: CORP. ENVTL. L. BLOG (Apr. 24, 2019), <https://jenner.com/library/posts/19029> [<https://perma.cc/XEP7-AGHD>] (identifying the use of state common law claims, including unjust enrichment, as a growing trend in climate change litigation).

like these are encouraging, but they suffer from inconsistency. Courts considering the claims have split on what unjust enrichment entails — sometimes outright rejecting that unjust enrichment sets out a valid basis for relief at all.<sup>74</sup> It is this problem that we hope to address, albeit modestly, in this edition of *Developments in the Law*.

To that end, we hope that this issue will prove a valuable starting point for practitioners and scholars as they seek to understand both the theoretical foundations and the real-world potential of unjust enrichment as a distinct private law claim. This edition of *Developments in the Law* is not, as many past editions have been, a summary of recent changes in a substantive area of doctrine. Rather, this issue explores what it could mean to revive unjust enrichment as a source of obligation on par with contract and tort.

The first two Chapters examine the theoretical underpinnings of unjust enrichment as a legal obligation and restitution as the associated liability. Chapters III and IV propose areas of substantive law that might benefit from serious consideration of unjust enrichment doctrine. The purpose of these Chapters is to spark conversation and contemplation about how this ancient legal principle may be used to address modern legal problems, while also providing a theoretical blueprint for doing so.

Chapter I traces an intellectual history of unjust enrichment.<sup>75</sup> The genesis of the concept is often attributed to a few legal scholars writing at the end of the nineteenth century.<sup>76</sup> But, as this Chapter emphasizes, the obligation we now call unjust enrichment has much earlier roots in both common law and equity — reaching back as far as Roman law. Confusion over this legacy, the Chapter argues, contributes to the principle's relative lack of popularity in American courts.

The Chapter charts this evolution: First, it analyzes restitution as a principle in Roman law. Then it follows the concept through the civil law tradition of Scotland and into England. There, the Chapter argues, unjust enrichment had a home in common law courts, under the guise of *indebitatus assumpsit* — or contract implied at law.<sup>77</sup> This source of interpersonal obligation was recognized at common law despite being understood as a “kind of equitable action.”<sup>78</sup> It mapped roughly to our sense of unjust enrichment today.

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<sup>74</sup> Compare *Cleary*, 656 F.3d at 516–17 (suggesting that unjust enrichment may not be a distinct source of obligation under Illinois state law), with *Raintree Homes, Inc. v. Village of Long Grove*, 807 N.E.2d 439, 445 (Ill. 2004) (recognizing unjust enrichment as the “substantive basis for [a] claim”).

<sup>75</sup> See *infra* ch. I, p. 2077.

<sup>76</sup> See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 11 (2004). The seminal text of this era is WILLIAM A. KEENER, *A TREATISE ON THE LAW OF QUASI-CONTRACTS* (1893), which generated some discussion in the *Harvard Law Review*, see sources cited *supra* note 6.

<sup>77</sup> See *infra* ch. I, pp. 2082–83.

<sup>78</sup> *Moses v. MacFerlan* (1760) 97 Eng. Rep. 676, 680; 2 Burr. 1005, 1011.

Those traditions of unjust enrichment — both as a common law source of obligation, and as an equitable principle — eventually found their way into American courts.<sup>79</sup> Eighteenth- and nineteenth-century American courts considered principles of unjust enrichment at both common law and equity,<sup>80</sup> and in the late nineteenth century, scholarship of unjust enrichment as a distinct obligation spanning law and equity flourished both in classrooms and in print.<sup>81</sup>

Unjust enrichment lost its early hold in American legal practice, the Chapter argues, when common law and equity were fused in American courts. Because unjust enrichment claims rely on a judge's perception of the equities, erasure of the doctrine's common law bona fides coalesced with the rise of the legal realist movement — and its attendant dismissal of equitable principles — to effectively repress unjust enrichment as a viable legal theory.<sup>82</sup> Although restitution for unjust enrichment thrived in the United Kingdom and in Commonwealth countries, it was dormant in the United States for most of the latter half of the twentieth century.<sup>83</sup>

More recently, scholars and practitioners have begun to understand unjust enrichment as a common law claim with underpinnings in natural law; the result has been a renewed interest in using the theory of unjust enrichment to litigate controversies ranging from domestic disputes<sup>84</sup> to large-scale war crimes.<sup>85</sup> Ultimately, the Chapter argues, the intellectual history of unjust enrichment reveals that organizing private law around the obligations of contract and tort is inadequate.<sup>86</sup> The Chapter concludes with a call for a more analytically precise theory of unjust enrichment based explicitly on an understanding of the principle as a distinct source of obligation rooted in both equity and common law.<sup>87</sup>

Chapter II builds on Chapter I's intellectual foundations by considering restitution as a remedy to victims of large-scale frauds.<sup>88</sup> It considers one particular sub-doctrine of restitution — the concept of “tracing” —

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<sup>79</sup> See *infra* ch. 1, pp. 2084–85.

<sup>80</sup> See, e.g., *Duncan v. Baker*, 21 Kan. 99, 105 (1878) (common law); *Cadwallader v. Mason*, 1 Wythe 188, 189 (Va. Ch. 1793) (equity).

<sup>81</sup> See *supra* note 76 and accompanying text.

<sup>82</sup> See *infra* ch. 1, p. 2089.

<sup>83</sup> See Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 101–03 (2008).

<sup>84</sup> See, e.g., Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1408–09 (2011).

<sup>85</sup> See, e.g., Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 11, 14 (2002).

<sup>86</sup> See *infra* ch. 1, p. 2100.

<sup>87</sup> See *infra* ch. 1, p. 2100.

<sup>88</sup> See *infra* ch. II, pp. 2101–02.

and ultimately uses the example of frauds to consider the problems that can accompany the adjudication of unjust enrichment claims.

Traditionally, restitution has entitled a plaintiff to the return of the *identifiable property* by which the defendant has been unjustly enriched — that is, either the plaintiff’s specific property, or any “traceable product” of that property, such as profit from a sale.<sup>89</sup> Multi-victim frauds such as Ponzi schemes, however, often involve the commingling of victims’ funds.<sup>90</sup> As a result, it can be difficult for investigators to identify the extent to which each *individual* victim’s assets have unjustly enriched the perpetrator of the fraud.<sup>91</sup>

Chapter II first examines the “tracing” tools that courts have traditionally used to award appropriate restitutionary remedies to fraud victims.<sup>92</sup> Because commingled funds can be hard to track, the doctrine of reuniting Ponzi scheme victims with their “identifiable property” can result in an uncomfortable distinction between victims: those who are able to “trace” their property through the defendant’s fraudulent gains may find themselves in a much stronger position than victims who are unable to identify the extent to which their *specific funds* unjustly enriched the fraudster.<sup>93</sup> In response to this, several courts have adopted a “pro rata” solution, which allows victims to recover from a fraudulent scheme’s assets in proportion to the amount they contributed regardless of whether a given victim’s property is traceable.<sup>94</sup>

The solution of allowing victims to recover pro rata has grown in popularity in recent decades, powered by judicial notions of equity.<sup>95</sup> But this Chapter argues that this reliance on equity — which, as employed in multi-victim fraud cases, is essentially a fig leaf for judicial discretion — is mistaken for two reasons. First, it untethers remedy from the common law of restitution, creating a system of justice almost wholly reliant on a single judge’s sense of first-order fairness.<sup>96</sup> The result is a system of justice comprising judicial opinions that are inconsistent and, consequently, of limited precedential value.<sup>97</sup> Second, a discretionary approach to restitution undermines the standards intrinsic to the practice of judging.<sup>98</sup> Using Professor Alasdair MacIntyre’s theory

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<sup>89</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 (AM. LAW INST. 2011).

<sup>90</sup> See Mallory A. Sullivan, Note, *When the Bezzle Bursts: Restitutionary Distribution of Assets After Ponzi Schemes Enter Bankruptcy*, 68 WASH. & LEE L. REV. 1589, 1605–06 (2011).

<sup>91</sup> See *id.*

<sup>92</sup> See *infra* ch. II, pp. 2103–05.

<sup>93</sup> See Andrew Kull, Essay, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 318–19 (2014).

<sup>94</sup> See, e.g., *United States v. Durham*, 86 F.3d 70, 72–73 (5th Cir. 1996); *SEC v. Elliott*, 953 F.2d 1560, 1569–70 (11th Cir. 1992).

<sup>95</sup> See Kull, *supra* note 93, at 293 n.4 (collecting cases).

<sup>96</sup> See *infra* ch. II, p. 2110.

<sup>97</sup> See *infra*, pp. 2113–15.

<sup>98</sup> See *infra*, p. 2115.

of excellence in practice as a guide,<sup>99</sup> Chapter II argues that the insufficient structure of the pro rata approach to restitution harms the practice of judging as a whole. Restitution and unjust enrichment may indeed be principles rooted in equity, but equity unmoored from law is a “castle in the air.”<sup>100</sup> The solution, this Chapter argues, is to reground restitution in its common law traditions.<sup>101</sup>

Building on this theoretical basis, Chapters III and IV look forward. They consider how unjust enrichment can apply in two very different contexts: the dissolution of unmarried cohabiting partnerships and ongoing controversies over land use in the Hawaiian Islands. In doing so, they develop concrete examples of how the principles of unjust enrichment could reshape modern conflicts not previously considered in those terms.

Chapter III proposes that unjust enrichment provides a suitable framework for vindicating the rights of unmarried cohabitants who might otherwise be viewed as legal strangers.<sup>102</sup> Courts have struggled with how best to approach the division of property following the dissolution of a nonmarital relationship.<sup>103</sup> To the extent that legal institutions have been able to grapple with unmarried cohabiting relationships *at all*, they have traditionally done so in one of two ways: either by uneasily recasting romantic relationships as implied contracts reflecting bargained-for exchange, or by grafting marital status onto any relationship a court deems “marriage-like.”<sup>104</sup>

This Chapter argues that these two theories are insufficient as bases for resolving property disputes between unmarried former partners. By contrast, restitution for unjust enrichment allows cohabitants to seek a legal remedy for the dissolution of unmarried partnerships without imposing ill-fitting contract- or status-based structures on diverse family relationships. This idea in itself is not new; courts have considered unjust enrichment claims related to the dissolution of unmarried partnerships for decades.<sup>105</sup> But Chapter III argues that courts’ resolution of

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<sup>99</sup> See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 187–94 (2d ed. 1984). Under MacIntyre’s framework, a “practice” is “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence . . . are systematically extended.” *Id.* at 187.

<sup>100</sup> F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 19 (2d ed. 1949).

<sup>101</sup> See *infra* ch. II, pp. 2121–23.

<sup>102</sup> See *infra* ch. III, p. 2128.

<sup>103</sup> See generally Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 *LAW & POL’Y* 119, 124–45 (2004).

<sup>104</sup> Cf. Janet Halley, *What is Family Law?: A Genealogy, Part I*, 23 *YALE J.L. & HUMAN.* 1, 6–12 (2011) (exploring the distinction between contract and status approaches).

<sup>105</sup> See Kovacic-Fleischer, *supra* note 84, at 1419.

these claims has overlooked an important facet of unjust enrichment in the context of familial relationships: domestic labor.<sup>106</sup>

Chapter III seeks to rectify this omission by arguing that the value of domestic labor services should be included in courts' accountings of what restitution is due plaintiffs seeking to dissolve unmarried partnerships. As women disproportionately bear the brunt of domestic labor,<sup>107</sup> this Chapter argues that failure to account for the value of this labor results in an unfair distribution of assets when partnerships are dissolved.<sup>108</sup>

Chapter IV explores the potential of unjust enrichment as a basis for the restitution of land to Native Hawaiian people. Since 2015, Native Hawaiian activists and their allies have prevented developers from beginning construction of a new Thirty Meter Telescope on Mauna Kea, the dormant volcano on the island of Hawai'i.<sup>109</sup> With this controversy as a jumping-off point, Chapter IV argues that the United States and the State of Hawai'i have been unjustly enriched by lands seized from the Kingdom of Hawai'i and from its people, and that courts should consider land restitution as a viable remedy for this wrong.<sup>110</sup>

The Chapter begins by recounting the history of Hawaiian lands. Prior to Western contact, Native Hawaiians communally cultivated parcels of land known as ahupua'a.<sup>111</sup> Following the arrival of Western settlers in the late eighteenth century, ahupua'a were redistributed into private ownership; as part of this Māhele, or division, the Kingdom of Hawai'i and the Hawaiian royal family each retained large swaths of land — known as the Government Lands and the Crown Lands, respectively.<sup>112</sup> Both Government and Crown Lands were seized by the United States after the Overthrow of the Kingdom of Hawai'i, and these lands were transferred in trust to the State of Hawai'i when it joined the union.<sup>113</sup> Although dethroned Queen Lili'uokalani sued the United States in the Court of Claims immediately following the Overthrow,<sup>114</sup>

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<sup>106</sup> See *infra* ch. III, pp. 2136–37.

<sup>107</sup> See Yang Hu & Deniz Yucel, *What Fairness? Gendered Housework Division and Family Satisfaction Across 30 Countries*, 34 EUR. SOC. REV. 92, 97 (2018).

<sup>108</sup> See *infra* ch. III, pp. 2138–39.

<sup>109</sup> See generally Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, VOX (Jul. 24, 2019, 12:30 PM), <https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii> [<https://perma.cc/AMW2-S4EE>].

<sup>110</sup> See *infra* ch. IV, pp. 2149–50.

<sup>111</sup> See Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE 2, 8–9 (Melody Kapilialoha MacKenzie et al. eds., 2015).

<sup>112</sup> See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 51–58 (2008).

<sup>113</sup> See Melody Kapilialoha MacKenzie, *Public Land Trust*, in NATIVE HAWAIIAN LAW, *supra* note 111, at 76, 79, 82.

<sup>114</sup> *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

the Government and Crown Lands — including Mauna Kea — remain held in trust by the State of Hawai‘i.<sup>115</sup>

Pointing to common law principles of duress and breach of fiduciary duty, as well as principles of international law,<sup>116</sup> Chapter IV argues that the history of the Hawaiian land maps onto the basic pillars of unjust enrichment: the United States, and its successors in interest, have retained a benefit of enormous value without adequate basis.<sup>117</sup> The Thirty Meter Telescope has already been litigated in Hawaiian state courts,<sup>118</sup> but this Chapter argues that this litigation should be reimagined through the lens of restitution for unjust enrichment.<sup>119</sup> Using Mauna Kea as a case study, this Chapter considers and responds to some of the challenges — including identifying appropriate parties and a possible laches defense — likely to arise should Native Hawaiian people choose to pursue land restitution in this way.<sup>120</sup> The Chapter — and this edition of *Developments in the Law* — concludes with a call to consider the potential of private law claims as a tool for dismantling the widespread harms of U.S. settler colonialism.<sup>121</sup>

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The issue thus presents an intellectual history of unjust enrichment, examines some theoretical problems with adjudicating appropriate restitutionary remedies, and explores potentialities for unjust enrichment in the modern day. In composing this issue, we considered and ultimately left out many rich veins of discussion — from the validity of disgorgement as a remedy to the possibility of unjust enrichment as a path to relief for people incarcerated without trial. Our intent in publishing this issue is not to summarize or restate the doctrine. Instead, it is to serve as a catalyst for discussion about the future of unjust enrichment. As such, these Chapters are neither definitive nor comprehensive; rather, our sincere hope is that they will be generative.

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<sup>115</sup> The summit of Mauna Kea is part of the ahupua‘a of Ka‘ohe, see *Pualani Kanahale on Mauna Kea, Kaohe, and The Elementals*, BIG ISLAND VIDEO NEWS (Apr. 28, 2015, 12:56 AM), <https://www.bigislandvideonews.com/2015/04/28/video-pualani-kanahale-on-mauna-kea-kaohe-and-the-elementals> [<https://perma.cc/HK6M-865B>], which was set aside as part of the Government Lands in the Māhele, see An Act Relating to the Lands of His Majesty the King and of the Government, Supplement to the Statute Laws of His Majesty, Kamehameha III, at 22, 25, 31, 41 (1848).

<sup>116</sup> See *infra* ch. IV, pp. 2158–60.

<sup>117</sup> See *infra* ch. IV, p. 2149.

<sup>118</sup> See *In re* Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 431 P.3d 752 (Haw. 2018).

<sup>119</sup> See *infra* ch. IV, p. 2163.

<sup>120</sup> See *infra* ch. IV, pp. 2164–65, 2169.

<sup>121</sup> See *infra* ch. IV, pp. 2170–71.