

2017

## Wrongful Benefit & Arctic Drilling

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### Recommended Citation

Cornell, Nicolas, co-author. "Wrongful Benefit & Arctic Drilling." Sarah E. Light, co-author. *UC Davis L. Rev.* 50, no. 5 (2017): 1845-910.

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# UC DAVIS LAW REVIEW

VOL. 50, NO. 5



JUNE 2017

## Wrongful Benefit & Arctic Drilling

Nicolas Cornell & Sarah E. Light\*

*The law contains a diverse range of doctrines — “slayer rules” that prevent murderers from inheriting, restrictions on trade in “conflict diamonds,” the Fourth Amendment’s exclusion of evidence obtained through unconstitutional search, and many more — that seem to instantiate a general principle that it can be wrong to profit from past harms or misconduct. This Article explores the contours of this general normative principle, which we call the wrongful benefit principle. As we illustrate, the wrongful benefit principle places constraints both on whether anyone should be permitted to exploit ethically tainted goods, and who may be permitted to profit or otherwise benefit from past wrongful or harmful conduct. We test the boundaries of the principle by examining its application to the pressing and complex case of Arctic drilling. The burning of fossil fuels and the resulting melting of Arctic ice have, ironically, opened access to oil fields in the Arctic that were previously inaccessible. In our view, the historical cause of this opportunity is normatively significant to questions about what oil*

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\* Copyright © 2017 Nicolas Cornell and Sarah E. Light. Assistant Professors of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania. Thanks to Brian Berkey, Eric Biber, Matt Caulfield, Peter Conti-Brown, Emily Dupraz, Daniel Farber, Gwen Gordon, Sarah Jansen, David Miller, Kristi Olson, Eric Orts, Amy Sepinwall, Richard Shell, Alan Strudler, and David Zaring, as well as participants in workshops at Temple, Haub, and Vermont Law Schools, Bowdoin College, the American Constitution Society Public Law Workshop, the Philosophy Desert Workshop, and the Society for Applied Philosophy for comments and insights on earlier drafts. All errors are our own.

*extraction should be permitted in the Arctic in the future. We conclude by suggesting the kind of legal responses — both domestic and global — that can incorporate the wrongful benefit principle.*

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## INTRODUCTION

Climate change, driven by past fossil fuel consumption, has begun to open up significant portions of the Arctic Ocean that were previously inaccessibly frozen. This new accessibility has, in turn, created profitable new opportunities. Ironically, the most notable opportunity is for more oil drilling.<sup>1</sup> Drilling in such formerly inaccessible areas of the Arctic would thus involve capitalizing on the very environmental changes that past fossil fuel consumption has wrought on the planet.<sup>2</sup>

Do such backward-looking considerations — facts about where the opportunity comes from — matter? We believe that they do. Across a range of contexts, the law operates to prevent actors from benefiting from past harm and past wrongs. In this Article, we argue that these doctrines coalesce around a normative idea that we call the *wrongful benefit principle*, and we explore how this normative idea would apply to the new and pressing issue of Arctic drilling.

Legally and ethically, it is often impermissible to exploit an opportunity that has been wrongfully acquired. As an initial matter, a perpetrator generally ought not profit from *his or her own* past wrongful acts.<sup>3</sup> For example, the person who has killed a family member commits a further wrong when he seeks to collect and retain life insurance payments, and judicial doctrine generally precludes such conduct.<sup>4</sup> The Fourth Amendment exclusionary rule prevents the prosecutor from introducing into evidence documents obtained by his own agents' unconstitutional search.<sup>5</sup>

Other examples demonstrate, however, that even *innocent* parties who did not cause or contribute to past harms may have obligations not to exploit them. Put another way, certain goods or opportunities to profit themselves become “tainted” as a result of the process by which they were acquired. Such tainted goods include stolen goods

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<sup>1</sup> See, e.g., Bryan Walsh, *Arctic Sea Ice Vanishes — and the Oil Rigs Move In*, TIME (Sept. 11, 2012), <http://science.time.com/2012/09/11/arctic-sea-ice-vanishes-and-the-oil-rigs-move-in/> (noting a U.S. Geological Survey that indicates more than 90 billion barrels of Arctic oil may be newly accessible); *The Melting North*, THE ECONOMIST (June 16, 2012), <http://www.economist.com/node/21556798> (noting that large oil companies stand to profit from the receding polar ice caps).

<sup>2</sup> When referring to the “Arctic,” we do not mean just those areas of the Outer Continental Shelf (OCS) within the jurisdiction of the United States, but the entire Arctic Ocean, including areas governed by other nations, and areas under global governance. See *infra* Parts IV, V (discussing global governance of the Arctic).

<sup>3</sup> See *infra* Part II.

<sup>4</sup> See *infra* Part II.A.

<sup>5</sup> See *infra* Part II.B.

and so-called conflict or “blood” diamonds, which may raise ethical concerns even for those entirely innocent of any role in their wrongful procurement.<sup>6</sup> Similarly, anti-price gouging laws may preclude merchants from profiting as a result of a natural disaster they did not cause by unconscionably raising prices on necessities.<sup>7</sup>

Drawing upon cases in which courts and legislators have considered issues like these, we describe what we call the *wrongful benefit principle*: it is wrong to benefit knowingly from a bad act if the benefit one would receive is sufficiently connected to the bad act. This general principle captures both the *perpetrator-oriented* cases in which a party has caused or contributed to the past wrong him or herself, and the *object-oriented* cases in which even innocent parties should not benefit from ethically tainted goods. But the principle, as thus described, is still only schematic. It leaves open what counts as a “bad act” and what constitutes a “sufficiently connected” benefit. Filling these ideas in different ways can yield stronger or weaker versions of the principle.<sup>8</sup>

Arctic drilling in newly accessible areas — critical in its own right — offers a new and nuanced case study through which to explore the contours of this broader principle. Much of the controversy around Arctic drilling pertains to forward-looking concerns about the potential impact on the climate, the pristine environment in the Arctic, and marine life.<sup>9</sup> However, there is arguably another, largely overlooked dimension as well. The fact that the fossil fuels buried below the melting Arctic ice are becoming accessible only because of past harmful conduct in burning fossil fuels renders drilling in the Arctic distinct. These circumstances distinguish Arctic drilling from drilling in regions that have long been accessible in the absence of anthropogenic climate change, offering an additional reason for seeing it as ethically and legally problematic.

We argue that the backward-looking considerations about how we got here matter, in some fashion or another, to what we should do going forward. In particular, we contend that the wrongful benefit principle places some limits both on those actors who directly contributed to the past harm and also on what any actor may permissibly do with drilling opportunities to profit that are arguably “tainted” in at least some respect.<sup>10</sup> If this is correct, it holds

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<sup>6</sup> See *infra* Parts II.C, II.D.

<sup>7</sup> See *infra* Part II.E.

<sup>8</sup> See *infra* Parts I, IV.

<sup>9</sup> See *infra* Part III.A.

<sup>10</sup> One of the most interesting aspects of using Arctic drilling as a case study is

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significant implications for how the international community and domestic policy should frame questions about Arctic oil extraction, as well as broader implications beyond the Arctic case.

This Article is structured as follows. In Part I, we begin with our conclusion. We briefly set forth a sketch of the wrongful benefit principle to give context for the discussion that follows, in which we explain its derivation and examine its contours. In Part II, we examine a range of existing judicial doctrines and legal rules that place constraints on exploiting ethically problematic situations to tease out insights from other contexts. From these diverse cases, we extract a general normative principle that unifies these insights. In Part III we offer the case study of Arctic drilling, describing the increasing accessibility of its resources, global efforts to exploit those resources, and the role of would-be suitors — both nation-states and the fossil-fuel industry — in bringing about climate change. In Part IV, using the case study of Arctic drilling, we examine the wrongful benefit principle's content, limitations, and theoretical underpinnings.

Part V shifts from a discussion of principle to the concrete world of policy. We recommend three courses of action to effectuate the principle in global law and policy in descending order of preference: a moratorium on drilling in areas of the Arctic exposed by a warming climate, adoption of global certification regime modeled after the Kimberley Process Certification Scheme for conflict diamonds, and a more expansive reading of the existing cost-benefit analysis that informs current Arctic law by incorporating these backward-looking

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that we are all, in some sense, contributors to climate change, though we do not all have the capacity to drill for fossil fuels in the warming Arctic. *See infra* Part III.B. We note, however, that our project does not entail an effort to apportion responsibility among various contributors for their relative share of the costs of mitigation or adaptation to climate change. There is already a rich literature both in the law and in environmental ethics regarding who bears an obligation to pay these costs, focusing both on nation-states, and the relative responsibility of producers and consumers. *See, e.g.,* Daniel Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605 (2007) [hereinafter *Basic Compensation*] (arguing that compensation from responsible parties to victims for costs of adaptation is appropriate); Matthew Adler, *Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859 (2007) (responding to Farber's claims for compensation); Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1565 (2008) (contending that arguments from distributive and corrective justice fail to justify "special obligations for greenhouse gas reductions on the United States"); Amy Sinden, *Allocating the Costs of the Climate Crisis: Efficiency Versus Justice*, 85 WASH. L. REV. 293, 323-39 (2010) (examining who should pay for mitigation and adaptation costs under different theories of justice).

ethical norms. We make this shift consciously, to demonstrate that taking the principle seriously has global implications.

#### I. THE WRONGFUL BENEFIT PRINCIPLE

The new opportunity to access oil and gas in the Arctic poses a fundamental question: Is there anything wrong with reaping the benefit from a past bad act or event? We believe that there is.<sup>11</sup> Our aim in this Part is to describe a very rough outline of the principle at work here, which we will then fill in, defend, and explore in the remainder of the Article.

As a starting point, there appears to be something independently wrong with profiting from a past harmful act or event.<sup>12</sup> For example, if someone kills her family member, she commits a further wrong by inheriting the family fortune from the victim.<sup>13</sup> The remorseful murderer who remits her ill-gotten inheritance to a charitable cause does less wrong than the murderer who willingly accepts the bounty from her completed crime. Even innocent parties — be they purchasers trying to save on a diamond engagement ring or struggling small business owners during a hurricane<sup>14</sup> — may be doing something wrong by exploiting unfortunate circumstances for their own benefit. The law exerts itself upon each of these situations — and many other related situations — in interesting and overlapping ways that we will explore in depth below.

But, before wading into the details of how the law handles such situations or how any of this might matter to the Arctic, we begin by

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<sup>11</sup> Although this idea has received recent attention in a range of new contexts, *see, e.g.*, Ronald M. Green, *Benefiting from 'Evil': An Incipient Moral Problem in Human Stem Cell Research*, 16 *BIOETHICS* 544 (2002) (discussing profiting from morally wrong behavior in the context of stem cell research), the basic moral thought has been around for a very long time. *See Proverbs* 10:2 (New Int'l Version) ("Ill-gotten treasures have no lasting value.").

<sup>12</sup> Our claim is that profiting is, as moral philosophers might put it, *pro tanto* wrong. By analogy, breaking a promise is also *pro tanto* wrong. Despite this wrongness, there may nonetheless be situations in which one should or must break a promise. It is still wrong, even though it is the thing to do in these circumstances. That an action is *pro tanto* wrong is not determinative of what one ought to do all things considered; however, it is more than merely one consideration among others. When we discuss the obligation not to benefit, we should be read as describing just such a *pro tanto* duty or obligation — terms that we use interchangeably. For the distinction between *pro tanto*, *prima facie*, and all-things-considered duties, *see* Andrew E. Reisner, *Prima Facie and Pro Tanto Oughts*, in *THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS* (Hugh LaFollette, ed., 2013).

<sup>13</sup> *See infra* Part II.A.

<sup>14</sup> *See infra* Parts II.D, II.E.

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sketching the core ethical principle, which we believe underlies all these cases, the *wrongful benefit principle*: It is wrong to benefit knowingly from a bad act if the benefit one would receive is sufficiently connected to the bad act. This normative principle applies to situations like that of the inheriting murderer and — depending on how it is filled in — might extend to reach cases like that of Arctic drilling.

As stated above, however, the principle still needs a great deal of clarification. In particular, there are two elements that need to be filled in further: First, what is meant by “bad act”? That is, what sorts of actions does one have an obligation not to benefit from? Does this principle extend beyond acts that are intentionally bad or illegal? And, second, what does it mean to be “sufficiently connected”? That is, how must the benefit received be related to the bad act that produced it? Can the connection be only based on the person or entity that committed the bad act? Or can the connection follow the object or the goods? In what follows, we demonstrate how these two variables — the nature of the act’s “badness,” and the connection between the bad act and benefit received — interact to produce four different versions of the wrongful benefit principle.

Regarding the first question, the wrongful benefit principle takes on different character depending on what kind of culpability one requires. In one form, it requires truly culpable wrongdoing; in another, even innocent but harmful acts or events may trigger it. Regarding the second question, wrongful benefit can have either a *perpetrator-oriented dimension* or an *object-oriented dimension*. As in the murderer case, benefitting can be wrong because the person or entity who benefits has perpetrated the injustice from which the benefit now flows. More recently, however, ethical theorists have noted that remedial obligations can also be object-oriented.<sup>15</sup> That is, due to their history, some objects may impose on their prospective acquirers — even innocent acquirers — an obligation to refuse or relinquish them. Conflict diamonds, for example, arguably impose object-oriented obligations.<sup>16</sup>

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<sup>15</sup> For more on this distinction, see Robert E. Goodin, *Disgorging the Fruits of Historical Wrongdoing*, 107 AM. POL. SCI. REV. 478 (2013); see also Edward Page & Avia Pasternak, *Guest Editor’s Introduction*, 31 J. APPLIED PHIL. 331, 331 (2014).

<sup>16</sup> See Kate Sheppard, *How Do I Buy an Ethical Engagement Ring?*, MOTHER JONES (Oct. 17, 2011, 6:00 AM), <http://www.motherjones.com/environment/2011/10/how-do-i-buy-ethical-engagement-ring>; *infra* Part II.D.



Assembling these different dimensions generates at least four different ways to understand the wrongful benefit principle, as described in Table 1.

Table 1

		“Sufficiently Connected”	
		Perpetrator-Oriented	Object-Oriented
“Bad Act”	Culpable Acts	Box 1: Profiting from one’s own culpable act	Box 3: Taking the profits of another’s culpable act
	Innocent But Harmful Acts	Box 2: Profiting from one’s own innocent but harmful act	Box 4: Profiting from another’s innocent but harmful act

These different understandings are progressively more expansive. While we expect most readers to accept the application of the wrongful benefit principle to cases that fall into Box 1, we recognize that the application to Box 4 is quite a bit more contentious. The reader who finds these more expansive understandings implausible need not reject the wrongful benefit principle entirely, but simply take a more conservative understanding of it. We intend the basic framework to be acceptable to a wide range of views.

In order to defend the existence of this principle and in order to give the framework more determinate content, we start in Part II by considering various legal contexts that seem to instantiate a common concern about benefitting improperly from wrongdoing or disaster. In the subsequent Parts, we turn our lens to the Arctic, which we consider an excellent case study for the complexities and limits of the principle. Discussing Arctic drilling against this backdrop exerts pressure in two different, equally important directions: first, it presses toward a more expansive understanding of certain normative considerations, and second, it shows how even familiar and less expansive premises may press toward significant legal and policy outcomes. That is, thinking about the Arctic potentially strengthens and expands the wrongful benefit principle, and thinking about even a minimal wrongful benefit principle would strengthen our response to climate change and the Arctic.

## II. WRONGFULLY BENEFITTING IN THE LAW

In a range of contexts, the law suggests that there is something ethically problematic with benefitting from a past bad act. In this Part, we examine a variety of these legal doctrines. These contexts are not intended to be comprehensive. Instead, our analysis is meant to suggest both that there is some common normative commitment that appears to transcend particular content areas, and that this commitment takes a variety of forms. Diverse though they are, these doctrines form a sufficiently unified constellation that something must exist that holds them together.

A. *Slayer Rules & Son of Sam Laws*

A clear-cut example of a wrongful benefit arises when a criminal would profit directly or indirectly from her crime. Unsurprisingly, the law has generally evolved — through various judge- and legislature-fashioned mechanisms — to ensure the truth of the old adage that crime does not pay.

Under what is generally called the “slayer rule,” if someone murders her family member, she cannot then inherit the victim’s fortune.<sup>17</sup> This general principle has a long history, originally connected with old common law doctrines including “corruption of blood.”<sup>18</sup> In America, the problem most famously came to the fore in *Riggs v. Palmer*.<sup>19</sup> Elmer Palmer poisoned his grandfather, Francis Palmer, knowing that he was to be the recipient of his grandfather’s sizeable fortune and fearing that his grandfather might change the will.<sup>20</sup> Elmer’s two aunts, who were only left small legacies in the will, sought to invalidate their father’s will.<sup>21</sup> The court denied the murderous grandson his

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<sup>17</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(2) (AM. LAW INST. 2011) (“A slayer’s acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim’s death constitutes unjust enrichment that the slayer will not be allowed to retain.”). See generally Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 804-07 (2012) (tracing the slayer rule, in part, to the maxim *ex turpi causa non oritur actio*, which proclaims that, from a dishonorable cause, no claim arises).

<sup>18</sup> See Alison Reppy, *The Slayer’s Bounty — History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 241 (1942) (describing the history of legal responses to murderous heirs).

<sup>19</sup> *Riggs v. Palmer*, 115 N.Y. 506 (1889); see also *Mut. Life Ins. Co. of N.Y. v. Armstrong*, 117 U.S. 591, 600 (1886) (predating *Riggs* and holding that a murderer could not benefit under his victim’s life insurance policy).

<sup>20</sup> *Riggs*, 115 N.Y. at 508-09.

<sup>21</sup> *Id.* at 508.

inheritance, starkly declaring that to allow the grandson to “enjoy the fruits of his crime” would be “a reproach to the jurisprudence of our state.”<sup>22</sup> Contrary to the argument pressed by the dissent,<sup>23</sup> the *Riggs* court determined that denying the inheritance was not adding a further punishment beyond the criminal sanction, but rather simply ensuring that “he shall not acquire property by his crime, and thus be rewarded for its commission”<sup>24</sup> — that is, ensuring that he not wrongfully benefit.<sup>25</sup>

*Riggs* is noteworthy not so much for the moral principle that it embodies — namely, that a murderer should not inherit his victim’s estate — which seems intuitive. Rather, what makes the case notable is that this intuitive principle shaped the common-law decision despite arguably having little foundation in positive law at the time.<sup>26</sup> But, as the *Riggs* court noted,<sup>27</sup> civil law jurisdictions have long explicitly prohibited murderers from inheriting.<sup>28</sup> Since *Riggs*, most American jurisdictions have enacted so-called “slayer statutes” that explicitly prohibit murderers from inheriting.<sup>29</sup>

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<sup>22</sup> *Id.* at 512-13; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 28-29 (1977) (describing *Riggs* as founded upon “the principle that no man may profit from his own wrong”).

<sup>23</sup> *Riggs*, 115 N.Y. at 519 (Gray, J., dissenting) (“[T]o concede appellants’ views would involve the imposition of an additional punishment or penalty upon the respondent. What power or warrant have the courts to add to the respondent’s penalties by depriving him of property?”).

<sup>24</sup> *Id.* at 514 (majority opinion).

<sup>25</sup> The same reasoning is applied in much more mundane cases as well. See *Mazzei v. Comm’r of Internal Revenue*, 61 T.C. 497, 497 (1974) (disallowing a tax deduction for funds stolen by a co-conspirator in a scheme to produce counterfeit currency).

<sup>26</sup> See DWORKIN, *supra* note 22; cf. Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 47 (2000) (describing the issue in *Riggs* as how to define the “working relationship” between courts and the legislature). But see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1707-08 (1998) (arguing that the only issue in *Riggs* was proper interpretation of the wills statute).

<sup>27</sup> *Riggs*, 115 N.Y. at 513.

<sup>28</sup> See Cohen, *supra* note 17, at 797 n.33 (citing sources).

<sup>29</sup> See Tara L. Pehush, Comment, *Maryland Is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271, 271-72 n.9 (2005) (compiling 42 state statutes); Anne-Marie Rhodes, *Consequences of Heirs’ Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 980 (2007) (finding some version of the rule in 48 states). For an early and influential advocacy of the statutory approach, see John W. Wade, *Acquisition of Property by Wilfully Killing Another — A Statutory Solution*, 49 HARV. L. REV. 715 (1936). In some jurisdictions, statutes even bar inheritance by those who have been abusers leading up to a victim’s death. See, e.g., OR. REV. STAT. ANN. §§ 112.455(1), 112.455(2)(b), 112.465(1) (2016) (covering physical or financial abuse within five years of a

Notably, slayer rules sometimes prevent inheritance by parties who are not legally culpable. First, some slayer statutes disinherit not merely a murderer but also the murderer's heirs. For example, Maryland precludes even uninvolved, innocent heirs from inheriting through a murderer.<sup>30</sup> Second, some states do not require a criminal conviction to preclude inheritance. For example, the Washington Supreme Court has recently joined other states in holding that the state's slayer statute bars inheritance even where the would-be heir was found not guilty by reason of insanity.<sup>31</sup> In North Dakota, it was determined that the slayer statute applies even where the killer is too young to be charged with a felony.<sup>32</sup> What these details of the slayer rule suggest is that the rule is ultimately concerned not with a perpetrator's culpability *per se* but with wrongful inheritance. We prevent parties from benefitting from violence in which they participated, even if perhaps not in a way that was criminally culpable. But we also, at times, go further to preclude parties — even entirely innocent parties — from benefiting from the wrongful conduct of others.

The general principle behind the slayer rule — that one ought not profit from crime — is not limited to inheritance cases.<sup>33</sup> Legislatures have often sought to prevent criminals from profiting from their crimes in other ways as well. Most famously, after rumors circulated that publishers and the film industry were considering giving large sums of money to David Berkowitz, the convicted “Son of Sam” serial killer, the New York state legislature passed a law requiring that profits from such publications or films be held in escrow for the purpose of paying victims who obtain a civil judgment.<sup>34</sup> Similar so-called “Son of Sam laws” have now been enacted federally and in most

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testator's death).

<sup>30</sup> See *Cook v. Grierson*, 845 A.2d 1231, 1231-32 (Md. Ct. App. 2004) (“Because the slayer never acquired a beneficial interest in the victim's estate, anyone claiming through the slayer, even though innocent of any wrong doing, may not share in the victim's estate.”).

<sup>31</sup> *In re Estate of Kissinger*, 206 P.3d 665, 666 (Wash. 2009); see also *Osman v. Osman*, 737 S.E.2d 876, 876 (Va. 2013) (applying slayer rule in case of insanity); *Congleton v. Sansom*, 664 So. 2d 276, 277-78 (Fla. Dist. Ct. App. 1995) (applying Florida slayer statute in case of insanity).

<sup>32</sup> *In re Estates of Josephson*, 297 N.W.2d 444, 449 (N.D. 1980).

<sup>33</sup> See Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 LOY. L.A. ENT. L. REV. 341, 344-45 (2004) (characterizing *Riggs v. Palmer* as “lay[ing] grounds” for Son of Sam laws).

<sup>34</sup> See N.Y. Exec. Law § 632-a(1) (2011).

American states.<sup>35</sup> Whereas general forfeiture statutes take the direct proceeds from the commission of a crime, Son of Sam laws target profits arising indirectly from the notoriety a crime produces.<sup>36</sup> This raises complex First Amendment issues, which led to New York's original law being struck down by the Supreme Court.<sup>37</sup> But the Court acknowledged that "[t]he State . . . has an undisputed compelling interest in ensuring that criminals do not profit from their crimes" and that a better tailored law might survive review.<sup>38</sup> While Son of Sam laws continue to be challenged,<sup>39</sup> they also continue to bear on high-profile criminals ranging from "real housewives" stars,<sup>40</sup> to the "Wolf of Wall Street."<sup>41</sup>

Slayer rules and Son of Sam laws share a common underlying motivation to ensure that criminals not be allowed to profit from their crimes. While laws sometimes have ancillary justifications in terms of deterring crime or compensating victims, their real moral thrust seems to be aimed at preventing a benefit that is perceived as wrongful.

#### B. Fourth Amendment Exclusionary Rule

The Fourth Amendment's exclusionary rule, which prevents the state from benefitting at trial from an unconstitutional search or seizure, offers another example of a legal prohibition on benefitting from a wrong.

At common law, evidence improperly obtained by the state — if relevant — could be introduced in a criminal prosecution.<sup>42</sup> In the

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<sup>35</sup> See, e.g., *Keenan v. Super. Ct. of L.A. Cty.*, 40 P.3d 718, 721-22 (Cal. 2002) (overturning California's "Son of Sam law" as applied to the kidnapper of Frank Sinatra, Jr.).

<sup>36</sup> See, e.g., 18 U.S.C. § 3681 (2012); David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 428-29 (1988).

<sup>37</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

<sup>38</sup> *Id.* at 119.

<sup>39</sup> See Lindsey R. Hammitt, *What's Wrong with the Picture? Reviewing Prison Arts in America*, 30 ST. LOUIS U. PUB. L. REV. 575, 578, 605-07 (2011) (discussing challenges to Son of Sam laws by statutes and case law).

<sup>40</sup> See Vicki Hyman, 'Real Housewives' sentencing: Do 'Son of Sam' laws apply to Joe and Teresa Giudice?, N.J. STAR-LEDGER (Oct. 3, 2014, 4:31 PM), [http://www.nj.com/entertainment/celebrities/index.ssf/2014/10/joe\\_and\\_teresa\\_giudice\\_sentencing\\_son\\_of\\_sam.html](http://www.nj.com/entertainment/celebrities/index.ssf/2014/10/joe_and_teresa_giudice_sentencing_son_of_sam.html).

<sup>41</sup> See William Schindler, *Punishing the Wolf of Wall Street: Jordan Belfort's Second Act*, BRIGHT LIGHTS FILM J. (June 19, 2014), <http://brightlightsfilm.com/punishing-wolf-wall-street-jordan-belforts-second-act>.

<sup>42</sup> *People v. Defore*, 150 N.E. 585, 587-88 (N.Y. 1926) (Cardozo, J.) (rejecting the

1914 case of *Weeks v. United States*, however, the Supreme Court created a judicial remedy in criminal cases that excluded evidence obtained by federal officers in violation of the Fourth Amendment.<sup>43</sup> Subsequent cases made clear that the exclusionary rule applied not only to the primary evidence that was illegally seized, but also to evidence subsequently discovered that was derivative of the illegal search, unless such evidence was obtained by means that were sufficiently “attenuated as to dissipate the taint.”<sup>44</sup> Such derivative evidence became known as the “fruit of the poisonous tree.”<sup>45</sup>

In fashioning the exclusionary rule, the Court offered two interwoven rationales. First, the Court explained that exclusion was necessary to ensure meaningful Fourth Amendment protection.<sup>46</sup> Second, the Court held that sanctioning unconstitutional conduct by admitting wrongfully seized evidence would render the Court complicit in the wrongdoing and thus undermine judicial integrity.<sup>47</sup> In other words, the exclusionary rule was originally envisioned both as a mechanism for deterring constitutional violations and as a way of distancing the judiciary from involvement with tainted objects and evidence. A great deal of subsequent Fourth Amendment jurisprudence has been devoted to exploring and developing these ideas, with the deterrence-based rationale largely taking precedence.<sup>48</sup>

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idea that “[t]he criminal is to go free because the constable has blundered”).

<sup>43</sup> *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>44</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>45</sup> *Id.*

<sup>46</sup> *Weeks*, 232 U.S. at 393.

<sup>47</sup> *Id.* at 392 (“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts.” (emphasis added)).

<sup>48</sup> See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (holding that the “exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits”); *Davis v. United States*, 564 U.S. 229, 237 (2011) (noting that the “sole purpose” of the exclusionary rule is deterrence); *United States v. Leon*, 468 U.S. 897 (1984) (holding that the costs of exclusion outweigh its deterrent benefits when officers act in good faith reliance on a warrant that is subsequently found constitutionally defective); *United States v. Calandra*, 414 U.S. 338, 352 (1974) (rejecting extension of exclusionary rule to grand jury proceedings on the basis that such an extension would have minimal marginal deterrent effect); Robert M. Bloom, *Judicial Integrity: A Call for its Reemergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 471 (1993) (arguing the judicial integrity concept has been supplanted by the deterrence rationale); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 179 (1998) (“[*United States v. Leon*] completes the Court’s abandonment of the ‘judicial integrity’ rationale for Fourth Amendment exclusion.” (alteration added)). The dominance of the deterrence rationale remains contested, however. See *Utah v. Strieff*, 126 S. Ct. at 2066 (Sotomayor, J., dissenting) (citing both

In this rich line of cases, one can see the Court wrestling with both object-oriented and perpetrator-oriented issues. After *Weeks* introduced the exclusionary rule, the question immediately arose regarding which objects were tainted in the relevant way. In *Olmstead v. United States*, the Court — over vigorous dissent — answered the question somewhat narrowly, holding that only evidence obtained through unconstitutional conduct, and not conduct that was merely illegal under state law or otherwise unethical, would be excluded.<sup>49</sup> In *Olmstead*, federal officials had obtained evidence via a wiretap, which was illegal under state law at that time.<sup>50</sup> The majority refused to exclude the illegally obtained evidence, reasoning that viewing such merely illegal evidence as tainted would frustrate too many prosecutions, to the detriment of social order.<sup>51</sup> In separate dissents, Justice Brandeis and Justice Holmes each advocated a broader reading of the exclusionary rule that would serve to condemn the illegal conduct. Brandeis contended that by availing themselves of the evidence obtained illegally by individual federal officers, the federal officials “assumed moral responsibility for the [individual] officers’ crimes.”<sup>52</sup> Along similar lines, Justice Holmes declared that the law is undermined when the state “knowingly accepts and pays . . . for the fruits [of crime].”<sup>53</sup> In their view, evidentiary objects became tainted through any illegality, not merely unconstitutionality.

In addition to these questions about the scope of evidence that is precluded, subsequent cases have raised questions about the extent to which the rule is limited to the actual perpetrator. One anomaly particularly tested these limits. From 1914, when the Court decided *Weeks*, until 1961 when it held that the exclusionary rule applied to state action through the Fourteenth Amendment in *Mapp v. Ohio*, the exclusionary rule applied to searches by *federal* officials, but not searches by *state* officials.<sup>54</sup> This forced the Court to determine what to do if state officials obtained evidence in a manner that would have

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deterrence and judicial integrity rationales for exclusion, and favoring exclusion of “evidence obtained by exploiting misconduct”).

<sup>49</sup> See *Olmstead v. United States*, 277 U.S. 438, 468 (1928).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 481-83 (Brandeis, J., dissenting); cf. *id.* at 485 (“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”).

<sup>53</sup> *Id.* at 469-70 (Holmes, J., dissenting) (alteration in original).

<sup>54</sup> *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

been unconstitutional had the search been conducted by federal officials. In such cases, those state officers could simply hand the evidence to federal officials for federal criminal prosecution. The Court initially approved of such procedures — under what became known as the “silver platter doctrine” — reasoning that the exclusionary rule concerned only federal officials’ misconduct, not tainted evidence *per se*.<sup>55</sup> But, after several cases tested the bounds of the silver platter doctrine, the Court eventually rejected the doctrine in *Elkins v. United States*, holding that the Fourth Amendment barred introduction of evidence at a federal criminal trial that had been improperly obtained by state officials.<sup>56</sup> In extending the rule beyond evidence from federal perpetrators, the Court appealed again to both deterrence-based rationales — stifling collusion, subterfuge, and forum shopping, and encouraging lawful cooperation<sup>57</sup> — as well as integrity-based rationales — avoiding “making the courts themselves accomplices in willful disobedience of law.”<sup>58</sup> Other cases have continued to test the extent to which the exclusionary rule attaches to perpetrators or to the resulting evidence.<sup>59</sup>

In the doctrine developed under the exclusionary rule, one can see how any principle of wrongful benefit confronts both a perpetrator-oriented dimension (meaning that one’s own or one’s agent’s own past bad acts may limit one’s ability to profit in the future), and an object-oriented dimension (meaning that the taint may follow the goods

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<sup>55</sup> See *Elkins v. United States*, 364 U.S. 206, 208 n.2 (1960) (citing *Lustig v. United States*, 338 U.S. 74, 79 (1919) for the first use of the term “silver platter”).

<sup>56</sup> *Id.* at 208-15. *Elkins* was decided one year before *Mapp*, 367 U.S. 643.

<sup>57</sup> *Id.* at 217.

<sup>58</sup> *Id.* at 223 (citing *McNabb v. United States*, 318 U.S. 332, 345); see also *id.* at 223 (citing dissents of Brandeis and Holmes in *Olmstead*, 277 U.S. at 470 for the proposition that the government, through its conduct, is “the omnipresent teacher”).

<sup>59</sup> In 1921, the Court rejected the idea that evidence obtained illegally by a *private* citizen and provided to federal officials should be excluded in a federal criminal trial. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Justices Brandeis and Holmes dissented, again relying on normative principles. *Id.* at 476-77 (Brandeis, J., dissenting) (reasoning that to permit the government to profit from the wrongful acts of another — including a private citizen — would “shock the common man’s sense of decency and fair play”); cf. *United States v. Janis*, 428 U.S. 433, 454 (1976) (holding, over dissent, that suppression of evidence obtained unconstitutionally by state officers in a federal *civil* federal tax enforcement proceeding was not warranted, because no additional deterrent was required if the exclusionary rule would bar introduction of the evidence in both federal and state criminal trials). For more discussion of the subsequent cases that tested the extent of the exclusionary rule and their impact, see Gray et al., *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7 (2012) (suggesting that the Court has resurrected a new version of the silver platter doctrine by creating exceptions to the exclusionary rule in collateral proceedings).



themselves from which another seeks to benefit in certain circumstances). It also illustrates the multiplicity of possible rationales for such a principle, including deterrence of future bad acts, expressive notions of the law as teacher, avoidance of complicity in the bad act, or preventing the exploitation of a morally troubling situation.

### C. *Stolen Goods*

The law of stolen goods provides a clear example of how *goods themselves* can become tainted as a result of a sufficiently wrongful act — and how that “taint” prevents even a *bona fide* purchaser from acquiring good title or otherwise freely transferring such goods to others. Thus, unlike most slayer rules and Son of Sam laws, the focus of legal and ethical reasoning is on the fact that the goods were wrongfully acquired, rather than on the identity of the perpetrator.

Under the Uniform Commercial Code, the law offers certain protections to good faith purchasers for value in order to promote commerce in the marketplace.<sup>60</sup> A “good faith” or “*bona fide*” purchaser is a person who purchases property from a seller without knowledge of any impropriety regarding how the object was acquired.<sup>61</sup> If the seller engaged in certain bad acts to purchase the goods from the original owner, such as deceit, fraud, or purchase with a bad check, the good faith purchaser for value still acquires title to the goods. However, that title is “voidable,” such that the original owner may void the title before the sale to a good faith purchaser through legal action.<sup>62</sup> If the original owner who was defrauded in the transaction fails to protect her interests in time, the *bona fide* purchaser can then freely hold and alienate the goods.

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<sup>60</sup> Shyamkrishna Balganes, *Copyright and Good Faith Purchasers*, 104 CALIF. L. REV. 269, 277-80 (2016) (discussing historical development of the common law doctrines regarding good faith purchasers); see U.C.C. § 2-403(1) (AM. LAW INST. & UNIF. LAW COMM’N 2011) (“A purchaser of goods acquires all title which his transferor had power to transfer . . .”); Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1058 (1954).

<sup>61</sup> Balganes, *supra* note 60, at 271; see Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1333-34 (2011) (noting that different jurisdictions outside the United States have different rules on good faith purchasers, complicating the treatment of recovery of stolen goods internationally).

<sup>62</sup> U.C.C. § 2-403(1)(a)–(d) (“A person with voidable title has power to transfer a good title to a good faith purchaser for value.”) (listing four types of bad act that result in voidable title).

However, there is one bad act — theft — that has been deemed sufficiently pernicious that even a good faith purchase by an innocent purchaser cannot cleanse the taint on the goods. In his commentaries, William Blackstone cited the rule: “But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them.”<sup>63</sup> One who obtains stolen goods from a thief does not acquire title to those goods, even if that purchaser acts in “good faith” and purchases the goods for value.<sup>64</sup> This rule goes back to the Latin maxim *nemo dat quod non habet*, meaning that one cannot convey a right greater than that which one has.<sup>65</sup>

Art theft offers a high-profile context in which the law of stolen goods has played out. In 1976, Georgia O’Keefe brought suit to compel the return of paintings that she alleged had been stolen from a gallery run by her husband, the late Alfred Stieglitz.<sup>66</sup> The paintings were in the possession of an alleged *bona fide* owner, who claimed that his father had obtained them legally. While the court determined that the factual dispute over whether they had actually been stolen precluded summary judgment, it announced that the case should be determined based on the long-standing principle that “if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft.”<sup>67</sup> Similarly, in *Solomon R. Guggenheim Foundation v. Lubell*, the New York Court of Appeals considered the case of an allegedly stolen

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<sup>63</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*449; Balganes, *supra* note 60, at 283 (“The law views the crime of theft as sufficiently harmful and worthy of condemnation that it attaches the taint to the seller’s possession right away, without the need for any action on the part of the owner for the taint to attach.”). Note that the doctrine of “market overt,” which Blackstone mentions, does not apply in the United States. See Schwartz & Scott, *supra* note 61, at 1334-37.

<sup>64</sup> *Alamo Rent-A-Car, Inc. v. Mendenhall*, 937 P.2d 69, 73 (Nev. 1997) (“[A]ny title derived from a thief . . . is . . . considered void . . .” (citing *Suburban Motors, Inc. v. State Farm*, 268 Cal. Rptr. 16, 19 (1990))); *Saltus & Saltus v. Everett*, 20 Wend. 267, 282 (N.Y. 1838) (discussing that in cases of theft the owner “can follow and reclaim [her property] in the hands of any person, however innocent” (alteration in original)); *Ogden v. Ogden*, 4 Ohio St. 182, 195 (1854) (“In this country no one can obtain title to stolen property . . . however innocent he may have been in the purchase; public policy forbids the acquisition of title through the thief.”); *Pate v. Elliott*, 400 N.E. 2d 910, 912 (Ohio Ct. App. 1978) (holding that a title procured from a thief is void); see also *Candela v. Port Motors, Inc.*, 617 N.Y.S.2d 49, 50 (N.Y. App. Div. 1994) (“[I]f it is proven that Port purchased the vehicle from an actual car thief, or from the successor in interest to a car thief, then Port’s title would be void . . .”).

<sup>65</sup> Schwartz & Scott, *supra* note 61, at 1335.

<sup>66</sup> *O’Keefe v. Snyder*, 416 A.2d 862, 865 (N.J. 1980).

<sup>67</sup> *Id.* at 487-88 (citation omitted). Recovery by the owner may be limited by the applicable statute of limitations. See *id.* at 493.

Chagall gouache. This court also reiterated the longstanding rule that the owner of stolen property may recover that property “even if it is in the possession of a good-faith purchaser for value.”<sup>68</sup>

While these stolen art decisions are partly motivated by an instrumental concern about deterring “illicit trafficking in stolen art,”<sup>69</sup> they also display an unwillingness to become “a haven for cultural property stolen abroad,”<sup>70</sup> reflecting a distaste for harboring objects with a tainted history.

#### D. Conflict Diamonds

Another example of goods becoming tainted for subsequent purchasers through the past wrongful acts of others are so-called conflict diamonds.<sup>71</sup> Conflict diamonds are “rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments.”<sup>72</sup> There is no difference between the two physical objects — a “conflict” diamond and a conflict-free diamond — just as there is no material difference between oil or gas extracted from the Arctic and oil or gas extracted elsewhere.<sup>73</sup> It is the process by which the diamonds were acquired

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<sup>68</sup> Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 427-29 (N.Y. 1991) (declining to impose any duty of “reasonable diligence” on the owners for purposes of the statute of limitations).

<sup>69</sup> *Id.* at 431.

<sup>70</sup> *Id.* (quoting the Governor of New York’s veto statement of a bill that would have changed the rule).

<sup>71</sup> Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 615-21 (2004) (discussing the ethics of avoiding conflict diamonds and other “process-based purchasing decisions”); Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1 (2003); *Conflict Diamonds*, U.S. DEP’T ST. (January 31, 2017, 12:26 AM), <http://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm>. See generally Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT’L ECON. L. 835 (2003). Other examples include ivory from elephant tusks, and so-called “slavery chocolate.” See 50 C.F.R. § 17.40 (2016); Kysar, *supra* at 615-16 (discussing a connection between the chocolate trade and child slavery in West Africa); Morgan V. Manley, *The Inter(national) Strategy: An Ivory Trade Ban in the United States and China*, 38 FORDHAM INT’L L. J. 1511 (2015) (discussing limitations on ivory trade).

<sup>72</sup> *Kimberley Process Certification Scheme*, § I, at 3 (2016), <https://www.kimberleyprocess.com/en/kpcs-core-document-version-2016-0>.

<sup>73</sup> See Kysar, *supra* note 71, at 532 (“Just as money is not purely fungible to social beings, consumer products — even when physically indistinguishable — are not perfect substitutes to the extent that they are produced using different processes about which consumers have strong feelings.”). Kysar laments the fact that international law affords insufficient weight to the processes by which goods enter the market,

and the purpose toward which the profits from their sale would be used that raise issues of moral taint.<sup>74</sup>

Recognizing these concerns, a group of nations from southern Africa met in Kimberley, South Africa in 2000 to discuss how to end the trade in such diamonds.<sup>75</sup> Subsequently, in December, 2000, the United Nations adopted Resolution 55/56 calling upon Members to create certification standards for diamonds.<sup>76</sup> In 2003, the Kimberley Process Certification Scheme (Kimberley Process) entered into force to “control trade in rough diamonds between participating countries through domestic implementation of a certification scheme.”<sup>77</sup> The Kimberley Process requires rough diamonds to be shipped in sealed containers with a certification that the diamonds have not benefitted rebel movements.<sup>78</sup> Each member state must adopt national legislation and create or empower institutions to prevent conflict diamonds from “entering the legitimate [diamond] trade.”<sup>79</sup> The Kimberley Process recognizes that “trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fueling of armed conflict, the activities of rebel movements . . . and the illicit traffic in, and proliferation of, armaments.”<sup>80</sup>

As in the case of stolen goods, conflict diamonds are an example of object-oriented ethical concerns. While the Kimberley Process arguably limits the potential profits for the perpetrators who extracted these diamonds, the moral “taint” follows the goods to limit the ability of even innocent actors to benefit as well. Just as merchants are bound by these certification procedures, such moral obligations may also be

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including by child labor, and suggests that such preferences should be accommodated through better information disclosure as “outlets for public-minded behavior.” *Id.* at 534, 615-23. We agree, and argue that the wrongful benefit principle should apply. *See infra* Part V.

<sup>74</sup> Price, *supra* note 71, at 7-25 (discussing origins of conflict diamonds and political upheaval in the nations in which they are mined).

<sup>75</sup> *Id.* at 34.

<sup>76</sup> *Id.* (citing U.N. GAOR., 55th Sess., 79th plen. mtg., U.N. Doc. A/RES/55/56 (2001)).

<sup>77</sup> *Conflict Diamonds*, *supra* note 71. The Kimberley Process is an “international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds.” *Id.*

<sup>78</sup> *Kimberley Process Certificate Scheme*, *supra* note 72, at §§ II (certificate must accompany shipment), III (no trade with non-participants), IV (tamper-resistant containers), and Annex I (contents of Certificates).

<sup>79</sup> *About*, KIMBERLEY PROCESS (Feb. 1, 2017 1:07 PM) <https://www.kimberleyprocess.com/en/about>. Pursuant to this obligation, in 2003, Congress enacted the Clean Diamond Trade Act of 2003. Clean Diamond Trade Act of 2003, 19 U.S.C. §§ 3901–3913 (2012).

<sup>80</sup> *Kimberley Process Certificate Scheme*, *supra* note 72, Preamble, at 1.

relevant to the ultimate consumers of such goods.<sup>81</sup> This certification procedure may reflect an underlying motivation to avoid contributing to those who continue to commit wrongful acts or to avoid “complicity” in such wrongful acts.<sup>82</sup> To deny even “innocent” purchasers or merchants the ability to benefit from such tainted goods may send an expressive message condemning the wrongful nature of the act through which such goods were acquired. It may further manifest respect for the victims of the harm.<sup>83</sup>

#### E. Price Gouging in Natural Disasters

All of the examples above involve some form of bad act. The act may have been intentionally harmful (as in the slayer rule) or unconstitutional (as in the Fourth Amendment exclusionary rule). In some cases, the bad act was performed by the same actor seeking to profit or benefit; while in other cases, the actor is different (as in the case of the innocent purchaser of stolen goods, merchants in the diamond trade, or the silver platter doctrine).

But sometimes the world simply suffers a disaster of arguably “natural” origins — a so-called “act of God.” Should anyone be permitted to profit from such disasters — even those who played no role in creating the bad situation? In at least one context we think that the answer is “no.” To date, more than thirty states and the District of

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<sup>81</sup> See Kysar, *supra* note 71, at 616. Consumers may seek to influence the process by which such goods become available through their purchasing decisions, or may simply view their choices “as moral acts that have personal significance irrespective of their instrumental effects.” *Id.* at 532.

<sup>82</sup> Kysar notes that consumers may be motivated by a desire to avoid helping those who extract resources in a harmful manner, or to avoid being “complicit with practices they regard as immoral.” *Id.* (“[s]ome people do not want to benefit from or be associated with what they regard as wickedness even if they are unable to prevent it.” (citing Robert Howse & Donald Regan, *The Product/Process Distinction — An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249, 275 (2000))); see also Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 709 (2003) (“[P]eople feel a ‘moral taint’ as a result of an association with wrongful behavior over which they had no control and therefore for which, under traditional individualistic premises, they carry no blame.”). Posner and Vermeule offer examples not only of taint from past actions, but also of forward-looking behavior (such as a seller refusing to sell a knife that he knows may be used to kill someone). In their view, “people might try to wipe away the feeling of moral taint after it occurs. A natural way to remove the stain of moral taint is to make an apology, do good works, or pay reparations — depending on the nature of the associated conduct.” *Id.* at 709-10.

<sup>83</sup> See *infra* Part IV.B (discussing foundations of the wrongful benefit principle).

Columbia have enacted anti-price gouging or anti-profiteering laws.<sup>84</sup> These laws preclude merchants from selling certain necessities such as food, medicine, fuel, or other emergency supplies for what is often described as an “unconscionable price” — meaning a price significantly higher than the average price on a day prior to the natural disaster or state of emergency. At least one state refers to an attempt by merchants or suppliers to profit under such circumstances as “profiteering,”<sup>85</sup> while others refer to it as “unconscionable” conduct.<sup>86</sup>

Among the offered rationales for such anti-price gouging statutes is that no one should be permitted to benefit excessively from natural disasters. For example, the Attorney General of North Carolina has observed, “A hurricane shouldn’t be an excuse to rip off customers.”<sup>87</sup> The Attorney General of Florida has explained:

[W]hen we are in a state of emergency, if there is a gross disparity between what the store was charging before the emergency arose and then afterwards, it’s very clear that that is not making a profit. That’s profiteering at the expense of people at a time of need.<sup>88</sup>

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<sup>84</sup> See, e.g., ALA. CODE § 8-31-1 (2017); ARK. CODE ANN. § 4-88-301 (2017); CAL. PENAL CODE § 396 (2017); CONN. GEN. STAT. ANN. § 42-232 (2017); D.C. CODE §§ 28-4101 to -4102 (2017); FLA. STAT. ANN. § 501.160 (West 2011); GA. CODE ANN. §§ 10-1-393.4 to -397 (2015); HAW. REV. STAT. ANN. § 209-9 (2016); IDAHO CODE ANN. § 48-603 (2013); ILL. ADMIN. CODE tit. 14, §§ 465.10–.30 (2017); IND. CODE ANN. § 4-6-9.1-1 to 4-6-9.1-7 (2016); IOWA ADMIN. CODE r. 61-31.1(714) (2017); KAN. STAT. ANN. § 50-6,106 (2017); KY. REV. STAT. ANN. § 367.374 (2017); LA. STAT. ANN. § 29:732 (2016); ME. STAT. tit. 10, § 1105 (2017); 940 MASS. CODE REGS. 3.18 (2017); MISS. CODE ANN. § 75-24-25 (2017); MO. CODE REGS. ANN. tit. 15, § 60-8.030 (2017); N.J. STAT. ANN. § 56:8-107 (2017); N.Y. GEN. BUS. LAW § 396-r(1)-(2) (2017); N.C. GEN. STAT. ANN. § 75-38 (2017); OKLA. STAT. tit. 15, §§ 777.1–777.5 (2017); OR. REV. STAT. ANN. §§ 401.960–970 (2016); Pa Price Gouging Act, P.L. 1210, No. 133 (Oct. 31, 2006); 30 R.I. GEN. LAWS ANN. § 30-15-19 (2016); S.C. CODE ANN. § 39-5-145 (2016); TENN. CODE ANN. §§ 47–18-5101 to -5104 (2016); TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (2015); UTAH CODE ANN. § 13-41-101 (2016); VT. STAT. ANN. tit 9, § 2461d (2016); VA. CODE ANN. § 59.1-527 (2016); W. VA. CODE ANN. § 46A-6J-1 (2016); WISC. ADMIN. CODE ATCP §§ 106-01 to -03 (2017).

<sup>85</sup> See, e.g., KAN. STAT. ANN. § 50-6,106 (2017).

<sup>86</sup> Alabama, Florida, Illinois, Indiana, Kansas, Maine, Mass., New York, Oregon, Pennsylvania, South Carolina, Vermont, and Virginia employ this language. See sources cited *supra* note 84. Some states, like North Carolina, note that it is reasonable to increase a price if the seller’s own costs have risen. See e.g., N.C. GEN. STAT. ANN. § 75-38 (2017).

<sup>87</sup> *Hurricane Joaquin Puts North Carolina Price Gouging Law Into Effect*, N.C. CONSUMERS COUNCIL (Oct. 1, 2015), <https://www.nconsumer.org/news-articles/hurricane-joaquin-puts-north-carolina-price-gouging-law-into-effect.html>.

<sup>88</sup> Edward J. Page & Min K. Cho, *Price Gouging 101: Call to Florida Lawmakers to*

As this statement captures, we generally take there to be a difference between seeking profit and seeking to exploit a tragedy or disaster. The distinction means that even a struggling small business owner may be in the wrong should she try to benefit at the expense of affluent customers ill-prepared for the disaster, who are willing to pay exorbitant prices.<sup>89</sup>

#### F. Unjust Enrichment

We would be remiss if we did not advert to the law of unjust enrichment, as it raises similar issues to those that motivate our discussion. On its face, unjust enrichment constitutes an entire legal category devoted to the idea that legal liability may attach to improperly benefitting.<sup>90</sup> For example, one general principle of unjust enrichment and restitution is that “a person is not permitted to profit by his own wrong.”<sup>91</sup> Unjust enrichment law also addresses cases in which a person benefits from the inadvertent act of another, such as a mistaken payment,<sup>92</sup> or a benefit from natural causes, such as the migration of natural gas through a geological formation.<sup>93</sup> Some of these cases bear a great similarity to our central case.

In fact, the breadth of unjust enrichment law is reflected in its transdoctrinal nature. The *Restatement* acknowledges that the principles underlying the law of unjust enrichment are expressed in

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*Perfect Florida's Price Gouging Law*, 80 FLA. B.J. 49 (Apr. 2006), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Autor/011F2B0D680BA7DB8525713B005DCD54>.

<sup>89</sup> This point suggests that the concerns about wrongful benefits are not motivated by concerns about distributive justice and the overall fairness of the allocation of resources in society. For a discussion of the normative principles that do motivate our account, see *infra* Part IV.B.

<sup>90</sup> See generally PETER BIRKS, UNJUST ENRICHMENT (2005); Warren Seavey & Austin Scott, *Restitution*, 54 LAW Q. REV. 29, 31 (1938).

<sup>91</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 & cmts. a–c (AM. LAW INST. 2011) (discussing this principle as a basis for the remedy of disgorgement, even if the profit realized exceeds the claimant's loss); see, e.g., Kane v. Stewart Tilghman Fox & Bianchi, P.A., 85 So. 3d 1112, 1113-14 (Fla. Dist. Ct. App. 2012) (affirming judgment of unjust enrichment against attorneys who “engineer[ed] a secret \$14.5 million global settlement” of their clients' claims that resulted in the attorneys receiving millions in fees and plaintiffs receiving a pittance).

<sup>92</sup> See, e.g., State ex rel. Zoeller v. Aisin USA Mfg., Inc., 946 N.E.2d 1148, 1157 (Ind. Ct. App. 2011) (holding that the State could pursue a common-law unjust enrichment claim to recover an erroneously issued refund).

<sup>93</sup> See, e.g., Beck v. N. Nat. Gas Co., 170 F.3d 1018, 1022-23 (10th Cir. 1999) (upholding verdict of unjust enrichment in favor of landowners against natural gas drilling firm that benefitted by storing natural gas in a subsurface reservoir under their property without contractual leasing rights).

other areas of the law, including contract law, the law of fraudulent conveyance, restitution provisions in criminal law, and the laws of *bona fide* purchase, among others.<sup>94</sup> Many of the specific examples already described in this Part might be said to fall within the ambit of unjust enrichment.<sup>95</sup> Insofar as this is true, our project might be understood as exploring the implication of certain unjust enrichment principles. The law of unjust enrichment expresses a commitment to many of the same values that underlie our focus — and thus reinforces our normative account.

But there are also important differences between unjust enrichment law and the wrongful benefit principle. According to the *Restatement (Third) of Restitution and Unjust Enrichment*, “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.”<sup>96</sup> This means that unjust enrichment requires more than merely an improper benefit but also some corresponding loss by another. As one court put it, “Unjust enrichment requires a showing of an enrichment, an impoverishment, and a connection between the two.”<sup>97</sup> Unjust enrichment is inherently relational, like other forms of private law such as contract and tort; there must be a plaintiff and a defendant, and the defendant must have benefitted *at the plaintiff’s expense*.<sup>98</sup>

Relatedly, the law of unjust enrichment is concerned with remedies like restitution and disgorgement that either seek to restore the plaintiff to her position prior to her loss, or to eliminate the defendant’s gain by transferring it to the plaintiff. The remedies for unjust enrichment can vary under different circumstances, and may range from a court order to restore the plaintiff to her position prior to the harm, to an order to disgorge the defendant’s unjust gain (even if

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<sup>94</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. g.

<sup>95</sup> See *id.* § 45 (discussing the slayer rule); *id.* § 66 (discussing the *bona fide* purchaser).

<sup>96</sup> *Id.* § 1; see also *id.* §1 cmt. a (noting that “at the expense of another’ can also mean ‘in violation of the other’s legally protected rights’”). This statement of course begs the question as to what makes an enrichment “unjust.”

<sup>97</sup> *BTA Oil Producers v. MDU Res. Grp., Inc.*, 642 N.W.2d 873, 882 (N.D. 2002).

<sup>98</sup> HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES I* (1997) (describing unjust enrichment as “the third branch of civil liability (along with contracts and torts)”; see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (“Restitution is the law of nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms.”). Unjust enrichment is thus a parallel source of liability and basis for recovery. However, it is subordinated to contract remedies that have been bargained for. See *Clapp v. Goffstown Sch. Dist.*, 977 A.2d 1021, 1025 (N.H. 2009); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d.



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larger than the plaintiff's loss) as measured by different criteria, such as the defendant's proceeds, profits, or the fair market value of the resource.<sup>99</sup> Regardless, it is deeply and inherently relational — concerned with doing justice between two parties.

In contrast, the wrongful benefit principle is not relational in this way. Our focus is simply on whether — and to what extent — it is permissible for a single party to benefit from a past bad act. We are thus not concerned with private remedies, with who can sue whom to recover ill-gotten gains, or with how to measure the damages to be recovered. Rather, our focus is a normative principle embodying the view that past actions should create a moral obligation not to benefit in the first place.<sup>100</sup> It says something about what ought not be done, but says little about who might be wronged by such conduct. As a result, our policy prescriptions are rooted in public, not private law.

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As these cases demonstrate, the wrongful benefit principle plays a role in a diverse range of legal contexts. In some instances, such as slayer statutes and the exclusionary rule, its perpetrator-oriented dimensions exert a stronger influence. In other contexts, such as conflict diamonds and stolen goods, its object-oriented dimensions predominate. Sometimes the trigger is culpable wrongdoing, like murder or theft, while in other instances even acts or events for which no one bears culpability, like children's acts or natural disasters, may generate the relevant obligations. In the next Part, we offer the possibility of drilling in a warming Arctic as a particularly complex, contemporary case study that will help us to understand better not only the outer limits of the wrongful benefit principle, but what gives the principle its normative force.

### III. A MODERN CASE STUDY: ARCTIC DRILLING

There is, if nothing else, an irony in the fact that climate change caused by the burning of fossil fuels has generated access to more fossil fuels. Certain actions that we now appreciate to have been

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<sup>99</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. e; DAGAN, *supra* note 98, at 12 (discussing alternative measures of recovery).

<sup>100</sup> One way to illustrate the difference is by noting that, unlike a relational duty, which can normally be waived by the prospective victim, the obligation not to profit may seem to exist irrespective of any other party's response. For example, it might be wrong for the murdering heir to inherit even if the murder victim were to consent explicitly to such inheritance in spite of the crime. The inheritance might be wrong, though not wrong to the victim.

harmful — taken by a whole range of different actors, often innocently but sometimes negligently or even nefariously — have created new opportunities for profit. Arctic drilling is thus a timely and extremely important context in which to examine not only the outer limits of the wrongful benefit principle, but also whether the principle may have any role to play in the concrete world of policy.

In this Part, we examine the global race to exploit the Arctic's increasingly accessible resources, and the role of would-be suitors for Arctic resources — both nation-states and the fossil-fuel industry — in bringing about the climate change that has made these resources accessible. In the following Part, we apply the wrongful benefit principle in each of its forms to Arctic drilling.

#### A. *The Changing Race for Arctic Resources*

The United States Geological Survey has estimated that the Arctic holds one fifth of the world's undiscovered conventional oil and natural gas reserves, as well as mineral resources such as rare earth metals, iron ore, and nickel.<sup>101</sup> As nations around the globe see exploiting these resources as a matter of national energy security, both investor-owned and state-owned oil and gas firms have made efforts to extract them. In the past, such efforts — both in the United States and elsewhere — have been limited and have largely come to nothing.

But now the climate is changing in the Arctic. As the climate warms, Arctic oil resources are becoming more accessible, and this trend will only continue. The polar regions of the Earth are warming more quickly than other regions. According to the NASA Goddard Institute, over the past forty years, while the Earth's overall average temperature has warmed by 1.44 degrees Fahrenheit, the Arctic has warmed by over 3.5 degrees.<sup>102</sup> This warming has dramatically increased the length of the so-called "open water season" in the Arctic — the period during which oil and gas drilling can occur. Over the last thirty years, the Department of the Interior (DOI) has concluded that the average

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<sup>101</sup> Philip Budzik, *Arctic Oil and Natural Gas Potential*, U.S. ENERGY INFO. ADMIN. 6 (Oct. 2009), [http://www.eia.gov/oiaf/analysispaper/arctic/pdf/arctic\\_oil.pdf](http://www.eia.gov/oiaf/analysispaper/arctic/pdf/arctic_oil.pdf); Jessica Robertson, *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, U.S. GEOLOGICAL SURV. (July 23, 2008), <https://archive.usgs.gov/archive/sites/www.usgs.gov/newsroom/article.asp-ID=1980.html>; see also *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, U.S. GEOLOGICAL SURV. (2008), <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

<sup>102</sup> Kristyn Ecohard, *What's causing the poles to warm faster than the rest of Earth?*, NASA (Apr. 6, 2011), <http://www.nasa.gov/topics/earth/features/warmingpoles.html>.

length of the open water season during which there is less than ten percent ice concentration in the central Chukchi Sea of the Arctic has lengthened by approximately four weeks, to a summer average of seventeen weeks.<sup>103</sup>

In addition to improved drilling conditions, high oil prices in the late 2000s increased the impetus toward offshore Arctic drilling.<sup>104</sup> In 2008, when oil prices peaked, several major oil and gas firms purchased significant leases on the Outer Continental Shelf of Alaska.<sup>105</sup> In the summer of 2015, Shell began exploratory drilling, prompting significant protests by environmental groups.<sup>106</sup> And that's just the United States. Internationally, a number of countries, notably including Russia and China, have actively pursued opportunities to access natural resources in the Arctic, highlighting their growing strategic importance.<sup>107</sup> To stake its claims to the Arctic, in 2007, Russia planted a titanium Russian flag on the seabed directly under the North Pole.<sup>108</sup> In January 2016, Norway approved a production rig at Eni SpA's Goliat field — the northernmost rig in the world.<sup>109</sup>

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<sup>103</sup> BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, CHUKCHI SEA PLANNING AREA: ENVIRONMENTAL ASSESSMENT 25 (2011).

<sup>104</sup> David Hulst, *Environmental Regulation at the Frontier: Government Oversight of Offshore Drilling North of Alaska*, 44 ENV'T L. 761, 783 n.146 (2014) (noting that interest in Arctic drilling has depended upon economic factors including the price of oil and the increasing accessibility of the region).

<sup>105</sup> See, e.g., Robert Grattan, *Questions linger for ConocoPhillips on Arctic drilling program following Shell's OK*, FUELFIX (May 12, 2015), <http://fuelfix.com/blog/2015/05/12/questions-linger-for-conocophillips-on-arctic-drilling-program-following-shells-ok/> (discussing ConocoPhillips' 2008 purchases of leases).

<sup>106</sup> See Coral Davenport, *Shell Wins Final Permission for Arctic Oil and Gas Drilling*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/us/shell-wins-final-permission-for-arctic-oil-and-gas-drilling.html>; see also Coral Davenport, *U.S. Will Allow Drilling for Oil in Arctic Ocean*, N.Y. TIMES, (May 11, 2015), <https://www.nytimes.com/2015/05/12/us/white-house-gives-conditional-approval-for-shell-to-drill-in-arctic.html>.

<sup>107</sup> See Gary Roughead, *In the Race for Arctic Energy, the U.S. and Russia are Polar Opposites*, WALL ST. J. (Aug. 25, 2015, 6:43 PM), <https://www.wsj.com/articles/in-the-race-for-arctic-energy-the-u-s-and-russia-are-polar-opposites-1440542608>; Press Release, Gazprom Neft, *Second Well Brought into Production at Neft Prirazlomnoye Field* (Aug. 19, 2015), <http://www.gazprom-neft.com/press-center/news/1108569/>.

<sup>108</sup> Adrian Blomfield, *Russian submarine plants flag at North Pole*, TELEGRAPH (Aug. 1, 2007, 11:43 AM), <http://www.telegraph.co.uk/news/worldnews/1559264/Russian-submarine-plants-flag-at-North-Pole.html>.

<sup>109</sup> See *Eni Delivers First Oil From Goliat in the Barents Sea*, OFFSHORE (Mar. 14, 2016), <http://www.offshore-mag.com/articles/2016/03/eni-delivers-first-oil-from-goliat-in-the-barents-sea.html>.

Low oil prices blunted some of this momentum, both for U.S.-based and other global energy firms.<sup>110</sup> Between 2008 and today, the price of oil has fallen from a high of approximately \$140/barrel to less than \$50/barrel.<sup>111</sup> A number of other firms have relinquished their leases in the U.S. Arctic waters in light of these economic realities.<sup>112</sup> Regulatory responses have followed. In October 2015, the DOI announced that it would cancel two potential Arctic offshore lease sales set for 2016 and 2017 in light of market conditions.<sup>113</sup> Low oil prices contributed to these retreats.<sup>114</sup>

The prospect of drilling for fossil fuels in the Arctic has garnered significant opposition from environmental organizations. These objections to Arctic drilling have focused almost exclusively on the environmental consequences of such drilling.<sup>115</sup> The main fear appears to be that oil and gas exploration cannot occur without incident in the harsh conditions of the Arctic Ocean, creating the prospect of an oil spill in a remote area of wilderness where cleanup might be near

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<sup>110</sup> See Chester Dawson, *Chevron Suspends Arctic Offshore Drilling Program in Canada 'Indefinitely'*, WALL STREET J. (Dec. 17, 2014, 7:33 PM), <https://www.wsj.com/articles/chevron-suspends-arctic-offshore-drilling-program-in-canada-1418862814> (citing “uncertainty over the outlook for crude prices”); Grattan, *supra* note 105; Mikael Holter, *Statoil Puts Arctic Exploration on Hold After Oil-Price Plunge*, BLOOMBERG (Jan. 29, 2015, 6:58 AM), <https://www.bloomberg.com/news/articles/2015-01-29/statoil-puts-arctic-exploration-on-hold-after-oil-price-plunge>; Clifford Krauss & Stanley Reed, *Shell Exits Arctic as Slump in Oil Prices Forces Industry Retrench*, N. Y. TIMES (Sept. 28, 2015), <https://www.nytimes.com/2015/09/29/business/international/royal-dutch-shell-alaska-oil-exploration-halt.html>.

<sup>111</sup> *Cushing OK WTI Spot Price FOB*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=D> (last visited May 3, 2017); *Europe Brent Spot Price FOB*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RBRT&f=D> (last visited May 3, 2017).

<sup>112</sup> See Phil Taylor, *Global companies give back most U.S. leases*, GREENWIRE (May 10, 2016), <http://www.eenews.net/greenwire/2016/05/10/stories/1060036995> (noting that leases covering approximately twenty percent of the original acres in the Chukchi Sea remain).

<sup>113</sup> Press Release, U.S. Dep’t of the Interior, Interior Department Cancels Arctic Offshore Lease Sales (Oct. 16, 2015), <https://www.doi.gov/pressreleases/interior-department-cancels-arctic-offshore-lease-sales>.

<sup>114</sup> See sources cited *supra* notes 104, 105.

<sup>115</sup> See Suzanne Goldenberg, *Al Gore Criticizes Obama on Climate Change and 'Insane' Arctic Drilling*, GUARDIAN (July 16, 2015), <https://www.theguardian.com/us-news/2015/jul/16/al-gore-obama-climate-change-arctic-drilling>; Luke Whelan, *Kayaktavists Take Over Seattle's Port to Protest Shell Oil's Arctic Drilling Rig*, MOTHER JONES (May 17, 2015), <http://www.motherjones.com/blue-marble/2015/05/kayaktavistsv-take-over-seattles-elliott-bay-protest-shell-oil-rig>; William Yardley, *Portland protesters hanging from bridge disrupt Arctic-bound Shell vessel*, L.A. TIMES (July 30, 2015), <http://www.latimes.com/nation/la-na-sej-shell-protest-20150730-story.html>.

impossible.<sup>116</sup> Even beyond the risks of a spill, criticisms have focused squarely on forward-looking environmental impacts. Some critics fear the potential impacts on marine life.<sup>117</sup> Others have expressed general dismay at the expansion of fossil fuel production and its impact on the climate.<sup>118</sup>

Indeed, responding to some of these recent concerns about environmental impacts, in January 2015, President Obama withdrew approximately 9.8 million acres in the waters of the Arctic from commercial oil and gas development by Presidential memorandum, largely in light of environmental concerns.<sup>119</sup> And more recently, on December 20, 2016, President Obama withdrew from commercial oil and gas exploration the Chukchi Sea Planning Area and the Beaufort Sea Planning Area (with certain exceptions) by Presidential Memorandum pursuant to section 12(a) of the Outer Continental Shelf Lands Act (OCSLA).<sup>120</sup> He cited, in support of his decision, concerns regarding environmental impacts.<sup>121</sup> These actions, of

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<sup>116</sup> See Andrew Hartsig, *Shortcomings and Solutions: Reforming the Outer Continental Shelf Oil and Gas Framework in the Wake of the Deepwater Horizon Disaster*, 16 OCEAN & COASTAL L.J. 269, 270 (2011). See generally NAT'L RESEARCH COUNCIL ET AL., RESPONDING TO OIL SPILLS IN THE U.S. ARCTIC MARINE ENVIRONMENT (2014). In 2012, even the CEO of the French energy firm Total SA said there should be no drilling in the Arctic, because the risk of spills was too high. Guy Chazan, *Total Warns Against Oil Drilling in Arctic*, FIN. TIMES (Sept. 25, 2012), <https://www.ft.com/content/350be724-070a-11e2-92ef-00144feabdc0>.

<sup>117</sup> See, e.g., Press Release, Earthjustice, Environmental Groups File Lawsuit Challenging Shell Oil's Risky and Reckless Arctic Drilling Plan (June 2, 2015), <http://earthjustice.org/news/press/2015/environmental-groups-file-lawsuit-challenging-shell-oil-s-risky-and-reckless-arctic-drilling-plan>.

<sup>118</sup> See, e.g., Bryan Walsh, *It's Not Just the Spills: The Climate Risks of Arctic Drilling*, TIME (July 20, 2012), <http://science.time.com/2012/07/20/its-not-just-spills-the-climate-risks-of-arctic-drilling> (noting that Arctic drilling will likely release significant greenhouse gases such as methane and black carbon) (citing CLEAN AIR TASK FORCE, BEST PRACTICES FOR REDUCTION OF METHANE AND BLACK CARBON FROM ARCTIC OIL AND GAS PRODUCTION (July 2013)).

<sup>119</sup> See Presidential Memorandum, Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 59 (Jan. 27, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/27/presidential-memorandum-withdrawal-certain-areas-united-states-outer-con>; Mike Boots & Dan Utech, *President Obama Protects Untouched Marine Wilderness in Alaska*, WHITE HOUSE ARCHIVES (Jan. 27, 2015), <https://obamawhitehouse.archives.gov/blog/2015/01/27/president-obama-protects-untouched-marine-wilderness-alaska> (citing 9.8 million figure).

<sup>120</sup> Memorandum from President Barack Obama to the Secretary of the Interior (Dec. 20, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/20/presidential-memorandum-withdrawal-certain-portions-united-states-arctic>.

<sup>121</sup> See *id.*; sources cited *supra* note 119.

course, have no impact on areas of the Arctic under global control and outside the jurisdiction of the United States.<sup>122</sup>

The Arctic's status is likely to remain contested and uncertain for some time. Pressures have mounted to overturn the drilling withdrawal in the U.S. Arctic waters. On April 28, 2017, President Trump signed an Executive Order on *Implementing an America-First Offshore Energy Strategy*.<sup>123</sup> Section 5 of that Order purports to undo President Obama's 2016 withdrawal of Arctic leasing areas.<sup>124</sup> This move is consistent with industry advocacy to overturn or undo the former withdrawal.<sup>125</sup> Former military leaders in the United States have likewise indicated their support for continued drilling in the Arctic to promote national energy security.<sup>126</sup> However, it is not likely that legal authority exists for a President to reverse the withdrawal under the current statute simply by executive order, as no such delegation of the power to "undo" a withdrawal exists within the statute's terms.<sup>127</sup> Perhaps recognizing this point, in April, 2017, two Senators introduced a bill called the Offshore Production and Energizing National Security Alaska Act of 2017, pursuant to which the 2016 withdrawal by President Obama pursuant to Section 12(a) of OCSLA would be deemed to have "no force or effect."<sup>128</sup> Environmental groups and scientists continue to oppose leasing land for drilling — largely focusing on their forward-looking environmental concerns.<sup>129</sup> It remains to be seen what will come next.

### B. Climate Change and Responsibility

We are all, in some respect or another, responsible for climate change. There is not a person, corporation, organization, or nation

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<sup>122</sup> See *infra* Part V.B (discussing global governance).

<sup>123</sup> Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

<sup>124</sup> *Id.*

<sup>125</sup> John Yoo & Todd Gaziano, *Trump Can Reverse Obama's Last-Minute Land-Grab*, AEI.org (Dec. 30, 2016), <https://www.aei.org/publication/trump-can-reverse-obamas-last-minute-land-grab/> (favoring acts to undo the withdrawal of lands).

<sup>126</sup> STATEMENT OF FOREIGN POLICY AND NATIONAL SECURITY SPECIALISTS ON THE PROPOSED 2017–2022 OCS OIL AND GAS LEASING PROGRAM (June 16, 2016), [http://www.eenews.net/assets/2016/06/16/document\\_ew\\_02.pdf](http://www.eenews.net/assets/2016/06/16/document_ew_02.pdf).

<sup>127</sup> Keith Goldberg, *Obama's 11th-Hour Offshore Drilling Ban May Be Hard to Sink*, LAW360.COM (Dec. 21, 2016), <https://www.law360.com/articles/875398/obama-s-11th-hour-offshore-drilling-ban-may-be-hard-to-sink>.

<sup>128</sup> OPENS Alaska Act of 2017, S. 883, 115th Cong. § 101 (as proposed to the Senate, April 4, 2017), <https://www.congress.gov/115/bills/s883/BILLS-115s883is.pdf>.

<sup>129</sup> Margaret Kriz Hobson, *440 Scientists to Obama: No New Leasing*, ENERGYWIRE (Jun 15, 2016), <https://www.eenews.net/stories/1060038818>.

that has not — in some capacity or another — contributed. Our aim, however, unlike much work on the ethics of climate change, is not to apportion responsibility.<sup>130</sup> We will not attempt to say who bears what share of the blame or what share of the remedial burdens going forward. That is both a Herculean task and one that is not relevant to our question. It is, however, worth noting that many of the investor-owned and state actors who would potentially profit from Arctic drilling have contributed significantly to the climate change that is opening up the Arctic waters.

Undeniably, the oil industry has been a significant contributor to global greenhouse gas emissions.<sup>131</sup> Indeed, one recent study concluded that “nearly two-thirds of historic carbon dioxide and methane emissions can be attributed to 90 entities,” including both investor- and state-owned oil and gas firms.<sup>132</sup> The top twenty investor- and state-owned entities contributing to global emissions from 1751 to 2010, including such firms as Chevron, ExxonMobil, Saudi Aramco, BP, Gazprom and Shell, contributed almost one third of global emissions.<sup>133</sup> Similarly, Northern nations and regions like the United States, the European Union, and Russia have had an outsized role in burning fossil fuels that have caused the climate to change.<sup>134</sup>

To say that corporations and nations have been major contributors is not to make any ethical judgment. These greenhouse gas emissions might be attributed equally to the consumers who created demand for petroleum products (*i.e.*, all of society).<sup>135</sup> National emissions could

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<sup>130</sup> See, *e.g.*, sources cited *supra* note 10.

<sup>131</sup> We mean that the oil industry’s upstream emissions through extraction and refining, direct emissions, and downstream emissions resulting from the consumption of fuel by consumers, have been significant.

<sup>132</sup> Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 *CLIMATIC CHANGE* 229, 229-30, 238 (2014), <https://link.springer.com/article/10.1007/s10584-013-0986-y>.

<sup>133</sup> *Id.* at 237 tbl.3.

<sup>134</sup> Mengpi Ge, Johannes Friedrich & Thomas Damassa, *6 Graphs Explain the World’s Top 10 Emitters*, WORLD RESOURCES INSTITUTE (Nov. 25, 2014), <http://www.wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters>.

<sup>135</sup> Again, for purposes of this Article, we are not concerned with overall allocation of global responsibility to pay the costs of climate mitigation or adaptation. As a matter of administrative ease, we recognize that placing responsibility “upstream” on oil and gas producers can allow costs associated with such responsibility to be passed downstream to others in society, including consumers. Many scholars therefore advocate upstream carbon taxes or emissions trading to address carbon emissions domestically. See, *e.g.*, Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming than Cap and Trade*, 28 *STAN. ENVTL. L.J.* 3, 37-44 (2009) (advocating an upstream carbon tax);

just as easily be attributed to the consumers demanding and purchasing products manufactured in other nations. And many contributions occurred before the effects of burning fossil fuels were known.<sup>136</sup> The fact of contribution implies only a causal responsibility, not necessarily an ethical responsibility.

There is one respect, however, in which some major actors do bear at least some moral culpability. Many major energy firms took actions that sought to obfuscate the effects of anthropogenic activity on the climate.<sup>137</sup> The Global Climate Coalition, in which many oil and gas firms were members, actively lobbied against government regulation of energy-related activities and greenhouse gas emissions, based on its claims that the science was uncertain as to whether human activity was contributing to climate change.<sup>138</sup> Recently uncovered evidence shows, however, that Exxon was internally aware of climate change as early as 1991, although until recently the firm “publicly dismiss[ed] climate change models] as unreliable and based on uncertain science.”<sup>139</sup> More recently, a 1991 film produced by Shell, called “Climate of Concern,” came to light, which had warned that climate

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Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 344–53 (2008) (advocating an upstream carbon cap-and-trade system).

<sup>136</sup> Daniel Farber, for example, has argued that, while most historical emissions of greenhouse gasses were arguably innocent, once the United States entered into the United Nations Framework Convention on Climate Change in 1992, claims of innocence possess less moral weight; see Farber, *Basic Compensation*, *supra* note 10, at 1641-42. Frumhoff et al. have likewise argued that investor-owned fossil fuel producers bear distinctive responsibilities for climate change in light of the significant emissions that have occurred since the IPCC was established, and “leading scientists had stated publicly that anthropogenic climate change was underway.” Frumhoff et al., *The Climate Responsibilities of Industrial Carbon Producers*, 132 CLIMATIC CHANGE 157, 158-59 (2015).

<sup>137</sup> See Ingvild Andreassen Sæverud & Jon Birger Skjærseth, *Oil Companies and Climate Change: Inconsistencies between Strategy Formulation and Implementation?*, 7 GLOBAL ENVTL. POL. 42, 43 (2007) (discussing oil companies’ strategic obfuscation of anthropogenic nature of climate change).

<sup>138</sup> Frumhoff et al., *supra* note 136, at 162-64 (discussing industry efforts to spread “misleading claims about climate science”); see Lester R. Brown, *The Rise and Fall of the Global Climate Coalition*, EARTH POL’Y INST. (July 25, 2000), [http://www.earth-policy.org/plan\\_b\\_updates/2000/alert6](http://www.earth-policy.org/plan_b_updates/2000/alert6); see also Sæverud & Skjærseth, *supra* note 137, at 49 (discussing Global Climate Coalition).

<sup>139</sup> Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About the Earth’s Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <http://graphics.latimes.com/exxon-arctic/>.



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change could lead to “extreme weather, floods, famines and climate refugees as fossil fuel burning warmed the world.”<sup>140</sup>

Most relevant to Arctic drilling, Exxon’s models predicted, accurately, that climate change would lengthen the open water season in the Arctic. In 1992, a researcher at that firm stated publicly that a longer open water season could reduce the costs of drilling in the Arctic by “30% to 50%.”<sup>141</sup> Thus, at the very least, this firm was aware that continuing production and consumption of fossil fuels would reduce its costs of future drilling in the Arctic — creating an opportunity to benefit. If the early 1990s seems like relatively recent history, it is worth noting that recent contributions to greenhouse gas emissions have dwarfed historical emissions, with half of total carbon and methane emissions from 1751 to 2010 having been emitted since 1984, and half of emissions “traced to carbon major fossil fuel and cement production” having been emitted since 1986.<sup>142</sup>

What is important is to appreciate that past anthropogenic contributions to climate change raise complex questions about the nature of our ethical obligations moving forward. While past contributions to climate change have not generally been criminal (like murder), or unconstitutional (like a seizure in violation of the Fourth Amendment), these contributions have unquestionably caused significant harm to the planet. Historical contributions exist at various points along a broad spectrum from the comparatively innocent to the comparatively culpable. Thus, while it would be a mistake to say that climate change is the result of past intentionally wrongful behavior like murder, it would also be a mistake to say that the origins of climate change have no ethical significance.

Having introduced the relevant facts regarding Arctic drilling and responsibility for climate change, we now turn to the heart of the analysis — using the case of Arctic drilling to determine the contours and limits of the wrongful benefit principle.

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<sup>140</sup> Damian Carrington & Jelmer Mommers, ‘Shell Knew’: Oil Giant’s 1991 Film Warned of Climate Change Danger, THE GUARDIAN (Feb. 29, 2017), <https://www.theguardian.com/environment/2017/feb/28/shell-knew-oil-giants-1991-film-warned-climate-change-danger> (contrasting Shell’s public film from 1991 “Climate of Concern” with its subsequent strategy of lobbying against climate regulation).

<sup>141</sup> Jerving et al., *supra* note 139.

<sup>142</sup> Heede, *supra* note 132, at 234 (citations omitted).

## IV. THE WRONGFUL BENEFIT PRINCIPLE IN THE ARCTIC

In Part I, we offered a sketch of the wrongful benefit principle. But that sketch left undefined the key elements of the principle. In this Part, we unpack the elements of the wrongful benefit principle in its four versions, using the case of Arctic drilling as our guide.

As we described, the wrongful benefit principle has different dimensions, depending on what degree of culpability one requires in the underlying act and depending on whether one takes a perpetrator-oriented or an object-oriented approach. In one sense or another, every dimension of the wrongful benefit principle might be separately applicable to Arctic drilling. Nation states and oil and gas firms have arguably engaged in both culpable and non-culpable actions that have contributed to climate change. And the wrongful benefit principle potentially applies whether one focuses on these perpetrators or simply on the Arctic oil as a morally tainted object. In this way, the ethical concerns regarding the Arctic drilling are thoroughly overdetermined. But we consider the various dimensions sequentially, both for clarity about the different ways that the wrongful benefit principle can operate and to acknowledge that, as the dimensions become more expansive, they depend on increasingly contentious normative claims.

A. *Applying the Wrongful Benefit Principle*

## 1. Culpable Perpetrators

The clearest form of wrongful benefit arises where a benefit derives directly from a party's own morally wrong past conduct. The inheriting murderer receives a benefit that is the direct result of her own morally culpable behavior. She profits from her own crime.<sup>143</sup> We suspect that few readers will disagree that such profiting is morally problematic.

While this may be the easiest case to justify the wrongful benefit principle, it may be more challenging to square this version of the principle with the facts of Arctic drilling. One may object that those who would drill in the Arctic — be it an investor-owned firm or a nation-state — would do nothing morally similar to the murderer who

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<sup>143</sup> Note that it is not important whether subsequent profit was the intention behind the wrongful act. It is wrong for the murderer to collect the inheritance, whether the murder was part of a calculated scheme to inherit or the murder was motivated entirely by other animus and the inheritance was unanticipated.

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seeks to inherit. These entities would not be profiting from their own past crimes.

Notice that this response is based upon a particular understanding of the wrongful benefit principle. The imagined interlocutor accepts the basic principle, but interprets both “bad act” and “sufficiently connected” in relatively narrow ways. “Bad act” is understood to imply morally blameworthy or even illegal conduct, like murder, and “sufficiently connected” is understood to mean that the beneficiary authored the bad act in question. In other words, wrongful benefit on this view arises only insofar as one’s benefit would derive from one’s own morally blameworthy or culpable conduct. While this understanding reflects one form of the wrongful benefit principle, as we argue below, this is not the only form that the principle may take.

Supposing that moral culpability were necessary for the wrongful benefit principle to apply, there is an argument that the oil industry has done something morally wrong that renders it responsible — at least in part — for producing the benefits it now seeks to exploit. Emissions have caused, and will continue to cause, harm to people and the planet that otherwise would not have occurred but for past extraction and refining of fossil fuels. The conduct causing these emissions is not entirely innocent. Despite scientific understanding of the anthropogenic nature of climate change, more than half of global emissions have occurred since 1986.<sup>144</sup> Even after the United States entered into the U.N. Framework Convention on Climate Change, and the IPCC made clear that the extraction, refining, and consumption of fossil fuels is affecting the climate, major oil and gas firms continued with a business-as-usual approach and actively funded misinformation campaigns.<sup>145</sup> And at least one firm knew as far back as 1992 that continuing fossil fuel production would decrease the costs of future drilling in the Arctic.<sup>146</sup> In this light, one could argue that this past conduct cannot be viewed as entirely innocent.

One might object that, even if the oil industry has engaged in morally culpable behavior that has contributed to climate change, the causes of climate change are so diffuse that it is misleading to characterize anyone as a “perpetrator.” Any single actor’s role in producing climate change (or even the contributions of an entire industry or nation) is far more attenuated than the murderer’s role in producing the inheritance. The inheritance is directly attributable to

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<sup>144</sup> See Frumhoff et al., *supra* note 136, at 161; Heede, *supra* note 132, at 234.

<sup>145</sup> See Frumhoff et al., *supra* note 136, at 163.

<sup>146</sup> See Jerving et al., *supra* note 139.

the murderer's conduct, whereas the oil industry did not single-handedly cause climate change. Along these lines, it might be pointed out that, the murder is the but-for cause of the inheritance while it is surely not true that climate change would not have happened but for any particular actor's emissions. At best, any given culpable actor has been only a very small contributor to global emissions.<sup>147</sup>

We do not believe that this distinction is morally important to our question. We are not interested in allocating responsibility or determining what share of the culpability to assign to whom. Our question is simply whether an actor's past conduct is enmeshed in creating an opportunity such that taking advantage of the opportunity becomes inappropriate. The question is not whether an agent is *the* perpetrator, but rather whether an agent has been *a* perpetrator.

To begin with, but-for causation is certainly not necessary for culpability, as over-determination cases show.<sup>148</sup> If a murderer shot her relative at the same moment that another person also shot her relative, then her actions would not be the "but-for" cause of her inheritance. Yet it would be bizarre to think that this makes any significant difference to the question of wrongful benefit. The mere fact that there was another wrongdoer involved does not cleanse an otherwise tainted inheritance.

More generally, wrongful benefit can arise when one's actions are only part of a broader systemic wrong. For example, imagine that someone contributed to widespread online bullying of a peer. Suppose that the peer commits suicide as a result of the bullying and, surprisingly, leaves an inheritance to the person who participated in it. We think that it would be wrong for this individual simply to accept the money for personal use. It should either be refused altogether or put toward some other cause. This is true regardless of how much of a causal contribution the participation played in the suicide. It is unnecessary to inquire how many others participated and how badly, whether the bullying would have happened regardless, or whether the victim even knew about this particular participant's contributions.<sup>149</sup>

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<sup>147</sup> Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1245 (1968) (noting that individuals have incentives to overuse public goods and perceive their negative impact to be small); Kevin M. Stack & Michael P. Vandenberg, *The One Percent Problem*, 111 *COLUM. L. REV.* 1385, 1388-90 (2011) (proposing that climate change can only be solved through regulation of small contributions to global emissions, but biases lead individuals to discount or ignore small values).

<sup>148</sup> See, e.g., MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 430 (2009) ("Counterfactual dependence is not and should not be necessary in these cases.").

<sup>149</sup> An alternative example might be where someone has played a role in a system

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In short, the wrongful benefit principle may apply even where a wrongdoer's own contribution is small and impossible to distinguish from the contributions of others.<sup>150</sup>

Fossil fuel producers (both investor-owned and state-owned) are in a similar position with regard to global climate change. No individual firm single-handedly caused global climate change. Nor was the oil industry solely responsible. As noted above, one study recently concluded that almost thirty percent of global carbon emissions from 1751 to 2010 could be attributed to the top twenty investor- and state-owned oil and gas firms, leaving more than two thirds of emissions attributable to other sources.<sup>151</sup> These firms did causally contribute to an overall system that produced global climate change. Similarly, no individual nation — let alone consumer — has caused climate change on its own. But nations like the United States and Russia have clearly played a non-trivial role in causing climate change. As with the merely participating bully, one need not lay the fault squarely at any single actor's feet to say that there is something morally wrong with profiting from one's own culpable or causal misconduct.

## 2. Non-Culpable, Causal Perpetrators

On this account, major nations and energy firms have engaged in enough past culpable behavior to render it morally problematic for them to profit from climate change opening up the Arctic waters. But suppose that the reader disagrees, and remains unconvinced that their past conduct was culpable. For the most part, the oil industry has merely produced and sold fossil fuels and major nations have merely consumed them. For a long time, we did not even appreciate that these activities were harmful, and, even now that we do, that appreciation does not make them categorically wrong — it certainly does not make them comparable to murder. Why should anyone think that the drilling in the Arctic would count as improperly profiting

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of ethnic subjugation. Imagine, say, a German citizen who willingly assisted Nazi officers in locating Jews. It would be a further wrong for that person to accept benefits from this system, such as receiving confiscated Jewish property. It would not matter whether the property in question came from the Jews against whom the person had informed. But this example also highlights the non-perpetrator dimension of wrongful benefit. It could be wrong for anyone, informer or not, to accept the stolen property.

<sup>150</sup> One implication of this point with regard to climate change is that almost no one is completely excused from responsibility. This may imply that we all — not just the oil industry — have some perpetrator-oriented reasons to refrain from exploiting the Arctic oil.

<sup>151</sup> Heede, *supra* note 132, at 237 tbl.3; *see also* Frumhoff et al., *supra* note 136, at 158.

from one's past misconduct? If the corporations and nations in question have done nothing culpable, then one might think that the wrongful benefit principle would not apply.

The assumption behind this argument — that a perpetrator must have engaged in a morally culpable bad act for the wrongful benefit principle to apply — is probably too strong.<sup>152</sup> Even if the past contributions to global climate change were entirely innocent, we believe that there are still perpetrator-oriented reasons to think that the wrongful benefit principle would apply. Non-culpable responsibility can suffice for application of the wrongful benefit principle.

To see the point, consider an instance of non-culpable killing.<sup>153</sup> Suppose that a person who has killed another in true self-defense is then in position to profit from the killing. Perhaps the defensive killer is declared the beneficiary of the deceased's will.<sup>154</sup> Or perhaps the defensive killer might profit by selling his story or his weapon.<sup>155</sup> Would there be anything wrong with this?

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<sup>152</sup> For a discussion of the perils in assuming that there is anything unjust about liability without fault, see generally Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976).

<sup>153</sup> As already noted, the slayer rules in various jurisdictions sometimes apply to non-culpable killings, whether killers were not guilty by reason of insanity or minority. See *supra* Part II.A.

<sup>154</sup> The slayer rule does not apply in cases of self-defense. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(1) (AM. LAW INST. 2011). For a criticism of this position, see Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 622 (2009).

<sup>155</sup> For our purposes, imagine someone who kills another in a paradigmatic, unavoidable case of self-defense then profiting from having committed the killing by, say, selling the gun. George Zimmerman is thus not the best example, given the controversy surrounding his acquittal after killing Trayvon Martin. See, e.g., *Zimmerman Found Not Guilty, Technically, But C'mon*, ONION (July 15, 2013), <http://www.theonion.com/article/zimmerman-found-not-guilty-technically-but-cmon-33124> (satirizing the outcome of the Zimmerman Trial). But Zimmerman does provide an example of the possibility for profit, as he sought to auction the gun that he used, claiming that he ultimately accepted a bid of \$250,000 for the weapon. Karen Brooks, *George Zimmerman Gun Sells For \$250,000*, HUFFINGTON POST (May 20, 2016, 9:28 PM), [http://www.huffingtonpost.com/entry/george-zimmerman-gun-auction\\_us\\_573fb7abe4b00e09e89f2834](http://www.huffingtonpost.com/entry/george-zimmerman-gun-auction_us_573fb7abe4b00e09e89f2834). The facts surrounding Zimmerman's auction suggest that others share our sense that profiting here would be wrong. A first attempt at auctioning the gun failed after public outrage caused the auction site to remove the auction and refuse to participate. See Frances Robles & Mike McPhate, *George Zimmerman Tries to Auction Gun Used to Kill Trayvon Martin*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/us/george-zimmerman-gun-auction-trayvon-martin.html>. Even Zimmerman — who fiercely maintained his innocence — seems to have viewed the proceeds as subject to special constraints, declaring that he would

We think that there would. Even if one is not culpable, there are constraints on how one can permissibly profit. It would be inappropriate for the innocent killer to say simply, "Well, lucky for me." To profit in this way fails to express what Bernard Williams has labeled "agent regret."<sup>156</sup> When an agent is the cause of harm, even innocently, we expect him or her to manifest certain attitudes of regret or remorse, and profiting is generally incompatible with these attitudes. If even the innocent killer ought not profit, that suggests that culpability is not a necessary condition for the wrongful benefit principle to apply.

Lest one think that this point depends on something special about killing, it is worth considering a more ordinary case. Suppose that a toxic chemical leaks from a faulty holding tank at a chemical plant and contaminates surrounding properties. Let us stipulate that the chemical company is entirely cleared of any wrongdoing or liability, the problem having been either entirely unforeseeable or attributable to another party like the tank engineers. Suppose that the contamination of the adjacent properties causes the state to condemn them. The chemical company, which had hoped to expand but could not previously afford the properties, then has the opportunity to purchase the long-coveted lands incredibly cheaply at public auction.

In this scenario, we think that there would be something wrong with scooping up the land as cheaply as possible and viewing it as merely a fortuitous windfall. It matters that the company would be benefitting from past harms that it played a role in causing. Even though the company was not culpable for driving the surrounding residents out of their homes, it may be subject to special obligations. Indicative of such obligations, it would be perfectly intelligible if the public auction demanded special concessions or if the company offered to pay an above-auction price. Such responses are intelligible as a response to the sense that benefitting here would be suspect. We do not mean to suggest that any acquisition of the land would be impermissible; we make only the weaker claim that some obligations arise. The general point is that the wrongful benefit principle may be triggered even without culpability. It is not only wrong to profit from one's crimes; it can also be wrong to profit from non-culpable acts or events.

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donate them to conservative causes. See Christopher Brennan, *George Zimmerman Says that He Will Use \$250G from His Gun Auction to Fund Conservative Causes*, N.Y. DAILY NEWS (May 24, 2016, 7:49 AM), <http://www.nydailynews.com/news/national/george-zimmerman-netted-250-000-gun-auction-article-1.2647713>.

<sup>156</sup> See BERNARD WILLIAMS, *MORAL LUCK* 27-30 (Cambridge Univ. Press ed., 1981).

Even if nations like the United States and oil and gas firms were not morally culpable for contributing to climate change, there is little doubt that they played a significant role in causing climate change. Two-thirds of recent emissions are attributable to ninety investor- and state-owned oil and gas firms.<sup>157</sup> In short, the industry's historical practice of extraction and refining of fossil fuels was one of the most significant causes of climate change. This production has as its mirror image the consumption of oil-thirsty nations, to whom causal responsibility can also be heavily attributed. Even if we did not appreciate it at the time, we now know that this has been, and will continue to be, incredibly harmful.

This historical role in causing global climate change — even if entirely innocent — may make it wrong for these nations and firms to profit from the damage that climate change has wrought. The causal role in bringing about climate change is arguably enough to trigger the wrongful benefit principle. Like the innocent chemical company, firms and nations have contributed, however innocently, to altering other people's backyards adversely and now finds itself in a position to profit as a result. This causal responsibility may be enough to trigger certain obligations. These obligations may place constraints on whether these parties may now profit or on how such profits might permissibly be used. In saying this, we are not claiming that firms or nations should be punished for innocent behavior, just as one need not think that a defensive killer is culpable in order to think that he ought not reap a six figure payday off his firearm. In both cases, culpability aside, some special normative situation is created, which creates some obligations going forward.

### 3. Object-Oriented Obligations

Thus far, we have described perpetrator-oriented reasons for thinking that the wrongful benefit principle applies to the oil industry or historically high-emitting nations drilling in the Arctic.<sup>158</sup> But is the

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<sup>157</sup> Heede, *supra* note 132, at 237 tbl.3.

<sup>158</sup> Whether the fact that particular managers or shareholders who made the decisions to extract fossil fuels in the past have died raises issues under the nonidentity problem is beyond the scope of this Article. See DEREK PARFIT, REASONS AND PERSONS 351-78 (Oxford Univ. Press ed. 1984) (discussing the nonidentity problem more generally); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 12 (1992) (describing the application of the nonidentity problem to rectifying injustice). We note that under principles of corporate law, corporations have "perpetual existence." Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012).



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concern only based on the fact that a firm or nation is a past contributor to climate change? One might wonder whether there would be anything wrong with a new energy company — untarnished by any history — drilling in the now-accessible regions of the Arctic Ocean. Imagine, for example, that a newly formed company, NewCorp, was the firm seeking to drill. We can even imagine that the company has essentially no ties to the previous oil and gas industry or the historical carbon emissions — perhaps it has been created by Martians who had no role in past emissions on Earth. Would the wrongful benefit principle still apply?

We believe that it would, though perhaps in a slightly different form. In other words, the wrongful-benefit concerns about drilling in the Arctic are not only about nations' and corporations' past history as perpetrators. There is also something problematic about the act of drilling for fossil fuels in areas accessible only due to the harm caused by burning fossil fuels.<sup>159</sup> This might be referred to the *object-oriented* dimension of wrongful benefit.<sup>160</sup> An object — be it your grandmother's china or a conflict diamond — can acquire special ethical significance as a result of its history or how it was acquired. As with the conflict diamond, such object-oriented significance can arise out of a connection between the benefit received and some past bad act, even if the recipient had nothing to do with the bad act.

Consider the following hypothetical — based on an example from Daniel Butt<sup>161</sup> — as an illustration of object-oriented remedial obligations. You are a farmer in a small farming community on a remote island. You all grow identical crops, which provide just enough yield to live on. One year, however, one farmer surreptitiously redirects the underground water flow from everyone else's property onto his own. Because your property abuts his property, extra water flows onto your land. Come harvest time, you produce a massive bumper crop, tripling your normal output, while all your neighbors' fields are barren. Following Butt, we think that, in this situation, it would be wrong for you to keep the excess crops. This obligation is not based simply on your capacity to compensate your neighbors —

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<sup>159</sup> In contrast, imagine that an alternate universe existed in which humans had not caused the climate to change, but, due to other circumstances, it became possible to drill for oil in the Arctic. In that other universe, the object would not be tainted in the same way, even if the environmental consequences of drilling for oil in the alternative universe Arctic were the same as the consequences in our actual world.

<sup>160</sup> See generally Goodin, *supra* note 15.

<sup>161</sup> See Daniel Butt, *On Benefiting from Injustice*, 37 CANADIAN J. OF PHIL. 129, 132-33 (2007).

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the fact that you are now in possession of a surplus — but rather based on the fact that this surplus derived from the wrongdoing of your neighbor. That is, your excess crop yield is an object that comes with ethical strings attached. You have done nothing wrong — you are not a perpetrator in any sense — but the wrongful benefit principle nonetheless applies to you.

In his telling, Butt includes another party who works harder than you and achieves a crop surplus — though he is unaffected by the redistribution of the water. Despite having an even greater capacity to compensate based on his hard work, this party plausibly has less duty to do so than the party who benefitted from the wrongdoing. It is important to distinguish our claims from those based upon principles of distributive justice. Even the poor farmer who is the beneficiary of past wrongful conduct may have an obligation to disgorge some of the profit, or not to profit in the first place. Distributional concerns, such as whether the distribution of resources was just in the first instance, must be addressed through different mechanisms.<sup>162</sup>

This version of the wrongful benefit principle — based on culpable conduct by others and a tainted object — applies to the case of Arctic drilling quite readily. Even if the firm seeking to drill in the Arctic were NewCorp, there would be a good argument that it would have an obligation not to profit from the past culpable acts of others. The opportunity to drill, like the bumper crop, is the direct result of past harmful acts. To avail oneself of this benefit is to profit from a past wrong, even if one is innocent oneself.<sup>163</sup>

One might object that there is a morally relevant difference between Arctic drilling and the bumper crop in the above example. Unlike the bumper crop, the opportunity to drill in the Arctic — the benefit received — is not the same object that was wrongfully “taken” if anything was “taken” at all. In the farming example, the benefit received is essentially the object that was wrongfully taken. The excess water that you receive is basically a stolen good, wrongfully taken from your neighbors at the expense of their ability to water their own crops. Relinquishing the crops you derive from the water seems akin to relinquishing the stolen water itself. Global climate change, in

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<sup>162</sup> See *infra* Part IV.B.

<sup>163</sup> For a discussion of what duties one might owe particular victims as a result of others' past culpable conduct, see generally Robert E. Goodin & Christian Barry, *Benefiting from the Wrongdoing of Others*, 31 J. APPLIED PHIL. 363 (2014) (discussing “who owes what to whom” when an innocent party is a beneficiary of past wrongdoing, such as the father's payment of a bribe to a Harvard admissions officer to admit his child).

contrast, has not stolen from anyone the opportunity to drill in the Arctic waters. So the connection between the wrongful harm and the benefit received appears more tenuous.

This objection raises a serious question about the expansiveness of the object-oriented versions of the wrongful benefit principle. It cannot be the case, one might say, that *any* benefit that results from another's past wrongful act is, as a result, necessarily a tainted object or tainted good. For example, Truman Capote wrote *In Cold Blood* based on the murders committed by Dick Hickock and Perry Smith. Capote benefitted significantly — to the tune of \$2 million in the first year<sup>164</sup> — and this benefit derived from the heinous crime that Hickock and Smith committed.<sup>165</sup> If the wrongful benefit principle would condemn the opportunity to profit from Capote's book, it runs the risk of becoming overinclusive.<sup>166</sup> Every gain traceable back to some human misfeasance — from the short seller who profits after financial fraud<sup>167</sup> to the incidental workplace beneficiary of a wrongful termination<sup>168</sup> — might become morally questionable. Examples like these suggest that not every benefit that conceivably derives from a wrong is necessarily impermissible; not all benefits from wrongdoing are tainted. So how can we say that drilling in the Arctic is like the bumper crop rather than like *In Cold Blood*?

Determining the limits of what counts as a tainted good is a difficult, philosophically rich puzzle. Surely the correct answer will depend, in part, on the normative foundation of the wrongful benefit principle, an

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<sup>164</sup> Harry Gilroy, *A Book in a New Form Earns \$2-Million for Truman Capote*, N.Y. TIMES (Dec. 31, 1965), <http://www.nytimes.com/books/97/12/28/home/capote-million.html>.

<sup>165</sup> One might object that, had Hickock and Smith not committed the murders, Capote would simply have written about some other true crime and that his success came from inventing a new genre, not from the crime itself. While this may be largely correct, it remains hard to argue that Capote did not, in fact, benefit from Hickock and Smith committing the crime that they did.

<sup>166</sup> *But see* RALPH F. VOSS, TRUMAN CAPOTE AND THE LEGACY OF *IN COLD BLOOD*, 192-216 (2011) (discussing whether Capote was guilty of exploiting the Kansas community where the crimes took place).

<sup>167</sup> *See, e.g.*, MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010).

<sup>168</sup> In a classic *Seinfeld* episode, George cruelly tells a restaurant manager that a busboy caused a fire at the neighboring table and Elaine jokingly adds that she will never eat there again. *See Seinfeld: The Busboy*, Season 2, Episode 12 (NBC television broadcast June 26, 1991). The busboy is fired. As it turns out, however, the next day there is a fire in the restaurant killing the wait-staff — the busboy was saved only by being fired the day before. Arguably, the busboy benefitted from George's immoral conduct. In fact, much of the episode's humor comes as the busboy thanks George for saving his life. Surely, one might say, the busboy should not regard his fortunate escape as morally tainted because it stemmed from arguably wrongful conduct.

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issue we address below. But, for present purposes, there are two features of Arctic drilling that we believe make Arctic resources tainted goods. First, the opportunity to drill is the *reciprocal* of the environmental harms of climate change insofar as both are matters of the same changed climate conditions. Second, drilling in the Arctic will produce more of the same harm from which it derives, reflecting a morally problematic indifference to the initial harm.

To explain the first of these responses in greater detail, the suggested disanalogy between Arctic drilling and the bumper crop was that the bumper crop recipient gets the precise thing that the victims lose, namely water. According to this view, the oil industry, in contrast, is not getting the precise thing that victims of climate change are losing. We disagree. This view derives from an overly reified conception of the benefits and losses. In fact, the oil industry is getting more favorable global climate conditions, which are the precise inverse of what climate victims are getting, namely less favorable conditions.

To see the point, consider a modified version of Butt's farming example. Again imagine that you are part of an isolated island farming community. This time, imagine that, for no particular reason, you grow tomatillos on your land, but the other farmers around you grow blueberries. With moderate effort every year, you each generate just enough of your respective crops to cover your living expenses. One year, after the crops have been planted, one of the other farmers intentionally uses an illegal chemical fertilizer, hoping to boost his yield illicitly. The fertilizer contaminates the entire community, significantly altering the pH balance of the soil to make it more alkaline. The blueberries, which require acidic soil, are completely wiped out. But your tomatillos, which thrive in alkaline conditions, produce a bumper crop of triple their normal output. Do you have any remedial obligations?

It seems to us that there is no moral difference between this case and the original case where water is diverted. In both, you receive a bumper crop due entirely to the malfeasance of another, which has harmed others within the community. Though the first involved receipt of a physical substance (water) and the second involved receipt of a condition (alkalinity), that difference cannot be normatively significant. But the receipt of changed conditions — beneficial to some but harmful to many others — is precisely the situation of the global community with regard to climate change. The investor- or state-owned oil firms, in availing themselves of unfrozen Arctic waters,

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would be benefitting from the warmer planet that threatens billions of people and even more non-human animals worldwide.<sup>169</sup>

Even if this were not enough, there is a second reason why Arctic drilling should be regarded as a tainted object in a way that *In Cold Blood* is not. The reason is that Arctic drilling will impose the same harm that has brought about its possibility. One might think that an important feature of *In Cold Blood* is that it is a literary masterpiece. It was an overall good for society that Capote penned it. In general, however, we do not think there is a moral requirement that one's actions be overall beneficial to society.<sup>170</sup> There is nothing necessarily morally wrong about writing a terrible or artistically meritless book, a book that has more harmful consequences than good ones, or even a book that inspires readers to commit murder (lest we condemn *Catcher in the Rye*).<sup>171</sup> Still, there is something valuable in the intuition here.

Imagine that Capote had written a book that compounded the harm that he was capitalizing on. Suppose, for example, that instead of writing *In Cold Blood*, Capote had penned the equally profitable *How to Commit Murder in Cold Blood*, again based on what he gathered from the real-life murders of Hickock and Smith. Now, we contend, there would be something wrong about profiting in this way. The wrong is based neither on writing a book based on real-life murders nor on writing a book that causes harm, but it is based on the confluence of these two factors. Writing such a book would manifest indifference to the real murders. It would treat them as opportune and replicable

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<sup>169</sup> See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FIFTH ASSESSMENT SYNTHESIS REPORT (2014), <http://www.ipcc.ch/report/ar5/> (providing an overview of current knowledge of the science of climate change); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS (2014), [https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5\\_wgII\\_spm\\_en.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf) (discussing threats and potential impacts of climate change on humans, animals, and the environment).

<sup>170</sup> In saying this, we are rejecting robust act utilitarianism — the view that one is morally required to maximize the good consequences of every action — but such a view has such radical consequences that this hardly seems like a significant position to take.

<sup>171</sup> See STALKING, THREATENING, AND ATTACKING PUBLIC FIGURES: A PSYCHOLOGICAL AND BEHAVIORAL ANALYSIS 22 (J. Reid Meloy, Lorrain Sheridan & Jens Hoffmann eds., 2008) (“[T]he most striking example [of the influence of literature is] the intense interest in, and identification with, Holden Caulfield, the angst-ridden adolescent in the book, *Catcher in the Rye* . . . . Mark Chapman was 25 years old when he killed John Lennon in December, 1980, and then sat down on the curb and was reading the book when the police arrived. Three months later, John Hinckley Jr., was 25 when he attempted to assassinate President Ronald Reagan. The book was found in his hotel room. Robert Bardo was 19 when he killed Rebecca Schaeffer 8 years later. He had the book in his possession at the time.”).

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models rather than as something to be condemned.<sup>172</sup> Thus, profit that might not be per se wrongful — here, profit from writing a deleterious book — can become wrongful when it arises in a historical context that ought to be met with condemnation rather than opportunism. In other words, an object may become tainted when profiting from it would reflect insensitivity rather than condemnation in the face of a regrettable reality.

The same is true, we believe, of Arctic drilling in the face of climate change. Drilling in Arctic regions that are only accessible due to the burning of fossil fuels involves taking advantage of the past harms. It fails to register the disapprobation that is appropriate for the environmental damage that continues to be wrought. By simply treating the melting Arctic as an opportunity to produce more fossil fuels, Arctic drilling reflects a willful indifference to the harms of climate change. It is one thing to cause the ordinary harms of fossil fuel production; it is another to respond to the collective harms of fossil fuel production by treating them as an opportunity for more such harms. This, we believe, can trigger the wrongful benefit principle. In contrast, *In Cold Blood* is not connected in this way; it does not treat the victims as an opportunity for more of the same kind of harm.

#### 4. Objects Stemming from Others' Past Innocent Conduct and Moral Ills

Many of the object-oriented forms of wrongful benefit that we have discussed thus far involve goods that are tainted by truly culpable acts like murder or theft. One might argue, at this point, that climate change is unlike this. Climate change, the thought goes, is not some abhorrent act that needs to be condemned as immoral, but rather an unfortunate conundrum that we have gotten ourselves into, with no one to blame. This is what Holly Lawford-Smith has referred to as a “moral ill”: “The world has not gone as it ought, morally, to have gone.”<sup>173</sup> No identifiable party is culpable and there is no incremental improvement that any party could make.<sup>174</sup> There is no wrongdoing or injustice, but there has been a failure.

It is questionable whether climate change is actually like this — innumerable people to blame should not be confused with no one to

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<sup>172</sup> See Butt, *supra* note 161, at 143 (arguing that obligations of beneficiaries arise out of the duty to condemn injustice).

<sup>173</sup> Holly Lawford-Smith, *Benefiting from Failures to Address Climate Change*, 31 J. APPLIED PHIL. 392, 395 (2014).

<sup>174</sup> *Id.*

blame. But, even if it is, we believe that the wrongful benefit principle may still apply. Consider yet a final variation of the farming example. Suppose that the pH balance in the soil is not altered by one individual's illegal use of fertilizer, but rather by the collective toll of the community's farming practices, including your own.<sup>175</sup> Assume that no single individual is to blame, nor would any single individual's action have made any difference. Nonetheless, you now have a bumper crop of tomatillos and everyone else has lost their blueberries. We believe that, again, you would have some remedial obligations not simply to pocket this surplus. Though no one has done anything culpable, the world has not gone as it ought to have gone, and you should not benefit because of this deviation.<sup>176</sup>

Even if no one were at all culpable for anthropogenic climate change, it would have this same character. We have, collectively, failed to ensure that the world go as it ought. Many individuals will be harmed by this change, but some will benefit directly from it. It is incumbent upon those who do reap the benefits to view them as, in a nonculpable sense, wrongfully obtained. This may entail obligations to forgo or surrender some of the benefits.

In this final sense, then, Arctic drilling may be subject to the wrongful benefit principle. Even if we assume that no one is blameworthy for climate change, there is something morally suspect about investor- or state-owned oil and gas firms, or nations reaping profits from a human failure that has inflicted grave and still unfolding harm on millions, if not billions, of innocent people.<sup>177</sup> This is an

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<sup>175</sup> This example shares features of nonpoint source water pollution such as agricultural runoff into the Gulf of Mexico.

<sup>176</sup> Cf. Lawford-Smith, *supra* note 173, at 399-400 ("If there is at least one person who suffers as a result of the world going other than it morally ought to have gone who can be compensated or made reparation, then to that extent it is impermissible to retain any benefits necessary to the world going as it morally ought to have gone.").

<sup>177</sup> See DARA, CLIMATE VULNERABILITY MONITOR (2d ed. 2012), <http://www.daraint.org/wp-content/uploads/2012/10/CVM2-Low.pdf> (estimating that climate change and a carbon-intensive economy will cause 100 million deaths by 2030); see also Farber, *Basic Compensation*, *supra* note 10, at 1610-13 (cataloguing the victims of climate change). In discussing the application of wrongful benefit to moral ills, Lawford-Smith adopts a "victim-driven" principle. That is, she suggests that benefitting may only be wrong if there is a victim to whom the benefits might be transferred. Lawford-Smith, *supra* note 173, at 399. It is abundantly evident that there are many victims of climate change, so her rationale applies. But we believe that there might be reasons to apply the wrongful benefit principle even in the absence of human victims. First, as the discussion of permissible harms above showed, some benefits may be all-things-considered harmful to the world, including non-human species and the environment itself. In such cases, forgoing the benefit would serve a purpose, even in the absence of

object-oriented perspective, not focused on any single firm or nation as a perpetrator, and it assumes no culpability of any actor. Admittedly, this is the broadest conception of wrongful benefit and one that not everyone will readily endorse. But it highlights the fact that the different versions of the wrongful benefit principle apply to Arctic drilling in a wide range of ways, even if one ignores any single firm's or nation's role as a significant and culpable contributor.

### B. *The Normative Foundations of the Wrongful Benefit Principle*

By drawing out various analogies and moral intuitions, we have suggested that the wrongful benefit principle applies to drilling in the Arctic. It applies because those who would drill have been perpetrators in changing the climate, and it applies because the newly accessible regions of the Arctic should be regarded as objects that are tainted by the moral stain of anthropogenic climate change. One may view the application of the principle to be more or less expansive, but we hope to have suggested that even the most conservative interpretation will still raise considerations in the Arctic context.

Even if one accepts the argument thus far, it may appear theoretically unsatisfying. We have extracted a principle — perhaps plausible in its own right — but with little explanation of its theoretical underpinnings. Even if they do exist, where do these obligations not to profit come from? And what are their limits?

In order to answer these questions, consider first the nature of the obligations imposed by the wrongful benefit principle. The obligations described by the wrongful benefit principle are correlates of remedial or rectificatory obligations.<sup>178</sup> A central premise of corrective justice is that, in response to injustice, parties may acquire obligations to rectify the injustice.<sup>179</sup> For example, a thief acquires an obligation to return the stolen property. Often remedial obligations have this form, calling for the relinquishment of wrongfully obtained gains. The wrongful benefit

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any victim to compensate. Second, for those who are motivated by a deterrence-based rationale, forgoing benefits may be viewed as a form of self-policing, where abstaining from the benefit deters future wrongdoing. *See infra* Part IV.B; *cf.* Aaron Ridley, *Ill-Gotten Gains: On the Use of Results from Unethical Experiments in Medicine*, 9 PUB. AFF. Q. 253, 261-62 (1995).

<sup>178</sup> *See* Butt, *supra* note 161, at 130-31.

<sup>179</sup> *See, e.g.,* Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 429-30 (1992); Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 352-54 (1992); Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403-04 (1992) (citing ARISTOTLE, NICOMACHEAN ETHICS 120-23 (Martin Ostwald trans., 1962)).



principle applies similar logic when the gains have yet to be realized. Rather than saying that the wrongfully obtained gains must be relinquished, however, the wrongful benefit principle says that they should not be acquired in the first place. Ultimately, the same rationale is at work, whether we say that the murderer has an obligation to relinquish her inheritance or has an obligation not to inherit.

As the invocation of corrective justice implies, the law is deeply concerned with perpetrator-oriented remedial obligations. The law also recognizes object-oriented remedial obligations in a number of ways. Good faith purchasers of stolen goods are generally required to return them to their original owners.<sup>180</sup> Unjust enrichment may require even innocent recipients of benefits, such as accidental or misdirected payments, to restore them to their rightful owners.<sup>181</sup> More recently, financial clawback suits and clawback legislation have become a tool for ensuring that parties do not profit, even non-culpably, from unfair financial transactions.<sup>182</sup>

Legal and ethical theorists have suggested a range of justifications for object-oriented remedial obligations from those incorporating expressive concerns to those incorporating consequentialist concerns with incentives. For example, Daniel Butt argues that refusing to accept benefits is a necessary aspect of the duty to condemn injustice.<sup>183</sup> In contrast, Aaron Ridley contends that availing oneself of the benefits of wrongdoing would encourage other acts of wrongdoing.<sup>184</sup> Quite differently, Robert Goodin argues that object-oriented responses to wrongdoing may offer informational efficiencies over other possible responses.<sup>185</sup> Finally, Axel Gosseries traces the object-oriented duties of beneficiaries to the duty not to free ride.<sup>186</sup>

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<sup>180</sup> See *supra* Part II.C.

<sup>181</sup> See *supra* Part II.F.

<sup>182</sup> See generally Amy Sepinwall, *Righting Others' Wrongs: A Critical Analysis of Clawbacks in Madoff-type Ponzi Schemes and Other Frauds*, 78 BROOK. L. REV. 1 (2012) (discussing the ethical challenges of using clawback suits to recoup gains from innocent investors who profited from Ponzi schemes, and arguing for the broader application of clawbacks and restitution).

<sup>183</sup> See Butt, *supra* note 161, at 143 (“[T]aking our nature as moral agents seriously requires not only that we be willing not to commit acts of injustice ourselves, but that we hold a genuine aversion to injustice and its lasting effects. We make a conceptual error if we condemn a given action as unjust, but are not willing to reverse or mitigate its effects on the grounds that it has benefitted us. The refusal undermines the condemnation.”).

<sup>184</sup> See Ridley, *supra* note 177, at 261.

<sup>185</sup> See Goodin, *supra* note 15, at 479.

<sup>186</sup> See Axel Gosseries, *Historical Emissions and Free-Riding*, 11 ETHICAL PERSP. 36, 51-52 (2004).

Each of these justifications could plausibly apply to drilling in the Arctic. For example, climate change has such a massive range of responsible agents — essentially everyone on earth to some extent or another — meaning that fault-based responses involve overwhelming information costs. A more effective response may be object-oriented, targeting the beneficiaries of climate change.<sup>187</sup> Climate change is indisputably going to impose massive societal costs. To reap the profits from it while letting others shoulder its costs looks like a form of free riding.

One might be tempted to link these cases together through the lens of incentives and deterrence. On this view, the purpose of the wrongful benefit principle and the legal doctrines we have discussed as falling within its ambit are all about providing incentives to avoid bad acts. The exclusionary rule tells federal and state agents not to violate the Constitution in their searches, or they will be unable to use the evidence to support conviction. Slayer statutes deter murders by removing the incentives that might shape a killer's motive. But while this might be a compelling rationale for perpetrator-oriented culpable acts like murder, or even some object-oriented considerations such as the desire to deter rebel warfare in diamond mining, a deterrence rationale cannot fully explain the wrongful benefit principle in all of its forms. Deterrence has no role to play in cases of non-culpable but causal actions that create opportunities for profit. The wrongful benefit principle has no impact on the insane person who kills and stands to inherit — who cannot legally “intend” such an act. Nor can the wrongful benefit principle deter natural disasters like hurricanes, though we argue that the principle still applies to prevent price-gouging. In such cases, deterrence has no impact. Similarly, while recognizing some intuitive appeal to viewing the principle through the lens of distributive justice, we do not believe that such an account captures all of its nuances. Whether a beneficiary of past wrongful conduct is rich or poor is not normatively significant to whether an ethical obligation arises to forego the benefit. Distributional concerns can be addressed through other mechanisms.<sup>188</sup>

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<sup>187</sup> This is part of the motivation behind the so-called “beneficiary pays principle,” which would allocate costs of mitigating climate change on the basis of present benefit rather than past contributions to pollution. See Edward A. Page, *Give it Up For Climate Change: A Defence of the Beneficiary Pays Principle*, 4 INT'L THEORY 300, 306 (2012). The wrongful benefit principle is quite different, and we do not mean to be endorsing the beneficiary pays principle. We are not concerned here with who must pay the costs of climate mitigation and adaptation.

<sup>188</sup> See *supra* Section IV.A.3.

Ultimately, we believe that the wrongful benefit principle is founded upon the duty of respect. What is wrong with benefitting from wrongdoing is that it fails to respect those who have suffered from the wrongdoing.<sup>189</sup> As we noted earlier about writing a profitable book based on a series of real murders, the action seems wrong insofar as it would manifest indifference to the real murders. The wrong consists in failing to respect the fact that real people were murdered.

This explanation may seem to treat the duties of wrongful benefit as expressive. They appear to be forms of our general duty to condemn injustice. In one sense, we accept this characterization. Continued drilling in the Arctic seems wrong — at least in part — for expressive reasons. It manifests a refusal to condemn climate change, and instead an embrace of it. Viewing global climate change as merely a business opportunity fails to acknowledge its ethically loaded character, and it may even encourage the destructive dependence on fossil fuels that has produced the problem.<sup>190</sup> And these kinds of considerations are part of what would make drilling in the Arctic an instance of wrongful benefit.

Still, characterizing the obligations against wrongful benefit as expressive can be misleading. It might suggest that the duty is about communicating some content (e.g. that what happened was wrong) to some recipient. If this were the case, then it would raise two classic issues faced by expressive theories in other contexts. First, why can't the expression be accomplished in other, less costly ways?<sup>191</sup> And, second, would the duty still apply if the expressive content were going

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<sup>189</sup> Our focus on respect for those who have been harmed or wronged — victims, so to speak — takes no stand on who *or what* might fall within this class. Depending on one's views, it might include nonhuman animals or other entities like a community, an ecosystem, or even the earth itself. For example, one might think that there is something wrong with wearing the ermine coat that you inherited from your grandmother because it seems to manifest a lack of respect for the creatures that were killed to create it. Your action won't create positive incentives — the animals are long dead — but it still might seem disrespectful to cloak oneself in their skins. Or one might think that drilling in the Arctic would manifest a failure to respect the harm that we have wrought on the earth itself. But if one is inclined toward a more anthropocentric moral view, then one can focus only on the human victims of climate change.

<sup>190</sup> See Jerving et al., *supra* note 139 (discussing Exxon's research demonstrating that continuing fossil fuel burning would reduce the cost of drilling in the Arctic by thirty to fifty percent).

<sup>191</sup> As T.M. Scanlon evocatively puts it, "Insofar as expression is our aim, we could just as well 'say it with flowers' or, perhaps more appropriately, with weeds." T.M. Scanlon, Jr., *The Significance of Choice*, 8 TANNER LECTURES ON HUM. VALUES 149, 214 (1986).

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to be masked or unreceived?<sup>192</sup> For example, suppose that our inheriting murderer could condemn her crime through a public statement or could be certain that her receipt of the inheritance would go unnoticed. Would either of these facts make receiving the benefit any less bad? We think not. For this reason, we believe that the better characterization of the duties in question is in terms of *manifesting respect*. Whether one manifests respect is independent of recipient observation.<sup>193</sup> It would be disrespectful, for example, to use your deceased mother's portrait as kindling even if one were alone or if one vocally exclaimed one's enduring love for her.

What disrespect is manifested by wrongfully benefitting? We believe that it is a disrespect for those who were previously victimized by the bad conduct, and for the environment itself — not merely its human inhabitants. For example, when the murderer inherits from her victim, it manifests a new and further disrespect for the victim, who becomes merely an instrument for the murderer's own ends. When an American couple purchases a conflict diamond for their engagement, it manifests a lack of respect for the fact that Africans were brutally exploited in its acquisition. Similarly, if an investor- or state-owned firm or the United States itself treats the Arctic oil as just another opportunity to achieve profit or even something like energy security, it manifests a lack of respect for the fact that climate change has harmed current human and non-human victims, in addition to victims in future generations.

Described in this way, the wrongful benefit principle connects naturally with the broader ethical concept of exploitation. Consider the following characterization of exploitation from Ruth Sample:

The basic idea is that exploitation involves interacting with another being for the sake of advantage in a way that degrades or fails to respect the inherent value in that being. It is this lack of respect that explains the badness of exploitation . . . [W]e can fail to respect a person by taking advantage of an injustice done to him. . . . If we gain advantage from an interaction with another, and that advantage is due in part to an injustice he has suffered, we have failed to give him appropriate respect . . . Those who make use of such weaker

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<sup>192</sup> See, e.g., Jean Hampton, *The Retributive Idea*, in *THE RETRIBUTIVE IDEA* 111, 131 (1988) (arguing that we should still mete out punishment for expressive reasons even if the message will go unheard).

<sup>193</sup> See JOSEPH RAZ, *VALUE, RESPECT, AND ATTACHMENT* 151-53 (2001) (characterizing respect in terms of a particular way of responding to value).

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bargaining positions for the sake of advantage are failing to demonstrate the appropriate respect that is due to the victims of injustice.<sup>194</sup>

For Sample, one way that a party may exploit another is to fail to respect their status as a victim and to take advantage of their situation of less leverage or bargaining power.

Now, wrongfully benefitting does not exactly involve taking advantage of a person in the way that Sample is explicating. But it does involve taking advantage *of a situation*. It is no coincidence that cases of wrongful benefit may also be described in terms of exploitation. The inheriting murderer is trying to exploit his relative's death.<sup>195</sup> If Capote did anything wrong, it was because he exploited the horrific Kansas murders.<sup>196</sup> And continued drilling in the Arctic would arguably be exploiting climate change.

Of course, not all things that can be described as “exploiting” are morally problematic. Peyton Manning exploits an opponent's weak secondary; Fallingwater exploits the beauty of its natural setting. There are some things that it is permissible to take advantage of — either because doing so is not disrespectful or because there is no duty of respect that is owed. But human tragedy, environmental degradation, and significant wrongs are not among these things. When a party benefits wrongfully, she takes advantage of a wrongful situation in a way that fails to acknowledge that some persons (and non-humans) are now victims. In the case of climate change — among the most significant tragedies and wrongs — these victims are mainly persons in the developing world or future generations. They deserve our respect and something more than crassly profiting from what has been or will be done to them. Such consideration, at least, should figure into the reasons concerning whether one ought to drill.

## V. POLICY IMPLICATIONS

We could choose to end our analysis here. We have articulated a normative principle, gleaned lessons about its features from both

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<sup>194</sup> RUTH J. SAMPLE, EXPLOITATION: WHAT IT IS AND WHY IT'S WRONG 57, 74 (2003).

<sup>195</sup> Highlighting the connection, a number of states have now included within their slayer statutes provisions to prevent anyone who has financially exploited the decedent from inheriting. *See, e.g.*, WASH. REV. CODE §§ 11.84.010–020 (2016) (including “abuser,” which is defined as “any person who participates . . . in the willful and unlawful financial exploitation of a vulnerable adult,” alongside “slayer” in the state's slayer statute).

<sup>196</sup> And some people did accuse him of this. *See* VOSS, *supra* note 166, at 211.

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ethics and law, applied it to our case study, and addressed its foundations and limits. However, we believe that one important task remains: to consider how these theoretical principles might inform actual law or policy. Therefore, in this final Part, we make three concrete policy recommendations that would incorporate the wrongful benefit principle in practice and consider how these recommendations might be realized in present legal structures. We recognize that this final Part represents a shift in tone — from a discussion of abstract principles to the concrete world of policy in action. We make this choice consciously. Our aim is to demonstrate that the wrongful benefit principle is not merely theory, but can have practical bearing on a complex and contemporary real-world problem of global import.

#### A. *Three Policies*

While current discussions about how to govern Arctic waters are largely viewed in terms of cost-benefit analysis or international realpolitik, we contend that normative considerations like the wrongful benefit principle deserve a place in the discussion as well. We do not mean to claim, however, that considerations of wrongful benefit are the only ones at play. The norm against wrongful benefit must be weighed alongside many other competing considerations, including pragmatic concerns about environmental, economic, and other consequences. So what would this look like?

In Part II, we examined a range of legal doctrines, all of which appear to incorporate the wrongful benefit principle in some fashion. Each offers some concrete legal remedy or response, ranging from direct prohibitions on slayer inheritance or price-gouging, to the exclusion of unconstitutionally seized evidence from trial, to informational governance regimes like the Kimberley Process Certification Scheme (“Kimberley Process”). If one takes seriously the application of the wrongful benefit principle to the Arctic, what sort of legal response might be appropriate? We offer three policies — in descending order of ambition — through which our global and domestic legal and customary institutions governing the Arctic might incorporate the principle.

First, we propose a global moratorium on drilling in regions of the Arctic that have only become accessible as a result of climate change. If, as we have argued, the benefits to be reaped and the actors who would reap them both raise significant ethical concerns, then a moratorium would seem a logical response. A moratorium would effectuate the meaning of the wrongful benefit principle in practice, as

it would not only preclude those actors that in the past contributed to climate change from drilling; it would likewise preclude others from benefitting from the tainted goods that lie therein. Moreover, many people are already calling for a ban or moratorium on Arctic drilling out of concern for harms to the environment, to marine life, or to the climate in the future.<sup>197</sup> There is, of course, a partial withdrawal of areas from leasing currently in place on the United States Outer Continental Shelf as a result of Presidential action under the prior administration. That action is consistent with the wrongful benefit principle, even if it was not adopted with the principle in mind.<sup>198</sup> To the extent that debate continues over the withdrawal of areas from leasing, either as a result of President Trump's Executive Order on *Implementing an America-First Offshore Energy Strategy* or an effort at Congressional action, the wrongful benefit principle provides an additional principled reason for supporting the existing withdrawal. But, regardless, such action should not be limited to the United States.

Short of a global moratorium, we still envision two ways that the wrongful benefit principle can affect Arctic policy. Our argument, after all, is that wrongful benefit generates concerns that should be weighed when considering whether, and in what ways, to permit Arctic drilling under the relevant legal and customary regimes. With that in mind, we propose two concrete ways that the law could take such considerations into account.

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<sup>197</sup> For example, in May, 2016, sixty-eight members of Congress co-signed a letter to the Secretary of Interior calling for a revision of leasing plans to ensure that “the Arctic Ocean should be permanently protected from oil drilling, not used to drill for more fossil fuels that we will not need — and must not burn — if we are serious about powering our future with clean energy.” Press Release, Rep. Jared Huffman, Rep. Huffman Leads Bipartisan Letter Urging DOI to End Dangerous Oil & Gas Drilling in the Arctic (May 2, 2016), <https://huffman.house.gov/media-center/press-releases/rep-huffman-leads-bipartisan-letter-urging-doi-to-end-dangerous-oil-gas>.

<sup>198</sup> We note, parenthetically, that a ban on mining for mineral resources was adopted under Article 7 of the Madrid Protocol on Environmental Protection to the Antarctic Treaty, June 22, 1991, 30 I.L.M. 1455 (“Any activity relating to mineral resources, other than scientific research, shall be prohibited.”); see also S.K.N. Blay, *New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol*, 86 AM. J. INT’L L. 377, 395 (1992) (discussing the mining ban). In 2016, on the twenty-fifth anniversary of the signing of the Antarctic Treaty, the Consultative Parties met and reaffirmed this commitment to “prohibit any activity relating to mineral resources, other than scientific research.” CONSULTATIVE PARTIES TO THE ANTARCTIC TREATY, SANTIAGO DECLARATION ON THE TWENTY FIFTH ANNIVERSARY OF THE SIGNING OF THE PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY, at 2 (May 30, 2016), [http://www.ats.aq/documents/ATCM39/ad/atcm39\\_ad003\\_e.pdf](http://www.ats.aq/documents/ATCM39/ad/atcm39_ad003_e.pdf). Therefore, global cooperation at this level is possible.

Our second recommendation is a system of global cooperation modeled on the Kimberley Process that would require a chain-of-custody certification that fossil fuels do not come from Arctic waters. Such an informational governance regime would put potential beneficiaries and the public on notice of the tainted nature of Arctic fossil fuels, just as the Kimberley Process does for conflict diamonds.<sup>199</sup> Informational governance tends to be less expensive and less controversial than other forms of governance, such as prescriptive rules or bans, but the provision of information can affect both public and private decision making.<sup>200</sup> It can educate firm managers about not only their environmental impacts but also their ethical obligations, and can inform consumers that there may be ethical distinctions of which they were not previously aware — for example, the distinction between Arctic and other fossil fuels. We acknowledge that informational governance does not guarantee outcomes as a prescriptive rule or ban might and opens the door to potential manipulation.<sup>201</sup> But, we believe that these concerns can be overcome through careful institutional design. A well designed informational regime would be a way to show that these considerations matter, even if they are not categorically determinative.

Third, without imposing any new governance structures, we propose reinterpreting existing statutory cost-benefit analysis in a more capacious way, so that it incorporates considerations like those in the wrongful benefit principle. Cost-benefit analysis can, especially in environmental law, risk devolving into a purely forward-looking consequentialist calculus. It has at times been reasonably criticized for smuggling in controversial assumptions about value.<sup>202</sup> But cost-benefit analysis can also be a much more innocent directive to

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<sup>199</sup> Cf. Kysar, *supra* note 71, at 615-623 (favoring information disclosure to inform consumers about the processes by which goods have been produced); Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L. REV. 511, 519-25 (2013) (discussing advantages and disadvantages of informational governance in the climate context).

<sup>200</sup> Light, *supra* note 199, at 520.

<sup>201</sup> See *id.* at 521.

<sup>202</sup> See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* ch. 9 (1993) (criticizing the use of cost-benefit analysis for its treatment of human and environmental values as commodities); MARK SAGOFF, *PRICE, PRINCIPLE, AND THE ENVIRONMENT* (2004) (arguing that environmental economics fails to provide accurate valuation); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 4 REGULATION 33 (1981) (noting that there are good reasons to question valuations placed on non-marketed costs and benefits).



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examine and weigh all the relevant considerations systematically.<sup>203</sup> In this light, our existing statutory structures might be reinterpreted to include the concerns associated with the wrongful benefit principle alongside the concerns that stem from environmental, economic, and social impacts in the future.

In the remainder of this Part, we discuss the legal and customary institutions governing the global Arctic. Our discussion focuses on how these existing institutions might effectuate these three policy proposals. We begin with a focus on international governance regimes, which will inevitably determine the fate of the Arctic, but we also address domestic law in the United States.

### B. Global Arctic Governance

Both formal global governance through the United Nations Convention on the Law of the Sea (UNCLOS), and informal governance through the Arctic Council should take account of the wrongful benefit principle in decisions and policies concerning Arctic resources.<sup>204</sup>

#### 1. UNCLOS

UNCLOS represents an “unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind’s very source of life.”<sup>205</sup> The Convention addresses navigational rights, territorial sea

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<sup>203</sup> See Kelman, *supra* note 202, at 33 (“At the broadest and vaguest level, cost-benefit analysis may be regarded simply as systematic thinking about decision-making.”); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUDS. 931, 934 (2000) (“The framework of costs and benefits has a very extensive reach, going well beyond the variables that get standardized attention in the usual techniques associated with the application of cost-benefit analysis.”). And cost-benefit analysis need not be inherently deregulatory. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008).

<sup>204</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; ARCTIC COUNCIL, DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL (Sept. 19, 1996), [https://oaarchive.arctic-council.org/bitstream/handle/11374/85/EDOCs-1752-v2-ACMMCA00\\_Ottawa\\_1996\\_Founding\\_Declaration.PDF](https://oaarchive.arctic-council.org/bitstream/handle/11374/85/EDOCs-1752-v2-ACMMCA00_Ottawa_1996_Founding_Declaration.PDF) [hereinafter *Ottawa Declaration*]. While the United States has not yet ratified UNCLOS, it is a member of the Arctic Council.

<sup>205</sup> *The United Nations Convention on the Law of the Sea: A Historical Perspective*, U.N. DIVISION FOR OCEAN AFF. & L. SEA (1998), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm) [hereinafter *Historical*

limits, economic jurisdiction, and conservation of marine life, among other issues, and provides a dispute resolution procedure between states.<sup>206</sup> Opened for signature in 1982, the Convention entered into force in 1994.<sup>207</sup> Of particular interest for our purposes, UNCLOS might be used to implement either the moratorium or the informational governance scheme that we suggest.

UNCLOS's most important provisions relating to Arctic drilling are those defining control over ocean resources. Article 76 defines the continental shelf of coastal States generally as the area to a distance of 200 nautical miles — but potentially up to 350 miles — from certain geographic baselines.<sup>208</sup> This scheme leaves large swathes of the world's oceans — including the Arctic — outside the jurisdiction of any nation. All rights to the “Area” beyond the limits of national jurisdiction,<sup>209</sup> are “vested in mankind as a whole” and minerals may only be recovered from this Area in accordance with the terms of the Convention.<sup>210</sup> UNCLOS specifically grants the governing body the power to limit the production of minerals, which includes oil and natural gas.<sup>211</sup> In general, UNCLOS adopts a cost-benefit type approach, recognizing the need to balance economic development and environmental concerns with orderly management of resources and international cooperation.<sup>212</sup>

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*Perspective*].

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* The United States is the only Arctic State that is not party to the UNCLOS, because the Senate has yet to ratify it. See Michael A. Becker, *International Law of the Sea*, 43 INT'L L. 915, 915-17 (2009) (detailing historical rejections by the Senate of the UNCLOS); Emily Yehle, *Congress Won't Ratify Law of the Sea This Year — Murkowski*, GREENWIRE (June 9, 2016), <http://www.eenews.net/greenwire/2016/06/09/stories/1060038570>. Because it is the available mechanism for formal cooperative governance in the Arctic, the United States Senate should ratify it.

<sup>208</sup> UNCLOS, *supra* note 204, art. 76, §§ 1, 5. Under articles 55 and 56(1) of UNCLOS, nations have exclusive jurisdiction over natural resources in their “Exclusive Economic Zone” (EEZ), which overlaps with the continental shelf. *Id.* arts. 55, 56(1), 57. If exploitation of resources occurs beyond the EEZ, the coastal State must make “payments of contributions in kind” to distribute them to other States Parties to the Convention. *Id.* art. 82. See also *Historical Perspective*, *supra* note 205, at *Setting Limits*; UNCLOS, art. 77, § 1 (“The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”).

<sup>209</sup> UNCLOS, *supra* note 204, art. 1, § 1.

<sup>210</sup> *Id.* art. 137; see also *id.* art. 140 (“benefit of mankind”).

<sup>211</sup> *Id.* art. 151(9). For the definition of minerals, see *id.* art. 133.

<sup>212</sup> See *id.* art. 150.

While neither the wrongful benefit principle nor any close analog explicitly appears among UNCLOS's listed objectives, we believe that its objectives should be construed broadly. In particular, a variety of phrases might open the door to considerations like those embodied in the wrongful benefit principle. Article 150 calls for "rational management of the resources."<sup>213</sup> UNCLOS states throughout that the resources are a "common heritage" to be used "for the benefit of mankind."<sup>214</sup> And it also repeatedly calls for prices that are "just" and "fair to consumers."<sup>215</sup> In reviewing activities, UNCLOS calls for assessment of whether development "result[s] in the equitable sharing of benefits."<sup>216</sup> While it is possible to read all of this language as consistent with a narrow focus on balancing economic and environmental consequences, we believe that a more inclusive, open-ended reading is equally plausible and much more felicitous. The generic vocabulary of listing objectives and encouraging cost-benefit analysis should not force us to abandon backward-looking, non-consequentialist considerations.

Beyond this interpretive suggestion, we specifically recommend amending UNCLOS to require information disclosure regarding the location of extraction of any resources from either the Area or the continental shelf of member States that has been exposed as a result of melting Arctic ice. That is, we recommend inserting a requirement that minerals extracted from previously inaccessible areas of the Arctic be labeled as such. In tandem, we recommend the creation of a global certification process that fossil fuels extracted from other areas do not come from the Arctic. Such a disclosure/certification regime would mark these goods as "tainted," just as the Kimberley Process requires a certification that diamonds were not mined from conflict areas. As in the Kimberley Process, the hope would be that member States would agree formally not to trade in such Arctic resources or, at least, to restrict trade. In this way, a certification would allow both those who would extract and those who would purchase fossil fuels from the Arctic to condemn the exploitation of wrongfully obtained resources.

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<sup>213</sup> *Id.* art. 150(b).

<sup>214</sup> *See id.* at preamble; *see also id.* arts. 136, 150(i), 153(1) (explaining that UNCLOS's governing body operates "on behalf of mankind as a whole").

<sup>215</sup> *Id.* arts. 150(f), 151(1)(a).

<sup>216</sup> *Id.* art. 155(f); *see also id.* art. 160(2)(g).

## 2. The Arctic Council

Formal mechanisms under UNCLOS are not the only route to incorporating the wrongful benefit principle. It may be easier to adopt such a measure through informal channels in the first instance, before formal mechanisms can be put into place.

In particular, one such informal channel — the Arctic Council — already exists and could likewise play an important role. In September 1989, officials from the eight Arctic States, including the United States, Canada, the Kingdom of Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, and Sweden, met to discuss “cooperative measures to protect the Arctic environment.”<sup>217</sup> In 1996, the Arctic Council was formally established as an intergovernmental forum that seeks to “provide a means for promoting cooperation, coordination and interaction among the Arctic States.”<sup>218</sup> In addition to the eight member States, there are Permanent Participants to represent the interests of indigenous communities, and other state and non-governmental observers.<sup>219</sup>

The Council operates by consensus among the Arctic States,<sup>220</sup> with issues being considered through six Working Groups and occasional Task Forces to address specific matters of concern.<sup>221</sup> While the Council has adopted two legally binding agreements,<sup>222</sup> for the most part, the Council’s role is as a forum for cooperation. The Council has

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<sup>217</sup> See *Frequently Asked Questions*, ARCTIC COUNCIL (Nov. 4, 2016), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/faq>.

<sup>218</sup> *Ottawa Declaration*, *supra* note 204, at Part 1(a). Its mission specifically excludes issues relating to military security. *Id.*, at Part 1(a) n.1.

<sup>219</sup> Heather A. Conley & Matthew Melino, *An Arctic Redesign: Recommendations to Rejuvenate the Arctic Council*, CTR. FOR STRATEGIC & INT’L STUD. (Feb. 6, 2016), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/160302\\_Conley\\_ArcticRedesign\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/160302_Conley_ArcticRedesign_Web.pdf); *The Arctic Council: A Background*, ARCTIC COUNCIL (2016), <http://www.arctic-council.org/index.php/en/about-us> (discussing increased interest and participation in Council by observer states and NGOs) [hereinafter *A Background*].

<sup>220</sup> *Ottawa Declaration*, *supra* note 204, at part 7.

<sup>221</sup> *A Background*, *supra* note 219, at 1-2.

<sup>222</sup> See AGREEMENT ON COOPERATION ON MARINE OIL POLLUTION PREPAREDNESS AND RESPONSE IN THE ARCTIC (2013), <http://www.ifrc.org/docs/idrl/N813EN.pdf> (providing for a binding agreement on marine oil in the Arctic); AGREEMENT ON COOPERATION ON AERONAUTICAL AND MARITIME SEARCH AND RESCUE IN THE ARCTIC (2011), [https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2068-v1-ACMMSE08\\_KIRUNA\\_2013\\_agreement\\_on\\_oil\\_pollution\\_preparedness\\_and\\_response\\_signedAppendices\\_Original\\_130510.PDF](https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2068-v1-ACMMSE08_KIRUNA_2013_agreement_on_oil_pollution_preparedness_and_response_signedAppendices_Original_130510.PDF) (providing for a binding agreement on search and rescue methods in the Arctic).

no power to implement or enforce any agreements; each Arctic State must instead adopt domestic implementing legislation.<sup>223</sup>

We suggest that the Council create a Working Group or a Task Force to discuss the newly accessible oil and gas resources in the Arctic. Among outcomes from such a forum might be either a moratorium or the adoption of an informational governance regime like the Kimberley Process that would require certifications that fossil fuels extracted by its members do not come from newly accessible Arctic waters.<sup>224</sup> These discussions should address concerns about wrongfully exploiting climate change, which, though backward-looking, dovetails with the Council's focus on issues of environmental concern. Ultimately, individual member States would then be responsible for adopting legislation effectuating the terms of any agreement on a moratorium or an informational governance regime.

An informal global approach to the management of common pool resources in the Arctic is not without precedent. In July 2015, outside the auspices of the Arctic Council, Canada, Denmark (in respect of Greenland), Norway, the Russian Federation, and the United States signed a declaration to "prevent unregulated commercial fishing" in the central Arctic Ocean.<sup>225</sup> The Declaration noted that while commercial fishing would not likely occur in the near future, a precautionary approach was warranted, given the likely future trajectory of the Arctic climate.<sup>226</sup> Signatories committed to adopt "interim" measures to facilitate "proper management of living marine resources in the Arctic Ocean."<sup>227</sup> These interim measures include joint programs of scientific research, permitting vessels to conduct commercial fishing only in accordance with the terms of fisheries

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<sup>223</sup> See *A Backgrounder*, *supra* note 219, at 2. We note that the same holds true for the Kimberley Process. See *supra* Part II.D.

<sup>224</sup> See *supra* Part II.D.

<sup>225</sup> DECLARATION CONCERNING THE PREVENTION OF UNREGULATED HIGH SEAS FISHING IN THE ARCTIC OCEAN 1 (2015), <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf> [hereinafter HIGH SEAS FISHING]; Press Release, U.S. Department of State, Arctic Nations Sign Declaration to Prevent Unregulated Fishing in the Central Arctic Ocean (July 16, 2015) [hereinafter Declaration to Prevent Unregulated Fishing], <https://2009-2017.state.gov/t/pa/prs/ps/2015/07/244969.htm>.

<sup>226</sup> *Id.* Such an approach, to the extent that it permits and even encourages overlapping governance by global and domestic law, could be thought of as an extension of the notion of *precautionary federalism* to the global sphere. Cf. Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333 (2017) (extending the concept of precaution from a guide for substantive regulation to the allocation of regulatory authority within the federal system in the United States).

<sup>227</sup> HIGH SEAS FISHING, *supra* note 225, at 1.

management programs, and coordinating monitoring activities.<sup>228</sup> Delegates from these nations, as well as other countries with major commercial fishing fleets that are not Arctic states (such as China), continued these discussions in 2016.<sup>229</sup> This Declaration relating to fisheries management could provide a template for informal global governance of Arctic fossil fuel resources — either under the auspices of the Arctic Council or through other global means. As with the case of fishing, exploration for fossil fuels is inchoate in the Arctic. A precautionary approach similarly makes sense to address this problem before there are more entrenched interests supporting unregulated drilling. And any global governance regime should include not only those nations that border the Arctic, but also those nations that play a significant role in fossil fuel extraction globally.

### C. Domestic Legal Governance

While the application of the wrongful benefit principle to Arctic drilling is a global concern, it is important to consider the role of domestic law for two reasons. First, as noted above, domestic legislation may be required to effectuate a global regime. But second, portions of the Arctic — namely, various nations' continental shelves — are under the jurisdiction of those individual nations. In the United States, the Outer Continental Shelf Lands Act (OCSLA) is the primary domestic statute governing oil and gas extraction in the Arctic waters.<sup>230</sup> The President plays a key role in determining an overall plan for development of Arctic resources, and retains the statutory authorization under OCSLA to withdraw unleased areas from oil and gas development.<sup>231</sup> As we have noted, on December 20, 2016,

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<sup>228</sup> *Id.* at 2.

<sup>229</sup> Hannah Hoag, *Nations Negotiate Fishing in Arctic High Seas*, ARTIC DEEPLY (Apr. 28, 2016), <https://www.newsdeedly.com/arctic/articles/2016/04/28/nations-negotiate-fishing-in-arctic-high-seas>.

<sup>230</sup> See Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2012). The Outer Continental Shelf includes “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined [in this title], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” *Id.* § 1331(a). Drilling also implicates other legal obligations under related environmental statutes. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012) (requiring disclosure of significant impacts on the environment); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012) (protecting endangered species from harm); Clean Water Act of 1972, 33 U.S.C. §§ 1311–1377 (2012) (aiming to promote the “chemical, physical, and biological integrity to the Nation’s waters.”).

<sup>231</sup> 43 U.S.C. § 1341(a) (2012).

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President Obama withdrew from commercial oil and gas exploration the Chukchi Sea Planning Area and the Beaufort Sea Planning Area (with certain exceptions) by Presidential Memorandum pursuant to section 12(a) of OCSLA. He cited, in support of his decision, concerns regarding environmental impacts.<sup>232</sup> This determination — though now contested as a result of President Trump’s Executive Order on *Implementing an America-First Offshore Energy Strategy* — was consistent with the wrongful benefit principle, even if President Obama’s reasoning did not take the principle expressly into account. We recommend that future administrations consider the wrongful benefit principle — in addition to forward-looking concerns about environmental impact — in deciding whether to permit any future leasing under OCSLA or whether to continue indefinitely the existing Arctic leasing withdrawal. And to the extent that Congress considers the bill proposing to overturn the withdrawal, we recommend that members of Congress likewise take into consideration the wrongful benefit principle.

OCSLA tends to take a cost-benefit approach, focusing on preventing harmful environmental impacts, while promoting the energy and resource needs of the United States.<sup>233</sup> Likewise, the 2013 National Strategy for the Arctic and the 2014 Implementation Plan for the National Strategy both recognize the need to balance these competing environmental, economic, and strategic concerns.<sup>234</sup>

OCSLA sets forth a four-stage process to develop an oil well on the Outer Continental Shelf (OCS),<sup>235</sup> and the wrongful benefit principle should inform decisions at each stage. First, the DOI formulates a five-year leasing plan; second, the Department conducts a lease sale; third, the lessee must submit various plans to the DOI including regarding oil spill response; and finally, if the DOI approves the plan, and exploration reveals oil or gas, the lessee must submit a “development

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<sup>232</sup> See *supra* note 120.

<sup>233</sup> See 43 U.S.C. § 1332(3) (noting that the OCS is a “vital national resource reserve held by the Federal Government for the public” that should be made available for development, while taking into account environmental concerns).

<sup>234</sup> DEP’T OF DEF., NATIONAL ARCTIC STRATEGY 7 (2013); IMPLEMENTATION PLAN FOR THE NATIONAL STRATEGY FOR THE ARCTIC REGION 14 (2014); see also National Security Presidential Directive-66/Homeland Security Presidential Directive-25 (Jan. 2009), <https://fas.org/irp/offdocs/nspd/nspd-66.htm>; Exec. Order 12,501, 3 C.F.R. 328 (1985); Exec. Order 13,547, 3 C.F.R. 227 (2010); Exec. Order No. 13,580, 3 C.F.R. 258 (2011).

<sup>235</sup> *Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984); see 43 U.S.C. §§ 1337(a)–(b), 1340(c)(1), 1344(a), 1351(a)(1).

and production plan” to the Department for approval.<sup>236</sup> The DOI should consider the wrongful benefit principle at several stages of this process.

OCSLA contains broad language enumerating the multiple values that the Secretary of the Interior must consider in managing the OCS, including “economic, social, and environmental values of the renewable and nonrenewable resources.”<sup>237</sup> While recognizing the important goal of developing national energy resources, OCSLA also acknowledges that “[t]iming and location of exploration, development, and production of oil and gas” should include consideration of “an equitable sharing of developmental benefits and environmental risks.”<sup>238</sup> The law broadly authorizes the Secretary to reject a development and production plan if the advantages of disapproving it outweigh the advantages.<sup>239</sup>

This is broad, normatively laden language. Pursuing “social values” could include ensuring compliance with the wrongful benefit principle, for example in a determination of the appropriate locations for such leases, and whether these locations are newly accessible in light of melting Arctic ice.<sup>240</sup> We believe that such considerations belong alongside considerations of potential economic gain and environmental harm in the Secretary’s determinations regarding Arctic drilling. Whether this outcome can be accomplished through regulatory interpretation or requires statutory amendment is less important to our proposal than the overarching principle.<sup>241</sup>

The 2016 withdrawal of the Arctic OCS from leasing was certainly a salutary development. But it is limited. It does not govern those areas of the Arctic under global governance or under the jurisdiction of other nations and the new Administration, and members of Congress are already attempting to reverse this action.<sup>242</sup> Thus, it remains to be seen precisely what will be the state of play of Arctic waters even under the jurisdiction of the United States, which is only part of the global puzzle. We believe that continuing review — at all levels — of

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<sup>236</sup> Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1215 (9th Cir. 2015).

<sup>237</sup> 43 U.S.C. § 1344(a)(1) (2012).

<sup>238</sup> *Id.* § 1344(a)(2).

<sup>239</sup> *Id.* U.S.C. § 1351(h)(1)(D).

<sup>240</sup> Because review of actions under OCSLA is provided under the arbitrary and capricious standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012), the Secretary of the Interior is vested with significant discretion.

<sup>241</sup> We recognize, of course, that statutory amendment would be a more complex process than mere interpretation by the agency or adoption of regulations.

<sup>242</sup> See *supra* note 128 and accompanying text.



drilling in newly accessible regions of the Arctic should factor in the wrongful benefit principle.

#### CONCLUSION

The wrongful benefit principle, as we have described it, seeks to capture our widely shared commitment to the impermissibility of exploiting bad acts for one's own gain. This commitment manifests itself across such a diversity of different legal doctrines — what biologists might describe as “convergent evolution”<sup>243</sup> — that it is hard to doubt the existence of some underlying normative pull. The best way to probe and understand this normative phenomenon is by thinking about new cases that challenge its various dimensions and boundaries.

The opening of Arctic waters for new drilling opportunities — a pressing and controversial matter of global import — presents just such a new and difficult case. We contend that efforts to drill in the Arctic fall within the aegis of multiple forms of the wrongful benefit principle, generating both perpetrator-oriented and object-oriented obligations. But one need not share all of our conclusions in this regard to think that the wrongful benefit principle applies *in some respect*. While consideration of the wrongful benefit principle is not outcome-determinative — rather, it must be weighed against competing considerations, including environmental, strategic, and economic consequences — we hope to have made the case that it deserves consideration by nations around the globe, as well as domestic agencies, the President, and Congress in weighing how to act in the Arctic. Our concrete aim is to put these considerations on the table.

But we also have a more theoretical interest in the wrongful benefit principle itself. Our aim, in this regard, has been to use the case of the Arctic to explore the principle's contours. That project, of course, matters to all sorts of cases in which parties might gain through the exploitation of wrongdoing or collective failure. Gun manufacturers profit from the occurrence of mass shootings and terrorist attacks, sometimes even drawing on these events for advertising fodder.<sup>244</sup>

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<sup>243</sup> See, e.g., GEORGE MCGHEE, CONVERGENT EVOLUTION: LIMITED FORMS MOST BEAUTIFUL xi (2011) (“[I]n many cases we see that evolution has produced the same form — or a very similar one — over and over again in many independent species lineages, repeatedly, on timescales of hundreds of millions of years.”).

<sup>244</sup> See Evan Osnos, *Making a Killing: Business and the Politics of Selling Guns*, NEW YORKER (June 27, 2016), <http://www.newyorker.com/magazine/2016/06/27/after-orlando-examining-the-gun-business/> (explaining that “[i]n recent years, in response to three kinds of events — mass shootings, terrorist attacks, and talk of additional gun

Some companies have begun thriving off the current refugee crisis in Europe, as overwhelmed states and municipalities outsource service provision.<sup>245</sup> Like Arctic drilling, these are hard, complex cases. But there is something that gives us pause here, and there is some principle behind that pause. There are considerations about where an opportunity has come from that are worth taking seriously.

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control — gun sales have broken records,” and describing gun industry strategy to encourage concealed carry weapons as a response).

<sup>245</sup> See Antony Loewenstein, *How Private Companies Are Exploiting the Refugee Crisis for Profit*, INDEPENDENT (Oct. 23, 2015), <http://www.independent.co.uk/voices/how-companies-have-been-exploiting-the-refugee-crisis-for-profit-a6706587.html/> (“A grim reality of the current migrant crisis sweeping Europe . . . is the growing number of corporations seeing financial opportunity in the most vulnerable people.”).