ARTICLES

THE (DE)MYSTIFICATION OF ENVIRONMENTAL INJUSTICE: A DRAMATISTIC ANALYSIS OF LAW

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ABSTRACT

Although Kenneth Burke is the preeminent rhetorician of the modern era, and his theories have been applied to issues of social change and the environment (including by legal scholars), the role of "justice" and "law" in his critical method of dramatism have received only passing treatment. This Article is therefore the first in any discipline to consider what Burke means when he defines law as the "efficient codification of custom"—as the law develops, it moves farther away from material conditions by stretching concepts in ways that lead to abstract legal fictions. The legal system thereby directs attention toward dubious identifications between the government and the governed and emphasizes ways in which the needs of both are unified. This rhetorical compensation for disunity actually "mystifies" injustice in subtle ways that reinforce the social status quo to the detriment of racial minorities, indigenous people, and the poor. The Article shows this mystification by analyzing transnational and international law and global issues related to environmental justice before concluding with suggestions for further research on how dramatism can provide a theoretical basis for effective social (and legal) change.

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INTRODUCTION

Perhaps the law is a path toward environmental justice. For example, climate justice litigation allows affected communities to act as "norm entrepreneurs" who can sway courts to expand the bounds of common law tort.[1] Moreover, political advocacy such as that of native Hawaiians has led to new state constitutional, statutory, and regulatory laws that might help them preserve traditional cultivation practices that are threatened by climate change.[2] Conversely, the law may reinforce a system that perpetuates injustice. This was the case with U.S. statutes and treaties that merely displaced pollution to landfills and incinerators in communities of color or exported them to nations of the Global South.[3] Further, the North American Free Trade Agreement (NAFTA) led to Mexico being flooded with cheap U.S. corn that devasted indigenous farmers and caused negative externalities like loss of agrobiodiversity.[4]

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1. *See* Maria L. Banda, *The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement*, 42 HARV. ENVTL. L. REV. 325, 386–87 (2018); *see also* JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 49–51 (2015).

2. D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157, 162 (2016); *see* Duncan French, *Sustainable Development and the Instinctive Imperative of Justice in the Global Order*, *in* 7 GLOBAL JUSTICE & SUSTAINABLE DEVELOPMENT 3, 22 (Duncan French ed., 2010) (calling a legal framework "a necessary element of justice").

3. DANIEL FABER, CAPITALIZING ON ENVIRONMENTAL INJUSTICE: THE POLLUTER-INDUSTRIAL COMPLEX IN THE AGE OF GLOBALIZATION 5 (2008); *see* Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995 (1992) (highlighting the irony that the disproportionate siting of hazardous facilities in minority neighborhoods is not a failure of environmental law but instead a success because, "[w]hile we may decry the *outcome*, the laws are working as they were designed to work").

4. Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 740–55 (2011) [hereinafter Gonzalez, *Critique*]; *see* Jonas Ebbesson, *Introduction: Dimensions of Justice in Environmental Law*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 1, 2–3 (Jonas Ebbesson & Phoebe Okowa eds., 2009) ("[Environmental justice] has taken the form of a critical voice [that] reveal[s] what is seen as unjust consequences of existing social arrangements and norms. For the same reasons, concerns for justice arise in the

Consider a third view—maybe the relationship between the law and environmental justice is one of flawed potential because the law can incorporate environmental justice principles only "in partial and imperfect ways" despite their formal recognition in legal instruments.[5] This is exemplified in the Submission on Enforcement Matters process in the North American Agreement on Environmental Cooperation, which can lead to poor communities obtaining remedies—but only as one of several tactics used strategically in a broader activist campaign.[6]

To see beyond these conflicting views, this Article provides new perspectives on "justice" and "law" by building on scholarship that draws from literary and rhetorical theory. For example, several commentators explore narrative and law: the opportunities and obstacles communities face to ensure their stories are heard by courts and other decisionmakers.[7] Others look at the literary devices and tropes employed in environmental justice litigation to opine that courts in issuing rulings favorable to the plaintiffs adopt these allegories in their opinions.[8] Still others apply specific rhetorical theories like classical stasis or the new rhetoric of Chaim Perelman to evaluate the effectiveness of different argumentative tactics in environmental justice disputes.[9]

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contexts of international environmental law as well." (footnotes omitted)); *see also* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

5. Shannon M. Roesler, *Challenging What Appears "Natural": The Environmental Justice Movement's Impact on the Environmental Agenda*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 230, 238–39, 246 (Keith H. Hirokawa ed., 2014).

6. *See* JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS 103–06 (2008); Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 137–38 (2007) (calling a citizen submission "additional fuel" for the Mexican government to initiate programs to provide environmental justice to indigenous peoples harmed by illegal logging, but calling the "direct contribution of the citizen submission process . . . difficult to distill because of its coincidence with other highly publicized events" like the arrest of Isidro Baldenegro Lopez, an indigenous leader and activist); *see also* North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., arts. 14–15, Sept. 14, 1993, 32 I.L.M. 1482 [hereinafter NAAEC].

7. *See, e.g.*, Pearl Kan, *Towards a Critical* Poiesis*: Climate Justice and Displacement*, 33 VA. ENVTL. L.J. 23, 54 (2015) (arguing for a greater use of poetry and storytelling in environmental legal advocacy); Helen H. Kang, *Respect for Community Narratives of Environmental Injustice: The Dignity To Be Heard and Believed*, 25 WIDENER L. REV. 219, 219–21 (2019) (arguing that fighting environmental injustice requires advancing community narratives); Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. ENVTL. L. & LITIG. 331, 338–45, 356–59 (2014) (comparing litigation to poetry and fairy tales to emphasize the need for narrative in nuisance-based environmental claims); Grace Nosek, *Climate Change Litigation and Narrative: How To Use Litigation To Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 738 (2018) (arguing that both framing theory and psychological research should be used by litigants to more "effectively advance their cause").

8. *See, e.g.*, Michael Burger, *The Last, Last Frontier*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH, *supra* note 5, at 303, 304–06 (recognizing that courts in Arctic drilling lawsuits sometimes adopt the plaintiffs' environmental tropes and allegories); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 350–53 (2017) (explaining how climate justice plaintiffs in *Juliana v. United States* structured the complaint as an "environmental jeremiad" that the court repeated (citing Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016))); *see also* Albert C. Lin, *Myths of Environmental Law*, 2015 UTAH L. REV. 45, 81–83 (explaining how environmental myths perpetuate social injustice).

9. *See, e.g.*, Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 ENVTL. L. 557, 592–609 (2020) [hereinafter Todd, *Fighting Stance*] (applying classical stasis theory to two climate justice

Such critical methods provide a theoretical foundation for understanding the connection between environmental justice and law. For example, one commentator wrote that such an approach to environmental legal discourse "offers a way to uncover how we identify and define problems (and problem-makers), how we conceive desirable goals (and goal-achievers) and how we craft solutions."[10] Because rhetoricians consider the tensions between law and justice,[11] such approaches are particularly apt for addressing whether the law corrects, causes, or has minimal effect on environmental injustice.

Perhaps no method is better suited for this task than that of Kenneth Burke, which some scholars claim is the most significant contribution to rhetorical theory since Aristotle.[12] Burke developed his theory of dramatism through a half-century corpus of eight books and numerous articles that have drawn the attention of critics in various disciplines—including law.[13] Because dramatism uses literary concepts as "[a] technique of analysis of language and thought as basically modes of action rather than as means of conveying information,"[14] it aligns with environmental justice activists' emphases on narrative and activism.[15]

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cases); Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENVTL. L. REV. 169, 210–31 (2020) [hereinafter Todd, *Sense of Equity*] (applying the new rhetoric and rule of justice of Chaim Perelman to two climate justice cases).

10. Michael Burger, *Environmental Law/Environmental Literature*, 40 ECOLOGY L.Q. 1, 5 (2013) [hereinafter Burger, *Environmental Law*].

11. *E.g.*, Austin Sarat & Thomas R. Kearns, *Editorial Introduction* to THE RHETORIC OF LAW 1, 3 (Austin Sarat & Thomas R. Kearns eds., 1996) (suggesting that "attending to the rhetoric of law is a way of attending . . . to questions of justice and injustice"); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1546 (1990) ("[T]here is an awkward but persistent tension between, on the one hand, what we know as the rule of law and, on the other, our commitments to justice and democracy."); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) ("[R]hetoric is continuous with law, and like it, has justice as its ultimate subject.").

12. Anthony Burke, Kyle Jensen & Jack Selzer, *Editor's Introduction* to KENNETH BURKE, WAR OF WORDS 1, 1 (Anthony Burke et al. eds., 2018) (characterizing Kenneth Burke's *A Rhetoric of Motives* as "the most intriguing, original, and stimulating contribution to rhetorical theory since Aristotle's treatise on the subject"); *see* Richard Graff & Wendy Winn, *Kenneth Burke's "Identification" and Chaïm Perelman and Lucie Olbrechts-Tyteca's "Communion": A Case of Convergent Evolution?*, *in* THE PROMISE OF REASON: STUDIES IN THE NEW RHETORIC 103, 103–04 (John T. Gage ed., 2011) (calling Burke along with Perelman "the head of the canon of twentieth-century rhetorical thought").

13. *See* WILLIAM H. RUECKERT, KENNETH BURKE AND THE DRAMA OF HUMAN RELATIONS, at xiii (2d ed. 1982); *see also* KENNETH BURKE, ATTITUDES TOWARD HISTORY (3d ed. 1984) [hereinafter ATH]; KENNETH BURKE, COUNTER-STATEMENT (3d ed. 1968) [hereinafter CS]; KENNETH BURKE, A GRAMMAR OF MOTIVES (Cal. ed. 1969) [hereinafter GM]; KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD (1966) [hereinafter LASA]; KENNETH BURKE, PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE (3d ed. 1984) [hereinafter PC]; KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM (3d ed. 1973) [hereinafter PLF]; KENNETH BURKE, A RHETORIC OF MOTIVES (Cal. ed. 1969) [hereinafter RM]; KENNETH BURKE, THE RHETORIC OF RELIGION: STUDIES IN LOGOLOGY (1970). This Article will follow the practice of Burke scholars by citing his books by their abbreviations. *See, e.g.*, RUECKERT, *supra*, at vii–viii.

14. LASA, *supra* note 13, at 54 (citation omitted); *see also* GM, *supra* note 13, at xxii (naming this method dramatism "since it invites one to consider the matter of motives in a perspective that, being developed from the analysis of drama, treats language and thought primarily as modes of action").

15. *See* PATRICIA BIZZELL & BRUCE HERZBERG, THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 1295–96 (2d ed. 2001) (defining rhetoric "as the use of language to form attitudes and influence action" and writing that dramatism "unifies rhetoric and poetic in a single analytic framework"); Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*,

Burke has been dubbed the "pioneer of ecocriticism"[16]: for over three decades, humanities and communication scholars have applied dramatism to environmental issues,[17] including the discourse of environmental justice.[18] Although both justice and law recur throughout his works,[19] the role of these concepts in dramatism remains underdeveloped by both rhetorical and legal commentators.[20] A dramatistic analysis of environmental justice provides a fitting vehicle to develop these concepts given their shared concern with the social: Burke treats rhetoric as fundamental to the maintenance

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39 DUQ. L. REV. 457, 468 (2001) ("What Kenneth Burke brings to legal thought is a framework for understanding why narrative is so powerful.").

16. Laurence Coupe, *Kenneth Burke: Pioneer of Ecocriticism*, 35 J. AM. STUD. 413, 413 (2001); *see* Randall Roorda, *KB in Green: Ecology, Critical Theory, and Kenneth Burke*, 4 INTERDISC. STUD. LIT. & ENV'T 39, 39 (1997) (noting that Kenneth Burke is considered one of the first critical ecologists).

17. Phaedra C. Pezzullo, *Unearthing the Marvelous: Environmental Imprints on Rhetorical Criticism*, 16 REV. COMM. 25, 33 (2016) (claiming that environmental rhetoricians have employed dramatistic analysis for over three decades); *see, e.g.*, M. JIMMIE KILLINGSWORTH & JACQUELINE S. PALMER, ECOSPEAK: RHETORIC AND ENVIRONMENTAL POLITICS IN AMERICA 23 (1992) (developing the concept of "ecospeak" based on Burke's treatment of rhetoric as identification); Molly Hartzog, *Scapegoating in the Wild: A Burkean Analysis of Two Outdoor Adventures Gone Wrong*, 9 ENVTL. COMM. 520, 522 (2015) (applying Burke's scapegoating and mortification); Tarla Rai Peterson, *The Will to Conservation: A Burkean Analysis of Dust Bowl Rhetoric and American Farming Motives*, 52 S. SPEECH COMM. J. 1, 2 (1986) (applying Burke's pentadic ratios); Casey R. Schmitt, *Scapegoat Ecology: Blame, Exoneration, and an Emergent Genre in Environmentalist Discourse*, 13 ENVTL. COMM. 152, 153–55 (2019) (discussing Burke's scapegoating, the negative, and binaries).

18. *See, e.g.*, Phillip Drake, *Indonesia's Accidental Island: Composing the Environment in the Echo of Disaster*, 12 ENVTL. COMM. 261, 263–64 (2018) (applying the concept of ecospeak to the discourses about a mud volcano that may have been caused by a mining company); Oscar Schmidt & Manuel Rivera, *No People, No Problem—Narrativity, Conflict, and Justice in Debates on Deep Seabed Mining*, 75 GEOGRAPHICA HELVETICA 139, 141 (2020) (applying Burke's pentad to justice issues in debates about deep seabed mining); Steven Schwarze, *Environmental Melodrama*, 92 Q.J. SPEECH 239, 254–55 (2006) (arguing that a melodramatic framing of environmental justice issues can be effective for gaining attention and identifying issues).

19. *See, e.g.*, ATH, *supra* note 13, at 291–92 (calling law "the efficient codification of custom" that over time becomes stretched to protect special interests); GM, *supra* note 13, at 173 ("[A]ny term for 'ideal' justice can be interpreted as a rhetorical concealment for *material injustice*, particularly when the actual history of legal decisions over a long period can be shown to have favored class justice *in the name of* ideal justice."); PC, *supra* note 13, at 186 n.2 (calling the law "an implement for the molding of custom").

20. Don J. Kraemer, *The Reasonable and the Sensible: Toward a Rhetorical Theory of Justice*, 46 PHIL. & RHETORIC 207, 208 (2013) [hereinafter Kraemer, *Reasonable*] (claiming that Burke's "commitment to questions of justice . . . is underdeveloped"). The author could locate only one sustained treatment of Burke's writings on law, which is an article by a sociologist. *See* Thomas Meisenhelder, *Law as Symbolic Action: Kenneth Burke's Sociology of Law*, 4 SYMBOLIC INTERACTION 43 (1981). Despite making several keen observations, the article ignores Burke's definition of law as "the *efficient* codification of custom" and the role of casuistic stretching. *See* ATH, *supra* note 13, at 291 (emphasis added). Although numerous legal scholars have applied Burke, only a handful have referenced justice and law, and then only in passing. *See, e.g.*, Conti, *supra* note 15, at 461–65 (summarizing portions of Burke's writings on justice, law, and constitutions); Kirsten K. Davis, *"The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 503 n.169 (2013) [hereinafter Davis, *Reports of My Death*] (quoting LASA, *supra* note 13, at 11) (noting Burke's claim that laws are essentially negative); Kirsten K. Davis, *The Rhetoric of Accommodation: Considering the Language of Work-Family Discourse*, 4 U. ST. THOMAS L.J. 530, 530 n.3 (2007) [hereinafter Davis, *Rhetoric of Accommodation*] (quoting ATH, *supra* note 13, at 291, 322) (noting Burke's treatment of the law as abstraction and as secular prayer); Jeff Todd, *The Poetics and Ethics of Negligence*, 50 CAL. W. L. REV. 75, 119–21 (2013) [hereinafter Todd, *Poetics*] (discussing the development of law as "the efficient codification of custom" (quoting ATH, *supra* note 13, at 291)).

of social order, and commentators view the social injustice of racism and poverty as a distinct dimension of environmental injustice.[21]

Dramatism can help individuals overcome "occupational psychosis" about the law,[22] which results in "trained incapacity," where their way of understanding problems blinds them to other ways of perceiving them.[23] Applying terms from literature and rhetoric creates "perspective by incongruity," a different way of seeing and thus a new understanding.[24] This perspective shows ways in which the law mystifies inequality through legal fictions that identify subaltern communities with their government.[25] Through ambiguous terms that suggest common interests between the government and the governed, the law deflects attention away from the plights of the marginalized and thereby perpetuates environmental injustice, particularly for the poor and indigenous people of the Global South and for those most affected by the global problem of climate change. By revealing how the law mystifies environmental injustice, a dramatistic analysis simultaneously demystifies the operation of law so that greater clarity might show the way toward justice.[26]

Section I opens with some core aspects of dramatism. Burke approaches rhetoric as identification, a study of how people use symbols—language—to show that their interests are similar so that they can identify with each other and with institutional structures like a nation or church.[27] In this sense, rhetoric is the use of symbols to create and maintain social order. Because individuals must communicate about reality by choosing terms that symbolize reality, language forms a "terministic screen"[28] that filters and thereby shapes human perceptions.[29] While terministic screens can aid in

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21. *See, e.g.*, ANN GEORGE, KENNETH BURKE'S *PERMANENCE AND CHANGE*: A CRITICAL COMPANION 10 (2018) (calling one of Burke's "fundamental" claims the theory "that humans understand themselves and their worlds via interpretative networks that are constituted by social exchange and are thus rhetorical, embodied, and experienced"); Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT'L L.J. 366, 370–71 (2019) (calling social injustice a concern because "environmental degradation is closely linked with broader social ills (such as poverty and racism)" (citing Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10683–702 (2000))).

22. *See* PC, *supra* note 13, at 49 (explaining that occupational psychosis results because "[a] way of seeing is also a way of not seeing—a focus on object *A* involves a neglect of object *B*").

23. *See id.* at 5–7 (calling trained incapacity "that state of affairs whereby one's very abilities can function as blindnesses").

24. *Id.* at 90 (writing that perspective by incongruity involves "taking a word usually applied to one setting and transferring its use to another setting," thereby "violating the 'proprieties' of the word in its previous linkages" to "exemplify[] relationships between objects which our customary rational vocabulary has ignored").

25. *See* ROSS WOLIN, THE RHETORICAL IMAGINATION OF KENNETH BURKE 186 (2001) (calling mystification "the process by which certain ideas are held to be universally valid by those who benefit from their espousal").

26. Kraemer, *Reasonable*, *supra* note 20, at 225 (explaining Burke's interest in the identification of inequality as a way to demystify it and thus lead "toward justice"); *see also* GEORGE, *supra* note 21, at 30 (calling perspective by incongruity "an overarching term for a series of critical methodologies and rhetorical strategies designed to overcome pious resistance to social change").

27. ATH, *supra* note 13, at 266 (defining duty as "a shorthand way of indicating identification with some larger corporate unit (church, nation, party)"); Kenneth Burke, *The Rhetorical Situation*, *in* COMMUNICATION: ETHICAL AND MORAL ISSUES 263, 269–70 (Lee Thayer ed., 1973) [hereinafter Burke, *Situation*] (characterizing one's identification with the state or country as an example of "the very roots of the rhetorical situation").

28. See *infra* notes 45–59 and accompanying text for an explanation of terministic screens.

29. *See* LASA, *supra* note 13, at 44–62 (developing the concept of terministic screens).

understanding, they also have the potential to diminish or exclude other perspectives, including by making those who are socially divided appear to have a common identity.[30]

Section II explains that the language of law is perhaps the most important terministic screen. In codifying the customary ways that people act, the law also reinforces the status quo of different justices for different classes.[31] As the law develops, old concepts are stretched to address new situations, becoming so abstract that their rationales no longer relate to material reality but instead become mixed dead metaphors.[32] Through the selection of legal fictions, the law becomes efficient, reflecting social unity by deflecting attention from material injustice. The rhetorical embodiment of an ideal legal system that affords the same justice to all portrays disunity as unity, which subtly reinforces the social status quo.

Section III then considers the intersection of environmental justice and law from a dramatistic perspective. The identity of some communities is one of marginalization, vulnerability, and exclusion because environmental justice is the environmentalism of minorities, the poor, and indigenous peoples, whether in the United States or other nations, especially those of the Global South.[33] Legal fictions can mystify inequality by identifying the interests of the community as "substantially" the same as the government's—even when the government has not acted or has opposing interests.[34] This Section explains this "rhetorical concealment"[35] through dramatistic analyses of transnational legal issues, such as the weakness of the "polluter pays" principle to mandate effective relief; the lack of access to justice because of the forum non conveniens (FNC) doctrine and trade and investment treaty investor-state dispute mechanisms (ISDMs); and the halting of climate justice litigation through procedural doctrines like displacement, political question, and standing.

Because this first application of dramatism to environmental justice is necessarily limited to a survey of a few legal issues, the Article concludes with suggestions for further research to help demystify environmental injustice. Given that dramatism draws from literary concepts, this includes the ironic possibility that some laws or legal institutions and initiatives afford environmental justice while others perpetuate injustice. Another avenue could be aspects of dramatism on social (and thus legal) change that can provide the theoretical backing in the search for corrective justice.[36]

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30. *See infra* Section I.

31. GM, *supra* note 13, at 173, 428–29; *see also* RM, *supra* note 13, at 142.

32. ATH, *supra* note 13, at 291; Davis, *Rhetoric of Accommodation*, *supra* note 20, at 530 n.3 (writing that law is a resource "to invent new abstractions by analogy to existing abstractions" (citing ATH, *supra* note 13, at 291)).

33. *See infra* Part III.A.

34. *See infra* Part III.B.

35. Rhetorical methods are "riddled with concealments [and] deceptions." Walter Jost, *On Concealment and Deception in Rhetoric: Newman and Kierkegaard*, 24 RHETORIC SOC'Y Q. 51, 52 (1994). Using "we" language when marginalized people are actually excluded is a rhetorical concealment of how the law does not afford relief.

36. *See* FRANK LENTRICCHIA, CRITICISM AND SOCIAL CHANGE 31 (1983) (calling Burke a "critical theorist of social change").

I. SOME CORE CONCEPTS: TERMINISTIC SCREENS, IDENTIFICATION/DIVISION, AND THE RHETORIC OF SUBSTANCE

Dramatism starts with a "terministic analysis," which means it gives individuals a way to critique human relations by inquiring into human symbol use—their language and words.[37] Burke defines man as "the symbol-using (symbol-making, symbol-misusing) animal."[38] Although other animals communicate with each other, humans are the "inventor of the negative," by using language that describes what something is as well as what something "is not"—and perhaps more importantly, by using language that describes proscriptions on action, such as the hortatory "thou shalt not."[39] The negative command leads to another important feature of language: action.[40]

The dramatistic approach "stress[es] language as an aspect of 'action,' that is, as 'symbolic action.'"[41] Burke does not view "symbolic action" in the sense of mere show without substance; to the contrary, words have the potential to persuade and thus motivate others to act (or refrain from acting).[42] Accordingly, "the use of words by human agents to form attitudes or to induce actions in other human agents" is "the basic function of rhetoric."[43] Rhetoric is further defined as "*the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols*."[44]

People cannot say anything without words,[45] so all language use involves a terministic screen, which is "an orientation to discourse that promotes some views, reactions, and statements while it 'filter[s]' out others."[46] Burke writes, "[e]ven if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function as a *deflection* of reality."[47] In one sense, this means that, because words are symbols, the term that designates some

37. Kenneth Burke, *Dramatism*, *in* COMMUNICATION: CONCEPTS AND PERSPECTIVES 327, 332 (Lee Thayer ed., 1967) [hereinafter Burke, *Dramatism*] ("Dramatism is a method of terministic analysis (and a corresponding critique of terminology) designed to show that the most direct route to the study of human relations and human motives is via a methodic inquiry into the cycle or cluster of terms and their functions implicit in the key term, 'act.'").

38. LASA, *supra* note 13, at 16 (emphasis omitted).

39. *Id.* at 10, 16 (emphasis omitted); *see also id.* at 420 ("The essential distinction between the verbal and the nonverbal is in the fact that language adds the peculiar possibility of the Negative." (emphasis omitted)).

40. *Id.* at 421 ("By a 'Dramatistic' approach to the negative, . . . we mean . . . we start from problems of action.").

41. *Id.* at 44; PLF, *supra* note 13, at 8 ("[A]ny verbal act[] is to be considered as 'symbolic action.'").

42. RM, *supra* note 13, at 42 ("[R]hetorical language is inducement to action (or to attitude, attitude being an incipient act)."); *see, e.g.*, *id.* at 80 ("Man is moved to action . . . for the sake of either real or apparent good; but desire depends on perception: perception in turn depends on the senses (which require images)."); PLF, *supra* note 13, at 9–11 (calling the symbolic act the "*dancing of an attitude*").

43. RM, *supra* note 13, at 41.

44. *Id.* at 43.

45. LASA, *supra* note 13, at 50 ("We *must* use terministic screens, since we can't say anything without the use of terms . . . .").

46. Lynda Walsh, *A Zero-Sum Politics of Identification: A Topological Analysis of Wildlife Advocacy Rhetoric in the Mexican Gray Wolf Reintroduction Project*, 36 WRITTEN COMM. 437, 447 (2019) (alteration in original) (quoting LASA, *supra* note 13, at 46).

47. LASA, *supra* note 13, at 45.

thing or act is *not* that thing or act.[48] Accordingly, the chosen vocabulary must be adequate to reflect the situation.[49]

More importantly, the selection of certain terms can also be a deflection because the choice of "nomenclature necessarily directs the attention into some channels rather than others."[50] Consider this analogy:

> When I speak of "terministic screens," I have particularly in mind some photographs I once saw. They were *different* photographs of the *same* objects, the difference being that they were made with different color filters. Here something so "factual" as a photograph revealed notable distinctions in texture, and even in form, depending upon which color filter was used for the documentary description of the event being recorded.[51]

Like the different color filters on a camera, different terms for the same situation can affect the perception of that situation. The choice of one term over another can emphasize certain features and deemphasize others or direct the attention toward one meaning but exclude other meanings that alternate terms would suggest.[52] Once terms are established, then debates about policy will be in those terms.[53] This means that dominant metaphors and common topics can generate a screening effect that influences the perceptions of discourse participants.[54] All discourse therefore involves decisions about "what meanings to reveal and conceal, disclose and foreclose"; accordingly, all language is "inherently rhetorical because its use is necessarily selective and partial."[55]

Terministic screens have a role in socialization by directing attention to certain orderings that necessarily exclude others. Start with the word "substance," which has a common meaning of a person's or thing's core, main part, or essential characteristics—what that person or thing *is*.[56] Burke, however, considers the etymological foundation of the word, "sub-stance," which taken literally means

48. *Id.* at 461 ("[M]an must spontaneously recognize that his *word* for a thing is *not* that thing."); *see also id.* at 52 ("[A]ll members of our species conceive of reality somewhat roundabout, through various *media* of symbolism.").

49. *See* Lawrence J. Prelli & Terri S. Winters, *Rhetorical Features of Green Evangelism*, 3 ENVTL. COMM. 224, 226 (2009); GM, *supra* note 13, at 59 ("Insofar as the vocabulary meets the needs of reflection, we can say that it has the necessary scope.").

50. LASA, *supra* note 13, at 45.

51. *Id.*

52. M. Nils Peterson, Jessie L. Birckhead, Kirsten Leong, Markus J. Peterson & Tarla Rai Peterson, *Rearticulating the Myth of Human-Wildlife Conflict*, 3 CONSERVATION LETTERS 74, 74–75 (2010) ("[V]ocabularies form terministic screens, wherein individual words (terms) interact to emphasize some aspects of reality, while deemphasizing others. . . . Terministic screens, therefore, direct attention by emphasizing or deemphasizing different elements of reality."); Prelli & Winters, *supra* note 49, at 226 ("Our terminological choices direct the attention toward some meanings but excluding others that could have been evoked through selection of alternative terms." (emphasis omitted)).

53. Burke, *Dramatism*, *supra* note 37, at 341.

54. Walsh, *supra* note 46, at 447.

55. Prelli & Winters, *supra* note 49, at 226; *see also* LASA, *supra* note 13, at 45 ("The dramatistic view of language, in terms of 'symbolic action,' is exercised about the necessarily *suasive* nature of even the most unemotional scientific nomenclatures.").

56. GM, *supra* note 13, at 21–22.

"something that stands beneath or supports the person or thing."[57] From this perspective, substance thus indicates what a person or thing *is not*: "That is, though used to designate something *within* the thing, *intrinsic* to it, the word etymologically refers to something *outside* the thing, *extrinsic* to it."[58] Stated differently, that which stands beneath is context, and context is outside or beyond the person or thing.[59]

Burke then advances this analysis of the "paradox of substance" to a treatment of "dialectic substance," which is an "over-all category of dramatism," one that seeks to understand "human motives in the terms of verbal action."[60] Language is dialectical because individuals understand what a word means only by defining it in terms of something else: getting to the substance of *a word* thus requires one to look outside of that word by comparing it to—even stating it in—*other words*.[61] Dialectic is therefore an exchange between terms, a process of merger and division where "scattered particulars" are joined in one idea that is then "carve[d] . . . at the joints," and the transit between merger and division allows for a new understanding.[62]

Burke, following Aristotle in treating rhetoric as the counterpart to dialectic, builds on the ambiguity of substance with an exploration of rhetoric as identification, by which Burke means a sharing of substance.[63] "A is not identical with his colleague, B. But insofar as their interests are joined, A is *identified* with B. Or he may *identify himself* with B even when their interests are not joined, if he assumes that they are, or is persuaded to believe so."[64] In this way, "A is 'substantially one' with a person other than himself," but "at the same time he remains unique, an individual locus of motives."[65] The identification of A with B means that A is "consubstantial" with B.[66] Burke continues that "substance, in the old philosophies, was an *act*; and a way of life is an *acting-together*; and in acting together, men have common sensations, concepts, images, ideas, attitudes that make them *consubstantial*."[67]

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57. *Id.* at 22; *see* ROBERT L. HEATH, REALISM AND RELATIVISM: A PERSPECTIVE ON KENNETH BURKE 169 (1986) ("[L]inguistic transformation rests solely in the nature of terministic substance.").

58. GM, *supra* note 13, at 23.

59. *Id.*

60. *Id.* at 33; *see* BARBARA A. BIESECKER, ADDRESSING POSTMODERNITY: KENNETH BURKE, RHETORIC, AND A THEORY OF SOCIAL CHANGE 31 (1997) (recognizing "Burke's tactic of taking language and thought as the object of inquiry" as a way "to come to terms with . . . human motivation").

61. *See* GM, *supra* note 13, at 33–34; *see also* LASA, *supra* note 13, at 14 (calling the "second-level aspect of human symbolism" the use of "words about words (as with the definitions of a dictionary)"); Burke, *Dramatism*, *supra* note 37, at 339 (writing that any symbol system that describes the nonsymbolic must speak of things in terms of what they are not).

62. GM, *supra* note 13, 403–04, 440 (discussing Socrates' principle of merger); *see also* GREIG E. HENDERSON, KENNETH BURKE: LITERATURE AND LANGUAGE AS SYMBOLIC ACTION 116 (1988); Todd, *Poetics*, *supra* note 20, at 110.

63. *See* RM, *supra* note 13, at 21; *see also* Kraemer, *Reasonable*, *supra* note 20, at 214 (calling "identification" the "key term in Burke's rhetorical theory").

64. RM, *supra* note 13, at 20.

65. *Id.* at 21.

66. *Id.*

67. *Id.*; *see* KILLINGSWORTH & PALMER, *supra* note 17, at 23 ("Kenneth Burke's chief contribution to rhetorical theory was the concept of *identification* as the means by which a speaker or writer puts forth an image or character . . . and invites the audience to participate in a consubstantial relationship with that image.").

Expressions like "way of life" and "acting-together" suggest a broader vision for rhetoric than the classical notion of oratorical training or a good man speaking well[68]: rhetoric designates a function that is present in all socialization and the social order itself.[69] One commentator calls identification "Burke's name for the ontologically guaranteed but genuinely historical process whereby a condition of impossibility (the irreducible estrangement of the individual) is dialectically transformed or sublated into a condition of possibility (sociality) by way of rhetoric."[70] Persons in their natural or biological state feel estranged from each other.[71] Nevertheless, people transcend the natural by creating order through language and its "[r]esources of classification, of abstraction, of comparison and contrast, of merger and division, of derivation, and the like."[72]

It is through the symbolic—language and rhetoric—where the social "takes place" and has its "very mode of existence."[73] As Burke writes, "the language factor thus shows in the ability to develop a complex human social order, in the corresponding ideas of status and property, in the thou-shalt-not's indigenous to such a structure, and in the various 'positives' that arise out of such negations."[74] Accordingly, individuals identify not only with each other but also with institutional structures like a nation or church.[75] Rhetoric can thus "enable group cooperation, build social networks, and even

68. *See, e.g.*, Kirsten A. Dauphinais, *Quintilian's Curriculum*, 20 NEV. L.J. 917, 929–32 (2020) (discussing the importance to Roman Empire rhetorical educator Quintilian of being both skilled in speaking and possessing good character).

69. RM, *supra* note 13, at 39, 44 (claiming that there is an "ingredient of rhetoric in all *socialization*" because "[t]he individual person, striving to form himself in accordance with the communicative norms that match the cooperative ways of his society, is by the same token concerned with the rhetoric of identification"); *see also* Kraemer, *Reasonable*, *supra* note 20, at 216 ("We act with attitudes, forming ourselves ethically in accord with this or that socioeconomic order.").

70. BIESECKER, *supra* note 60, at 48, 59 ("[T]he movement of the dialectic guarantees the emergence of the social, the provisional sublation of the individual into the collective."); *see also* RM, *supra* note 13, at 39.

71. BIESECKER, *supra* note 60, at 46.

72. *Id.* at 46–47 (alteration in original) (quoting RM, *supra* note 13, at 285); *see also* RM, *supra* note 13, at 23 (writing about the possibility of rhetoric moving us "to the universal"); Kraemer, *Reasonable*, *supra* note 20, at 215 ("Burkean identification joins body and ideology . . . .").

73. BIESECKER, *supra* note 60, at 50; *see also* ATH, *supra* note 13, at 266–67 ("Identification is not in itself abnormal; nor can it be 'scientifically' eradicated. One's participation in a collective, social role cannot be obtained in any other way. In fact, 'identification' is hardly other than a name for the *function of sociality*.").

74. LASA, *supra* note 13, at 443.

75. *See* ATH, *supra* note 13, at 266 (defining duty as "a shorthand way of indicating identification with some larger corporate unit (church, nation, party)"); *see also* Burke, *Situation*, *supra* note 27, at 269–70 (characterizing one's identification with a state or country as an example of "the very roots of the rhetorical situation").

'assist[] the survival of cultures by promoting social cohesion.'"[76] Viewed optimistically, terministic screens offer symbolic possibilities that enable people to unite as a society.[77]

Burke's use of quotation marks around "positives" suggests the corresponding negatives of terministic screens. Implied in the concept of identification is "its ironic counterpart: division."[78] After all, identification is important "precisely because there is division. Identification is compensatory to division. If men were not apart from one another, there would be no need for the rhetorician to proclaim their unity."[79] Although rhetoric can overcome division by bringing persons together, the very process of identification creates or reinforces new divisions by delineating groups and setting the stage for conflict. "[T]he social appears not as a perfectly egalitarian space of cooperation but always and already as a field necessarily fraught with factional strife."[80] Rhetoric thus involves identification as "a partisan weapon," as "the possibilities of classification in its partisan aspects; it considers the ways in which individuals are at odds with one another, or become identified with groups more or less at odds with one another."[81] Here, one arrives at the "cynical view" of rhetoric as "the way in which speakers trick, manipulate, or even deceive their audience into identifying with them and into doing what they want."[82] In Burke's words, "the lugubrious regions of malice and the lie."[83]

The nature of terministic screens means that the rhetorical construction of bogus identifications need not result from outright lies. People can conceive of reality only

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76. Courtney Megan Cahill, *"If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument*, 55 BUFF. L. REV. 777, 800–01 (2007) (alteration in original) (quoting RM, *supra* note 13, at 43); *see also* Ann Branaman, *Drama as Life: The Seminal Contributions of Kenneth Burke*, *in* THE DRAMA OF SOCIAL LIFE: A DRAMATURGICAL HANDBOOK 15, 24 (Charles Edgley ed., 2013) ("Identification is, at its heart, a matter of worldview—the identification of human purpose in some terms—in relationship to a dominant set of meanings in a society or historical period.").

77. *See* BIESECKER, *supra* note 60, at 21 (calling rhetoric "the condition of possibility for collective human action"); Peterson et al., *supra* note 52, at 75 ("The terministic screens people use enable them to consider and discuss the importance, meaning, and demands (action called for) of their experience."); Prelli & Winters, *supra* note 49, at 227 ("Pursuit of identification involves searching for and exhibiting terminological and other symbolic properties shared with others, properties that screen situations in ways that imply mutual adherence to the substance of a point of view."); *see also* Burke, *Dramatism*, *supra* note 37, at 331 (writing that every terminology suggests possibilities).

78. RM, *supra* note 13, at 23.

79. *Id.* at 22; *see also* Conti, *supra* note 15, at 459 ("Inducing cooperation is only necessary because man is divided . . . .").

80. BIESECKER, *supra* note 60, at 49; *see also* RM, *supra* note 13, at 23 ("[The] ideal culminations [of rhetoric] are more often beset by strife as the condition of their organized expression, or material embodiment."); Matthew Ortoleva, *"We Face East":* The Narragansett Dawn *and Ecocentric Discourses of Identity and Justice*, *in* 16 ENVIRONMENTAL RHETORIC AND ECOLOGIES OF PLACE 84, 84 (Peter N. Goggin ed., 2013) ("[T]he public sphere is a space of conflict, imbued with power structures and saturated with domination and subordination.").

81. RM, *supra* note 13, at 22–23, 45 (emphasis omitted) ("Since identification implies division, we found rhetoric involving us in matters of socialization and faction.").

82. Cahill, *supra* note 76, at 800.

83. RM, *supra* note 13, at 23, 45 (recognizing the possibility of "deliberate cunning" when "an identification favorable to the speaker or his cause is made to seem favorable to the audience"); *see also* Bill Bridges, *Terministic Screens*, *in* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 722, 723 (Theresa Enos ed., 1996) (writing that Burke called attention to how terministic screens could "manipulate us").

"through various *media* of symbolism,"[84] so "*many of* [*our*] *'observations' are but implications of the particular terminology in terms of which the observations are made*."[85] Accordingly, "much that we take as observations about 'reality' may be but the spinning out of possibilities implicit in our particular choice of terms."[86] Although the array of terminological options has the potential to produce different views about some thing or situation, terministic screens can also "limit our perception."[87] Recall the example of the same object photographed with different color filters[88]: the camera lens and its filter not only highlight certain features but also exclude others because, for each picture, "one cannot see what is outside of the camera frame or see the photograph in a different light."[89]

Applying this metaphor to the social arena, terministic screens can be used to deflect attention away from divisions that are legitimately established by one set of terms through the selection of ambiguous terms that suggest identification. Consider the expression that something is "*substantially* true." Through this qualifier, the rhetor can identify something as "true" even if the evidence does not show it to be true.[90] This "linguistic resource" allows for power through ambiguity, the ability to claim something is "substantially" a certain way rather than having to definitively state that it *is* or *is not* that way.[91] As discussed above, the word "substance" is important for dramatism, but this rhetoric of substance finds expression in other ways, such as "in principle": diplomats can avoid commitment by accepting a proposal "in principle," or scientists can overcome the lack of scientific proof by saying that a proposition is possible "in principle."[92]

This same function exists even without "telltale expressions" like "substantially," "in principle," or "essentially."[93] Consider the pronoun "we," which Burke calls a "wonder-word" because it applies collectively and thus obscures distinctions.[94] For example, when the national "we" goes to war, some will be "trudging in the muck" while others "are making a killing by speculating in war stocks."[95] Further, when "we" as a nation lend money to foreign countries, businesses are paid back via payments for exports, so this "ambiguity of identification" makes the citizens of the nation idealists while some nationals are involved in real transactions.[96] When even the "most

84. LASA, *supra* note 13, at 52.

85. *Id.* at 46.

86. *Id.*

87. HEATH, *supra* note 57, at 90.

88. *See supra* note 51 and accompanying text.

89. Peter Loge, *How To Talk Crimey and Influence People: Language and the Politics of Criminal Justice Policy*, 53 DRAKE L. REV. 693, 695 (2005).

90. GM, *supra* note 13, at 52.

91. *Id.*; *see also* George Cheney, Kathy Garvin-Doxas & Kathleen Torrens, *Kenneth Burke's Implicit Theory of Power*, *in* KENNETH BURKE AND THE 21ST CENTURY 133, 135 (Bernard L. Brock ed., 1999) ("Burke directs our attention . . . to the many meanings and ambiguities of power that symbols introduce into human experience.").

92. GM, *supra* note 13, at 52.

93. *Id.* at 52–53.

94. PC, *supra* note 13, at 305–06.

95. *Id.* at 306.

96. Burke, *Situation*, *supra* note 27, at 271–72.

clear-sounding of words can thus be used for the vaguest of reference,"[97] then "we obscure difference even as we revel in difference" and "deepen exclusion" though seeming to find "greater inclusiveness."[98]

In sum, "the terms used to create identification work to include the members of a group in a common ideology, while at the same time excluding alternate terms, other groups, and competing ideologies."[99] One consequence is that "[t]erministic screens shape the way society reacts to environmental challenges by constraining possibilities."[100] These constraints are particularly problematic for communities marginalized by race or socioeconomic status, because ambiguous discourse masks injustice by enabling the powerful to protect their privileged status—deflecting attention away from class distinctions via the assertion of a common interest with the powerless.[101] As one Burkean scholar on justice asks, "what does it mean, then, when strategic identification, at its most powerful, appears to obscure difference and inequality?"[102] In search for an answer, the next Section turns to Burke's writings on justice and law to show how the capacity for the abstractions and ambiguities inherent in legal language can perpetuate injustice.

II. (IN)JUSTICE AND LAW IN DRAMATISM: EFFICIENCY, CASUISTRY, AND "WE THE PEOPLE"

Commentators seem to have conflicting views about Burke's concept of law. Perhaps law brings society together because "our common nature is produced through the dramatic and rhetorical sharing of common symbols and motives; law is especially relevant as an example of shared identity through communication."[103] Contrarily, maybe the law drives society apart: "[The] law is intrinsically a symbolic entity that gives rise to the creation of differentiations within and between individuals and by doing so paradoxically alienate[s] man from his nature as a social being."[104]

As this Section demonstrates, approaching the law rhetorically as a terministic screen reconciles the contradiction: the abstractions of law deflect attention away from class division by reinforcing a communal social order—where the interests of the government and the governed are consubstantial. This approach, however, reflects reality

97. GM, *supra* note 13, at 52.

98. Don J. Kraemer, *Between Motion and Action: The Dialectical Role of Affective Identification in Kenneth Burke*, 16 ADVANCES HIST. RHETORIC 141, 160 (2013) [hereinafter Kraemer, *Between Motion*].

99. BIZZELL & HERZBERG, *supra* note 15, at 1296; *see also* HEATH, *supra* note 57, at 91 ("[A] given classification . . . produces new alignments incongruous with the alignments flowing from other modes of classification." (quoting PC, *supra* note 13, at 102)); Prelli & Winters, *supra* note 49, at 227 ("Burke also points out that whenever we come to terms regarding a situation's meaning with some we risk division from others who regard that situation from vantages afforded by different terms.").

100. Peterson et al., *supra* note 52, at 75.

101. *See* James L. Kastely, *Love and Strife: Ultimate Motives in Burke's* A Rhetoric of Motives, 31 RHETORICA 172, 196–97 (2013).

102. Kraemer, *Between Motion*, *supra* note 98, at 160.

103. John Witte, Jr. & Christopher J. Manzer, *A Prequel to* Law and Revolution*: A Long Lost Manuscript of Harold J. Berman Comes to Light*, 29 J.L. & RELIGION 142, 161 (2014).

104. Yong Ryung Lee, *Empirical Study of the Symbolic Function of Law: The Legal Treatment of Koreans in Japan*, 7 INT'L J. INTERDISC. CIVIC & POL. STUD. 13, 14 (2014).

only in the sense that the legal fictions selected by those in power must be obeyed. This Section explains Burke's definition of "law as the efficient codification of custom"[105] to mean that laws enshrine and perpetuate class differences. Rather than evolve with and respond to a changing world, existing concepts are stretched by abstract analogies so that what seems like justice-through-unity is actually a compensation for disunity that mystifies injustice.

Imagine the ordering of society in the West before bureaucratic legal systems. Propriety—the sense of what properly goes with what—determined relationships, so tribes acted via custom.[106] The Greek word for justice (*diké*) is an "act" word that referred to social custom because it meant "custom, usage, manner, fashion"; given the "homogenous tribal pattern of Greek life," there was "one 'way' or 'justice' shared by all."[107] As society became more complex, the homogeneity broke down and with it came a corresponding diversity in ways of living, "with correspondingly different values, for the different social classes."[108] These differences led the Sophists to consider *diké* in its plural form when they "observed that there was a different justice for the rich than for the poor."[109] Put differently, since the word for "justice" referred to the customary way of life, there were "different 'justices' in the sense that different social classes had different living conditions, with judgments to match."[110]

The transition from tribe to political state was matched by a shift in the use of "*diké*" from "custom" to "a word of the law courts" that "refer[red] to *legal justice*, the *right* which is presumed to be the object of law."[111] The codification of custom maintains social order when "customs are ceasing to possess unquestioned authority among the group as a whole, whereas a fraction of the group would greatly profit by the continuance of the old habits."[112] In a society with "a range of economic classes, each [has] its own properties and proprieties."[113] By way of the symbolic negative, those with property can preserve their hold over it.[114]

Without the verbal, there are "no negative acts, states, or commands," but with language, man "adds the negative and all of its products—such things as property rights, moral and social proscriptions of all kinds, law, justice, and conscience."[115] Humans impose the law on nature as "a substantival ingredient [of] all non-verbal and extra-verbal

105. ATH, *supra* note 13, at 291.

106. *See* PC, *supra* note 13, at 186 n.2.

107. GM, *supra* note 13, at 15 (emphasis omitted); *see also* ATH, *supra* note 13, at 291 ("Ideally, we begin with custom.").

108. GM, *supra* note 13, at 173; *see also id.* at 428–29 (discussing how "occupational diversity" led to "the search for an ideal of justice . . . [which] resides in each man's readiness to do that for which he is best fitted").

109. *Id.* at 173.

110. RM, *supra* note 13, at 152.

111. GM, *supra* note 13, at 15.

112. PC, *supra* note 13, at 186 n.2; *see also* Meisenhelder, *supra* note 20, at 46 ("[T]he law is a set of shared symbols that contributes much to the creation and maintenance of . . . a sense of social order in society.").

113. GM, *supra* note 13, at 173.

114. *See* RM, *supra* note 13, at 45 (describing "a wavering line between peace and conflict, since identification is got by property, which is ambivalently a motive of both morality and strife").

115. RUECKERT, *supra* note 13, at 130; *see* ATH, *supra* note 13, at 329 (writing that "[s]ymbols of [a]uthority" like laws are "[f]undamentally connected with property relations").

reality," so that a "No Trespassing" sign infuses the "linguistic negative into nature."[116] This prohibition therefore alienates some people from the material nature of place, and in this way, the law reinforces "social differentiations."[117] For Burke, then, the law is "essentially negative" because "'mine' equals 'not thine'; insofar as property is not protected by the thou-shalt-not's of either moral or civil law, it is not protected at all."[118]

Though at first the law accurately reflects the custom of different justices related to property and class, it develops in response to new situations to become "an implement for the molding of custom."[119] To rephrase it through the concept of terministic screens, the selection of legal language deflects attention away from material reality and directs it toward the abstract. The authority of custom wanes with the advent of new material, with class struggle that threatens to disrupt occupational and property relationships.[120]

In response, "those who command the loyalty of the legislators" attempt to "cash in" on the law as a resource by encouraging lawmakers "to 'take up the slack,' between what is desired and what is got, by legal exhortations."[121] These "exhortations" are "the inducements to casuistic stretching, by the introduction of legal fictions and judicial 'interpretations' that further serve to bridge the gap between principle and reality."[122]

Casuistic stretching is a type of metaphorical extension. Consider a situation in which there are two related terms but no higher-order abstract term to unite them, or the converse of an abstract concept of unity without a specific "antithes[is] subsumed [within] it."[123] Casuistry fills the lacunae through reasoning by analogy, by "'coach[ing]' the transference of words from one category of associations to another."[124] Although casuistry is inherent in language itself, casuistic stretching can give rise to deception.[125]

Through this process, "one introduces new principles while theoretically remaining faithful to old principles," such as the casuistic stretching of legal fictions[126]: "The abstract resources of law are implicit in speech. For abstractions are dead metaphors.

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116. RUECKERT, *supra* note 13, at 130; *see also* Patsy Callaghan, *Myth as a Site of Ecocritical Inquiry: Disrupting Anthropocentrism*, 22 INTERDISC. STUD. LITERATURE & ENV'T 80, 82 (2015) ("[A]longside his belief in the 'word,' he maintained the existence of a physical reality that is beyond linguistic construct, but in which the human possibility of symbolic language is grounded.").

117. Meisenhelder, *supra* note 20, at 45; *see also* Cheney et al., *supra* note 91, at 137 ("Ordering exists in the forms of physical location, property relationships, and controls of various kinds . . . .").

118. LASA, *supra* note 13, at 11; Davis, *Reports of My Death*, *supra* note 20, at 503 n.169 (noting that Burke claims, because property law is "the basis of our communal 'character,'" laws are negative (quoting LASA, *supra* note 13, at 11)).

119. PC, *supra* note 13, at 186 n.2 ("At first, law is hardly more than the codification of custom. . . . Law is thus an educative, or manipulative device. It begins as theological law, still close to its 'magical' origins—but as it develops and proliferates, a new situation arises: though it was originally a mere codification of custom, it now becomes an implement for the molding of custom.").

120. ATH, *supra* note 13, at 291.

121. *Id.*

122. *Id.*

123. *Id.* at 231; *see also* PC, *supra* note 13, at 103–05 (discussing abstraction as a process where one "draw[s] from" old classifications and extends them to new situations and contexts that are not sanctioned by previous usages).

124. ATH, *supra* note 13, at 230.

125. *Id.* ("[L]anguage owes its very existence to casuistry . . . ."); *id.* at 232 (writing about "the many deceptions we have attributed to casuistic stretching").

126. *Id.* at 229.

You build abstractions atop the abstractions by mixed dead metaphors. And thinkers can even coach the language, deliberately inventing new abstractions, after the analogy of usages already established."[127] Because judges "talk the same language" as lawyers, courts accept lawyers' "ingenious misinterpretations," like "the legal fiction that financial corporations are persons (thereby deserving the freedom granted to human beings by divine, natural, or Constitutional law)."[128]

Characterizing legal fictions as "misinterpretations" leads to another consideration: what Burke means by "efficient" when he calls law "the efficient codification of custom."[129] He treats "efficiency" as the aspect of language whereby one manipulates terministic screens. "A man cannot say everything at once. Thus, his statements are necessarily 'efficient' in our sense; they throw strong light upon something, and in the process cast other things into shadow."[130] Take the Cheshire cat in *Alice in Wonderland*: it has all the components of a fully formed feline, but when it smiles, everything else on the cat slowly vanishes except the smile, which is thus a pure or efficient smile.[131] Extending this metaphor to language, efficiency is "to isolate one quality, making it the whole of life," so that "you are left in possession of an unadulterated smile, the *smiliness* of smile, an 'efficient,' abstract essence."[132] Burke wrote that the "lawyer's brief" is efficient, similar to polemics or caricature, because it "adopts a simple criterion for stressing certain considerations and omitting others"; as a work of "planned disproportion," it hinders rather than helps one understand "the true proportions of a situation."[133]

These disproportions receive assistance from the "mixed dead metaphors" of various legal doctrines. Metaphor is a trope in which one thing is stated in terms of another, usually two seemingly unlike things that nevertheless "resemble each other in some crucial respect."[134] Metaphor is a transaction between contexts because the audience takes a familiar concept and maps its understanding onto a new concept.[135] Metaphors construct legal reasoning and the law itself; for example, the common law develops as each new opinion cites to existing authority.[136] But if these metaphors are

127. *Id.* at 291; *see also* Davis, *Rhetoric of Accommodation*, *supra* note 20, at 530 n.3 ("[L]aw is a resource . . . to invent new abstractions by analogy to existing abstractions . . . ." (citing ATH, *supra* note 13, at 291)).

128. GM, *supra* note 13, at 174.

129. *See* ATH, *supra* note 13, at 291.

130. *Id.* at 248.

131. *Id.* at 249.

132. *Id.*; *see also* HEATH, *supra* note 57, at 46 (quoting CS, *supra* note 13, at 165) (describing the standard for eloquence in an artistic work as efficiency—whether each line reinforces the work's themes through strong symbols and formal effects).

133. ATH, *supra* note 13, at 249–50 ("[The lawyer's] tactics can assist us to understand the world only insofar as we know how to discount them by considering the *interests* behind his caricature. We understand the true proportions of a situation not on the basis of the work itself, but by making allowances for the planned disproportion.").

134. Todd, *Poetics*, *supra* note 20, at 81.

135. Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 955 (2007).

136. Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 36 (1996) (claiming that the common law is "constructed by analogy and

"dead," then they are nothing more than clichés because their reference to the "corporeal, visible, [and] tangible" has been "forgotten."[137] Moreover, if two or more metaphors are "mixed," then they are combined in a mash-up that can result in confusion.[138] Although metaphor has the potential to aid in the understanding of abstract concepts,[139] mixed dead metaphors work in reverse by intensifying abstraction, thus blurring the ability to see that the two purportedly similar concepts do not have much in common after all.[140]

This blurring is also part of the rhetoric of substance, the use of ambiguity to proclaim that two things are "substantially" alike or unified "in principle" even though they are divided. Burke gives an example from the law:

> For instance, a list of citizens' signatures had been collected for a petition asking that a certain politician's name be placed on the ballot. In court it was shown that some of these signatures were genuine, but that a great many others were false. Thereupon the judge invalidated the lot on the grounds that, the whole list being a mixture of the false and the genuine, it was "saturated" with fraud. He here ruled in effect that the list was *substantially* or *essentially* fraudulent. The judgment was reversed by a higher court which ruled that, since the required number of genuine signatures had been obtained, the false signatures should be simply ignored. That is, the genuine signatures should be considered in themselves, not contextually.[141]

This example is worth quoting at length because it epitomizes the essence of Burke's concept of law: the law is a terministic screen that molds reality by creating abstract identifications that gloss over actual divisions. As the remainder of this Section shows, the ideal of justice renders it the most abstract of terms, and the law's identification of the government with the governed obscures continuing injustice.

Justice is an idealization, a concept so abstract and overarching that opponents in a legal dispute can each make a claim to it.[142] Consider Plato's search for "a 'higher' concept of justice, an 'ideal' justice" to transcend the different justices based on social class.[143] This philosophical search is also a rhetorical problem, the need to remove the "conflict between two concepts of justice . . . by the adoption of a remoter term broad

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representation" and therefore, "*is* comparison and representation"); Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning.").

137. *See* GM, *supra* note 13, at 506; *see also* Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295, 301–02 (2013) (calling dead metaphors clichés because they are "[w]orn out").

138. *See* Van Patten, *supra* note 137, at 302.

139. Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 279 (2011) [hereinafter Berger, *The Lady, or the Tiger?*] ("Conceptual metaphor is . . . effective for understanding and reasoning about the abstract concepts that often underlie legal arguments.").

140. *See* Van Patten, *supra* note 137, at 301–02.

141. GM, *supra* note 13, at 53 (emphasis added).

142. *Id.* at 173 ("The nature of language . . . encourages this search for an 'idea' of justice prevailing above and despite the many different 'justices,' or ways, necessarily embodied in a society that had developed quite a range of economic classes, each with its own properties and proprieties."); RM, *supra* note 13, at 280 ("For justice is the *universalization* of a standard."); *see, e.g.*, Lucien J. Dhooge, Yaiguaje v. Chevron Corporation*: Testing the Limits of Natural Justice and the Recognition of Foreign Judgments in Canada*, 38 CAN.-U.S. L.J. 93, 96 (2013) (describing how the plaintiffs and the defendant in an environmental tort dispute each claimed that justice supported its position).

143. GM, *supra* note 13, at 173.

enough to encompass both."[144] This invites casuistry—the stretching of a concept and the introduction of a new principle by seeming to remain faithful to the old.[145] The new principle here is legal justice, "the *right* which is presumed to be the object of law."[146]

When there is "economic inequality," however, justice "gravitates between an 'ideal' and a rhetorical compensation, since it is not 'substantiated' or grounded in the nature of the scene."[147] Consider the rhetorical embodiment of justice through constitutions and other legal enactments.[148] In the early days of the United States, "many [j]udicial decisions were substantiated in the name of the 'higher law,'" which like "justice" is an idealization.[149] With the passage of time and accumulation of precedent, a court "could ground its choice of 'mandatory' decisions in a corresponding choice of precedents, by selecting the particular kind of precedent that best substantiated, or rationalized, the favored decision."[150]

Burke writes that precedent would work better if used in reverse: given that the nation undergoes constant change, "one might adduce precedents to justify the *opposite* kind of decision now, on the grounds that the scenic conditions are now so different from those when the precedent was established."[151] Framing precedent-in-reverse tropologically, it would be metonymy, where the term for a tangible thing represents an intangible or abstract concept (i.e., the "heart" for "love"), thereby reversing the law's dead metaphors by giving them a concrete reference in the here and now.[152] Higher law and the precedents flowing therefrom do not refer to material conditions, "but to the kind of 'immutable scene' that could be idealized and generalized in terms of 'eternal truth, equity and justice.'"[153]

Through this explanation, Burke shows that what seems a Platonic unification, with ideal justice informing the law-as-applied to abrogate the different class justices, actually conceals how the law develops through lawmakers' decisions rather than the people's decisions:

> "[U]nification" is not unity, but a *compensation for disunity*—hence, any term for "ideal" justice can be interpreted as a rhetorical concealment for *material injustice*, particularly when the actual history of legal decisions over a long period can be shown to have favored class justice *in the name of* ideal justice.[154]

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144. *Id.*

145. *See* ATH, *supra* note 13, at 229–32.

146. GM, *supra* note 13, at 15.

147. *Id.* at 124; *see also* Conti, *supra* note 15, at 462 ("[A] system of law can also function as a 'compensation for disunity.'").

148. *See* GM, *supra* note 13, at 175.

149. *Id.* at 379.

150. *Id.*

151. *Id.*; *see* Conti, *supra* note 15, at 464 (writing that Burke believes precedent should work in reverse "because it is the present that should shape the past into an appropriate vessel to guide the future").

152. *See* GM, *supra* note 13, at 506; *see also* Todd, *Poetics*, *supra* note 20, at 113–14.

153. GM, *supra* note 13, at 379–80.

154. *Id.* at 173; *see also* Lee, *supra* note 104, at 14 ("[S]ocial inequality can gain the legitimacy of being grounded in what people see as natural inequalities."); Meisenhelder, *supra* note 20, at 50 ("In one sense, ideals such as 'justice' are betrayals for they create an ideological mystification of injustices in the name of justice itself." (citing GM, *supra* note 13, at 172–73)).

Though attired in ideal justice, the imaginative possibilities of law must still be enacted (or in Burke's phrasing, bureaucratized) "in the realities of a social texture, in all the complexity of language and habits, in the property relationships, the methods of government, production and distribution, and in the development of rituals that re-enforce the same emphasis."[155] That emphasis is hierarchy,[156] sometimes reinforced directly, but more often indirectly "in some veiled 'social allegory,' in overt and covert metaphors, in all kinds of seemingly non-hierarchic symbols which turn out to be secretly charged with 'judgments of status' through identification with something in the socio-political hierarchy."[157] Individuals are therefore bound to hierarchy through "constitutive forms we often enact with partial consciousness."[158]

These constitutive forms include "laws and constitutions [that] derive from assemblies whose enactments are taken to represent 'the will of the people,'"[159] even those people whose will is unknown since they lack the right or ability to vote. The Constitution "proclaims for us a common substance that transcends our material differentiations"[160] because through this document "We the People" are made consubstantial with "a more perfect Union."[161] Here, too, society finds hierarchy: the "supreme Law of the Land"[162] created a federal government with enumerated powers, but as an afterthought, the founders reserved remaining power to the states, or if there is anything left, "to the people."[163]

International human rights law establishes "the same right to life, health, food, water, privacy, [and] a healthy environment" for all through neutral and universal language.[164] In granting present equality, however, the law "erases" culpability for historic injustices committed by the powerful "and cloaks further acts of domination

155. ATH, *supra* note 13, at 225; *see also* PC, *supra* note 13, at 281 (calling bureaucratization of the imaginative "essentially idealistic" because it involves a pure idea or purpose attaining its "materialization" or "embodiment[] in the temporal order" (parenthesis omitted)); Cheney et al., *supra* note 91, at 137 (claiming that language has the ability to develop a complex human social order and corresponding ideas of status and property); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 172 (2015) [hereinafter Gonzalez, *Human Rights*] (recognizing that the institutionalization of justice is necessary but that it then "become[s] embedded in pre-existing relations of power").

156. *See* PC, *supra* note 13, at 282 ("Bureaucracy and Hierarchy obviously imply each other.").

157. RUECKERT, *supra* note 13, at 142 (citing RM, *supra* note 13, at 219); *see also* Cheney et al., *supra* note 91, at 141 ("[P]ower is 'invested' in social systems, such as bureaucracies, and that power is often not easily identified with individual actors.").

158. Kraemer, *Reasonable*, *supra* note 20, at 216; *see also* ATH, *supra* note 13, at 341 ("[T]he mind, being formed by language, is formed by a *public grammar*. And this public grammar involves at every turn material factors.").

159. GM, *supra* note 13, at 175.

160. Meisenhelder, *supra* note 20, at 49.

161. U.S. CONST. pmbl.; *see also* GM, *supra* note 13, at 349 ("A constitution may . . . propound a set of generalized rights or duties, and all these may be considered as a grand promissory unity . . . ."); Cheney et al., *supra* note 91, at 143 ("A constitution comes to stand for or represent a collectivity.").

162. U.S. CONST. art. VI, § 1, cl. 2.

163. *Id.* amend. X; *see also* Conti, *supra* note 15, at 461 (noting the "basic divisiveness inherent in [the Constitution's] terms").

164. Gonzalez, *Human Rights*, *supra* note 155, at 173.

(such as 'good governance' initiatives and 'humanitarian' interventions) in the benevolent rhetoric of universality and common humanity."[165]

By extending "far into the realm of the *idealistic*," this "sense of consubstantiality is symbolically established between beings of unequal status."[166] The implementation of ideal justice in human institutions like the legal system therefore reinforces "hierarchic stratification,"[167] with justice transcendent only if society views the diversity of inequality through the lens of a united polity.[168] The powerful project a common interest with the disempowered—the government identifies with the governed—so the law legitimates power by inducing the audience to feel a part of a union with those at the top.[169] But "out of this idealistic element" of law there arises a kind of "mystery that sets its mark upon all human relations"[170]: through legalese embedded in the rituals of court and politics, the law mystifies injustice because "the institutions contribute to reproduce and maintain inequality in ways which are neither obvious nor obviously coercive."[171]

The "abstractions of legal *fiat*" therefore reinforce customary social divisions but replace custom with "the liquid, constantly shifting alterations of law."[172] With "the idealistic fictions . . . written into the very law of the land," the law becomes "our 'reality' insofar as it is a public structure of *motives*."[173] In this way, the law can "obscure class distinctions . . . as a way to protect privileges . . . by assuming or asserting a common identity when no such identity exists."[174]

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165. *Id.*

166. RM, *supra* note 13, at 46.

167. *Id.* at 313.

168. *See* GM, *supra* note 13, at 428–29; Meisenhelder, *supra* note 20, at 46–47 ("Humans create order in their social world by, in a sense, symbolically translating the negativity of differences into the positivity of a hierarchial [sic] arrangement of classes organized in the name of utopian principles of order, [which] is often created by the law and its ideal of justice.").

169. Kastely, *supra* note 101, 196–97; Meisenhelder, *supra* note 20, at 53.

170. RM, *supra* note 13, at 46.

171. Lee, *supra* note 104, at 14; *see also* Meisenhelder, *supra* note 20, at 54–55.

172. PC, *supra* note 13, at 186 n.2; *see also* Lea Brilmayer, *International Justice and International Law*, 98 W. VA. L. REV. 611, 632–33 (1996) (writing that international justice "searches for ideals, not practical solutions," but also that international law maintains the status quo). At least one commentator has addressed the connection between legal fiat and social status. *See* Christopher P. Guzelian, *The Dollar's Deadly Laws that Cause Poverty and Destroy the Environment*, 98 NEB. L. REV. 56 *passim* (2019) (arguing that laws mandating the use of "fiat money" benefit the government and well-connected individuals but increase poverty and exacerbate environmental harm).

173. GM, *supra* note 13, at 174; *see also* ATH, *supra* note 13, at 291 ("[T]he introduction of legal fictions and judicial 'interpretations' . . . further serve to bridge the gap between principle and reality."); Nancy D. Perkins, *The Dialects and Dimensions of Sustainability*, 21 J. ENVTL. & SUSTAINABILITY L. 331, 370 (2015) (calling legal discourse "'a locus of power' that creates its own reality" as it is recontextualized to reflect "cultural practices and ideological agendas" (first quoting JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 7, 9 (2d ed. 2005); and then quoting Frances Rock, Chris Heffer & John Conley, *Textual Travel in Legal-Lay Communication*, *in* LEGAL-LAY COMMUNICATION: TEXTUAL TRAVELS IN THE LAW 3, 25–26 (Chris Heffer et al. eds., 2013))).

174. Kastely, *supra* note 101, at 196; *see also* RM, *supra* note 13, at 44 (noting that the "ways of identification that contribute variously to social cohesion" can be "for the advantage of special groups whose rights and duties are indeterminately both a benefit and a tax on the community, as with some business enterprise in our society").

III. A DRAMATISTIC ANALYSIS OF LAW AND ENVIRONMENTAL INJUSTICE

In following the development of law to the modern era, Burke wrote that "as law becomes more highly bureaucratized, more 'efficient,' being seized casuistically for the protection of special interests, it moves out of the field of magical sanctions and into the field of traffic regulation (where the efficient backing is solely the threat of force or fine)."[175] Though traffic regulation seems inapt for a discussion of environmental injustice, consider that the rules of the road are "suited to human beings only insofar as they are drivers of automobiles."[176] This Section turns to the effects of such efficient laws on people who do not drive, like those too poor to afford a car, too young to have a license, or too connected to the land to forego living traditional indigenous lifestyles.

This Section retells the story of environmental justice through a dramatistic analysis of the interplay between justice and law. Building on commentators who opine that the law is inadequate or part of a rigged system, it offers a more nuanced perspective of the law as stretched casuistically to address new problems; as the law becomes more efficient, it can mystify the injustices suffered by subaltern communities.[177] As described through a survey of laws relevant to transnational and global issues, legal fictions and dead metaphors select a reality of communities as "substantially" unified with the government, but this rhetorical embodiment of justice in law deflects from material reality to compensate for the disunity of environmental injustice.[178]

A. The Efficient Codification of Custom: The Unfulfilled Ideal of Legal Justice

Start with law as the codification of custom—customs that are shaped by proprieties, the sense of what properly goes with what. The most pernicious relationships involve property, particularly when one man could own others as slaves or when the native peoples of the Americas were forced off their lands to make way for the cultivation of cotton, tobacco, or timber.[179] Industrialization can be viewed from the perspective of property as well, the use of things to make more things, with people as no more than additional parts in the engines of production.[180] Colonization transferred rule over many

175. ATH, *supra* note 13, at 292.

176. PC, *supra* note 13, at 186 n.2.

177. *See infra* Part III.A.

178. See *infra* Part III.B for a global demonstration that reveals how seeming identification mystifies material division.

179. *See, e.g.*, Wesley M. Oliver, *Dred Scott and the Political Question Doctrine*, 17 WIDENER L.J. 13, 20 (2007) (writing that the Dred Scott decision was "premise[d] on the claim that the Constitution protected slaveholders' interests and the institution of slavery from any sort of interference from the federal government" and that "the Framers of the Constitution made a slaveholder's interest in his property a fundamental right" (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449–52 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV)); Rebecca Tsosie, *Indigenous Peoples and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1629–30 (2007) [hereinafter Tsosie, *Environmental Justice*] (discussing how businesses used the lands of indigenous peoples for purposes like growing crops).

180. *See, e.g.*, Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. TORT L. 71, 75 (2018) ("In the nineteenth century, machine force replaced human (and animal) force."); Gonzalez, *Human Rights*, *supra* note 155, at 168 (writing that development "commoditiz[es] . . . nature (private property) and human activity (labor)").

lands of Africa, Asia, Australia, and the Americas to European empires, and along with it, rights in the mineral and agricultural resources.[181]

As social mores changed, the law reinforced custom to preserve class injustice to the benefit of those in power. When the United States ended slavery, various laws maintained social hierarchy by mandating segregated neighborhoods.[182] Native Americans were granted reservations—though the federal government held those lands and their subsurface minerals in trust.[183] The "unholy trinity" of assumption of the risk, contributory negligence, and the fellow servant doctrine prevented injured workers from recovering compensation for workplace injuries.[184] International law based on European norms provided the legal justification for colonization, with concepts like *terra nullius* proclaiming the lands of indigenous persons vacant and thus subject to acquisition and then cultivation.[185] As political structures around the world changed, private enterprises took up the slack of colonization through concession agreements that gave them quasi-sovereign powers.[186]

Burke's interest in law and social order manifests in environmental discourse as a concern about "scene" in the sense of "place," which corresponds with the redefinition of "environment," from the natural world or wilderness to the places "where people live, work, play, and go to school."[187] In the United States, those places include "urban ghettos, barrios, ethnic enclaves, rural 'poverty pockets,' and Native American reservations."[188] These share a common trait: the residents lack power relative to business, government, and even the middle and upper classes.[189]

Community movements were initially grouped under the term "environmental racism" because the earliest struggles involved the disproportionate siting of hazardous

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181. *See, e.g.*, Gonzalez, *Critique*, *supra* note 4, at 731–32 (discussing Spanish colonial appropriation of indigenous Mexican land); Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 1, 8 (2010) [hereinafter Miles, *International Investment*] (asserting that concession agreements were often "exploitative" and "procured through the exertion of pressure from Western states seeking favorable concessions for their nationals").

182. *See, e.g.*, Andrea Giampetro-Meyer & Nancy Kubasek, *Harvey: Environmental Justice and Law*, 31 FORDHAM ENVTL. L. REV. 37, 42–43 (2020) (discussing "historic segregation" in cities like Houston, Texas).

183. *See* Tsosie, *Environmental Justice*, *supra* note 179, at 1629–32; *About Us*, U.S. DEP'T INTERIOR: INDIAN AFF., http://www.bia.gov/about-us [https://perma.cc/5RKH-EN69] (last visited Apr. 1, 2021) ("Established in 1824, [the Bureau of Indian Affairs] is responsible for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.").

184. Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 901 n.35 (2017).

185. Gonzalez, *Human Rights*, *supra* note 155, at 163–66.

186. *See* Miles, *International Investment*, *supra* note 181, at 8–9, 12–14.

187. *See* Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 459 (1999); Rick Carpenter, *Place-Identity and the Socio-Spatial Environment*, *in* 16 ENVIRONMENTAL RHETORIC AND ECOLOGIES OF PLACE, *supra* note 80, at 199, 203 (discussing Burke's identification and the rhetoric of place).

188. Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037, 1046 (1994).

189. *See, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 624–30 (1992) [hereinafter Cole, *Empowerment as the Key*].

waste and industrial facilities in communities of color, activities which were enabled by business-friendly laws.[190] This frame expanded to include the struggle of poor persons and indigenous communities against business and industry interests.[191] Climate justice is "concerned with the most vulnerable, as it explores the intersection of race, poverty, and climate change."[192] Activists even criticize the mainstream environmental groups supported by middle-class Americans because of their focus on nature and wildlife instead of the needs of people.[193]

Environmental racism persists outside of the United States as well. The developing nations of the Global South experience environmental racism because nations of the Global North export hazardous waste and invest in manufacturing, mining, petroleum, and chemical-intensive agriculture, thus reaping benefits while ignoring the negative externalities.[194] Further, the harms are not evenly distributed in the Global South because there are "hotspots of environmental injustice."[195] While the affluent within developing countries become even richer from trade and investment, "indigenous peoples, racial and ethnic minorities, and the poor" bear a disproportionate share of the burdens.[196] Consider that the poor typically live near or work in hazardous facilities, agricultural or mining operations are necessarily located in rural areas, and indigenous peoples often have no rights to their traditional (and often timber- and mineral-rich) lands.[197]

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190. *See* Robert Benford, *The Half-Life of the Environmental Justice Frame: Innovation, Diffusion, and Stagnation*, *in* POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT 37, 39–40 (David Naguib Pellow & Robert J. Brulle eds., 2005); David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 469 (2006) ("[M]any environmental justice concerns involve the disproportionate impacts from lawful pollution attributable to private sector decisions or practices.").

191. *See* Deepa Badrinarayana, *The "Right" Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience*, 43 BROOK. J. INT'L L. 75, 78 (2017) ("Some Americans, primarily because of their race or economic status, bear a disparate burden of environmental problems and/or enjoy lesser benefits from environmental protection laws."); David W. Case, *The Role of Information in Environmental Justice*, 81 MISS. L.J. 701, 707 (2012) ("[E]nvironmental justice communities are typically poor and substantially lacking in the political acumen and power enjoyed by business and industry interests that create environmental impacts and risks for surrounding communities.").

192. Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 447 (2018).

193. *See* Danielle Endres, *Response Essay: The (Im)Possibility of Voice in Environmental Advocacy*, *in* VOICE AND ENVIRONMENTAL COMMUNICATION 110, 116 (Jennifer Peeples &. Stephen Depoe eds., 2014) ("Environmental justice advocates have indicted the environmental movement as an exclusionary, white, upper-class voice." (citing ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT (Ronald Sandler & Phaedra C. Pezzullo eds., 2007))); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 814 (2018) (noting one environmental justice critique of mainstream environmentalism as "parochial attachment to a woods-and-waters version of the core problems of environmental law, in which humans, especially socially vulnerable people, were too often secondary").

194. *E.g.*, Gonzalez, *Human Rights*, *supra* note 155, at 154–55.

195. Chelsea M. Keeton, Comment, *Sharing Sustainability: Preventing International Environmental Injustice in an Age of Regulation*, 48 HOUS. L. REV. 1167, 1173 (2012).

196. Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 78 (Shawkat Alam et al. eds., 2013).

197. *See* Krista Harper & S. Ravi Rajan, *International Environmental Justice: Building the Natural Assets of the World's Poor*, *in* RECLAIMING NATURE: ENVIRONMENTAL JUSTICE AND ECOLOGICAL RESTORATION 327, 332–36 (James K. Boyce et al. eds., 2007) (listing environmental injustices within nations to include class; race,

The Platonic ideal would unite disparate justices into one justice applicable to all, manifested through a legal system that mediates among the classes. One can see the attempt in many laws to correct the injustices suffered by marginalized communities. In the United States, the passage of the Civil Rights Act of 1964[198] and other statutes from 1960s and 1970s addressed discrimination in employment, housing, and voting, and mandated safer work environments.[199] Another example is federal law that has expanded Native American rights, such as creating initiatives related to economic and energy development.[200] Environmental statutes in the 1960s, 1970s, and 1980s created the Environmental Protection Agency (EPA), addressed various types of pollution, and allowed for "citizen suits" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[201] (CERCLA) so that people could turn to federal courts to order polluters to study and remediate harm.[202] Courts expanded common law tort, and legislators sometimes responded with statutes related to products like lead-based paint and asbestos.[203]

International bodies like the United Nations pushed for environmental protection and autonomy for marginalized persons, including with the principles issued from the 1992 United Nations Conference on Environment and Development (Rio Declaration) and the United Nations Declaration on the Rights of Indigenous Peoples.[204] The General Agreement on Tariffs and Trade facilitated a global trade order that led to the establishment of the World Trade Organization, expansion of trade through membership

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ethnicity, and nationality; urban and rural differences; age; and gender); Rebecca Tsosie, Professor, Ariz. St. U., Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity, Keynote Address at the Journal of Environmental Law and Litigation Symposium: Advocating for an Environment of Equality: Legal and Ethical Duties in a Changing Climate (Sept. 11, 2009), *in* 25 J. ENVTL. L. & LITIG. 7, 9–10 (2010) (claiming that Latin American nations give commercial enterprises timber and mineral rights derived from native land resulting in destruction of that land).

198. Pub. L. No. 88-352, 78 Stat. 241 (1964).

199. *See, e.g.*, Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. VA. L. REV. 117, 119–20 (2008) (providing an overview of the Occupational Health and Safety Act of 1970 and claiming that it has "significantly improved safety and health conditions for American workers"); Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 63–76 (2009) (summarizing constitutional and statutory civil rights laws that environmental justice plaintiffs used).

200. *See* Tsosie, *Environmental Justice*, *supra* note 179, at 1644–45 (describing the unique sovereign status of indigenous peoples).

201. 42 U.S.C. §§ 9601–75 (2018).

202. *See* Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1340–49 (2016) (discussing significant environmental laws).

203. Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543, 566 (Randall S. Abate ed., 2016) (writing that lead paint and asbestos litigation spurred federal legislation).

204. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, arts. 3, 8, 10, 26, 28 (Sept. 13, 2007) (articulating the rights of indigenous people to their land and their culture); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex 1(Aug. 12, 1992) [hereinafter *Rio Declaration*].

by developing countries, and initiatives to improve trade and investment in those developing countries.[205]

Regional trade and investment treaties like NAFTA can focus on the specific strengths and issues of smaller blocs of countries and thereby improve conditions through the comparative advantage of each member nation.[206] Additionally, developing nations have enacted their own laws, such as Mexico's environmental statutes that are modeled after U.S. environmental laws or Ecuador's constitution recognizing indigenous peoples' rights and restoring to those people title to their lands.[207]

Rather than afford environmental justice to the most vulnerable in the United States and throughout the world, however, these laws exemplify that there is a tension between the ideal of justice and its rhetorical embodiment in laws and legal institutions. Indeed, commentators have addressed how U.S. statutes and tort law (both substantive and procedural) as well as treaties and international declarations gave rise to the environmental justice movement in the 1980s.[208] The identity of the movement arose from opposition and conflict, "both in the sense of a struggle against polluters and of opposition to the legal status quo that disempowers the poor, minorities, and indigenous peoples."[209]

In the United States, despite evidence of waste disposal and hazardous operations being disproportionately sited in communities of color, civil rights statutes do not apply in the absence of discriminatory intent—an almost impossible burden of proof.[210] Environmental statutes are also ineffective: "Environmental laws are not designed by or for poor people. The theory and ideology behind environmental laws ignores the systemic genesis of pollution."[211] Thus, complaints under the National Environmental

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205. *See* Gonzales, *Critique*, *supra* note 4, at 795–97; Gabrielle Marceau & Clément Marquet, *Practices and Ways of Doing Things in the World Trade Organization (WTO) Law*, *in* 15 INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 513, 513–14 (Hélène Ruiz Fabri ed., 2019).

206. *See* Orrin G. Hatch, *Continuing American Prosperity Relies on Free Trade*, 49 GEO. J. INT'L L. 553, 554 (2018) ("After all, a foundational tenet of free trade is comparative advantage, which essentially advances the notion that trade allows countries to focus on what they do relatively more efficiently than others, and therefore makes all countries better off through free trade.").

207. *See, e.g.*, Judith Kimerling, *Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni*, 40 VT. L. REV. 445, 460–62 (2016) (writing that Ecuador granted indigenous peoples rights to land included indigenous peoples' rights in a new constitution in the early 2000s); John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 54 (2001) (writing that Mexico has environmental laws equivalent to those of the United States).

208. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–18 (2001) (tracing the rise of the environmental justice movement to include the role of environmental law in contributing to injustice and in structuring the relationship of actors engaged in power struggles).

209. Todd, *Fighting Stance*, *supra* note 9, at 592; *see also* Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141, 144–45 (2004) (claiming that the identity of the environmental justice movement arose from contests among stakeholders).

210. *See* Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 510–11 (2018); Purdy, *supra* note 193, at 829–30.

211. Cole, *Empowerment as the Key*, *supra* note 189, at 642, 646–47.

Policy Act of 1969[212] typically only slow rather than stop a project, the single-emitter design of air and water pollution statutes render them "clunky tools" to address the diffuse problem of climate change, and CERCLA is a complex and sophisticated body of law that necessitates the help of specialists.[213] Lastly, communities that suffer harms from multiple polluters do not fit the optimal tort situation of a single tortfeasor causing a single, identifiable harm.[214]

International laws are at least, if not more, problematic.[215] The strongest language about environmental protection for the poor, minorities, and indigenous peoples is usually in soft law instruments that are not then incorporated into investment agreements.[216] Although the trade regime created by the General Agreement on Tariffs and Trade has increased global standards of living overall, the shift to export-oriented commerce and lack of effective global environmental standards has disrupted small businesses and farming and led to the pollution of indigenous people's lands.[217]

Given the power asymmetries of the Global North and South, investment treaties exacerbate problems.[218] Bilateral investment treaties were initially proposed by European countries as a way "to protect the investments of nationals and domestic companies abroad" so that they could manage their assets in the newly sovereign nations of the Global South.[219] They create rights for multinational corporations that limit the

212. Pub. L. No. 91-190, 83 Stat. 852 (1970).

213. *See* Michael B. Gerrard, *What Does Environmental Justice Mean in an Era of Global Climate Change?*, 19 J. ENVTL. & SUSTAINABILITY L. 278, 280–82 (2013) (calling environmental statutes "clunky tools" for dealing with climate change); Kaiman, *supra* note 202, at 1342–50 (describing shortcomings of several environmental statutes such as the National Environmental Policy Act and CERCLA); Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of* West Dallas Coalition for Environmental Justice v. EPA, 20 VA. ENVTL. L.J. 431, 434–36 (2001) (describing shortcomings of National Environmental Policy Act of 1969).

214. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 62 (2011) ("Classical tort is most comfortable with liability when *A* is shown to have directly and exclusively caused a discrete harm to *B*.").

215. *See* Gonzalez, *Human Rights*, *supra* note 155, at 194 ("[L]aw and institutions are embedded in power relations that replicate colonial discourses (such as the savior-savage narrative) and enable Northern states and transnational corporations to evade responsibility for their abuse of nature and of vulnerable states and peoples."); Tim Stephens, *Sustainability Discourses in International Courts: What Place for Global Justice?*, *in* GLOBAL JUSTICE & SUSTAINABLE DEVELOPMENT, *supra* note 2, at 39, 42–43 ("[Justice] can and should be used to provide a legitimate and principled basis for arguing that present and future generations should have a reasonable share of the planet's natural resources and ecosystem services. However, international law is obviously not oriented, in any comprehensive way, toward the achievement of these objectives.").

216. *See* Kate Miles, *Reconceptualising International Investment Law: Bringing the Public Interest into Private Business*, *in* INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 295, 300–03 (Meredith Kolsky Lewis & Susy Frankel eds., 2010).

217. *See* Gonzalez, *Critique*, *supra* note 4, at 795–97 (writing that the WTO has led to developing nations shifting their obligations toward the interests of industrialized countries); Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 255–56 (2015) (describing weaknesses in global legal regulation of the environment).

218. *See* George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361, 365–67 (2013) [hereinafter Foster, *Investors*].

219. Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 129–30 (2019).

sovereignty of developing nations to protect the environment and the people who inhabit it.[220] They also facilitate the export of hazardous materials like asbestos from the Global North to the Global South.[221]

Problems also arise from national laws. Consider Mexico's "flaccid" enforcement of its environmental laws when the number of border maquiladoras boomed following the passage of NAFTA.[222] Further, a variety of laws continue to hamper indigenous persons in Ecuador from using their lands—including laws that provide for the government's retention of mineral rights even after it returned title to the land to indigenous persons.[223]

B. The Mystification of Injustice: Legal Fictions Deflect Attention Away from Marginalized Communities Through Identifications with the Government

Whether inside or outside of the United States, Part III.A showed that the defining social factor for environmental justice communities is distinction and disunity from the majority, other classes, business and industry, and the government. Rather than the ideal that unifies different justices by affording one justice for all, the rhetorical embodiment in law directs attention to ways in which communities have a "substantial" union, a union "in principle," with the government. This unity is nothing more than a rhetorical compensation for continuing disunity, a compensation made possible by legal fictions that are subtle rather than obvious since the law is built of mixed dead metaphors from abstraction and ambiguity. This Part reframes several laws dramatistically to reveal how seeming identification mystifies material division with three transnational and global examples: the polluter pays principle,[224] FNC and ISDMs,[225] and justiciability doctrines applied in climate justice litigation.[226]

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220. J. Robert Cox, *Golden Tropes and Democratic Betrayals: Prospects for the Environment and Environmental Justice in Neoliberal "Free Trade" Agreements*, *in* ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT, *supra* note 193, at 225, 233 (writing that guarantees in investment agreements "have undermined the ability of many Third World nations to protect environmental quality, health, and, in some cases, human survival itself"); Elisa Morgera, *Multinational Corporations and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 196, at 189, 189.

221. John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1, 29–34 (2002).

222. Katherine M. Bailey, Comment, *Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study*, 16 GEO. INT'L ENVTL. L. REV. 323, 324–26, 329–30, 335–39 (2004) (writing that "corruption, incompetence, and a tradition of exclusion" in Mexico's executive branch—which controls agencies like the Federal Environmental Protection Agency (PROFEPA)—combined with a "flaccid judiciary" resulted in nonenforcement of Mexican environmental laws following the passage of NAFTA). A maquiladora is a manufacturing plant.

223. Kimerling, *supra* note 207, at 461–62 (writing that Ecuador's indigenous peoples have limited control over their lands because of various laws and that the government retains mineral rights).

224. *See infra* Part III.B.1.

225. *See infra* Part III.B.2.

226. *See infra* Part III.B.3.

1. "The Polluter Should, in Principle, Bear the Cost of Pollution"[227]

The "polluter pays" principle has been characterized as an environmental justice concept because "it encompasses the notion that those who engage in and profit from activities that damage the environment should be liable for the harm caused."[228] As captured in principle 16 of the Rio Declaration, however, the polluter pays principle locates this responsibility with national governments and not private enterprises: "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[229]

Note the curious case of commas, with "in principle" splitting the verb "should bear." This choice displays the rhetoric of substance, with the subject of the clause—the polluter that actually causes harm—bearing the costs "in principle," which is another way of saying not at all.[230] Such a construction could support an argument that people who live in polluted areas because of low cost voluntarily accept the risks, or the time-priority rule of nuisance where those who move to an area after it has been polluted have little or no right to compensation.[231] Under this reading, the polluter pays principle reinforces social hierarchy, so from an environmental justice perspective, it is unacceptable because polluters would have no incentive to improve areas where the residents are too poor to move.[232]

One commentator has opined that, "if we instead concentrate on the harm and see the need for compensation to the victim," then "*who* pays compensation is less important from a *corrective justice* point of view," so a "state budget" instead of the polluter is acceptable.[233] Extending this notion to the language of Rio principle 16, if the government provides a means of remediation, then does it satisfy its obligations to the victims of pollution? While an economist might answer "no" because of the lack of deterrent effect,[234] the rhetorical critic sees something more insidious in identifying the victim's right to remedy with the government: laws that seem to offer relief are built on legal fictions that maintain inequality.

In the United States, environmental statutes do not provide for monetary damages, so these statutes are not a way to compensation.[235] Communities could use CERCLA, however, for a direct action against a private polluter to recover response costs for the

227. *Rio Declaration*, *supra* note 204, princ. 16.

228. Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 23 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

229. *Rio Declaration*, *supra* note 204, princ. 16.

230. *See supra* notes 90–92 and accompanying text.

231. *See* Hans Christian Bugge, *The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 4, at 411, 421.

232. *Id.*; Giampetro-Meyer & Kubasek, *supra* note 182, at 43 (writing that many residents of historically segregated neighborhoods are too poor to move).

233. Bugge, *supra* note 231, at 422 (citing JULES L. COLEMAN, RISKS AND WRONGS (1992)).

234. *See* Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice*, 44 ECOLOGY L.Q. 89, 144 (2017) [hereinafter, Todd, *Trade Treaties*].

235. *E.g.*, Kaiman, *supra* note 202, at 1345–48 (writing that the Clean Water Act, Clean Air Act, Resource Conservation Recovery Act, and Toxic Substances Control Act do not allow for monetary damages).

release of hazardous substances.[236] Indeed, the statute has a citizen suit provision, a grand metaphor that empowers each individual to wield the power of the government—but only if the government first allows it: victims cannot file a citizen suit until the EPA lists the site on the National Priorities List.[237] Substitute "until" for "unless," and the sublation of the community within a social hierarchy becomes more clear because the government can simply do nothing and thereby render CERCLA useless.

Of course, the EPA does list some sites, such as the hazardous metal "slag" deposited in the Columbia River by a Canadian smelting company, which allowed representatives of federally recognized tribes to bring a citizen suit in *Pakootas v. Teck Cominco Metals, Ltd.*[238] This case reinforced one commentator's characterization of CERCLA's processes as "very lengthy, complicated, and filled with acronyms."[239] Only a lawyer can appreciate that the statute's definition of "facility" applied to the slag and not to the smelter that produced it, thus allowing for jurisdiction in the United States.[240] Plus, while one might read this as a CERCLA success story since the tribes prevailed, the EPA investigation and subsequent court proceedings lasted almost twenty years—despite this being a single polluter causing an identifiable harm to a specific location.[241]

Environmental law traces its origins to tort law, so perhaps the state ensures that the polluter pays through common law public and private nuisance, which have broad applicability and the potential for both monetary damages and equitable relief.[242] This potential diminishes in Rio principle 16, which mandates that "[n]ational authorities" give "due regard to the public interest."[243] Like the reasonably prudent person from negligence law, one struggles to identify what exactly counts as the "public" because it is a dead metaphor, an ambiguous concept without reference to the "corporeal, visible, [and] tangible"[244]: the actual communities that suffer harm. This legal fiction is built into

236. Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 407–08 (2013) (citing 42 U.S.C. §§ 4601(1), 4607 (2012)); *see also* JOHN S. APPLEGATE, JAN G. LAITOS, JEFFREY M. GABA & NOAH M. SACHS, THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES 511–16 (2d ed. 2011) (writing that CERCLA allows for recovery of response costs for the release of hazardous substances, imposes strict liability, and has retroactive joint and several liability).

237. *See* Kaiman, *supra* note 202, at 1347–48.

238. 452 F.3d 1066, 1068–69 (9th Cir. 2006).

239. Kaiman, *supra* note 202, at 1348.

240. *See Pakootas*, 452 F.3d at 1079 ("We have previously said that 'neither a logician nor a grammarian will find comfort in the world of CERCLA.'" (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001))).

241. *See* Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-0256-LRS, 2016 WL 4258929, at *1 (E.D. Wash. Aug. 12, 2016) (tracing the history of the case to the tribes' petition to the EPA to conduct a CERCLA investigation); *see also* Kysar, *supra* note 214, at 62 ("Classical tort is most comfortable with liability when *A* is shown to have directly and exclusively caused a discrete harm to *B*.").

242. Kyle W. La Londe, *Who Wants To Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 43–44 (2004); Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 903–05 (writing about the foundation of environmental law in tort law).

243. *Rio Declaration*, *supra* note 204, princ. 16.

244. *See* GM, *supra* note 13, at 506.

the very name "public nuisance," which requires the plaintiffs to prove that the defendant's action constitutes an "unreasonable interference" with a public right.[245]

Private nuisance merely hides the word "public" in the word "social" when it balances the social utility of the defendant's operation against the harm caused because the "social utility of environmentally-polluting activities is often quite high."[246] Courts therefore can find the interference reasonable, award monetary damages but not equitable relief if the utility is high, or even decline monetary damages if they are so high that they force the defendant to cease operations.[247] The social hierarchy therefore prevails, with the hypothetical public suffering none of the harms inflicted on an actual counterpublic of low-income residents, minorities, or indigenous peoples, who share in little—or none—of the benefits.[248]

The government could identify itself with the victims in a material way by representing marginalized communities through the law of state responsibility, which allows one nation to make a claim against another for activities in the other nation that cause transborder pollution—even if those activities arise from a private enterprise.[249] Though this law unites citizens with a champion, it suffers from many limitations. For example, it does not help communities injured by domestic polluters, nor can the nation as representative hold the foreign polluter directly accountable.[250] Further, many hazardous activities do not count as cross-border pollution, like Global North investors operating mines in the Global South, maquiladoras in Global South host countries, or the lawful cross-border shipping of hazardous waste that injures poor residents.[251] Plus, the government has the option of whether to bring the claim.[252] Given that the polluter pays principle places environmental protection below commerce—by having national authorities internalize the costs of pollution "without distorting international trade and investment"[253]—the government has ample rhetorical compensation for the continuing marginalization built into the social order.

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245. Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Why Trial Courts Have Been Quick To Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 826 (2010).

246. Todd, *Sense of Equity*, *supra* note 9, at 182.

247. *See* La Londe, *supra* note 242, at 44–45; Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 547–48 (1997).

248. *See* Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 221–26 (2012) (citing studies that show that the economic benefits of environmentally harmful activities flow primarily out of the communities).

249. *See Rio Declaration*, *supra* note 204, princ. 2.

250. *See, e.g.*, Phoebe Okowa, *Responsibility for Environmental Damage*, *in* RESEARCH HANDBOOK ON INT'L ENVTL LAW 303, 305–08 (Malgosia Fitzmaurice et al. eds., 2010) (citing Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1905 (1941)).

251. Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837, 842 n.14 (2008) (recognizing that harm caused by an entity from one country operating in another may have a "transnational character" but it is not governed by major civil liability treaties); *see also* FABER, *supra* note 3, at 246 (writing that southern tier nations seek investments via free trade agreements so that toxic waste is relocated from Black communities in the U.S. to African villages, thus exacerbating environmental injustice).

252. *See, e.g.*, Okowa, *supra* note 250, at 305–08 (citing *Trail Smelter*, 3 R.I.A.A. 1905).

253. *Rio Declaration*, *supra* note 204, princ. 16.

2. Foreign Governments Have Essentially the Same Interest in Remediating Harm as Their Citizens—Even When They Do Not

U.S. investors, through their foreign subsidiaries, have long engaged in environmentally hazardous operations in the Global South. For decades, a Texaco subsidiary had a joint venture with state-owned PetroEcuador that resulted in petroleum waste on indigenous lands.[254] Until the 1980s, U.S. fruit companies grew bananas in Central America with a pesticide that was later shown to cause sterility in men.[255] Further, a Union Carbide subsidiary had a manufacturing plant in Bhopal, India, that released a cloud of cyanide gas that killed or injured hundreds of thousands.[256]

Starting in the 1990s, the proliferation of trade and investment treaties like NAFTA led to even more commercial activities, such as an increase in maquiladoras at the Texas-Mexico border that led to more air, water, and soil contamination.[257] Commentators argue that residents from host countries injured by the environmentally harmful conduct of investors should have the same access to the courts of the parent corporation's home as U.S. citizens.[258] The FNC doctrine, however, pushed (and continues to push) environmental justice cases, like the three mentioned above, out of U.S. courts and back to the plaintiffs' home countries.[259] Trade and investment treaties do not modify FNC or establish any mechanisms for foreign persons to obtain remedies directly from the company or their own government.[260] By sending foreign plaintiffs to their home legal systems, the U.S. FNC doctrine and commercial treaties identify the interests of foreign residents with their governments. The reality, however, is that poor

254. *See* Chiara Giorgetti, *Mass Tort Claims in International Investment Proceedings: What Are the Lessons from the Ecuador-Chevron Dispute?*, 34 U. PA. J. INT'L L. 787, 787–88 (2013).

255. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 489–90 (2011).

256. Sukanya Pillay, *Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America*, 14 MICH. ST. J. INT'L L. 479, 483–84 (2006).

257. Todd, *Trade Treaties*, *supra* note 234, at 118–19 (describing the increase in maquiladoras and corresponding increase in pollution and overcrowding); *see also* Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 225 (2008) (quoting Per G. Fredriksson, *Trade, Global Policy, and the Environment: New Evidence and Issues*, *in* TRADE, GLOBAL POLICY, AND THE ENVIRONMENT 1 (Per G. Fredriksson ed., 1999) (giving statistics about the pollution and waste increases in Mexico following the passage of NAFTA).

258. *E.g.*, Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 4, at 270, 276, 281, 287–88.

259. *E.g.*, Acuña-Atalaya v. Newmont Mining Corp., 308 F. Supp. 3d 812 (D. Del. 2018) (dismissing claims brought by Peruvian farmers against a U.S. mining company for the harms attributed to the activities of its Peruvian subsidiary), *vacated*, 765 Fed. App'x 811 (3d Cir. 2019); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 536–37 (S.D.N.Y. 2001) (dismissing claims of indigenous persons from Ecuador and Peru against Texaco related to harms allegedly caused by decades of petroleum extraction activities in the Amazonian rainforest), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1372–73 (S.D. Tex. 1995) (dismissing cases brought by plaintiffs from twelve different countries against chemical and agriculture companies for exposure to pesticides containing DBCP), *aff'd*, 231 F.3d 165 (5th Cir. 2000); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (dismissing a suit by the government of India on behalf of persons affected by the cyanide gas leak from a plant owned by a subsidiary of Union Carbide), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

260. *See* Jeff Todd, *Ecospeak in Transnational Environmental Tort Proceedings*, 63 U. KAN. L. REV. 335, 369–71 (2014) [hereinafter Todd, *Ecospeak*].

persons are locked out of the court systems of the Global South—especially when the nation's interests are aligned with U.S. investors and therefore opposite to those of the people.

If a U.S. company is sued in a U.S. court by foreign plaintiffs for torts committed outside of the United States, that company will move to dismiss under the FNC doctrine, which considers whether the home or host forum is more convenient based upon a number of factors.[261] Before the U.S. court even balances these factors, however, it must first ensure that the foreign courts are available and adequate.[262] One might think that:

> [T]he shortcomings of Latin American courts that drive foreign plaintiffs to choose U.S. courts—the lack of contingency fee contracts, the inability to handle complex cases, the lack of strict liability and punitive damages and jury trials, the probability of lower damage awards, and corruption in and politicization of the judiciary—[would] render the foreign forum inadequate.[263]

Yet, courts still dismiss the suit despite the likelihood of higher costs, smaller damages, fewer theories of liability, and more difficulty in proving these theories in foreign courts.[264] U.S. courts ignore the reality of the plaintiffs' plight via abstractions that proclaim the foreign governments will afford access to justice—even when that government states that it cannot.

By itself, the issue of "who pays what" in many Global South legal systems should give a U.S. court pause because plaintiffs who are farm laborers or indigenous communities likely cannot afford attorneys except with contingency fees, and if they lose, they would have to pay the fees of the multinational corporation's army of lawyers.[265] U.S. courts do not consider the "economic sense" of filing in the alternative forum, however.[266] Further, evidence of corruption and politicization in the judiciary of nations like Nicaragua and Ecuador is not relevant to the adequacy determination.[267]

The likelihood of significantly smaller damages does not preclude dismissal, despite the Supreme Court's recognition that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable

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261. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1089–90 (2010).

262. Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 614 (2008) [hereinafter Heiser, *Retaliatory Legislation*].

263. Todd, *Trade Treaties*, *supra* note 234, at 126.

264. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 & n.22 (1981); *see also* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1456–60 (2011).

265. *See* Whytock & Robertson, *supra* note 264, at 1483–84.

266. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1174 (2005) [hereinafter Heiser, *Choice of Law*].

267. *See* John S. Baker, Jr. & Agustín Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1, 13 (2010) (citing evidence that Nicaragua and Ecuador "rank among the judiciaries with the most corruption" and "are among a group of countries where corruption has worsened as populist regimes politicized the judiciaries"); Whytock & Robertson, *supra* note 264, at 1458–59 (describing how courts either do not inquire into corruption and politicization or apply only minimal scrutiny).

change in law may be given substantial weight[;] the district court may conclude that dismissal would not be in the interests of justice."[268] One might think that $2,500 for the death of a child is unsatisfactory, yet comity cautions that Mexico fulfilled its sovereign duties: "[i]t would be inappropriate—even patronizing—for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims."[269]

However, another federal court had no problem patronizing India. In the Bhopal litigation, the Government of India represented the plaintiffs' claims and opposed FNC dismissal with evidence showing "chronic delay and backlog in Indian courts, inadequate pretrial discovery, undeveloped tort law, lack of capacity within the Indian courts and bar to handle complex tort litigation, unavailability of class action procedures and contingent fees, and problems with enforcement of judgements [sic]."[270] Despite India's government characterizing its own courts as ineffective, the district court concluded that they were "up to the task of handling this case."[271] Only by the most extreme casuistry can the definition of "adequate" be stretched to encompass (sometimes corrupt) courts whose laws cap remedies at four figures for plaintiffs who cannot afford attorneys, and to legal systems that lack numerous procedural doctrines that make litigating complex environmental torts feasible.

The finding of an available and adequate forum does not necessarily mean that the court will dismiss the action: it must then balance the private and public interest factors, which relate to the parties' ability to obtain evidence from abroad and to the functional concerns of the court, respectively.[272] Once again, here is an all-encompassing "we" word—"public"—except now the metaphor has quasi-tangible referents so it is both mixed and dead. The public includes U.S. courts and citizens, with considerations like the administrative difficulties from congested U.S. court dockets, the burden placed on a local jury required to decide a case with no connection to the community, and the appropriateness of having the dispute tried in a forum familiar with the governing law rather than having a U.S. court untangle conflicts of law and apply foreign law.[273] The public also includes the foreign nation because another factor is the "local interest in having localized controversies decided at home."[274] One might presume that the plaintiffs are part of that foreign nation, except that the Supreme Court has written that a foreign plaintiffs' choice of forum "deserves less deference,"[275] which in practice means

268. Heiser, *Choice of Law*, *supra* note 266, at 1172 (quoting *Piper*, 454 U.S. at 254).

269. Gonzalez v. Chrysler Corp., 301 F.3d 377, 382 (5th Cir. 2002).

270. Heiser, *Choice of Law*, *supra* note 266, at 1169–70.

271. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 852 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

272. Tarik R. Hansen & Christopher M. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923, 927–29 (2016).

273. *Id.* at 928–29 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947)).

274. *Gilbert*, 330 U.S. at 509.

275. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) ("Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

that "this presumption all but disappears when the plaintiff is a resident of a foreign country."[276]

Hierarchy and class inequality reveal themselves once again (though not explicitly): Although the defendant is American, the U.S. courts and people are very busy, so the case gets kicked to a foreign government that has some vague "local interest" in resolving the dispute, and the plaintiff's choice of forum means nothing.[277] Dismissal is typically outcome determinative because many cases are never pursued further, and when the plaintiffs prevail or negotiate a settlement, the amounts can be far lower than they would have been in the United States.[278] The U.S. multinational corporation thereby avoids significant liability, so the status quo is maintained.

Trade and investment treaties also maintain the status quo by giving additional protections to the already powerful. If the foreign nation had an interest in protecting its citizens, then it would leverage its sovereign right to grant concessions to develop natural resources to negotiate more rights for its people as well as access to a U.S. court or arbitration.[279] Instead, treaties provide investors with ISDMs that allow them to bypass a host nation's courts to hold that nation accountable.[280] Trade treaties like NAFTA go farther, such as broadening what counts as expropriation and providing a means to calculate damages.[281] Trade and investment treaties have no provisions for human rights, nor do they provide access to the ISDM for affected non-state actors.[282] The North American Agreement on Environmental Cooperation (as well as the new United States-Mexico-Canada Agreement) does give communities the Submission on Enforcement Matters process, which can result in a factual record that highlights the government's refusal to enforce its own laws—but it does not allow an action against the actual polluter, result in any finding of wrongdoing, or provide remedies.[283]

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276. Heiser, *Choice of Law*, *supra* note 266, at 1168.

277. *See* Heiser, *Retaliatory Legislation*, *supra* note 262, at 619 (writing that the factors typically balance in favor of dismissal).

278. Todd, *Trade Treaties*, *supra* note 234, at 127.

279. Several commentators have made these and similar proposals. *See, e.g.*, Foster, *Investors*, *supra* note 218, at 393, 399; Robertson, *supra* note 261, at 1129; Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 506 (2011); *see also* Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. INT'L L.J. 357, 361–62 (2020) (writing that nations with relatively low bargaining power can negotiate bilateral investment treaties with favorable provisions if those are the nation's preferences).

280. *See* Sheffer, *supra* note 279, at 488–89.

281. *See* NAFTA, *supra* note 4, art. 1110; *see also* Howard Mann & Mónica Araya, *An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability*, *in* GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 163, 165 (Carolyn L. Deere & Daniel C. Esty eds., 2002) ("[C]hapter 11 provides investors with a broader combination of rights and remedies than all previous bilateral investment treaties."); Philip M. Moremen, *Private Rights of Action To Enforce Rules of International Regimes*, 79 TEMP. L. REV. 1127, 1157 (2006) (writing that investors have brought claims for indirect expropriation for losses related to environmental regulation).

282. Sheffer, *supra* note 279, at 493–94.

283. Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., art. 24.27, Nov. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, http://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/24%20Environment.pdf [https://perma.cc/6YRH-XNWM]; NAAEC, *supra* note 6, arts. 14–15; *see also* John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEXAS INT'L L. J. 505 *passim* (2012) (evaluating the NAFTA Environmental Commission's citizen petition process); David L. Markell & Tom R.

Although FNC assumes that the foreign state has an interest in adjudicating "local controversies," trade and investment treaties cut against this assumption by aligning the interests of the host state and investor against local stakeholders.[284] For example, the host nation benefits from foreign investment in the form of "revenues from concessions and profits from joint ventures."[285] Accordingly, rather than "defend[] the rights of their citizens, post-colonial states often . . . ruthlessly repress grassroots resistance movements."[286] This repression need not be violent; after all, when the government has a stake in the proceedings, the judiciary yields to political pressure from the executive branch in highly publicized cases.[287]

The result is the same with administrative agencies, which on paper have the power to force an intermediate plant closing, negotiate a compliance agreement, and detain polluters, but which are also subject to the executive's discretionary power to enforce environmental law and regulations.[288] Finally, if host countries gave their citizens an ISDM-like forum, then the government as a joint venturer in projects like mineral extraction and construction of public utilities would also be a potential respondent.[289] In light of this material reality, the one justification for the otherwise weak Submission on Enforcement Matters process—that spotlighting the government's inaction will shame it into taking corrective action—fails because the purported union of interests between host state and citizens is another rhetorical compensation for disunity.[290]

Justice concerns supposedly lie at the heart of the FNC analysis,[291] yet in practice, foreign plaintiffs have their lawsuits dismissed to be tried in forums where they cannot access justice. Justice also has historic roots in the provision of alternative forums to investors when they are denied relief in foreign courts, and trade and investment treaties

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Tyler, *Using Empirical Research To Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 7–11 (2008) (discussing CEC citizen petitions).

284. Foster, *Investors*, *supra* note 218, at 368, 380–82.

285. Todd, *Trade Treaties*, *supra* note 234, at 124–25.

286. Gonzalez, *Human Rights*, *supra* note 155, at 171.

287. Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65, 84–85 (2003).

288. Bailey, *supra* note 222, at 335–36 ("[T]he government does not follow the administrative steps described on the books, and citizens who try to use them see no results.").

289. *See* Foster, *Investors*, *supra* note 218, at 404 (recognizing that adding an ISDM for affected residents into investment treaties would likely require that the host government be exempt); Miles, *International Investment*, *supra* note 181, at 8 (discussing the transfer of sovereign rights from the state to the concession holder and the subsequent protection by the military).

290. *See* David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 430–31, 430 n.30 (2010) (discussing how the Submission on Enforcement Matters process spotlights a nation's lack of enforcement and spurs it toward action); *see also* Lauren A. Hopkins, *Protecting Costa Rica's Osa Peninsula: CAFTA's Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 392 (2007) (calling the Dominican Republic-Central American Free Trade Agreement submissions process "pure rhetoric").

291. Hansen & Whytock, *supra* note 272, at 929–30 ("[The] overarching (if sometimes underappreciated) purpose [of FNC] is to promote the ends of justice.").

strengthen this right.[292] U.S. investor Metalclad recovered damages not for the expropriation of its hazardous waste facility but for a Mexican environmental decree that was "tantamount to expropriation,"[293] and Chevron did not have to prove exhaustion of remedies before initiating ISDM proceedings against Ecuador.[294] The haves thus get more while the have-nots get a factual record published on a website.[295]

3. Courts Identify Climate Justice Plaintiffs' Remedies in the Political Branches While Conceding That Those Branches Have Failed To Address Climate Justice

Commentators have shown how existing tort, environmental, and civil rights laws are less-than-perfect vehicles to correct environmental injustice.[296] Subaltern communities faced with dominant narratives that suppress their voices respond with "indecorous voices" that challenge courts to apply those laws in novel or creative ways,[297] thereby affixing tangible terms to abstract concepts to reanimate those mixed dead metaphors through the trope of metonymy.[298] Plaintiffs' highlighting the shortcomings of law, however, also gives defendants ammunition to move for dismissal under procedural doctrines like displacement, standing, and political question, which have cut short many environmental and climate justice lawsuits.[299]

Take as an example two high-profile climate justice cases. In *Native Village of Kivalina v. ExxonMobil Corp.*,[300] a federally recognized tribe of Inupiat and the town in

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292. *See* Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, 20 EUR. J. INT'L L. 729, 743–44 (2009) (calling international access to justice primarily a right of investors and only secondarily raising questions of access for the public harmed by investment activities).

293. Metalclad Corp. v. United Mexican States, ICSID Case No. Arb(AF)/97/1, Award, ¶ 104 (Aug. 30, 2000), 40 I.L.M. 36, 50 (2001).

294. George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201, 236–38 (2011).

295. *See Registry of Submissions*, COMM'N FOR ENVTL. COOPERATION, http://www.cec.org/sem-submissions/registry-of-submissions [https://perma.cc/U5NP-NA6W] (last visited Apr. 1, 2021).

296. *See* Kaiman, *supra* note 202, at 1340–57; *see also supra* Part III.B.1.

297. Endres, *supra* note 193, at 119–20 (calling the "indecorous voice" a "[*k*]*airoti*c opportunity for rhetorical invention" to resist unjust participation models); *see, e.g.*, Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 525–26 (1994) (recommending that environmental justice litigators apply some existing laws "with a twist"); Kysar, *supra* note 214, at 2–7 (arguing that climate change litigation that pushes traditional tort boundaries can help the common law to develop in a way that more effectively answers the problem).

298. GM, *supra* note 13, at 506.

299. *See, e.g.*, Ted Hamilton, *The Virtues of Uncertainty: Lessons from the Legal Battles over the Keystone XL Pipeline*, 18 VT. J. ENVTL. L. 222, 245 (2016) (listing several "structural impediments" to private environmental claims, including tort standing and the political question doctrine); Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 732–44 (2019) (explaining how courts have taken a hands-off approach to climate change litigation through doctrines like displacement, preemption, standing, and political question); La Londe, *supra* note 242, at 45 & n.134 (citing cases that barred common law nuisance claims under the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and a Washington "Right-to-Farm" statute); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 900 (arguing against the court's finding of lack of standing in a climate justice case).

300. (*Kivalina I*), 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

which they lived (collectively, Kivalina) sued several energy and petroleum companies, alleging that those businesses have exacerbated climate change, which in turn is leading to the destruction of the town from winter storms.[301] They alleged federal and state common law nuisance and sought monetary damages to pay their relocation expenses.[302] In *Juliana v. United States*,[303] several youth plaintiffs along with an environmental NGO and a guardian for future generations sued the U.S. government, alleging that its policies have failed to combat climate change.[304] They sought declaratory and injunctive relief for violation of their due process rights and the public trust doctrine.[305] Neither case reached the discovery stage.

The *Kivalina* trial court ordered dismissal because of the standing and political question doctrines, and the Ninth Circuit affirmed because of displacement.[306] The *Juliana* trial court's denial of the motion to dismiss was reversed by the Ninth Circuit on standing grounds.[307] A dramatistic perspective reveals how these legal fictions are ironic: by locating the plaintiffs' relief with the political branches, the courts concede that those branches have failed to make that relief available. To add insult to irony, the courts fail to address how the marginalized status of the plaintiffs should have given them a stronger claim for a judicial remedy.

Kivalina suffered the indignity of all three procedural doctrines halting its case. After the district court ordered dismissal, the Supreme Court held that the Clean Air Act[308] (CAA) displaces federal public nuisance claims for climate change-related harms in *American Electric Power Co. v. Connecticut*.[309] The Ninth Circuit therefore ruled that Kivalina's cause of action was displaced and did not reach the standing and political question arguments.[310] Although federal public nuisance is not an ideal cause of action to combat climate change, it is a flexible "catchall,"[311] so this is a case where the community could twist that phantom "public" to its advantage. In holding that the federal

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301. *Kivalina I*, 663 F. Supp. 2d at 868; *see also* Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 206 (2010) (explaining how the Inupiat of Kivalina reside on the tip of a barrier reef that is becoming uninhabitable because winter storms are becoming worse and sea ice that protects the village from those storms is eroding).

302. *Kivalina I*, 663 F. Supp. 2d at 869.

303. 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

304. *Juliana*, 217 F. Supp. 3d at 1233.

305. *Id.* at 1233; *see also* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 25–27 (2017).

306. Native Village of Kivalina v. ExxonMobil Corp. *(Kivalina II),* 696 F.3d 849, 854–55, 858 (9th Cir. 2012).

307. Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

308. 42 U.S.C. §§ 7401–671q (2018).

309. 564 U.S. 410, 424–25 (2011) (citing 42 U.S.C. § 7411(d)) (holding that the CAA provides "a means to seek limits on emissions of carbon dioxide from domestic powerplants," and thus, displaces "parallel" federal common law claims); *see* Rachel Jean-Baptiste, Randall S. Abate, Maria Antonia Tigre, Patricia Ferreira & Wil Burns, Dialogue, *Recent Developments in Climate Justice*, 47 ENVTL. L. REP. NEWS & ANALYSIS 11,005, 11,007 (2017) (citing 42 U.S.C. §§ 7401–7671q) (calling displacement because of the CAA an "obstacle" that has led to climate justice cases being dismissed).

310. *See Kivalina II*, 696 F.3d at 858.

311. King, *supra* note 7, at 354–55 (characterizing nuisance as "capacious" and a "catchall" or "miscellany category" that is "able to contain a wide range of annoyances" so that "nuisance law serves as an entrance for problems that are so new that they have no established place in the law.").

public nuisance claims were displaced, however, the court engaged in efficient abstraction—focusing attention on the CAA as remaining faithful to the tort of public nuisance—thereby identifying Kivalina's needs with the government.

This focus on the CAA throws other issues into the shadows—specifically, Kivalina needed money for relocation expenses, and the CAA does not provide for monetary damages (not to mention it has other gaps in its coverage of greenhouse gas (GHG) emissions that render it a poor fit for addressing the "super wicked" problem of climate change).[312] Through this terministic screen, the court deflected attention away from the material reality of a town sinking into the sea by selecting a reality that the government has it covered—while simultaneously recognizing that the CAA does not in any practical way help them: "Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[313]

If precedent worked in reverse, Kivalina could educate the judiciary about how the material conditions have changed since the CAA was passed almost fifty years ago, how scientific evidence not only confirms climate change but also can apportion responsibility for it to major GHG emitters, and how the law can respond to social needs by articulating new legal norms.[314] The courts select the terms of the debate, however, so social inequality remains mystified in an ambiguous fog of ironic legal symbols.

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312. Nicole Johnson, Native Village of Kivalina v. ExxonMobil Corp*: Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*, 40 ECOLOGY L.Q. 557, 561 (2013) ("The United States' legal system does not have a way for communities like Kivalina to recover under current circumstances, as the CAA does not provide relief for damages."); *see also* Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 117–18 (2011) [hereinafter Burkett, *Climate Justice*] (describing gaps in statutory coverage of GHG emissions and arguing that claims for compensatory damages should not be displaced even if claims for injunctive relief are); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present To Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009) (writing that the issue of climate change "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution"); Zachary Hennessee, Note, *Resurrecting a Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation after* Utility Air Regulatory Group v. EPA, 67 DUKE L.J. 1073, 1114 (2018).

313. *Kivalina II*, 696 F.3d at 858; *cf.* James G. Cantrill, *Gold, Yellowstone, and the Search for a Rhetorical Identity*, *in* GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA 166, 191 (Carl G. Herndl & Stuart C. Brown eds., 1996) (claiming that environmental action that focuses on technical fixes to the place obscures the deeper social justice issues).

314. *See* Banda, *supra* note 1, at 382–83 (claiming that climate science can tie "companies' historic emissions to a concrete share of the global total" and make it possible to "arrive at a more precise apportionment of responsibility for climate damages"); Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENVTL. L. REV. 1, 9 (2016) (calling the assumption "that human activities are either causing [climate] change, or are significantly contributing to it on a global scale . . . so well accepted within the scientific community that the arguments against them are . . . far-fetched"); Olivia Molodanof & Jessica Durney, *Hope Is a Song in a Weary Throat: An Interview with Julia Olson*, 24 HASTINGS ENVTL. L.J. 213, 221–22 (2018) (citing Steven Breyer, Justice, U.S. Supreme Ct., Address at the 2016 Annual Meeting for the American Society of International Law, Mar. 31, 2016) (explaining how plaintiffs can educate courts about changes to the social order); Weaver & Kysar, *supra* note 8, at 314 (quoting Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981)) (explaining how adjudication gives plaintiffs an opportunity to articulate why the judiciary should adopt new legal norms).

Defendants invoke the political question doctrine when a case raises prudential considerations like a "lack of judicially discoverable and manageable standards for resolving" a case or the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[315] The *Kivalina* trial court had ordered dismissal on political question grounds.[316] Only by a casuistry can a lawsuit against nongovernmental defendants, based upon a well-recognized tort where the relief sought is monetary rather than equitable, be called a "political" question.[317] Even assuming the doctrine should apply, it does not necessarily prevent all environmental suits against governmental defendants from going forward. For example, in another case, the Ninth Circuit ruled that no political questions were raised in interpreting provisions of the National Historic Preservation Act[318] related to a challenge of the construction of a military base that threatened the dugong, a manatee-like marine mammal of cultural significance to Okinawans.[319]

The *Kivalina* trial court nevertheless ruled that the case raised a political question, in part because the court would have to make a policy determination about the reasonableness of GHGs, so "the resolution of Plaintiffs' nuisance claim requires balancing the social utility of Defendants' conduct with the harm it inflicts."[320] Phrased differently, resolution of the claim required balancing a dead metaphor against actual harm. The Inupiat's spiritual connection to a place rather than the vague interests of society in general should guide the political question balancing test: "the social utility of industrial GHG emissions for indigenous peoples like the Inupiat who live a traditional subsistence lifestyle is zero, yet the harm is the loss of that culture and the destruction of their entire town."[321] But it seems that in the social order, Okinawan dugongs outrank Alaska Natives.

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315. Nathan Howe, Comment, *The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,229, 11,231 (2010) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). Four other prudential considerations are a "textually demonstrable constitutional commitment of the issue to a coordinate political department," the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," an "unusual need for unquestioning adherence to a political decision already made," and the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

316. Kivalina I, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

317. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 481–84 (2017). *Compare* Gilligan v. Morgan, 413 U.S. 1, 11–12 (1973) (invoking the political question doctrine to decline considering a request for relief that would impose judicial review over the training and operation of the Ohio National Guard in a case arising from the Kent State University shootings), *with* Scheuer v. Rhodes, 416 U.S. 232, 250 (1974) (concluding that the governor and other Ohio civilian and military officials did not enjoy sovereign immunity in a damages action for wrongful death arising from the Kent State University shootings).

318. 16 U.S.C. §§ 470–470x-6 (2018).

319. Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 808–09, 821–30 (9th Cir. 2017).

320. *Kivalina I*, 663 F. Supp. 2d at 876–77.

321. Todd, *Fighting Stance*, *supra* note 9, at 612 (citing Geisinger, *supra* note 248, at 229–30) (arguing for a "reasonable benefit" standard where community benefit must be proportional to the amount of increased harm caused by development, and if not, then the development should not be allowed); *see* RESTATEMENT (SECOND) OF TORTS § 826 cmt. b (AM. LAW INST. 1977) ("[T]he unreasonableness of intentional invasions is a problem of *relative values* to be determined by the trier of fact in each case in the light of all the circumstances of that case." (emphasis added)).

The *Kivalina* trial court also dismissed the suit on standing grounds, and one appellate judge concurred.[322] The test for constitutional standing was announced in *Lujan v. Defenders of Wildlife*[323]: the plaintiff has suffered a concrete injury, causation is "fairly . . . trace[able]" to defendant's conduct, and the injury can be redressed by a court order.[324] The context or "material scene" of *Lujan*, however, was a response to statutes in the 1960s and 1970s that empowered citizens to bring suit for public harms that had traditionally been reserved for the government.[325] *Lujan*'s bolstering of the standing requirement helped courts avoid being conscripted by the legislative branch to perform executive functions when the executive has chosen not to act.[326]

Because there is no constitutional basis for applying a standing analysis to lawsuits when plaintiffs seek to vindicate personal injuries through common law tort, some commentators have called the imposition of these requirements on plaintiffs like Kivalina "superfluous" and "historically unwarranted."[327] The efficient characterization is that the courts have engaged in a casuistry: they stretched a concept with foundation in a practical concern (separation of powers) to control situations where separation of powers is not an issue, thereby killing the metaphor's referent through the ambiguity of "prudence." The *Kivalina* court also killed any chance that the plaintiffs had at recovering monetary damages by limiting their right to sue.

Another argument lay in the Supreme Court's holding that states as separate sovereigns have the "special solicitude" to sue on behalf of their citizens to protect natural resources and environmental health, so the CAA does not displace their federal common law claims.[328] As a federally recognized indigenous community, the Native Village of Kivalina is quasi-sovereign, so some commentators have argued that it should have had *parens patriae* standing to assert public nuisance claims.[329] The trial court

322. Kivalina II, 696 F.3d 849, 854–55 (9th Cir. 2012); *id.* at 867–69 (Pro, J., concurring).

323. 504 U.S. 555 (1992).

324. *Lujan*, 504 U.S. at 560–61 (omission in original) (alteration in original) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1024 (2009).

325. Mary Kathryn Nagle, *Tracing the Origins of* Fairly Traceable*: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 478–79 (2010); Solimine, *supra* note 324, at 1027 ("[T]he development of the regulatory state and the expansion of substantive constitutional rights . . . 'created diffuse rights shared by large groups and new legal relationships . . . .'" (quoting RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74 (Robert C. Clark et al. eds., 6th ed. 2009))).

326. *See* Nagle, *supra* note 325, at 478–80 (discussing the Supreme Court's predication of the standing doctrine on the separation of powers); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276–77 (2008) ("[A] desire to limit private individuals' ability to invoke the judiciary to vindicate public rights has motivated the Court to limit the types of factual injuries that support standing.").

327. *E.g.*, Hessick, *supra* note 326, at 277; Nagle, *supra* note 325, at 480 ("[N]o court or academic has provided any constitutional justification for the doctrine's drift into private law."); Solimine, *supra* note 324, at 1026–27 ("Prior to the early decades of the twentieth century, most justiciability issues were resolved by asking whether the plaintiff had suffered an injury that would be recognized at common law.").

328. Massachusetts v. EPA, 549 U.S. 497, 519–21 (2007); Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 REVUE GÉNÉRALE DE DRIOT, 113, 147 n.146 (2013) (Can.); *see also* Georgia v. Tenn. Copper, 206 U.S. 230 (1907).

329. Elizabeth Ann Kronk, *Effective Access to Justice: Applying the* Parens Patriae *Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RES. L. REV. 1, 23–25 (2011); *see*

rejected this argument, finding Kivalina was "not entitled to any 'special solitude'" because it was not seeking to enforce procedural rights, and it lacked "quasi sovereign interests" because it "did not surrender its sovereignty as the price for acceding to the Union."[330]

The appellate court recognized that Kivalina is "a self-governing, federally recognized tribe of Inupiat Native Alaskans," but in ruling on displacement rather than standing, the court avoided the question of sovereignty.[331] One could argue that Alaska Natives surrendered sovereignty because, not long after Alaska became a state, the Alaska Native Claims Settlement Act[332] extinguished many of their rights in exchange for compensation.[333] How a "self-governing" tribe lacks sovereignty comes down to Burke's rhetoric of substance: "quasi-sovereign" is a way of saying substantially sovereign, which means "not sovereign."[334] In this vertical separation of powers, the federal government sits at the top, states fall somewhere in the middle, and indigenous people are reminded of their place at the bottom of the social hierarchy.

Turning to *Juliana*, the Ninth Circuit held that the plaintiffs lacked standing under Article III of the Constitution—specifically, the requested equitable relief was not within the district court's power to award.[335] The court found that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[336] The court further found that such policy decisions would "plainly require consideration of 'competing social, political, and economic forces,' which must be made by the People's 'elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.'"[337] The court concluded "that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box."[338]

The Ninth Circuit's reference to the "People's 'elected representatives'" and "the political branches" reinforces hierarchy in a way similar to *Kivalina* by identifying the plaintiffs' relief with the political branches—even while simultaneously recognizing that that relief is currently unavailable.[339] The court conceded "[t]hat the other branches may

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also Warner & Abate, *supra* note 328, at 148–49 (arguing that "from an environmental justice perspective," a court could hear the Kivalina plaintiffs' federal common law nuisance claim "based on the trusteeship relationship that the federal government has with Indian tribes and because of the tribes' special relationship to their lands").

330. Kivalina I, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

331. Kivalina II, 696 F.3d 849, 853, 869 (9th Cir. 2012).

332. 43 U.S.C. §§ 1601–29(e) (2018).

333. *See* Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 31–32 (2007); E. Barrett Ristroph, *Fulfilling Climate Justice and Government Obligations to Alaska Native Villages: What Is the Government Role?*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 501, 510 (2019) (writing that Native Alaska villages are "dependent sovereigns" because the federal government "usurped lands and natural resources that tribes needed for their survival . . . .").

334. *See supra* notes 90–92 and accompanying text.

335. Juliana v. United States, 947 F.3d 1159, 1173–75 (9th Cir. 2020).

336. *Id.* at 1171.

337. *Id.* at 1172 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 128–29 (1992)).

338. *Id.* at 1175.

339. *Id.* at 1172, 1175.

have abdicated their responsibility to remediate the problem" but claimed that such abdication "does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."[340]

The more subtle hierarchy is the irony that the plaintiffs can make their case to the "electorate," which identifies the plaintiffs with a great and powerful "we," the voters who can assert their democratic control over inefficient politicians. The appellate court failed to mention something that the trial court found key: at the time the lawsuit was filed, most of the plaintiffs were "minors who cannot vote and must depend on others [the courts] to protect their political interests."[341] The final chapter for the legal fiction of standing in *Juliana* is that courts cannot order the political branches around—and neither can the plaintiffs.

CONCLUSION

This dramatistic analysis revealed ways in which the law mystifies environmental injustice through dubious identifications. A survey revealed how legal institutions' recourse to the ideal of justice in the abstract operates as a "rhetorical concealment for *material injustice*" that reinforces and maintains the status quo.[342] Rather than end by suggesting a rejection of the law or a radical overhaul of the courts, however, this Article returns to Burke's purpose for criticism, which is not to debunk but to demystify.[343]

Burke himself is ultimately hopeful about the law's potential for justice, a potential that rhetoric can develop: "by its very nature, language also drives toward the 'ultimate' of itself. And the ultimate is '[j]ustice,' a kind of *completion* whereby laws are so universalized that they also apply to the lawgiver."[344] There is therefore the irony that the same ideals that mystified injustice can be a "creative force[],"[345] so that "an *idea* of justice may make possible some measure of its *embodiment* in material situations."[346] In light of the scale of dramatism as a critical method and of environmental justice as a series of multidimensional global movements, this Article took but one step toward demystification. Following Burke's lead of approaching justice as a verb, additional research is needed to explore what the law *does*—or at least *can do*—to embody justice.[347]

Because the conclusion that the law contributes to environmental injustice was based on a survey of a handful of laws, applying the same dramatistic methods to other laws or legal initiatives might reveal ways in which the law currently manifests justice.

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340. *Id.* at 1175.

341. Juliana v. United States, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016).

342. GM, *supra* note 13, at 173.

343. *See* Timothy N. Thompson & Anthony J. Palmeri, *Attitudes Toward Counternature (with Notes on Nurturing a Poetic Psychosis)*, *in* EXTENSIONS OF THE BURKEIAN SYSTEM 269, 281–82 (James W. Chesebro ed., 1993) (urging environmental advocates to engage in "poetic/comic agitat[ion]" to demystify rather than debunk existing social structures).

344. LASA, *supra* note 13, at 440.

345. Meisenhelder, *supra* note 20, at 50.

346. GM, *supra* note 13, at 174.

347. *See* GM, *supra* note 13, at 174 (claiming that "an idea of justice may make possible some measure of its embodiment in material situations" (emphasis omitted)); RM, *supra* note 13, at 152–53 (arguing that abstract concepts like "justice" should be treated as verbs).

For example, rather than obscure how communities are divided by race or class, the expansion of environmental justice NGOs and law school clinics, the rise of movement lawyering, and the creation of specialized environmental tribunals implicitly recognize their distinct identities.[348]

Also, rhetorical critics often examine texts in minute detail. Therefore, analyses of specific statutes, treaties, judicial opinions, and other legal documents could confirm, challenge, or refine this Article's conclusions.[349] Scholars could also apply other components of dramatism, like the pentad or the four master tropes.[350] Another possibility is to compare and contrast the results of applying dramatism with those from other literary or rhetorical approaches. For example, like dramatism, the new rhetoric of Chaim Perelman deals with issues of justice in the context of argumentation and legal disputes.[351] Further, one rhetorician has considered a "rhetoric[] . . . of justice" that synthesizes key theories from Perelman and Burke.[352]

Finally, recall from the Introduction that rhetorical approaches seek to increase understanding and find practical solutions.[353] To the extent that the law perpetuates or creates environmental injustice, dramatism could provide a theoretical foundation for corrective justice.[354] Just as unity suggests its opposite in division, division and alienation can have the effect of motivating people to identify with others and thereby unite for collective action for the "making and unmaking of social structures."[355] Future research could consider the appeal of form, where framing discourse in recognizable patterns

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348. *See, e.g.*, J. Michael Angstadt, *Securing Access to Justice Through Environmental Courts and Tribunals: A Case Study in Diversity*, 17 VT. J. ENVTL. L. 345 *passim* (2016) (arguing for the potential of environmental courts and alternative dispute tribunals to afford justice); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 *passim* (describing the contours of social movement lawyering); Kaiman, *supra* note 202, at 1338 (claiming that there are dozens of environmental justice clinics, organizations, and law firms).

349. *See* Todd, *Sense of Equity*, *supra* note 9, at 232–33.

350. *See* GM, *supra* note 13, at xv–xxii (introducing the five pentadic terms—"act," "agent," "scene," "agency," and "purpose"—as means of studying motives); *id.* at 503 (explaining how the master tropes of metaphor, metonymy, synecdoche, and irony can help critics "in the discovery and description of 'the truth'"). Legal scholars have applied these concepts to other issues. *See, e.g.*, Berger, *The Lady, or the Tiger?*, *supra* note 139, at 303 (applying the pentad to describe metaphor and narrative in criminal law); Sarah J. Nelson & Luke R. Nelson, *A Pentadic Analysis of Competing Narratives in Opening Statements*, 15 U. ST. THOMAS L.J. 135 *passim* (2018) (applying the pentad to opening statements in trial); Todd, *Poetics*, *supra* note 20, at 113–31 (applying the master tropes and the pentad to negligence and negligence per se).

351. *See, e.g.*, CHAÏM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (John Petrie trans., 1963); CHAÏM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING (John Petrie et al. trans., 1980); *see also* GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 295 (2d rev. ed. 1999) ("Perelman was a student of jurisprudence and he approached rhetoric from a philosophical and legal position rather than as a purely linguistic and literary phenomenon."); Francis J. Mootz III, *Perelman's Theory of Argumentation and Natural Law*, 43 PHIL. & RHETORIC 383, 383 (2010) (referring to Perelman's "deep and abiding concern with justice").

352. Kraemer, *Reasonable*, *supra* note 20, at 227 (arguing that developing a synthesis of Perelman and Burke "should bring us closer to what a rhetorical theory of justice promises: namely, not to exclude the sensible from the reasonable").

353. *See supra* notes 5–26 and accompanying text; *see also* Burger, *Environmental Law*, *supra* note 10, at 5.

354. *See* GM, *supra* note 13, at 174.

355. *See* BIESECKER, *supra* note 60, at 9.

invites the audience to participate in the form and thereby become "cocreators" in a quest for justice.[356]

Communities might frame their struggles in the form of environmental melodrama, which focuses on sociopolitical conflict, polarizes the stakeholders into villains and victims, and relies upon strong emotional appeals to create monopathy in the audience.[357] Alternatively, they might present their situation in a comic frame, which one Burke scholar calls an "essentially . . . ecological frame" because it requires consideration of others.[358] It is a frame of both acceptance and rejection, one that does not ignore conflict but instead accommodates it by assuming a "*charitable* attitude" toward others while maintaining "shrewdness" about them.[359] Communities might even start with one frame but shift to another as their movements gain traction.[360] Additional study could thus continue demystifying in ways that can support Burke's claim that "there is the powerfully and nobly creative aspect of idealism, since an ideal may serve as standard, guide, incentive—hence may lead to new real conditions."[361]

356. Kraemer, *Between Motion*, *supra* note 98, at 157–58; *see* Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 UMKC L. REV. 667, 688 (2011) (describing how form calls attention to certain aspects of a situation based upon the audience's experience with that form).

357. Steve Schwarze, Jennifer Peeples, Jen Schneider & Pete Bsumek, *Environmental Melodrama, Coal, and the Politics of Sustainable Energy in* The Last Mountain, 17 INT'L J. SUSTAINABLE DEV. 108, 111 (2014).

358. Marilyn DeLaure, *Environmental Comedy:* No Impact Man *and the Performance of Green Identity*, 5 ENVTL. COMM. 447, 457 (2011) (quoting Marika A. Seigel, *"One Little Fellow Named Ecology": Ecological Rhetoric in Kenneth Burke's* Attitudes Toward History, 23 RHETORIC REV. 388, 398 (2004)).

359. ATH, *supra* note 13, at 166; *see also* Gregory Desilet & Edward C. Appel, *Choosing a Rhetoric of the Enemy: Kenneth Burke's Comic Frame, Warrantable Outrage, and the Problem of Scapegoating*, 41 RHETORIC SOC'Y Q. 340 *passim* (2011).

360. Hannah Schmid-Petri, Ueli Reber, Dorothee Arlt, Dag Elgesem, Silke Adam & Thomas Häussler, *A Dynamic Perspective on Publics and Counterpublics: The Role of the Blogosphere in Pushing the Issue of Climate Change During the 2016 US Presidential Campaign*, 14 ENVTL. COMM. 378, 380 (2020) ("In cases when the issues and positions discussed on a certain agenda change, the tenor of the counterpublic sphere should also shift . . . .").

361. GM, *supra* note 13, at 174; *see also* Karin Mickelson, *Competing Narratives of Justice in North-South Environmental Relations: The Case of Ozone Layer Depletion*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 4, at 297, 300 (describing environmental justice as a quest for "a more equitable and sustainable social order").