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. Moreover, political advocacy such as that of native Hawaiians has led to new state constitutional, statutory, and regulatory laws that might help preserve traditional cultivation practices that are threatened by climate change. 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. Further, the North American Free Trade Agreement (NAFTA) led to Mexico being flooded with cheap U.S. corn that devastated indigenous farmers and caused negative externalities like loss of agrobiodiversity.


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”).

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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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 ENVT'L 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. ENVT'L 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”).


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.” Because rhetoricians consider the tensions between law and justice, 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. 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. 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,” it aligns with environmental justice activists’ emphases on narrative and activism.

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).


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. Winther, 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 Chaim 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”).


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”\textsuperscript{16}: for over three decades, humanities and communication scholars have applied dramatism to environmental issues,\textsuperscript{17} including the discourse of environmental justice.\textsuperscript{18} Although both justice and law recur throughout his works,\textsuperscript{19} the role of these concepts in dramatism remains underdeveloped by both rhetorical and legal commentators.\textsuperscript{20} A dramatic 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

\begin{thebibliography}{99}

\bibitem{16} Doq. L. Rev. 457, 468 (2001) (“What Kenneth Burke brings to legal thought is a framework for understanding why narrative is so powerful.”).


\bibitem{19} See, e.g., Phillip Drake, \textit{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, \textit{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, \textit{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).

\bibitem{20} 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”).

\bibitem{21} Don J. Kraemer, \textit{The Reasonable and the Sensible: Toward a Rhetorical Theory of Justice}, 46 PHIL. & RHETORIC 207, 208 (2015) [hereinafter Kraemer, \textit{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, \textit{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, \textit{“The Reports of My Death Are Greatly Exaggerated”: Reading and Writing Objective Legal Memoranda in a Mobile Computing Age}, 92 ORT. L. REV. 471, 503 n.169 (2013) [hereinafter Davis, \textit{Reports of My Death}] (quoting LASA, supra note 13, at 11) (noting Burke’s claim that laws are essentially negative); Kirsten K. Davis, \textit{The Rhetoric of Accommodation: Considering the Language of Work-Family Discourse}, 4 U. ST. THOMAS L.J. 530, 530 n.3 (2007) [hereinafter Davis, \textit{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, \textit{The Poetics and Ethics of Negligence}, 50 CAL. W. L. REV. 75, 119–21 (2013) [hereinafter Todd, \textit{Poetics}] (discussing the development of law as “the efficient codification of custom” (quoting ATH, supra note 13, at 291)).

\end{thebibliography}
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

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. Kuenz, 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

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.
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 prescriptions 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, ‘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 . . . .”)
47. LASA, supra note 13, at 45.
thing or act is not that thing or act. Accordingly, the chosen vocabulary must be adequate to reflect the situation.

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.” 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.

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. Once terms are established, then debates about policy will be in those terms. This means that dominant metaphors and common topics can generate a screening effect that influences the perceptions of discourse participants. 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.”

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. 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 dramaticist view of language, in terms of ‘symbolic action,’ is exercised about the necessarily suasive nature of even the most unenomotional 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. Rhetoric designates a function that is present in all socialization and the social order itself. 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.” Persons in their natural or biological state feel estranged from each other. 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.”

It is through the symbolic—language and rhetoric—where the social “takes place” and has its “very mode of existence.” 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.” Accordingly, individuals identify not only with each other but also with institutional structures like a nation or church. Rhetoric can thus “enable group cooperation, build social networks, and even

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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.’ Viewed optimistically, terministic screens offer symbolic possibilities that enable people to unite as a society.\footnote{76} 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.”\footnote{77} 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.”\footnote{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.”\footnote{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.”\footnote{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.”\footnote{82} In Burke’s words, “the lugubrious regions of malice and the lie.”\footnote{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


\footnote{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).

\footnote{78} RM, supra note 13, at 23.

\footnote{79} Id. at 22; see also Conti, supra note 15, at 459 (“Inducing cooperation is only necessary because man is divided . . . .”).

\footnote{80} BIESECKER, supra note 60, at 49; see also RM, supra note 13, at 23 (“[T]he 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 ECOCENOSES 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.”).

\footnote{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.”).

\footnote{82} Cahill, supra note 76, at 800.

\footnote{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 ANTIQUE 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,” so “many of [our] ‘observations’ are but implications of the particular terminology in terms of which the observations are made.” Accordingly, “much that we take as observations about ‘reality’ may be but the spinning out of possibilities implicit in our particular choice of terms.” 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.” Recall the example of the same object photographed with different color filters: 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.”

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. 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. 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.”

This same function exists even without “telltale expressions” like “substantially,” “in principle,” or “essentially.” Consider the pronoun “we,” which Burke calls a “wonder-word” because it applies collectively and thus obscures distinctions. 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.” 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. When even the “most

84. LAAS, 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.
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.
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.
102. Kraemer, Between Motion, supra note 98, at 160.
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 (díke) 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 díke 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 “díke” 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 proprieeties.”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 substantial 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.”\textsuperscript{116} This prohibition therefore alienates some people from the material nature of place, and in this way, the law reinforces “social differentiations.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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[s] subsumed [within] it.”\textsuperscript{123} Casuistry fills the lacunae through reasoning by analogy, by “‘coach[ing]’ the transference of words from one category of associations to another.”\textsuperscript{124} Although casuistry is inherent in language itself, casuistic stretching can give rise to deception.\textsuperscript{125}

Through this process, “one introduces new principles while theoretically remaining faithful to old principles,” such as the casuistic stretching of legal fictions\textsuperscript{126}; “The abstract resources of law are implicit in speech. For abstractions are dead metaphors.

\textsuperscript{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) (“Alongside 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.”).

\textsuperscript{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 . . . .”).

\textsuperscript{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)).

\textsuperscript{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.”).

\textsuperscript{120} ATH, supra note 13, at 291.

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{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).

\textsuperscript{124} ATH, supra note 13, at 230.

\textsuperscript{125} Id. (“Language owes its very existence to casuistry . . . .”); id. at 232 (writing about “the many deceptions we have attributed to casuistic stretching”).

\textsuperscript{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.
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.” Moreover, if two or more metaphors are “mixed,” then they are combined in a mash-up that can result in confusion. Although metaphor has the potential to aid in the understanding of abstract concepts, 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.

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.

This example is worth quoting at length because it epitomizes the essence of Burke’s concept of law: the law is a termenistic 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. Consider Plato’s search for “a ‘higher’ concept of justice, an ‘ideal’ justice” to transcend the different justices based on social class. 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 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 propertied.”); 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 judicial 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:

“[N]e¬ification” 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

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.
154. Id. at 173; see also Lee, supra note 104, at 14 (“Social inequality can gain the legitimacy of being grounded in what people see as natural inequalities.”); Meisenheller, 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-hierarchical 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 realistic” 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. pbl.; 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. XI; see also Conti, supra note 15, at 461 (noting the “basic divisiveness inherent in [the Constitution’s] terms”).

(such as ‘good governance’ initiatives and ‘humanitarian’ interventions) in the benevolent rhetoric of universality and common humanity.”

By extending “far into the realm of the idealistic,” this “sense of consubstantiality is symbolically established between beings of unequal status.” The implementation of ideal justice in human institutions like the legal system therefore reinforces “hierarchic stratification,” with justice transcendent only if society views the diversity of inequality through the lens of a united polity. 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. But “out of this idealistic element” of law there arises a kind of “mystery that sets its mark upon all human relations,” 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.”

The “abstractions of legal fiat” therefore reinforce customary social divisions but replace custom with “the liquid, constantly shifting alterations of law.” 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.” 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.”

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

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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.
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.”); González, Human Rights, supra note 155, at 168 (writing that development “commoditize[s] . . . 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”).


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


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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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.”).


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 1964198 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 1980201 (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

by developing countries, and initiatives to improve trade and investment in those developing countries.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{211} Thus, complaints under the National Environmental


\textsuperscript{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.”).


\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{211} Cole, Empowerment as the Key, supra note 189, at 642, 646–47.
Policy Act of 1969\textsuperscript{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.\textsuperscript{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.\textsuperscript{214}

International laws are at least, if not more, problematic.\textsuperscript{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.\textsuperscript{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.\textsuperscript{217}

Given the power asymmetries of the Global North and South, investment treaties exacerbate problems.\textsuperscript{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.\textsuperscript{219} They create rights for multinational corporations that limit the

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\item \textsuperscript{212} Pub. L. No. 91-190, 83 Stat. 852 (1970).
\item \textsuperscript{214} Douglas A. Kysar, What Climate Change Can Do About Tort Law, 41 Env’tl. 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.”).
\item \textsuperscript{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.”).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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].
\item \textsuperscript{219} Tim R. Samples, Winning and Losing in Investor-State Dispute Settlement, 56 AM. BUS. L.J. 115, 129–30 (2019).
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sovereignty of developing nations to protect the environment and the people who inhabit it.\textsuperscript{220} They also facilitate the export of hazardous materials like asbestos from the Global North to the Global South.\textsuperscript{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.\textsuperscript{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.\textsuperscript{223}

\section{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 dramatically to reveal how seeming identification mystifies material division with three transnational and global examples: the polluter pays principle,\textsuperscript{224} FNC and ISDMs,\textsuperscript{225} and justiciability doctrines applied in climate justice litigation.\textsuperscript{226}


\textsuperscript{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).

\textsuperscript{224} See infra Part III.B.1.

\textsuperscript{225} See infra Part III.B.2.

\textsuperscript{226} See infra Part III.B.3.
“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.
229. Rio Declaration, supra note 204, princ. 16.
230. See supra notes 90–92 and accompanying text.
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].
release of hazardous substances.\textsuperscript{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.\textsuperscript{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.\textsuperscript{238} This case reinforced one commentator’s characterization of CERCLA’s processes as “very lengthy, complicated, and filled with acronyms.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{242} This potential diminishes in Rio principle 16, which mandates that “[n]ational authorities” give “due regard to the public interest.”\textsuperscript{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”\textsuperscript{244}: the actual communities that suffer harm. This legal fiction is built into

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\item \textsuperscript{237} See Kaiman, supra note 202, at 1347–48.
\item \textsuperscript{238} 452 F.3d 1066, 1068–69 (9th Cir. 2006).
\item \textsuperscript{239} Kaiman, supra note 202, at 1348.
\item \textsuperscript{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))).
\item \textsuperscript{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.”).
\item \textsuperscript{243} Rio Declaration, supra note 204, princ. 16.
\item \textsuperscript{244} See GM, supra note 13, at 506.
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the very name “public nuisance,” which requires the plaintiffs to prove that the defendant’s action constitutes an “unreasonable interference” with a public right.  

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.” 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. The social hierarchy therefore prevails, with the hypothetical public suffering none of the harms inflicted on an actual countercultural low-income residents, minorities, or indigenous peoples, who share in little—or none—of the benefits.

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. 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. 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. Plus, the government has the option of whether to bring the claim. Given that the government pays principle places environmental protection below commerce—by having national authorities internalize the costs of pollution “without distorting international trade and investment”—the government has ample rhetorical compensation for the continuing marginalization built into the social order.

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

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).
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

263. Todd, Trade Treaties, supra note 234, at 126.
265. See Whytock & Robertson, supra note 264, at 1483–84.
267. See John S. Baker, Jr. & Agustin Parise, Conflicts in International Tort Litigation Between U.S. and Latin American Courts, 42 U. MIAMI INT’L L. REV. 1, 13 (2010) (citing evidence that Nicaragua and Ecuador “rank among the jurisdictions 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.”

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.”

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].”

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.” 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. 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. The public also includes the foreign nation because another factor is the “local interest in having localized controversies decided at home.” 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,” 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.
273. Id. at 928–29 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947)).
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

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
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)
(“Chapter 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.,
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:
(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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284. Foster, Investors, supra note 218, at 368, 380–82.
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).
291. Hansen & Whytock, supra note 272, at 929–30 (“[T]he overarching (if sometimes underappreciated) purpose [of FNC] is to promote the ends of justice.”).
strengthen this right. U.S. investor Metalcld recovered damages not for the expropriation of its hazardous waste facility but for a Mexican environmental decree that was “tantamount to expropriation,” and Chevron did not have to prove exhaustion of remedies before initiating ISDM proceedings against Ecuador. The havens thus get more while the have-nots get a factual record published on a website.

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. 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, thereby affixing tangible terms to abstract concepts to reanimate those mixed dead metaphors through the trope of metonymy. 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.

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


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 “[h]ipocratic 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 Francioni, 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.\footnote{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).} They alleged federal and state common law nuisance and sought monetary damages to pay their relocation expenses.\footnote{Kivalina I, 663 F. Supp. 2d at 869.} In Juliana v. United States,\footnote{217 F. Supp. 3d 1224 (D. Or., 2016), rev’d, 947 F.3d 1159 (9th Cir. 2020).} 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.\footnote{Id., 947 F.3d 1159 (9th Cir. 2020).} They sought declaratory and injunctive relief for violation of their due process rights and the public trust doctrine.\footnote{Id. at 1233; see also Michael C. Blum & Mary Christina Wood, “No Ordinary Lawsuits”: Climate Change, Due Process, and the Public Trust Doctrine, 67 Am. U. L. REV. 1, 25–27 (2017).} 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.\footnote{Native Village of Kivalina v. ExxonMobil Corp. (Kivalina II), 696 F.3d 849, 854–55, 858 (9th Cir. 2012).} The Juliana trial court’s denial of the motion to dismiss was reversed by the Ninth Circuit on standing grounds.\footnote{Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).} A dramatic 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\footnote{42 U.S.C. §§ 7401–671q (2018).} (CAA) displaces federal public nuisance claims for climate change-related harms in American Electric Power Co. v. Connecticut.\footnote{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).} Although federal public nuisance is not an ideal cause of action to combat climate change, it is a flexible “catchall,”\footnote{See Kivalina II, 696 F.3d at 858.} so this is a case where the community could twist that phantom “public” to its advantage. In holding that the federal
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). 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.”

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. The courts select the terms of the debate, however, so social inequality remains mystified in an ambiguous fog of ironic legal symbols.

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 Hennessey, Note, Resurrecting a Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation after Utility Air Regulatory Group v. EPA, 67 DUKL.J. 1073, 1114 (2018).


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.”\textsuperscript{315} The \textit{Kivalina} trial court had ordered dismissal on political question grounds.\textsuperscript{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.\textsuperscript{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\textsuperscript{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.\textsuperscript{319}

The \textit{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.”\textsuperscript{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.”\textsuperscript{321} But it seems that in the social order, Okinawan dugongs outrank Alaska Natives.

\textsuperscript{315} Nathan Howe, Comment, \textit{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 “usual 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.

\textsuperscript{316} Kivalina I, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009), aff’d, 696 F.3d 849 (9th Cir. 2012).

\textsuperscript{317} See John Harrison, \textit{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), \textit{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).


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

\textsuperscript{320} \textit{Kivalina I}, 663 F. Supp. 2d at 876–77.

\textsuperscript{321} Todd, \textit{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); \textit{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 traceable” 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 *parses patriae* standing to assert public nuisance claims.329 The trial court

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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.”).
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.”

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. One could argue that Alaska Natives surrendered sovereignty because, not long after Alaska became a state, the Alaska Native Claims Settlement Act extinguished many of their rights in exchange for compensation. 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.” 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. 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.” 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.’” 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.”

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. The court conceded “[t]hat the other branches may

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”).

331. Kivalina II, 696 F.3d 849, 853, 869 (9th Cir. 2012).
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 irony 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.
342. GM, supra note 13, at 173.
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.\footnote{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).}

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.\footnote{349}{See Todd, Sense of Equity, supra note 9, at 232–33.} Scholars could also apply other components of dramatism, like the pentad or the four master tropes.\footnote{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’”).} 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.\footnote{351}{Further, one rhetorician has considered a “rhetoric[] . . . of justice” that synthesizes key theories from Perelman and Burke.} Finally, recall from the Introduction that rhetorical approaches seek to increase understanding and find practical solutions.\footnote{352}{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”).} To the extent that the law perpetuates or creates environmental injustice, dramatism could provide a theoretical foundation for corrective justice.\footnote{353}{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”).} 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.”\footnote{354}{See supra notes 5–26 and accompanying text; see also Burger, Environmental Law, supra note 10, at 5.} Future research could consider the appeal of form, where framing discourse in recognizable patterns

\footnote{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).


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 Mckelson, 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”).