**Towards a Critical *Poiesis*: Climate Justice and Displacement**

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*Poiesis*—an imaginative making— [1]
--Gayatri Chakravorty Spivak

***Prologue*: *Start From Wherever You Are***

How do we talk about the Arctic? . . . .
Along the way, we talk about big animals, big migrations, big hunting, big land, big rivers, big ocean, and big sky; and also about big coal, big oil, big warming, big spills, big pollution, big legislations, and big lawsuits.
And we talk about small things, too—small animals, small migrations, small hunting, small rivers, small warming, small spills, small pollution, small legislations, and small lawsuits.
--Subhankar Banerjee[2]

We are now thirteen years into the twenty-first century. I am not trained as a scientist. I stumbled into environmental law with little capacity for acronyms and even less capacity for numbers. My only entry into an issue, even a legal issue, is through literary experience. *We tell ourselves stories in order to live*.[3] John Cage instructs us to "begin anywhere."[4] A brute within the law, I can only start where I am and hope to tell a story. Climate change is a large idea. Carbon markets are a large idea. The market itself is an amorphous and opaque idea. I will shelve these large ideas for now. Start small, start with the tactile, start with an image even, and respond.

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[1] GAYATRI CHAKRAVORTY SPIVAK, DEATH OF A DISCIPLINE 37 (2003).
[2] SUBHANKAR BANERJEE, *From Kolkata to Kaktovik En Route to Arctic Voices*, *in* ARCTIC VOICES: RESISTANCE AT THE TIPPING POINT 1 (Subhankar Banerjee ed., 2012).
[3] JOAN DIDION, *The White Album*, *in* THE WHITE ALBUM 11 (2009).
[4] Thanks to Charlene Chen for this.

Imagine somewhere up North, north of center, there is an 8-mile-long barrier reef island.[5] There, a village of about four hundred people resides.[6] Their tiny village is named Kivalina. The people trace their ancestry thousands of years back to one of the very first settlements in the Americas.[7] The village consists of mostly Iñupiat, Natives of northern Alaska.[8] Like many Alaska Natives, the Native Village of Kivalina survive the harsh Arctic climate through a close understanding of the hunting and gathering seasons, retaining a largely subsistence way of life.[9]

Imagine an aerial photo taken of this village, the coastline inches closer and closer to the houses, the school, the hospital. The coastline is eroded. The village looks dangerously close to being submerged by the sea.[10] Soon it will happen.[11] There is another photo, this one a close-up, a young girl, about nine or ten, with long dark hair and a wide toothy grin, smiling straight into the camera.[12] *Things that exist exist and everything is on their side*.[13] You now know that this is not entirely true, that you are talking about the law, not art, and what exists in art may have no place in the law. The first image sticks in your mind as an example of an enterprise gone awry, the culmination of the effects of anthropogenic climate change embodied in one single photograph. The second image, the one of the girl, is more harrowing: it speaks to you as an

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[5] CHRISTINE SHEARER, *Kivalina: A Climate Change Story*, *excerpted in* Arctic Voices: Resistance at the Tipping Point 208 (Subhankar Banerjee ed., 2012).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See* Richard Frank, *Kivalina and the Courts: Justice for America's First Climate Refugees*?, LEGAL PLANET (Nov. 28, 2011), http://legalplanet.wordpress.com/2011/11/28/kivalina-and-the-courts-justice-for-americas-first-climate-refugees/, *see also* GAO, Alaska Native Villages: Most are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Dec. 2003, at 31.
[11] GAO, Alaska Native Villages: Most are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Dec. 2003, at 32; GAO, Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009, at 1.
[12] CRPE photo *available at*: http://www.crpe-ej.org/crpe/index.php/component/content/article/254 (last visited, April 23, 2013).
[13] *See* Richard Shiff, *Judd through Oldenburg*, *available at*: http://www.tate.org.uk/download/file/fid/7541 (last visited, April 21, 2013).

image of a lost future.[14] These two images alone are enough for you to conclude that something is wrong, irrevocably wrong.

## I. Native Village of Kivalina v. ExxonMobil Corp.

### *a. Before the Lawsuit*

Ten years ago the U.S. Government Accountability Office ("GAO") issued a report entitled "Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance."[15] (How prescient! Ten years later the Ninth Circuit says basically the same thing: you are harmed but we can do nothing done about it.) In 2009, GAO issued another report, "Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion."[16] The report discusses how the lack of a lead federal agency tasked to address questions of relocation pertaining to Native Alaskan villages makes it difficult to coordinate concerted action.[17] But there is more to this story. Christine Shearer has written a book that tracks how climate change and the lack of regulatory responses have affected Kivalina over decades.[18] As early as 1992, the community, noting increased erosion of the island, voted to relocate.[19] Kivalina selected a new site by 1998.[20] "As they tried to engineer the move, however, they found that a government body to assist communities with relocation does not exist."[21] The City Administrator Janet Mitchell reported: "[w]e talked to everyone we could. But the word relocation does not exist at the federal level, and I doubt it exists at the state

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[14] *See generally* JONATHAN LEAR, RADICAL HOPE: ETHICS IN AN AGE OF CULTURAL DEVASTATION (2006).
[15] *See* GAO, Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance, Dec. 2003.
[16] GAO, Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion, June 2009, at 20 ("Federal programs to assist threatened villages prepare for and recover from disasters and to protect and relocate them are limited and unavailable to some villages.").
[17] *Id.*
[18] *See* CHRISTINE SHEARER, *Kivalina: A Climate Change Story*, *excerpted in* ARCTIC VOICES: RESISTANCE AT THE TIPPING POINT 208 (Subhankar Banerjee ed., 2012).
[19] *Id.* at 210.
[20] *Id.*
[21] *Id.*

level."[22] Kivalina Tribal Administrator Colleen Swan "reported a similar experience: 'There wasn't anyone we could talk to about global warming that deals with climate change.'"[23] Colleen Swan reported: "[d]ue to the lack of ice formation along the shores of Kivalina, by October 2004 the land began failing . . . . The island seemed to be falling apart and disappearing into the Chukchi Sea before the very eyes of its inhabitants."[24]

Nine years ago the island was falling apart, nine years later the problem still does not exist at the federal regulatory level. How can you insist that your problem is real, that you face imminent danger, if there is no agency, in fact, no language at all, within the regulatory regime to receive your narrative? If you don't speak my language, how can you understand what I am trying to tell you? *The word relocation does not exist at the federal level*. The problem presented is doubly disturbing: first, because the federal government is not at all prepared to address these imminent dangers,[25] and second, because we now have to contend with the reality that the question of relocation is real and must be addressed as a matter of national policy.[26]

*b. Federal Court Cannot Redress Kivalina's Harms*

The district court in *Native Village of Kivalina v. ExxonMobil Corp.* dismissed the plaintiffs' complaint for lack of subject matter jurisdiction and lack of standing.[27] In considering "whether [courts] have legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions'"[28] the district court emphasized that "the relevant inquiry is whether the judiciary is *granting relief in a reasoned fashion* versus allowing the claims to proceed such that

[22] *Id.*
[23] *Id.*
[24] *Id.* at 208.
[25] *See supra* note 15.
[26] "Go on, Government, quibble. Bargain. Beat it down. Say *something*." ARUNDHATI ROY, THE GREATER COMMON GOOD (1999).
[27] Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009).
[28] *Id.*

they 'merely provide hope without a substantive legal basis for a ruling.'"[29] The district court found that the central difficulty is locating a "discrete number of 'polluters'"[30] and "by pressing this lawsuit, Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming."[31] While the district court acknowledges that even if the plaintiffs' assertion that the named defendants are responsible for more of the problem than anyone else in the nation due to their collective greenhouse gas emissions is true, the court finds "that the allocation of fault-and-cost-of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[32] On appeal, the Ninth Circuit upheld the lower court's decision. The Ninth Circuit did not develop the political question or standing issues, but rather focused on the doctrine of displacement.

*c. Displacement of Federal Common Law*

The Ninth Circuit's opinion in *Native Village of Kivalina v. ExxonMobil Corp.* is nicely bookended. It starts off clear as a cloudless day: "The question before us is whether the Clean Air Act, and the Environmental Protection Agency action that the Act authorizes, displaces Kivalina's claims. We hold that it does."[33] Locating a poignant homonymic moment in the law, at the end of the opinion the majority writes "[o]ur conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea."[34] AFFIRMED. The legal issue that the Ninth Circuit addressed in *Kivalina* is the narrow question of whether the Clean Air Act ("CAA") and

[29] *Id.* at 874 (internal citations omitted).
[30] *Id.* at 875.
[31] *Id.* at 877.
[32] *Id.* at 877.
[33] Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).
[34] *Id.* at 858.

Environmental Protection Agency's ("EPA") authorized actions under the CAA displace a federal common law claim of public nuisance seeking damages as remedy.[35]

While *Kivalina* was being appealed to the Ninth Circuit, the Supreme Court decided *Connecticut v. American Electric Power*. In *AEP*, New York City, eight states, and three private land trusts brought a public nuisance action against "the five largest emitters of carbon dioxide in the United States."[36] The plaintiffs in *AEP* brought their claim under a theory of federal common law interstate nuisance and sought injunctive relief through a court-ordered imposition of emissions caps.[37] The Supreme Court in *AEP* held "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement"[38] of carbon dioxide emissions. Under the holding of *AEP* the Supreme Court concluded that the CAA "thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law."[39] Because the Supreme Court held in *Massachusetts v. EPA* that the CAA authorized EPA regulation of greenhouse gases, including carbon dioxide[40]—the decision in *Massachusetts v. EPA* coupled with the relief sought by the plaintiffs under *AEP* resulted in the Supreme Court's holding in *AEP*: "The Act itself thus provides a means to seek limits on emissions of carbon dioxide from power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track."[41] The holding under *AEP* directly ties the relief requested by plaintiffs, pollution abatement, with the power of EPA under the CAA to promulgate rulemakings addressing emissions caps specifically. The Court reasons that under the CAA, because EPA has the power

[35] *Id.* at 856-57.
[36] Connecticut v. Am. Electric. Power Co., 131 S. Ct. 2530, 2533-34 (2011).
[37] *Id.* at 2534.
[38] *Id.* at 2537-38.
[39] *Id.* at 2538.
[40] *Id.* at 2532.
[41] *Id.* at 2538.

to regulate pollution abatement specifically, the plaintiffs' cause of action is displaced by the regulatory scheme of the CAA.

i. Doctrine of Displacement

The doctrine of displacement is especially relevant to environmental laws. In *Milwaukee II*, the Supreme Court held that the amendments to the Clean Water Act ("CWA") displaced the nuisance claim that was originally recognized in *Milwaukee I*.[42] The Supreme Court explained that "when Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal court disappears."[43] The test for whether a specific federal law displaces federal common law or not turns on the inquiry of whether the statute "speak[s] directly to [the] question" at issue.[44] The Ninth Circuit in *Kivalina* also relies on the doctrine of displacement to dismiss Kivalina's case from federal court.

ii. Applying the Doctrine of Displacement to Other Environmental Laws

The Ninth Circuit in *Kivalina* cites case law concerning nuisance causes of action and displacement analysis within the context of the CWA for the proposition that where a cause of action is displaced, the damage remedy is displaced as well.[45] In the CWA case, *Middlesex v. National Sea Clammers Association*, the public nuisance claim sought both injunctive and declaratory relief as well as compensatory and punitive damages to fishing grounds caused by discharges and ocean dumping of sewage.[46] The Supreme Court in *Middlesex* emphasized that after *Illinois v. Milwaukee*, "The Court has now held that the federal common law of nuisance in

[42] *Id.* at 2537.
[43] *Id.*
[44] *Id.* (internal citations omitted).
[45] Native Village of Kivalina v. ExxonMobil Corp., 696, F.3d 849, 857 (9th Cir. 2012) (citing Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 4 (1981)).
[46] Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 US 1, 5 (1981).

the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA, which was completely revised soon after the decision in *Illinois v Milwaukee*."[47] While the Court in *Middlesex* does not utilize the test of whether the statute, FWCPA, "speaks directly to the question" presented by the plaintiffs, the Court concluded that it does not have to reach that question because the statute is comprehensive enough that it preempts all federal common law claims concerning water pollution.[48] It should be noted that critical to the Court's analysis of the comprehensiveness of the FWCPA (the precursor to the CWA as it exists today) was the fact that Congress revised the FWCPA after the Supreme Court's decision in *Milwaukee I*, which did recognize a nuisance claim. For the Supreme Court, the Congressional act of revising the FWCPA in response to the Court's decision in *Milwaukee I* spoke to Congress' intent to occupy the entire regulatory field of water pollution through its revision of the FWCPA.[49] Here, with regards to the CAA, we have no analogous comprehensive statutory revision.

iii. Difference in Remedy Requested Does Not Change Ninth Circuit's Displacement Analysis

While the Ninth Circuit conceded that the application for the test of displacement, whether the statute speaks directly to the question at issue, "can prove complicated,"[50] the Ninth Circuit relied on the Supreme Court's decision in *AEP* as providing the necessary guidance.[51] The Ninth Circuit notes that while Kivalina "does not seek abatement of emission" as the plaintiffs did in *AEP* but rather "damages for harm caused by past emissions," it nonetheless regards *AEP* as instructive for the displacement analysis.[52]

[47] *Id.* at 22.
[48] *Id.*
[49] *Id.*
[50] *Kivalina*, 696 F.3d at 856.
[51] *Id.* at 856.
[52] *Id.* at 857.

While *Kivalina* and *AEP* both utilized the theory of federal common law of nuisance for their climate change litigation, the critical distinction between the two cases is the remedy requested. The plaintiffs in *Kivalina* seek damages, not injunctive relief. In holding that there is no distinction between a federal common law claim of public nuisance that requests injunctive relief as opposed to damages, the Ninth Circuit majority opinion cites to the 2008 Supreme Court decision *Exxon Shipping Co. v. Baker* for the proposition that "under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies."[53]

The Ninth Circuit majority opinion quotes the language of *Exxon Shipping* where the Supreme Court "rejected similar attempts to sever remedies from their causes of action."[54] However, the *Exxon Shipping* case is an uneasy analogy. The question left after *AEP* is whether a federal common law nuisance claim requesting damages differs from a federal common law nuisance claim requesting injunctive relief. In *Exxon Shipping*, defendant Exxon, faced with a jury verdict awarding punitive damages due to a 1989 grounding of an oil supertanker in Alaska, attempted to argue that the CWA displaced punitive damages but not compensatory damages.[55] The Supreme Court, in response to Exxon's argument explained, "nothing in the statutory text [of the CWA] points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action."[56] In fact, the Supreme Court goes on to say "[a]ll in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies . . . . nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme."[57]

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[53] *Id.*
[54] *Id.* (Citing Exxon Shipping Co. v Baker, 554 U.S. 471, 489 (2008)).
[55] Exxon Shipping Company v. Baker, 554 U.S. 471, 489 (2008).
[56] *Id.*
[57] *Id.*

The Supreme Court specifically distinguishes *Exxon Shipping* from cases such as *Milwaukee* on the grounds that there, the "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA. Here, Baker's private claims for economic injury do not threaten similar interference with federal regulatory goals with respect to 'water,' 'shorelines,' or 'natural resources.'"[58] The opinion of *Exxon Shipping* actually strengthens the argument that indeed there is a difference between a private claim for economic injury which does not frustrate the overall goals of the regulatory scheme of a specific environmental law. A fortiori, because the plaintiffs in *Kivalina* are also requesting damages for economic injury which does not frustrate the overall goals of the CAA, abatement of air pollution, there is a strong argument that *Kivalina* in fact differs from *AEP* in a dispositive way.

The concurring opinion in *Kivalina* employs a more nuanced reading of the *Exxon Shipping* case:

> The *Exxon* Court was not evaluating whether a claim for damages is of a different character than a claim for injunctive relief. In fact, the case upon which *Exxon* relied for that statement, *Silkwood*, likewise disapproved of an attempt to sever compensatory and punitive damages, but its overall holding suggests that severing rights and remedies is appropriate as between damages and injunctive relief in some circumstances.[59]

*Silkwood v. Kerr-McGee Corporation* concerned a preemption question in the context of the Atomic Energy Act.[60] While the analysis for whether federal law preempts state law differs somewhat from the analysis of statutory displacement of common law, *Silkwood* is nonetheless a useful case for examining how rights and remedies relate to one another in a cause of action. Prior to *Silkwood*, the Supreme Court, in *Pacific Gas & Electric Co. v. State Energy Resources*

[58] *Id.* at note 7.
[59] Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 863 (9th Cir. 2012).
[60] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 241 (1984).

*Conservation & Development Comm'n*. concluded that states are preempted from regulating the safety aspects of nuclear energy.[61] Despite the holding in *Pacific Gas & Electric*, the majority in *Silkwood* held that a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is not preempted by federal law.[62] In the *Silkwood* case, the Court seemed to focus on the purpose of the damages, and concluded that punitive damages did not frustrate the scheme of the Atomic Energy Act.[63] While *Silkwood* addressed federal preemption of state law claims and *Kivalina* is focused on displacement of federal common law—the holding in *Silkwood* is still useful for understanding how broadly or how narrowly a court can choose to construct its preemption or displacement analysis when considering if remedies can affect the scope of displacement or preemption.

iv. Ninth Circuit Concludes CAA is Comprehensive Enough to Displace Kivalina's Claims

Ultimately, the Ninth Circuit in *Kivalina* yokes the Supreme Court's reasoning in *Middlesex* with the holding in *AEP* to conclude that the CAA is comprehensive enough so it speaks to any federal common law claim of nuisance, regardless if the claim seeks injunctive relief or damages. But in *Kivalina*, the request for damages resulting from greenhouse gas emissions is precisely what distinguishes the case from *AEP*. Any new rulemaking promulgated by the EPA to limit greenhouse gas emissions would not "speak directly to the question at issue," indeed it *could* not speak directly to the question at issue because the statutory scheme of the CAA does not address the looming question of relocation.

[61] *Id.*
[62] *Id.* at 258.
[63] *Id.* at 257.

No federal agency is currently tasked with addressing questions of relocation of communities due to climate change, "and no funding is specifically designated for relocation."[64] Furthermore, the CAA primarily addresses issues of air pollution.[65] So how does the statute in question, the CAA and EPA's delegated authority to carry out the Act, speak directly to the question at issue? It depends entirely on how you present your question doesn't it? If the question is: does the CAA address population displacement attributed to climate change? It seems difficult to interpret the CAA as comprehensive enough so it speaks directly to the question of climate change induced displacement. Furthermore, because of cases like *Exxon Shipping* and *Silkwood*, it seems there is still room to argue that here, because Kivalina's request for damages does not frustrate the overall scheme of the CAA, the cause of action should be allowed to go forward.

The Native Village of Kivalina has recently filed its petition for certiorari.[66] In light of the Supreme Court's decision in *AEP* coupled with the Ninth Circuit's decision in *Kivalina*, depending on if the Supreme Court grants cert, it is unclear if there is a remaining path for federal common law claims to proceed in the CAA climate change tort context. Maybe we have

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[64] Robin Bronen, *We Must Protect Communities Who Face Climate Change Displacement*, THE GUARDIAN, April 17, 2009, http://www.guardian.co.uk/global/2009/apr/17/alaska-migration-climate-change. *See supra* note 16.

[65] Air Pollution Prevention and Control—Congressional findings and declaration of purpose
(b) Declaration
The purposes of this subchapter are—
(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.
42 USC § 7401 (2006).

[66] *See* J. Wylie Donald, *Native Village of Kivalina Files Its Petition for Certiorari*, CLIMATE LAWYERS, (Mar. 15, 2013) http://www.climatelawyers.com/post/2013/03/15/Native-Village-of-Kivalina-Files-Its-Petition-for-Certiorari-A-Five-Year-Climate-Change-Litigation-Marathon-That-Has-Yet-to-Start.aspx

to hit the bottom, exhaust all our options in order to revitalize and grow anew.[67] *Native Village of Kivalina* is critical litigation that brings to focus the emerging principle of climate justice, and climate justice adds a new dimension to the growing body of environmental justice and environmental poverty lawyering issues in the twenty-first century.

## II. New Departures in Environmental Justice: Climate Justice

This essay takes off from Jonathan London and Julie Sze's description of the environmental justice movement as praxis.[68] London and Sze note that the environmental justice movement "draws from and integrates theory and practice in a mutually informing dialogue . . ."[69] They go on to describe environmental justice as a movement that "rise[s] through the convergence of social movements, public policy, and scholarship."[70] Discussing the environmental justice movement as praxis in the twenty-first century provides the environmental justice movement with the necessary elasticity to expand and encompass different populations, problems and places.[71] From a legal perspective, environmental justice as praxis enables the embrace of other disciplines such as sociology, anthropology and public health to complicate and broaden legalistic formulations of harm and redress. Climate justice is an emerging principle that subscribes to the larger environmental justice mission though it presents new issues in light of the urgency of climate change.

This paper started off with a discussion of the *Native Village of Kivalina v. ExxonMobil Corp.* litigation and will continue to utilize *Kivalina* to guide discussion of emerging issues

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[67] "Only if one acknowledges that there is no longer a genuine way of going on *like that* might there arise new genuine ways of going on *like that*." (Discussing the last great Chief of the Crow Nation and possibilities for hope after the end of a particular way of life) JONATHAN LEAR, RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION 51 (2006).
[68] Julie Sze and Jonathan K. London, *Environmental Justice at the Crossroads*, 2/4 SOCIOLOGY COMPASS 1331, 1332 (2008).
[69] *Id.*
[70] *Id.*
[71] *Id.*

within climate justice. Part III provides a brief overview of some of the key concerns of the environmental justice movement, and an introduction to the inseparable relationship between capitalism and unequal distribution of environmental hazards. Part IV explores the continual task of the environmental poverty lawyer: which this paper names as critical *poiesis*, the simultaneous task of revealing into being the poetics of the vulnerable, and the forgotten, as well as utilizing the technology of law, law's *techne*, to create change. Part V advocates for what Arundhati Roy evokes as "the Century of the Small,"[72] and what Andrew Revkin terms as "the lesser Anthropocene."[73] The paper considers what change can look like in this increasingly interconnected world, and tentatively concludes that small acts must work in tandem with the longer arc of history in mind. The essay concludes with a discussion of mankind's entry into a new geologic age, and underscores how this moment of temporal and geologic convergence presents new opportunities and challenges for the law. The essay also ends on an aspirational note of possibility: the environmental justice lawyer in the twenty-first century must continue to master many languages: starting with the language of the law without forsaking the language of the people, only by telling this world, by insisting upon the thing seen, can we shape this world.

## III. Brief History of Environmental Justice

The environmental justice movement today is still, at its core, an insistence that we do in fact exist. The environmental justice movement originally developed to address "the lack of adequate attention to race and class issues by [the] mainstream environmental movement."[74] David Pellow puts it another way: "[t]his is what the movement for environmental justice has stood for since its inception: the inextricable relationship between the degradation of people and

[72] *See infra* note 123.
[73] Andrew C. Revkin, *Confronting the Anthropocene*, N.Y.TIMES, DOT EARTH (May 11, 2009), http://dotearth.blogs.nytimes.com/2011/05/11/confronting-the-anthropocene/
[74] Julie Sze and Jonathan K. London, *Environmental Justice at the Crossroads*, 2/4 SOCIOLOGY COMPASS 1331, 1334 (2008).

their ecosystems."[75] Pellow goes on to suggest that "[w]hen movements can articulate these links and integrate them into international norms and state and corporate policies and practices, this constitutes a remarkable achievement, because it involves both discursive and structural 'disruptions' in the otherwise normal flow of power."[76] The discursive and disruptive force of the environmental justice movement ultimately makes visible communities and peoples that the late modern machine discounts as disposable.

*a. Environmental Justice Encompasses Many Different Social Justice Movements*

There are many points of entry to the environmental justice movement itself and by now there are growing number of books and articles that explore this history well.[77] In Luke Cole and Sheila Foster's seminal book, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, the authors liken the environmental justice movement to a river, "fed over time by many tributaries."[78] From the Civil Rights Movement to the Anti-Toxics Movement to the Labor Movement, environmental justice carries a "perspective that recognized that the disproportionate impact of environmental hazards was not random or the result of 'neutral' decisions but a product of the same social and economic structure which had produced de jure and de facto segregation and other racial oppression."[79] Environmental justice recognizes that environmental hazards—externalities largely associated with the frenetic productivity of our capitalist system are calculated to burden the most vulnerable and the poor because there,

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[75] DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 67 (2007).
[76] *Id.*
[77] *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE (2007); Dayna Nadine Scott, *Confronting Chronic Pollution: A Socio-Legal Analysis of Precaution*, 46 OSGOODE HALL LAW JOURNAL 2 (2008); Michelle Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 4 (2010); ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2011); just to name a few examples of the very many excellent pieces of scholarship available on environmental justice issues today.
[78] Cole and Foster at 20.
[79] *Id.* at 21.

corporate power faces the least resistance, or so they think.[80] The historic struggle over siting of waste facilities embodies many of the issues the environmental justice movement has identified throughout the years: it "concerns itself with the cleanup of contaminated industrial sites, the elimination of occupational hazards, lead abatement, enforcement of existing environmental regulations, and the guarantee of representation in the environmental decision-making process."[81] Environmental justice can be understood as both aiming to tackle the immediate problem at hand: whether the issue concerns access to safe drinking water or cleanup of contaminated industrial sites without losing sight of the larger systemic problems: overuse of nitrogen fertilizer in industrial agriculture[82] or a regulatory regime's historical inattention to economic and racial disparities within siting decisions.[83]

*b. Capitalism and Its Economic Logic*

In Rob Nixon's *Slow Violence and the Environmentalism of the Poor*, one of the book's first epilogues comes from a leaked confidential memo written by Lawrence Summers, former president of the World Bank. Summers writes: "I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that . . ."[84] The "economic logic" and the calculations that track the treadmill of production[85] and

[80] *See The Warriors of Qiugang*, a documentary about a small village in China's successful organizing and fight against a chemical company in their village. *Available at*: http://e360.yale.edu/feature/the_warriors_of_qiugang_a_chinese_village_fights_back/2358/

[81] COLE AND FOSTER at 17. *See The Struggle of Kettleman City* in, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001);

[82] "More nitrogen fertilizer is applied in agriculture than is fixed naturally in all terrestrial ecosystems." Paul J. Crutzen, *Geology of Mankind*, 415 NATURE 23, (Jan. 2002), *See also Water and Health in the Valley: Nitrate Contamination of Drinking Water and the Health of the San Joaquin Valley Residents*, COMMUNITY WATER CENTER *available at*: http://www.communitywatercenter.org/files/PDFs/2011%20Nitrate%20Health.pdf.

[83] AB 1329, the Toxics Equity Act currently percolating in the California legislature is a bill that would require California's Department of Toxic Substances and Control to identify racial and economic inequities in siting hazardous waste facilities and develop enforceable strategies to eliminate that disparity. If passed, AB 1329 would be another gain for environmental justice. Text of proposed bill *available at*: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1329 (last visited, April 23, 2013).

[84] ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 1 (2011) *quoting* Lawrence Summers, confidential World Bank memo, December 12, 1991.

disposal make sense within the hermeneutics of market-based capitalism: "[t]he production of social inequalities by race, class, gender, and nation is not an aberration or the result of market failures. Rather, it is evidence of the normal, routine, functioning of capitalist economies. Modern market economies are *supposed* to produce social inequalities and environmental inequalities."[86] Nixon analyzes Summers' rationalization of his "poison-redistribution ethic as offering a double gain, it would benefit the United States and Europe economically, while helping appease the rising discontent of rich-nation environmentalists."[87] The logic of the double gain overshadows the double loss: lowest wage countries not only receive the toxic waste of the wealthy nations, their lack of participatory power continually leaves them no choice but to receive.[88]

While Nixon and Pellow discuss capitalism's economic logic with regards to waste and toxics, these ideas may be extended to climate justice as well. As ExxonMobil and other large oil and gas companies continue to increase their profits engaging in the business of greenhouse gas emissions, within this schema, communities like the Native Village of Kivalina, are expendable—unaccounted for externalities at the end of the day, that make perfect economic sense within the bounds of free market logic. What is 400 people up in the middle of the Chukchi Sea in comparison to $44.9 billion in the year 2012 alone, for one company alone? It's easy math really.[89]

*c. Environmental Justice's Staying Power: Saying No and the Force of Storytelling*

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[85] *See generally* KENNETH A. GOULD, DAVID N. PELLOW, ALLAN SCHNAIBERG, THE TREADMILL OF PRODUCTION: INJUSTICE AND UNSUSTAINABILITY IN THE GLOBAL ECONOMY (2008).
[86] DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 17 (2007).
[87] Nixon at 2.
[88] Pellow at 191.
[89] ExxonMobil earned $44.9 billion overall in 2012, just $300 million short of the world record. *See* Chris Isidore, *Exxon Mobil Profit is Just Short of Record*, CNN MONEY, (Feb. 1, 2013), http://money.cnn.com/2013/02/01/news/companies/exxon-mobil-profit/index.html?iid=HP_LN

… an experimental art whose touchstone is again an emergence, giving a very concrete meaning to Gilles Deleuze's motto that to think is to resist.

--Isabelle Stengers[90]

By now, the corpus of environmental justice literature reflects a movement, at times disparate, at times synchronized, that stands to resist the dominant worldview that the market is the choice determinant of free will; [91] that the end of history rests with one word, globalization. [92] A chronicler of modern Latin American history once wrote me, "don't give up your research or feel that it's less important than denouncing a bad situation." I have taken this advice to heart. I have finally started to understand what this word—resistance—means. Sometimes the only meaningful utterance is no. But there is more, one must say no with one breath, but continue to forge ahead in the next. For every master narrative there exists a hundred counter-narratives.[93]

Why does environmental justice make people uncomfortable? To say no to the status quo is inherently destabilizing. To say no is to refuse. But there is something more uncomfortable here than the autonomous decision to say no. The pithy statement of no declared *in public* is both a statement and a stance. This singular word—no—has the power to implicate formidable institutions and disrupt well-established systems of thought; this small word has surprising seismic force.[94] Environmental justice doubts that as a nation-state we understand what equal

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[90] ISABELLE STENGERS, *The Cosmopolitical Proposal*, *in* MAKING THINGS PUBLIC: ATMOSPHERES OF DEMOCRACY 1002 (Bruno Latour and Peter Weibel eds., 2005).

[91] *See* John Gray, *The World is Round*, 52 THE NEW YORK REVIEW OF BOOKS 13, (Aug. 11, 2005).

[92] "That meant that nothing was left to stand in the way of a truly global free market, one in which liberated corporations were not only free in their own countries but free to travel across borders unhindered, unleashing prosperity around the world . . . . It was, as Francis Fukuyama said, 'the end of history' – 'the end point of mankind's ideological evolution.'" NAOMI KLEIN, THE SHOCK DOCTRINE 22 (2007) (internal citations omitted).

[93] *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism and Narrative Space*, 81 CAL. L. REV. 1241 (1993) and Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691 (2007).

[94] In addition to saying no, we should honestly acknowledge that we cannot always expect a specific event, an action item, to follow from saying "no" affirmatively. Philosopher Isabelle Stengers writes: "[a]dding a cosmopolitical dimension to the problems that we consider from a political angle does not lead to answers everyone should finally accept. It raises the question of the way in which the cry of fright or the murmur of the idiot can be heard

treatment means.[95] The movement is skeptical of the proposition that efficiency and cost benefit analyses are neutral, and it insists that even neutrality itself can impose or affirm a worldview that perpetuates disparities.[96] Environmental justice identifies the urgency underlying Ann Lauterbach's remark that "[c]hoice confined to the marketplace endangers the very core of participatory democratic processes."[97] Environmental justice refuses the lie that to choose between one's health and access to employment is meaningful choice. It moves along the discursive meridian to embrace storytelling and to write against the grain of the market based machinery.

Environmental justice is also personal. It is in large part an outcry against a world of toxics that disproportionately burdens bodies – bodies of the poor, of people of color.[98] It is a

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'collectively,' in the assemblage created around a political issue . . . . Giving this insistence a name, cosmos, inventing the way in which 'politics,' our signature, could proceed, construct its legitimate reasons 'in the presence of' that which remains deaf to this legitimacy: That is the cosmopolitical proposal." ISABELLE STENGERS, *The Cosmopolitical Proposal*, *in* MAKING THINGS PUBLIC: ATMOSPHERES OF DEMOCRACY 996 (Bruno Latour and Peter Weibel eds., 2005).

[95] While the U.S. EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies," http://www.epa.gov/environmentaljustice/, this focus on fair treatment *regardless* of race, fails to take into account the racial dimensions of environmental justice. Compare EPA's definition of environmental justice with the principles of environmental justice adopted during the First National People of Color Environmental Leadership Summit in 1991, which recognizes that discriminatory practices abound and the only way to address issues of environmental justice is by acknowledging our differences, including race: "We, the people of color gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands . . . to respect and celebrate each of our cultures . . ." http://www.ejnet.org/ej/principles.html.

[96] *See supra* note 15, GAO Report at 3: "The Continuing Authorities Program, administered by the U.S. Army Corps of Engineers, and the Watershed Protection and Flood Prevention Program, administered by the Department of Agriculture's Natural Resources Conservation Service, are the principal federal programs that provide assistance for the prevention or control of flooding and erosion. However, small and remote Alaska Native villages often fail to qualify for assistance under these programs because they do not meet program criteria. For example, according to the Corps' guidelines for evaluating water resource projects, the Corps generally cannot undertake a project when the economic costs exceed the expected benefits. With few exceptions, Alaska Native villages' requests for assistance under this program are denied because the project costs usually outweigh expected benefits. Even villages that meet the Corps' cost/benefit criteria may still fail to qualify if they cannot meet cost-share requirements for the project." Not sure what the cost/benefit criteria entail, but what the report seems to be saying is that saving the lives of 400 people (just looking at Kivalina alone) from permanent displacement, which of course is the looming issue that we are really talking about when we talk about coastal erosion and flooding, is not enough of an expected benefit for the federal government's cost/benefit calculus.

[97] ANN LAUTERBACH, THE NIGHT SKY: WRITINGS ON THE POETICS OF EXPERIENCE 7 (2005).

[98] *See supra* note 72.

complex thing, to talk about the body, the diseased physical body poisoned by toxics that, under the legal gaze, cannot be traced to one single wrongdoer, or even multiple wrongdoers.[99] The literary corpus is also a body; a body of words that inscribes and is inscribed upon; some palimpsest of stories that insists, resists, and remains. The literary corpus of environmental justice is a body of words that gives voice to the body that aches. Law too belongs in the realm of the literary, that institution which has no bounds.[100] What endures? *No one dies so poor that he does not leave something behind.*[101]

## IV. Unstable Stuff: *Poiesis*, *Techne* and the Law

I began with a literary idea of experience, and I still don't know where all the lies are.
– Joan Didion[102]

The Greeks have the word *aletheia* for revealing. The Romans translate this with *veritas*. We say "truth" and usually understand it as correctness of representation. –Heidegger[103]

Poetic Justice –Kendrick Lamar[104]

The structure of law is replete with its own language, semiotics and semantics. There are many functions of the law: to enforce rights, allow for redress, to punish. Here, in the context of climate justice, I focus on the functionality of the law to state a claim, in short, to be heard and to be seen—render visible, be recognized. The language of law quite literally brings forth into

[99] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Services Inc., 528 U.S. 167 (1999), the trend of modern standing jurisprudence makes it more and more difficult to "trace" your harm back to the alleged wrongdoer, *see also infra* note 136. Consider how one might ever be able to meet the "fair traceability" requirement for modern Article III standing in the situation illustrated here: "[t]he direct effects of pollution hit people and animals harder in the Arctic, too. Airborne pollutants emitted in the mid-regions of the planet swirl north . . . . collect in organisms, and continue up the food chain. In an excerpt Banerjee includes from a book called *Silent Snow: The Slow Poisoning of the Arctic*, the environmental journalist Marla Cone writes, 'The Inuit living in northern Greenland, near the North Pole, contain the highest concentrations of chemical contaminants found in humans anywhere on earth.'" Ian Frazier, *In the Beautiful, Threatened North*, 60 THE NEW YORK REVIEW OF BOOKS 4, (Mar. 7, 2013).
[100] *See* DEREK ATTRIDGE, *"This Strange Institution Called Literature": An Interview with Jacques Derrida*, ACTS OF LITERATURE 35 (Derek Attridge, ed., 1992)
[101] WALTER BENJAMIN, *The Storyteller*, ILLUMINATIONS: ESSAYS AND REFLECTIONS 98 (Hannah Arendt, ed., 1968), quoting Blaise Pascal.
[102] Joan Didion, *The Art of Fiction No. 71*, Interviewed by Linda Kuehl, THE PARIS REVIEW 72 (1978).
[103] MARTIN HEIDEGGER, *The Question Concerning Technology*, MARTIN HEIDEGGER: BASIC WRITINGS, 317-18 (David Farrell Krell ed., 2nd ed. 1977).
[104] Kendrick Lamar, good kid, m.A.A.d city, track 6 (2012).

being, *it is so ordered*.[105] I argue here that in the context of climate justice, using *Native Village of Kivalina v. ExxonMobil Corp.* as a continuing example, the law does not have to exercise its technocratic power over its power to reveal, to bring forth. Ultimately, the task of the law in a democratic society is to make present, to bring out of concealment. *Kivalina* and its corresponding tort claims present an aporia in the law, how displacement of federal common law claims in the age of climate change as a legal principle does not sufficiently answer—does not sufficiently bring forth *aletheia*, revealing, or *veritas* because it does not adequately represent the new types of questions presented by large scale displacement of Native Alaskans due to climate change.

*a. A Brief Introduction to Poiesis*

In Plato's formulation of *poiesis*, the term means coming forth, bringing forth,[106] and Heidegger builds on this by explaining *poiesis* as the process of bringing forth something out of concealment, and this unconcealment can also be understood as revealing.[107] Unconcealment or revealing requires that something resides, is present, though hidden. In Heidegger's *The Question Concerning Technology*, the conclusion of his essay reads like a hybrid variant of poem and parable:

> There was a time when it was not technology alone that bore the name *techne*. Once the revealing that brings forth truth into the splendor of radiant appearance was also called *techne*.
>
> There was a time when the bringing-forth of the true into the beautiful was called *techne*. The *poiesis* of the fine arts was also called *techne*.
>
> . . . . . And art was simply *techne*. It was a single, manifold revealing. It was pious, *promos*, i.e., yielding to the holding sway and safekeeping of truth.
>
> . . . . What was art—perhaps only for that brief but magnificent age? Why did art bear the modest name *techne*? Because it was

[105] Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (2009).
[106] Heidegger at 317.
[107] *Id.*

> a revealing the brought forth and made present, and therefore belonged within *poiesis*. . .[108]

I focus on this interaction between *techne* and *poiesis* –the technical craft and the poetical—because I see the magnetism between the two concepts as instructive for the law in the age of climate change. If, according to Heidegger, art—the beautiful—bears the modest name *techne* simply because it functions to reveal, and if art, too, belongs within the realm of *poiesis* because *poiesis* too carries with it the function of revealing; craftsmanship, the technical and *poiesis* both have the same task: to reveal, to bring forth into being. Whichever path you choose, the technical or the poetical, the task is still the same, to reveal, to bring forth and make present. The continuing task of the environmental poverty lawyer, too, is to bring forth and make present, both the beautiful, the poetics of lived experience, as well as the crafted and the structured technology of law.

*b. The Continuing Task of Environmental Justice Lawyering*

The lawyer is trained to scrutinize the details, the minutiae of statutory codes and registers, this can be a strength, the *techne* of the law. But the environmental justice advocate is still tasked with that equally critical responsibility of revealing into being, to strive toward the *correctness* of representation, and this is the role of *poiesis*. Displacement is a convenient legal principle to rely on in order to preclude federal common law claims from proceeding within climate change tort actions. The doctrine of displacement may be enough to stave off litigation for now, we will see if the Supreme Court takes on *Kivalina*, but, perhaps more urgently, the problem of displacement is here to stay. Whichever legal doctrine you employ to keep these cases out of the courts, you cannot suppress the problem for the long haul. The problem of large-scale displacement due to climate change and global warming has arrived. It has arrived and it

[108] *Id.* at 319.

will continue to arrive, it is and will be an emerging, persisting and irrevocable reality. Give a thing a name and find the law to let the narrative develop or give a thing a name and find the law to squash it. Poetically, the law and the problem before us, both have one and the same name, displacement.

*c. Techne and Technology: Globalization and the Invisible Local*

The philosophy of technology according to Heidegger brings the function of *techne* low toward the modest task of revealing "truth" into the present moment. In stark contrast to this understanding of *techne* as being a vehicle for truth-revealing, technology also plays an acute role as the driving force of globalization within the late modern era.[109] With the advent of accelerated processes of communication, technology, has in part allowed the wealthy to continue to amass more wealth and for those in power to carefully guard access points to information.[110] Even beyond the capacity for technology in our present time to create vast disparities between the wealthy and the poor, in its most insipid form, technology continually distracts us from bringing forth the type of clarity necessary to see an issue as it is.

In John Gray's 2005 review of Thomas Friedman's neoliberal embrace of globalization, Gray critiques the metaphor of Friedman's "flat world" as uncritical and oversimplified.[111] Gray concedes that while Friedman "acknowledges the existence of an 'unflat' world composed of people without access to the benefits of new technology," nonetheless "[Friedman] never connects the growth of this netherwold of the relatively poor with the advance of globalization."[112] Gray dissects Friedman's visit to Infosys headquarters, a high-tech company in

[109] *See* John Gray, *The World is Round*, 52 THE NEW YORK REVIEW OF BOOKS 13, (Aug. 11, 2005).
[110] *See* Sherry Cable, Thomas E. Shriver, Tamara L. Mix, *Risk Society and Contested Illness: The Case of Nulcear Weapons Workers*, 73 AMERICAN SOCIOLOGICAL REVIEW 3, 393 (June 2008) (Workers of Oak Ridge Nuclear Reservation workers' illness claims "were contested by corporate management authorities who used three tactics: denial of individual exposures, refusal to allow access to health records . . .").
[111] John Gray, *The World is Round*, 52 THE NEW YORK REVIEW OF BOOKS 13, (Aug. 11, 2005).
[112] *Id.*

Bangalore as failing to recognize "the widening difference in standards of life in the region . . ."[113] Gray underscores that "only by decoupling itself from the local environment that Infosys is able to compete effectively in global markets. Infosys demonstrates that globalization does have the effect of leveling some inequalities in world markets, but the success of the company has been achieved by using services and infrastructure that the society around it lacks."[114] Global processes and the technological advances that have helped make the "world smaller"[115] and communication faster still does not automatically make this world a more equitable or just place. In fact, we are now living in a distinctively unequal world, plagued by persistent issues of poverty.[116]

John Gray's criticism of Friedman's "The World is Flat" is a warning against the dangerous ease with which neoliberals embrace globalization as a unidirectional force that purports to level the playing field.[117] Within the politics of twenty-first century natural resource exploitation, climate justice brings into sharp focus the largely unaccounted for externalities perpetuated by a global economy powered by energy-intensive fossil fuel dependent lifestyles. In fact, climate justice emerges as a critical voice that exposes and insists upon the intimate relationship between global processes and local cultural devastation, as much as the global market economy attempts to decouple the two.

If climate justice subscribes to the larger goals of environmental justice: bringing to light the disproportionate hazards and risks that beleaguer the poor and people of color, it follows that as an organizing principle, climate justice cannot do this properly without manifestly

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See* Joseph E. Stiglitz, *Some Are More Unequal Than Others*, N.Y.TIMES, (Oct. 26, 2012) ("It's not just that the top 1 percent takes in about a fifth of the income, and controls more than a third of the wealth. America also has become the country (among the advanced industrial countries) with the least equality of opportunity.")
[117] John Gray, *The World is Round*, 52 THE NEW YORK REVIEW OF BOOKS 13, (Aug. 11, 2005).

acknowledging the inequalities associated with the larger currents of globalization and industrialization. An emphasis on the longer arc of history and its corresponding lessons is imperative as we continue to craft local solutions with an eye toward larger systemic problems.

*d. Resist Flattening*

*The Native Village of Kivalina v. ExxonMobil Corp.* refracts these larger issues of globalization and energy-intensive modern lifestyles through the lens of litigation. The plaintiffs in *Kivalina* identify twenty-four of the largest emitters of greenhouse gases in the U.S through their ownership and operation of electric power plants: "Electric power plants that burn fossil fuels are the largest source of carbon dioxide emission in the United States. Such plants in the U.S. emit approximately 2.6 billion tons of carbon dioxide each year."[118] One of the challenges that the plaintiffs faced in district court is the fair traceability requirement for standing. Defendants "argue that plaintiffs lack standing under Article III to pursue their global warming claims under a nuisance theory on the ground that their injury is not 'fairly traceable to the conducts of the defendants."[119] The district court ultimately favored the defendants' position noting that "the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings makes clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time."[120]

I wonder if this moment in climate change tort litigation also serves as an opportunity to locate and expose the narrative gap that parallels the lazy "flattening" metaphor that Gray warns against. The refrain that the environmental lawyer hears again and again from policy makers and

[118] Plaintiff's Complaint at 42 Native Village of Kivalina v. ExxonMobil Corp. (2008) (No. 08-1138)
[119] Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 870 (N.D. Cal. 2009).
[120] *Id.* at 880.

industry and politicians is that everyone emits greenhouse gases, we are all at fault, how can we trace our harm to the specific molecular emission of a particular polluter. The growing difficulty, but the persistent task, is to link large and seemingly global, unwieldy, "too-big-to-fail" processes, such as global releases of greenhouse gases, to local effects and harms. The organizing principle of climate justice refuses the decoupling effect that globalization seeks to promote.

In the age of climate change, the discussion of *techne* and technology is necessarily twofold and divergent—it focuses on the contradictory ability of technology to obscure the deleterious effects of an ever growing global market and also the modest function of *techne* to make present, to authentically portray lived reality, and adequately depict those harmed by the currents of globalization. It is my small attempt here to try and reclaim the modest function of *techne*, despite the dominant consumerist view of technology as largely an endless catalog of acquirable and disposable goods in the global era, to try and revamp and restore *techne*'s original utility and ability to reveal the persistent systemic problems that come along with man's dependency on fossil fuel powered economy.

The environmental poverty lawyer must continue to utilize law's *techne* to infuse the public sphere with narratives resisting the decoupling mechanism globalization imposes on local communities. The persistence and utilization of law's *techne* to implement social change in the language of environmental justice will reverberate and grow louder through time if we continue to resist essentialism. The environmental poverty advocate, strengthened by our heritage in grassroots organizing and community lawyering, must continue to go forward with a sensitivity toward detail, respect and attention for the small, recognizing that different struggles speak

different vernaculars, and finally resist the temptation to flatten stories along the tired binaries of good versus bad and victor versus victim.

*e. Convergence and the Correctness of Representation*

Correctness of representation, as Heidegger explains as *veritas*, is the inherent and core struggle for narrative dominance within our adversarial legal system. Because truth, *veritas*, and truthful representation are ever-contested, it becomes clear that the role of the advocate, and the environmental justice advocate, remains the struggle to present and maintain the correctness of representation for the longue duree. "Correctness" of course, is always up for grabs, and it is often idiosyncratic to the facts presented. But here again lies the importance of *poiesis*. Bring forth into being, tell the story as honestly as you can. This is no simple task, but you find your compass if you are willing to see things as they are, within all their contradictions, to immerse in both sadness and beauty, which at times are inseparable.

If correctness of representation is at its core unstable, at least the judiciary should create the necessary space for adequate[121] recognition of the problem associated with climate change induced displacement. At least there should be a possibility for the conversation to move forward, fractured and acrimonious as it is. The law should provide the necessary dialogic space to acknowledge that there is a disharmony within the crisis of climate change, that not everyone is impacted equally, and that we all (legislative, executive, judiciary) need to play an adequate[122] role in revealing into being both what the problem is as well as *make possible* a solution. The emerging principle of climate justice can help us locate this tension in the law—the dire need for action as well as the tremendous difficulty of tangible solutions—by bringing forth and giving voice to those like the Kivalina villagers, who are the among the most affected by climate change

[121] English Oxford Dictionary, Adequate, adj. 2. *Philos.* and *Logic*. Of an idea, concept, etc.: fully and exactly representing its object.
[122] English Oxford Dictionary, Adequate, adj. 1. Equal in size or extent; exactly equivalent in form.

and yet have contributed little to global warming due to their traditional ways of life.[123] The critical moment of the geologic now is fraught with contradictions and injustices yet it also presents new opportunities to imagine this melting world.

## V. Climate Change Has Arrived

Who knows, perhaps that's what the twenty-first century has in store for us. The dismantling of the Big. Big bombs, big dams, big ideologies, big contradictions, big countries, big wars, big heroes, big mistakes. Perhaps it will be the Century of the Small. Perhaps right now, this very minute, there's a small god up in heaven readying herself for us. Could it be? Could it *possibly* be? It sounds finger-licking good to me." –Arundhati Roy[124]

Anthropogenic climate change is real.[125] We can no longer afford to debate if it really is happening, there is no time to lose. We have to look squarely at the reality that the Arctic is melting, that communities are being displaced and will continue to be displaced, we also have to admit to ourselves that the law must change to accommodate for this emerging moment in history. This is no easy task. It seems daunting to take on "climate change." But this is what I mean, and I think this is what Roy and Bankarjee mean, by the word "small." We have to break down large problems into smaller ones to render them visible, we have to start small and tell a story.

### *a. Climate Change Presents Difficulties for the "Thing Seen"*

In the midst of the confusing confluence of both rising public consciousness as well as manufactured corporate doubt regarding the hazards and realities associated with anthropogenic climate change,[126] climate justice functions to clarify the immense and imminent scope of harm that will inevitably take place as the planet continues to warm. *Kivalina* brings into sharp focus

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[123] *See supra* note 18.
[124] ARUNDHATI ROY, THE GREATER COMMON GOOD (1999).
[125] Another cause of action in the Kivalina lawsuit is concert of action and conspiracy of defendants to fund climate-denial science and promulgate bad science. *See* Plaintiff's Complaint at 61, Native Village of Kivalina v. ExxonMobil Corp. (2008) (No. 08-1138). Leading NASA scientist Jim Hansen "repeatedly called for trying the most vociferous climate-change deniers for 'crimes against humanity.'" *See* Justin Gillis, *Climate Maverick to Retire from Nasa*, N.Y. TIMES, April 1, 2013. The conspiracy cause of action is beyond the scope of this paper.
[126] *See supra* note 96, *see also* ERIC POOLEY, THE CLIMATE WAR (2010).

the problems facing Arctic peoples especially, since the Arctic is warming at twice the rate as the rest of the world.[127] Native Arctic peoples also occupy a particular position of vulnerability. Due to their traditional lifeways, Native Arctic peoples, such as the Kivalina residents, do not contribute to global warming as much as an urban dweller, for example, and yet currently, they are the ones who face imminent displacement from their ancestral homes.[128]

The age of climate change poses new challenges that are at once immense, urgent, and yet difficult to approach because it requires a radical shift away from the status quo. The world is rapidly entering an era of irretrievable loss and irreparable change, and there is no better place to witness this than in the Arctic. By some calculations, the Arctic will be completely ice free in the summers by 2016.[129] At a recent conference, the moderator presented this fact, of the Arctic possibly being ice-free in the summers by 2016, which completely stunned me into silence. *Three years*—the panel moved on. A maritime attorney started talking about new shipping routes through the Arctic that would be available once the sea ice melted enough to allow for safe passage. It's already happening, he said. Everyone wants a seat at the table. Some wide dissonance settled within me, *did anybody hear what the professor just said? The Arctic may be completely ice free in the summers within three years. Why are we talking about new shipping routes?*

I mechanically scribbled some numbers down: London to Yokohama 15,700 kilometers through the Arctic. Or was it 13,841 kilometers. Through the Suez: 21,200 kilometers. It made no difference to me. I know it means something for somebody out there. Sitting there in a chilly

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[127] Lauren Morello, *Sea Ice Loss Accelerates Arctic Warming*, THE SCIENTIFIC AMERICAN April 30, 2010, http://www.scientificamerican.com/article.cfm?id=sea-ice-arctic-warming.
[128] *See supra* note 16.
[129] John Vidal, *Arctic expert predicts final collapse of sea ice within four years*, THE GUARDIAN Sept. 17, 2012, http://www.guardian.co.uk/environment/2012/sep/17/arctic-collapse-sea-ice.

conference room in Salt Lake City, with the nerves at the back of my neck constricting, the numbers seemed irrelevant at best and sinister when I thought about it, this efficiency, this calculation, this anticipation, and finally, to even talk about "savings of fuel" (quote, end-quote, enter footnote) seemed absurd at that moment. Did you not hear that the Arctic is melting? You should not have the right to use that word "save" in this context. *To rescue or deliver from danger or harm*.[130] You do not get to talk about saving fuel right now. *To preserve or guard from injury, destruction, or loss*.[131] How dare you use that word: save. It is too late to save the Arctic. It will be ice free in the summer months within three years. Save. Some violent catachresis. This phrase "irreversible threshold crossing" pulsated in front of my mind's eye.

*b. Climate Justice Can Help Reveal into Being Contradictory Narratives*

It is part of the democratic task to reveal into being the plurality of experience, to bring forth the declaration that *e pluribus unum*. The aspiration that out of many, one, is of course an inherent paradox. If we recognize there are many, why do we insist on just one? The acknowledgment of many but the insistence upon one reveals the simultaneous democratic celebration and discomfort with plurality. Drawing from feminist legal theory and critical race theory, this essay too subscribes to the notion that "[a] unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright."[132] This democratic experiment, this democratic consciousness is " . . . a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated."[133]

Within the growing narrative of climate justice, those harmed, like the Kivalina villagers, are directly experiencing the "contradictory state of becoming." Life goes on, fractured and

[130] Merriam Webster, *transitive verb*.
[131] *Id.*
[132] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990).
[133] *Id.*

displaced, even as the Arctic melts. Climate change is perceived as incremental, not discrete,[134] and yet Arctic ice as we know it may cease to exist completely well within our lifetime.[135] Radical change to our ecosystems is experienced as slow violence.[136] But is the violence really slow? I guess it depends on whom you talk to. For Kivalina, slow or fast, the violence has arrived, temporally and geographically.[137] Your home will be no longer. The problem is how to see it. How can we really *see* what is happening to our world, to our people, in the midst of such vast contradictions? Compound myopia with moneyed corporations exerting their well funded influences to inject doubt into climate science,[138] compound human folly with "hegemonic brevity or incessant promptness that . . . dominate[s] contemporary communications."[139] The question becomes how can we see things clearly and "maintain our attention over the *longue duree* as we seek to extend and sustain the pathways to environmental justice . . ."[140] How can we continue to listen to one another, to empathize, to strive to understand one another, when our very world is "seething with virtual ecologies of connection and distraction"?[141] When the

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[134] "The sources of climate change are obscure and multiple, and they lack faces; hence outrage, an amplifier with respect to public reactions to risk, is dampened or absent. Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 507 (2007).

[135] *See supra* note 99.

[136] *See generally* ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2011).

[137] Plaintiff's Complaint at 46 Native Village of Kivalina v. ExxonMobil Corp. (2008) (No. 08-1138) Citing U.S. Army Corps of Engineers GAO's conclusion that Kivalina must be relocated "in the near future" since a perfect storm could completely flood the village.

[138] A January 2007 report from the Union of Concerned Scientists offered a comprehensive overview of how ExxonMobil used misleading tactics to "cloud the scientific understanding of climate change to delay action on the issue." The non-profit identified four tactics used by ExxonMobil: the company "manufactured uncertainty, information laundering by using seemingly independent front organizations, promoted scientific spokespeople who misrepresent peer-reviewed scientific findings, and attempted to shift the focus away from meaningful action on global warming." *Available at*: http://www.ucsusa.org/assets/documents/global_warming/exxon_report.pdf.

[139] Nixon at 275.

[140] *Id.* at 276.

[141] *Id.* at 275. *See also* Mark Danner, *In Conversation: Robert Silvers*, NEW YORK MAGAZINE, April 7, 2013: "And that raises a question: What is this? What are the kinds of prose, and the kinds of thinking, that result from the imposition of the tweet form and other such brief reactions to extremely complex realities? My feeling is that there are millions and millions if not billions of words in tweets and blogs, and that they are not getting and will not get the critical attention that prose anywhere should have unless we find a new form of criticism. . . . But this means that billions of words go without the faintest sign of assessment. And yet, if one cares about language, if one cares about the sensibility in which language is expressed, and if one cares about the values that underlie our use of language,

structures of private power seek to obfuscate and sever routes of causation?[142] How can we continue to understand integrity in a culture where everything is for sale?[143] How can we cut through? Fail or win, no matter, the task is still the same: to cut through the contradictions and bring forth our specific truth. One form in which the environmental poverty lawyer and the advocate must continue to do so is in the form of the utterance, through speech and critical writing: narrative.

*c. History and "the Geologic Now" Converge*

Percolating among historians and scientists is the notion that the Anthropocene Age has arrived.[144] "Now that humans—thanks to our numbers, the burning of fossil fuel, and other related activities—have become a geological agent on the planet, some scientists have proposed that we recognize the beginning of a new geological era, one in which humans act as a main determinant of the environment of the planet. The name they have coined for this new geological age is Anthropocene."[145] Historian Dipesh Chakrabarty, in his article, *The Climate of History: Four Theses* posits that if we are indeed in the Anthropocene Age, "[t]he geologic now of the Anthropocene has become entangled with the now of human history."[146]

Similar to the contradictory narratives that form around the problem of climate change, the Anthropocene is the naming of a moment in time where constructed and remembered human history converges with the geologic now. Humans press upon the world as a "geological

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such as affection, privacy, honesty, cogency, clarity—then these media, it would seem to me, should qualify as the subject of criticism. We seem at the edge of a vast, expanding ocean of words, an ocean growing without any critical perspective whatever being brought to bear on it. To me, as an editor, that seems an enormous absence." http://nymag.com/news/features/robert-silvers-2013-4/index6.html

[142] *See supra* note 46.

[143] Michael Sandel, *What Isn't for Sale?*, THE ATLANTIC, Feb. 2012, http://www.theatlantic.com/magazine/archive/2012/04/what-isnt-for-sale/308902/

[144] *See* Dipesh Chakrabarty, *The Climate of History: Four Theses*, CRITICAL INQUIRY 35 (Winter 2009) and Paul Crutzen, *The Geology of Mankind*, 415 NATURE 23 (Jan. 2002).

[145] Dipesh Chakrabarty, *The Climate of History: Four Theses*, CRITICAL INQUIRY 35, 209 (Winter 2009)

[146] *Id.* at 212.

agent,"[147] time and spatiality converge into present time. Chakrabarty goes on to articulate that "[t]he task of placing, historically, the crisis of climate change thus requires us to bring together intellectual formations that are somewhat in tension with each other: the planetary and the global; deep and recorded histories; species thinking and critiques of capital."[148] The opportunity to bring together intellectual formations that are at times disparate or not commonly in conversation with one another has arrived simultaneously with the moment of crisis. Critical *poiesis*.

Andrew Revkin writes in his series for the *New York Times*, Dot Earth, "As far as science can tell, there's never, until now, been a point when a species became a planetary powerhouse and also became *aware* of that situation."[149] The interplay between coming into being as a planetary powerhouse but then also the intimacy of knowing is key—because not only do we now live in "a geological age of our own making"[150] we are aware of this circumstance, we are aware of ourselves as the "causative element."[151]

Again, climate justice and the *Kivalina* litigation in particular, bring to light the contradictory narratives that intersect one another in this moment of great accelerated change. We know on a grand scale that man is the causative element for this new age, and yet we refuse to recognize that harm in Article III court because an expert agency will somehow address that problem through environmental laws that could not have anticipated the realities of the Anthropocene. The multifaceted problems of climate change demand multifaceted responses,

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[147] *Id.* at 210.
[148] *Id.* at 213.
[149] Andrew C. Revkin, *Confronting the Anthropocene*, N.Y.TIMES, DOT EARTH (May 11, 2009), http://dotearth.blogs.nytimes.com/2011/05/11/confronting-the-anthropocene/
[150] *Id.*
[151] *Id.*

new forms of recognition, and an imaginative making within the law itself in order to make the future *possible*.

Revkin notes "that while the 'great acceleration' described by Steffen and others is already well under way, it's entirely possible for humans to design their future, at least in a soft way, boosting odds that the geological record will have two phases—perhaps a 'lesser' and 'greater' Anthropocene."[152] Like Arundhati Roy, I hope that this is a century of the small. It is my hope that environmental poverty lawyers in the twenty-first century can work locally but in solidarity to embrace the idiosyncrasies of the 'lesser' Anthropocene. This can only happen by embracing the contradictive revealing, which simultaneously requires expansion of our legalistic understanding of harm while lessening our mark on the earth—in short, to reconstitute our understanding of humanity in the Age of Man, the Anthropocene.

The term Anthropocene, similar to the phrase global warming, "is sufficiently vague to guarantee it will be interpreted in profoundly different ways by people with different world views. . . . Some will see this period as a 'shame on us' moment . . . . Some will argue for the importance of living smaller and leaving no scars. Others will revel in human dominion as a normal and natural part of our journey as a species."[153] Revkin, as a science writer, believes in the importance of "making sure this conversation spills across all disciplinary and cultural boundaries from the get-go."[154] Environmental justice in the twenty-first century is a good a vehicle as any to coordinate the conversation between disciplinary and cultural boundaries. The black letter law is useful to understand boundaries. But the role of the law is not simply to create boundaries, it can also create movement and solutions. The organizing principle of climate

[152] *Id.*
[153] *Id.*
[154] *Id.*

justice and the remaining task of the environmental justice advocate is to both acknowledge boundaries and still to imagine overcoming them.

*Kivalina*, as much as it is a hallmark litigation of our time, is also utilizing the law as a vehicle to tell a story, and it is very much the story of this shift in history where geological and historical time finally converge to mark the ushering in of the Anthropocene age. *Kivalina* is a story about real people, irrevocable harm and irretrievable loss. And so *Kivalina* is also a story about death. *Kivalina* is also a metonym, a foreshadowing of what is to come. In this sense, *Kivalina* occupies the space of critical *poiesis,* straddling both the bounded narrative of the law and also the larger imaginative space of revealing.

### ***Epilogue*: *"The Thing Seen"***

> When poets are connected to the times in which they live, the forms they explore give us keys to the construction of meaning. Gertrude Stein made this point most succinctly: "Nothing changes from generation to generation except the thing seen and that makes a composition," she wrote in "Composition as Explanation." . . . . Artists, she believed, are responsible for portraying this shifting emphasis; that is, for finding forms that reflect the movement of time, as neither historical narrative nor descriptive mimesis, but as immediate engagement and response.
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> –Ann Lauterbach[155]

Can the lawyer also be a poet? Can the lawyer also hold herself responsible for portraying a shifting emphasis in "the thing seen?" I argue in this essay that not only is this possible, it is deeply necessary in this age of great change, with the rise of the organizing principle of climate justice and the realities of large-scale displacement. There is little room to ask outright of the law, at least in Court, for a change in the status quo. Politically, there is currently little possibility that Congress will take comprehensive action to address climate change. But we must not throw our hands up in defeat—because we do still have the lawyer, and the community organizer, and the voices of dissent. We are mostly lawyers here, so what can we

[155] ANN LAUTERBACH, THE NIGHT SKY: WRITINGS ON THE POETICS OF EXPERIENCE 2 (2005).

do? The lawyer acts within the law, but as an advocate, she has the ability to imagine new ways of being. The lawyer can be a poet.[156] The environmental poverty lawyer *must* be a poet and an advocate. We must acknowledge where the fulcrum of the law currently sits but we must insist that history still pivots and that the force of law resides in who gets to tell the story, and which story is most compelling.

In Greek, the word history is the verb to ask.[157] We must ask while we work—and by doing so create new histories. We must be obstinate in the face of climate deniers, but we must still have hope. We must strip away the deliberate insouciance of corporate reports, infuse frigid data with stories and continue to sharpen our critical eye in the age of information overload. But perhaps, the fundamental task is the ever-enduring responsibility environmental poverty lawyers have to make present, that tireless state of creative efficacy, to bring forth *veritas*. At the core of human history is the story of human fragility, and the only way something can be seen depends on the fitness and the power of representation.

[156] "Here by 'poet' I mean the broadest sense of a creative maker of meaningful space. The possibility for such a poet is precisely the possibility for the creation of a new field of possibilities." JONATHAN LEAR, RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION 51 (2006).
[157] ANNE CARSON, NOX, 1.1 (2010).