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Narrative, Nuisance, and Environmental Law

I.	Putting This Paper in Context.....	332
II.	Storytelling.....	335
	A. Dull Stories, Good Stories, Better Stories, and Best Stories.....	336
	B. Cause Litigation.....	337
	C. Scripts: Lyric Poetry.....	338
	D. Scripts: Fairy Tales.....	340
III.	Climate Change.....	345
IV.	Nuisance.....	354
	A. Private Nuisance: The Story of the Bad Neighbor.....	355
	B. Public Nuisance: The Story of the Bad Citizen.....	357
	C. Public Nuisance Suits for Climate Change Harms.....	358
V.	The Conventional Failure of Public Nuisance Suits for Climate Change Harms—and Their Unconventional Success.....	359
	Conclusion.....	362

In this paper, I address the early climate change impact claims that sounded in nuisance, such as *Comer v. Murphy Oil*¹ and *Native Village of Kivalina v. ExxonMobil*.² I propose that nuisance law and the litigation process allowed for the shaping and broadcasting of a new narrative that helped both to break new ground in the telling of difficult environmental disasters in general and to energize the climate movement in particular. Specifically, my claim is that environmental litigators remodeled and combined private and public nuisance scripts to create a hybrid script for climate change that

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¹ *Comer v. Murphy Oil USA*, 718 F.3d 460 (5th Cir. 2013).

² *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

worked—if not through redress, then by narrative relief and inspiration. With comparisons to genres such as lyric poetry and fairy tales, I argue that litigation allows us to engage in a kind of psychological ritual in which chaos is transformed into order. Such a ritual is especially needed for the unwieldy climate change crisis with its massive scope, global reach, diffuse and unpredictable effects, and hard-to-track causes. In fact, litigation is arguably an even more powerful ordering tool than other storytelling genres because it provides a moral framework with ready-made rationales for why one activity should be stopped and another saved.

The paper proceeds in parts. In Part I, I place my claims in the context of relevant recent work on impact litigation and legal storytelling, both alongside social change. In Part II, I explore the power of storytelling—and, in particular, storytelling via litigation—as a transformative genre. In Part III, I describe how urgently climate change needed such a narrative transformation. In Part IV, I describe the transformative narrative that environmental litigators built for climate change from private and public nuisance scripts. In Part V, I raise and challenge criticisms of the use of nuisance in climate change litigation.

I

PUTTING THIS PAPER IN CONTEXT

My claims intersect with a number of threads of inquiry. First, they are in conversation with a body of literature on the effectiveness of litigation to bring social change. Numerous scholars have argued, as I do, that litigation can have more than just precedential effects. For example, Michael Klarman acknowledges the possibility for litigation victories to cause ripples in a broader movement when he argues that the Supreme Court's ruling in favor of desegregation in *Brown v. Board of Education* caused a backlash in the South that then galvanized white support for civil rights legislation.³ Lynn Mather has credited litigation victories against tobacco companies with mobilizing political support from political and scientific elites.⁴ Lani Guinier argues, meanwhile, that judicial opinions can reach beyond

³ Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994).

⁴ See, e.g., Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 935 (1998).

elite groups, both provoking “mass conversation”⁵ and sounding alarms that alert social change activists to what is possible.⁶

In contrast with these scholars, Gerald Rosenberg is skeptical of the power of litigation victories to make social change, as the title of his book *The Hollow Hope: Can Courts Bring About Social Change?* suggests.⁷ But before registering his disappointment with litigation outcomes, Rosenberg articulates their potential power, looking to their persuasive, symbolic, and atmospheric capacities. For example, Rosenberg imagines that judicial decisions may be resources for change, may bring salience to issues, and may exert pressure on the other branches.⁸

Nevertheless, whether they are ultimately discouraged or optimistic about the power of litigation, most of the scholars exploring this area have focused on litigation *outcomes* as resources for change. My attention is instead on an available part of the litigation *process*. Specifically, I examine an instance of creative claim making—climate change nuisance claims—in which a new legal narrative soothed psychological chaos and initiated problem-solving by giving shape and in particular by assigning agency to an amorphous problem. That is, my theory is that the creation of a new legal claim has power wholly apart from the power of a litigation victory (or litigation loss)⁹ or a court decision.

I do not mean to suggest that in the conversation about litigation’s ability to bring social change, the potential power of the litigation *process* has been ignored; on the contrary, it has been a central part. In 1997, Thomas Stoddard observed that some rule shifts were accompanied by culture shifts (e.g., the Civil Rights Act of 1964) while others were not (e.g., New Zealand’s progressive gay rights laws), and he was curious about what accounted for the difference.¹⁰ Noting that “how change is made matters almost as much as what is,

⁵ Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 556 (2009).

⁶ *Id.* at 556.

⁷ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420 (2d ed. 2008) (describing the “mostly disappointing results of attempts to use the courts to produce significant social reform in civil rights, abortion, women’s rights, the environment, reapportionment, criminal rights, and same-sex marriage”).

⁸ *Id.* at 8.

⁹ Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing the productive effects of litigation losses on social movements).

¹⁰ Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

in the end, done,”¹¹ Stoddard identified the process—specifically, unhurried, informal public debate—as a major feature of successful culture-shifting rule shifts.¹² Stoddard’s rule-shifting/culture-shifting framework has been a foundational concept in this body of literature, and it is a productive starting point for my claims. But rather than trying to determine the relationship between rule-shifting and culture-shifting, I suggest in this paper that litigation can succeed in shifting culture *even when it fails to shift rules* and that it does so because it shares some of the features of Stoddard’s successful rules. That is, it engages public attention, and it frees public imagination. In the case of climate change nuisance suits, it does so through the medium of story.

Accordingly, my theory is also in conversation with the literature on narrative in the law as a force for social change.¹³ Scholars acknowledge the power of stories in law to make social change in a range of contexts: in briefs as an influence on judges,¹⁴ in legal scholarship,¹⁵ in dispute resolutions beyond courts (such as in restorative justice efforts),¹⁶ and in judges’ written opinions and oral dissents.¹⁷ Again, this paper adds to this array of materials by positing yet another context for legal narrative as social change maker: creative claim making. I am not referring to the bringing of claims, although that too can be creative. Instead, I am referring to the invention of new causes of action. My idea is that social change also occurs when new challenges, like climate change, are clothed in new legal narratives fashioned from old and flexible materials, such as nuisance law. Thus, my claim echoes Robert Cover’s concept that law is a “resource in signification”¹⁸—meaning that, like language, it is

¹¹ *Id.* at 977.

¹² *See id.* at 977–78.

¹³ Note that I am narrowing the vast body of literature on narrative in the law to just that addressing narrative in the law as a force for social change.

¹⁴ *See* Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS’N LEGAL WRITING DIRECTORS 1 (2010).

¹⁵ *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

¹⁶ John Braithwaite, *Narrative and “Compulsory Compassion,”* 31 LAW & SOC. INQUIRY 425 (2006).

¹⁷ *See* Guinier, *supra* note 5; Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135 (2007).

¹⁸ ROBERT COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 100 (1992).

expressive. Cover gives the example that capital punishment is used “to *express* the dignity of human life.”¹⁹ Also, like language, law is not a limited resource with a fixed set of materials, but a flexible and expanding one.

My approach is also similar to that of Anthony Amsterdam and Jerome Bruner in *Minding the Law*.²⁰ Amsterdam and Bruner conceive of legal argument as drawing on—and contributing to—a cultural storehouse of mythic structures. I resonate with Amsterdam and Bruner’s instinct that law is closely bound to myth, and in particular with their concept of law not just as a recycler of myths, but as a creator of myths. Sometimes a culture needs new myths. Our era of climate change is such a time. Law provides the needed mythmaking structure through its most flexible forms, such as nuisance law.

II STORYTELLING

Law is not just a governance tool; it is also a storytelling tool. Our society has several important realms for storytelling. One is religion, and another is art, especially literature, music, and film. Although religion and art are more obvious vehicles for story, legal storytelling has its own power. Like religious storytelling, legal storytelling has moral force. Although jurists bind themselves to the mass of existing law, refusing (at least explicitly) to inject their own moral judgments into their decisions, common and statutory laws serve as society’s declaration of right and wrong, reasonable and unreasonable, acceptable and unacceptable. The judges who apply this law therefore act as a kind of conscience for the culture. Or, at the very least, there is overlap and dialog between morality and law. Unlike legal stories, the same religious stories are passed *down*; the point is repetition and memory. By contrast, legal stories are offered *up* in forms that are as varied and novel as life. Litigators and judges, always facing new details, have the power to exercise creativity (you might call it flexibility) in telling the facts and applying the law to the facts. Similarly, the choice of claim can be a creative act. As a result, legal storytelling offers something like the creativity found in art on the

¹⁹ *Id.* n.22.

²⁰ ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAY WE UNDERSTAND THE LAW—AND OURSELVES* (2000).

one hand and something like the moral force found in religion on the other. We need this kind of storytelling tool, which allows us to make sense of new kinds of harm by creatively casting them in relation to the moral expectations embodied by our system of law.

A. Dull Stories, Good Stories, Better Stories, and Best Stories

Legal stories follow the usual rules of effective narration. A dull story tracks expectations: if asked “what happened today?,” we might respond “nothing much” if our day was as expected; if pressed, we could bore our listener with a recounting of the usual details. By contrast, a good story upends expectations. There is news: a fire along the freeway during the morning commute or a hoped-for but surprising invitation. An even better story identifies a protagonist, a goal, and an obstacle to the goal. The story need not be complex; think of the classic children’s book *The Very Hungry Caterpillar* by Eric Carle.²¹ A caterpillar, our protagonist, pops out of a tiny egg. His goal is to satisfy his hunger, which soon appears to be insatiable as he eats through fruits, cake, a pickle, Swiss cheese, and more. In the most intriguing stories, the goal and the obstacle are well-matched. We are eager to know what happened next—did the hero reach his goal or did the obstacle overwhelm him? The caterpillar does reach his goal: he finally gets a tummy ache, eats a leaf to feel better, forms a cocoon, and emerges as a butterfly.

Legal stories are much the same. A legal story in which no law-breaking occurs does not merit telling. An advocate who is seen to be telling this kind of story will be rebuffed with Civil Procedure Rule 12(b)(6): failure to state a claim upon which relief can be granted. A plaintiff tells a good legal story when he makes out a valid claim by showing that, on the facts as plaintiff presents them, a law was violated. But legal storytelling can do more. A legal story best captures the fact finders’ attention when it identifies a goal and an obstacle. And it is most compelling when the goal and the obstacle are well-matched. As Anthony Amsterdam and Jerome Bruner put it in their book *Minding the Law*, in the best stories, a hero is thwarted in his noble quest by “something equally extraordinary . . . bearing the opposite sign.”²²

There have been many compelling stories in law. Striking constitutional law rights cases come to mind: *Brown v. Board of*

²¹ ERIC CARLE, *THE VERY HUNGRY CATERPILLAR* (1969).

²² AMSTERDAM & BRUNER, *supra* note 20, at 128.

Education,²³ *Loving v. Virginia*,²⁴ and *Roe v. Wade*.²⁵ In many of these cases, the story that the litigants tell is one of discrimination, prejudice, or wrong thinking on the one hand and a constitutionally protected right on the other. The story may even supersede the facts. A recent *New Yorker* article explains that in *Lawrence v. Texas*,²⁶ the plaintiffs' right to engage in consensual sex (the goal) was narratively pitted against society's hostility, prejudice, and double-standard thinking (the obstacle).²⁷ Here was a compelling story involving well-matched forces. But in fact, it was a facade: the plaintiffs were not in a relationship and were not having sex when they were arrested for sodomy.²⁸

B. Cause Litigation

The rights cases mentioned above are examples of cause litigation—that is, strategic litigation for a cause, such as racial equality, gay rights, or environmental protection. *Lawrence v. Texas* vividly demonstrates an important aspect of cause litigation: it is more fictional than other sorts of litigation. I am by no means suggesting that cause litigators regularly disguise or doctor facts, as in *Lawrence v. Texas*. But I am suggesting that part of a cause litigator's work is, if possible, to find sympathetic fact scenarios and to shape them compellingly. A cause litigator is therefore like a novelist. His materials are more limited than the novelist's, but both sorts of storytellers have a creative vision and creative control over its telling.

Cause litigators have a special need to tell compelling stories. This is because a cause is by definition a minority or marginal position. What separates a cause from a societal norm (a law, for example) is sheer numbers: a cause is an aspiring norm, often advanced by a small, dedicated corps of supporters. The cause may be opposed by a weight of contrary belief, or it may be merely invisible—that is, people may simply not know it is a problem. Abortion is an example of a cause heavily opposed, while global warming is an example of a

²³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁷ Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, THE NEW YORKER, (Mar. 12, 2012), http://www.newyorker.com/arts/critics/books/2012/03/12/120312erbo_books_lithwick.

²⁸ *Id.*

cause that forecasters have struggled merely to make visible. Storytelling gives the maligned or unacknowledged cause a boost.

Again, I am not intending to cast shadows on the nobility of the legal process. I am suggesting that good storytelling can sway fact finders to legal conclusions they would not otherwise make. But I do not mean that fact finders can be so charmed by good stories that they act in spite of the law. Instead, I am suggesting that good stories can help fact finders see more clearly in situations where their vision of how the facts apply to the law is clouded, for example, by prejudice or ignorance.

C. Scripts: Lyric Poetry

Cause litigators hope to make difficult facts palatable. They do this by seeking out and shaping compelling fact scenarios. They also do this by bending and shaping legal claims—or what I will call legal scripts.

I use the word “scripts” because the word is not part of legal but of literary language, and I hope it calls to mind nonlegal structures and organizing principles. I wish to evoke these nonlegal structures because I propose that, like them, legal claims fulfill the human need to order and understand experience. As I suggested previously, law is more than a vehicle for settling disputes. It is also a storytelling tool that allows us to situate new factual circumstances in an ordered universe of right and wrong, acceptable and unacceptable. This universe is more than a binary system. It offers numerous scripts in the form of legal claims that allow judges to provide a story-based justification for their rulings.

Indeed, I propose that legal claims help meet our need for an orderly moral universe in the same way that lyric poetry and fairy tale motifs satisfy the human need for order in our personal and psychological experience. Of course, these realms are not sharply divided but are overlapping. Each of these tools can be thought of as “threshold” genres—that is, as narrative tools that touch and transform experience at the threshold of order and disorder.

I borrow the concept of the “threshold” genre from the poet Gregory Orr, who used it in the context of lyric poetry.²⁹ Orr describes the lyric poem as an invention that allows us to find security and order in the midst of personal upheavals such as romantic passion

²⁹ GREGORY ORR, *POETRY AS SURVIVAL* (2002).

or the death of a companion.³⁰ The lyric poem allows us to fashion a stylized, vivid, and beautiful emblem out of what was once too close and too messy to bear.³¹ Orr observes that different poets are satisfied by different levels of order: for some poets, only the tight rules of meter and rhyme are sufficient to swaddle chaos into calm; others are satisfied by free-form weaving of metaphor and sound.³² In all cases, however, the lyric poem succeeds not by containing all the dynamic detail of a crisis, but by formalizing and dramatizing that crisis in a way that makes it survivable.

In Orr's view, everyday life is a dance between the enjoyment of untranslated experience in its raw power and the impulse to order that experience into something bearable. The idea of a dance between order and disorder is not unique to Orr. As one example, the Navajo worldview is similar. The Navajo describe a constant flux between two poles of experience: *hózhó* and *hóchxo'*, which may be translated as beauty and brokenness, order and chaos, or harmony and discord.³³ In Navajo culture, ritual or creative singing is used to restore order.³⁴

Like lyric poetry in all of its forms, including Navajo song, the law brings order to disorder. I am not referring to the physical order that law offers—that is, order in the *Law & Order* sense: the arrest and prosecution of criminals. Instead, I am referring to narrative order. Gregory Orr says that lyric poetry brings stability to destabilizing crises (1) by allowing us to distance ourselves from strong emotions by making the experience abstract—by turning it into symbolic language and metaphor and (2) by giving us power over the situation through our creative transformation of it.³⁵ Law offers us the same opportunity to transform destabilizing experience (1) by framing it as a legal claim, into an abstraction that gives us comfort, and (2) by taking action over it, for example through the process of naming it and pursuing redress.

In law as in lyric poetry, disorder can be shifted into order only through creative action. For example, in the moment that what will

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.* at 24.

³³ GARY WITHERSPOON, *LANGUAGE AND ART IN THE NAVAJO UNIVERSE* 23–25 (1977).

³⁴ *Id.* at 61 (“To control air and to speak and sing the order, harmony, and beauty of *hózhó* is to make contact with the ultimate source of life and restore it to the ideal condition of *hózhó*.”).

³⁵ ORR, *supra* note 29, 4–5.

later be labeled as a tort occurs, the experience is still raw and untranslated. It can be given form only through a process of mental digestion that involves, first, a plaintiff's perception and pursuit of a wrong. This "emergence and transformation of disputes" has been characterized by William Felstiner, Richard Abel, and Austin Sarat as the process of "naming, blaming, and claiming."³⁶ The sequence is narrative throughout and builds to a narrative climax. After the plaintiff pieces together the foundational narrative elements—perceiving that a wrong has been done ("naming") and determining who is at fault ("blaming")—the process of transforming an experience into a tort becomes a storytelling competition. The plaintiff proposes a narrative that conforms to a legal category and that helps explain the events at issue, the defendant counters by refusing the plaintiff's narrative and perhaps by proposing a counter-narrative, and the court chooses one narrative or the other—or invents one itself.

D. Scripts: Fairy Tales

My aim in this Part has been to show how legal claims can offer litigants narrative as well as injunctive, monetary, or declaratory relief. I chose lyric poetry as the foundation of this Part because, particularly as it has been described and practiced by poet Gregory Orr, lyric poetry offers a clear example of the power of ordered language to help those who feel traumatized or overwhelmed to make sense of the chaos of experience. However, while both lyric poetry and the law offer tools for ordering disorder, there is a key difference between them. Lyric poetry can be highly patterned, as where the poet employs an established form, such as a sonnet, but it need not be. By contrast, the law requires plaintiffs to present their complaints in the form of legal claims, meaning pre-set scripts designed to capture every human wrong that our founders, legislators, and common law judges deem worthy of legal redress. Thus, although lyric poetry provides a nice example of the dance between order and disorder, other more tightly-patterned forms—such as fairy tales—may be more analogous to legal claims and can help elucidate what I mean by "scripts."

³⁶ William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 *LAW & SOC'Y REV.* 631 (1980–1981).

The pairing of fairy tales with legal claims may seem incongruous, perhaps because law is rooted in reality and requires its participants to search for fixed truths (what happened? where is the boundary? what is the harm?), while fairy tales are rooted in fantasy and allow their tellers to imagine unreal scenarios (husbands who are literally beasts, women who can live for years in dormant states of semi-slumber, the transformation of pumpkins into carriages). Undeniably, law is society's machinery for meting out tangible relief to wronged parties. But, again, it is my contention that law has an important role to play beyond the tangible; I have been referring to its narrative, or ordering, role and describing it, by analogy to lyric poetry, as a genre that helps us in times of unease and dislocation to find meaning in the mess of experience. By peeling back law's outer skin of tangible relief, we can examine its inner core of narrative relief. Analogizing legal claims to fairy tales can help us explore the frequently hidden dimensions of law: as a psychological salve, as a narrative anchor, as a vehicle for affirmation.

As narrative tools, fairy tales and legal claims are similar both in form and in purpose. In form, both genres offer off-the-rack scripts. Law's scripts consist of the body of acceptable claims that a court will hear: these may be claims brought for statutory violations, or they may be common law claims such as those for trespass or nuisance. Just as legal claims take customized shape around particular facts, fairy tale scripts³⁷ take customized shape in the crucible of particular times and places. The Cinderella script, for example, has taken hundreds of distinct, varied shapes. To American children, the best-known is perhaps the German "Aschenputtel," published by Jacob and Wilhelm Grimm in 1812.³⁸ But there are many others. In an ancient Greek version from the first century, a young girl is bathing when her slipper is snatched by an eagle, then dropped into the king's lap.³⁹ In a ninth century Chinese version, the girl's finery and slippers are created by the spirit of a beautiful fish "with golden eyes" that the girl has befriended and that her stepmother kills out of spite.⁴⁰ In

³⁷ What I am calling fairy tale "scripts" were first called "motifs" by A.N. Veselovskij and later termed "functions" by Vladimir Propp. See VLADIMIR PROPP, MORPHOLOGY OF THE FOLKTALE 12, 19–24 (2d ed. 1968).

³⁸ THE CLASSIC FAIRY TALES, at ix (Maria Tatar ed., 1st ed. 1999).

³⁹ 8 STRABO, GEOGRAPHY 94–96 (Horace Leonard Jones trans., 1932), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Strabo/17A3*.html (describing a woman's tomb on which this story was found).

⁴⁰ AI-LING LOUIE, YEH-SHEN: A CINDERELLA STORY FROM CHINA (1982).

Charles Perrault's Parisian version, "Donkeyskin," a poor girl wears the skin of a donkey (she is hiding from her father, who wishes to marry her) and loses her ring in a cake that a prince eats.⁴¹ Despite their very different details, each of these stories is recognizable as Cinderella: each involves a poor beautiful girl, a wealthy powerful man, and a delicate item (a slipper, a ring) that the man discovers and that fits only the girl. Just as cultural details are cast through the lens of fairy tale scripts (motifs), facts are cast through the lens of legal scripts (claims). Indeed, a fairy tale motif can be applied to a nearly infinite variety of cultural settings, just as a legal claim can be applied to a nearly infinite variety of fact settings. In both cases, the details pass through the organizing structure and are shaped by it.

This shaping serves many psychological functions. Specifically, both legal and fairy tale scripts allow us to tame our destabilizing emotions and receive societal affirmation. That fairy tales have this power has been articulated most persuasively by Bruno Bettelheim. Like Gregory Orr, Bettelheim views life as chaotic, as a cause of psychological upheaval. "A struggle against severe difficulties in life is unavoidable," Bettelheim says.⁴² And yet, also like Orr, Bettelheim believes this upheaval can be tamed—in his view, through the reading of fairy tales during childhood. According to Bettelheim, fairy tales help children civilize their raw and inarticulate feelings—the bewildering emotions that appear in reaction to the complex world within which children live and must "learn to cope."⁴³

Specifically, Bettelheim believes that fairy tales help a child "bring his inner house into order" by subtly affirming difficult feelings and providing solutions.⁴⁴ According to Bettelheim, children feel validated when their emotions—fear, anger, curiosity, guilt—are modeled by other children and adults in troubling situations.⁴⁵ And they feel empowered when they see "examples of both temporary and permanent solutions to pressing difficulties."⁴⁶ At the same time, fairy tales do not present only "wish-fulfilling images" to the child or expose him only "to the sunny side of things."⁴⁷ Instead, they show

⁴¹ Charles Perrault, *Donkeyskin*, in *THE CLASSIC FAIRY TALES*, *supra* note 38, at 109.

⁴² BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 8 (1976).

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

that “the source of much that goes wrong in life is due to our very own natures—the propensity of all men for acting aggressively, asocially, selfishly, out of anger and anxiety.”⁴⁸ Thus, fairy tales soothe children through tough love: they affirm children’s experience that life is challenging, demonstrate that it is possible to overcome challenges using courage and cleverness, and teach that things sometimes turn out disastrously nevertheless.

Like fairy tales, legal claims are structures into which litigants can channel hard-to-handle emotions—anger, powerlessness, vulnerability. Likewise, the legal process offers litigants the possibility of solutions—in the form of redress—and affirmation. That a craving for affirmation motivates litigants has been demonstrated, paradoxically, by studies showing that apology can cut short or avert litigation. For example, apology has been shown to move parties closer to settlement⁴⁹ or to defuse anger and prevent a legal dispute from arising in the first place.⁵⁰ A possible implication of this work is that litigants crave validation that their narrative is right and that their opponent’s narrative is wrong. That is, although relief may come, say, in the form of money, it is arguably not the money alone that brings satisfaction, but also—and importantly—what the money represents: society’s stamp of approval on a winning narrative.

Fairy tales not only give children affirmation and solutions; they also allow children simply to distance themselves from trauma through drama, symbolism, and embroidery. Witness ordinary little girls costumed as Disney princesses—Snow White, Cinderella, Belle, Ariel—adapted from fairy tales to see the drama played out. And consider the dream-like symbols of fairy tales: the egg that the new wife is not to drop, but tellingly lets fall into the blood of her slain predecessors in versions of Bluebeard;⁵¹ the rose petal that the young girl eats that becomes a pregnancy in a version of Sleeping Beauty.⁵² According to Bettelheim, such symbols, and the frequent use of descriptions rather than proper names for fairy tale characters

⁴⁸ *Id.*

⁴⁹ See, e.g., Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1167 (1997).

⁵⁰ Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1022 (1999) (citing a medical malpractice study).

⁵¹ BETTELHEIM, *supra* note 42, at 301.

⁵² Giambattista Basile, *The Young Slave*, in THE CLASSIC FAIRY TALES, *supra* note 38, at 80.

(“Beauty,” “Red Riding Hood,” “Snow White”) allow listeners to superimpose their own troubles, fears, and conflicts onto the tales.⁵³ In this way, when processed through fairy tales, traumatic experiences can be made into emblems that can be viewed from a distance.

In much the same way, litigants channel their emotions and distance themselves from traumatic events through legal narratives. For example, litigants’ emotions—say, frustration and anger—are channeled into the ritual and creative moves and countermoves made by the opposing lawyers. And all the formal trappings that may attend a lawsuit—service of the complaint, briefing, oral argument, courtrooms with their stated and unstated rules of conduct and dress, written opinions—transform something that was once personal, perhaps even unseen, into a visible, formalized activity upon which a community turns its sober attention.

Perhaps the most visible function of fairy tales, especially to adults, is their moral content. Fairy tales are not fables, of course; their morals are not declared. But fairy tales do arise from within a moral framework, and they serve an ethical norming function for children. As Bettelheim puts it, the fairy tale provides “a moral education which subtly, and by implication only, conveys to him the advantages of moral behavior, not through abstract ethical concepts but through that which seems tangibly right and therefore meaningful to him.”⁵⁴ Legal claims similarly gratify litigants by placing their stories within a framework of right and wrong. Although law is not morality, it arises from morality. Legal claim making serves the same ethical norming function offered by fairy tales: it takes raw experience and processes it through a storehouse of cultural expectations.

Thus, fairy tales are an apt analogy to legal claims because they highlight the kind of restorative psychological work that legal claims can provide for litigants through scripted narratives that reflect and affirm societal understandings. That said, in both law and fairy tales, gradual change is always happening at the margins. Scripts are scripts because they are useful: they are individually flexible enough and collectively broad enough to respond to nearly every human crisis—to accommodate nearly every mess of which humans yearn to make ordered sense. But circumstances that do not fit existing scripts do arise. Thus, fairy tales are also an apt analogy to legal claims because they demonstrate, in their varied faces across cultures, that scripts that

⁵³ BETTELHEIM, *supra* note 42, at 40–41.

⁵⁴ *Id.* at 5.

have served well in particular circumstances may call for revisions, large or small, to new circumstances. For example, in a culture in which mothers are especially revered, a fairy tale may cast an aunt or childless old woman in what is elsewhere a mother's evil role, such as happens in the story of Hansel and Gretel.⁵⁵ Likewise, legal claims may be revised to address new wrongs, such as the consequences of climate chaos caused by greenhouse gas emitters.

III CLIMATE CHANGE

The storytelling material above, with its wide-ranging analogies to poetry and fairy tales, will now serve as the foundation for my next point: climate change is a modern destabilizing crisis. It breeds emotion, including fear, impatience, and vulnerability. People feel a desire to make sense of this crisis and have done so through story. Apocalyptic visions in literature and film are common these days.⁵⁶ However, those who feel overwhelmed or victimized by climate change have had trouble telling their story and receiving redress (narrative or otherwise) through the legal system. Among the many legal scripts available, there are none that will accommodate the story that environmental litigators want to tell about climate change. As a result, environmental litigators—the good cause litigators and creative storytellers that they are—have designed a tailor-made, or at least tailor-altered, script.

Climate change is not a new phenomenon—our climate has been shifting for as far back in time as scientists can see. Nor are major human impacts on vast natural systems unprecedented. Indeed, humans have changed the face of the earth. We have colonized the globe, spreading cities, suburbs, and agriculture. We have extinguished animals. Most notably, perhaps, is our possible key role in the Quaternary extinction event—the worldwide extinction of megafauna, including the mammoth in North America.⁵⁷

⁵⁵ Jacob Grimm & Wilhelm Grimm, *Hansel and Gretel*, in *THE CLASSIC FAIRY TALES*, *supra* note 38, at 184.

⁵⁶ For example, consider books written by Margaret Atwood, Octavia E. Butler, and Cormac MacCarthy.

⁵⁷ Paul S. Martin, *Prehistoric Overkill: The Global Model*, in *QUATERNARY EXTINCTIONS: A PREHISTORIC REVOLUTION* 354, 357 (Paul S. Martin & Richard G. Klein eds., 1984).

However, while there are aspects of the current crisis that mirror previously-seen scenarios, there are also new aspects. First, I grant that climate change, like the Quaternary extinction event, is a version of the tragedy of the commons scenario in which each user of a common resource takes more than he would if he were caring for the resource alone. If continued unchecked, such behavior leads to collapse of the resource.⁵⁸ In the climate context, every participant in the climate system (each carmaker, farmer, and consumer) is releasing more greenhouse gas (GHG) into the atmosphere—and thus taking more than their share of the available flexibility in the system—than they would if they were caring for the system alone. That said, the climate change context differs along important dimensions from other tragedy of the commons scenarios. Specifically, never has the commons been so big, so diffuse and unpredictable in its effects, and so causally complex.

First, the climate commons is global. It is true that other human changes to natural systems have had global effects. Both human changes to earth's landscape and the Quaternary extinction event are examples: nearly every corner of the earth's landscape has been remade by human civilization, and extinctions occurred on every continent during the Quaternary.⁵⁹ Climate change is nevertheless different. The difference lies not in the scale of the effects, but in the scale of the commons. In the climate context, the commons itself is global, so that GHG additions anywhere in the world contribute to total GHG in the atmosphere, and these GHGs have a collective effect on weather everywhere. By contrast, the decimation of mammoths in North America did not affect the decimation of giant kangaroos in Australia during the Quaternary. In comparison with the truly global climate commons, the extinction event, although worldwide, was really the combined collapse of many smaller commons.

Second, pressure on the climate commons has diffuse and unpredictable effects. That is, GHGs released anywhere will contribute to warming that in turn leads to weather events that may strike anywhere else. Thus, GHGs released by a coal-fired power

⁵⁸ The classic description of the "tragedy of the commons" is contained in Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). However, Hardin was not the first to observe the phenomenon that a shared resource will be overexploited under conditions of individualistic competition. See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 *J. POL. ECON.* 124 (1954).

⁵⁹ See Martin, *supra* note 57, at 357–58.

plant in Pennsylvania may contribute to warming that breeds a typhoon in India.

Third, the chain of causation is impossible to track. Scientists describe that every addition of GHGs contributes to the worldwide bank of GHGs in our atmosphere. In a 2007 article, John Sterman and Linda Sweeney analogize the atmosphere to a bathtub that is filling with GHGs faster than it is draining.⁶⁰ This is a good analogy for several reasons, one of which is that the molecules of gas that polluters send into the atmosphere are like the water molecules in a bathtub; they are not name-tagged, nor do they act independently. Thus, the CEO of the Pennsylvania coal-fired plant is not in any straightforward or intuitive way to blame for typhoons in India, and yet he is about as much to blame as anyone is.

Here is a situation, then, in which companies and individuals are each pulling gently on the puppet strings of the sensitive global weather system. Each of the impacts is small, the cumulative effects are diffuse and unpredictable, and the results are impossible to trace to particular causes. As a result, the legal basis for assigning blame rests on uncertain footing. At the same time, the pressure to tell the climate change story through the law is powerful, for climate change is causing current, and threatening future, destabilization.

The storytelling material in the previous Part comes to bear in three ways in this Part. First, I am proposing that climate change is causing collective anxiety in America that the artists among us are transforming into novels, essays, film, poetry, song, visual art, dance, and more. In this way, just as with lyric poetry and fairy tales, the artist or storyteller and his or her audience are given the power to channel their emotions and to distance themselves from and exert control over the destabilizing global warming experience, making of it something ordered that we can make peace with—or be inspired with the courage to change.

Second, I am proposing that law as a narrative tool stabilizes the psychological upheaval caused by climate change in a unique way. Specifically, law offers storytellers a chance to be heard by their community and to receive validation by their culture—not just the present embodiment of their culture, but also its past as contained in the constitution, common law, or statutes. Thus, law offers a chance

⁶⁰ John D. Sterman & Linda Booth Sweeney, *Understanding Public Complacency About Climate Change: Adults' Mental Models of Climate Change Violate Conservation of Matter*, 80 *CLIMATIC CHANGE* 213, 216 (2007).

for litigants to have their stories validated and placed into a moral framework of right and wrong, acceptable and unacceptable.

Third, I am proposing that to order disorder and place it into a moral framework in a way that serves the psychological well-being of the culture as a whole, cause litigators must tell good stories. Good stories, as described above with reference to Anthony Amsterdam and Jerome Bruner's book *Minding the Law*, involves a protagonist, a goal, and an obstacle to the goal. To tell these stories, the cause litigator looks to the world for his material and chooses the starkest, most compelling scenarios.

Environmental cause litigators looked to the world in this way, and their eyes fell on the Alaskan village of Kivalina. The facts of *Kivalina*, as borne out in *Native Village of Kivalina v. ExxonMobil Corp.*,⁶¹ involve striking contrasts that make for good storytelling. The protagonists are the residents of Kivalina—about four hundred Inupiat Eskimos—and their village on the tip of a six-mile barrier reef located between the Chukchi Sea and the Kivalina and Wulik Rivers.⁶² Their goal is simple: to continue living as they and their ancestors have lived “since time immemorial,” as their lawyers put it in the complaint.⁶³ Of course, as in any good story, we can expect the steady state to be disturbed by trouble or, in other words, for the goal to encounter an obstacle. In this case, that trouble or obstacle is the imminent destruction of the village, which can only be forestalled by urgent and expensive action. As the lawyers tell it, the “[h]ouses and buildings are in imminent danger of falling into the sea as the village is battered by storms and its ground crumbles from underneath it.”⁶⁴ Meanwhile, the only solution is a relocation to the mainland that will cost “hundreds of millions of dollars.”⁶⁵

Here, our sympathies are with the protagonists and their goal, and the goal and obstacle are well-matched. First, the goal is a worthy one: the perpetuation of a village that has existed for tens of thousands of years. And the protagonists have our sympathies: they are an established culture, vulnerable on their narrow barrier reef, and

⁶¹ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

⁶² *Id.* at 868–69.

⁶³ Complaint for Damages Demand for Jury Trial at 1, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012) (No. C 08-1138 SBA), 2008 WL 594713.

⁶⁴ *Id.* at 2.

⁶⁵ *Id.* at 1.

innocent of the harms that cause global warming. On the other hand, the disruptive trouble, the obstacle, is easy to root against. Its cause, as Kivalina's lawyers tell us, are fuel companies, such as ExxonMobil, who are doing things with names evocative of hell: "flaring," "combust[ing]," and "mining".⁶⁶ These activities are cast as dirty and inappropriate to the steady state of Kivalina, which is the quiet, remote, innocent continuation of an ancient human settlement.

Similarly, environmental cause litigators found a compelling story on the Mississippi Gulf Coast. As told in the complaint for *Comer v. Murphy Oil USA*, the protagonists were landowners Ned and Brenda Comer, whose goal was the quiet enjoyment of their private property and the public trust use—including hunting, fishing, bird watching, boating, and camping—of nearby public property.⁶⁷ The obstacle, again, was destruction by powerful weather—this time a big-name event: Hurricane Katrina. When the hurricane made landfall, as told by Comer's lawyers, it "spawned tornados, mesovortices, wind shear, [and] storm surge."⁶⁸ This destruction was "fueled and intensified" by warm temperatures, which were in turn caused by emissions released by oil companies who "mine, drill, manufacture, release, vent, and/or combust substances."⁶⁹ Here, again, the cause litigators presented a story of sympathetic protagonists who were invaded at home by destructive weather forces "spawned" by emitters.

In *Kivalina* and *Comer*, environmental cause litigators told compelling stories in which residents were pitted against oil companies. But storytelling in the legal context requires more than sympathetic protagonists whose goals are well-matched to imposing obstacles; it demands, of course, that the facts be presented through a legal claim. However, at the time that *Kivalina* and *Comer* were brought, there was no legal claim available to hold companies who were emitting methane in Texas or carbon dioxide in Arkansas responsible for permafrost melting in Alaska or hurricane damage in Mississippi.

For cause litigators hoping to curb climate change, one possible basis for a legal claim was the Clean Air Act (CAA). However, the

⁶⁶ See, e.g., *id.* at 5, 7, 9.

⁶⁷ Third Amended Class Action Complaint at 2, 17, *Comer v. Murphy Oil USA*, No. 1:05-CV-00436-LTS-RHW (S.D. Miss. Apr. 19, 2006), *rev'd* 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), 2006 WL 1474089.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.* at 11, 16.

CAA appeared then—and remains—a problematic and contested vehicle for the regulation of GHGs. First, the CAA’s centerpiece—the National Ambient Air Quality Standards (NAAQS) program—seemed a poor fit for a global pollutant like GHGs⁷⁰ in the eyes of many CAA attorneys.⁷¹ Many environmentalists agreed, noting the move’s potential for backlash. Although the Center for Biological Diversity (CBD) and 350.org petitioned the Environmental Protection Agency (EPA) to list GHGs as a criteria pollutant under the NAAQS program,⁷² other environmentalists quickly disavowed that approach. David Bookbinder, chief climate counsel at the Sierra Club, gave a number of interviews emphasizing that CBD and 350.org were in the minority in the environmental community and explaining the folly of a NAAQS approach to global warming. “With the exception of Bill Snape [at CBD] and a few others, no one wants to use the NAAQS,” Bookbinder said.⁷³ The move would “provide little if indeed any emissions benefits at enormous political and economic cost.”⁷⁴

The “enormous political and economic cost” Bookbinder was referring to would flow from the fact that the NAAQS are strictly harm-based: standards must be set at the level “requisite to protect the public health” with “an adequate margin of safety;”⁷⁵ the EPA is not permitted to consider the costs of regulation.⁷⁶ Strict harm-based standards that take no account of costs could cause a political

⁷⁰ NAAQS (National Ambient Air Quality Standards) are set for pollutants—referred to as “criteria” pollutants—that come from “numerous or diverse . . . sources” and “endanger public health or welfare.” 42 U.S.C. § 7408 (2012). GHGs meet this definition and thus could be regulated as criteria pollutants.

⁷¹ Brigham Daniels, Hannah Polikov, Timothy Profeta & James Salzman, *Regulating Climate: What Role for the Clean Air Act?*, 39 ELR 10,837, 10,838 (2009) (noting that most speakers at a 2009 conference on the EPA’s use of the CAA to reduce GHGs argued that the EPA should avoid using the NAAQS program; the day-long conference, featuring “a group of the nation’s leading CAA experts,” was cosponsored by the Nicholas Institute for Environmental Policy Solutions at Duke University, the Duke University School of Law, and the Harvard Law School).

⁷² Robin Bravender, *Groups Petition EPA to Set Greenhouse Gas Limits Under Clean Air Act*, N.Y. TIMES (Dec. 2, 2009), <http://www.nytimes.com/gwire/2009/12/02/02green-wire-groups-petition-epa-to-set-greenhouse-gas-limi-40485.html> (quoting David Bookbinder, chief climate counsel at the Sierra Club, as saying that CBD’s petition was headed to “well-deserved bureaucratic oblivion” at the EPA).

⁷³ Robin Bravender, *Enviro Group Criticizes EPA Exemption Language in Senate Bill*, E & E NEWS PM (Nov. 3, 2009), http://www.biologicaldiversity.org/news/media-archive/BoxerKerryBillEPA_EandENewsPM_11-03-09.pdf.

⁷⁴ *Id.*

⁷⁵ 42 U.S.C. § 7409(b)(1) (2012).

⁷⁶ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 457–58 (2001).

backlash spurred by the numerous, powerful companies that emit GHGs. States would likely join the industry in opposing the regulation. This is because the NAAQS program is one of cooperative federalism: national standards are set for “criteria” pollutants,⁷⁷ and states that exceed the standards are required to comply, but empowered to do so as they see fit.⁷⁸ This design is appropriate for the control of local pollutants. But with a pollutant such as GHGs, which are distributed evenly across the globe, individual states would have very little control over the concentration of GHG over their state; GHG reductions in Pennsylvania could be undone by GHG increases in Hong Kong. Political backlash led by industry and states could cause a congressional amendment of the CAA—perhaps in the form of an explicit ban on regulation of GHGs under the CAA, an outcome which would prevent even the more measured forms of regulation that are available outside of the NAAQS program. Moreover, merely establishing NAAQS for GHGs would take years.⁷⁹ More progress could be made more quickly by pursuing other options.

One such option was the motor vehicle provision of the CAA. In 1999, twenty organizations petitioned the EPA to regulate GHGs under the motor vehicle provision.⁸⁰ The EPA declined to do so, arguing that Congress had not intended the CAA to cover GHGs.⁸¹ A group of states, local governments, and private organizations then sued the EPA.⁸² In 2009, spurred by the US Supreme Court’s decision in *Massachusetts v. EPA*,⁸³ the EPA began the process of bringing GHGs under the CAA.⁸⁴ In the mid- to late-2000s, the most promising CAA approach seemed to be advocating for GHG regulation under

⁷⁷ 42 U.S.C. § 7409 (2012).

⁷⁸ 42 U.S.C. § 7410 (2012).

⁷⁹ Bravender, *supra* note 73 (quoting David Bookbinder).

⁸⁰ Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act, Int’l Ctr. for Tech. Assessment v. Browner (1999) (No. A-2000-04), *available at* <http://www.regulations.gov/contentStreamer?objectId=09000064800bcf5c&disposition=attachment&contentType=pdf>.

⁸¹ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

⁸² *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005).

⁸³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁸⁴ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (codified at 40 C.F.R. ch. I).

the motor vehicle provision. And that turned out to be the right move.⁸⁵ Under the CAA, the EPA now imposes GHG emission standards on cars and trucks⁸⁶ and requires major stationary sources of GHGs⁸⁷ to install “best available control technology” for all pollutants regulated under the CAA.⁸⁸

However, although the CAA now controls GHGs, it remains a poor fit for the pollutants, and its grasp over them is tenuous. Stationary sources of GHGs are regulated under the CAA only because the D.C. Circuit closed its eyes to the EPA’s revision of clear statutory language—numbers.⁸⁹ Climate change litigators searching for a legal claim were justified in looking beyond the CAA because it was a problematic regulatory vehicle for climate change—and for another reason too: the CAA is a poor *narrative* vehicle for climate change. The CAA is a mammoth document that is both dense and intricate. Law offices that specialize in environmental litigation, such as Earthjustice, hire specialists whose sole focus is the CAA. Even the most experienced environmental attorneys in the organization consult these specialists. In short, the CAA is intimidating and, frankly, boring to the public. Of course, the problem is not unique to the CAA. Environmental cause litigants frequently must work hard—arguably harder than litigants in other public interest realms—to tell compelling stories. It is easy to get buried in complexity in environmental law, with its often overlapping statutory frameworks and its administrative layers. As a result, environmental litigation risks being dry and distant from its animating concerns. Contrast environmental law in this respect with civil rights law, where it is easier for litigators to find sympathetic Davids pitted against Goliaths and to preserve the vividness of this conflict through constitutional argument that demands relatively less textual construction and

⁸⁵ See Laura King, *Changing Climate, Unchanging Act, Improvising Agency, Enabling Court: The Story of Coalition for Responsible Regulation v. EPA*, 37 HARV. ENVTL. L. REV. 267 (2013).

⁸⁶ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600 and at 49 C.F.R. pts. 531, 533, 536–38).

⁸⁷ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (establishing triggering thresholds for regulation of GHGs from major stationary sources); *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (preserving the Tailoring Rule).

⁸⁸ 42 U.S.C. § 7475(a)(4) (2012).

⁸⁹ *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (calling on standing doctrine to avoid facing, and thus being faced to overturn, the Tailoring Rule).

relatively more appeal to values than does statutory construction in environmental law. Contrast, for example, *Babbitt v. Sweet Home*,⁹⁰ a landmark environmental case, with *Loving v. Virginia*,⁹¹ a landmark civil rights case, both decided by the US Supreme Court. As environmental cases go, *Babbitt v. Sweet Home* is among the most accessible. And as environmental statutes go, the statute underlying *Babbitt*—the Endangered Species Act (ESA)—is among the most straightforward. The ESA contains specific prohibitions, including the prohibition against the “take” of endangered species.⁹² And yet *Babbitt* still suffers from textual and administrative complexity. The question in the case was whether the Fish and Wildlife Service’s (FWS) regulatory elaboration of the statutory definition of “take” was a reasonable construction of the ESA.⁹³ That sounds reasonably accessible, but when I taught *Babbitt* this spring to a group of undergraduates at Boston College, the students found the case hard to remember during later review. They had struggled, I think, with the three layers of text: (1) the ESA’s take prohibition, (2) the ESA’s definitional elaboration on the take provision, and (3) the FWS’s definitional elaboration on the ESA’s definitional elaboration on the take provision. In addition to its complexity, there is another limit to *Babbitt*’s capacity for narrative inspiration. While as a practical matter *Babbitt* hugely advances environmental values—by protecting endangered species not just from hunting and trapping, but also from impairment to their breeding, feeding, or sheltering behaviors—as a technical matter, it is interpreting legal tendrils far from the central stalk. That is, it upholds an agency regulation interpreting a congressional act. That regulation is politically vulnerable to revision. So, in fact, is the ESA. By contrast, in *Loving v. Virginia*, the Supreme Court ruled that our country’s core document, the US Constitution, granted citizens the right to marry across racial lines, finding that right in both the Due Process Clause and the Equal Protection Clause.⁹⁴ In another universe, *Babbitt* might have been able to tell a similarly strong and simple story about the right of animals to feed, breed, and shelter. But, in this country, such protection is often granted or stripped away at the agency level, and it is at that level,

⁹⁰ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

⁹¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹² 16 U.S.C. § 1538(a)(1).

⁹³ *Babbitt*, 515 U.S. at 687.

⁹⁴ *Loving*, 388 U.S. at 2.

over language interpreting language, that many environmental fights take place.

Vividness matters. It arguably makes a difference in the injunctive or monetary relief that plaintiffs are awarded, and it certainly makes a difference in what I have been calling narrative relief. As I have argued above, legal storytelling is a powerful tool for the affirmation by society of the story of someone who feels wronged. When the story is buried in complexity, that affirmation rings less loudly and provides less satisfaction. But nuisance, as it has been adapted to the climate change story, provides the vivid narrative opportunity that many litigants are seeking.

IV NUISANCE

In everyday language, a nuisance is an annoyance of almost any sort. It can be a bothersome circumstance that puts us out or frustrates us. Merriam Webster offers the sample sentence, “Folding up this map is such a nuisance.”⁹⁵ It can be an animal that inconveniences us: mosquitoes that attack during an outdoor dinner, for example. A person who is a nuisance—a persistent caller, a nag, or someone who demands our unwilling attention—may be seen as lacking courtesy, as being selfish or boorish, or as having clueless bad manners. Nuisance in the general imagination buzzes at the low end of harmfulness; a frequent formulation is “it was just a nuisance,” as in, “the virus was just a nuisance; it didn’t make anyone seriously ill” or “the light snowfall was just a nuisance; it wasn’t enough to cause people to stay home from work.”

Legal nuisance is both alike and different. On the one hand, like nuisance in everyday language, legal nuisance is capacious, able to contain a wide range of annoyances—the actions of people and animals, the results of weather. Nuisance has for this reason been called a garbage can.⁹⁶ After one’s litigious imagination has

⁹⁵ *Nuisance*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/nuisance> (last visited Mar. 16, 2014).

⁹⁶ William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). However, not everyone would go so far. See, e.g., Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 49 (1979) (arguing that it is possible to see nuisance law as internally coherent, “admittedly with some tugging and hauling”); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970 (2004) (“[N]uisance [law] is not so much a mess or a

exhausted all other possible crimes and torts, it acts as a miscellany category. If something bothers you while you are out in the community, and it is not a crime, the next piece of legal logic might be: is it a public nuisance? If something bothers you while you are at home, and it is not a trespass, you might ask: is it a private nuisance?

On the other hand, legal nuisance is different from everyday nuisance in two ways. First, it is a legal term with a defined meaning, with narrative contours, and with moral echoes derived from centuries of litigation strategy, judicial opinions, and commentators' summaries. Second, it is not necessarily a mere annoyance that never amounts to grave harm. Plaintiffs bringing a nuisance claim may have no other legal foothold, but their claim may still be seriously injurious. This is especially the case where the catchall of nuisance law serves as an entrance for problems that are so new that they have no established place in the law.

By comparing everyday nuisance with legal nuisance, I hope to shed light on environmentalists' use of nuisance law. As I will describe in more detail below, (1) nuisance allows litigators to tell a compelling story that has moral resonance with both the "bad neighbor" and the "bad citizen" stories of private and public nuisance and (2) nuisance is both accessible and pliable.

A. Private Nuisance: The Story of the Bad Neighbor

*We keep the wall between us as we go.
To each the boulders that have fallen to each.*

...

*Oh, just another kind of outdoor game,
One on a side. It comes to little more:*

...

*He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbors."⁹⁷*

– Robert Frost, *Mending Wall*

mystery as a hybrid between different methods of delineating rights, and that this hybrid reflects the information costs incurred in employing these strategies").

⁹⁷ Robert Frost, *Mending Wall*, in *THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED* 33, 33 (Edward Connery Lathem ed., 1969).

Although private nuisance is a flexible tool that can accommodate a range of facts, it has long served as a script for the story of the bad neighbor. Its oft-quoted principle in the common law is *sic utere tuo ut alienum non laedas*: “use your property in such a way as not to injure another’s.” Meanwhile, the Restatement defines nuisance as an unreasonable interference with another’s use and enjoyment of his property.⁹⁸ Although the *sic utere* doctrine and the Restatement do not demand that a nuisance claim proceed between neighbors, in practice they invite that framework. That is, in practice, private nuisance claims arise between neighbors because, although next door lands are distinct (fenced, say) they also cannot help but be connected: “Land is not the sort of property over which dominion can be exercised in disregard of the fact that land is situated in a particular place, and thus is by nature bound to the property of others.”⁹⁹

Thus, private nuisance has long served as a legal tool for addressing conflicts arising from the land use of next door or adjoining landowners. Private nuisance cases have involved, for instance, a livery stable sixty-five feet from a hotel,¹⁰⁰ a piggery in the vicinity of houses,¹⁰¹ a wrecking yard near several houses, a tavern, a picnic ground, and a greenhouse,¹⁰² a dumping ground for brewing waste adjacent to houses,¹⁰³ a baseball field close to a two-story house owned by four sisters,¹⁰⁴ and a switching yard kitty-corner to a “well-kept dwelling.”¹⁰⁵

Frost’s *Mending Wall* provides a vivid anchor for these sorts of neighborly nuisance narratives: there, the neighbors feel a kind of physical kinship through the land as they walk the wall between them, “one on a side,” replacing fallen boulders to mend their boundary. Trespass is one possible neighborly wrong—unlikely in his situation, Frost jokes, “My apple trees will never get across/And eat the cones under his pines.” Nuisance is another. The difference, as Henry Smith has articulated it, is that trespass implements more of an exclusion

⁹⁸ RESTATEMENT (SECOND) OF TORTS § 822 (1979).

⁹⁹ J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1, 5 (1993).

¹⁰⁰ *Coker v. Birge*, 9 Ga. 425 (1851).

¹⁰¹ *Trowbridge v. City of Lansing*, 212 N.W. 73 (1927).

¹⁰² *Sohns v. Jensen*, 105 N.W.2d 818 (1960).

¹⁰³ *Kamke v. Clark*, 67 N.W. 2d 841 (1955).

¹⁰⁴ *Neiman v. Common Sch. Dist. No. 95, Butler Cnty.*, 232 P.2d 422 (1951).

¹⁰⁵ *DeNucci v. Pezza*, 329 A.2d 807 (1974).

strategy, while nuisance implements more of a governance strategy.¹⁰⁶ Although trespass is a tort, it proceeds from a property-like basis: it grants a landowner the right to exclude others from and to forbid any physical invasion of his land, whether his exclusions are reasonable or not. By contrast, nuisance requires the fact finder to evaluate the reasonableness of uses, as for example by reference to the character of the neighborhood or the utility of the activity. A nuisance may not involve physical invasions or may involve only subtle physical invasions: Frost might create a nuisance by opening his orchards to noisy, public apple-picking parties or his neighbor might create a nuisance by failing to heal a pine canker that infects Frost's trees. Thus, although the *sic utere* and Restatement standards taken at face value do not require it, nuisance tends to be used to complain of the interfering—albeit nontrespassory—activities of the next-door (or kitty-corner or nearby) landowner—in short, to tell the story of the bad neighbor.

B. Public Nuisance: The Story of the Bad Citizen

If private nuisance is the legal genre (along with its cousin trespass) for the story of the bad neighbor, public nuisance is the legal genre (along with its cousin criminal law) for the story of the bad citizen. Specifically, the public nuisance script involves an affront to the community's health, welfare, or convenience posed by an action performed by a member of the community; in response to the affront, the government exercises its police power to defend the large group from the individual transgressor. Both historical and modern texts describe public nuisance as involving a threat to the common good or the general public.¹⁰⁷ In short, public nuisance asks whether there has been an unreasonable interference with public rights.

One difference between private and public nuisance is that of scale. As an 1883 Wisconsin Supreme Court case put it, a nuisance is private if it is carried on in "*a place where it greatly incommodes an*

¹⁰⁶ Smith, *supra* note 96, at 978–79.

¹⁰⁷ Compare WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 197 (1716) (“[A public nuisance is] “an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King’s Subjects, or by neglecting to do a Thing which the common Good requires.”) with William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1000 (1966) (“[Public nuisance] comprehends a very miscellaneous and diversified group of petty offenses, all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public.”).

individual,” while a nuisance is public if it is carried on in “a place where it greatly incommodes a multitude of persons.”¹⁰⁸ Thematically, private nuisance generally involves contests between two similarly-situated entities while public nuisance involves an individual pitted against the multitudes: it is a kind of outcast or black sheep doctrine. Thus, a public nuisance may be an obstacle that obstructs public access, or it may be a malarial pond or diseased herd of animals that threatens public health.¹⁰⁹

C. Public Nuisance Suits for Climate Change Harms

Environmental litigators bringing suits for climate change have emphasized public nuisance claims over private nuisance claims.¹¹⁰ This is perhaps because public nuisance has traditionally been used in larger settings—on a citywide rather than a neighbor-to-neighbor scale. Moreover, the public nuisance story fits. The polluter is framed as a bad global citizen, fouling a planetary commons;¹¹¹ the litigators in effect are saying *you are breaking the uncodified reasonableness rules of our shared community*. On the other hand, the litigators in these suits have also zoomed in to tell the story of two landowners, with A’s activity unreasonably interfering with B’s reasonable use or enjoyment of his land. For example, *Comer* and *Kivalina* were both framed as a battle between two property owners, with one landowner’s belching of GHGs breeding weather that destroys the land of the other.¹¹² Thus, the litigators are also telling the private

¹⁰⁸ *Pennoyer v. Allen*, 56 Wis. 502, 14 N.W. 609, 612 (1883) (emphasis in original).

¹⁰⁹ See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

¹¹⁰ See Complaint for Damages Demand for Jury Trial at 249–67, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849 (9th Cir. 2012) (No. C 08-1138 SBA), 2008 WL 594713 [“Kivalina Complaint”] (bringing private nuisance claims in the alternative to public nuisance claims); Third Amended Class Action Complaint at 30, *Comer v. Murphy Oil USA*, No. 1:05-CV-00436-LTS-RHW (S.D. Miss. Apr. 19, 2006), *rev’d* 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), 2006 WL 1474089 [“Comer Complaint”] (framing the injury as one to the public, and positioning plaintiffs as members of the injured public).

¹¹¹ See *Kivalina* Complaint at 252 (claiming that defendants know or should know their actions contribute to global warming and to the “general public injuries such heating will cause”); *Comer* Complaint at 30 (claiming that defendants’ willful actions have caused demonstrable changes to the Earth’s climate).

¹¹² See *Kivalina* Complaint at (describing how defendants’ GHG emissions cause “melting of Arctic sea ice that formerly protected the village from winter storms,” leading to a “massive erosion problem” in *Kivalina*); *Comer* Complaint at 28 (describing how plaintiffs’ use of their property to “mine, drill, manufacture, release, vent, and/or combust substances” causes destruction to plaintiffs’ property via subsumption of land, hurricanes, and saltwater intrusion).

nuisance story that *your use of your property unreasonably interferes with my use of my property*.

Although harms for climate change do not snugly fit either the bad neighbor story of private nuisance or the bad citizen story of public nuisance, they draw moral resonance from analogy to both doctrines. In effect, environmental litigators have taken advantage of the flexibility of the nuisance doctrine to create something new: a hybrid nuisance doctrine that calls itself public nuisance, but is something else altogether—perhaps a maxi-version of public nuisance with inflections of private nuisance. In the process of remodeling and combining the private and public nuisance scripts, environmental litigators are performing the kind of psychological ordering ritual that we as a society need in order to make sense of the crisis of climate change.

V

THE CONVENTIONAL FAILURE OF PUBLIC NUISANCE SUITS FOR CLIMATE CHANGE HARMS—AND THEIR UNCONVENTIONAL SUCCESS

Climate change nuisance litigation has nearly met its demise. The first blow was dealt by the US Supreme Court in *American Electric Power Co. v. Connecticut*, which blocks nuisance claims when brought in federal court against electric power plants for the emission of GHGs.¹¹³ The Court reasoned that the Clean Air Act and the EPA's action (current and planned) to control GHGs under that statute displaced common law nuisance remedies.¹¹⁴

AEP v. Connecticut left open two questions: (1) whether nuisance claims for climate change harms may be brought for damages, rather than for the injunctive relief that the plaintiffs sought in *AEP*, and (2) whether nuisance claims for climate change harms may be brought in state court. The two cases relevant to these questions are *Comer* and *Kivalina*. In *Comer*, as described previously, landowners brought nuisance, trespass, and negligence claims against emitters of GHGs for property damage caused by Hurricane Katrina. In contrast to *AEP*, the plaintiffs in *Comer* brought state rather than federal claims and sought damages rather than an injunction. But as in *AEP*, the court

¹¹³ *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

¹¹⁴ *Id.*

found that plaintiffs' suit was displaced by the CAA.¹¹⁵ However, the preemption finding is dicta because the suit was dismissed on procedural grounds.¹¹⁶

Kivalina, as described previously, involved the gradual destruction of a Inupiat Eskimo village by storms and shore erosion, which forced the approximately four hundred residents of Kivalina to relocate. The Kivalina villagers sued twenty-two oil, energy, and utility companies for damages, claiming that the defendants' emissions had melted sea ice that had previously protected their shores. The Ninth Circuit found that the villagers' claim for damages was displaced, but left open the possibility of state nuisance claims.¹¹⁷ Thus, the use of nuisance litigation to fight climate change nuisance litigation has been largely squelched, with some residual possibility of state common law claims.¹¹⁸

The use of nuisance claims in climate change suits has been widely criticized, even beyond its inability to move courts.¹¹⁹ First, it has been criticized on unfairness grounds.¹²⁰ It is seemingly unfair to pin the responsibility for climate change on companies whose share of the damage is fractional. The amount of GHG that has been added to the troposphere over the past centuries dwarfs the amount of GHG that has been added by any single company over the past decade. Even conglomerates are only responsible for some small part of the climate change chaos and, accordingly, for only some small part of the damage to particular lands such as Kivalina. It is also unfair to attach responsibility for climate change to companies who may be ignorant of their climate impacts. This is especially the case because climate change is only just beginning to become visible on the landscape. Finally, pinning responsibility on companies is especially difficult not only empirically but also intuitively: making the leap between *this* hurricane and the venting of *this* oil field strains a sense of fairness.

Moreover, judges granting relief to nuisance challengers are arguably not helping to solve climate change. This is because judges

¹¹⁵ *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849, 865 (S.D.Miss. 2012), *aff'd* *Comer v. Murphy Oil USA*, 718 F.3d 460, 469 (5th Cir. 2013).

¹¹⁶ *Id.* at 855–57.

¹¹⁷ *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 866 (9th Cir. 2012)

¹¹⁸ State nuisance statutes are an additional source of climate change nuisance claims.

¹¹⁹ See, e.g., James W. Shelson, *The Misuse of Public Nuisance Law to Address Climate Change*, 78 DEF. COUNS. J. 195 (2011); Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803 (2010).

¹²⁰ See, e.g., Schwartz et al., *supra* note 113, at 835–42.

facing climate change suits are institutionally handicapped.¹²¹ First, legal doctrines such as standards of causation and culpability, burdens of proof, and sharing of liability were designed to deal with private risks and are too stringent to appropriately deal with public risks.¹²² Second, courts do not have the legislature's luxury of a systematic overview (for example, facing a series of shoplifting cases, a court cannot see or address the broader problem of urban poverty). Third, legislatures are able to elicit more and better information than courts because they are free to range widely beyond what the litigants present to them.

Climate change nuisance suits may have failed, ultimately, in the courts. Moreover, the nuisance doctrine may be neither a fair nor a straightforwardly effective tool for redressing climate change harms. Nevertheless, I would argue that climate change nuisance suits were a success. First, they *did* have some conventional success. That is, although federal nuisance claims were ultimately squelched by the Supreme Court in *AEP v. Connecticut*, environmental litigants' arguments did not entirely fall on deaf ears; they did earn legal recognition, such as in Second Circuit Judge Peter Hall's nearly one hundred-page opinion in *Connecticut v. AEP*¹²³ ruling that plaintiffs properly alleged a public nuisance claim.

Another possibility—perhaps deserving of further exploration elsewhere—is that environmental litigants have made public nuisance more available as a script for other current or imminent environmental threats that involve human responsibility for vast natural forces such as weather, wildlife, and disease. These are kinds of harm that do not fit seamlessly into the traditional private nuisance or public nuisance scripts, but that are enriched through analogy to those narratives. In the context of climate change, the nuisance script has both expanded public nuisance and co-opted the story of private nuisance in order to tell the story of human alteration of the weather, a very striking example of human puppeteering. By pushing the envelope in the climate context, environmental litigators have paved the way for other stories of human harm via vast and uncontrolled environmental agents. Such stories can be used against environmental values as they were (unsuccessfully) in recent litigation brought by cattle ranchers

¹²¹ See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990).

¹²² *Id.* at 1029.

¹²³ 582 F.3d 309 (2d Cir. 2009).

who hoped to limit the state-sanctioned roaming radius of wild buffalo in Montana.¹²⁴ But they can also be used to further environmental protection—for example, as a way to hold pesticide manufacturers or farm conglomerates liable for honeybee collapse.

Finally, and most importantly, climate change nuisance suits were narratively compelling in a way that attracted the attention of the media and, through the media, the public. There has even been an accessible book written about climate change nuisance suits.¹²⁵ Although they were not tangibly successful, like the CAA litigation, climate change nuisance suits were meaningful on a psychological level. In Robert Cover's words, they imbued action with significance.¹²⁶ In Thomas Stoddard's words, they were not rule-shifting, but they were culture-shifting.¹²⁷ Such success is hard to verify and measure, and yet I think it should not be ignored simply because it resists our quantification.

CONCLUSION

The social change effects of litigation are not limited to those occasioned by legal victories or stirring judicial opinions. They also include those spurred by the process of litigation—by litigators themselves as they tell stories in court and, in the case of climate change nuisance suits, as they shape new legal claims to encompass difficult new social problems. Law is not unlike poetry or fairy tales. Like those genres, it offers an ordering ritual that provides psychological healing. It is an especially powerful tool for ordering our “inner house[s]”¹²⁸ because it is grounded in our society's moral certainties and thus helps settle and satisfy us as to what is right and what is wrong. At the margins of human behavior, such as when oil companies act in ways that threaten our earth's climatic stability, such a moral ordering framework provides a needed anchor. Such an anchor is essential, for it is the starting point for more directed and effective action.

¹²⁴ See *Park Cnty. Stockgrowers Ass'n, Inc. v. Mont. Dep't of Livestock*, No. DV-11-77, DV-11-78 (Mont. 6th Jud. Dist. Ct. 2013), available at [http://www.buffalofieldcampaign.org/media/press1213/pressreleases1213/010713/FINALORDERANDJUDGMENTON\(AMENDED\)JOINTPETITION.pdf](http://www.buffalofieldcampaign.org/media/press1213/pressreleases1213/010713/FINALORDERANDJUDGMENTON(AMENDED)JOINTPETITION.pdf).

¹²⁵ See CHRISTINE SHEARER, *KIVALINA: A CLIMATE CHANGE STORY* (2011).

¹²⁶ COVER, *supra* note 18, at 100.

¹²⁷ See Stoddard, *supra* note 10, at 987–91.

¹²⁸ BETTELHEIM, *supra* note 42, at 5.