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## A Rhetoric of Sustainable Development

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# A RHETORIC OF SUSTAINABLE DEVELOPMENT

Jeff Todd\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	417
II. FROM FALSE IDENTIFICATIONS TO TPOLOGICAL CORRECTIVES: A SURVEY OF BURKE’S RHETORIC.....	422
A. Identification, Terministic Screens, and the Rhetoric of Substance.....	422
B. Efficiency, Casuistry, and the Mixed Dead Metaphors of Law.....	428
C. The Four Master Tropes: Devices for Perspective by Incongruity.....	433
III. A RHETORICAL CRITIQUE OF SUSTAINABLE DEVELOPMENT: TERMINOLOGICAL IDENTIFICATION AND MATERIAL DIVISION.....	437
A. Uneven Development, Fragmented Laws, and a Rhetorical Solution.....	438
B. Sustainable Development as a Terministic Screen: The Dubious Identification of Agreeing “in Principle” ....	442
C. The Three Pillars and Triple Bottom Line as Mixed Dead Metaphors.....	448
IV. A RHETORICAL CORRECTIVE: ADDITIONAL TROPES FOR NEW PERSPECTIVES ON SUSTAINABLE DEVELOPMENT.....	454
V. CONCLUSION.....	460

## I. INTRODUCTION

Sustainable development is a “big tent” concept that allows various stakeholders to find common ground.<sup>1</sup> Laws and companies that balance the three pillars or the triple bottom line (the factors related to economy, environment, and equity) can promote

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1. Alison Peck, *Sustainable Development and the Reconciliation of Opposites*, 57 *ST. LOUIS U. L.J.* 151, 158 (2012) (writing that the ambiguity of the term sustainable development creates a “big tent,” spacious enough to accommodate three usually disparate factions—development proponents, environmental groups, and social justice advocates”); see Albert C. Lin, *Myths of Environmental Law*, 2015 *UTAH L. REV.* 45, 65 (2015) (explaining how “sustainable development offers to reconcile the interests of present and future generations and of the rich and poor . . .”).

development that meets the needs of present and future generations.<sup>2</sup> Critics have nevertheless attacked this seeming strength as a discursive weakness.<sup>3</sup> While the concept enables numerous, sometimes divergent, interests to find general agreement, it simultaneously makes it harder for them to articulate priorities and thus implement meaningful legal and policy changes.<sup>4</sup>

Though they draw attention to the discursive shortcomings of sustainable development, commentators in the main have not applied rhetorical theory or literary criticism.<sup>5</sup> Those who do, however, hint

2. See, e.g., U.N. World Comm'n on Env't & Dev., Report of the World Commission on Environment and Development: Our Common Future, U.N. Doc. A/42/427, at 54 (1987), <https://digitallibrary.un.org/record/139811?ln=en> [hereinafter BRUNDTLAND REPORT] ("Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."); PETER JACQUES, SUSTAINABILITY: THE BASICS 116 (2015) (calling the "Triple Bottom Line" of sustainability "a way of operating multi-criteria accounting" to balance the trade-offs of economic growth, environmental values, and social justice); Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L L. 417, 425 (2015) ("The Brundtland Report synthesizes sustainability in terms of the 'Three E's': environment, economy, and equity.").

3. See, e.g., Scott D. Campbell & Moira Zellner, *Wicked Problems, Foolish Decisions: Promoting Sustainability Through Urban Governance in a Complex World*, 73 VAND. L. REV. 1643, 1657 (2020) ("Although many have envisioned sustainable development as a win-win outcome to enable continued growth without environmental costs, the model's focus on reconciling three conflicts suggested a more realistic view of the inevitability of trade-offs in a finite world."); Scott Fulton, David Clarke & María Amparo Albán, *Environmental Sustainability: Finding a Working Definition*, 47 ENV'T L. REP. NEWS & ANALYSIS 10488, 10488 (2017) ("[D]espite its expanding presence in environmental policy discourse since [1987], sustainability still suffers from ambiguity that must be overcome if governmental and private-sector decisionmakers are to optimize the concept's potential."); Becky L. Jacobs & Brad Finney, *Defining Sustainable Business—Beyond Greenwashing*, 37 VA. ENV'T L.J. 89, 90–91 (2019) (calling the lack of "a precise, authoritative definition" for sustainability a "threat . . . to a generally positive and important trend").

4. See William H. Rodgers, Jr., *The Myth of the Win-Win: Misdiagnosis in the Business of Reassembling Nature*, 42 ARIZ. L. REV. 297, 297 (2000) (attacking "the conviction that gains from economic development could be enjoyed without sacrifice of the natural world" as "a convenient, powerful, and serviceable myth [that] . . . happens to be faulty at its foundations."); Jorge E. Viñuales, *The Rise and Fall of Sustainable Development*, 22 REV. EUR. CMTY. & INT'L ENV'T L. 3, 6 (2013) (calling the "ability to encompass very different issues without clarifying the relations among them" a weakness of sustainable development because "it is indeed very difficult to set priorities").

5. Many scholars have employed some variation of rhetoric in the base sense of empty verbiage. See, e.g., Sanford E. Gaines, *Reimagining Environmental Law for the 21st Century*, 44 ENV'T L. REP. NEWS & ANALYSIS 10188, 10198 (2014) ("The question for this part is why new norms for sustainability have not yet emerged to transform sustainable development rhetoric into behavioral reality."); *id.* at 10211

at the insight to be gained from such approaches. For example, sustainable development has numerous discourses depending upon the community (whether business or government, for example),<sup>6</sup> which leads to practical problems like “materiality” being defined differently in financial versus environmental, social, and governance (ESG) reporting.<sup>7</sup> One analysis of the “discourses, debates and rhetoric about sustainable development” found “that the concept occupies highly contested ground,” so the path toward implementation is not consensus but the disruption of “settled assumptions.”<sup>8</sup> Another explains how sustainable development functions as a myth by reinforcing a shared recognition of the core truth about the earth’s limited carrying capacity, but this myth also veils genuine disagreement and the shortcomings of proposed solutions.<sup>9</sup> One article that explored alternative narratives to “lift the veil” on sustainable development therefore urged more interdisciplinary research that draws on the humanities, in particular rhetoric,<sup>10</sup> which is not merely ornamental but is instead a means toward better understanding and ultimately to action.<sup>11</sup>

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(“The world does not need new ideas or new principles; the difficult work is to bring the existing ideas and principles down from the realms of rhetorical declarations adopted by international conferences to the level of ordinary citizens, to embed those norms into the choices people make every day in their work and their personal lives.”). Although this use of “rhetoric” differs from this Article’s employing rhetoric as a critical theory with a robust contemporary following, the underlying point about the disjunction between the lofty language of sustainable development and the failure of implementation is well-founded. *See infra* Part III.

6. *See* Nancy D. Perkins, *The Dialects and Dimensions of Sustainability*, 21 J. ENV’T & SUSTAINABILITY L. 331, 338 (2015).

7. Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 646 (2019) (“Disagreement over the definition of materiality has resulted in financial and ESG disclosure occupying separate domains, a result that hampers mainstreaming of sustainability by keeping ESG factors separate from business operations.”).

8. Jaye Ellis, *Sustainable Development and Fragmentation in International Society*, in GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 57, 66, 72 (Duncan French ed., 2010).

9. *See* Lin, *supra* note 1, at 90.

10. Christopher P. Guzelian & Jeff Todd, *Sustainable Money*, 94 TEMPLE L. REV. 453, 458.

11. *E.g.*, ANNE MARIE TODD, COMMUNICATING ENVIRONMENTAL PATRIOTISM: A RHETORICAL HISTORY OF THE AMERICAN ENVIRONMENTAL MOVEMENT 5 (2013) (“Thinking rhetorically about environmental issues means thinking pragmatically about how to educate and mobilize action on the environment as well as thinking constitutively: acknowledging that representations of nature and environmental problems shape our understanding of our world and ourselves.”); Michael Burger, *Environmental Law/Environmental Literature*, 40 ECOLOGY L.Q. 1, 5 (2013) (writing that a method like

Kenneth Burke, who is arguably the most influential rhetorician since the classical era,<sup>12</sup> has a body of work that spans half a century.<sup>13</sup> From this corpus emerge theories that are particularly apt for an exploration of sustainable development: he examines business and economics throughout his works,<sup>14</sup> he has been dubbed the “pioneer of ecocriticism,”<sup>15</sup> and he is a “critical theorist of social change.”<sup>16</sup> Accordingly, this Article applies Burkean rhetoric, first to explain how

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literary criticism “offers a way to uncover how we identify and define problems (and problem-makers), how we conceive desirable goals (and goal-achievers) and how we craft solutions”).

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

13. In addition to numerous articles, Burke’s corpus includes eight books. This Article will follow the practice of Burke scholars by citing his books by their abbreviations. See KENNETH BURKE, *ATTITUDES TOWARD HISTORY* (3d ed. 1984) [hereinafter BURKE, ATH]; KENNETH BURKE, *COUNTER-STATEMENT* (3d ed. 1968) [hereinafter BURKE, CS]; KENNETH BURKE, *LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD* (1966) [hereinafter BURKE, LASA]; KENNETH BURKE, *A GRAMMAR OF MOTIVES* (Cal. ed. 1969) [hereinafter BURKE, GM]; KENNETH BURKE, *PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE* (3d ed. 1984) [hereinafter BURKE, PC]; KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM* (3d ed. 1974) [hereinafter BURKE, PLF]; KENNETH BURKE, *A RHETORIC OF MOTIVES* (Cal. ed. 1969) [hereinafter BURKE, RM]; KENNETH BURKE, *THE RHETORIC OF RELIGION: STUDIES IN LOGOLOGY* (1970). See WILLIAM H. RUECKERT, *KENNETH BURKE AND THE DRAMA OF HUMAN RELATIONS* vii-viii (2d ed. 1983).

14. *E.g.*, BURKE, ATH, *supra* note 13, at 225 (describing how imaginative possibilities become “bureaucratized” when they are enacted in “the realities of a social texture,” such as “the methods of government, production and distribution”); BURKE, GM, *supra* note 13, at 174 (explaining how “the legal fiction that financial corporations are persons” is a type of “casuistic stretching”); BURKE, RM, *supra* note 13, at 44 (noting that the “ways of identification that contribute variously to social cohesion” can be “for the advantage of special groups whose rights and duties are indeterminately both a benefit and a tax on the community, as with some business enterprise in our society”).

15. Laurence Coupe, *Kenneth Burke: Pioneer of Ecocriticism*, 35 J. AM. STUD. 413 (2001); see Randall Roorda, *KB in Green: Ecology, Critical Theory, and Kenneth Burke*, 4 INTERDISC. STUD. LITERATURE & ENV’T 39, 39 (1997) (calling Kenneth Burke the “first critical ecologist”); Phaedra C. Pezzullo, *Unearthing the Marvelous: Environmental Imprints on Rhetorical Criticism*, 16 REV. COMM’N 25, 33 (2016) (claiming that environmental rhetoricians have employed Burkean analytical methods for over three decades).

16. FRANK LENTRICCHIA, *CRITICISM AND SOCIAL CHANGE* 31 (1983); see BURKE, ATH, *supra* note 13, at 266–67 (writing that his theory of rhetoric as identification “is hardly other than a name for the *function of sociality*”).

the abstract language of sustainable development creates false identifications that hinder the implementation of tangible actions, and second to recommend correctives in the form of alternative tropes that can re-orient perspectives.

Part II summarizes key aspects of Burke’s critical method. Because people understand concepts only through words, language acts as a “terministic screen” that can filter perceptions.<sup>17</sup> One such filter—which Burke calls the rhetoric of substance—occurs when words suggest a shared identity that does not exist, as when negotiators agree “in principle.”<sup>18</sup> Indeed, legal concepts are particularly problematic because they are “mixed dead metaphors” that compound abstraction.<sup>19</sup> Bogus identifications built around abstract concepts reinforce existing power structures by deflecting attention away from the possibilities suggested by other terms.<sup>20</sup> One corrective action is therefore recourse to literary devices like tropes to achieve new perspectives by considering an issue through different and even seemingly irrelevant or contradictory concepts.<sup>21</sup>

Part III then applies this theory to the discourse of sustainable development. In the 1980s, critics recognized that economic development contributed to environmental and social harms, which the fragmented areas of law were insufficient to correct. Sustainable development therefore provided a broad term sufficient to unite three otherwise distinct interests.<sup>22</sup> Its greatest successes, however, are limited to general agreement “in principle” or to treaty frameworks with only the vague potential for substantive results.<sup>23</sup> Moreover, the concepts of the three pillars and the triple bottom line are mixed dead metaphors that increase abstraction and thus make it harder to perceive problems. For example, the implementation of public private partnerships (PPPs) and the generation of private ESG metrics benefit those in power: by agreeing to what seem like compromises but are actually business as usual, stakeholders maintain the status quo rather than change it.<sup>24</sup>

Part IV re-orient the perspective towards sustainable

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17. BURKE, LASA, *supra* note 13, at 44–62.

18. BURKE, GM, *supra* note 13, at 52; *see infra* Part II.A.

19. BURKE, ATH, *supra* note 13, at 229–32.

20. *See infra* Part II.B.

21. *See infra* Part II.C.

22. *See infra* Part III.A.

23. *See infra* Part III.B.

24. *See infra* Part III.C.

development, not only to recover the luster that has dimmed in the generation-plus since its inception but also to animate its underlying metaphors into a critical tool, one that law- and policy-makers and businesses can use to identify problems, think creatively about solutions, and then implement them. This reorientation is via tropes. For example, metonymy works through tangible references for an abstract concept, synecdoche treats a part for the whole, and irony mandates the consideration of multiple—even conflicting—perspectives. This Part applies these tropes as correctives for the problems raised in Part III. The Article ends with a brief conclusion.

## II. FROM FALSE IDENTIFICATIONS TO TOPOLOGICAL CORRECTIVES: A SURVEY OF BURKE'S RHETORIC

For Burke, “the basic function of rhetoric [is] the use of words by human agents to form attitudes or to induce actions in other human agents . . . .”<sup>25</sup> More specifically, people employ symbols—language—to “induc[e] cooperation.”<sup>26</sup> Since we cannot say anything without the use of language, language acts as a terministic screen, which is “an orientation to discourse that promotes some views, reactions, and statements while it ‘filter[s]’ out others.”<sup>27</sup> Terministic screens are problematic when they establish a commonality that does not exist; for example, vague terms can suggest a shared identity while simultaneously deflecting attention away from the material divisions among stakeholders. This problem of terms also has a corrective in language, such as the literary language of tropes that can re-orient discourse by generating new, unusual, but also potentially constructive perspectives.

### A. Identification, Terministic Screens, and the Rhetoric of Substance

One entrée into Burke’s sophisticated theory of rhetoric is his concept of identification.<sup>28</sup> Humans differ from animals because of

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25. BURKE, RM, *supra* note 13, at 41.

26. *Id.* at 43 (calling rhetoric “the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols”).

27. Lynda Walsh, *A Zero-Sum Politics of Identification: A Topological Analysis of Wildlife Advocacy Rhetoric in the Mexican Gray Wolf Reintroduction Project*, 36 WRITTEN COMM’N 437, 447 (2019) (quoting BURKE, LASA, *supra* note 13, at 46); see BURKE, LASA, *supra* note 13, at 50.

28. See Don J. Kraemer, *The Reasonable and the Sensible: Toward a Rhetorical*

our use of language and our ability to use symbols that ascribe meaning to things, to each other, and to our world.<sup>29</sup> Indeed, if language were somehow removed so that we were left in a natural, biological state, persons would feel estranged from each other.<sup>30</sup> Language therefore provides the “[r]esources of classification, of abstraction, of comparison and contrast, of merger and division, [and] of derivation”<sup>31</sup> with which humans create order and thus transcend this natural state.<sup>32</sup>

This transcendence via the use of language is both internal and external.<sup>33</sup> Considered internally, language is the “substance” that helps us to identify ourselves and our place in our surroundings.<sup>34</sup> The word “substance” has a common dictionary definition of a person or thing’s “most important element . . . [or] main part.”<sup>35</sup> Split etymologically, however, “sub-stance” is a word that suggests context, the “something that stands beneath or supports the person or thing.”<sup>36</sup> The properties of “symbolic communication” therefore “characterize both ‘the human situation’ and what men are ‘in themselves.’”<sup>37</sup>

Considered externally, language is essential for socialization, for building and maintaining social structures.<sup>38</sup> Humans seek not only to uncover and understand their own substance but also to identify

*Theory of Justice*, 46 PHILOS. & RHET. 207, 214 (2013) [hereinafter Kraemer, *Reasonable*] (calling “identification” the “key term in Burke’s rhetoric theory”).

29. See BURKE, LASA, *supra* note 13, at 16 (calling man “the symbol-using (symbol-making, symbol-misusing) animal”) (emphasis omitted).

30. See BARBARA A. BIESECKER, ADDRESSING POSTMODERNITY: KENNETH BURKE, RHETORIC, AND A THEORY OF SOCIAL CHANGE 46 (2000).

31. BURKE, RM, *supra* note 13, at 285.

32. See BIESECKER, *supra* note 30, at 46–47; BURKE, RM, *supra* note 13, at 23 (writing about the possibility of rhetoric moving us “to the universal”); Kraemer, *Reasonable*, *supra* note 28, at 215 (writing that “Burkean identification joins body and ideology”).

33. See BURKE, GM, *supra* note 13, at 33 (“[S]ymbolic communication is not a merely external instrument, but also intrinsic to men as agents.”).

34. See ROBERT L. HEATH, REALISM AND RELATIVISM: A PERSPECTIVE ON KENNETH BURKE 169 (1986) (“Burke’s dialectic . . . demonstrates how linguistic transformation rests solely in the nature of terministic substance.”).

35. BURKE, GM, *supra* note 13, at 21–22 (quoting Webster’s Revised Unabridged Dictionary).

36. *Id.*

37. *Id.* at 33.

38. See Courtney Megan Cahill, “If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?”: An Essay on the Progressive Comparative Argument, 55 BUFF. L. REV. 777, 800–01 (2007) (quoting BURKE, RM, *supra* note 13, at 43) (writing that rhetoric can “enable group cooperation, build social networks, and even ‘assist[] the survival of cultures by promoting social cohesion.’”).

with others in a way that demonstrates a shared substance, or in Burke's term, to become "consubstantial" via "common sensations, concepts, images, ideas, attitudes."<sup>39</sup> Burke writes, "A is not identical with his colleague, B. But insofar as their interests are joined, A is *identified* with B. Or he may *identify himself* with B even when their interests are not joined, if he assumes that they are, or is persuaded to believe so."<sup>40</sup> As a means of socialization, identification allows A to "remain[] unique" while also being "'substantially one' with a person other than himself."<sup>41</sup> For Burke, identification is more than just one individual identifying with another; instead, it is the "historical process whereby a condition of impossibility (the irreducible estrangement of the individual) is dialectically transformed or sublated into a condition of possibility (sociality) by way of rhetoric."<sup>42</sup> As one Burke commentator writes, the social has its "very mode of existence" in the rhetorical exchange of symbols.<sup>43</sup> The rhetorical process of identification therefore enables individuals to unite as a society.<sup>44</sup>

While identification enables people to unite as a society, one could also take Burke's claim that "[i]dentification is compensatory to division" as a warning: "the social appears not as a perfectly

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39. BURKE, RM, *supra* note 13, at 21; *see also* M. JIMMIE KILLINGSWORTH & JACQUELINE S. PALMER, ECOSPEAK: RHETORIC AND ENVIRONMENTAL POLITICS IN AMERICA 23 (1992) ("Kenneth Burke's chief contribution to rhetorical theory was the concept of *identification* as the means by which a speaker or writer puts forth an image or character . . . and invites the audience to participate in a consubstantial relationship with that image.").

40. BURKE, RM, *supra* note 13, at 20.

41. *Id.* at 21; *see also* BURKE, ATH, *supra* note 13, at 266–67 ("In fact, 'identification' is hardly other than a name for the *function of sociality*.").

42. BIESECKER, *supra* note 30, at 48; *see also id.* at 59 ("[I]n the Rhetoric the movement of the dialectic guarantees the emergence of the social, the provisional sublation of the individual into the collective."); BURKE, RM, *supra* note 13, at 39 (claiming that there is an "ingredient of rhetoric in all socialization" because "[t]he individual person, striving to form himself in accordance with the communicative norms that match the cooperative ways of his society, is by the same token concerned with the rhetoric of identification.").

43. BIESECKER, *supra* note 30, at 50.

44. *See* BIESECKER, *supra* note 30, at 21 (calling rhetoric "the condition of possibility for collective human action"); Lawrence J. Prelli & Terri S. Winters, *Rhetorical Features of Green Evangelicalism*, 3 ENV'T COMM'N 224, 227 (2009) ("Pursuit of identification involves searching for and exhibiting terminological and other symbolic properties shared with others, properties that screen situations in ways that imply mutual adherence to the substance of a point of view."); *see also* Kenneth Burke, *Dramatism*, in COMMUNICATION: CONCEPTS AND PERSPECTIVES 327, 331 (Lee Thayer ed., 1967) (writing that every terminology suggests possibilities [hereinafter Burke, *Dramatism*]).

egalitarian space of cooperation but always and already as a field necessarily fraught with factional strife.”<sup>45</sup> It is “precisely because there is division” that we need identification as a compensation: “[i]f men were not apart from one another, there would be no need for the rhetorician to proclaim their unity.”<sup>46</sup> Burke does not propose that identification is merely the use of “deliberate cunning”<sup>47</sup> via linguistic devices with “which speakers trick, manipulate, or even deceive their audience into identifying with them and into doing what they want.”<sup>48</sup> Instead, he recognizes the disconnect between reality and language, how humans can conceive of and communicate about reality only “through various *media* of symbolism.”<sup>49</sup> The potential for deception and misunderstanding therefore resides in language itself: “much that we take as observations about ‘reality’ may be but the spinning out of possibilities implicit in our particular choice of terms.”<sup>50</sup>

Burke thus argues that words are “terministic screens” between reality and our perception of it, so that different terms lead to different perceptions.<sup>51</sup> “Even if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function as a *deflection* of reality.”<sup>52</sup> All language use—whether the speaker has the intent to deceive or not—requires a choice of terms, and the choice of “nomenclature

45. BIESECKER, *supra* note 30, at 49; see BURKE, RM, *supra* note 13, at 22–23 (claiming that the “ideal culminations” of rhetoric “are more often beset by strife as the condition of their organized expression, or material embodiment” and calling division the “ironic counterpart” of identification); Matthew Ortoleva, “*We Face East: The Narragansett Dawn and Ecocentric Discourses of Identity and Justice*, in ROUTLEDGE STUDIES IN RHETORIC AND COMMUNICATION: ENVIRONMENTAL RHETORIC AND ECOLOGIES OF PLACE 84, 84 (2013) (Peter N. Goggin ed., 2013) (“[T]he public sphere is a space of conflict, imbued with power structures and saturated with domination and subordination.”).

46. BURKE, RM, *supra* note 13, at 22; see Delia B. Conti, *Narrative Theory and the Law: A Rhetorician’s Invitation to the Legal Academy*, 39 DUQ. L. REV. 457, 459 (2001) (“Inducing cooperation is only necessary because man is divided . . .”).

47. BURKE, RM, *supra* note 13, at 45 (recognizing the possibility of “deliberate cunning” when “an identification favorable to the speaker or his cause is made to seem favorable to the audience”); see also *id.* at 23 (warning about “the lugubrious regions of malice and the lie”).

48. Cahill, *supra* note 38, at 800; see Bill Bridges, *Terministic Screens*, in ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 722, 723 (Theresa Enos ed., 1996) (writing that Burke called attention to how terministic screens could “manipulate us”).

49. BURKE, LASA, *supra* note 13, at 52 (writing that “all members of our species conceive of reality somewhat roundabout, through various *media* of symbolism”).

50. *Id.* at 46.

51. See, e.g., *id.* at 44–62.

52. *Id.* at 45.

necessarily directs the attention into some channels rather than others.”<sup>53</sup> If the same situation were stated in different terms, those competing terminologies would affect the audience’s perception of that situation.<sup>54</sup> Consider Burke’s analogy of several photographs of the same object, with the only difference being that each was taken with a different color filter; even for “something so factual as a photograph,” those filters revealed distinct textures and forms.<sup>55</sup> “The choice of one term over another can emphasize certain features and deemphasize others or direct the attention toward one meaning but exclude other meanings that alternate terms would suggest.”<sup>56</sup> All language is “inherently rhetorical because its use is necessarily selective and partial” since we must make decisions about “what meanings to reveal and conceal, disclose and foreclose.”<sup>57</sup>

In the realm of law and policy, debates will be framed in terms that are well-established,<sup>58</sup> which results in a “screening effect” because dominant metaphors and common topics will limit “the perceptions of discourse participants.”<sup>59</sup> For example, the selection of ambiguous terms that suggest identification can deflect attention away from divisions legitimately established by another set of terms.<sup>60</sup> Take Burke’s example of the expression that something is “*substantially* true”; the inclusion of this adverb allows the rhetor to

53. *Id.*

54. *See id.* at 46 (claiming that “many of [our] ‘observations’ are but implications of the particular terminology in terms of which the observations are made”).

55. *Id.* at 45.

56. Jeff Todd, *The (De)Mystification of Environmental Injustice: A Dramatic Analysis of Law*, 93 *TEMPLE L. REV.* 597, 605 (2021); *see also* Nils Peterson et al., *Rearranging the Myth of Human-Wildlife Conflict*, 3 *CONSERVATION LETTERS* 74, 74–75 (2010) (“[V]ocabularies form terministic screens, wherein individual words (terms) interact to emphasize some aspects of reality, while deemphasizing others . . . Terministic screens, therefore, direct attention by emphasizing or deemphasizing different elements of reality.”); Prelli & Winters, *supra* note 44, at 226 (writing that “the choice of one term over another directs the attention toward one meaning but excludes other meanings that could have been suggested by other terms”).

57. Prelli & Winters, *supra* note 44, at 226; *see* BURKE, *LASA*, *supra* note 13, at 45 (“The dramatic view of language, in terms of ‘symbolic action,’ is exercised about the necessarily *suasive* nature of even the most unemotional scientific nomenclature.”); Susan E. Provenzano, *How Rhetoric Reveals Judicial Motives in Employment Discrimination Cases*, 90 *TENN. L. REV.* (forthcoming 2022–23) (manuscript at 6) (writing that “thoughts and ideas are never free from the language used to frame them”).

58. *See* Burke, *Dramatism*, *supra* note 44, at 341.

59. Todd, *supra* note 56, at 605 (citing Walsh, *supra* note 27, at 447); *see* HEATH, *supra* note 34, at 90–91 (writing that terministic screens “limit our perceptions”).

60. *See, e.g.*, Todd, *supra* note 56, at 601.

identify something as “true” even if the evidence does not confirm it to be thus.<sup>61</sup> This “linguistic resource” allows for power through ambiguity because advocates can avoid definitive statements while proffering the suggestion that things are a certain way.<sup>62</sup> Another example of the rhetoric of substance is “in principle,” which allows speakers to accept a proposal or proposition while avoiding commitment or even overlooking a lack of proof.<sup>63</sup>

Terministic screens are particularly problematic when they lack “telltale expressions” like “substantially” or “in principle.”<sup>64</sup> As one relevant example that involves the law, consider:

[A] list of citizens’ signatures had been collected for a petition asking that a certain politician’s name be placed on the ballot. In court it was shown that some of these signatures were genuine, but that a great many others were false. Thereupon the judge invalidated the lot on the grounds that, the whole list being a mixture of the false and the genuine, it was “saturated” with fraud. He here ruled in effect that the list was *substantially* or *essentially* fraudulent. The judgment was reversed by a higher court which ruled that, since the required number of genuine signatures had been obtained, the false signatures should be simply ignored. That is, the genuine signatures should be considered in themselves, not contextually.<sup>65</sup>

Such substantial identifications are not limited to modifiers like adjectives and adverbs but also lurk in simple terms; for example, Burke calls the collective pronoun “we” a “wonder-word” because it obscures distinctions.<sup>66</sup> In short, even “[t]he most clear-sounding of words can thus be used for the vaguest of reference.”<sup>67</sup>

Identification thus operates in ways that are inclusive and exclusive, and this operation is simultaneous. The formation and maintenance of social identities based on a “common ideology” will “at the same time exclud[e] alternate terms, other groups, and competing ideologies.”<sup>68</sup> This has ironic results because “we obscure

61. BURKE, GM, *supra* note 13, at 52.

62. *See id.*; *see also* George Cheney et al., *Kenneth Burke’s Implicit Theory of Power*, in *KENNETH BURKE AND THE 21ST CENTURY* 133, 135 (Bernard L. Brock ed., 1999) (“Burke directs our attention . . . to the many meanings and ambiguities of power that symbols introduce into human experience.”).

63. *See* BURKE, GM, *supra* note 13, at 52.

64. *Id.* at 52–53.

65. *Id.* at 53 (emphasis added).

66. BURKE, PC, *supra* note 13, at 305–06.

67. BURKE, GM, *supra* note 13, at 52.

68. Patricia Bizzell & Bruce Herzberg, *THE RHETORICAL TRADITION: READINGS FROM*

difference even as we revel in difference” and “deepen exclusion” though seeming to find “greater inclusiveness.”<sup>69</sup> For example, in debates about environmental issues related to development, the use of polarizing, “us-versus-them” language can suggest alliances that do not in fact exist (as when a community group opposes a project, but some members of the community desire the jobs created by that project).<sup>70</sup> Perhaps most problematic, “ambiguous discourse . . . enabl[es] the powerful to protect their privileged status—deflecting attention away from class distinctions via the assertion of a common interest with the powerless.”<sup>71</sup> The next Subpart takes up this phenomenon in the context of legal concepts.

## B. Efficiency, Casuistry, and the Mixed Dead Metaphors of Law

Burke addresses the rhetoric of law throughout his works.<sup>72</sup> Few commentators—whether in the law, humanities, or social sciences—have addressed his concept of the law, however, so this aspect of his theory remains “underdeveloped.”<sup>73</sup> This Subpart therefore builds on the previous one by surveying Burke’s writings about law and rhetoric to show how “the law is a terministic screen that molds reality by creating abstract identifications that gloss over actual

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CLASSICAL TIMES TO THE PRESENT 1295–96 (2d ed. 2001); see HEATH, *supra* note 34, at 91 (quoting BURKE, PC, *supra* note 13, at 102) (“[A] given classification . . . produces new alignments incongruous with the alignments flowing from other modes of classification.”); Prelli & Winters, *supra* note 44, at 227 (“Burke also points out that whenever we come to terms regarding a situation’s meaning with some we risk division from others who regard that situation from vantages afforded by different terms.”).

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

70. See KILLINGSWORTH & PALMER, *supra* note 39, at 29–33; Peterson et al., *supra* note 56, at 75 (“Terministic screens shape the way society reacts to environmental challenges by constraining possibilities.”).

71. Todd, *supra* note 56, at 610 (citing James L. Kastely, *Love and Strife: Ultimate Motives in Burke’s A Rhetoric of Motives*, 31 RHETORICA: J. HIST. RHETORIC 172, 196–97 (2013)).

72. See, e.g., *id.* at 601.

73. See *id.* at 601 & n.20 (citing Thomas Meisenhelder, *Law as Symbolic Action: Kenneth Burke’s Sociology of Law*, 4 SYMB. INTERACTION 43, 53 (1981)) (finding “only one sustained treatment of Burke’s writings on law, which . . . ignores Burke’s definition of law as ‘the efficient codification of custom’ and the role of casuistic stretching.”); *id.* (citations omitted) (claiming that “only a handful [of legal scholars] have referenced [Burke’s concepts of] justice and law, and then only in passing”).

divisions.”<sup>74</sup>

Burke defines law as “the efficient codification of custom,”<sup>75</sup> a definition that invites further consideration of the term “efficient.” In the context of identification, “efficient” refers to the conscious “selection” and “deflection”—or, stated more bluntly, the manipulation—of terministic screens.<sup>76</sup> This operation flows from the reality that one “cannot say everything at once”; accordingly, one’s statements “throw strong light upon something, and in the process cast other things into shadow.”<sup>77</sup> Burke offers a literary analogy to the Cheshire Cat in *Alice in Wonderland*, which starts fully-formed, but then everything except for its broad smile slowly vanishes so that the smile is “pure” or “efficient” since it—and only it—draws the audience’s attention.<sup>78</sup> Applied to language use, this metaphor demonstrates how efficiency is the isolation of “one quality, making it the whole of life,” so that one is “left in possession of an unadulterated smile, the *smiliness* of smile, an ‘efficient,’ abstract essence.”<sup>79</sup> For an example of efficiency in the law, consider the “lawyer’s brief”: because an attorney does not write about a legal issue as a disinterested observer but as an advocate for one party in a dispute, the brief “adopts a simple criterion for stressing certain considerations and omitting others.”<sup>80</sup> The purpose is therefore not to give a neutral assessment of the issue so that the audience can grasp “the true proportions of a situation”; rather, the lawyer’s brief is a work of “planned disproportion” that in advocating for a certain position can hinder a more complete understanding.<sup>81</sup>

Efficiency is not limited to the adversary system of litigation but is an aspect of all law, particularly in its relationship with another concept, *casuistic stretching*.<sup>82</sup> The law is dynamic because it evolves in response to changing material situations.<sup>83</sup> That change comes

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74. *Id.* at 614.

75. BURKE, ATH, *supra* note 13, at 291.

76. See BURKE, LASA, *supra* note 13, at 45; Todd, *supra* note 56, at 613 (“He treats ‘efficiency’ as the aspect of language whereby one manipulates terministic screens.”).

77. BURKE, ATH, *supra* note 13, at 248.

78. See *id.* at 249.

79. *Id.*; see HEATH, *supra* note 34, at 46 (citing BURKE, CS, *supra* note 13, at 165) (describing the standard for eloquence in an artistic work as efficiency, whether each line reinforces the work’s themes through strong symbols and formal effects).

80. BURKE, ATH, *supra* note 13, at 249.

81. Todd, *supra* note 56, at 613 (quoting BURKE, ATH, *supra* note 13, at 249–50).

82. See *generally id.* at 608.

83. See BURKE, ATH, *supra* note 13, at 291.

with rhetorical challenges, such as when an abstract concept lacks specific terms that can be “subsumed in it,” or the opposite problem of showing a relationship between two conflicting terms that lack a higher-order abstract term to unite them.<sup>84</sup> Casuistic stretching is the transference of words “from one category of associations to another.”<sup>85</sup> Thus, it is a type of metaphorical extension that “fills the lacunae through reasoning by analogy.”<sup>86</sup> Through this process, “one introduces new principles while theoretically remaining faithful to old principles.”<sup>87</sup> New laws are considered just when based upon established legal concepts<sup>88</sup>—even when those concepts are imperfect fits. For example, judges draw on legal precedent to support their decisions, but opinions that worked well in a prior generation may not be adequate for contemporary circumstances and changing social norms.<sup>89</sup> Judges and other lawmakers also sometimes reference “justice” and “higher law,” idealizations that are so abstract that they can be used to support either side of a disputed issue.<sup>90</sup> Law therefore develops not by responding to material conditions but to “the kind of ‘immutable scene’ that could be idealized and generalized

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84. *Id.* at 231; see also BURKE, PC, *supra* note 13, at 103–05 (discussing abstraction as a process where one “draws from” old classifications and extends them to new situations and contexts that are not sanctioned by previous usages).

85. BURKE, ATH, *supra* note 13, at 230.

86. Todd, *supra* note 56, at 612.

87. BURKE, ATH, *supra* note 13, at 229.

88. See Jeff Todd, *A “Sense of Equity” in Environmental Justice Litigation*, 44 HARV. ENV'T L. REV. 169, 202–03 (2020).

89. See BURKE, GM, *supra* note 13, at 379 (arguing that precedent should lead to an opposite result since “the scenic conditions are now so different from those when the precedent was established”); NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 91 (2005) (arguing that a legal system based on precedent needs “an overall coherence of values and principles, enduring through time”); CHAÏM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 92–93 (John Petrie et al. trans., 1980) (writing that a rule that was considered reasonable when it was established may no longer be so when conditions change); *id.* at 39 (“[T]he evolution of moral sentiment may result in the fact that certain distinctions, neglected by legislators or judges, become essential in the present evaluation of the facts.”); Todd, *supra* note 88, at 211 (writing that when conditions change and social norms shift, “laws that were reasonable when formulated might now be inadequate to correct injustice”).

90. BURKE, GM, *supra* note 13, at 173; see also CHAÏM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 4–7 (John Petrie trans., 1963) (calling justice a “confused notion” and listing six different conceptions of justice); JAMES CROSSWHITE, DEEP RHETORIC: PHILOSOPHY, REASON, VIOLENCE, JUSTICE, WISDOM 303 (2013) (“Although the formal rule of justice enjoins us to treat people in the same way, the idea of justice contains several incompatible notions of what the essential consideration should be.”).

in terms of ‘eternal truth, equity and justice.’<sup>91</sup> Such casuistic stretching can lead to deception because “legal fictions and judicial ‘interpretations’ . . . further serve to bridge the gap between principle and reality.”<sup>92</sup>

Burke elaborates on the problem of legal analogizing through abstraction: “The abstract resources of law are implicit in speech. For abstractions are dead metaphors. You build abstractions atop the abstractions by mixed dead metaphors. And thinkers can even coach the language, deliberately inventing new abstractions, after the analogy of usages already established.”<sup>93</sup> Metaphor is a trope in which one thing is stated in terms of another, and these are usually two “distinctly different” things.<sup>94</sup> “Metaphor reflects ‘a transaction between contexts’” because the audience takes a familiar concept that it then “maps on top of the new experience.”<sup>95</sup> If two or more metaphors are “mixed,” then that means that “obviously diverse metaphoric vehicles” are combined in a mash-up.<sup>96</sup> Sometimes the combination is merely ludicrous—“Girding up his loins, the chairman plowed through the mountainous agenda”<sup>97</sup>—but this mixture can also result in confusion.<sup>98</sup> And if a metaphor is “dead,” then its reference to the “corporeal, visible, and tangible” has been “forgotten.”<sup>99</sup> For example, telling a very young child that a table has legs might induce thoughts of walking furniture; for adults, however, this metaphor has become so standard that it is a cliché with no power to capture attention and inspire us to think about the comparison.<sup>100</sup> Mixed dead metaphors intensify abstraction, “thus blurring the ability

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91. BURKE, GM, *supra* note 13, at 379–80.

92. BURKE, ATH, *supra* note 13, at 291; *see id.* at 232 (writing about “the many deceptions we have attributed to casuistic stretching”).

93. *Id.* at 291; *see* Kristen K. Davis, *The Rhetoric of Accommodation: Considering the Language of the Work-Family Discourse*, 4 U. ST. THOMAS L.J. 530, 530 n.3 (2007) (“According to Burke, law is a resource . . . to invent new abstractions by analogy to existing abstractions . . .”).

94. M. H. ABRAMS & GEOFFREY GALT HARPHAM, *A GLOSSARY OF LITERARY TERMS* 133 (11th ed. 2015).

95. Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 955 (2007) (quoting I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 94 (1936)).

96. ABRAMS & HARPHAM, *supra* note 94, at 134.

97. *Id.*

98. *See* Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295, 302 (2013).

99. BURKE, GM, *supra* note 13, at 506; *see* Van Patten, *supra* note 98, at 301–02 (calling dead metaphors clichés because they are “worn out”).

100. *See* ABRAMS & HARPHAM, *supra* note 94, at 134.

to see that the two purportedly similar concepts do not have much in common after all.”<sup>101</sup> Rephrased as a terministic screen, “the selection of legal language deflects attention away from material reality and directs it toward the abstract.”<sup>102</sup> Because the law and legal reasoning are analogical,<sup>103</sup> the law can rest upon weak analogies that are obscured by abstraction.

The greater concern is the question of what, exactly, gets obscured. Answering this question requires remembering that law, like all language, has a socializing function. The law does not exist in a vacuum but must be enacted “in the realities of a social texture, in all the complexity of language and habits, in the property relationships, the methods of government, production and distribution, and in the development of rituals that re-enforce the same emphasis.”<sup>104</sup>

That term “emphasis” brings us back to Burke’s definition of law as “the efficient codification of custom” and his treatment of “efficiency” as throwing light upon certain factors while keeping others in the dark.<sup>105</sup> The law’s emphasis appears to be maintaining a social order in which everybody shares—or in Burkean language, in which we are consubstantial—as with our Constitutional “more perfect Union” or international human rights law that establishes the same rights for all.<sup>106</sup> Another emphasis lurks in the shadows cast by that spotlight, however: the “hierarchical stratification” of the status

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101. Todd, *supra* note 56, at 614.

102. *Id.* at 612.

103. See Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 36 (1996) (claiming that the common law is “constructed by analogy and representation . . . [and] is comparison and representation.”); Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) (“Reasoning by analogy is the most familiar form of legal reasoning.”).

104. BURKE, *ATH*, *supra* note 13, at 225; see Cheney et al., *supra* note 62, at 136 (claiming that language has the ability to develop a complex human social order and corresponding ideas of status and property).

105. See sources cited *supra* note 73.

106. U.S. CONST. pmb.; see also Todd, *supra* note 56, at 616–17; BURKE, GM, *supra* note 13, at 249 (writing that the “generalized rights or duties” of a constitution “may be considered as a grand promissory unity”); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT’L L. 151, 173 (2015) (arguing that international human rights law uses neutral and universal language to establish “the same right to life, health, food, water, privacy, [and] a healthy environment”); Meisenhelder, *supra* note 73, at 49 (writing that the Constitution “proclaims for us a common substance that transcends our material differentiations”).

quo.<sup>107</sup> One Burke commentator writes that hierarchy is continually, and often indirectly, reinforced “in some veiled ‘social allegory,’ in overt and covert metaphors, in all kinds of seemingly non-hierarchic symbols which turn out to be secretly charged with ‘judgments of status’ through identification with something in the socio-political hierarchy . . . .”<sup>108</sup> After all, the Constitution’s terms are inherently divisive since it is the supreme law of the land that reserves some power to the states with any remainder “to the people,”<sup>109</sup> and one critic claims that the “benevolent rhetoric” of human rights law “cloaks . . . acts of domination.”<sup>110</sup>

The language of law thus unites the powerful and the disempowered in an *image* of unity “so the law legitimates power by inducing the audience to feel a part of a union with those at the top.”<sup>111</sup> Legal institutions thereby “contribute to reproduce and maintain inequality in ways which are neither obvious nor obviously coercive.”<sup>112</sup> Stated more bluntly, abstract language can mask how new laws do not result in change but instead maintain the status quo “by assuming or asserting a common identity when no such identity exists.”<sup>113</sup>

### C. The Four Master Tropes: Devices for Perspective by Incongruity

While the preceding discussion might suggest that figurative language like metaphor is problematic, it need not be so. After all, language use is inherently metaphoric: terms represent some thing or concept, and the very act of definition requires using other terms to describe the term under consideration.<sup>114</sup> Further, it is mixed dead

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107. BURKE, RM, *supra* note 13, at 313; *see* Todd, *supra* note 56, at 617.

108. RUECKERT, *supra* note 13, at 142; *see* Cheney et al., *supra* note 62, at 141 (“[P]ower is ‘invested’ in social systems, such as bureaucracies, and that power is often not easily identified with individual actors[.]”).

109. Todd, *supra* note 56, at 616–17 (citing, *inter alia*, U.S. CONST. art. VI, § 1, cl. 2; *see also id.* amend. X); *see* Conti, *supra* note 46, at 461 (noting the “basic divisiveness inherent in [the Constitution’s] terms”).

110. Gonzalez, *supra* note 106, at 173.

111. Todd, *supra* note 56, at 617 (citing Kastely, *supra* note 71, 196–97; Meisenhelder, *supra* note 73, at 53).

112. Yong Ryung Lee, *Empirical Study of the Symbolic Function of Law: The Legal Treatment of Koreans in Japan*, 7 INT’L J. INTERDISC. CIVIC & POL. STUDS. 13, 14 (2014); *see also* Meisenhelder, *supra* note 73, at 54–55.

113. Kastely, *supra* note 71, at 196.

114. *See* BURKE, GM, *supra* note 13, at 33; BURKE, LASA, *supra* note 13, at 14 (calling the “second-level aspect of human symbolism” our use of “words about words

metaphors that create confusion and intensify abstraction; used appropriately, literary devices can help achieve better clarity and new understanding.<sup>115</sup> Consider that metaphor by definition is not a comparison between two obviously similar things but between two “distinctly different” things that nevertheless have some crucial aspect in common.<sup>116</sup> Metaphor and all tropes require an active audience and thereby give that audience credit: the reader or hearer recognizes a disjunction and has to slow down and work through potential meanings to reconcile that disjunction.<sup>117</sup> A rhetorical critic can similarly explore a subject through various tropes—including irony, which is a trope of incongruities—to gain new perspectives on that subject.<sup>118</sup> This Subpart therefore summarizes Burke’s four master tropes of metaphor, metonymy, synecdoche, and irony as critical tools that achieve “perspective by incongruity.”<sup>119</sup>

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(as with the definitions of a dictionary”); Burke, *Dramatism*, *supra* note 44, at 339 (writing that any symbol system that describes the nonsymbolic must speak of things in terms of what they are not).

115. See generally T. Bahti & J. C. Mann, *Trope*, in THE PRINCETON ENCYCLOPEDIA OF POETRY & POETICS 1463, 1464 (Roland Greene & Stephen Cushman eds., 4th ed. 2012) (citing RICHARDS, *supra* note 95) (“[M]etaphor allows two or more ideas to be carried by a single word or expression” and that the meaning “result[s] from their ‘interaction’ on the basis of a relation . . .”). See also W. Martin, *Metaphor*, in THE PRINCETON ENCYCLOPEDIA OF POETRY & POETICS, *supra*, at 863, 863 (calling metaphor “[a] trope . . . in which a word or phrase is shifted from its normal uses to a context where it evokes new meanings”); Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 279 (2011) (“Conceptual metaphor is equally effective for understanding and reasoning about the abstract concepts that often underlie legal arguments.”).

116. ABRAMS & HARPHAM, *supra* note 94, at 133.

117. See WAYNE C. BOOTH, A RHETORIC OF IRONY 10–12 (1974) (describing how irony functions when the reader rejects a literal meaning and then searches for alternatives that are “more secure”); see also Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45, 57 (2016) (“[T]ropes depend upon rhetorical identification for their effectiveness: the audience recognizes the outsized distortion, questions whether the author intends it as true, and then attempts to resolve the ambiguity by finding alternative meanings.”); see, e.g., BURKE, ATH, *supra* note 13, at 249–50 (“[The lawyer’s] tactics can assist us to understand the world only insofar as we know how to discount them by considering the *interests* behind his caricature. We understand the true proportions of a situation not on the basis of the work itself, but by making allowances for the planned disproportion.”).

118. See BURKE, GM, *supra* note 13, at 503 (employing tropes as a critical tool for “the discovery and description of ‘the truth’”).

119. BURKE, PC, *supra* note 13, at 90 (writing that perspective by incongruity involves “taking a word usually applied to one setting and transferring its use to another setting,” thereby “violating the ‘proprieties’ of the word in its previous linkages” to “exemplify[] relationships between objects which our customary rational vocabulary has ignored”); see also ANN GEORGE, KENNETH BURKE’S *PERMANENCE AND CHANGE: A CRITICAL COMPANION* 30 (2018) (calling perspective by incongruity “an

Burke calls metaphor “perspective,” a “device for seeing something *in terms of* something else.”<sup>120</sup> Metaphor “brings out the thisness of a that, or the thatness of a this.”<sup>121</sup> It therefore creates a transaction between contexts: by mapping a new concept on top of another concept that it already knows, the audience comes to understand the new concept.<sup>122</sup>

Because all four tropes involve comparison (and, simultaneously, contrast), the other three tropes are “species” of metaphor.<sup>123</sup> Take metonymy, which is “the *reduction* of some higher or more complex realm of being to the terms of a lower or less complex realm of being.”<sup>124</sup> For example, emotion is a complex concept, yet we can reduce that concept to a physical organ of the body—the heart—as a more concrete expression.<sup>125</sup> In a sense, metonymy is merely a type of metaphor because it compares two seemingly unlike things; however, metonymy also has a role in resurrecting dead metaphors.<sup>126</sup> All language is “metaphorical extension”: as humans develop “incorporeal, invisible, and intangible” ideas, we borrow words from the realm of the “corporeal, visible, and tangible.”<sup>127</sup> As the “original corporeal reference is forgotten” over time, the word for the intangible concept becomes a dead metaphor.<sup>128</sup> Metonymy thus functions to “reverse” the metaphorical extension “back from the intangible into a tangible equivalent.”<sup>129</sup>

A “reduction is [also] a *representation*,” with “the act of perception” equivalent to “the thing perceived”; thus, metonymy leads to a consideration of synecdoche.<sup>130</sup> Synecdoche means to substitute the “part for the whole, whole for the part, container for the contained, sign for the thing signified, material for the thing made, . . . cause for

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overarching term for a series of critical methodologies and rhetorical strategies designed to overcome pious resistance to social change”).

120. BURKE, GM, *supra* note 13, at 503.

121. *Id.*

122. See Berger, *supra* note 95, at 955; see also Van Patten, *supra* note 98, at 299.

123. ABRAMS & HARPHAM, *supra* note 94, at 134 (“Some tropes, sometimes classified as species of metaphor, are more frequently and usefully given names of their own.”); see BURKE, GM, *supra* note 13, at 503.

124. BURKE, GM, *supra* note 13, at 506.

125. See *id.*

126. See ABRAMS & HARPHAM, *supra* note 94, at 134 (“Many dead metaphors, however, are only moribund and can be brought back to life.”).

127. BURKE, GM, *supra* note 13, at 506.

128. *Id.*

129. *Id.*

130. *Id.* at 507.

effect, effect for cause, genus for species, species for genus, etc.”<sup>131</sup> Two examples are referring to “‘ten *hands*’ for ten workers, or ‘a hundred *sails*’ for ships and, in current slang, ‘wheels’ to stand for an automobile.”<sup>132</sup> These examples suggest how metonymy differs from synecdoche. With the former, the substituted image is independent of the subject that it represents, and that subject is often an abstract concept that is given a tangible presence through a concrete term (thus, the heart is independent of love but gives a corporeal representation for it).<sup>133</sup> With synecdoche, by contrast, the relationship is direct, so that the hand and the sail are each physical components of men and of ships.<sup>134</sup> Further, these representations suggest an essential or important feature of each: the hand performs the work, the sail propels the ship.<sup>135</sup> Synecdoche thus implies an “integral relationship, a relationship of convertibility, between the two terms,” or a “connectedness between two sides of an equation” with each part being equal.<sup>136</sup>

While individual statements can be ironic, so that “the meaning that a speaker implies differs sharply from the meaning that is ostensibly expressed,” Burke takes a broader view that is more like structural irony.<sup>137</sup> “Irony arises when one tries, by the interaction of terms upon one another, to produce a development which uses all the terms.”<sup>138</sup> Irony is a “perspective of perspectives,” a dialectic that “aims to give us a representation by the use of mutually related or interacting perspectives—and this resultant perspective of perspectives will necessarily be a reduction . . . .”<sup>139</sup> In other words, irony subsumes the other tropes within it, and “none of the

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131. *Id.* at 507–08.

132. ABRAMS & HARPHAM, *supra* note 94, at 135.

133. See Sheila Davis, *Metonymy*, in ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 444, 444 (Theresa Enos ed., 1996).

134. See Sheila Davis, *Synecdoche*, in ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE *supra* note 133, at 712, 712.

135. See Halper, *supra* note 103, at 39 n.54 (“Synecdoche . . . assumes an entity and a part that represents it; in the part, the essential attribute of the whole is present.”).

136. BURKE, GM, *supra* note 13, at 508–09.

137. See ABRAMS & HARPHAM, *supra* note 94, at 186 (writing that, with structural irony, “the author, instead of using an occasional verbal irony, introduces a structural feature that serves to sustain a duplex meaning and evaluation throughout the work”).

138. BURKE, GM, *supra* note 13, at 512 (emphasis omitted).

139. *Id.* at 503.

participating ‘sub-perspectives’ can be treated as either precisely right or precisely wrong. They are all voices, or personalities, or positions, integrally affecting one another.”<sup>140</sup>

This Subpart closes by recognizing an irony of law. The same type of manipulation of tropes that creates bogus identifications and makes the law abstract—the casuistic stretching of concepts based on idealizations—can, in the hands of a critic, be a “creative force[]” to help embody those ideals in the material world.<sup>141</sup> The Article in Part IV, *infra*, develops this potential for sustainable development. Before considering correctives, however, it is necessary first to explore the rhetorical shortcomings of the concept of sustainable development, which the next Part takes up.

### III. A RHETORICAL CRITIQUE OF SUSTAINABLE DEVELOPMENT: TERMINOLOGICAL IDENTIFICATION AND MATERIAL DIVISION

This Part attempts to answer (in the context of sustainable development) a question posed by one Burkean scholar: “what does it mean, then, when strategic identification, at its most powerful, appears to obscure difference and inequality?”<sup>142</sup> Given the interrelationship of economic development with environmental harm and social issues like poverty, sustainable development emerged as the name for an approach to unite disparate areas of law and policy.<sup>143</sup> Like all terministic screens, sustainable development colors perceptions about material reality; given the complexity of the challenges it purports to address, however, this coloring has led to harmful consequences. For example, law- and policy-makers often reach agreement only “in principle,” thus touting success when in

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140. *Id.* at 512.

141. *Id.* at 174; *see also* Meisenhelder, *supra* note 73, at 50 (calling idealizations like “justice” a “creative force”); BURKE, *LASA*, *supra* note 13, at 440 (“[B]y its very nature, language also drives toward the ‘ultimate’ of itself. And the ultimate is ‘Justice,’ a kind of *completion* whereby laws are so universalized that they also apply to the lawgiver.”).

142. Kraemer, *Between*, *supra* note 69, at 160.

143. In explicating sustainable development through Burkean concepts, this Part assumes familiarity with the broad “story” of sustainable development, which has been re-told over the last thirty-five years through numerous books and articles. *E.g.*, Michael Burger et al., *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 ENV’T L. REP. NEWS & ANALYSIS 10342, 10356–57 (2013) (proposing sustainable development through three different “stories”); Lin, *supra* note 1, at 63–68 (describing the particular mythic structure of sustainable development).

reality the achievement is illusory. Further, existing concepts have been stretched into the mixed dead metaphors of the three pillars and the triple bottom line, abstractions that focus on seeming solutions while deflecting attention away from how the status quo is actually reinforced, thereby increasing harm to the environment and to the powerless.

#### A. Uneven Development, Fragmented Laws, and a Rhetorical Solution

Before the popularization of sustainable development, economic development was touted as a way to alleviate poverty and other inequities.<sup>144</sup> For example, the global trade order established by the General Agreement on Tariffs and Trade (GATT) expanded through membership by developing countries and World Trade Organization “initiatives to improve trade with and investment in those developing countries.”<sup>145</sup> In addition, by “focus[ing] on the specific strengths and issues within smaller blocs of countries,” regional trade and investment treaties sought to improve conditions by maximizing the comparative advantage of each member nation.<sup>146</sup>

While these treaties have increased overall standards of living, critics counter that some aspects of the environment and some populations became worse off. For example, the shift in the global South to export-oriented commerce disrupted small-scale farming and led to the pollution of indigenous people’s lands.<sup>147</sup> Further,

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144. See Berger-Walliser & Shrivastava, *supra* note 2, at 425 (claiming that advocates for impoverished people and nations were “most concerned with underdevelopment”). See generally John C. Dernbach, *Creating the Law of Environmentally Sustainable Economic Development*, 28 PACE ENV’T L. REV. 614 (2011).

145. Todd, *supra* note 56, at 622; see Gabrielle Marceau & Clément Marquet, *Practices and Ways of Doing Things in the World Trade Organization (WTO) Law*, in 15 INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 513, 513–14 (Hélène Ruiz Fabri & Burkhard Hess eds., 2019) (Ger.). See generally General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

146. Todd, *supra* note 56, at 622; see Orrin G. Hatch, *Continuing American Prosperity Relies on Free Trade*, 49 GEO. J. INT’L L. 553, 554 (2018) (“After all, a foundational tenet of free trade is comparative advantage, which essentially advances the notion that trade allows countries to focus on what they do relatively more efficiently than others, and therefore makes all countries better off through free trade.”).

147. See Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT’L L. 723, 795–97 (2011) (writing that the WTO has led to developing nations shifting their obligations toward the interests of industrialized

nations of the global North exported hazardous waste to and established manufacturing, mining, petroleum, and chemical-intensive agriculture in the global South, which resulted in significant environment damage.<sup>148</sup> These negative externalities were borne by the most marginalized: the poor who live near or work in hazardous facilities, rural inhabitants who are adjacent to agricultural or mining operations, and indigenous peoples whose traditional lands were used for timber and agricultural production and mineral extraction.<sup>149</sup> Harmful environmental and social consequences are not limited to the global South but include some communities in nations like the United States: consider as one example how the legacy of Jim Crow laws has resulted in de facto segregated communities with a disproportionate amount of waste disposal and hazardous industries compared to non-minority communities.<sup>150</sup>

The law was too fragmented to offer a means to alleviate these problems, however. While multinational corporations (MNCs) contributed either directly or indirectly to an outsized share of environmental and social harm,<sup>151</sup> trade treaties privileged commerce over environmental and humanitarian measures,<sup>152</sup> and investment

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countries).

148. *E.g.*, Gonzalez, *supra* note 106, at 154.

149. See Krista Harper & S. Ravi Rajan, *International Environmental Justice: Building the Natural Assets of the World's Poor*, in RECLAIMING NATURE: ENVIRONMENTAL JUSTICE AND ECOLOGICAL RESTORATION 327, 332–36 (James K. Boyce et al. eds., 2007) (listing environmental injustices within nations to include class; race, ethnicity, and nationality; urban and rural differences; age; and gender); Rebecca Tsosie, *Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity*, 25 J. ENV'T L. & LITIG. 7, 9–10 (2010) (claiming that Latin American nations give commercial enterprises timber and mineral rights to native land that results in destruction of that land).

150. See Robert Benford, *The Half-Life of the Environmental Justice Frame: Innovation, Diffusion, and Stagnation*, in POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT 37 (David Naguib Pellow & Robert J. Brulle eds., 2005); Andrea Giampetro-Meyer & Nancy Kubasek, *Harvey: Environmental Justice and Law*, 31 FORDHAM ENV'T L. REV. 37, 42–43 (2020) (discussing “historic segregation” in cities like Houston, Texas).

151. See Markus W. Gehring & Avidan Kent, *International Investment Agreements and Sustainable Development: Future Pathways*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 561, 562 (Shawkat Alam et al. eds., 2012) (recognizing that transnational corporations promote some aspects of sustainable development but have also been accused of “violations of a wide range of human rights” and adverse effects on the environment); Berger-Walliser & Shrivastava, *supra* note 2, at 427, 429 (“The rise in ecological degradation has paralleled an increase in the scale and severity of ecological crises caused by private-sector actions,” specifically “an immensely interdependent system of corporate industrial actions”).

152. *E.g.*, Elisa Morgera, *Multinational Corporations and International*

treaties reinforced the protections for investors (who had already received favorable treatment via concession agreements).<sup>153</sup> Further, “underlying issues of compatibility based on goals, structure, and implementation” among regulatory regimes have resulted in the WTO rarely upholding environmental protection measures that impeded trade.<sup>154</sup> And while nations passed laws regarding environmental protection, civil rights, and worker safety, these laws often fell short.<sup>155</sup> Taking a United States example, adverse environmental impacts are not redressable as civil rights violations absent the near-impossible showing of discriminatory intent,<sup>156</sup> while environmental statutes typically do not provide for money damages or are difficult and costly to implement.<sup>157</sup> Indeed, the siting of environmental hazards in communities of color in the 1970s was not in violation of the law but instead facilitated by it: environmental statutes mandating capture resulted in that pollution going to minority neighborhoods, where zoning and other laws allowed easier siting of hazardous waste.<sup>158</sup>

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*Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 151, at 189, 189 (writing that trade and investment treaties shield United States companies from liability for harm caused by their activities to the environment and the people who live there).

153. See George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 (2013); Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 125–26 (2019).

154. Mukta Batra & Namit Bafna, *Renewable Energy: The WTO's Position on Local Content Requirements*, 39 ENERGY L.J. 401, 418 (2018).

155. See Todd, *supra* note 56, 618–20.

156. See Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 510–11 (2018); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 829–30 (2018).

157. See Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1340–49 (2016) (describing shortcomings of CERCLA). The United States is not alone in having environmental statutes that fall short. See Katherine M. Bailey, Note, *Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study*, 16 GEO. INT'L ENV'T L. REV. 323, 324–30 (2004) (writing that “corruption, incompetence, and a tradition of exclusion” in Mexico’s executive branch—which controls agencies like the Federal Environmental Protection Agency (PROFEPA)—combined with a “flaccid judiciary” resulted in non-enforcement of Mexican environmental laws following the passage of the North American Free Trade Agreement (NAFTA)).

158. See DANIEL FABER, CAPITALIZING ON ENVIRONMENTAL INJUSTICE: THE POLLUTER-INDUSTRIAL COMPLEX IN THE AGE OF GLOBALIZATION 5 (2008); Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995 (1992) (highlighting the irony that the disproportionate siting of hazardous facilities in minority neighborhoods is not a failure of environmental law but instead a success

Popularized in the 1987 publication of *Our Common Future*—more commonly called the Brundtland Report—the concept of “sustainable development” offered a higher-order term that was more remote than economic, environmental, or social issues (and their laws) and thus could encompass all three.<sup>159</sup> Phrased differently, three areas of existing law were stretched to fit within an idealization that called for the erection of three pillars and the balancing of a triple bottom line.<sup>160</sup> This new term had the potential to unite diverse interests by providing a vehicle by which stakeholders could identify with each other.<sup>161</sup> Sustainable development combines two opposing concepts—the first focused on preservation, the second on change<sup>162</sup>—an irony that forces the audience to reconcile the disparity.<sup>163</sup> While development is part of improving the quality of life of the poor, the modifier “sustainable” acts as a check to ensure that development occurs in ways that protect the environment.<sup>164</sup> The seeming “guarantee” of environmental protection and social and economic development makes it “little wonder that politicians, policy-makers and many academics alike have been so attracted to such an

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because, “[w]hile we may decry the *outcome*, the laws are working as they were designed to work”); see also David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGY L.Q.* 443, 469 (2006) (calling “many” environmental justice concerns lawful pollution attributable to private sector actions).

159. See Berger-Walliser & Shrivastava, *supra* note 2, at 423 (calling the Brundtland Report “a watershed event because it set the stage for the establishment of the current sustainable development paradigm”); *id.* at 425 (“The Brundtland Report synthesizes sustainability in terms of the ‘Three E’s’: environment, economy, and equity.”).

160. See *supra* text accompanying notes 82–92.

161. Guzelian & Todd, *supra* note 10, at 10 (citing BURKE, GM, *supra* note 13, at 512; BURKE, PC, *supra* note 13, at 90) (claiming that the “positive effect” of the ironic term “sustainable development” was “altering the perspectives of seemingly opposed stakeholders so that they now agree on a common goal of development that balances the triple bottom line without sacrificing the needs of future generations”).

162. Barbara Stark, *Sustainable Development and Postmodern International Law: Greener Globalization?*, 27 *WM. & MARY ENV'T L. & POL'Y REV.* 137, 151–52 (2002) (adopting a postmodern perspective to view sustainable development as the merger of two meta-narratives, environmentalism and economic development, that creates “an intentional oxymoron, a paradox” where “one term endlessly undoes the other”).

163. See *supra* text accompanying note 117.

164. Dernbach, *supra* note 144, at 617–22 (arguing that, because “sustainable” is an adjective that modifies “development,” development must occur to improve the quality of life and standard of living of people in poor countries, but it must occur in a way that protects and restores the environment); see Guzelian & Todd, *supra* note 10, at 11 (calling the adjective “sustainable” a “check on unfettered economic development”).

apparently simple juxtaposition.”<sup>165</sup>

B. Sustainable Development as a Terministic Screen: The Dubious Identification of Agreeing “in Principle”

In sharing “common sensations, concepts, images, ideas, attitudes,”<sup>166</sup> these stakeholders seemed to become consubstantial with one another—until one tries to determine what, precisely, was the “substance” being shared. Uniting discrete concepts required casuistic stretching as three existing areas of law became housed within an abstraction.<sup>167</sup> Getting agreement on an abstract goal where everyone wins is easy; more difficult is gaining adherence on detailed, substantive business practices, policy enactments, and legal change.<sup>168</sup> The terministic screen of sustainable development was a selection that reflected one reality while simultaneously deflecting attention from issues that would be apparent if discussed in other terms.<sup>169</sup> As this Subpart shows, reaching agreement “in principle” created terminological blinders so that stakeholders failed—and continue to fail—to see that they do not in fact agree on much substance.

With its list of twenty-seven principles, the Rio Declaration offers an apt starting place to address the pitfalls of “substantial” identification via agreements “in principle.”<sup>170</sup> The Rio Declaration sought to build upon the Brundtland Report and the 1972 Stockholm Report of the United Nations Conference on the Human

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165. Duncan French, *Sustainable Development*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 51, 51 (Malgosia Fittzmaurice, David M. Ong, & Panos Merkourris eds., 2010); see Viñuales, *supra* note 4, at 3–4 (discussing the effectiveness of sustainability as a concept “to bring all States and other stakeholders to the negotiating table”).

166. BURKE, RM, *supra* note 13, at 21.

167. See *supra* text accompanying notes 84–93.

168. See Robin Kundis Craig, *Climate Change Means the Death of Sustainability*, in *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 ENV'T L. REP. 10354, 10354 (2013) (“To talk about sustainability in the abstract is to philosophize, not to pursue meaningful policies and laws.”); Guzelian & Todd, *supra* note 10, at 3 (“Enamored by this shared desire for positive outcomes, stakeholders might overlook the lack of enforceable standards or the concept’s overly broad scope and thus fail to see the downsides of supposed win-win-win solutions.”).

169. See *supra* text accompanying notes 51–63.

170. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*] (listing twenty-seven principles that nations should follow to achieve sustainable development).

Environment.<sup>171</sup> The Rio Declaration opens by embracing unity through “the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people.”<sup>172</sup> Even a cursory review, however, reveals how this unification is illusory. Some of the principles contradict each other, such as Principle 12 calling for transboundary environmental problems to “be based on an *international consensus*,” while Principle 13 commands that “*States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.*”<sup>173</sup> Principle 12 is problematic for the additional reason that it reinforces the primacy of the economic order over environmental protection and social equity. For example, it adopts (in a near-quote) the chapeau of GATT Article XX, which makes it difficult for nations to enact environmental and health protection measures.<sup>174</sup> Indeed, in an Orwellian move, this Principle promotes development as the means to *increase* environmental protection: “States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.”<sup>175</sup>

One particularly problematic example is how the Rio Declaration articulates the polluter pays principle. Consider how it embeds the expression “in principle” within the verb, which diminishes the force

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171. Sumudu Atapattu, *From “Our Common Future” to Sustainable Development Goals: Evolution of Sustainable Development Under International Law*, 36 *WIS. INT’L L.J.* 215, 221–22 (2019); see U.N. Conference on the Human Environment, *Stockholm Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 5, 1972) [hereinafter *Stockholm Report*].

172. *Rio Declaration*, *supra* note 170, annex I.

173. Compare *Rio Declaration*, *supra* note 170, Principle 12 (“Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an *international consensus*.” (emphasis added)), with *id.*, Principle 13 (“*States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.*” (emphasis added)).

174. See Batra & Bafna, *supra* note 154, at 406 (writing that the narrow exceptions and chapeau of Article XX “expose environmental measures with market impacts . . . to WTO disputes”). Compare *Rio Declaration*, *supra* note 170, Principle 12 (“Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”), with GATT, *supra* note 145, art. XX (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . .”).

175. *Rio Declaration*, *supra* note 170, Principle 12.

of the entire sentence: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, *in principle*, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”<sup>176</sup> The agent of harm therefore bears the costs “in principle,” so the polluter is effectively let off the hook.<sup>177</sup> Another limitation is that “[n]ational authorities” should give “due regard to the public interest.”<sup>178</sup> The “public” is a “we” word, perhaps even a dead metaphor since “public” lacks a tangible referent.<sup>179</sup> This abstraction has practical consequences when plaintiffs attempt to force polluters to pay: in common law countries like the United States, the “legal fiction is built into the very name ‘public nuisance,’”<sup>180</sup> while “private nuisance merely hides the word ‘public’ in the word ‘social’ when it balances the social utility of the defendant’s operation against the harm caused . . . .”<sup>181</sup> The polluter pays principle thereby reinforces social hierarchy because the “hypothetical public” suffers none of the harms inflicted on an actual community that reaps little if any of the benefits.<sup>182</sup> Indeed, the polluter pays principle maintains the status quo because, among the three pillars, commerce has a higher place than the environment and the victims of pollution: national authorities must internalize the costs of pollution “without distorting international trade and investment.”<sup>183</sup>

Rather than aim for greater specificity, later pronouncements about sustainable development like the Johannesburg Declaration on

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176. *Id.* Principle 16 (emphasis added).

177. See Todd, *supra* note 56, at 625 (explaining how “the subject of the clause—the polluter that actually causes harm—bearing the costs ‘in principle,’ . . . is another way of saying not at all”).

178. *Rio Declaration*, *supra* note 170, Principle 16.

179. See BURKE, GM, *supra* note 13, at 305–06, 506; see generally Jeremy Knee, *Rational Electricity Regulation: Environmental Impacts and the “Public Interest”*, 113 W. VA. L. REV. 739 (2011) (exploring the vagaries of the concept of the “public interest” in utilities regulation).

180. Todd, *supra* note 56, at 626–27 (citing Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803, 826 (2010)).

181. *Id.* at 627; see Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 ENV’T L. 557, 568 (2020).

182. Todd, *supra* note 56, at 627; see Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENV’T L. 178, 205–08 (2012) (citing studies that show that the economic benefits of environmentally harmful activities flow primarily out of the communities where those activities occur).

183. *Rio Declaration*, *supra* note 170, Principle 16.

Sustainable Development—which included representatives from business and social and environmental organizations along with governments—increased abstraction to widen the circle of identification.<sup>184</sup> The Johannesburg Declaration increases the twenty-seven principles to thirty-seven statements that merely proclaim various ways in which the collective “we” agree. Some of these agreements are vague, as with No. 29: “We agree that there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment.”<sup>185</sup> A need exists, as well as a regulatory environment in which accountability “*should* take place,” yet there is not even a suggestion about *how* to hold corporations accountable. Other statements are so broad as to be meaningless, such as No. 35: “We commit ourselves to act together, united by a common determination to save our planet, promote human development and achieve universal prosperity and peace.”<sup>186</sup> Statements like this empower stakeholders to affirm (truthfully) that an agreement exists, yet they agree only “to commit” to united action regarding the most aspirational of all goals: saving the planet and achieving peace.<sup>187</sup> Rather than articulate specific points of agreement, these UN-sponsored declarations “paper over” difference with euphemisms like “in principle”; modifiers like “together,” “common,” and “universal”; and repetition of the collective pronoun “we.”<sup>188</sup>

One might argue that the Stockholm, Rio, and Johannesburg instruments are merely aspirational, with no greater intent than to influence law- and policy-makers.<sup>189</sup> The problem, however, is that these abstractions are referenced in treaties, the opinions of international dispute bodies, and in some national laws.<sup>190</sup> For

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184. See French, *supra* note 165, at 53; World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002) [hereinafter *Johannesburg Declaration*] (“We recognize that poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are the overarching objectives of and essential requirements for sustainable development.”).

185. *Johannesburg Declaration*, *supra* note 184, art. 29.

186. *Id.* art. 35.

187. Guzelian & Todd, *supra* note 10, at 21 (writing that vague commitments allow negotiators to claim that an agreement exists even if it lacks specifics).

188. See Ellis, *supra* note 8, at 66.

189. See Atapattu, *supra* note 171, at 229–30.

190. See, e.g., *id.* at 235–38 (discussing how some of the principles articulated in the Rio Declaration are referenced in treaties and the opinions of tribunals, enacted

example, the North American Agreement on Environmental Cooperation mentions the Stockholm Report and Rio Declaration as well as “sustainable development”—but only in the preamble rather than in substantive provisions.<sup>191</sup> At least one component principle of sustainable development has hardened into customary law—environmental impact assessment, as recognized by the International Court of Justice in the Pulp Mills on the River Uruguay case<sup>192</sup>—but, except for inter-state procedural commitments, the others have uncertain legal status.<sup>193</sup> Sustainable development has not been implemented in a comprehensive and systematic way into law,<sup>194</sup> yet the continuing references “direct the attention” to the illusion that the law has embraced—or at least has laid a foundation to embrace—sustainable development in a concrete way.<sup>195</sup>

This continual emphasis ensures that discussions about law and

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in practice by nations, and discussed by scholars); Lin, *supra* note 1, at 64–65 (giving examples of references to sustainability in international and national laws).

191. North American Agreement on Environmental Cooperation, preamble, Sept. 14, 1993, 32 I.L.M. 1480 (1993) (opening that the parties are “CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations” and “REAFFIRMING the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992”); see French, *supra* note 165, at 57 (writing that mention of sustainable development in treaties is primarily in preambles and early “purpose” articles). The NAAEC was replaced by Chapter 24 of the United States Mexico Canada Agreement, which makes no mention of any international declarations, plus the Preamble to that treaty states that the parties resolve to “further the aims of sustainable development.” Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., arts. 0, 24, Nov. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

192. Pulp Mills on the River of Uruguay (Arg. v. Uru.), Rejoinder of Uruguay, 2008 I.C.J. Rep. 1, ¶ 5.70 (July 29).

193. See, e.g., Atapattu, *supra* note 171, at 235 (writing that many “procedural components” of sustainable development “have become binding on states”); Arnold Kreilhuber & Angela Kariuki, *Environmental Rule of Law in the Context of Sustainable Development*, 32 GEO. ENV’T L. REV. 591, 597 (2020) (writing that “legal scholars continue to debate whether the precautionary principle has any legally-binding force”).

194. Guzelian & Todd, *supra* note 10, at 13. See French, *supra* note 165, at 53 (writing that nations have responded positively to the “rhetoric” of reports and declarations about sustainable development but that “implementation remains an acute problem”); Perkins, *supra* note 6, at 344 (“Working with sustainability is challenging because its substance is unlike that of most areas of law practice; statutes devoted to sustainability are few, and there is no uniform law of sustainability.”).

195. BURKE, LASA, *supra* note 13, at 45 (internal citations omitted).

policy will be in these terms so that competing terms and other approaches are not considered.<sup>196</sup> Take as an example the African Continental Free Trade Area (AfCFTA), which was signed by fifty-four of the fifty-five African Union members.<sup>197</sup> The AfCFTA seems to establish a legal framework for the implementation of sustainable development<sup>198</sup> since it mentions this term in its objectives and makes specific reference to topics covered by the United Nations Sustainable Development Goals (SDGs) like gender equality and food security.<sup>199</sup> Any optimism generated by the broad agreement with sustainable development is not warranted in light of the obstacles to implementation: namely, numerous specific acts that must gain the adherence of nations with different interests. To achieve “full alignment with the seventeen SDGs and their 169 goals and 230 targets,” member nations will need to negotiate “strategies to address food security, health . . . , and environment and climate change, along with binding rules on gender, labor, and other aspects of human rights.”<sup>200</sup> This would be difficult enough with a compact regional trade area, but the AfCFTA includes fifty-four signatory nations of various sizes, economies, and resources.<sup>201</sup> Further, many of these nations are developing if not among the least developed and thus have “weak institutions” with which to address their serious “environmental injustice, human rights abuses and violation of labour

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196. See *supra* text accompanying notes 58–63.

197. *About AfCFTA*, AFRICAN CONTINENTAL FREE TRADE AREA, <https://au.int/en/cfta> (last visited Mar. 21, 2022).

198. Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 *Geo. J. Int'l L.* 753, 763 (2020).

199. Guzelian & Todd, *supra* note 10, at 20 (citing Kuhlmann & Agutu, *supra* note 198, at 762).

200. Kuhlmann & Agutu, *supra* note 198, at 762–63.

201. See, e.g., Nsongurua J. Udombana, *A Step Closer: Economic Integration and the African Continental Free Trade Area*, 31 *Duke J. Comp. & Int'l L.* 1, 86–87 (2020) (“A continent that is moving towards economic integration must have common positions on issues that are vital to sustainable development and prosperity. Certain matters cannot be left to the discretion of individual Member States.”); Prinesha Naidoo, *As World Wavers on Free Trade, Africa Embraces It*, *WASH. POST*, Aug. 26, 2020 (claiming that a potential hitch in negotiations is getting Nigeria and South Africa, the continent’s largest economies, to eliminate about 90% of its tariff categories over five years); Landry Signe, *Africa’s Big New Free Trade Agreement, Explained*, *WASH. POST*, Mar. 29, 2018 (listing challenges to the AfCFTA like the “heterogeneous size of African economies, the existence of numerous bilateral trade agreements with the rest of the world, overlapping REC memberships, divergent levels of industrial development and varying degrees of openness”).

rights.”<sup>202</sup> Shining the spotlight on general provisions about sustainability within a framework treaty casts into shadow the material reality that fifty-four signatories with different capabilities and objectives will have to reach agreement on dozens of goals and hundreds of targets, thereby making it more difficult to find solutions because there is no candid recognition of the points of disagreement.<sup>203</sup>

### C. The Three Pillars and Triple Bottom Line as Mixed Dead Metaphors

Terministic screens do more than mask legitimate points of contention: the choice of one set of terms deflects attention away from alternate terms,<sup>204</sup> which can “deepen exclusion” while suggesting “greater inclusiveness.”<sup>205</sup> The dominant terms for sustainable development are variants of a combination of economics-environment-society, often expressed by the metaphors of the three pillars or the triple bottom line.<sup>206</sup> Both are mixed dead metaphors. They are mixed with each other, with physical pillars conveying the same meaning—and thus being used interchangeably—with an expression for financial statements.<sup>207</sup> Further, the triple bottom line is its own mash-up that forces unquantifiable environmental and equitable concerns onto financial reporting,<sup>208</sup> with confusion

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202. Collins C. Ajibo, *African Continental Free Trade Area Agreement: The Euphoria, Pitfalls, and Prospects*, 53 J. WORLD TRADE 871, 890–91 (2019); see Udombana, *supra* note 201, at 56 (“Thirty-three of the 47 countries currently ranked as LDCs are from Africa.”).

203. See *supra* text accompanying notes 106–13; see also Gehring & Kent, *supra* note 151, at 564 (writing that “sustainable development remains challenging to include in new [international investment agreements]”).

204. See BURKE, LASA, *supra* note 13, at 44–45.

205. See Kraemer, *Between*, *supra* note 69, at 160 (lamenting that “we obscure difference even as we revel in difference” and “deepen exclusion” though seeming to find “greater inclusiveness”).

206. Jonathan Rosenbloom, *Sustainability: Defining It Provides Little Value, But Its Meaning Is Essential*, 43 ENV'T L. REP. 10344, 10345 (2013) (“Common generalized definitions include the triple bottom line of ‘economic prosperity, environmental quality, and social justice[.]’”).

207. See JACQUES, *supra* note 2, at 116 (claiming that the three P’s of people, profits, and planet and the three E’s of ecology, economy, and equity are related to the triple bottom line).

208. See *id.* at 116–17 (characterizing the triple bottom line as “a qualitative accounting framework” that “ask[s] for decision-makers at all levels to think about more than economic matters, but also to include often non-monetary costs and benefits that make the world more or less livable”).

resulting because important terms like “materiality” have different meanings depending upon what is being analyzed.<sup>209</sup> And the metaphor of a pillar is no better, having become as cliché as the “leg” of a table through expressions like “pillar of the community” and as descriptors for mundane items like candles.<sup>210</sup>

In Burkean terms, these metaphors demonstrate how law is the efficient codification of custom, meaning that the terms direct the attention toward a figurative unity while simultaneously deflecting attention away from the division between each “pillar” or inherent in the call to balance three factors on one line.<sup>211</sup> Deconstructing that identification, one sees that the metaphors create nothing new but instead provide cover for maintaining the status quo—after all, the triple bottom line modifies a concept from business, thus subtly reinforcing its primacy for sustainable development.<sup>212</sup> The focus on three pillars and a triple bottom line therefore makes it harder to see negative consequences.<sup>213</sup>

Take as an example PPPs for food and agriculture, which promise the strength of three co-equal pillars: to lift millions of people out of poverty, PPPs connect developing nations with private sector firms to promote greater efficiency, to build out infrastructure, and to enhance technical capacities in production.<sup>214</sup> Potential benefits for local

209. See Jebe, *supra* note 7, *passim*.

210. Some commentators have adopted the cliché “legs” when referring to the three areas of economy, economics, and social, sometimes mixing “leg” and “line.” See, e.g., Paulette L. Stenzel, *The Pursuit of Equilibrium as the Eagle Meets the Condor: Supporting Sustainable Development Through Fair Trade*, 49 AM. BUS. L.J. 557, 592 (2012) (“This Triple Bottom Line provides a starting point for developing ways to identify and monitor actions that contribute to the three legs of sustainability: economy, social equity, and environment.”); *id.* at 594 (“In short, the legs of the Triple Bottom Line are interconnected.”).

211. See *supra* Part II.B.

212. See ANDREW SAVITZ, TALENT, TRANSFORMATION, AND THE TRIPLE BOTTOM LINE: HOW COMPANIES CAN LEVERAGE HUMAN RESOURCES TO ACHIEVE SUSTAINABLE GROWTH (2013) (characterizing “profitability” as the traditional bottom line and of the need to expand the “traditional financial bottom line”); see also Burger et al., *supra* note 143, at 10356 (describing one view of sustainability as “a deceptive story that perpetuates existing power dynamics”).

213. See, e.g., Lin, *supra* note 1, at 66 (“Adoption of the concept [of sustainable development] is potentially counterproductive because it masks continuing harm and reinforces and perpetuates existing power dynamics.”); Viñuales, *supra* note 4, at 7 (writing that sustainable developments “obscures” the “tradeoffs between environmental, social and economic considerations”).

214. See Guzelian & Todd, *supra* note 10, at 25 (citing Susan H. Bragdon & Carly Hayes, *Reconceiving Public-Private Partnerships to Eradicate Hunger: Recognizing Small-Scale Farmers and Agricultural Biological Diversity as the Foundation of Global*

agricultural practices include maintaining agricultural biodiversity and promoting nutrient-rich crops.<sup>215</sup> The language of PPPs reinforces the union of economic development, environmental protection, and reduced poverty, but that myth masks how the structure of PPPs creates conflicts of interest and favors multinational agribusiness and wealthy entrepreneurs.<sup>216</sup> While those already in power are entitled to benefit from these arrangements, they should not be the exclusive beneficiaries. Yet PPPs grant multinational agriculture companies a “free pass” to access land along with favorable concessions from national governments, and they favor the global South’s “large farming operations that already exist” because of the “inherent difficulties” of dealing with dispersed small-scale farmers (SSFs).<sup>217</sup>

As to those SSFs and the goals of biodiversity and nutrient-rich crops, a “review of PPPs’ successes, as measured by their contribution to achieving development goals, conserving biodiversity, protecting SSF livelihoods, and increasing the supply of affordable and nutrient-dense food, found them to be more harmful than helpful.”<sup>218</sup> For example, the low-cost and sometimes free grant of land to Northern-tier agribusiness entities leaves less land for Southern-tier SSFs, a problem compounded by the fact that most of them do not have legally-registered title and so may be displaced altogether.<sup>219</sup> Also, many of these programs require the adoption of “biotechnologies and industrial inputs” over local methods and farmers’ existing seed

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*Food Security*, 49 GEO. J. INT’L L. 1271, 1297–305 (2018)).

215. See Susan H. Bragdon, *Living Links Connecting the United Nations Sustainable Development Goals: Small-Scale Farmers and Agricultural Biodiversity*, 21 SAN DIEGO INT’L L.J. 155, 158 (2019) (“In addition to being essential for the resilience and stability of agricultural production systems and for our ability to adapt to climate change and other stressors, agricultural biodiversity is fundamental to the livelihoods, health and nutrition of billions.”).

216. See Guzelian & Todd, *supra* note 10, at 26–27; see also Bragdon & Hayes, *supra* note 214, at 1303–05 (warning of the “structural conflict of interest” among stakeholders in PPPs); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 1008–09 (2001) (discussing the widely divergent views on environment and development between stakeholders in the global North versus South).

217. Bragdon & Hayes, *supra* note 214, at 1297.

218. Susan H. Bragdon, *Global Legal Constraints: How the International System Fails Small-Scale Farmers and Agricultural Biodiversity, Harming Human and Planetary Health, and What to Do About It*, 36 AM. U. INT’L L. REV. 1, 47 (2020).

219. See Bragdon & Hayes, *supra* note 214, at 1298–1300; Guzelian & Todd, *supra* note 10, at 26.

systems.<sup>220</sup> SSFs must take out loans to cover these costs, but without guaranteed purchasers, they are often left indebted because they must sell their export-oriented crops in a local market where they “are not in demand.”<sup>221</sup> Such negative consequences should motivate stakeholders and academics to search for new approaches, yet metaphors like the “three pillars” are so entrenched that even critics cannot see beyond them: they continue to recommend PPPs in the misplaced hope that actual balance will flow from the high-order—and to date empty—promises.<sup>222</sup>

The triple bottom line metaphor is also problematic, particularly when it comes to measuring the sustainability of investments because, for example, there are no hard law standards for what constitutes a green bond<sup>223</sup> while “the substance . . . of ESG investing [is] essentially unregulated.”<sup>224</sup> This legal void has been filled by a

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220. Bragdon & Hayes, *supra* note 214, at 1300–03.

221. *Id.* at 1300–01; see Alison Hope Alkon, *Resisting Environmental Injustice through Sustainable Agriculture: Examples from Latin America and Their Implications for U.S. Food Politics*, in ENVIRONMENTAL INEQUALITIES BEYOND BORDERS: LOCAL PERSPECTIVES ON GLOBAL INJUSTICES 185, 190 (JoAnn Carmin & Julian Agyeman eds. 2011) (describing how formerly landless people take on loans to participate in Green Revolution projects, but then they drop out of these programs “because they could achieve neither subsistence nor profit” and so end up landless again but also “mired in debt”); Nancy Ehrenreich & Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1, 8–9 (2011) (writing that efficient farming methods have negative consequences “on domestic economies, food quality, worker safety, and the health of the environment”).

222. *E.g.*, Roland Bardy, *Can Foreign Direct Investment Contribute to Restoring Social Order?*, 12 U. ST. THOMAS L.J. 249, 267 (2016) (arguing that, for investment bank infrastructure projects in southern Africa, “what is socially responsible and environmentally sustainable has proved to also be financially and economically viable”); Bragdon, *supra* note 218, at 48 (“If PPPs are to be effective in achieving the SDGs and supporting the sustainable production of affordable and nutrient dense food, the private sector part of the partnership must focus on [small-scale farmers] as private actors, and not corporate agribusiness.”); see Fulton et al., *supra* note 3, at 10489 (“When the three pillars are conflated in decision-making processes, paralysis sets in because of analytical complexity, a lack of consensus about prioritizing between pillars, or issues that go beyond the jurisdiction or expertise of the deciding authority.”).

223. See Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 STAN. J. INT’L L. 1, 8 (2018).

224. Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1925–26 (2020) (calling “the substance of environmental, social, and governance considerations in ESG investing . . . essentially unregulated” and claiming that “what qualifies as ESG performance is unclear and contested”).

“patchwork” of private standards,<sup>225</sup> such as industry-wide ratings or certification schemes (like the Roundtable on Sustainable Palm Oil or the Equator Principles),<sup>226</sup> voluntary ratings via ESG factors established by entities like the Global Reporting Initiative or the various green bond indices like those sponsored by Bank of America Merrill Lynch or Barclays and MSCI,<sup>227</sup> and the codes of corporate social responsibility (CSR) formulated by individual companies.<sup>228</sup>

The result is a fragmented regulatory—or, more accurately, self-regulatory—environment of thousands of private governance mechanisms.<sup>229</sup> Commentators have described how some of these are rigorous because they weigh multiple factors and invite participation from numerous stakeholders.<sup>230</sup> Others, however, weigh fewer factors (or only one) or restrict input from environmental and

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225. Guzelian & Todd, *supra* note 10, at 12.

226. See Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 283–84 (2015); see also Elise Groulx Diggs, Mitt Regan, & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT’L L. 309, 335–37 (2019) (describing how the Equator Principles condition development loans on criteria like conducting environmental and social impact assessment and including stakeholders like indigenous peoples in the process); Melissa Schoeman, Note, *The Obvious Solution to Unsustainable Palm Oil: Why National Enforcement Remains A Necessary Mechanism Despite the Emergence of Alternate Regulatory Schemes*, 40 N.C. J. INT’L L. & COM. REG. 1085, 1096–97 (2015) (discussing the Roundtable on Sustainable Palm Oil, which brings together multiple stakeholders to establish criteria for the production of palm oil and palm oil products); EQUATOR PRINCIPLES ASSOCIATION, EQUATOR PRINCIPLES 4–6 (2020) (describing environmental and social factors); ROUNDTABLE FOR SUSTAINABLE PALM OIL, *About*, RSPO.ORG (last visited Feb. 14, 2022) (“The RSPO has developed a set of environmental and social criteria which companies must comply with in order to produce Certified Sustainable Palm Oil (CSPO). When they are properly applied, these criteria can help to minimize the negative impact of palm oil cultivation on the environment and communities in palm oil-producing regions.”).

227. See Park, *supra* note 223, at 27; Stenzel, *supra* note 210, at 592–93.

228. See Federico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation: Stock Exchanges as Regulators of ESG Factors Disclosure*, 19 WASH. U. GLOBAL STUD. L. REV. 167, 177–81, 184–92 (2020).

229. See Ellis, *supra* note 8, at 57; see also Park & Berger-Walliser, *supra* note 226, at 259–60; Fornasari, *supra* note 228, at 199 (“[T]he CSR and [socially responsible investing] approaches to ESG factors disclosure created a fragmented regulatory landscape, where different frameworks were elaborated and used, and where moral considerations were mixed with financial, business and marketing ones”).

230. See Jacobs & Finney, *supra* note 3, at 95–97 (describing five performance and indicates and explaining how the Global 100 accounts for them all); Park, *supra* note 223, at 25–26 (describing how the Climate Bonds Initiative has multiple criteria for certification and includes participation by non-investing stakeholders).

humanitarian groups.<sup>231</sup> Plus, there are several potential conflicts of interest: ratings providers are paid by the companies they rate, and some providers offer both ratings and consulting and other services.<sup>232</sup> With over \$1 trillion in ESG assets currently under management,<sup>233</sup> and with investors willing to pay a “greenium” for these assets,<sup>234</sup> the incentive exists for rating providers to work with companies to greenwash their image or for companies to seek out the easiest of the various sustainability measures.<sup>235</sup> After all, minimal compliance can maximize the financial return through offering lower rates for green bonds, adding sustainable holdings to a portfolio, and attracting ESG-interested investors.<sup>236</sup>

The façade of balance hides the reality that the financial bottom

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231. See Jacobs & Finney, *supra* note 3, at 95–97 (“Moreover, many of the most popular and easily identifiable sustainability designations consider only one of the five performance indicators.”).

232. See Jean Eaglesham, *Wall Street’s Green Push Exposes New Conflicts of Interest*, WALL ST. J. (Jan 29, 2022), [https://www.wsj.com/articles/wall-streets-green-push-exposes-new-conflicts-of-interest-11643452202?mod=hp\\_lista\\_pos3](https://www.wsj.com/articles/wall-streets-green-push-exposes-new-conflicts-of-interest-11643452202?mod=hp_lista_pos3).

233. See Simon Constable, *What Is Greenwashing? Here Is What Investors Need to Know*, WALL ST. J. (Nov. 8, 2020), <https://www.wsj.com/articles/what-is-greenwashing-here-is-what-investors-need-to-know-11604881371?page=4>; see also Reiser & Tucker, *supra* note 224, at 1922–23 (“At the start of 2020, the market offered investors roughly 300 ESG funds—a subset of the more broadly defined sustainable funds. This number represents huge growth (considering there were ninety ‘sustainable’ funds in 2014). Fund growth in this area outpaces growth in traditional mutual fund and exchange traded fund (ETF) markets.”).

234. See, e.g., Park, *supra* note 223, at 15 (Because “demand for green bonds has far outstripped supply,” the result is a “‘greenium’ in which green bonds sell at higher prices (*i.e.*, a premium) vis-à-vis comparable plain vanilla bonds.”).

235. See Guzelian & Todd, *supra* note 10, at 17; see also Jacobs & Finney, *supra* note 3, at 99–100; Park, *supra* note 223, at 36–37; Fabiana Negrin Ochoa & Dieter Holger, *How to Tell if a “Sustainable” Business Is “Greenwashing”*, WALL ST. J. (Oct. 10, 2020), [https://www.wsj.com/articles/how-to-tell-if-a-sustainable-business-is-greenwashing-11602342001?mod=article\\_inline](https://www.wsj.com/articles/how-to-tell-if-a-sustainable-business-is-greenwashing-11602342001?mod=article_inline); Jacobs & Finney, *supra* note 3, at 99 (writing that “many of the definitions, rankings, and ratings of sustainability do not require a company to take such broad and in-depth actions to receive a ‘certification’ of sustainability.”).

236. See Fornasari, *supra* note 228, at 175–76 (calling it “legitimate and indeed realistic to be doubtful about the real transformative force of CSR,” in part because “some business leaders embraced CSR and sustainability as a way of advertisement and legitimization”); see also *id.* at 228 (expressing “doubts” that voluntary indicators “can solve the technical problems underlying ESG disclosure”); Guzelian & Todd, *supra* note 10, at 14 (claiming that “the desire to attain a reputation or label as sustainable while still striving for maximum profits tempts private-sector actors to establish metrics that short the environmental or the social (or both)”); Ellis, *supra* note 8, at 66 (writing that sustainable development has been viewed “as a means to justify economic development at the expense of environmental protection and protection of human rights”).

line still matters the most, which thereby facilitates business as usual with harm to the environment and to people.<sup>237</sup> For example, several Japanese, European, and North American banks have sustainability pledges that preclude loans for projects that involve deforestation, yet they loaned over \$40 billion to Asian palm oil companies that cleared forests by burning, which not only released significant greenhouse gasses but also displaced indigenous peoples as well as endangered species like orangutans.<sup>238</sup> Also, large Brazilian companies like Vale (two deadly dam accidents), Petrobras (ties to a corruption scandal), and JBS (accusations of packaging beef on deforested areas) have recently enacted voluntary sustainability initiatives.<sup>239</sup> Given the imperative to attract ESG-conscious investment and financing, and with few if any legal consequences for failing to adhere to voluntary standards,<sup>240</sup> prudence dictates skepticism that these companies will abide.<sup>241</sup>

#### IV. A RHETORICAL CORRECTIVE: ADDITIONAL TROPES FOR NEW PERSPECTIVES ON SUSTAINABLE DEVELOPMENT

In light of the rhetorical challenges presented by sustainable development and its primary metaphors, this Part considers correctives that are based in rhetorical theory. After all, terministic screens are not necessarily good or bad but instead a necessary part of all language use.<sup>242</sup> Consider how the irony implicit in the

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237. See Donald K. Anton, *The “Thirty-Percent Solution” and the Future of International Environmental Law*, 10 SANTA CLARA J. INT’L L. 209, 215 (2013) (arguing that sustainable development has been gradually “co-opted by environmentally ambivalent or hostile agendas” into a philosophy for continued economic growth).

238. See Guzelian & Todd, *supra* note 10, at 17 (citing Hiroko Tabuchi, *How Big Banks Are Putting Rain Forests in Peril*, N.Y. TIMES (Dec. 3, 2016)).

239. See *id.* at 17–18 (citing Jeffrey T. Lewis & Paulo Trevisani, *Brazil’s Recent Past a Challenge to Winning ESG Credibility*, WALL ST. J. (Feb. 4, 2021), <https://www.wsj.com/articles/brazils-recent-past-a-challenge-to-winning-esg-credibility-11612450800?page=1>).

240. See Jacobs & Finney, *supra* note 3, at 100 (writing that “confusion provides companies with an opportunity to promote their supposed sustainable practices and products while not always meeting consumer or investor expectations.”); Park & Berger-Walliser, *supra* note 226, at 288 (writing that MNCs can enjoy the benefits of CSR without the corresponding responsibilities because of the lack of legal liability for greenwashing).

241. See Fornasari, *supra* note 228, at 175–76 (calling it “legitimate and indeed realistic to be doubtful about the real transformative force of CSR,” in part because “some business leaders embraced CSR and sustainability as a way of advertisement and legitimization”).

242. See *supra* text accompanying notes 49–57 for extensive discussion of

expression “sustainable development” helped to change entrenched attitudes about the separation of economic, environmental, and social concerns and to encourage cooperation in the quest for solutions.<sup>243</sup> Further, the three pillars and triple bottom line fail not because they are figurative expressions but because those particular metaphors increase abstraction. Employed critically, however, tropes can lead to better clarity and new understanding: rather than conceal differences, they can reveal the unexpected-yet-crucial similarities hidden in those differences.<sup>244</sup> This Part therefore applies the master tropes to sustainable development.

Given the desire for greater clarity, a good place to start is with metonymy, where the amorphous is linked to the concrete.<sup>245</sup> Sustainable development has many recognized principles—some aspirational, but many more seemingly linked to specific concerns like pollution reduction and remediation—yet few of these have hardened into law.<sup>246</sup> In the example discussed above, the polluter-pays principle proclaims agreement, but the actual wording obscures the fact that polluters are not in fact held accountable and that vague concerns about the public interest and about trade distortion receive priority.<sup>247</sup> A metonymic fix makes this principle more specific,<sup>248</sup> such as by discarding the qualifier “in principle” and rephrasing the verb to a command that polluters “shall bear” the cost of pollution. Given that all pollution abatement measures likely increase costs or compliance burdens, the requirement that pollution measures not distort trade and investment should be excised as self-defeating—or at the very least qualified in a way to promote balance, such as mandating that measures should not “unreasonably” distort trade and investment. Finally, the “public interest” is a “we” word that ironically excludes those who are directly affected by pollution when they attempt to seek monetary or equitable relief, such as through

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terministic screens.

243. See *supra* Part III.A.

244. See *supra* text accompanying notes 115–18; see Rosenbloom, *supra* note 206, at 10345 (“Now, our focus and resources should be spent on designing creative solutions to apply the existing general definitions [of sustainable development] to new contexts.”).

245. See BURKE, GM, *supra* note 13, at 506; Davis, *supra* note 93.

246. See French, *supra* note 165, at 53; Perkins, *supra* note 6, at 344 (“Working with sustainability is challenging because its substance is unlike that of most areas of law practice; statutes devoted to sustainability are few, and there is no uniform law of sustainability.”).

247. See *supra* text accompanying notes 175–83.

248. See *supra* text accompanying note 125.

nuisance lawsuits.<sup>249</sup> Rather than favor some abstract, universal “public,” the scope should be narrowed to the more concrete “local” or “community” interest. Such metonymic thinking is not merely theoretical but can undergird efforts at legal change, such as by spurring litigants to pursue novel strategies by telling their own unique stories.<sup>250</sup>

Another way to approach metonymy is as a reduction from the complex to the simple.<sup>251</sup> The Rio Declaration’s twenty-seven principles were expanded by the Johannesburg Declaration to thirty-seven statements, while the seventeen UN SDGs have hundreds of goals and targets.<sup>252</sup> The sheer volume of topics makes it difficult to establish priorities and thus enact legal change.<sup>253</sup> Commentators therefore urge a focus on a few key issues, including addressing discrete areas of law to pursue incremental change.<sup>254</sup> For example, the development and human rights agendas share a goal of reducing poverty.<sup>255</sup> Given that many African nations are developing or among

249. See Todd, *supra* note 56, at 622–23; BURKE, PC, *supra* note 13, at 305–06 (explaining how “we” is a “wonder-word”).

250. See Todd, *supra* note 181, at 609–12 (applying classical stasis theory to explain how plaintiffs pursuing public nuisance claims should frame their arguments from the perspective of their local community and indigenous lifestyle to persuade courts to broaden the tort).

251. BURKE, GM, *supra* note 13, at 506 (calling metonymy a “reduction of some higher or more complex realm of being to the terms of a lower or less complex realm of being”).

252. See *supra* Part III.B.

253. Guzelian & Todd, *supra* note 10, at 16 (“The capaciousness of sustainable development . . . and its goal of accommodating everything and everybody[] results in paralysis.”); Viñuales, *supra* note 4, at 6 (lamenting how “it is indeed very difficult to set priorities” given the “different array of topics and concerns,” including “trade and the green economy, population dynamics, disaster reduction and resilience, oceans or sustainable cities—to name just a few issues . . .”).

254. See Ellis, *supra* note 8, at 72 (suggesting that “the appropriate approach to implementing a theme as grand and overarching as sustainable development might be an incremental one, focusing on the sites at which tensions between bodies of law and ways of knowing are felt most acutely”); Guzelian & Todd, *supra* note 10, *passim* (demonstrating how laws regulating the use of money lead to unsustainable results and urging more research into targeted changes to those laws).

255. See, e.g., Elena Pribytkova, *Global Obligations for Sustainable Development: Harmonizing the 2030 Agenda for Sustainable Development and International Human Rights Law*, 41 U. PA. J. INT’L L. 1031, 1034 (2020) (claiming that “the human rights agenda and the sustainable development agenda . . . share the same fundamental goal of global poverty eradication”); *id.* at 1035 (quoting G.A. Res. 70/1, *Transforming our World: The 2030 Agenda for Sustainable Development*, para. 2 (Sept. 25, 2015)) (declaring that “eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development”).

the least developed, as well as that many parts of the continent face disease or drought,<sup>256</sup> the AfCFTA might prioritize food production and distribution. Such focus can transform the AfCFTA from a framework that merely signals identification but that lacks action to a body that can achieve incremental—though meaningful—change for tens of millions of people.

Metonymy can also reinvigorate “moribund” metaphors,<sup>257</sup> and since metonymy is a “special application of synecdoche,”<sup>258</sup> then perhaps this trope of a “transfer” between the whole and its parts can correct the shortcomings of the three pillars and triple bottom line metaphors. For example, some critics dismiss environmental justice as incompatible with sustainable development since it is not as comprehensive: the focus on environmental harm to poor and minority communities combined with the adversarial, protest-oriented ethos of this movement means that it embodies only two of the three pillars.<sup>259</sup> A focus on these two parts, however, shows that the economic element is not excluded from environmental justice but instead reconceptualized. Rather than the top-down approach of governmental regulation or of traditional environmental organizations, communities sought self-empowerment through grassroots activism.<sup>260</sup> Rather than shun economic development, they

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256. See Udombana, *supra* note 201, at 21 (claiming that many African countries “are trapped by extreme poverty, illiteracy, massive debt overhang, AIDS, malaria and droughts”).

257. ABRAMS & HARPHAM, *supra* note 94, at 134 (writing that many seemingly dead metaphors “are only moribund and can be brought back to life”).

258. BURKE, GM, *supra* note 13, at 509. While other theorists treat synecdoche as a species of metonymy, they and Burke agree on the similarity of the two tropes. See Halper, *supra* note 103, at 39 n.54; Davis, *supra* note 134, at 712.

259. E.g., Shannon M. Roesler, *Challenging What Appears “Natural”: The Environmental Justice Movement’s Impact on the Environmental Agenda*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 230, 231 (Keith H. Hirokawa ed., 2014) (linking contemporary calls for environmental justice to a history of opposition to both law and mainstream environmentalism); J. B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, Then Competition, Then Conflict*, 9 DUKE ENV’T L. & POL’Y F. 161, 180 (1999) (“In the sustainable development framework, equity is co-equal with environment and economy. In the environmental justice framework, equity is placed above all else.”).

260. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–18 (2001) (describing how communities eschewed the top-down structure of mainstream environmentalism to engage in grassroots activism to protect the places where they live, work, play, and go to school); Gonzalez, *supra* note 106, at 172 (calling environmental discourse bottom-up when employed by grassroots environmental

sought a greater voice in how that development should occur, such as through community monitoring of hazardous activities and the creation of jobs for community residents.<sup>261</sup> Expressed as a synecdoche, a focus on parts—environmental and equitable concerns—can lead to a whole of “just sustainabilities” that includes positive economic consequences.<sup>262</sup> This approach is reflected in scholarship that calls for community-based sustainable development.<sup>263</sup> From this perspective, PPPs fail because their approach is top-down, with those in power (governments and MNCs) establishing a framework for those not in power, with the result that the marginalized are further disempowered.<sup>264</sup> A synecdochic

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justice movements but top-down when used in treaties and other legal instruments).

261. See, e.g., Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENV'T L. & LITIG. 309 (1994) (arguing that the main goal of environmental justice campaigns is community empowerment); Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of West Dallas Coalition for Environmental Justice v. EPA*, 20 VA. ENV'T L.J. 431, 466 (2001) (describing actions of the West Dallas Coalition for Environmental Justice in negotiating a settlement with a hazardous waste facility reduce its processing, incorporate clean-up and disposal services, and hire workers from the neighborhood); Alexandra McGee & Shalini Swaroop, *The Power of Power: Democratizing California's Energy Economy to Align with Environmental Justice Principles through Community Choice Aggregation*, 46 ECOLOGY L.Q. 985, 989 (2019) (quoting EJNET, *Principles of Environmental Justice* (Apr. 6, 1996), <https://www.ejnet.org/ej/principles.html>) (discussing the seventeen principles of environmental justice that were established in 1991 at the First National People of Color Environmental Leadership Summit, including Principle 5, which states that “[e]nvironmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples”).

262. See JULIAN AGYEMAN, *INTRODUCING JUST SUSTAINABILITIES: POLICY, PLANNING, & PRACTICE* (2013); see also Joshua C. Gellers & Trevor J. Cheatham, *Sustainable Development Goals and Environmental Justice: Realization Through Disaggregation?*, 36 WIS. INT'L L.J. 276, 278 (2019) (writing that environmental justice “rest[s] at the intersection” of the social equity and environmental protection “sectors” of sustainable development).

263. See, e.g., Matthew N. Currie, *Social Ecology and Lawyering in the Anthropocene*, 45 U. DAYTON L. REV. 401 (2020) (promoting community action to address broad climate and environmental ills); Kermit Lind, *Moving Toward Sustainable Residential Integration with Racial Justice and Social Equity*, 70 CASE W. RESV. L. REV. 759, 775 (2020) (“The way forward, therefore, requires a new approach, one that values just and equitable communities and their sustainability ahead of interests that sustain deep, destabilizing divisions.”); Shannon M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, 114 W. VA. L. REV. 49, 51 (2011) (“Because environmental injustices often occur at the community level, it is not surprising that much of the scholarship focuses on decisions regarding the siting of locally undesirable land uses (‘LULUs’), such as landfills and hazardous waste facilities.”).

264. See Bragdon & Hayes, *supra* note 214, at 1304–05 (writing that PPPs are

approach is community-based, such as the Indian Joint Forest Management program that is a partnership between local communities and government agencies,<sup>265</sup> or the laws passed in response to advocacy by native Hawaiians to help preserve traditional cultivation practices.<sup>266</sup> For PPPs to be effective, perhaps they should start with community and government planning, and from there they can reach out to business interests (rather than the other way around).

The final trope of irony is a consideration of multiple—even competing—perspectives, with the result often the opposite of what is expected.<sup>267</sup> Irony is already part of sustainable development: the very concept is ironic,<sup>268</sup> and academics urge “[j]oined-up [t]hinking.”<sup>269</sup> An ironic approach means avoiding a knee-jerk rejection of proposals that seem outside of the accepted parameters of sustainable development; after all, those parameters have created blinders that limit the ability to see existing divisions as well as creative solutions.<sup>270</sup> For example, given the shortcomings of private governance standards in light of corporate motives to satisfy the financial bottom line over the environmental or social,<sup>271</sup> the temptation is to reject them in favor of governmental regulation. Defenders note, however, that many of the private standards are both comprehensive and rigorous—even having been shaped via the participation of non-business stakeholders like environmental and humanitarian NGOs.<sup>272</sup> Further, one should not overlook that

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the result of multinational businesses engaging in policy discussions with governments).

265. Harper & Rajan, *supra* note 149, at 342–43.

266. D. Kapua’ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV’T L.J. 157, 162 (2016).

267. See BURKE, GM, *supra* note 13, at 512.

268. Guzelian & Todd, *supra* note 10, at 9–10.

269. Julian Agyeman et al., *Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 1 (Robert D. Bullard et al. eds., 2012).

270. *E.g.*, Lin, *supra* note 1, at 66–67, 84.

271. See *supra* Part III.C.

272. *E.g.*, Park, *supra* note 223, at 26 (“The Climate Bonds Standards Board, which governs the development of CBI’s standard and certification regime and must approve all certifications, is composed of members from a broad array of investor and stakeholder groups.”); Stenzel, *supra* note 210, at 592–93 (noting that the Global Reporting Initiative considers multiple factors in assessing sustainability); Schoeman, *supra* note 226, at 1097 (listing “environmental/nature conservation NGOs” and “social/developmental NGOs” among members of the RSPO).

governments can be part of the problem: as major bond issuers themselves, governments face the same temptation to establish sustainability metrics with low thresholds.<sup>273</sup> Accordingly, as governments take up the cause of ESG regulation,<sup>274</sup> they should draw from rather than exclude the standards created by businesses, banks, and trade associations.<sup>275</sup>

## V. CONCLUSION

Although the goals of sustainable development are laudable, discursive issues with this concept and its primary metaphors have limited their implementation. This Burkean analysis provides a theoretical basis to explain these shortcomings while also suggesting correctives through creative tropological thinking. Future research might turn to additional theories from Burke<sup>276</sup> or other rhetoricians,<sup>277</sup> or it might include a deeper analysis of the topics

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273. See Park, *supra* note 223, at 8 (noting that governmental entities are among the issuers of green bonds).

274. See Kristin Broughton & Mark Maurer, *Companies Could Face Pressure to Disclose More ESG Data*, WALL ST. J., Dec. 6, 2020 (reporting that the Biden administration is likely to push for rules regarding expanded ESG reporting).

275. See Park, *supra* note 223, at 37–38 (hypothesizing that “the imposition of public regulation could have a negative spillover effect on private initiatives,” such as “[i]f new laws to regulate green bonds disincentivize or crowd out other means to support climate mitigation,” because “then public regulation may actually detrimentally impact the environment”); *id.* at 44 (“As governments consider regulating green bonds, acceptance among existing market participants may be enhanced by involving private standard-setters in rulemaking and enforcement processes.”); Dieter Holger & Fabiana Negrin Ochoa, *Fund Managers Brace for Europe’s Anti-Greenwashing Rules*, WALL ST. J., Mar. 5, 2021 (reporting on how the European Union reduced its new ESG metrics from forty-seven to eighteen following input from industry that “such a lengthy list would only shift clients’ attention away from decision-useful information, and increase compliance costs without enhancing investors’ ability to make sustainable investments”).

276. For example, one of Burke’s important concepts is the pentad, which has been applied to issues of law and of development. BURKE, GM, *supra* note 13, at xv–xxii (introducing the five pentadic terms act, agent, scene, agency, and purpose as means of studying motives). See, e.g., Sarah J. Nelson & Luke R. Nelson, *A Pentadic Analysis of Competing Narratives in Opening Statements*, 15 U. ST. THOMAS L.J. 135, *passim* (2018) (applying the pentad to opening statements in trial); Provenzano, *supra* note 57, *passim* (applying the pentad to judicial opinions about summary judgment in employment discrimination cases); Oscar Schmidt & Manuel Rivera, *No People, No Problem- Narrativity, Conflict, and Justice in Debates on Deep-Seabed Mining*, 75 GEOGRAPHICA HELVETICA 139, 141 (2020) (applying Burke’s pentad to debates about deep seabed mining).

277. For example, a consideration of the rhetorical situation and of rhetorical stances could complement this analysis of terministic screens and the application of

surveyed here or those not addressed like climate change.<sup>278</sup> Building on the foundation of this Article, additional rhetorical analysis can lift the veil on discursive problems and guide the way toward practical solutions.

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tropes. *See, e.g.*, Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *PHIL. & RHETORIC* 1, 5–8 (1968) (calling the rhetorical situation “a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance”); Wayne C. Booth, *The Rhetorical Stance*, 14 *C. COMPOSITION & COMM’N* 139, 141, 144 (1963) (urging speakers to assume a rhetorical stance that balances arguments about the subject, the interests of the audience, and the voice of the speaker).

278. Climate change is such a super “wicked problem[]” that some commentators argue that sustainable approaches will be ineffective. Robin Kundis Craig & Melinda Harm Benson, *Replacing Sustainability*, 46 *AKRON L. REV.* 841, 844 (2013) (arguing that climate change has already become such a major problem that sustainable development is an insufficient concept to guide responses); *see also* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 *CORNELL L. REV.* 1153, 1159 (2009) (writing that the issue of climate change “defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution”). By applying the trope of synecdoche, however, critics could target specific facets of law and policy that might lead to meaningful change overall.