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Climate Justice and the Elusive Climate Tort

The Supreme Court's decision in *American Electric Power Co. v. Connecticut* (*AEP*)¹ closes another door for those most vulnerable to climate change. The corrective justice goals of tort law and the associated possibilities for redress—particularly vital to the most vulnerable—remain elusive due to the Court's restricted view of tort law's relevance to climate change. This Essay analyzes these climate justice implications of *AEP*.

The field of “climate justice” (CJ) is concerned with the intersection of race and/or indigeneity, poverty, and climate change. It also recognizes the direct kinship between social inequality and environmental degradation.² The term “climate vulnerable,” the subject of CJ, describes those communities or nation-states that have a particularly acute exposure to present and forecasted climatic changes. That increased vulnerability is due to either the nature and degree of climate impacts' forecast and/or the preexisting socioeconomic vulnerabilities that climate impacts amplify.³ Underscoring the “justice” element, these most vulnerable populations are also the least responsible for the emissions that fuel anthropogenic climate change.

The Essay argues that the common law nuisance claims rejected by the Court in *AEP* provide an important mechanism for the climate vulnerable to achieve corrective justice. Corrective justice is one of the most important goals of tort law because of its focus on the relationship between the tortfeasor and victim. While there are myriad interpretations of corrective justice theory and

1. 131 S. Ct. 2527 (2011).

2. See Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 193 (2008).

3. See Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 513-14 (2009).

its application,⁴ this approach at its core counsels simply that individuals who are responsible for the wrongful losses of others have a duty to repair those losses. Further, rectification of harms suffered can help restore the moral balance upset by the externalized costs that climate change inflicts on individuals and communities. The corollary, therefore, is that tort law should provide a venue and possible damages remedy for CJ plaintiffs whose claims—namely, injuries to life and property—demand compensation from the worst offenders.

As Professor Osofsky explains in her commentary,⁵ the *AEP* Court explicitly endorses the regulatory route for addressing emissions that contribute to climate change, rather than providing a parallel track in the courts through injunction.⁶ Even if a regulatory regime could achieve emissions reductions objectives more effectively than tort law, however, CJ claimants have lost the ability to confront major emitters and gain redress for their particular—and disproportionate—injuries. So while tort law, and the accompanying judicial process, introduces the complex web of claims and potential defendants that Professor Gerrard describes,⁷ it also provides a unique way for CJ claimants to face major emitters, argue that they have been injured, and demonstrate that defendants have an obligation to make amends for that wrong.

Public nuisance theory, in particular, serves as a potentially effective corrective justice mechanism for CJ claimants because it focuses on the nature of the harms plaintiffs suffer. *Native Village of Kivalina v. ExxonMobil Corp.*,⁸ another pending public nuisance case that faces an uphill battle after *AEP*, is a paradigmatic example of CJ by virtue of its plaintiffs and the nature of their claims. Plaintiffs seek monetary damages for the past and ongoing emissions of

4. See generally Allan Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 OXFORD J. LEGAL STUD. 475, 478-79 (2008) (describing theories of corrective justice).

5. See Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101 (2011), <http://yalelawjournal.org/2011/09/13/osofsky.html>.

6. See 131 S. Ct. at 2538.

7. See Michael B. Gerrard, *What Litigation of a Climate Change Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011), <http://yalelawjournal.org/2011/09/13/gerrard.html>. I appreciate the admonition Professor Gerrard provides. I share some of his concerns, particularly regarding the time and administrative resources litigation would require. See Burkett, *Climate Reparations*, *supra* note 3.

8. 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

several major oil, coal, gas and utility companies.⁹ Kivalina has almost 400 residents, 97 percent of whom are Alaska Natives. The village is traditional Inupiat and is located at the tip of a six-mile-long barrier reef. Plaintiffs allege that climate change has severely harmed Kivalina's people and property by reducing the sea ice that acts as a protective barrier to coastal storms. The storms and waves are destroying the land with such severity that the entire community must now relocate further inland.¹⁰ Government estimates have determined that the cost of relocation falls between \$95 million and \$400 million.¹¹

The Inupiat are among the most vulnerable to climate change and yet have produced insignificant emissions. The current regulatory infrastructure for reducing emissions does not respond to the specific needs of these plaintiffs. For them, a viable tort claim is a means to achieve compensation for the loss of their property and to facilitate their relocation. Public nuisance theory, with its emphasis on the unreasonableness of a plaintiff's *injury*, provides an appropriate focus for understanding climate impact claims. Instead of assessing the worth of a defendant's actions—often riddled with the politics of wealth and power—nuisance law shines a spotlight on the unprecedented events climate change introduces. Public nuisance claims, as Professor Abate explains, may succeed where disparate impact litigation failed in the environmental justice context.¹² They can provide the specific relief—funding for physical relocation in this case—that these particular CJ plaintiffs deserve. Even with a comprehensive regulatory scheme for emissions reduction in place, public nuisance law should remain a means by which climate-impacted communities can seek compensation from major emitters.

The decision in *AEP* forecloses federal common law public nuisance claims so long as the EPA retains regulatory authority over greenhouse gas emissions.¹³ The opinion further states that, even if the EPA decides not to regulate greenhouse gas emissions (or does so inadequately), the federal common law is not an available track to pursue such actions.¹⁴ That stance may negatively impact the ability for any court to address the individual claims

9. Complaint for Damages and Demand for Jury Trial, *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 08-1138 (N.D. Cal. Feb. 26, 2008).

10. *Id.* at 46.

11. *Id.*

12. See Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 243 (2010).

13. 131 S. Ct. at 2537.

14. *Id.* at 2538.

based on specific harms brought by CJ plaintiffs—claims that are critical for achieving redress for these vulnerable communities.

The Court's decision also betrays a skittishness in dealing with climate change suits generally, which underscores its failure to appreciate the deep injustices climate impacts introduce. Inexplicably, the *AEP* Court takes time in its relatively slender decision to inject doubt about elements of climate science. Abandoning the confidence demonstrated in *Massachusetts v. EPA*, the Court cites to a magazine article expressing doubt about climate change impacts as a counterweight to the voluminous peer-reviewed articles on which the EPA based its findings.¹⁵ Further, the Court pauses again to make a facile indictment of all breathing, sentient beings.¹⁶ In an instant, it dismisses the relative excess with which some have burned carbon for luxury and profit versus those who have for food and shelter.

This reluctance to address the justice elements of climate change is a legal phenomenon that exacerbates already dangerous climate effects. Over twenty years ago, David Caron explained that the law can create feedback loops that, like their counterparts in the physical world, amplify certain climate trends.¹⁷ A core purpose of law and the courts, particularly in a tort law context, is to provide recourse to those who have been wronged, especially if the wrongs involve the loss of life or property. If at every turn there is no avenue for remedy, the law and its institutions risk being perceived as an ineffective means to acknowledge and correct injustice—especially from the vantage point of the climate vulnerable. This denies the least responsible their day in court and further delays—if not, excludes—any possibility of being made whole.

Moving forward from the *AEP* decision, the lower courts have a choice about how they treat the unresolved alternative avenues for tort relief. If the lower courts make the distinction between the injunctive relief sought in *AEP* and the compensatory relief sought in *Kivalina* and recognize the corrective potential of compensation claims and their role in administering the process, the disparately impacted may enjoy appropriate recourse. Opening their doors to climate tort claims would be the courts' distinct contribution to what will hopefully be a diverse and multi-layered commitment to rectifying, at least in part, the losses of the climate vulnerable.

15. *Id.* at 2533 n.2 (citing Nicholas Dawidoff, *The Civil Heretic*, N.Y. TIMES, Mar. 29, 2009 (Magazine), <http://www.nytimes.com/2009/03/29/magazine/29Dyson-t.html>).

16. See 131 S. Ct. at 2538 (“After all, we each emit carbon dioxide merely by breathing.”).

17. David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L.Q. 621, 623 (1990).

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Preferred Citation: Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011), <http://yalelawjournal.org/2011/09/13/burkett.html>.