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# The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature

Chris Hilson  \*

## ABSTRACT

While narrative is a much-used term in environmental law scholarship, it is often used rather indiscriminately and interchangeably with other terms such as framing and discourse. The current article sets out to examine the various ways in which narrative features in the existing literature with a view to encouraging more critical and reflective usage. It also advocates for narrative, both to connect with the marginalised and to inject passion and emotion into environmental law – elements that can easily be lost in a discipline heavy with legislation and case law turning on fine aspects of legal doctrine. However, in the end it argues the need for a careful balance, with narrative and emotion playing a part, but not stealing the show.

**KEYWORDS:** narrative, storytelling, emotion, social movements, law and literature

*‘This time I am the polar bear. I live here (and not in a zoo) and my environment is changing. What you call the ice (not a signifier I recognise) is what I call home and it’s disappearing, fast. You have stolen my children’s future with your flights and your coal. All your legal talk of rights and duties, loss and damage, and attribution—where has it got me? How dare you!’*

## 1. INTRODUCTION

The aim of the current article is to explore the role that narrative plays in environmental law. It is in part a novel survey of the literature in environmental law where narrative approaches have been used, to try to unpick different senses of the term and contexts in which it can be found (the ‘nature of tales’ part of the article title). There is also some consideration of how nature itself—which is unable to tell its own story<sup>1</sup>—fares in narrative approaches and whether it is, ultimately, an anthropocentric enterprise (‘tales of nature’).

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1 At least not conventionally in oral or written form (despite the opening fictional quote’s attempt at this, with apologies to Greta Thunberg). Which is not to say that nature cannot be regarded as telling something like a story in its own way: see eg the work of Michel Serres discussed in Saskia Vermeylen, ‘Materiality and the Ontological Turn in the Anthropocene: Establishing a Dialogue between Law, Anthropology and Eco-Philosophy’ in Louis Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017) 137, 157.

The article argues that narrative has an important role to play in bringing environmental law alive and, potentially, in making it a more effective and inclusive force. Aspects of environmental law are incredibly complex and, let's face it, can at times be rather dull.<sup>2</sup> For example, academics, practitioners and students often struggle with its dense legislative make-up.<sup>3</sup> Narrative can thus provide a welcome opportunity to bring passion and emotion back into the subject, and this can be extremely effective in helping environmental law to hit home. As we will see, it also has the capacity to give a much needed voice to the marginalised (including, potentially, nature itself). However, although I am generally advocating for narrative, I urge a degree of caution, because it is ultimately about balance. We need legal expertise; and complexity, dull as it might sometimes be, is part of that. An over-reliance on the active deployment of narrative either in law and litigation, or in place of them, may be seen as embracing populism with its distrust of experts and a post-truth tendency to favour emotion over rationality.<sup>4</sup> However, as we shall see, narrative in environmental law does not always involve passion and emotion in overt narratives deployed by individual legal actors—it is also used in a rather different way to refer to stories and deeply embedded societal narratives that are hidden in the dry legal texts mentioned above.<sup>5</sup> Here, not only is the law itself free from passion and emotion, but so too is the elucidated narrative. With this latter type, my argument is more that scholars should be conscious of *how* they are using narrative, including this difference between the overt and covert categories. They should also be aware of *why* they are using it, perhaps in place of other language categories such as framing<sup>6</sup> or discourse.<sup>7</sup> Discernment and precision tend to make for better scholarship.

The article begins with a basic definition of narrative before considering how narrative has been used in law and literature and social movement scholarship which, as we shall see, does not always match that definition. I set out three broad approaches which that scholarship adopts. With this background context in place, the article moves on to analyse concrete examples of the various ways in which narrative makes

2 Laura King, 'Narrative, Nuisance, and Environmental Law' (2014) 29 *Journal of Environmental Law and Litigation* 331, 352.

3 Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) *Current Legal Problems*, cuab010.

4 Chris Hilson, 'Law, Courts and Populism: Climate Change Litigation and the Narrative Turn' in Susan Sterett and Lee Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar 2019) 81; Chris Hilson, 'Climate Populism, Courts, and Science' (2019) 31 *JEL* 395.

5 ie in them rather than something to use *instead* of them in order to inject passion and to avoid the dryness.

6 Chris Hilson, 'Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?' (2015) 27 *JEL* 177; Elizabeth Bomberg, 'Fracking and Framing in Transatlantic Perspective: A Comparison of Shale Politics in the US and European Union' (2017) 15 *Journal of Transatlantic Studies* 101; Carrie Bradshaw, 'England's Fresh Approach to Food Waste: Problem Frames in the Resources and Waste Strategy' (2020) 40 *Legal Studies* 321.

7 Maarten Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (OUP 1997); Bettina Lange, 'Foucauldian-Inspired Discourse Analysis: A Contribution to Critical Environmental Law Scholarship?' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge 2011) 39; John Paterson, 'A Systems Theory Perspective on the Principle of Precaution Employing Critical Discourse Analysis' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017) 364; Sanja Bogojević, *Emissions Trading Schemes: Markets, States and Law* (Hart 2013) (analysing different 'discourses' used in relation to emissions trading).

an appearance in environmental law—both in the substantive law (case-law, legislation and treaties) and in academic scholarship. It concludes with a plea for narrative as part of a need to ‘connect’ more in environmental law—not only emotion and rationality, but also with the marginalised. However, I argue that this turn to narrative should be done in a balanced way. We cannot have all emotion without any of law’s rationality; and neither should we have an approach that relies solely on narrative as a means of giving a voice to the marginalised.

What though of the article’s own narrative, or its method of storytelling? The story I am telling is a standard, academic, rational one, albeit with an emotional underpinning: I am trying to make sense of the myriad ways in which narrative has been used in environmental law; and yet I am also making an appeal for environmental lawyers to acknowledge a place for emotion in the subject, which stems from my own personal connection with the environment. There are no heroes in my story (narrator included) and the tale is not a linear one. It has more in common with Ursula Le Guin’s carrier bag approach to storytelling.<sup>8</sup> In an exercise of academic foraging, I picked out various examples of environmental law narratives I found in my academic travels and placed them into the carrier bag. The article lays out what is in the bag and tries to make sense of its disparate contents. But this disparate nature inevitably lends a somewhat meandering quality to the article’s own narrative. In the end, those contents are the collective effort of all the people who feature in the various sections. Academic environmental law stories are often like that: the fabled lone scholar is, in reality, typically building on stories that others have told before us, while hoping to add something new. That novelty here lies, I think, in the pieces I have selected for the bag, and the way I explain both what links them together in a narrative enterprise and what distinguishes them from each other as part of that enterprise.

## 2. WHAT DO WE MEAN BY ‘NARRATIVE’?

The term narrative is used, across a range of disciplines, in a bewildering variety of ways.<sup>9</sup> At a basic level, a narrative can be seen as possessing some of the structural features of a story. These might include one or more of: characters; story events, a plot order in which those events unfold; a temporal sequence involving a beginning, middle and an end; a moral of the story; and a narrator (who may be reliable or unreliable). I regard narrative and story as more or less interchangeable, whereas some separate them out, and may see narrative as a broader collective way of understanding the world and stories as something that contribute to this.<sup>10</sup> My own view is that

8 Ursula Le Guin, *The Carrier Bag Theory of Fiction* (Ignota Books 2019). See also Siobhan Leddy, ‘We Should All Be Reading More Ursula Le Guin’, 28 August 2019 <<https://theoutline.com/post/7886/ursula-le-guin-carrier-bag-theory?zd=1&zi=juaqu5j3>> accessed 2 November 2021, which helped to shape the thoughts in this paragraph.

9 Marie-Laure Ryan, ‘Toward a Definition of Narrative’ in David Herman (ed), *The Cambridge Companion to Narrative* (Cambridge University Press 2017) 22; Kjersti Fløttum and Øyvind Gjerstad, ‘Narratives in Climate Change Discourse’ (2017) 8:e429 WIREs Climate Change 2.

10 Michael Burger, ‘Environmental Law/Environmental Literature’ (2013) 40 Ecology Law Quarterly 1. On narrative used in this broad sense, see eg Amrekha Sharma, ‘Storytelling in the Work of “Justice”’, 12 December 2019, <<https://storytelling.greenpeace.org/story/1699/storytelling-and-the-work-of-justice-what-do-they-have-to-do-with-each-other/>> accessed 6 August 2021.

the term 'public discourse' sometimes better captures that broader category, which often lacks the various structural elements of a story.<sup>11</sup>

The aim of the current article is to analyse how narrative is used in environmental law. However, to fully understand this, we need to be able to place that usage in a background conceptual context. That requires us to engage in a discussion of the legal and social movement literature on narrative.<sup>12</sup>

We can place environmental law treatment of narrative within one of three broad or overarching approaches. First, there is a narrative typology approach rooted in law and literature which, as a wider discipline, can be subdivided into looking for literature in law,<sup>13</sup> looking at law in literature,<sup>14</sup> and looking at literature to better understand law and to empathise with those marginalised by law.<sup>15</sup> While law and literature is a mature subject within the legal academy, it has not been much applied within environmental law, with some key exceptions.<sup>16</sup> What is notable about those exceptions is that they are typically aimed at understanding how the environment is portrayed in environmental law, and they employ various narrative typologies<sup>17</sup> or categories from literature and ecocriticism<sup>18</sup> to illustrate that portrayal.

- 11 Public discourse is something that 'define[s] the boundaries of what can be thought of and communicated at a given time in a given society': Britta Baumgarten and Peter Ullrich, 'Discourse, Power, and Governmentality. Social Movement Research with and beyond Foucault' in Jochen Roose and Hella Dietz (eds), *Social Theory and Social Movements: Mutual Inspirations* (Springer Vieweg 2016) 13, 14. Positivist social movement scholars sometimes use the term 'discursive opportunity structure' instead of public discourse: Holly McCammon and others, 'Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements' (2007) 72 *American Sociological Rev* 725.
- 12 Some may question why I have not instead used my initial basic definition (and indeed why I provided one if I am not deploying it). The answer is twofold. First, I think it is useful to provide a jumping off, base definition to compare other approaches with—and my definition serves that purpose. Second, as I explain towards the end of Section 2, I have also relied on the wider literature on narrative because, in a survey of narrative across environmental law, it helps one to understand how other people have used the term if you can place which approach or category they sit within.
- 13 ie looking at law as literature, Burger (n 10) 12–13. This includes examining the role of narrative and other literary forms or elements (eg metaphor, rhetoric, myth) in legal argument.
- 14 Burger (n 10) 12. How law features in Shakespeare plays like *The Merchant of Venice* for example.
- 15 Eg Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1995). Empathy or compassion for the marginalised can of course include nature: Robert Verchick, 'Steinbeck's Holism: Science, Literature, and Environmental Law' (2003) 22 *Stanf Environ Law Jo* 3 (discussing Steinbeck's 'compassion' as a requirement for environmental law and policy).
- 16 eg Verchick (n 15), analysing lessons from Steinbeck's literary and wider work for environmental law; Burger (n 10), using ecocriticism to help identify narratives (eg apocalyptic, pastoral, wilderness, mythic) found in lawsuits around wolf reintroduction and also climate change; King (n 2), examining the power of telling climate change as a story of nuisance as a cause of action; Jarrod Ingles, 'A Narrative Understanding of the National Environmental Policy Act' (2019) 46 *Ecology LQ* 555, using a law and literature approach to come up with a range of different narratives and then arguing that NEPA procedures for public participation exclude many of these, including pastoral, adventure, place-based, and georgic narratives; and Nicole Rogers, *Law, Fiction and Activism In A Time of Climate Change* (Routledge 2019), examining narratives in a range of contemporary climate fiction books as well as those of litigants and judges (see too the review article on this: Chiara Armeni, 'Narratives as Tools of Legal Re-Imagination in the Climate Crisis' (2021) 33 *JEL* 485).
- 17 See n 16 for these (eg pastoral, georgic, wilderness, apocalyptic etc).
- 18 Defined by Burger as 'the study of the relationship between literature and the physical environment. As an intellectual discourse, it seeks to synthesize literary criticism with both the natural sciences (especially ecology) and environmental ethics and philosophy' (n 10) 15.

Secondly, narrative or storytelling is discussed within the social movements literature as a strategy used by movement actors—either alongside other language devices such as framing, or in place of other strategies.<sup>19</sup> In a law and social movements context, narrative may become a movement strategy to inject emotional resonance into the law in order to achieve better outcomes.<sup>20</sup> The emotional claimant submissions in the *Juliana* climate case, discussed in the next section, fit into this category, as does emotional narrative-style writing by legal academics in law reviews, considered later. On occasions, as we shall see, storytelling is also recommended as a strategy to use *instead of* law and litigation. Overall therefore, unlike the law and literature approach which is aimed at shedding light on how environmental law sees the environment, the purpose of narrative in a social movements context is often much more strategic and instrumental.

Both the above approaches typically analyse narratives put forward by individual actors, including in a legal context, litigants, judges, the public and academics. However, there is a third sense of narrative, also derived from law and literature scholarship, which is less about narratives actively marshalled in law and litigation and more about *environmental law* itself as a narrative. This third category can itself be sub-divided into two. First, there is the *environmental law* part. There are often hidden or less visible stories that writing in environmental law seeks to uncover or bring out.<sup>21</sup> These may be conceptual narratives in the discipline itself (such as the narrative of externalities), or they may be environment-related narratives uncovered in, for example, legislation. Secondly, there is the specifically *law* part of environmental law. While this has been little analysed within the environmental law literature on narrative,<sup>22</sup> it poses important questions for the field. As Robert Cover has observed, law can be read as narrative,<sup>23</sup> but law can also be seen as stemming from and being dependent on prior shared narratives.<sup>24</sup> There is a tension between the two. With the latter, narrative precedes law and gives rise to it. On this account, the narratives that underwrite the way our societies are ordered inevitably shape the laws that exist.

19 Francesca Polletta and Beth Gardner, 'Narrative and Social Movements' in Donatella Della Porta and Mario Diani (eds), *The Oxford Handbook of Social Movements* (OUP 2014) 534; Graeme Hayes, 'Negotiating Proximity: Expert Testimony and Collective Memory in the Trials of Environmental Activists in France and the United Kingdom' (2013) 35 *Law & Policy* 208; Grace Nosek, 'Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories' (2018) 42 *Wm & Mary Envtl L & Pol'y Rev* 733; Hilson (n 4). King (n 2) also discusses social movements and narrative as strategy (combined with a law and literature approach).

20 Hilson (n 4). Whether it does in fact produce better outcomes is an interesting question and one that future empirical research could usefully address, especially in the context of litigation.

21 Burger (n 10). This process can often of course make apparently dull subject matter, mentioned earlier, intellectually interesting.

22 Although see Roy Partain, 'Ecologies of Paideic Law: Environmental Law and Robert M. Cover's Jurisprudence of 'Nomos and Narratives' (2013) 24 *Hanyang L Rev* 423; Gavin Little, 'Developing Environmental Law Scholarship: Going Beyond the Legal Space' (2016) 36 *Legal Studies* 48.

23 'The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative': Robert Cover, 'The Supreme Court 1982 Term - Foreword: Nomos and Narrative' (1983) 97 *Harv L Rev* 4, 10.

24 '(N)or can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations', *ibid* 5. This sense of narrative (a collective, societal narrative) closely resembles the public discourse category mentioned earlier.

However, with the former, law itself contains an independent narrative force that is capable of reshaping those existing societal narratives.

The view one takes of the causal or temporal relationship between law and narrative is likely to have a bearing on strategic choice in the social movements context considered above. Those who see narrative coming first may emphasise the importance of changing societal narratives through narrative strategies. Some authors within critical race theory or feminism, discussed later, adopt this stance. In contrast, those who see law as coming first are more likely to advocate a place for law in changing dominant or accepted narratives. We can see this within, for example, Grace Nosek's argument that climate change litigation against carbon majors can help to shift the accepted societal narrative of individual responsibility for climate change towards one which more appropriately pins responsibility onto large fossil fuel companies.<sup>25</sup>

People in the 'narrative comes first' category, will be sceptical of this role for law, believing that it will be forever constrained by the wider existing societal narratives on which it is reliant. One of those that is particularly relevant to environmental lawyers is of course the narrative of capitalism and economic growth. For the sceptics, environmental law is ultimately incapable of asserting new, transformative narratives because it is constrained by the position it finds itself in within this wider, dominant socio-economic narrative.

These three broad approaches to narrative in the legal and social movement literature—narrative styles (pastoral etc), narrative as a strategy, and law as narrative—set the scene for the following sections, which discuss more specific examples of narrative in environmental law. The broader lens not only helps us to understand better how narrative is being used within these detailed examples, but also to appreciate overlaps or important distinctions between them.

### 3. NARRATIVES IN ENVIRONMENTAL LAW

In this section we consider stories that may be told, or else discovered, in environmental law, including in cases, legislation and treaties, as well as narratives about the history of environmental law. Section 4 then moves on to consider stories that provide much more of an *internal* glue to the subject as a whole.

#### 3.1 Stories in Case Law and Legislation

Our first example of narrative in environmental law can be found in case law. Court proceedings can be seen in narrative terms, with claimants telling autobiographical stories about themselves in submissions, legal advocate narrators telling stories about their clients, and judges telling the story of the case in their judgments.<sup>26</sup> While narrative may seem most readily applicable to stories about the facts, it also applies to the law. Steven Cammiss, for example, presents the notion of a legal narrative.<sup>27</sup> On

25 Nosek (n 19).

26 Whether in criminal or civil trials. Burger (n 10); Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2009).

27 Steven Cammiss, 'Stories in Law: Providing Space for "Oppositionists"?' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues, Volume 15* (OUP 2013) 221.



this view, based on the idea of legal translation, the job of lawyers is to translate the stories of their clients into the language of the law and hence into compelling legal narratives that will work to win in court. Legal argument and doctrine here is what must underpin and shape those initial raw client narratives. A judgment too is very much a story, not just of the facts but also the law.

However, besides this micro-level form of specific narratives within trials, the whole of a trial might itself be regarded as a form of narrative.<sup>28</sup> From this more macro-level perspective, claimants, defendants, advocates and judges all play an important role in the wider, overall trial plot and story.

Within existing environmental law scholarship, authors have tended to approach case law from a law and literature perspective, drawing on a range of literary and ecocriticism narrative types (such as pastoral, apocalyptic and so on) to help identify, make sense of, or justify, individual narratives put forward in such cases by litigants or judges.<sup>29</sup> Other authors have sought to examine not environmental and other narratives present *in* cases like this, but rather cases *as* a particular type of narrative. Thus, Kim Bouwer, for example, has looked at why academics, activists and practitioners have labelled certain types of climate change litigation cases as 'holy grail' ones and uses the holy grail story (and metaphor) as a vehicle for analysing the relevant case law.<sup>30</sup> Among the conclusions she draws is that, as with the grail legends, what counts as victory in climate change litigation is not always easy to discern, and that there is a risk of the quest itself becoming more important than the destination.

Some environmental law cases lend themselves to narrative recollection much more than others.<sup>31</sup> Thus, it is easy for a UK environmental lawyer to recount the story of the *Cambridge Water*<sup>32</sup> case with its historical spillages of solvent by the defendant, the groundwater migration, the new drinking water borehole which the claimant had to drill at great cost, and the role of the reasonable site supervisor. Similarly, the story of the plucky Kingsnorth climate activists who were prosecuted for climbing a power station chimney and painting graffiti on it springs easily to mind.<sup>33</sup> The same cannot be said of most environmental judicial review cases, or indeed of most pieces of environmental legislation. Points of illegality or statutory construction tend to lack some of the key features which make stories memorable, which is often to do with the characters involved and a plot that develops over time.<sup>34</sup> That is not to say that such cases or legislation do not contain stories at all—something that I will return to at the end of this section—simply that they are often not as readily apparent or memorable.

28 Bernard Jackson, *Fact, Law and Narrative Coherence* (Deborah Charles 1988).

29 See the sources cited at n 16.

30 Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9 TEL 347.

31 King (n 2).

32 *Cambridge Water v Eastern Counties Leather* [1994] 2 AC 264.

33 John Vidal, 'Kingsnorth Trial: Coal Protestors Cleared of Criminal Damage to Chimney' *The Guardian* (10 September 2008).

34 King (n 2). Of course, the facts of the case in this structural story sense are not the only element to memorability: the place of the case in the wider story of environmental law may also be important.

Some submissions within environmental cases are also memorable and moving. In the US *Juliana* climate change case for example, we are told in one plaintiff submission that:

Alex lives on his family's 570-acre farm, the Martha A. Maupin Century Farm . . . located along the Umpqua River. His great, great, great, great grandmother, Martha Poindexter Maupin, founded the farm in 1868 (she was one of the first women in Oregon to own a ranch) after arriving in the area by way of the Oregon Trail. The Maupin Century Farm is Alex's intellectual and spiritual base and a foundational piece of his life and heritage, and his identity and well-being depend on its preservation and protection. However, the drought conditions, unusually hot temperatures, and climate-induced migration of forest species are harming and will increasingly harm Alex's use and enjoyment of the Maupin Century Farm.<sup>35</sup>

This invites us to contemplate too the type of narrative that can be used in environmental cases.<sup>36</sup> This one from *Juliana* is very much a pastoral narrative. However, climate change litigants may also deploy apocalyptic narratives<sup>37</sup> and opinion will differ as to which of these is most necessary and effective as a means of climate communication for securing the desired change in policy and broader public opinion.<sup>38</sup>

We have seen then that claimants (*Juliana*) may tell good stories, but do judges? This first requires us to consider what makes a narrative compelling: what makes a story a good one? Part of it is no doubt to do with what makes one memorable in terms of character and plot touched on above, but an effective narrative is also one that engages emotion.<sup>39</sup> The *Juliana* submission is compelling as a story because it tugs at our emotions. What then of judges and their judgments? Here, one might first examine the judgment of McCullough J in a statutory appeal (akin to judicial review) on the motorway cutting through Twyford Down in South-East England:

The applicants . . . are two parish councils and three private individuals. They are aggrieved by a scheme made by the Secretary of State for Transport in March 1990 which authorises him to provide a special road, namely a motorway, between Bar End and Compton near Winchester. The proposed road is to be of three lanes in each direction and part of the M3 motorway. Between

35 para 24 of the claimant submissions. *Juliana v US*, 947 F 3d 1159 (9th Cir 2019). For further climate change litigation examples, see King (n 2).

36 Burger (n 10); Ingles (n 16).

37 *ibid*.

38 Greta Thunberg and Extinction Rebellion for example (albeit in a protest and campaigning rather than a litigation context), place themselves more at the apocalyptic, panic-inducing end of the climate communication spectrum. They believe that policy makers and the public should be panicking because we face an imminent disaster if we fail to act rapidly and with a sufficiently robust response to the climate emergency.

39 My argument thus differs from King's above (n 2), who argues that law and legal narratives represent a way of channelling people's often overwhelming emotions about eg climate change. I.e. there, the narrative itself is not necessarily emotional but rather stems from it.

Bar End and Hockley it is to pass in a cutting through Twyford Down, to the east of St. Catherine's Hill . . . He saw, like everyone else who has examined this difficult question, that each of the possible routes had something to be said against it. The choice was difficult. The proposal for a tunnel was environmentally superior and the one most favoured by the public, public interest bodies and nature conservation organisations, but he concluded that its attractions were outweighed by its disadvantages, chiefly those of cost and the delay that would result were it selected rather than the published route, which, he said, struck the most favourable balance; he recommended its adoption.<sup>40</sup>

What we are presented with here are the bare facts and a rational presentation of costs and benefits. There are of course emotional stories to be told about Twyford Down, with the ancient 'dongas' trails or pathways that crossed the Downs along with pilgrim routes, and the passion of anti-roads protestors who had fought the construction, including those who styled themselves the 'Dongas Tribe'.<sup>41</sup> But we see none of that here. The passion is emptied out of the case.

Compare that with Lord Denning MR in the famous *Miller v Jackson* nuisance case:

In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short . . . Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore . . . He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built . . . a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground . . . Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house . . . So they asked the Judge to stop the cricket being played. And the Judge, I am sorry to say, feels that the cricket must be stopped: with the consequences, I suppose, that the Lintz cricket-club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer.<sup>42</sup>

This pastoral narrative about the green space at risk from property development is compelling precisely because Denning is so emotionally fired up by the human sports activity and its associated history that will disappear. Of course, one response

40 *Twyford Parish Council v Secretary of State for the Environment* [1992] 1 CMLR 276.

41 John Vidal, 'Twyford Down's Dongas Return 20 years After M3 Protest' *The Guardian* (28 September 2012).

42 [1977] EWCA Civ 6.

would be to point out that Lord Denning was a judicial outlier and maverick<sup>43</sup> and that judges should really stick to rationality and the law and leave emotion out of it:<sup>44</sup> we want the rule of law, not the rule of emotion. While there may be some truth in that, especially given populism's tendency to reach for emotion and how something makes you feel in place of facts and expertise, it is a question of balance. Judges should still, surely, be able to lament the loss of a part of nature,<sup>45</sup> even if they think that the law makes it an inevitable outcome in a particular case.

Lord Denning's judgment also forces us to confront the fact that the story being told in environmental law cases is often an anthropocentric tale of how humans will be impacted.<sup>46</sup> Even where the impacts on nature are considered in cases, and even if nature is ascribed rights of its own, nature is, by definition, unable to tell its own tales in court. The Wild Law Judgment Project has made an important attempt to recast a number of key environmental law judgments from nature's perspective, but even there, nature is not speaking in the first person (unlike the article's opening polar bear quote).<sup>47</sup> Indeed, would we take it seriously if someone tried to write a judgment from the point of a view of, say, a whale or a polar bear judge?

While the current section has, for the sake of emphasis, deliberately separated out narrative based on emotion from more rational, expert legal and scientific argument, the reality of course is that both are typically to be found in cases. Although some cases are undoubtedly drier and more rational than others (for example the statutory appeal roads case above), most contain an assemblage or mixture of different types of language presentation and argumentation. Some of these—especially claimant submissions—are more likely to be emotional, autobiographical accounts, and others will be technical in nature.

Nor can it be said that drier cases or indeed environmental legislation lack stories.<sup>48</sup> This takes us back to what we mean by a story or narrative. The stories may not leap out in a memorable way and may lack direct emotional content, but the hidden narratives they contain may be all the more powerful for that. These are stories in which law sets out how things are to be ordered. Thus, in a fracking statutory appeal case, the story that ends up being told is that planning authorities do not have to consider scope 3<sup>49</sup> emissions as part of environmental impact assessment of

43 See eg Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 LQR 226, stating of a number of Denning's famous openings that '(n)o one ever spoke as Lord Denning wrote in these passages and no one ever wrote in that way except in fairy stories and tales for children' (245).

44 For a stance against emotional 'sentimentality', see eg Richard Posner, 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 Uni Chicago L Rev 1420.

45 Katie Woolaston and Afshin Akhtar-Khavari, 'Extinction, Law and Thinking Emotionally About Invertebrates' (2020) 29 Griffith L Rev 585.

46 Some might add that Denning's story is also one which prioritises men and their cricket, while ignoring women unable to use their gardens: their story is not given any real weight in his judgment. A less gender-reinforcing feminist argument is that women should also enjoy the space to play cricket and their opportunity too would be lost. Continuing the theme of gender stereotypical or essentialised views, women are often portrayed as emotional and men as rational. It is, however, a male judge here whose judgment is informed by emotion.

47 Nicole Rogers and Michelle Maloney, *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge 2017).

48 Burger (n 10) 14.

49 I.e. off-site emissions from the combustion of the fossil fuel by consumers.

drilling operations.<sup>50</sup> That presents a distinct story about what emissions get included and who gets to decide on how to control them—whether this is something for local communities or for national climate and energy policy. Reading these cases is dry and the cases themselves do not have obvious stories presented within them by claimants or judges as we saw with *Juliana* or with *Miller v Jackson*. But there is still a story that the case is implicitly telling about how we tackle climate change and where power lies to decide that.

Similarly with environmental legislation, if you take an example like The Storage of Carbon Dioxide (Licensing etc.) Regulations 2010,<sup>51</sup> this is a dry statutory instrument with details about the need for licences and storage permits for carbon capture and storage (CCS) sites being used to store carbon dioxide underground. It is not a riveting read. However, it can be seen as telling an implicit story about CCS as a legally authorised technological solution to climate change, which enables fossil fuel-based operations to continue. Rather than being forced to cut their carbon emissions by pivoting rapidly to renewables, CCS allows for more of a business-as-usual approach. The issue, however, is that the statutory instrument was introduced in 2010 and we are only now beginning to see signs of a CCS industry emerging<sup>52</sup>—and then not yet at the scale and competitive cost required for the technology to deliver the quantity of removals needed in the time we have available to avoid dangerous global heating.<sup>53</sup> Back in 2010, the law thus provided a legitimating but very much anticipatory story about the future, where the technology was as Elen Stokes puts it, ‘felt into existence’.<sup>54</sup> Law helped to ‘dynamize the future’, with that future promise exerting ‘a powerful pull on the present’.<sup>55</sup> In the end though, it is a story of climate delayism, with a technological get out of jail free card present in law and waved by industry, but with the technology always on the horizon and never actually reached.

### 3.2 The Story of Environmental Law, and of the Academic Discipline

Next, cases can be traced as part of the (his)story of environmental law, especially landmark cases.<sup>56</sup> Thus, Richard Lazarus and Oliver Houck’s edited collection, *Environmental Law Stories*,<sup>57</sup> seeks to set out what they regard as the foundational cases within US environmental law such as *Chevron*<sup>58</sup> on deference to agency interpretation of statutes, and *Laidlaw*<sup>59</sup> on standing. As they state: ‘We all enjoy a good

50 *Preston New Road Action Group v Secretary of State for Communities* [2018] EWCA Civ 9.

51 Applicable largely in England and Wales.

52 David Sheppard, ‘Exxon and Shell Join Scottish Carbon Capture Project’, FT, 16 July 2021.

53 Nathalie Thomas, ‘Environment Groups Question UK’s Carbon Capture Push’, FT, 11 January 2021; Conor Sullivan, ‘Carbon Capture Eyes Renewed Backing Despite Past Failures’, FT, 26 April 2021.

54 Elen Stokes, ‘Beyond Evidence: Anticipatory Regimes in Law’ (2021) 43 *Law & Policy* 73, 80.

55 *ibid.*

56 Landmark cases become part of the story of environmental law in part because of the reinforced stories we choose to tell about them (and not other cases). For a critical revisiting of the notion of the landmark case, see Stefan Theil, ‘Excavating Landmarks—Empirical Contributions to Doctrinal Analysis’ (2020) 32 *JEL* 221.

57 Richard Lazarus and Oliver Houck (eds), *Environmental Law Stories* (Foundation Press 2005).

58 *Chevron v Natural Resources Defense Council* 467 US 837 (1984).

59 *Friends of the Earth v Laidlaw Environmental Services* 528 U.S. 167 (2000).

story. The story of environmental law is a particularly rich one, improbable and unpredictable, and has been driven forward by lawsuits large and small.<sup>60</sup>

Of course, we can examine the narrative of environmental law more broadly—in other words not just via landmark cases but also, for example, landmark statutes in domestic environmental law or summits and treaties in international environmental law. In doing so we need to distinguish between the story of environmental law as a corpus of law and the story of the subject as an academic discipline.<sup>61</sup> Here it is useful to consider Matthew Windsor's treatment of narrative within the broad field of public international law.<sup>62</sup> Windsor draws on Ricoeur to argue that there are successional and configurational elements to narrative.<sup>63</sup> The successional aspect involves change over time. In UK environmental law, one might therefore trace the story of UK environmental law from its Victorian beginnings (with, say, the Alkali Acts) to the present day with the Environment Act 2021. These stories we tell students are often told as ones of progress (for example in relation to water quality and fish in the Thames, or the way in which law in the shape of the Clean Air Act 1956 helped to tackle the great London smog of the early 1950s), but it is also typically a story of progress on one front accompanied by law's failure on others (for example, regarding less visible urban air pollution, diffuse river pollution, and climate change).

If one looks instead at the academic discipline and the state of academic scholarship within environmental law, here too one finds assertions made just over a decade ago that, because of its failure to engage sufficiently with methodology, the subject should be regarded as an immature academic discipline.<sup>64</sup> While progress was 'eagerly awaited and predicted', adulthood had seemingly never arrived, with environmental law scholars still believing that the best was 'yet to come'.<sup>65</sup>

Neither are the stories we tell about environmental law over time uncontested. This is very much true, for example, of the story of the role of EU environmental law in the UK, which is inevitably influenced by one's views on Brexit. Thus, Ben Pontin in his book *The Environmental Case for Brexit*,<sup>66</sup> tells a much more optimistic story of how good UK environmental law was before the EU than Maria Lee, in her review article of the book, recalls.<sup>67</sup> While this example illustrates that there is no neutral history of environmental law out there, some stories of the subject are undoubtedly dominant and thus present an air of neutrality. That dominance in, for example, international environmental law has begun to be challenged by Third World Approaches to International Law (TWAIL). Thus, Usha Natarajan and Kishan

60 Lazarus and Houck (n 57) 1. The story or narrative element does not thereafter form a real thread of the book, however.

61 Ole Pedersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 OJLS 103.

62 Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 Leiden J Int'l L 743.

63 *ibid* 746–47, citing Paul Ricoeur, *Hermeneutics & the Human Sciences* (CUP 1981).

64 Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 JEL 213.

65 *ibid* 214.

66 Ben Pontin, *The Environmental Case for Brexit: A Socio-legal Perspective* (Hart 2019).

67 Maria Lee, 'Environmental Pasts and Futures: The European Union and the "British Way"' (2019) 31 JEL 559.

Khoday have questioned the dominant narrative that international environmental law's origins can be traced back to the 1972 Stockholm Conference on the Human Environment, arguing instead that for much of the Global South, the story began much earlier, in colonial times.<sup>68</sup> For those countries, international law—far from protecting their environments—systematically enabled the looting of their natural resources.<sup>69</sup>

Ricoeur's other narrative element is configurational, which involves constructing 'meaningful totalities out of scattered events'.<sup>70</sup> This takes us into the classic territory of whether environmental law really coheres as a subject.<sup>71</sup> Is it really just a series of scattered parts such as tort, public law and criminal law, or are there aspects like environmental principles and environmental rights which help to configure the subject within a coherent narrative? While these and other important legal doctrines undoubtedly help us narrate environmental law as a coherent story, it is also important to consider some of the broader intellectual glue that holds the subject—particularly as an academic discipline—together. We turn to look at both legal doctrine and this wider intellectual glue in the next section.

#### 4. INTERNAL NARRATIVES OF ENVIRONMENTAL LAW

Some types of narratives found in environmental law are thus internal to the subject itself and help to give it shape. This is not so much environmental law as a successional story, considered earlier, but rather the narrative elements that assist with its coherence, whether as a body of law or as an academic discipline. These may be non-doctrinal analytical concepts which help to shape the subject; or legal doctrine itself may play a similar configurational role.

##### 4.1 Non-Doctrinal Organising Analytical Concepts

First, there are non-doctrinal, organising analytical concepts, internal to environmental law, or what one might term 'conceptual' narratives.<sup>72</sup> Vito De Lucia, for example, describes the competing narratives of anthropocentrism versus ecocentrism within the broad ecosystem approach, which has become popular in environmental law.<sup>73</sup> Grace Nosek has analysed how compelling climate litigation narratives mirror what risk literature tells us cause people to perceive risks as serious—they are viscerally described, involuntary, and knowingly imposed.<sup>74</sup> As Nosek argues, using this in climate change litigation against the fossil fuel industry can help to shift the wider public narrative on climate change away from an emphasis on individual responsibility to

68 Usha Natarajan and Kishan Khoday, 'Climate Change' in Jean d'Aspremont and John Haskell (eds), *Tipping Points in International Law: Commitment and Critique* (CUP forthcoming 2021).

69 *ibid.*

70 Windsor (n 62) 746.

71 See eg Pedersen (n 61).

72 Margaret Somers and Gloria Gibson, 'Reclaiming the Epistemological Other: Narrative and the Social Constitution of Identity' (1994) CSST Working Paper #94, University of Michigan.

73 Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 JEL 91. On ecological narratives, see Jo Goodie, 'The Ecological Narrative of Risk and the Emergence of Toxic Tort Litigation' in Philippopoulos-Mihalopoulos (2011, n 7) 65.

74 Nosek (n 19).

a more appropriate focus on the structural responsibility of the carbon majors. Besides risk and risk perception as an organising conceptual narrative,<sup>75</sup> we also find within environmental law narratives of tragedy (of the commons),<sup>76</sup> sustainability, vulnerability and resilience, external cost imposition,<sup>77</sup> environmental and climate justice,<sup>78</sup> ecosystem services,<sup>79</sup> public participation<sup>80</sup> and stewardship.<sup>81</sup>

In addition, in recent years the Anthropocene has been analysed in narrative terms within environmental law scholarship. To some extent that scholarship usefully rehearses debates about Anthropocene narratives found in other disciplines. Thus, the original scientific narrative of the Anthropocene as a new geological era readable in the ice cores as a result of human (*anthropos*) industrial activity has been challenged by narratives from the social sciences and humanities.<sup>82</sup> The latter have questioned, inter alia, the scientific narrative's implicit attribution of responsibility to all humans when it is clear that the rich in the Global North have had the largest impact. However, the Anthropocene has become as much a normative project as a descriptive one,<sup>83</sup> and narrative-based legal scholarship has also addressed this former aspect. Thus, building on Anna Grear's call to 're-story' liberal law and rights,<sup>84</sup> Kathleen Birrell and Daniel Matthews have set this in the context of the Anthropocene to argue for a re-storying which replaces rights in favour of obligation.<sup>85</sup> They see obligation as much more expressive of human material

75 Also Goodie (n 73).

76 Surabhi Ranganathan, 'Global Commons' (2016) 27 EJIL 693.

77 Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25 JEL 347; Melinda Harm Benson, 'Reconceptualizing Environmental Challenges—Is Resilience the New Narrative?' (2015) 21 J Evtl & Sustainability L 99. cf Burger (n 10), who sees narrative approaches to environmental law as an alternative to more rational ways of understanding the subject such as economic analysis. ie for Burger, externalities are not a narrative.

78 Karin Mickelson, 'Competing Narratives of Justice in North–South Environmental Relations: The Case of Ozone Layer Depletion' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 297.

79 Keith Hirokawa, 'Three Stories About Nature: Property, the Environment, and Ecosystem Services' (2011) 62 Mercer L Rev 541.

80 Umberto Sconfienza, 'The Narrative of Public Participation in Environmental Governance and its Normative Presuppositions' (2015) 24 RECIEL 139.

81 Emily Barritt, 'The Story of Stewardship and Ecological Restoration' in Afshin Akhtar-Khavari and Benjamin Richardson (eds), *Ecological Restoration Law: Concepts and Case Studies* (Routledge 2019) 72.

82 Andreas Malm and Alf Hornborg, 'The Geology of Mankind? A Critique of the Anthropocene Narrative' (2014) 1 The Anthropocene Rev 62; Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26 Law and Critique 231; Nicole Graham, 'Learning Sacrifice: Legal Education in the Anthropocene' in Kirsten Anker and others (eds), *From Environmental to Ecological Law* (Routledge 2021) 209.

83 Vermeylen (n 1). Within law, this has been characterised as a difference between a descriptive law of the Anthropocene (which has helped to produce its pathology) and law for the Anthropocene (seen as a normative project for renewed legal thinking to help overcome that pathology): see eg Kathleen Birrell and Daniel Matthews, 'Laws for the Anthropocene: Orientations, Encounters, Imaginaries' (2020) 31 Law and Critique 233.

84 Anna Grear, 'It's Wrong-Headed to Protect Nature With Human-Style Rights' (2019) <<https://aeon.co/ideas/its-wrongheaded-to-protect-nature-with-human-style-rights>> accessed 5 August 2021.

85 Kathleen Birrell and Daniel Matthews, 'Re-storying Laws for the Anthropocene: Rights, Obligations and an Ethics of Encounter' (2020) 31 Law and Critique 275.



embeddedness in nature and our entanglement with it than even rights reconstituted as rights of nature can achieve.<sup>86</sup>

Finally, in her 2018 article 'Narratives of Capital Versus Narratives of Community: Conservation Covenants and the Private Regulation of Land Use', Bonnie Holligan argues that conservation covenants largely reflect a narrative of capital as opposed to a competing narrative of community. Such covenants—which have found their way into the UK Environment Act 2021—are agreements between private landowners and conservation bodies to secure conservation goals. As Holligan outlines, the narrative around them can be one of capitalist free markets and property rights being used in the service of conservation, but the alternative story is one that stresses the way in which effective third party community participation is often missing from such an approach.

Many, of the above narratives have a distinctly environmental flavour, though by no means all.<sup>87</sup> Inevitably, not everyone will buy into the ways of viewing the subject that some of these conceptual stories present. Some people will baulk at the law and economics related narrative of externalities, questioning whether the environment should be seen through a cost lens. Others may not see a Marxian narrative of capital as their preferred story or conceptual glue for understanding the subject. Indeed, this might well lead to a debate about whether all the narratives analysed here as internal to the subject belong in that category, or whether some might properly be regarded as external. I have included all the ones in this section as internal because they have been described in narrative terms in the existing environmental law literature. However, for individual scholars reading this article, a number of the narratives may well feel external to their way of understanding the subject.

#### 4.2 Legal Doctrine as Narrative

Next, some legal doctrines may also be characterised as narratives.<sup>88</sup> Nicole Rogers, for example, regards the legal necessity defence as a narrative (of necessity),<sup>89</sup> and argues that '(a)ctivist litigants are reshaping and repurposing legal doctrines . . . in an attempt to create transformative legal climate narratives.'<sup>90</sup> This obviously makes sense because activists do often use the necessity defence as an opportunity to tell their stories in court.<sup>91</sup> However, Rogers goes beyond this to describe other commonly used doctrines

86 Arguing eg that obligations tend to be situated within networks of solidarity and dependence, whereas rights of nature still involve separateness. The authors rely on New Materialist thinking in the works of Donna Haraway and others to ground their arguments. Green civic republican thought also stresses obligation in place of rights, albeit more typically from an 'enlightened anthropocentric' perspective: John Barry and Kimberly Smith, 'Civic Republicanism and Green Politics' in Stuart White and Daniel Leighton (eds), *Building a Citizen Society: The Emerging Politics of Republican Democracy* (Lawrence & Wishart 2008) 123; Chris Hilson, 'Republican Ecological Citizenship in the 2015 Papal Encyclical on the Environment and Climate Change' (2018) 21 CRISPP 754.

87 And some have perhaps come to be seen as environmental through routinized use and acceptance in the subject.

88 Burger (n 10) 5. There are obvious echoes here of the idea of legal narrative I mentioned earlier, although the discussion there was more focused on the process of legal translation rather than particular types of legal narratives as here in this section.

89 Rogers (n 16) 60, 186.

90 *ibid* 186.

91 Hayes (n 19).

in environmental law as narratives. Thus, we have a human rights narrative<sup>92</sup> and the public trust doctrine is presented as a narrative about protecting the environment for future generations.<sup>93</sup> These are both doctrinal and conceptual: human rights and public trust approaches are legal doctrines like the necessity defence, but unlike that narrow defence, they are also conceptual frameworks offering distinct stories about our relationship with nature and the responsibilities we have towards it. Along with other doctrines like environmental principles, rights and public trust have also been important in giving shape to environmental law as a subject.

## 5. NARRATIVES IN ENVIRONMENTAL LAW SCHOLARSHIP: ACADEMIC STORIES

Narrative has been used as a style of critical legal academic writing, mostly notably by Black and Latinx authors as part of critical race theory,<sup>94</sup> but also by feminist scholars.<sup>95</sup> Using a story-telling form has enabled them to present the lived experience of discrimination in both the academy and wider society. Patricia Williams' emotionally charged autoethnographic<sup>96</sup> type account of her experience of racist profiling by a US Benetton shop, where a shopworker would not let her in because of her race, is a classic example of such writing.<sup>97</sup> It succeeds in capturing the myth of an equal freedom to enter contracts better than a standard dry legal textbook account ever could. If you are not allowed in the door because others see you as a potential shoplifter, then you cannot even contemplate making a purchase.

However, beyond foregrounding discrimination, it can also be regarded as a type of stylistic push-back to the conventions of law journal writing more generally. As Rebecca French observes:

Legal academics and social scientists have been and continue to turn to narrative, in part because they are simply bored with their current reportage styles. The outline-with-interminable-footnoting format of law reviews that solidified as a style in the 1960s has been reviled as a straitjacket by many within the legal academy since its inception.<sup>98</sup>

It has not been without its critics on either account. Academics are loath to change their stylistic conventions. And on discrimination, commentators such as Daniel Farber<sup>99</sup> and Suzanna Sherry have pointed to a risk of essentialising

92 Rogers (n 16) 24.

93 *ibid* 48.

94 See eg Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991); Richard Delgado, 'Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence' (1995) 68 S Cal L Rev 545.

95 Kathryn Abrams, 'Hearing the Call of Stories' (1991) 79 Cal L Rev 971.

96 On autoethnography as a research method, see eg Carolyn Ellis, Tony Adams and Arthur Bochner, 'Autoethnography: An Overview' (2010) *Forum Qualitative Sozialforschung* / *Forum: Qualitative Social Research* 12 (1) <<https://www.qualitative-research.net/index.php/fqs/article/view/1589>> accessed 3 November 2021.

97 Williams (n 94).

98 Rebecca French, 'Of Narrative in Law and Anthropology' (1996) 30 *Law & Society Rev* 417, 418.

99 A well-known environmental and climate lawyer.

experiences.<sup>100</sup> A particular story does not always speak for or connect with the general in any group and there are often key elements of intersectionality (including, for example, class, with legal professors typically being middle class) that also need to be considered but which are at risk of being left out in certain narrative accounts. In any event, in the end for Farber and Sherry, ‘emotive appeal is not enough to qualify as good scholarship’.<sup>101</sup>

There are some examples of this narrative style within environmental law or which touch on key doctrines used by environmental law. Richard Delgado, a key proponent of critical race theory, writes about the public trust doctrine using a narrative dialogue between two fictional characters of colour (a middle-aged professor and his younger protégé) to reflexively discuss the merits of a narrative approach:

What are you thinking of writing about? You mentioned something about Trusts and Estates. Sounds a little dull, but I’m sure you’ll find a way of making it interesting, I added.

I’d like to show that the famous public-trust doctrine that Joseph Sax pioneered in environmental protection law a quarter of a century ago put a halt to the search for more far-reaching reform in that area. I would argue that the theory was both conservative and progressive at the same time . . .

It seems to me you could write the first one in the standard cases-and-policies mode.

I could. But I could also write it employing narratives, analyzing the rhetoric and logic of reform. I could show, for example, that the language and mental pictures of Sax’s trust approach are essentially male, revealing an unconscious fear of what might happen if we did not place the valued property beyond our reach, in the hands of someone else. It’s a little like what wealthy men do for their children fearing that they otherwise might be tempted to spend the child’s college funds on a sports car.

Like Ulysses lashing himself to the mast. I like this other approach much better. It lets you do more, go to the core of the problem, namely the way we think about natural goods like parks, beaches, and animal species.

‘I thought so, too,’ Rodrigo replied a little wryly, ‘but then I talked to a few of my colleagues. They all preferred the standard version. A couple of them showed thinly disguised scorn when I spoke of using a storytelling and narrative-analysis approach.’<sup>102</sup>

We can also find examples in UK environmental law scholarship. Liz Fisher, in her introductory textbook on environmental Law, writes about her personal experience of living in Oxford to illustrate the tragedy of the commons by way of a street parking analogy:

100 Daniel Farber and Suzanna Sherry, ‘Telling Stories Out of School: An Essay on Legal Narratives’ (1993) 45 *Stanford L Rev* 807; in reply, see eg Richard Delgado, ‘On Telling Stories in School: A Reply to Farber and Sherry’ (1993) 46 *Vand L Rev* 665.

101 Farber and Sherry, *ibid* 849.

102 Delgado (n 94) 556.

I live in a long narrow street in East Oxford. The houses in the street, like the streets around it, are mostly small Victorian terraced houses with no driveways and no garages. When I first moved in, during the 1990s, there was plenty of parking in the area . . . Those that lived in the street had pride in their ability to self-regulate parking – we even closed the street on occasion, cleared the cars, and had street parties.<sup>103</sup>

While Fisher is a woman, her example is more about narrative style as a (very effective) pedagogic example rather than something that speaks to her experience as a female academic as such. In contrast, Steven Vaughan, does address gay sexuality from a personal narrative perspective in his journal review piece, albeit not in describing an experience of discrimination:

A decade ago, I was in practice . . . working for a US law firm. Each year, the firm had a global conference and would fly in the attorneys . . . That year the conference was in Florida and . . . we had a private tour of the Kennedy Space Center. On the bus to Cape Canaveral, I sat behind a colleague from the Washington DC office. I had seen him earlier in the week and, from overheard conversations, knew that he was gay. He was also very attractive, in a sort of preppy, American, JC Crew kind of way. We got chatting on the bus. 'Which office are you from?', he asked. 'London.' 'And what do you do?' Here, I felt, I was in with a winning answer. An answer that would automatically make me look more attractive. I was an environmental lawyer . . . I told him what I did. He smiled. A wry sort of smile. 'So, what do you do?' I asked him, thinking that, whatever the answer, my own area of practice would win in a game of top trumps. 'Space law,' he said. 'Space law? Space law?!?!' 'Yes,' he said, 'space law'.<sup>104</sup>

It is, though, a very funny anecdote or story which adds immeasurably to the review. And while it does not broach discrimination as such, it quietly reminds the reader of the hidden nature of sexuality within academic writing on environmental law. It both openly outs the author and reminds one that environmental law (and indeed space law!) typically offers no obvious space for the discussion of sexuality. One certainly does not expect it in an analysis of EU REACH chemicals regulation—the subject of the review piece. In that way it is different from race or gender or class, where, as in much of the US literature, an author's identity is more likely to be critical to the law being discussed. It is not like a person of colour writing about their experience of environmental injustice for example.

In the light of the Black Lives Matter movement which has provided a renewed focus on race and law, it will be interesting to see if a more diverse academy begins to embrace a personal story-telling approach within environmental law.<sup>105</sup> However,

103 Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017) 6–7.

104 Steven Vaughan, 'My Chemical (Regulation) Romance' (2015) 27 JEL 167.

105 For a recent example, see Michelle Lim, 'Building Safe, Secure and Sustainable Futures in the South China Sea' (2020) 8 Critical Studies on Security 67.

I have discussed critical race theory here as much for one of its favoured strategies—viz using narrative (including in academic law journal writing) to speak out on behalf of marginalised voices—as for its particular emphasis on race. In environmental law, narrative techniques might be advocated in a similar way to provide a voice to LGBTQ experiences in environmental law,<sup>106</sup> for women's experiences, for indigenous peoples, for the old and young, for the poor, and not least for nature itself.<sup>107</sup> Environmental law and its scholarship has typically failed sufficiently to embrace this range of interests.<sup>108</sup> I also mention it because, as can be seen from the Farber and Sherry comments above, narrative here is typically emotive and this contrast between rational law and emotional narrative is again a thread I am exploring.

Of course, how persuasive one finds such a narrative strategy brings us back to the earlier discussion of narrative's prior relationship to law. If narrative precedes law, then, as a matter of strategy, attacking those dominant narratives through narrative is likely to have a certain appeal. Others may question whether dominant narratives are really likely to be shifted by stories that academics tell about the marginalised. This issue will be returned to below in section 7 on the Dark Mountain Project, which has a similar strategic emphasis on narrative.

## 6. NARRATIVES IN ENVIRONMENTAL LAW: STORIES OF THE PUBLIC

It is also possible to find environmental law examples of stories the public (as opposed to legal academics) tell about the law in everyday life, outside of court-settings. A good example can be found in the 'legal consciousness' literature, part of the US law and society tradition, which de-centers the role of formal legal institutions and stresses instead the meanings which ordinary individuals give to legal and non-legal norms.<sup>109</sup> In their book, *The Common Place of Law: Stories from Everyday Life*,<sup>110</sup> Patricia Ewick and Susan Silbey present a series of interviews with members of the public, eliciting their personal experiences of the law in everyday life. One, with Charles Reed, speaks of a whole variety of his commercial, consumer and education law exposures, including fraudulent activity over both radon and asbestos searches in house purchases, and waste recycling corruption, where people could be

106 Perhaps more likely in terms of discrimination in environmental law practice or academia rather than in terms of pollution as a form of environmental injustice.

107 Angela Lee has advocated precisely this in relation to animals within animal law, drawing parallels with a strategic preference for narrative expressed by some feminists: Angela Lee, 'Telling Tails: The Promises and Pitfalls of Language and Narratives in Animal Advocacy Efforts' (2017) 23 *Animal L Rev* 241.

108 Louis Kotzé, 'Reflections of the Future of Environmental Law Scholarship and Methodology in the Anthropocene' in Ole Pedersen (ed), *Perspectives on Environmental Law Scholarship Essays on Purpose, Shape and Direction* (CUP 2018) 140, 158. Cf planning law: Steven Vaughan and Brad Jessup, 'Backstreet's Back Alright: London's LGBT+ Nightlife Spaces and a Queering of Planning Law and Planning Practices' in Maria Lee and Carolyn Abbot (eds), *Taking Planning Law Seriously: New Research in English Planning Law* (UCL Press forthcoming).

109 Anna-Maria Marshall and Scott Barclay, 'Introduction: In Their Own Words: How Ordinary People Construct the Legal World' (2003) 28 *Law & Soc Inquiry* 617.

110 Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

paid off for taking away glass on their collection round when they were not supposed to.<sup>111</sup> His story of the latter is as follows:

It goes on all over the place. All over the place. We have a garbage stall behind our restaurant. It's fenced in, has boards, has a Dumpster in it. And the Dumpster is taken away by, what do you call it, a trash collector, refuse removal, no, disposal company. They don't take glass. Okay, but . . . if you pay the driver, he will overlook the fact that there are bottles in your garbage. He's taking it where there's not supposed to be glass, and he must be paying off somebody when he dumps it with the glass . . . It's all connected.<sup>112</sup>

As Ewick and Silbey note, his story is one of frustration with environmental law insofar as he believes that, because the law requires the separation of glass from other types of rubbish, it inevitably leads to corruption.<sup>113</sup> Radon and asbestos searches are similarly presented as an opportunity for homeowners to be scammed into having unnecessary work done.

The book allows for the telling of people's stories, but also in the end helps to make sense of them with three overarching narratives about the law formulated by Ewick and Silbey as an organising analytical framework.<sup>114</sup> They suggest that the individual narratives that they elicited in interviews themselves end up pointing to a wider set of stories about the law, which is portrayed in one of the following three ways: as magisterial and remote; as a game with rules that can be manipulated to one's advantage; or as an arbitrary power that is actively resisted. In other words, people's stories fit one or more of these broad narratives about the law and its role. In Charles Reed's case his stories about environmental law fit the second of these three narratives, where the law can be manipulated for personal financial gain.

The relevance of this 'legal consciousness' section for environmental law is that as a discipline, and like most lawyers, we have a tendency to be very court focused. If we take notice of ordinary people's stories, it tends to be when they are telling them in legal cases like in *Juliana*. The point of the current section is to show that narratives about environmental law exist in venues other than courts and that these are also worthy of research and consideration in environmental law. The stories that members of the public tell about environmental law provide us with insights into how they understand it and, perhaps, misunderstand it. Those insights may be useful in designing more effective environmental law, especially when that law is public-facing and seeking to encourage individual behavioural change.

111 *ibid* 118–19.

112 *ibid*.

113 *ibid*.

114 This could be included as an additional category of narrative in environmental law: the analytical narratives of law (and litigation) that legal academics identify in the accounts of others about law – whether accounts of the public, as here, or accounts of other academics. On the latter in environmental law, see eg Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*' (2013) 35 *Law & Policy* 236 (identifying three different narratives often offered by academics on why climate change litigation is important: 'it is a response to institutional failure, judicial reasoning provides authority for acting in response to climate change problems, and litigation is a forum for co-producing a physical and social understanding of climate change' (237)).

## 7. NARRATIVE IN PLACE OF ENVIRONMENTAL LAW: THE DARK MOUNTAIN PROJECT

Next, rather than narrative *in* environmental law,<sup>115</sup> we come to an idea that narrative should come *in place of* environmental law and litigation as a strategy for achieving much needed social change on climate and the environment. In other words, we should rely not on law, which has not served us well so far in tackling the crisis we find ourselves in, but rather on (non-legal) narrative. There are distinct echoes of Delgado here who, within critical race theory, has argued that stories and not litigation are the best way of tackling discrimination and inequality.<sup>116</sup> The Dark Mountain Project<sup>117</sup>—a cultural movement dismissive of environmentalism and sustainability<sup>118</sup>—is a good example of such an argument. While it does not single out law, it is dismissive of technological and political (and by implication also legal) solutions. As principle 2 of its eight foundational ‘principles of uncivilisation’ states, ‘We reject the faith which holds that the converging crises of our times can be reduced to a set of “problems” in need of technological or political “solutions”.’ We can see how environmental law might fit here, because it too is apt to conceive of a set of environmental problems for which the tools of environmental law then provide solutions.<sup>119</sup>

What Dark Mountain argues instead is that storytelling is the way forward, albeit telling a very different story to the dominant narratives of today:

We believe that the roots of these crises lie in the stories we have been telling ourselves. We intend to challenge the stories which underpin our civilisation: the myth of progress, the myth of human centrality, and the myth of our separation from ‘nature’. These myths are more dangerous for the fact that we have forgotten they are myths.<sup>120</sup>

This then leads to principle 4 in which they state that they ‘will reassert the role of storytelling as more than mere entertainment. It is through stories that we weave reality’.<sup>121</sup> Just as critical race theory held up storytelling as a means of allowing marginalised communities a voice which they often lacked, so too might (different) stories allow for the voiceless environment to be better heard.

In practice, such an approach is in danger of throwing the baby out with the bathwater. It is undoubtedly true that using political and legal levers to secure environmental policy change has been slow and not always effective, and that it is possible to be too optimistic about the role of law and litigation as a way out of our current

115 Including a narrative style in environmental law scholarship as in Section 5 above.

116 Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87 Michigan L Rev 2411. This is not necessarily reflective of critical race theory more broadly: Patricia Williams eg while mindful of some of the problems associated with litigation, still saw a place for it. Even Delgado later changed his mind somewhat.

117 <<https://dark-mountain.net/about/manifeto/>> accessed 24 June 2021.

118 The latter because they see it as an idea sustaining the current system, which is one based on growth and material progress, leading us towards collapse.

119 eg Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases, and Materials* (2nd edn, OUP 2019) 4.

120 (n 117) principle 3.

121 (n 117).

ecological and climate crisis. However, Dark Mountain type approaches suffer from what one might call equivalent ‘narrative optimism’: while ontological change is useful and the re-setting of some dominant narratives advisable, it is too much to expect that enough people in society will be swayed by storytelling to adopt a more enlightened relationship with nature, or that stories alone will provide us with the necessary regulatory detail. Thus, rather than narrative being seen as a complete *replacement* for law, it seems more sensible for legal sceptics to regard it as a necessary *precursor* of legal change in the Robert Cover sense considered earlier. In other words, one might more plausibly argue that a shift in societal narratives is needed before one can expect law to really make a difference.

## 8. FICTIONAL NARRATIVE

More recently, we have also seen the emergence not only of environmental law scholars engaging with fiction written by others in order to illustrate challenges facing environmental and climate law,<sup>122</sup> but also scholars writing environmental law as a fictional narrative.<sup>123</sup> Unlike Dark Mountain, this is not so much seeking to replace environmental law with narrative, but rather to incorporate or integrate fictional narrative *within* environmental law scholarship. Michelle Lim, for example, has written a law journal article on the idea of ‘endlings’ in the context of extinction as a hidden narrative in conservation and biodiversity law.<sup>124</sup> The law itself comes up with lists of endangered species but is typically silent on the topic of extinction. By interspersing a fictional account of extinct animals speaking from the past, Lim seeks to bring this hidden narrative out into the open and to connect with our emotions about extinction in a way that legal narrative often fails to manage.<sup>125</sup>

## 9. REFLECTING ON NARRATIVE

Having covered a range of different uses of narrative in environmental law, it is worth reflecting on what we can learn from the above accounts. One key element worth drawing out is the way in which narrative relates to law, rationality and emotion. In some of the sections (for example, legal doctrine as narrative, or when discussing CCS legislation), we see a close intertwining of rational law and narrative where it makes sense to speak of *legal* narratives. There, in other words, law is narrative. However, in other sections (notably critical race theory, the Dark Mountain Project, fictional narrative in law, and also parts of the case law section such as the quoted *Juliana* submission), we have a situation where narrative is presented as very much an alternative to law or conventional legal style—and often an emotional alternative at that. The whole point of these narratives is that they are being deployed as a strategic choice in place of law or a traditional legal approach. The emotional nature of the relevant stories is also often key. In a climate case like *Juliana* for example, the

122 Rogers (n 16).

123 For advocacy on this as a type of legal method, see Michelle Lim, ‘Fiction as Legal Method—Imagining with the More-than-Human to Awaken Our Plural Selves’ (2021) 33 JEL 501.

124 Michelle Lim, ‘Extinction: Hidden in Plain Sight – Can Stories of ‘The Last’ Unearth Environmental Law’s Unspeakable Truth?’ (2020) 29 Griffith Law Review 611.

125 My fictional opening polar bear quote does the same, but in more of a bite size than Lim’s extensive narrative.



children's emotionally charged submissions offer a striking contrast to the rational, technical language of the law and the science.<sup>126</sup> However, while it may have distinct benefits in litigation in terms of communication and emotional connection, this emotional populist element also carries risks, in that an over-reliance may in the long term undermine the expertise of the law.<sup>127</sup> Equally, some academics have shown themselves to be sceptical of emotional narrative writing by other academics in law journals, preferring a more standard, rational approach to legal scholarship.<sup>128</sup> Environmental lawyers experimenting with narrative styles (beyond the occasional paragraph or two)<sup>129</sup> may end up facing similar scepticism.

The distinction can in part be explained by the underlying academic literature which informs the various approaches. As we have seen, narrative is of interest both to those working from a law and literature tradition, and to those from a law and social movements perspective. The first is inclined to see law as literature (specifically here as narrative), while the latter is more likely to view law/litigation and narrative as alternative strategic choices available to social movement actors.<sup>130</sup>

Of course, this does not speak to the other wider issue raised by the current article, which is the more systemic relationship between law and narrative. If one sees narrative as preceding and shaping law, then one might be sceptical about using law and litigation as a strategy in environmental law to try to drive social and environmental change. That said, as we have seen, one might also be sceptical about using narrative as a strategy to try to disrupt and shift dominant narratives, especially those associated with capitalism and its emphasis on economic growth. Equally, for those who see law as having the potential to shape and not just be shaped by existing narratives, then using law and litigation as a strategy to help with the necessary reshaping is perfectly logical. Nosek's writing on climate change litigation and its capacity to change the public narrative around individual responsibility is an obvious example there.

## 10. CONCLUSION

In analysing the role of narrative in environmental law, one might be accused of adopting a rather inward-looking approach to the discipline. In that respect, the current article shares something in common with the range of material we have seen over the last decade or so on the state and nature of environmental law scholarship, which adopts a similar inward turn.<sup>131</sup> However, looking inwards is important for being able to face outwards effectively. That is true of analysing methodology and interdisciplinarity within the subject, but also—and to an extent as part of that—in thinking about the analytical language we are using in environmental law scholarship. Approaching our use of, often taken for granted, terms critically and reflectively helps

126 Hilson (n 4).

127 *ibid.*

128 Farber and Sherry (n 100).

129 As with eg Fisher and Vaughan above.

130 Even if the alternative (as with narrative in *Juliana*) is being used *within* litigation rather than *instead* of it—ie it is an alternative to a drier legal presentation within the case there, not an alternative to litigation.

131 See eg Fisher and others (n 64); Little (n 22); Ole Pedersen (ed), *Perspectives on Environmental Law Scholarship Essays on Purpose, Shape and Direction* (CUP 2018).

both academic lawyers and practitioners and activists to sharpen the way we deploy them. This, I suggest, is where the significance of the current article lies.

However, its origin also stemmed from a feeling that environmental law often fails to register or resonate with the emotional connection many of us have with the natural environment. There is a rich tradition of the study of emotion in law,<sup>132</sup> and environmental law has also begun to engage with this,<sup>133</sup> including examining the role of beauty/aesthetics in environmental law and their connection with emotion.<sup>134</sup> My argument is that narrative is important for its ability to bring emotion back into environmental law, but that it needs to exist in balance with rationality and expertise. We are also once again confronted with the different senses of narrative because, as Woolaston and Akhtar-Khavari have persuasively argued, the more hidden legal narratives of environmental law can equally do a good job of removing the emotion associated with, for example, decisions involving species extinction and thereby inure us to them.<sup>135</sup> These narratives manage to neutralise positive emotions in part because the law imposes a utilitarian calculus where human interests are prioritised,<sup>136</sup> rather than embodying their preferred feminist care ethic.<sup>137</sup>

Thus, while there remains a need for environmental lawyers to follow E.M. Forster's advice to 'only connect' the prose and the passion<sup>138</sup>—to find more of a place for emotion in the subject while maintaining the important prose rationality—we need to be aware that narrative can face both ways in terms of emotion in environmental law. It can both elicit and neutralise the passion.<sup>139</sup> Connecting in the Steinbeck sense is also important in that narrative can help us to connect with the marginalised, including nature and thereby to feel compassion.<sup>140</sup> However, if narrative becomes too commonly regarded as a 'weapon of the weak',<sup>141</sup> then that too is not without risk. Neither is putting all one's eggs in the narrative basket, Dark Mountain style, likely to be advisable. In the end, narrative is important in environmental law, but it must exist in balance.

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132 See eg Terry Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law Hum Behav* 119.

133 See eg Woolaston and Akhtar-Khavari (n 45); Lim (n 124).

134 Benjamin Richardson, Emily Barritt and Megan Bowman, 'Beauty: A Lingua Franca for Environmental Law?' (2019) 8 *TEL* 59.

135 Woolaston and Akhtar-Khavari (n 45).

136 *ibid.*

137 *ibid.*

138 EM Forster, *Howards End* (Penguin 1941).

139 Beauty has likewise been described as a potential double-edged sword in environmental law because some may see beauty in smokestacks or environmental destruction, and beauty can serve the interests of consumerism as well as nature (Richardson and others n 129).

140 Verchick (n 15).

141 James Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1985).