

The Problem That Is Global Warming: Introduction

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Global warming poses significant challenges to society at every level, evading easy definitions that would make the usual instrumental approaches to policymaking and regulation a relatively straightforward task. The embeddedness of the carbon economy in contemporary methods of industrialization and development means that climate protection is at once a problem of environment, the global economy, and human rights. It requires us to understand the strengths and limitations of a regulatory approach, to tease apart the intricacies of international law and governance to find ways to turn economic, legal, and cultural norms toward creating climate justice. Sector specific approaches to dealing with human rights and refugees, as well as international relations based on interstate relations, also have limitations. These include insufficient capacity to appreciate the differentiated responsibility of various actors in the creation of this ecological crisis as well as creating obstacles in finding appropriate ways to motivate those with the most ability to reduce our impact on the climate. Mutual reinforcement and “virtuous” arbitrage across fragmented regulatory regimes might create new synergies with potentially positive transformative effects for climate protection. To achieve this, the development and maintenance of legitimacy is central. The articles in this edition tackle these issues and, taken as a whole, provide a springboard for future scholarship.

This special issue started as an idea of the editors to bring together different disciplines and ways of seeing the world in order to understand how we can deal with arguably our greatest ecological challenge. The articles in this issue are a tentative step in this direction, bringing together diverse views on how to engage with the problem of global warming. Yet, it is the very nature of the problem that is global warming that brings with it such significant challenges. Understanding the intersections of the ecological, regulatory, and social complexity of global warming provides significant insights so that promising ways forward can be found. The articles in this issue make notable progress in this regard, from perspectives encompassing political science, law, and philosophy.

A traditional starting point for this journal has been regulatory, and it is here that the articles begin. Donald Feaver and Nicola Durant (2008) make

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a strong case that the current regulatory framework is overly complex and fraught with incoherence between the strong social need for reducing our impact on the climate and policy norms that appear designed more to shield countries from the negative economic repercussions from reducing greenhouse gas emissions. The lack of a substantive regulatory core, as they put it, has resulted in a rationalized administrative structure for governance and not the development of a robust regulatory scheme effective in reducing greenhouse emissions. They argue that the focus on market mechanisms in general and emissions trading in particular has been designed to accommodate fears about short-term economic impact, rather than climate needs.

One could critique an analysis of regulatory mechanisms alone since it appears to sidestep the political realities that have shaped the regime. But to do so would miss a critical aspect of this article, namely that substantive problems and regulatory frameworks are mutually reinforcing. The framing of the regulatory regime clearly is influenced by the political milieu, but once in place the regime itself then institutionalizes a particular understanding of the problem to be dealt with, in this case one focused on mitigation of the economic impact associated with rather modest changes. What is needed is a regulatory framework that enshrines a clear, unambiguous focus on the need to reduce emissions significantly. The regulatory regime acts independently to shape actors in their understanding of what needs to be done. Their analysis makes the powerful argument that a regulatory regime shapes, disciplines, and institutionalizes what the problem is that needs to be tackled.

For example, the centerpiece of the regulatory approach of Kyoto is the emissions trading regime. Yet, the history of various trading markets such as stock and futures markets acting as a "hub of virtue" in driving standards up has a rather checkered history (Clarke, Dean, and Oliver 2003; Gunningham 1991; Haines 2007; Reichman 1991). So, emissions trading may succeed as a market in the creation and distribution of wealth, but still not bring the necessary changes in carbon reduction. Counterproductive effects (Grabosky 1995), such as displacement of dirty industries to more lightly regulated jurisdictions or the creation of perverse incentives where dirty industries are set up to claim carbon credits at a later stage, mean compliance with a particular trading regime's rules in a manner that undermines the intent of policymakers in reducing overall global emissions. Further, creative methods of compliance with audit requirements may be designed to enable the pursuit of private interest at the expense of the public good (McBarnet and Whelan 1999; Shah 1996).

Global warming is no ordinary regulatory problem theoretically or practically. It poses a fundamental challenge to our understanding of what constitutes the regulatory space. As we have understood them thus far, regulatory spaces are conceptual spaces constructed by people, organizations, and events acting in concert around a specific issue (Hancher and Moran 1998; Shearing 1993). But efforts to reverse the condition of global warming transcend that notion of regulatory space as issue- or sector-specific. As the

articles by Cinnamon Carlarne (2008) and Harro van Asselt, Francisco Sindico, and Michael Mehling (2008) point out, tackling climate change is at once a problem of environment, trade, human rights, and many other spheres. It is about economics, politics, and culture. As these articles demonstrate, climate relates to biodiversity, trade, the law of the sea, and human rights. Grappling with one component of the problem, such as the need for an emissions trading regime, in isolation may not lead to a significant reduction in warming (as Feaver and Durant assert), but it may also create new problems in terms of the impact on biodiversity, trade relations, and social justice.

Both Carlarne and van Asselt, Sindico, and Mehling deal with the issue of fragmentation of international law and the need to develop some coherence both in terms of substantive issues and in terms of process. van Asselt et al. focus on the challenge of dealing with a fragmented system of international law when trying to reduce our impact on the climate. The authors point to significant substantive and procedural conflicts that can arise between different treaty regimes. Regime conflicts are not limited to the formal agreements themselves but can extend through and emanate from implementing bodies whose status as lawmakers is not always recognized in international law. Importantly, however, van Asselt et al. argue that there are also positive aspects to this fragmentation. They point to synergies that can arise between various bodies of international law both in terms of biodiversity and, more controversially, in terms of trade law with beneficial outcomes for both regimes. The use of the multilateral trade regime to enhance trade in environmentally friendly technology, as well as to pressure countries to reduce their subsidies on fossil fuels, are two practical examples of how the trade regime might augment the impact of the climate change regime. At the level of the procedure of international law, van Asselt et al. also argue that differences in legal and quasi-legal process may be beneficial to allow disparate locales flexibility in dealing with climate related issues in the most suitable manner—provided of course that the outcome for the climate is the key concern in the particular issue at hand. There is also a further point that can be made here. In terms of process, if not substance, the multiplicity of regimes also might be understood as a natural experiment where successful processes might be disseminated.

What is interesting in the van Asselt et al. article is the argument that so-called “conflict clauses” in treaties designed to resolve specific conflicts between disparate treaties regimes might be usefully reformulated as “interaction clauses” designed to deal not only with treaty conflict but to act more broadly and affirmatively to promote change. What is intriguing here is the sense that such interaction clauses might pave the way for “virtuous arbitrage” where states use such clauses to the overall benefit of the climate. Certainly, the strategic use of diverse legal platforms for the pursuit of public good is not unheard of; Susan Silbey and Egon Bitner (1982) have pointed to the creative way U.S. regulators used law strategically in pursuit of the public interest. Here van Asselt et al. make a similar argument, but in the pursuit of a different problem and at an international level.

Cinnamon Carlarne's article broadens the discussion beyond the fragmentation of law to the need for coherence of governance of climate including, but extending beyond, international law. She follows Daniel Esty's (2006) views of governance as encompassing hard and soft law, deployed in various contexts (i.e., governmental and intergovernmental; public and private). She analyzes the challenge of fragmentation within this broad field where rules, norms, and procedures for engaging with climate change mitigation are developed and sustained. Like van Asselt et al., Carlarne also sees some benefits to fragmentation, particularly in the potential for dealing with the multiple and sometimes highly technical challenges of diverse environmental problems. While localized development of problem-specific solutions may well be valuable, however, the time is ripe for systematic coordination among regimes so that the multiple environmental challenges we face, including global warming, can be dealt with effectively. Her analysis of the law of the sea in the context of climate change policies points to the benefits of creating problem-solving partnerships between scientists, policy experts, industry, and nongovernmental organizations (NGOs) in tackling particular issues. (See also Canan and Reichman's (2002) discussion of similar kinds of partnerships for addressing the problem of stratospheric ozone layer depletion.) For Carlarne, the key for good climate governance is the creation of an overarching supranational environmental organization. She argues that the growing realization of the need to address climate change puts new vigor into political demands for such an organization. Moreover, she argues that there is need for more immediate action and, in a manner consistent with that of van Asselt et al., the article explores the possible ways the interlinkages between regimes might be developed to enhance policies and practices to deal with human induced climate change.

As we encourage research and scholarship to understand current synergies present in current regimes and how they may be enhanced for climate stewardship, we must be mindful of concerns for social justice, as the next two articles by Paul Harris (2008) and Angela Williams (2008) suggest.

Paul Harris forcibly argues for rethinking state-centric models for tackling climate change. As a resident of China, Harris mounts a cosmopolitan argument around the responsibility of individuals to deal with climate change. His article acknowledges common arguments around differentiated national responsibility and the need for the developed world to take the lead in reducing their emissions, since the bulk of the problem was of their (our) making. However, he argues both on the basis of the need to substantively reduce greenhouse emissions *and* in terms of social justice (or climate justice as he terms it) that wealthy individuals of all nations, including developing and industrializing nations, must play their part. It is not acceptable, he argues, for the wealthy of China or India, for example, to hide behind the averaging of per capita emissions. Quite simply, this allows the wealthy of such countries to benefit at the expense of the poor, not only in their own countries but the poor across the globe. His article teases apart the various

components of individual responsibility and reasserts the central agency inherent in a world where the wealthy not only have the means to help address the problem but also have the knowledge that their (our) actions are responsible for compounding the current crisis. The latter part of his article begins to flesh out the policy measures that might be commended as best able to stimulate climate-friendly responses by individuals. As an example, taxes, particularly of luxury items, are recommended in combination with the development of infrastructure (such as mass public transit). In this way, incentives and disincentives are created to enable a low-emission society that also takes account of the need for individualized justice. Harris points out that policies such as these may help shape development in countries such as China and India away from current trends toward conspicuous consumption that comes at high environmental cost and towards more sustainable forms of development.

A significant aspect of the challenge of global warming is that the juridical subject toward whom various measures might be targeted is so complex. The subject includes not only large multinational corporations, but individuals of considerable wealth in the industrializing world as well as refugees and multiple vulnerable populations either directly or indirectly affected by changes to the climate. At every level, to tackle global warming, organizations, institutions, and individuals need to be protected and engaged. At every level, too, the demands of political engagement, environment, development, and social justice coalesce. There is not a point at which we can say we can stop worrying about the environment in order to meet social justice or development demands. However, untangling how the problem of global warming has arisen and the way it is embedded in contemporary industrialized life clearly demonstrates a differentiated responsibility in generating the problem. Nonetheless, in order to create a sustainable alternative future (including a different model of industrial development) what is brought to the fore is also ability in response (response-ability) that is differentiated not only by wealth, but in the capacity of regions, states, and individuals to map out climate friendly futures.

The final article, by Angela Williams (2008), takes up the challenge of dealing justly with climate refugees and demonstrates key aspects of the intertwined problems of global warming, social justice, and sustainable futures. She shows how the plight of climate change refugees falls into the interstices of current refugee law and of the need for new structures to deal with climate-related displacement. Thus, the need to restructure existing forms of law and regulation in the face of global warming extend beyond mitigation to encompass the need to adapt justly and sustainably with a changed geography and climate. As she points out, global warming will change the social proximity of nations and in doing so challenge neighbors in their traditional dealings. Further, particular communities (such as the Inuit) that cut across national boundaries may feel the pressure of climate change more acutely and be in need of particular forms of support. Overall, she argues that regional agreements may provide the best starting point for

assisting those individuals and communities displaced, either temporarily or permanently, by rising sea levels, melting glaciers, and desertification due to rising temperatures.

This special issue points to the problems that arise in dealing with global warming in isolation from other demands and concerns, yet it also points out the critical need to ensure that reducing our impact on the climate acts as the touchstone for these other human and environmental needs. We cannot afford to ignore justice and human rights in our pursuit of emissions reduction, nor can we assume that the realpolitik that has resulted in current regulatory attempts to reduce emissions will produce the necessary changes to assure future generations. Clearly, there are lessons that can be learned from past practice in dealing with other social problems. Readers of this journal will be aware that much is understood about how externally imposed regulation is received and understood by those with a responsibility to act. Measures imposed from the outside on an unwilling recipient often prove problematic (Black 1997b; Gunningham, Thornton, and Kagan 2005). To be sustainable, then, climate protection needs to be seamlessly interwoven into everyday life.

In the absence of this mutual reinforcement, the likely outcome is a regulatory solution to addressing global warming that relies on risky methods to reduce emissions. These risks are not limited to incompatibilities between technique and context, goal and method (Gunningham and Grabosky 1998) but include perennial challenges to the legitimacy of various institutions set up to act on behalf of climate concerns. Such a challenge to legitimacy, as neoinstitutionalists remind us, leads institutions, organizations, and policy-makers to mimicking measures that may provide a semblance of legitimacy yet result in little action on the ground (Black 1997a; 2008; Meyer and Rowan 1977; Suchman 1995). At a more grounded level, the problem of regulatory solutions in the absence of normative commitment can result, in Carol Heimer's (2008) words, in the structuring of attention by those charged with responding to regulatory overtures, where compliance with climate protection demands vies for the primacy of attention over competing demands (see also Haines 2005; Haines and Sutton 2003).

What is clear, however, is that creating a successful regime to combat global warming is not just a problem of implementation but also a theoretical problem that, so far, regulatory theories have failed to generate. Climate change is a problem that eludes and evades the inherent instrumentalism of much regulation (Black 2002; Scott 2004). The embeddedness of the carbon economy in contemporary methods of industrialization and development means regulatory models resting on assumptions that the risk of rising emissions can be extracted from the benefits of economic development and growth butt up against entrenched interests (Reichman 1998) and path dependency in economic growth. Moreover, problems also arise in diverse perceptions of what constitutes "the public good," views that draw from disparate sociocultural norms across various jurisdictions (Douglas 1966;

Haines 2005) and that result in diverse claims about what actually constitutes social justice. Dealing with climate change, then, demands that we rethink both the social dynamics that led us to this point and the social dynamics that can lead us away from the ecological crisis. It requires us to question, to draw on our existing knowledge and extend it, and to question standard regulatory practices and traditional locales of both responsibility and authority. This is a complex undertaking not least because placing climate protection “on the inside” requires dealing with the intersecting challenges of environmental protection, social justice, and economic development. It will not be sufficient simply to appreciate the nature of social, economic, and political relations that constantly result in shortcomings in the development of law and policy. Nor will it be sufficient to posit normative arguments that conveniently forget what we know about the challenges of policymaking. Rather, what is demanded is finding ways forward in full acknowledgment of the challenges. If this can be achieved, then perhaps scholarship can make a useful contribution in informing policy and debate in a way that can bring about the commitment necessary for mutual reinforcement between multiple regimes, regimes ultimately centered on sustainable human and institutional relations not only with the environment (including climate) but also in terms of social justice and economic development.

The articles in this special issue have mapped the contours of the problem of human-induced global warming in terms of regulatory policy, fragmentation of international law and governance, individual responsible and social justice in dealing fairly with those forced to leave their homes due to an increasingly adverse climate. Yet clearly more work needs to be done. In particular, we would encourage our fellow scholars to put their skills, particularly in much-needed empirical work, both on the ideas advanced in this special issue and beyond in the multiple arenas that impinge on reducing our impact on the earth’s climate. We at *Law & Policy* would be happy to receive such contributions.

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