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CLIMATE JUSTICE AND THE CHINA FALLACY

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Climate Justice and the China Fallacy

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The United States, the wealthiest country in the world, contributes far more than its share of greenhouse gases. It is now clear that these emissions have caused serious risks to the world as a whole, particularly the poorest nations. Does the United States have a moral duty to impose reasonable curbs on its future emissions? Does it have a duty to help other countries, especially poorer countries, adapt to whatever climate change cannot be avoided? Or, on the contrary, are any duties that we might have conditional on whether other countries – in particular China – take action?

The idea that our actions are irrelevant unless China acts has considerable popular traction. It has also received support from some major legal scholars. Eric Posner and Cass Sunstein, have recently argued that the United States does not have any moral duty to the rest of the world to reduce emissions or compensate climate change victims, in part because of this “China argument.”² Posner and Sunstein argue that if most people around the world fail to cut back on their emissions to an optimal level, then the contribution of Americans to climate change will be “close to nil,” and so “it cannot be considered negligent for Americans to fail to engage in cutbacks of greenhouse-gas emitting activities.”³ In another recent paper, Jason Johnston argues that whether investments to reduce greenhouse gas emissions “pay off in terms of a lessened probability of harmful climate change” will “depend almost entirely upon

¹ Sho Sato Professor of Law and Director, California Center for Environmental Law and Policy, University of California, Berkeley. Some of the arguments made in this article are presented in more complete form as part of a forthcoming article, *The Case for Climate Compensation* [Utah L. Rev. 2008].

² Eric A. Posner and Cass R. Sunstein, *Climate Change Justice* (August 2007) (available on ssrn.com). For similar views, see Maurice O’Brien, Cutting Carbon Emissions Futile, *New Zealand Herald*, April 09, 2008 (available at http://www.nzherald.co.nz/section/466/story.cfm?c_id=466&objectid=10502373&ref=rss); William L. Thomas, Public Utilities Reports, Inc. (April 15, 1999) (“American concessions on binding reductions will be completely ineffectual if new Asian, African and Latin American emissions overwhelm U.S. savings”) (available at <http://www.pur.com/pubs/3213.cfm>).

³Posner and Sunstein, *supra* note 1, at 34.

the actions taken by other countries, in particular by China.”⁴ He does favor some adaptation assistance to developing countries, but accuses those who favor U.S. emission reductions of “climate hysteria.”

The China argument – that we only have a duty to reduce emissions or assist victims of climate change if China reduces emissions -- is all too often taken for granted. It may be superficially appealing, but is based on two serious errors. One error is conceptual: the idea that one person’s culpability is excused to the extent that the actions of others would have independently caused the same harm. That view is contrary to a basic and deeply entrenched principle of our tort system. The other error is factual: the assumption that the amount of harm done by our own emissions goes down to the extent that other countries have high emissions.

The core of the China argument is that someone whose conduct would have caused harm by itself should be released from responsibility if another party’s conduct would have independently caused the harm. Similar arguments have been made many times, in many different settings, by tort defendants. They have never had any traction:

The rule that has evolved is that, at least where both causes involve comparable blameworthiness, both actors are liable, even though the conduct of either one was not a sine qua non of the injury because of the conduct of the other. There is no reason why a polluter should be insulated from responsibility in a case where a traditional tortfeasor would not be.⁵

As the Ninth Circuit has explained:

Take the philosophers' example . . . of the kitchen with a light switch at each end. When two people simultaneously flip both switches on, the light goes on. Neither person's conduct is a sine qua non, because the light would have gone on anyway. Neither individual's conduct made a difference to the outcome. [This] analysis would compel the conclusion that neither person caused the light to go on.

. . . If conduct had to be a sine qua non even for this overdetermined result, then neither person's conduct caused the light to go on. But the light went on. And it did so by human agency, not spontaneously. So the conclusion that [defendant’s] argument compels, that no one caused the light to go on, is false. Because the correct answer has to be the same for the two individuals, by eliminating the false answer we have left only one

⁴ Jason Scott Johnston, *Climate Change Hysteria and the Supreme Court: The Economic Impact of Global Warming on the U.S. and the Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, available at ssrn.com/abstract=1098476.

⁵ *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1183 (9th Cir. 2000).

possible answer which must be true: Each of the two persons caused the light to go on.⁶

The classic example of this over-determination effect is the destruction of property by two simultaneous negligent fires. The courts consistently hold that both are liable, dismissing arguments that neither one should be considered culpable because the property would have been destroyed by the other fire anyway.⁷ For the same reason, when a group of emitters contributes to saturating the atmosphere with a gas, all of them should be considered causal factors, even if the marginal contribution to the harmful effect is zero because of the saturation effect.

Of course, we are not necessarily talking about legal liability in the climate change setting. But the tort rule about simultaneous tortfeasors seems to reflect a clear moral judgment. Rather, the tort law reflects an obvious moral principle: no one is excused from responsibility just because someone else was also responsible – “Johnny did it too” is an argument that is only suitable for children.

Thus, even if a saturation effect did exist, it would not excuse the United States from reducing emissions or relieve it of responsibility for past emissions. More importantly, there is no reason to believe in the existence of such a saturation effect. Climate models show increased temperature effects with increased CO₂ emissions over a broad range of assumptions.⁸ Nor is there any reason to think that once temperature increases reach a certain level, further increases will not cause additional harm. Economists generally model damages

⁶ Id. at 1184-1185.

⁷ See Kenneth S. Abraham, *The Forms and Functions of Tort Law* (3d ed. 2007) (stating that this is the “universal” outcome and that it would be “absurd” to relieve either negligent party of liability). This position is also taken by the Third Restatement of Torts. Section 27 of the Restatement holds that, “[i]f multiple acts exist, each of which alone would have been a factual cause under § 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm.” Restatement of the Law, *Torts: Liability for Physical Harm* 452 (Proposed Final Draft No. 2, April 6, 2005). (Section 26 provides that “[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct.” Id. at 417). Courts have consistently applied this rule in toxic tort cases where the plaintiff has been exposed to the same toxic substance by multiple defendants. None of the defendants is allowed to escape liability on the grounds that the other exposures would have been enough to cause liability. Comment g, id. at 470.

⁸ The IPCC synthesis of the physical science for policymakers (Table SPM.6) shows that shows that differences in CO₂ concentrations at the point where concentrations are stabilized from 350 ppm to 700 ppm translates into temperature changes from around 2.0 °C to the neighborhood of 5 °C. See http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf There is no sign of any saturation effect in the sense that marginal increases in concentration result in declining contributions to temperature.

as a quadratic function of temperature increase past a certain point.⁹ The Nordhaus model, which seems to be particularly well regarded by American economists, “predicts that the cost of climate change will increase faster than global mean temperature, so that the aggregate loss in global GDP almost doubles as global mean temperature increases from 4°C to 6°C above pre-industrial levels.”¹⁰

Indeed, in terms of the level of the carbon tax, the saturation argument may be exactly backwards. If there is a nonlinear effect and if temperature increases are proportional to increases in CO₂ concentrations, then the optimal carbon tax (in terms of global welfare) for the United States may be *higher* if China fails to control emissions than if China does so. Under other assumptions, the optimal tax may be lower if China fails to control emissions. But in any event, there is no reason to think the optimal tax would be zero. Thus, regardless of whether other countries do so, countries that chose to reduce their CO₂ emissions help reduce the ultimate level of harm (or risk of harm) from climate change. In fact, perhaps counter-intuitively, failure to control emissions by one country may become even more harmful if other countries are also failing to do so. This is the opposite of the saturation effect.¹¹

In part, the China argument may be based on confusion between the total level of harm and the marginal level of harm. It is true that if other nations such as China do not reduce emissions, the *total* level of harm would be much higher than if everyone controlled emissions. But this does not mean that the *marginal* global harm from the incremental contribution of the United States suddenly becomes zero, or even that it would be decreased. If the incremental net harm from U.S. emissions is above zero, the optimal carbon tax should also be set at this level.¹² The incremental harm from U.S. emissions could be driven to zero only if there is a saturation effect, so that climate change “maxes out” from the contribution of other countries and emissions from the U.S. become irrelevant. From an economic perspective, if the marginal harm is above zero, the United

⁹ See Mendelsohn et al., *Country Specific Market Impacts of Climate Change* (undated) http://crga.atmos.uiuc.edu/publications/market_impact/text.html. For a discussion of the various models, see Stern Report at 146 figure 6.2.

¹⁰ See William D. Nordhaus and Joseph Boyer, *Warming the World: Economic Models of Global Warming 94-95* (2000).

¹¹ There could still be an equity argument that the U.S. should not have to bear the cost of controlling emissions if other countries fail to do so. I am not persuaded that it is inequitable to ask one wrong-doer to cease and desist, when doing so will avoid some harm, even if other wrong-doers are beyond persuasion. Even if the road is full of drunk drivers on New Years Eve, adding another drunk driver merely increases the risk level to other drivers.

¹² It is important to use the net harm because climate change may also cause some benefits, which need to be netted out.

States should decrease its emissions, and if it fails to do so, it should be held responsible for the resulting harm.

This, the “China argument” does not offer a valid excuse for the United States. Even if China fails to control its emissions – in which case we are all admittedly in a lot of trouble – the U.S. remains responsible for its own past and future emissions, and for the incremental harm that they cause. Of course, we don’t know what China might do in the future about its emissions. So it seems especially strained to say that we have no duty to do anything today because of the mere possibility that China may not do its share to help reduce emissions in the future.

In the context of adaptation, the China argument is at its weakest. Let’s assume for the sake of argument that at some point in the future, America’s efforts to reduce emissions will make no difference to climate change, and let’s suppose that this possibility does excuse us from making the effort to reduce emissions today. Even so, our past emissions have already contributed to on-going climate change, which will require adaptation by developing countries even before our historic contributions to current greenhouse gas levels could be matched by China. At least for that interim period, we would surely have a duty to help finance adaptation in developing countries. As I have argued, our duty to finance adaptation is even stronger because China’s potential responsibility for climate change, however great, would not erase our own responsibility, and because in fact our emissions will continue to be harmful (and perhaps become even more harmful) even if China’s emissions are unchecked.

In short, the China argument should be rejected as a fallacy in considering American climate policy, and in particular should be seen as completely irrelevant to whether we have a duty to finance adaptation by developing countries. It goes without saying that China’s future emissions are critically important to the U.S. and to the world – but our own conduct remains our own responsibility.