

SUPPLEMENT TO THE POLLUTER PAYS PRINCIPLE: THE DO NOTHING APPROACH

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Abstract. In “Cosmopolitan Justice, Responsibility, and Global Climate Change,” Simon Caney argues that the Polluter Pays Principle (PPP) is not sufficient for addressing the burdens of climate change, so he proposes a “hybrid account” which supplements the PPP with two further “‘ability to pay’ principles” (APPs) (2010 p.136). I argue that Caney leaves the APPs unmotivated. Instead, I propose a “do nothing approach” (DNA) that leaves the PPP incomplete in the ways Caney highlights. Sections one and two provide an overview of Caney’s arguments. Section three asserts that Caney does not provide sufficient argumentation to support the APPs. Section four argues in favour of the DNA. Section five considers three objections. Ultimately, the DNA is intended to be a refinement of Caney’s hybrid account rather than a rejection of it insofar as the DNA keeps the APPs but reduces them to supererogatory duties.

CANEY'S ANALYSIS OF THE POLLUTER PAYS PRINCIPLE

CANEY identifies five distinct problems with the PPP, four of which are relevant to this paper: Past Generations, Ignorant Polluters, Poor Polluters, and Noncompliers (2010 p.134). While Caney's analysis of these problems deserves more scrutiny, I want to stress that my aim in this paper is to show that even when we grant all of the arguments leading up to the hybrid account, the hybrid account remains unsupported. It is sufficient to note Caney's concerns with the PPP in order to understand the problems that the APPs are intended to solve.

Before these problems can be addressed, it is useful to explain the PPP. Caney presents a "macro-version" of the PPP, which claims that polluters "as a class" ought to pay for their pollution¹⁴. At face value, this is rather intuitive. The problems arise when one tries to get clearer about the details.

Caney asks, "Who pays when the polluter is no longer alive?" (2010 p.127). Responses to this question that rely on the PPP can take three different forms - individualist, collectivist, or polluter-focused - all of which Caney rejects. If one takes the individualist approach, one is pushed to abandon the PPP for a beneficiary pays principle (BPP), at which point one runs afoul of Parfit's "non-identity problem" (Caney 2010 p.128). If one takes the collectivist approach and claims that states ought to pay for their previous emissions, one treats the individuals in those states unfairly (Caney 2010 p.129). If it is unfair for children to inherit the debts of their par-

¹⁴I would like to thank Dr. Luc Bovens, Dr. Katie Steele, and the *Rerum Causae* editors for helpful comments on earlier drafts of this paper. While the "micro-version" requires that we can identify the harms created by each individual polluter, the macro-version requires only that we can identify the amount of pollution individuals emit, not the harm they produce. We can then determine the total harm resulting from the collective emissions of the group and assign responsibility for portions of the harm to individual polluters based on their contribution to the collective emissions. This is advantageous in dealing with climate change because it is difficult to establish a direct link between individual pollution and the resulting harm (Caney 2010 p. 125-126).

ents, then it is unfair for children to inherit responsibility for their parents' emissions (Caney 2010 p.130). Finally, if one takes the polluter-focused approach and claims that current polluters ought to pay for previous emissions, then one forces polluters to pay for harms that they did not cause (Caney 2010 p.130). This violates "the intuition underlying the PPP...that people should pay for the harm that they (not others) have created" (Caney 2010 p.130). Since none of these three solutions offers an acceptable answer to the question of what to do when the polluter is not alive, Caney concludes that the PPP is incomplete with regard to the pollution of previous generations¹⁵.

Caney claims that the PPP is too strong insofar as it would punish polluters who were excusably ignorant of the harms associated with their actions (2010 p.130). While he does not go into too much detail, he points to Singer's claim that pre-1990 polluters did not and could not have known about the harms they were causing with their pollution (2010 p.131)¹⁶.

¹⁵Dr. Luc Bovens, in his response to this paper at the *Rerum Causae* Conference, objected that sometimes we want to extract recompense from the beneficiaries of deceased criminals. For instance, when a Mafioso kills a woman to steal her money and he dies before he can be tried, bequeathing the money to a nephew, it seems fair to demand that the nephew return the stolen money to the victim's family (Bovens 2011). This conclusion seems indisputable; we want to use the BPP in the Mafioso case, but it does not follow that we want to use the BPP in the case of climate change. The Mafioso case avoids Parfit's non-identity problem, which was one of Caney's key objections to the BPP as a solution to climate change (2010 p.128). While we may demand recompense from the Mafioso's nephew, there seems to be something troubling about demanding recompense from the great-great-great-grandchildren of a criminal. Moreover, Caney notes that in the context of climate change the BPP seems "unfair to individuals who did not make those decisions (to pollute) and who might have objected violently to those decisions" (2010 p.130).

¹⁶Bovens objects that sometimes it seems perfectly acceptable to demand recompense from the ignorant. For instance, Bovens claims that if two people start drinking a disproportionate amount of beer at a keg party and unwittingly create a shortage of beer (perhaps they mistakenly believed that there was a second keg), it is reasonable to ask them to stop drinking so that others may have a chance to consume (Bovens 2011). So long as this is an application of something

Caney claims that the PPP is also too strong when it forces impoverished polluters to pay for their pollution (2010 p.132). He clarifies that this should lead us not to abandon the PPP but to supplement it, since we would want a poor polluter that we had excused to pay for its pollution if it became rich for unrelated reasons (2010 p.132). This is meant to show that poverty is an exception to a rule we find intuitive.

Finally, Caney argues that the PPP is incomplete because it does not specify how to deal with polluters who refuse to pay. The PPP does not determine who should do what about the pollution caused by such polluters (Caney 2010 p.134)¹⁷.

CANEY'S "HYBRID ACCOUNT"

To solve these problems with the PPP, Caney proposes his hybrid account. He begins by presenting an argument intended to motivate this account: (P1) assume that if someone has a fundamental interest in X, then that person has a right to X. (P2) People have fun-

like the PPP, this claim is consistent with the DNA. It simply means that the PPP is less incomplete than Caney thinks. If this is an argument for the BPP instead of the PPP, then aside from Caney's critique of the BPP I would note that in the keg party case the BPP agrees with the APPs, so that this case cannot be instructive in deciding between the BPP and the PPP supplemented with APPs (whether in Caney's hybrid account or my DNA).

¹⁷There are a number of other problems with the PPP that Caney does not address, for instance, Bovens asserts that it is not clear that polluters, as parties to a collective action problem, can be held accountable for their actions. One could argue that it is the government's responsibility to correct the incentives and dissolve the collective action problem, and that insofar as this has yet to happen the government is responsible for the pollution (Bovens 2011). While this problem deserves more attention, a full defence of the PPP is not possible in this paper. I would simply note that the PPP conforms to what seems to be an uncontroversial intuition that when x violates y's right, x ought to compensate y in proportion to the violation (Caney appeals to the same intuition, p. 125), and that if governments enforced the PPP then this could dissolve the collective action problem. Moreover, the PPP could be tailored to exclude retroactive claims in order to sidestep the problem of holding parties to a collective action problem accountable.

damental interests in not suffering a host of different consequences of global climate change. (C) Therefore, people have a right not to suffer the effects of climate change (Caney 2010 pp.135-136).

Caney then outlines the hybrid account: (D1) No one can emit more than his or her quota of greenhouse gasses (GHGs). (D2) All post-1990 non-poor polluters are obligated to compensate for their excess GHG emissions by contributing to mitigation or adaptation. (D3) Regarding the pollution of previous generations, excusably ignorant polluters, poor polluters and non-compliers, this pollution is the responsibility of the most advantaged individuals. (D4) The most advantaged are also required “to construct institutions that discourage future non compliance” (Caney 2010 p.136)¹⁸.

(D1) and (D2) are the PPP updated to exclude the pollution caused by previous generations, the excusably ignorant, and the impoverished. (D3) and (D4) are the APPs that assign responsibility for the left-over pollution to the most advantaged. It is important to bear in mind that Caney is working within an individualist framework, thus “most advantaged” refers to wealthy individuals, not companies or countries (2010 p.137).

AGAINST THE APPS

Incompleteness in Motivation

The first criticism questions the relation between the motivating argument and the hybrid account: it seems that Caney intends for the argument to motivate both the PPP and the APPs, yet only the PPP is motivated by that argument.

Moving from (C) to the hybrid account, (D1) and (D2) rely on a negative interpretation of (C): anyone who violates (C) must make

¹⁸For some reason, Caney makes no mention of poor polluters in his hybrid account. Presumably, he thinks that the work of excusing the poor should be done by another principle in a pluralist approach to justice (p.132). For the sake of being explicit, I include poor polluters in the list of exceptions in (D2) and (D3), but it should be noted that Caney does not.

amends in terms of adaptation or mitigation. In this sense, (D1) and (D2) are analytically deduced from the negative interpretation of (C) - that is, the negative interpretation of (C) already specifies those upon whom it imposes duties, and roughly what those duties are¹⁹.

On the other hand, (D3) and (D4) only make sense if (C) is interpreted as a positive right. This is because (D3) and (D4) impose duties on people regardless of whether or not they have violated the negative interpretation of (C) - they demand not only that one forebears violating (C), but that one actively promotes the realization of (C). Thus, (D3) and (D4) are meant to supplement the positive interpretation of (C); they are augmentative insofar as their content is *not* contained in (C). As a positive right, (C) does not specify *who* bears the duties associated with that right. But then what arguments support (D3) and (D4)? It appeared that the motivating argument was intended to support the hybrid account, yet it can only motivate the PPP; (D3) and (D4) remain unmotivated.

Distinction: Ethical vs. Legal

Although the motivating argument leaves the APPs unmotivated, Caney defends (D3) from the objection that it is unfair, and this defence could be extended to include (D4). Caney's response is to claim that the alternatives to (D3) - making the poor pay or leaving the pollution unaccounted for - are even more unpalatable (2010 p.137). "There is, we can agree," Caney claims, "an unfairness involved in asking some to compensate for the shortcomings of others," yet given the alternatives, (D3) is the best course of action (2010 p.138). It is at this point in the argument that a crucial ambiguity comes to the forefront: what is the nature of the "duty" Caney is talking about in (D3) and (D4)?

I think Caney is conflating two sets of questions. It is important,

¹⁹If the concept of a "right" did not already contain the duty not to violate that right, and the requirement that violators either make amends or be punished, it is not clear what would be left to the concept of a right.

first, to distinguish the ethical question of how to deal with the burdens of climate change not covered by the PPP from the legal question of how to deal with these burdens²⁰. Caney's response to the objection above is completely insufficient if we are to take (D3) and (D4) as imposing ethical duties: he essentially concedes that they are unfair, and justifies this by saying that there is no better solution. Moreover, (D3) and (D4) are open to the same criticism Caney raised against the beneficiary pays principle: they force individuals to pay for harms that they did not cause, counter to the intuition driving the PPP (2010 p.130). Thus, since (D3) and (D4) are insufficient as ethical principles, we must consider whether they are acceptable as legal principles.

Distinction: Legal vs. Economic

When considering (D3) and (D4) as legal principles, we should note Coase's distinction between the question of "what shall be done by whom" (the economic question) and the question of "who has the legal right to do what" (the legal question) (1960 p.15). Coase claims that the first question can be answered independently of the second, since "it is always possible to modify by transactions on the market the initial legal delimitation of rights" (1960 p.15).

In his response to the objection that (D3) and (D4) are unfair, Caney claims that either the rich pay, the poor pay, or the pollution goes unaddressed, and of those options, the first is obviously best (2010 p.138). But the alternatives are richer than that; after all, what ends up happening is, to an extent, a separate matter from

²⁰The ethical question and the legal question would appeal to different sets of considerations when arguing for a judgment. While the legal question ought to consider the ethical status of the proposal, other considerations of efficiency and implementation would be more appropriately considered when answering the legal question than when answering the ethical question. Moreover, the legal question can often be answered independently of the ethical question (e.g., when deciding whether cars ought to drive on the right or the left side of the road).

the legal question²¹. We can concede that (D3) and (D4) are good solutions to the question of what should be done by whom, but that does not show that (D3) and (D4) ought to be legal principles. Not only does Caney fail to provide an argument supporting (D3) and (D4) as answers to the legal question, but I argue that we have good reason to reject them as laws since they are unfair to the most advantaged. Caney's support for (D3) and (D4) as legal principles obviates the motivating argument, and much of his moral reasoning. Thus, (D3) and (D4) are adequately supported neither as ethical principles nor as legal principles.

THE DO NOTHING APPROACH

Ethically, who is responsible for the pollution emitted by previous generations, excusably ignorant polluters, and non-compliers? No one. This may sound counterintuitive, but consider the following analogy: an arsonist has just burnt down a family's home. The family's bank, also their home insurance provider, filed for bankruptcy the day before the fire, so through no fault of its own the family has no insurance and no money. The arsonist left no relevant evidence, and the police will not catch him. The family has no friends and no extended family, and a winter storm is on its way. Who is responsible for the damage?

In this analogy, there is someone who is responsible (the arsonist) but there is no way of extracting recompense from this party. Fundamental interests are at stake: presumably having shelter in a winter storm is a fundamental interest that would ground a right for Caney. The family has no other family or friend support structure, and is harmed through no fault of its own, mirroring the notion that

²¹Consider the case where a state implements a cap and trade policy to enforce the PPP. In such a program, emission rights/mitigation duties are being redistributed via a market mechanism, and at least theoretically, any private individual could buy rights from the market. On such a system, who ends up doing what is determined independently of the original legal assignment of rights and duties.

climate change has a disproportionate effect on large groups of poor people where family and friends will be unable to help with the costs. So now, given that the arsonist has successfully escaped, who out of all the remaining candidates is responsible?

Once more, I claim that the intuitive answer is: no one - at least, on one interpretation of “responsible.” If we interpret “who is responsible?” as “who is failing to fulfill a moral obligation by not helping?” the answer, I think, is no one. But if we are asking who should feel a desire to help out - *to take on the responsibility* - then the answer is rather simple: anyone who can.

Thus, we have good reason to reject (D3) and (D4) as ethical “duties” (responsibilities in the first sense): no one is under a duty to compensate for the harm in such cases. To approach the problem in that manner completely mischaracterizes the situation, and robs it of important moral features. To take on the responsibility is to help out; it is something to be praised. When, instead, you characterize this as a duty, you rob the act of its praiseworthiness and its positive moral sentiments. To put it in less fuzzy terms, the action is supererogatory. Supererogatory actions are a common feature of our moral lives, and the APPs fail to appreciate this.

Turning to the legal question, the family-arsonist case supports a Do Nothing Approach as the best strategy for dealing with the pollution not covered by the PPP. DNA is not what we want to see happen, but that is separate from the question of what we want to legislate. Insofar as we want to impose laws only when they enforce existing duties, we want the DNA²².

OBJECTIONS

Recklessness

Caney objects to the idea of leaving the pollution of non-compliers unaddressed, claiming that this is “reckless” (2010 p.134). “In light of the havoc it wreaks on people’s lives,” Caney claims that “we

²²This will be subjected to qualification in section “Transaction Costs.”

cannot accept a solution in which there are such widespread and enormously harmful effects on the vulnerable” (2010 p.134). However, this objection glosses over the distinction between the legal and the economic question, since Caney equates doing nothing with “(leaving) the duties unperformed” (2010 p.134).

At the same time, Caney’s objection is correct to a certain extent. There is a trade-off between guaranteeing the security of the poor and treating everyone (including the most advantaged) fairly. Caney’s approach is to give ultimate consideration to the former at the expense of the latter; the DNA gives priority to the latter while claiming that we ought to strive to fulfill the former without relying on governmental coercion.

Singer

One could also raise Singer’s example of the child drowning in the pond as an objection to the DNA (1972 p.231). Singer argues that if one sees a child drowning in a pond, one has a duty to save the child even at a cost to oneself (1972 p.231). Singer goes on to argue that this example generalizes, and that we have a duty to alleviate global suffering at potentially significant personal cost (1972 p.234). Moreover, he argues that “the traditional distinction between duty and charity cannot be drawn” (1972 p.235).

In response, it should first be noted that Singer’s example supports an answer to the economic question but not the legal question²³. Second, the family and the arsonist case better reproduce the circumstances we see in global climate change. Third, taking the time to ask, “Who should save the child?” in Singer’s example might obviate the answer, since the child could be dead by the time we figured it out. This makes room to claim that the two cases might be different in morally relevant respects, and that the family arsonist case is the best match to the case of climate change.

²³For this point I am grateful to Jesse Saloom.

Transaction Costs

While I have relied heavily on Coase's distinction between the economic and the legal question, there is a potential Coasean objection relying on transaction costs. In cases where it is very expensive to find the party responsible, arrange a contractual agreement, and enforce the contract, one can expect the legal assignment of rights and duties to be roughly final. This is because high transaction costs deter market redistribution. Moreover, in the case of global climate change there seem to be high transaction costs.

This objection holds; however, it provides a fundamentally different kind of argument from Caney's and leads to a very different kind of policy. Whereas Caney's argument would lead to something like a mandatory progressive income tax, the argument from transaction costs would only justify governmentally administered programs to which contribution was optional (e.g., an opt-in or opt-out income tax). Thus, (D3) and (D4) would still not be adopted as legal principles based on high transaction costs. Moreover, the kinds of policies one would get with such justification are consistent with the DNA's interpretation of the APPs as supererogatory duties, since such policies leave individuals to take on the responsibilities voluntarily.

CONCLUSION

I have presented four of Caney's reasons for supplementing the PPP with the APPs: past generations, ignorant polluters, poor polluters, and noncompliers. I then examined Caney's proposed hybrid account, and its motivating argument. I argued that the APPs are justified neither as ethical duties nor as legal duties. I argued for a DNA that treats the APPs as supererogatory duties. While the DNA is not so different from the hybrid account in terms of what it requests of individuals, its implementation is crucially different in terms of how the "request" is made. While Caney's account gives ultimate concern to the security of the poor, the DNA attempts to strike a balance between providing security for the poor and treating

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everyone fairly. While some government action may be justified by high transaction costs, such programs would have to be voluntary in order to respect the supererogatory nature of the APPs . I believe that the DNA is more faithful to our ethical intuitions than Caney's hybrid account, and is therefore a better way of implementing the PPP.

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