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Perspectives

How to cite:

Eagle, Josh. "Climate Change and the Confluence of Natural and Human History: A Lawyer's Perspective" In: "Whose Anthropocene? Revisiting Dipesh Chakrabarty's 'Four Theses,'" edited by Robert Emmett and Thomas Lekan, *RCC Perspectives: Transformations in Environment and Society* 2016, no. 2, 21–26.

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Leopoldstrasse 11a, 80802 Munich, GERMANY

ISSN (print) 2190-5088
ISSN (online) 2190-8087

SPONSORED BY THE

Federal Ministry of Education and Research

Deutsches Museum

LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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Climate Change and the Confluence of Natural and Human History: A Lawyer's Perspective

In a 2000 article, Paul Crutzen and Eugene Stoermer argued that human activities, particularly the production of greenhouse gases, had so altered the Earth that we had, in the past few centuries, entered a new geological epoch: the Anthropocene.[1] As Crutzen and Christian Schwägerl described it, the period dating from the birth of the Industrial Revolution was unique in Earth's history due to the "human dominance of biological, chemical and geological processes."[2] "For millennia," according to Crutzen and Schwägerl, "humans have behaved as rebels against a superpower we call 'Nature' . . . Albeit clumsily, we are taking control of Nature's realm . . . A long-held religious and philosophical idea—humans as the masters of planet Earth—has turned into a stark reality."[3]

For Dipesh Chakrabarty, the collapse of the distinction between "[human] species history and the history of the earth systems" raises a host of moral and epistemological questions. On the smallest scale, the new paradigm requires a new vocabulary, one that takes into account our potential role as instigators of the "natural" events to which we must respond.[4] At a meta-level, the fact of climate change calls into question prior assumptions about human power and concomitant responsibility. At the core of Chakrabarty's argument about history is a statement about the changing relationship between humans, Earth's geophysical history, and the other plant and animal species on the planet. Prior to the discovery of the Anthropocene, the majority of historians perceived humans and the natural world as two separate, if interacting, entities, but the birth of the Anthropocene melded the two pieces into one. Humans have become inseparable from natural forces—or, as Chakrabarty puts it, "the need arises to view the human simultaneously on contradictory registers: as a geophysical force and as a political agent, as a bearer of rights and as author of actions; subject to both the

1 Paul J. Crutzen and Eugene F. Stoermer, "The 'Anthropocene,'" *IGBP Newsletter* 41 (2000): 17–18.
2 Paul J. Crutzen and Christian Schwägerl, "Living in the Anthropocene: Toward a New Global Ethos," *Yale Environment 360* (24 January 2011), http://e360.yale.edu/feature/living_in_the_anthropocene_toward_a_new_global_ethos/2363/.
3 Ibid.
4 Dipesh Chakrabarty, "Climate and Capital: On Conjoined Histories," *Critical Inquiry* 14 (Autumn 2014): 19.

stochastic forces of nature (being itself one such force collectively) and open to the contingency of individual human experience; belonging at once to differently-scaled histories of the planet, of life and species, and of human societies."[5]

This essay explores the potential ramifications of the Anthropocene concept for environmental law and policy. Environmental lawyers would likely struggle with the proposition that what is novel about climate change, in comparison to other environmental threats, is that it has reordered the relationship between humans and the rest of the planet. From the beginning, environmental law has been premised on the idea that humans are a powerful force in reshaping our environment. Laws would not be necessary, or even logical, absent the assumption that people can harm the environment such that others are then harmed; remedies would be equally irrelevant if humans did not also have the power to at least partially prevent or remediate harm. Indeed, there is a substantial literature on the implications of climate change for environmental law. Most of that work focuses on how we might amend existing laws or adopt new laws to reduce greenhouse gas emissions ("mitigation") or help people and government agencies respond to unpredictable climate change impacts ("adaptation").[6] The birth of climate change law can be attributed to lawyers' perceptions of unprecedented environmental threats and the search for novel remedies to novel harms. Yet in legal thought, even on this planetary scale, it does not matter whether—if climate change is anthropogenic—people are part of or apart from the trajectory of the natural world—that is, whether we are insiders or outsiders in relation to nature. Lawyers care about harm and remedies for harm: what matters is whether a person is causing harm to another person and whether there is a remedy for that harm.

This is not to say that the question of naturalness does not inform the process of contemplating harm and remedy. Suppose the river that supplies A with water becomes unusable because of high concentrations of heavy metals. B has historically deposited heavy metals, byproducts of his business, into the river. Even in the absence of B's actions, heavy metals

5 Dipesh Chakrabarty, "Postcolonial Studies and the Challenge of Climate Change," *New Literary History* 43, no. 1 (2012): 14.

6 Cinnamon Piñon Carlarne, *Climate Change Law and Policy: EU and US Approaches* (New York: Oxford University Press, 2010); Michael B. Gerrard, ed., *Global Climate Change and US Law* (Chicago: American Bar Association, 2007); Michael B. Gerrard and Katrina Fischer Kuh, eds., *The Law of Adaptation to Climate Change* (Chicago: American Bar Association, 2012); Reuven S. Avi-Yonah and David M. Uhlmann, "Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade," *Stanford Environmental Law Journal* 28, no. 3 (2009): 3–50.

would occur in the river from natural sources. If the current, dangerously high levels of contamination are part of a natural cycle, so that B's contributions did not prevent A from using the water, can we consider B's actions harmful? Obviously, answering this question would take some research and some thought, but it is easy to see why understanding the natural state of things would be important. Once it has been established that harm has occurred and that reducing B's contributions could make A whole again, however, it would not matter whether B existed within or outside of the natural world. Nevertheless, the inside-outside question can matter a great deal in coloring the politics that inevitably shape legal rules. The way in which it does this stems from rhetorical framing, rather than the ontological status of humans and nature.

The question of whether humans are insiders or outsiders vis-à-vis the natural world has long played a central role in political arguments for and against environmental regulation. Although the meaning of the two terms is subject to manipulation, the basic concepts are as follows. Humans, as insiders, are merely one species among many. While we may be cleverer than other animals, we are part of the natural order—that is, part of a system of interdependent species. We must care for other species because we are dependent upon their wellbeing. The outsider view, on the other hand, posits human exceptionalism: humans are, for religious reasons or because of the enormous difference between our mental capacities in comparison to other animals, qualitatively different from all other species. Interestingly, both environmentalists and those opposed to more stringent regulation have made use of both the insider and outsider frameworks, even within the same specific policy contexts.

The insider status of humans is a core tenet of modern environmentalism. In a work that would become central to environmental ideology, Aldo Leopold famously expressed the idea that all species, including humans, are interdependent parts of a shared system: "We abuse land because we see it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect."[7]

Other famous environmentalists have made the same point: Anne and Paul Ehrlich, analogizing species to rivets on an airplane wing,[8] and James Lovelock and Lynn Mar-

7 Aldo Leopold, *A Sand County Almanac* (New York: Random House, 1966).
8 Paul R. Ehrlich and Anne Ehrlich, *Extinction: The Causes and Consequences of the Disappearance of Species* (New York: Random House, 1981).

gulis, who introduced the "Gaia hypothesis" positing the complete interdependence of all living and non-living components of Earth.[9] Some important modern US environmental laws, most notably the Endangered Species Act (ESA) of 1973, can be read as reflecting this insider view of interdependence. In the text of the ESA, Congress acknowledges that the loss of other species would likely have a suite of detrimental consequences for humans.[10]

But those in favor of greater protections for endangered species have also sometimes employed an outsider frame. Holmes Rolston III, a leading environmental philosopher, has argued that there is nothing harmful or unnatural about interspecies competition, but when that competition involves humans, it is no longer a fair one—it becomes unnatural.[11] Rolston also makes an ethical-outsider argument: as a more powerful species, one with competitive superpowers that other species do not possess, we owe less powerful species a duty to be circumspect about how we use our superpowers.[12]

Regulated parties also rely on both insider and outsider arguments. Opponents of endangered species law have sometimes taken the insider position, arguing that it is only natural for species, including humans, to compete for survival: "Humans have just as much right to use the land and prey on other animals as the wolf or the lion."[13] Human victories in evolutionary battles do not represent harm or require remedy, and they also have a moral component: Why should people feel bad, or be vilified, for using their property in ways that happen to decrease other species chances for long-term survival?[14]

It is possible to spin the story of the Anthropocene as either an insider or outsider tale. On the one hand, it portrays humans as having become the ultimate insider, literally a part of natural phenomena on every scale. On the other hand, the story vividly illustrates the powers that make humans distinct from other species: no other species has, or could ever, generate its own geological epoch. In the US context, if one goal of telling the story

9 James E. Lovelock and Lynn Margulis, "Atmospheric Homeostasis by and for the Biosphere: The Gaia Hypothesis," *Tellus Series A* 26, no. 1–2 (1974): 2–10.
10 Endangered Species Act of 1973, 16 U.S.C 1531-1544, 87 Stat. 884, § 1531(a)(3).
11 Holmes Rolston III, "Property Rights and Endangered Species," *University of Colorado Law Review* 61, no. 2 (1990): 283–306.
12 Holmes Rolston III, "Duties to Endangered Species," *BioScience* 35, no. 11 (1985): 718–26.
13 Susan Warren, "In a New Spin on Conservation Debate, Fort Worth Zoo Gives Credit to Hunters," *The Wall Street Journal*, 14 June 2001, accessed 1 December 2015, http://www.wsj.com/articles/SB992464676750910480.
14 Ibid.

of the Anthropocene is to move climate change legislation forward, the outsider emphasis on "humans as masters of the planet" may have particular resonance with US Christian conservatives because it dovetails with interpretations of the Bible that stress "human exceptionalism."[15] One of the leading, recent champions of outsider framing of environmental policy is former Secretary of the Interior Manuel Lujan, Jr., who served under US President George H.W. Bush. On endangered species, Lujan stated: "I believe that man is at the top of the pecking order. I think that God gave us dominion over these creatures, not necessarily to serve us . . . I just look at an armadillo or a skunk or a squirrel or an owl or a chicken, whatever it is, and I consider the human being on a higher scale. Maybe that's because a chicken doesn't talk."[16]

Similarly, most Americans who identify as opposed to government climate change action fit the profile of what Dan M. Kahan, Hank Jenkins-Smith, and Donald Braman call "hierarchical individualists."[17] Those whose views are consistent with this profile see people as individually powerful and are less likely to support community efforts: imagining human society as ordered and hierarchical seems more consistent with the outsider view of humans as "at the top of the pecking order." Of course, it is always possible that the adoption of an outsider view of the climate change problem might lead in another direction. An approach to the problem that relies on geoengineering is entirely consistent with the view of humans as special: special enough to have created their own epoch, and special enough to rein in the threatening results with new technologies. Ultimately, delays in reducing emissions may render risky forays into geoengineering inevitable.

What do these historical uses of an inside-outside distinction mean for the environmental law of climate change? If anything is certain, it is that a paleontologist's conclusion that human impacts will hereafter be detectable in the fossil record will not fundamentally alter

15 As the prosecutor in the famed Scopes Monkey Trial asked one of Scopes' students:
Q – How did [Scopes] classify man with reference to other animals?
A – Well, the book and he both classified man along with cats and dogs, cows, horses, monkeys, lions, horses and all that.
Q – What did he say they were?
A – Mammals.
Q – Classified them along with dogs, cats, horses, monkeys and cows?
A – Yes, sir.
(See the transcript of the trial, reprinted as: *The World's Most Famous Court Trial: Tennessee Evolution Case* [Clark, NJ: Lawbook Exchange, 1999], 126.)

16 Ted Gup, "The Stealth Secretary," *Time Magazine*, 24 June 2001, http://content.time.com/time/magazine/article/0,9171,159723,00.html.

17 Dan M. Kahan, Hank Jenkins-Smith, and Donald Braman, "Cultural Cognition of Scientific Consensus," *Journal of Risk Research* 14, no. 2 (2011): 147–74.

the insider-outsider debate. It is also highly unlikely that the policy world's acceptance of an inside or outside characterization of the problem will determine whether or not we properly mitigate or adapt to climate change, as both arguments will remain salient no matter what the stratigraphy commission decides in 2016.

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