

## Unhealthy Environments are a Problem of Structural Injustice

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Keisha Ray and Jane Fallis Cooper (2023) argue that bioethicists should take environmental justice seriously as a matter of health justice; as part of this project, they defend a legal right to a healthy environment. One important question that must be addressed in any account of a right is who (or what) the corresponding duty-bearers would be (see Shue 1980). In this article, I argue that a narrowly legalistic approach to the proposed right to a healthy environment may not capture all of the relevant (moral) duty-bearers: in singling out specific actors for blame and fault, a legalistic approach may be overly individualistic and therefore ignore the *structural* features of environmental injustices. In contrast to purely legalistic remedies for unhealthy environments, I suggest a broader ethical approach based on structural injustice theory (Young 2011), which would imply a much wider set of (moral) duty-bearers than that which may be captured by the legal right to a healthy environment *simpliciter*. Even if we cannot or should not hold certain actors legally accountable for environmental harms, a structural injustice account tells us that they are still not off the hook morally speaking.

In defending a proposed legal right to a healthy environment, Ray and Cooper take their cue from the United Nations Environment Programme's (UNEP) definition of this right, which specifies both substantive and procedural elements. From a substantive point of view, the right includes: (1) clean air; (2) safe climate; (3) healthy and sustainably produced food; (4) access to safe water and adequate sanitation; (5) non-toxic environments in which to live, work and play; (6) healthy ecosystems and biodiversity. From a procedural standpoint, the right encompasses: (7) access to environmental information; (8) public participation in environmental decision-making; (9) access to justice, i.e. the standing to bring lawsuits concerning violations of the above entitlements (UNEP 2020). In suggesting the value of a legalistic approach, Ray and Cooper argue that "legal efforts can promote and help fulfill the ethical obligation to ensure healthy environments as a matter of health justice" (2023: n.p.).

I will not take issue with the core entitlements (1)-(8) of the right as spelled out in the UNEP definition, as I assume these to be intuitive and largely uncontroversial (although others may disagree). Instead I will focus my discussion on the resort to legal remedies found in (9). Any account of a right must specify who (or what) the relevant duty-bearers would be (Shue 1980) and the extent to which the duty-bearers owe compensation to the right-holders. A legalistic approach presupposes, therefore, that the only duty-bearers are *legal persons* (whether they be individuals or collectives) against whom a legal claim may be actionable and from whom adequate compensation may be obtained.

For the legal approach to work, three conditions must be in order: (i) an environmental wrong can be causally connected to an identifiable, legally responsible party; (ii) that party can be appropriately sued; (iii) the party acted voluntarily and was cognizant of the consequences; and (iv) the party can fully compensate the injured right-holder (cf. Young 2011: ch. 4). The compensation may be monetary (i.e. financial damages) or non-monetary (e.g. perhaps the

awarding of territorial rights). But even if all these conditions are met, a purely legalistic approach may still fail to capture all of the relevant (moral) duty-bearers. This is because in singling out specific actors for blame and fault, a legalistic strategy may be overly individualistic and therefore pay scant regard to the *structural* features of environmental injustices.

In emphasizing the structural nature of environmental injustices, I have in mind Iris Marion Young's (2011) account of structural injustice. For Young, structural injustices occur when the accumulated actions of individuals and institutions, as elements within a social structure, give rise to an injustice (ibid.: 52). Importantly for our purposes, the injustice is *not a matter of personal blame* or character flaw, but rather arises through circumstances beyond the victim's control; the agents within the unjust structure *do not break any laws* or standards of public decorum; and the injustice *cannot be traced back to a particular unjust law or policy* (ibid.: 45-47).

To illustrate, let us take an example from Ray and Cooper's own argument (2023), *Held v. State of Montana*. In this lawsuit, a collection of youth plaintiffs have sued the state of Montana for environmental wrongs committed as a result of Montana's energy policy. The assumption behind the lawsuit is that there is a clearly identifiable victim (the youth plaintiffs), a clear perpetrator (the state of Montana or its representatives) and a causal pathway of injustice connecting the two. Politicians in Montana who enacted the unjust energy policy may be seen as personally to blame for the climate harms suffered by the youth plaintiffs, such as a worsening pollen allergy or asthma exacerbated by wildfire smoke. But these climate harms cannot completely be traced back to the energy policy or the actions of public officials in Montana. These harms are the product of *climate change*, which implicates many other agents, including those *outside Montana* and those who may not necessarily constitute legal persons. They may not be violating any laws or social norms when they contribute to the climate catastrophe. There is no law or policy that is singularly responsible for the climate harms endured by the plaintiffs in *Held v. Montana*.

Indeed, it is the fact that climate change implicates *all those who contribute to carbon emissions* to some degree, wherever they are on the planet, that arguably makes climate change a type of *global* structural injustice (see e.g. Eckersley 2016; Sardo 2023; Sparenborg 2022). Because emissions do not respect borders and often those emissions are the product of blameless action or are the outcome of no unjust law or policy, it is difficult to establish a direct pathway of injustice between a certain set of emissions produced by (say) a commuter driving to work in Denmark and a worsening pollen allergy in Montana. (There is no unjust law or social norm that forbids driving to work in Denmark.) The legal action in *Held v. Montana* excludes commuter drivers in Denmark and all other relevant actors from any kind of responsibility, even though they are in some sense responsible for contributing to climate harms. Instead, by targeting the state of Montana, the lawsuit assumes that only Montana or its representatives owe duties of compensation. In reality, many other people in many other places may come to owe such duties, even if they cannot be so easily identified and targeted from a legal standpoint. Relying solely on the courts to dispense justice may even be *unethical*, to the extent that it fails to alert other agents in the global arena to carry out their appropriate responsibilities.

An ethical approach based on structural injustice theory would therefore suggest a much wider class of (moral) duty-bearers, with relevant (moral) responsibilities, than that which may be captured by a legal right to a healthy environment *simpliciter*. Unhealthy environments are first and foremost a problem of global structural injustice, which means that they will require structural transformations to fully address them that go beyond legal remedies in the courts. While it is beyond the scope of this paper to spell out what such structural changes might involve, what matters here is that structural transformation implies *forward-looking responsibilities* to ensure that the structural injustice does not persist into the future, in addition to the *backward-looking responsibilities* of restitution and compensation that flow from the legal approach (cf. Young 2011: ch. 4). This is a further limitation of the legalistic strategy: it can only make sense of backward-looking duties to rectify past environmental wrongs. Arguably, it fails to account for forward-looking duties to ensure that healthy environments are available for future generations.

I am not suggesting that it is pointless to explore legal avenues to combat environmental injustice. Rather, my aim in this paper has been to draw attention to the pitfalls of a purely legalistic strategy. We should acknowledge that legal remedies can at most only be part and parcel of a broader ethical approach, which recognizes the moral responsibilities of many other actors within an unjust social structure that allows the climate crisis to persist. Even if we cannot or should not hold certain actors legally accountable for environmental harms, a structural injustice story tells us that they are still not off the hook *morally speaking*.

Efforts to enshrine a legal right to a healthy environment have been commendable. But, as I have argued in this paper, they cannot and should not be viewed as a magic-bullet solution for environmental harms. Indeed, doing so may even be unethical because it would fail to awaken other relevant actors to their climate responsibilities, wherever in the world they may be. We need a broader ethical approach derived from structural injustice, in order to fully appreciate the extent of the moral problem and the need for deep structural transformation to preserve healthy environments for the future.

## References

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