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The All-Affected Principle and Climate Change*

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Discussions of the history of the All-Affected Principle (AAP) frequently locate it in a procedural maxim of Roman private law known by the tag *quod omnes tangit* ("what touches all"), a maxim that became, in various formulations, a more expansive principle of medieval canon and civil law.[1] One representative locus of this maxim is in a law passed under Justinian in 531 and included in the second edition of the *Codex* that forms part of his *Corpus Iuris Civilis*, that where several different *tutores* (tutors) were appointed as guardians for a single ward or an undivided guardianship (*tutela*), all of them must consent to any legal proceeding to terminate the joint guardianship. The relevant part of the law reads: "it is necessary that all of them give their authorization so that something which touches them all in the same way is approved by all of them (*necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur*)," the *quod omnes … tangit* serving as the familiar tag.[2] I begin this contribution with reflections on the significance of this particular legal origin as inspiration for the All-Affected Principle, before going on to deploy these reflections to assess the relevance of the principle for the case of climate change. (For clarity, I will refer to *quod omnes tangit* in its various formulations as "the maxim" or "maxims," and to contemporary formulations of the AAP as "the principle" or "principles." I focus on those versions of the principle that adhere relatively closely to the original maxim.)

THE ROMAN LAW MAXIM: "QUOD OMNES TANGIT"

While the All-Affected Principle "has migrated into democratic theory" in a broad wave of scholarship over the last several decades, as Mark Warren observes in his contribution to this volume, the relevance of the Roman law formulation has been disputed by Jürgen Habermas, who argues that as a maxim of judicial procedure (a context of norm application), it is not relevant

to the principles governing the fundamental justification of norms [note that this volume uses "justification" and "application" in related ways].[3] One might think to bolster Habermas' case by pointing out the private law context of the original maxim. How could a maxim governing court procedure for legal guardians be relevant in any more than a homonymic way to broad issues of normative democratic theory?

In fact, the history of political thought has already been deeply marked by Roman private law as a source of maxims migrating into the realm of political theory and eventually democratic theory, as Daniel Lee has argued in his work on the emergence of the idea of popular sovereignty.[4] Already in the medieval period, the *quod omnes tangit* maxim had begun a migration into the public domain, for example in the English royal approach to the defense of the realm in a "'case of necessity,'" in which it was held that "all must consent to such extraordinary taxes as were justified by the emergency."[5] So while differences in contexts are of course significant, a brief overview of the history of *quod omnes tangit* and related maxims indicates that many of the dilemmas marking the AAP today share commonalities with the Roman and medieval uses, and debates, about the varied forms of the original maxim.

Within Roman law, variants of the maxim were implicitly or explicitly formulated in a number of contexts. In addition to the law that was noticed above (of the multiple guardians (*tutores*) appointed to share a single guardianship (*tutela*) who must all agree to a proceeding to terminate that guardianship), another case discussed by Ulpian in the *Digest* was that of the users of the water of a given aqueduct, all of whom were entitled to be heard in relation to certain decisions about its management.[6] As these cases suggest, a first commonality between the original Roman context of the maxim and contemporary versions of the principle lies in the interaction of the procedural and the substantive. Construing the AAP within the ambit of its Roman law origins points to a procedural focus in the sense of discursive input. The maxim originated in the context of judicial procedure and the scholar Gaines Post summed up what it required in the contexts to which it applied: "all must be given a hearing and a defense of their rights."[7] Such a procedural right clearly depends on a prior specification of moral claims in at least two respects: first, who has the right to be heard in a given proceeding, and second, on what basis (in virtue of what specific other rights or other morally relevant attributes) that right to be heard is attributed. So in the case of the Roman guardianship law mentioned above, each guardian's right to be heard in any legal proceeding to terminate the guardianship depended on their having been previously named in that role and so attributed the bundle of rights to act on behalf of the ward that such a role entailed.

Thus, the very specification of procedural rights relied on a previous set of substantive rights, themselves assigned or recognized through other procedures. The AAP as a maxim was, as it were, an auxiliary or supplementary framework that depended on a body of wider law to give it point and meaning.

Moreover, the guardianship law accommodating multiple guardians of a single ward's interests and rights underscores the relevance of the procedure in relation to giving voice to some on behalf of the interests of others. This is also a potentially promising feature for modern versions of the AAP to emphasize: discursive input may be given procedurally by empowering some to speak on behalf of the moral claims of others.

A second important commonality lies in the need to achieve closure of a procedure that could otherwise seem quite open-ended, and in which a dilatory or evasive attitude to the summons, or a demand that still others putatively affected also be summoned, could threaten to extend a court case indefinitely. One such danger that became especially evident in medieval times was this: that the right to have rights considered could be exercised as a capacity to block or obstruct the resolution of justice. Distance, in particular, such as for those "overseas or in the Holy Land [presumably on crusade]," was one factor that often came into play.[8] This led to the need to achieve "a synthesis of voluntary and procedural consent."[9] Procedural rights to be heard had to be made to comport with procedural devices to close hearings and resolve cases. While an open-ended procedure might have value as a regulative ideal, in institutional legal and political contexts, a procedure is most practically useful when it can be conclusively resolved. Closure does not require unanimous consent, but rather, only compliance with the required procedure, just as majority decision procedures need not be interpreted as representing the will of the minority or of the whole, but only as serving to determine a binding decision to be followed.[10]

This general point may help to explain some of the important variations that developed in the statement of the maxim itself, building on variant formulae found already in the corpus of the Roman law. In particular, as Gaines Post observes, the great common law authority Bracton followed popes such as Innocent III and sovereigns such as Edward I in their related formulations in never using either the word *similiter* ("in the same way") or the phrase *ab omnibus comprobetur* ("must be approved by all").[11] By leaving out *similiter*, on the one hand, Bracton opened the door to a recognition that those who are touched may not all be touched in the same way, an important feature for contemporary developments of the principle. By leaving out *ab omnibus comprobetur*, on the other hand, and preferring weaker formulations requiring only that all those touched be summoned to a hearing (*vocandi sunt*),[12] he transmuted an absolute consent requirement into a summoning procedure in which verification that one had had the opportunity to be heard could suffice.[13] In so doing, Bracton's uses of the maxim suggest ways in which the AAP might be likewise reformulated for new purposes today, while also limiting its reach and power to what one might call having a voice, rather than even a potential veto – a point that has been made by others in criticizing the AAP and related principles and to which I return in my conclusion.[14]

The third point of comparison, which may initially appear to be a disanalogy to many contemporary applications of the AAP, will lead directly into my

discussion of climate change. It pertains to the significance of the private law context of the original *quod omnes tangit* maxim. The maxim presupposes the existence of rights (in particular, though not exclusively, rights related to property) that have been already established by a different part of the legal code and already acknowledged as held by those to whom the maxim applies. The "all" in *quod omnes tangit* is not an open-ended, indeterminate group of people, but rather a specific and already separately identifiable group who possess already acknowledged rights. The procedures to which *quod omnes tangit* applies are those which give force to, and are based on, preexisting rights, rather than serving to establish rights *ab initio*. Indeed, it is this sort of point that is likely to have inspired Habermas' remark, noted earlier, dismissing the relevance of *quod omnes tangit* to the justification of norms, even though the burden of this chapter is that such relevance can nevertheless be defended.

As I turn now to consider whether the maxim can underpin a version of the AAP as a principle relevant to a moral and political response to the anthropogenic role in causing climate change through greenhouse gas emissions, the potential disanalogy just noted may seem to present a roadblock. For it may seem that there are no preexisting rights or claims in the area of property that are relevant to climate change and that could thus underpin an application of the maxim-based principle. In the next section, however, I will argue that this is not the case. Rather, there are grounds to identify moral rights to a fair per capita share of a total global carbon budget, which could then underpin an application of the AAP. Such an application could involve any version of that principle adhering closely to the procedural force – in allowing discursive input – of the original maxim ("what touches all similarly must be approved by all," or the variations noted above and considered further below). In the subsequent section I will consider the case for another (additional or parallel) application of the AAP, not on the basis of moral rights to a kind of property, but on the basis of moral rights against the unjust imposition of harm or the risk of harm. Then, in the final section, I will consider a range of procedural and institutional possibilities for taking account of both of these kinds of rights in embodying the AAP in moral, legal, or political expectations and practices.

CLIMATE CHANGE AND THE AAP: THE CASE FOR MORAL RIGHTS TO A KIND OF PROPERTY

To think about whether the AAP is helpful in the context of climate change, one must think first about the value of focusing on procedural forms of expressing discursive input into the establishment or modification of a moral or legal order. The presumptive value would include rectifying some inequities in causal and political power and so potentially allowing for better substantive outcomes in the domain of the harms caused by climate change than is currently the case. In order to realize any such procedure, we must consider the underlying substantive rights on which it would have to rest: whether there

are recognizable rights or claims that some group of "all affected" hold, and whether that group can be properly identified. While one might leap to the issue of "future generations" here – and indeed we will come on to that issue below – I think that it is more helpful to inquire first, as the above discussion of the maxim suggested, into the sense in which there might be in this context a group of "all" with preexisting rights or claims that a principle such as the AAP can acknowledge.

One argument that would support the application of the AAP would be to accept arguments that have been made for the atmosphere as a global commons as the basis for the preexisting moral rights on the basis of which a claim to discursive input for all affected could be founded.[15] This moral idea takes as a starting point the idea of a global "carbon budget" of greenhouse gases in the atmosphere, set at a point that is likely to be compatible with keeping the increase in the earth's mean surface temperature within a certain tolerable range. That total accumulation – understood as a sum of carbon sources and sinks – is a total for all time. It has been driven most dramatically (though not solely) by fossil fuel emissions in the period of the Industrial Revolution, and its rate of increase is expected to eventually slow, stop, and gradually decline, as future energy and other needs can be supplied instead by non-fossil fuel and non-greenhouse-gas emitting activities. On the global commons argument, this total accumulation is understood as a kind of negative commons, one to which no individual or country had preexisting property rights or could rightfully establish a squatter's claim to keep out others from making equal fair use of the same commons.[16]

For present purposes, consider the players in the Industrial Revolution period of the dramatic increase in the accumulation in terms of countries or nation-states, divided into richer countries that have emitted far more and poorer countries that have emitted far less per capita, and in many cases less also in absolute terms.[17] Countries are also the dominant (though not the only) players in the politics of potential mitigation in the critical period of the next decades in collectively determining whether a sustainable path to a tolerable likely global mean temperature rise will be achieved. Thus the concept of a global carbon budget for fossil fuel emissions is assigned per capita to the populations of countries between, say, 1880 and 2050, providing something akin to "property rights" as a moral basis for the applicability of a version of the AAP.[18]

This cumulative carbon budget of fossil fuel emissions has been calculated as 820 GtC, of which just over 400 GtC have been already emitted since 1880 (using 2010 data).[19] Yet in 2011, one billion of the people living in the poorest countries emitted less than 1 percent of the total global carbon emissions that year.[20] Working the numbers, one could calculate the proportion of emissions in the full period likely to be attributable to the richest countries versus the poorest countries. That has been done by the Global Carbon Project for a slightly different time period (1870–2015), for cumulative emissions from

fossil fuels and cement, showing the United States to be responsible for 26%, the EU28 for 23%, China for 13%, Russia for 7%, Japan for 4%, India for 3%, and all other countries for the remainder.[21] A further adjustment for populations over that time period would confirm, broadly speaking, that the "property rights" attributable on the basis of the global carbon budget to the poorer countries, and people within them, have been usurped to a considerable extent by the richer, who have taken up far more than their fair share of the carbon budget to date, while the poor are far more vulnerable to its effects.[22] (The Global Carbon Project data just cited shows that the United States and the EU28 are jointly responsible for just under half of the total.)

Of course, these rights are moral, not at present legal, but as often in the history of rights claims, the former can provide a basis for eventual political and sometimes ultimately legal claims. Indeed, Susan James has argued that even moral rights must be conceptually understood to require an "effective method of implementation," judgments about which will be "partly shaped by our moral beliefs about the urgency of the right in question."[23] This brings the AAP itself into focus. The AAP can be understood as a moral insistence that all affected have a right to be heard, implying a procedure – whether actual or counterfactual – that is capable of reaching some conclusive outcome such that the right to be heard can be brought to bear in relation to some decision or outcome. As the right to a fair share of the global commons has never been implemented and its absence is having dire consequences for many, especially in the Global South, the impetus to develop a version of the AAP that can inform a moral procedure and ultimately a legal or political one (however imperfectly on each level) is considerable.[24]

Such a procedure would ideally include the summoning of all affected in some form (whether as a thought experiment, or through some institutional means, the possible implementation of each of which is discussed below) in order to redress the balance of so-called property rights through mechanisms of compensation as well as mitigation and support for adaptation. Carbon footprint calculations can help to establish broad divisions among those who are using up more than their fair share of the global carbon budget (the term in ancient Greek would be *pleonexia*, or greedily grasping more than one's fair share). This can establish the baseline for compensation, while institutional arrangements for forms of trusteeship (canvassed below) can help to forestall further such usurpation, drawing on the AAP's origins (or at least originating encapsulation) in the Roman law maxim that allows and enables some to speak on behalf of the moral claims of others.

Setting an end date in defining the global carbon budget has the further advantage that it can obviate some of the conceptual difficulties about future generations that otherwise arise when considering the ethics and politics of climate change and the AAP more generally. The AAP must always contend with the problem of whether "possible" people – including those whose very existence is contingent upon the decisions made to which the AAP is being

applied – are relevant to its application, or whether only "actual" people in the actual world that materializes as a result are so relevant. While Robert E. Goodin's original reasons for construing the principle in terms of those who are "possibly affected" remain theoretically cogent, the imposition of an end date for the global carbon budget calculation helps to limit the scope of possibility, albeit without resolving the theoretical difficulties entirely.[25] Indeed, the need to consider an indefinitely long sequence of future generations, each composed (barring a catastrophe of human extinction or near-extinction) of very large numbers of people, is difficult more generally for consequentialist reasoning as for democratic theory.[26] Being able to posit that future generations beyond a certain point should not need any longer to emit carbon from burning fossil fuels, and should be able to drastically reduce their remaining emissions into balance with natural or artificially created carbon sinks, enables us to remove them from consideration of the All-Affected Principle in terms of the agency of those who will go on doing the affecting. They still remain, of course, in the pool of "all affected" by the ongoing effects that anthropogenic climate change, even if such change is eventually to be slowed or stopped, will have upon them. That brings me to the next section, on the AAP as a principle applied to moral rights against wrongful harm or the risk of such harm.

CLIMATE CHANGE AND THE AAP: THE CASE FOR MORAL RIGHTS AGAINST UNJUST HARM

As just discussed, unjust usurpation of moral "property rights" is one way of construing the morally salient way in which some agents "touch" or "affect" others by means of greenhouse gas emissions and so make the AAP potentially relevant to climate change. A more general explanation for the wrongs done by anthropogenic climate change – wrongs that will continue well beyond the date set for contributions to the global carbon budget – lies in the wrongful imposition of harm or the risk of harm. An agent (individual or collective, but I shall focus on the former here for simplicity) emits greenhouse gases or in some relevantly responsible way induces or acquiesces in their being emitted as a means, or side-effect, of pursuing the agent's ends. And these emissions contribute to the imposition of serious harm on others, when that harm could be avoided (either by reducing emissions, though not possible in all cases, or by providing compensation).[27]

By imposing this unnecessary and disproportionate harm, all those who emit – or more precisely, those who emit above a relevant fair threshold and without perfect compensatory offsetting, if such a thing is technically feasible to a sufficiently high epistemic standard – are contributing to a grave moral injustice against all those affected by their emissions. That is, against all present and future persons, all of them subject to the changing climate that emissions contribute to engendering, as well as, on some accounts, other constituents of the biosphere.[28] Not only are all present and future persons, and living (and

indeed nonliving) natural entities, affected, but all past and present persons have contributed to some extent to affecting others in this way (even people in the far distant past emitted greenhouse gases in the course of living their lives, though their moral responsibility for having done so may be limited by fair-share as well as epistemic considerations). Carbon footprint analysis and sectoral studies, as well as country-level analyses, can help to distinguish those who are proportionately most responsible in generating emissions.

Here a number of problems have been flagged in the literature. One is whether what emissions impose is actual harm, or a "risk of harm." John Broome refers to the latter at one point,[29] but what he means by this is that "there is only the tiniest possibility that your emissions harm no one," presumably having in mind questions about thresholds or timing that he has discussed earlier. (He relies upon a continuous harm function and one to which all emissions potentially, and almost certainly actually, contribute, even if in infinitesimal amounts.) But one might wonder, first, whether emissions that are necessary for a certain standard of living (to be philosophically or politically determined) should count as doing harm at all, insofar as they do not cross an accepted threshold for interpersonal (and ideally reciprocal) interaction. And one might wonder, further, whether the risk involved should not be taken more seriously, in its potentially differential effects. Broome argues that even if one's emissions engender only "minuscule, imperceptible harms," nevertheless on a global scale "the amounts add up."[30] Here I pass over the controversy over whether so-called "imperceptible" or "negligible" harms can in fact be understood as contributing, causally or in some other relevant sense, to a significant collective harm, one that I have discussed elsewhere.[31] My interest at present, relative to the AAP, is in the differential effects of such contributions as well as their differential causes.

The key point is this: those affected will not all be affected *similiter*. On the contrary, the modifications in ecological conditions effected by climate change will (almost certainly) affect present and future people, and other constituents of the biosphere, in dramatically different ways and to significantly different extents, both because of the altered extent of exposure to hazardous changes and because of social as well as natural factors shaping differential vulnerabilities.[32] A few lucky people may find previously extreme climates become more temperate (though even they will also be affected by drastic climate-induced changes of various kinds); far more will see their livelihoods evaporate with parched fields, or their villages or countries inundated by rising sea levels (this was seen catastrophically in the flooding of Pakistan in the summer of 2022). And because the "patients" of the harm done will suffer its consequences in these very different ways and extents, the "agents" of the harm done must be treated as causing very different kinds and levels of harm to different patients. The generic contribution that a marginal emission of greenhouse gases makes to climate change (even if we posit that it is generically equal, which may not be the case, for example, if an aviation emission at altitude does more harm

because of radioactive forcing than the same marginal emission would do emitted elsewhere) is not equivalent to a generic imposition of equal harm. Thus, to the broad division between rich and poor in causing climate change must be added the inverse vulnerability to suffering its effects.

To be sure, just how emissions link to harm is a matter of ongoing scientific debate and increasing capacity for precisification. While the causal link between greenhouse gas accumulation and global mean temperature is well established in basic science on the basis of observations, models, and historical records, the effects of an increase in global mean temperature on the complex systems that shape the biosphere and so result in increased risk of harm to many of its constituents (while also in some cases benefits to some) are far more complicated to trace. Scientists have in recent years made great progress in being able to conduct attribution studies that can quantify the increased risk of certain events occurring (extreme weather events, severity of hurricanes, and so on) as a result of the changed background conditions shaped by global warming (in its turn shaped crucially by anthropogenic greenhouse gas emissions). It is now possible to quantify how changes in climate (to which individual agents contribute) make certain effects (such as hurricanes) more likely, or more likely to be more destructive, and so to have expected greater levels of affectingness on individuals.[33] Studies also demonstrate how changes in climate, such as temperature rises, lead to differential likelihoods of individual and group actions such as conflict and violence.[34] In light of these studies, we can move beyond the individualized causal framework that has dominated philosophical debates about imperceptibility in assessing contributions to climate change, at least when seeking ways of thinking about "all affected" and "all affecting" rather than answering questions of individual moral responsibility.[35] Rather than seeking to individuate the likelihood of an individual emission causing, or contributing relevantly to, some harm to some specific other persons, we can explore other paradigms of affecting and affectedness. I shall canvass two: forms of tort liability on the one hand, and structural injustice that might be compared to racism and sexism (and other similar phenomena) on the other.

The tort liability paradigm can in some cases assess responsibility for causing a risk of harm to an entire community, even though that may not eventuate in a harm to a specific person. One might think of emitting greenhouse gases at least above a "necessary" threshold as like driving above the speed limit, knowing that by doing so one imposes the risk of harm on other drivers (and more problematically on pedestrians, cyclists, etc., as there the risk is not fully reciprocated). In such contexts, some have argued that public policy can and should, in assessing contributions to corrective justice, include those who have negligently or otherwise wrongly imposed risks of harm, even where those harms do not eventuate – for example, by setting up a fund for all motorists (or all caught on speed cameras, even if not ticketed) to contribute to compensation for those who are in the event harmed by car accidents. Catriona McKinnon has drawn this analogy in advocating a "corrective justice"

approach to greenhouse gas emissions. As she suggests, adopting such an "ex ante view of responsibility" – in the way that some have argued should be done for tort liability – would provide "a justification for extracting resources for reparation from a liable agent (or her insurers) now even though those their actions put at risk exist in the distant future and, indeed, even if many of those distant strangers are never in fact harmed by the action."[36]

The tort liability paradigm, however, does not break with the individualizing paradigm of harm on which harms are still generally treated as assignable to discrete persons as both agents and patients, even if the risk of harm affected a class of persons generally before its materialization as an actual harm. An alternative paradigm could seek to model the harms posed by climate change as akin to contributions to structural injustices such as racism, sexism, and other forms of domination. One reason to consider climate change to be "structural injustice" is that it is hard to separate the "affecters" from the "affected": very many people are doing the affecting, though some much more extensively and culpably than others, and everyone now or in the future alive (as well as other beings and the earth itself) is in the group of those affected, though again not necessarily *similiter*, given the ways in which exposure and vulnerability are seamed and structured by political, social, and economic inequalities. And this means, further, that there are no clear lines from the actions of one individual or discrete group to the harm suffered by another, an ambiguity that is further heightened by the complexities of climate science itself, in terms of the multiple and sometimes countervailing effects that increased concentrations of greenhouse gases have on various aspects of the dynamics of the climate system. Instead, the actions of the affecters collectively constitute conditions that make harm likelier without making it individually predictable or assignable (even if group-level probabilistic predictions may be feasible).

To be sure, contributions to greenhouse gas emissions are not exactly like contributions to sustaining racism and sexism. It is beyond the scope of this chapter to provide a full analysis of the similarities and differences; instead I will simply point to some commonalities. One is that in all these contexts, actions that might be *prima facie* (or "facially": on their face) innocent and legitimate can instead have unjust effects, harming distinct individuals but also further embedding unjust domination into the social and sometimes physical fabric of society. As Luke Cole and Caroline Farrell have argued, in an article that both compares and links pollution and racism, because "racism … is … structural … [f]acially neutral decisions" can reinforce it, as when business owners choose the site of a polluting factory based on the criteria of "appropriate zoning, access to transportation, and cheap land."[37] Other work on the production and reproduction of identities, including identities shaped by domination, suggests that people tell, institutionalize, and objectify (build into the material civic fabric) the stories that construct these identities.[38] Others still suggest that it is our "habits" that shore up oppression and inequality, as for example the "racial habits" that shore up racism.[39] In these cases, it would be

both impossible and unnecessary to try to individuate a discrete harm or causal chain – from one person's facially neutral decisions; telling, institutionalizing, or objectifying of stories; or racial habits – to a specific measurable harm suffered by another who is affected by those actions or dispositions.

In structural cases, people contribute to harm by playing a role in the social constitution of conditions and dispositions that make it likely or effect it. Neither insiders nor outsiders can penetrate or dissolve that social web to identify either the harm caused by individual agents or that suffered by individual patients, much less to link them directly. Nevertheless, one might be able to attempt "attribution studies" of a similar kind in the social sphere to those now being pursued in climate science. Do increases in background expressions or toleration of racist attitudes, for example, create a climate in which acts of racist hatred and racially motivated violence become measurably more likely? If so, one could establish varying levels of responsibility, from that of individual perpetrators of specific acts, to that of those who more actively facilitate the formation of structural conditions, to that of all people who serve as contributors by tolerating the continued existence of those conditions and failing to intervene actively to attempt to change them.[40] The same kind of broad scale of responsibility can be applied to the harms caused or risked by climate change. Those who contribute to its background conditions – especially and disproportionately those who are on a global scale relatively wealthy, measured both as individuals and also as countries (though the latter requires further analysis of the distribution of responsibility internally) – are responsible in one way. Those who more actively facilitate the formation of structural conditions, such as by promoting the continuation rather than the phasing out of especially polluting industries, are responsible in another way. There may be relatively few equivalents in the domain of climate change to the individually identifiable perpetrators of individual racist or sexist acts. But that only means that the responsibility of the contributors and facilitators is all the more urgent to address.

CLIMATE CHANGE AND THE AAP: PROCEDURAL AND INSTITUTIONAL ARRANGEMENTS

I have argued so far that the AAP can embody procedural recognition, at least morally speaking, of those who have preexisting moral claims, whether analogous to property rights (in the moral domain), or against being subjected to wrongful harm or the risk of harm. Yet as observed earlier, even in the original development and application of the maxim *quod omnes tangit*, the entitlement of all affected (or touched) to give their consent to the proposal in question had to be modified in the medieval period's more expansive applications of it to allow for procedural closure. Bracton, as was noted above, dropped the call for all touched to consent, instead calling only for them to be summoned – giving them the presumptive opportunity to be heard, but depriving them of an effective veto should they fail or refuse to respond to that opportunity. That turned

the maxim in judicial contexts into something closer to a compulsory consideration of potentially affected interests and rights in the context of a conclusive procedure. In other words, it gave those affected the opportunity to exercise their voice, but not the opportunity to exercise a veto at their discretion (as the original Roman guardianship cases may have envisaged, though even there the need for procedural closure was significant).

In the context of climate change, such a move would suggest the institutionalization of procedures enabling the compulsory consideration of all potentially affected interests and rights, within the relevant domain (so bounded by an end date for the "property rights" of the global carbon budget, but extending indefinitely into the future for the risks of harm). A number of institutional mechanisms have been canvassed in the literature for such purposes. Some of these would introduce the voice of otherwise unrepresented parties into present-day proceedings by means of representation. For example, the model of ombudspersons appointed in democratic assemblies to represent the interests of nonhumans, distant humans, or future humans is potentially promising. We might also take a leaf out of Bracton's focus on judicial settings to think about the potential for guardian ad litem positions, modelled on those "appointed as an 'arm of the court' to protect children who are unable, because of age or other incapacity, adequately to express their wishes," though in this case those being protected would not necessarily be minors.[41] Indeed, as noted earlier, a Roman law in the context of which the *quod omnes tangit* maxim was articulated involved the several guardians (*tutores*) of a single ward. Empowering some to speak on behalf of the moral rights of others, who would otherwise go unheard, would be broadly in keeping with the spirit of the original maxim and its historical evolution (even though in that law it was the rights of all the guardians to be heard that was in question).

Another institutional route would be to protect the moral claims to "property rights" in the global commons of the carbon budget, in the form of actual commons trusts.[42] Such trusts have been canvassed elsewhere in environmental law. Issuing "shares" in the carbon budget whose use would require the consent of the trust would be akin to cap and trade mechanisms, but could operate at a more dramatic and symbolic level of global politics. More broadly, the idea of trusteeship for future generations – both for their own capacities and institutions for democratic self-governance, as argued by Dennis F. Thompson, and perhaps also more broadly for their environmental capacities and institutions, political as well as ecosystem-related – again seems a natural extension of the original context of guardians at stake in the *quod omnes tangit* maxim.[43]

CONCLUSION

Whatever institutional arrangements are pursued for particular purposes will carve up the world of interactions in a particular way. Models of affectingness and affectedness are always shaped by judgments of salience, within the

scope of existing knowledge, and must also allow for closure if they are to be institutionally and even, in many cases, morally relevant. It behooves those concerned with climate change to broaden the horizon of the AAP to include the intricate patterns of interaction, inequality, dependence, expectation, and "normality" within which the effects of climate change are shaped, and also to seek institutional and theoretical mechanisms that can impose principled closure on those patterns relevant for specific purposes.

At the same time, in light of the grave failure of national and international institutions so far to rise fully to the challenges of mitigation and adaptation on the existential scale that is urgent, the lack of a veto to accompany the voice granted by the AAP is of increasing concern. As Pakistan Senator Mustafa Nawaz Khokhar wrote in the *Guardian* about the catastrophic climate change-induced flooding of 2022, "Pakistan contributes less than 1% in global emissions and yet it is one of the countries most at risk due to climate change and global heating … We're now living through a crisis that wasn't of our making."[44] Being guided by the original uses, contexts, and variations of the Roman law maxim *quod omnes tangit* may open the door to a richer, more variegated, and more objectively discernible horizon of understanding the AAP – who is affecting whom, and what follows from that – when it comes to climate change. Yet as with all matters to do with the ethics and politics of the AAP and climate change alike, there are no easy ways out.

NOTES

* I am grateful to Susan Brison for encouraging me to think about harm in relation to climate change on the model of structural injustice and domination; Colleen O'Gorman for her thinking and research on contributions to the structural injustice of domination in the context of sexual assault; Anastasia Repouliou, Emily Salamanca, and Ian Walling for research assistance supported by Princeton University; Wolfgang Ernst, during my stay at All Souls College in Hilary 2018, for stimulating discussions of the *quod omnes tangit* principle and for sharing his expertise and research in Roman law; Dennis Thompson and Melissa Williams for their thoughtful comments on earlier drafts of this chapter at the Harvard AAP workshop, and all the participants therein; the helpful work of the editorial team, variously including Danielle Allen, Archon Fung, Sean Gray, and Tomer Perry; Steve Pacala for inviting me to co-teach the Environmental Nexus course in Spring 2017 with him, Marc Fleurbaey, and Rob Nixon, as well as Ian Campbell for superb teaching assistance that extended to intellectual camaraderie about these questions; and the Climate Futures Initiative at Princeton University, which I currently co-convene with Rob Socolow, and which has been supported over time by Princeton University's High Meadows Environmental Institute, Andlinger Center for Energy and the Environment, Princeton Institute for International and Regional Studies, and University Center for Human Values, for providing a fruitful context for this strand of my research.

1 For example, Christian List and Mathias Koenig-Archibugi cite it in the form *quod omnes tangit ab omnibus approbetur*, as famously used by Edward I (see footnote

following herein); Johan Karlsson Schaffer cites it in the form *quod omnibus tangit, ab omnibus tractari et approbari debet,* used *inter alia* by Innocent III and Boniface VIII. See Christian List and Mathias Koenig-Archibugi, "Can There Be a Global Demos? An Agency-Based Approach," *Philosophy and Public Affairs* 38 (2010): 76–110, at 81 n.12. The Roman law origins are noticed by others, including Johan Karlsson Schaffer, "The Boundaries of Transnational Democracy: Alternatives to the All-affected Principle," *Review of International Studies* 38 (2012): 321–42, at 323.

2 C. 5, LIX, 5, 2, cited from the Latin and English in *The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text*, based on a translation by Justice Fred H. Blume, general editor Bruce W. Frier, 3 vols. (Cambridge: Cambridge University Press, 2016), vol. 2, pp. 1358–9. See also the older edition of the Paulus Krueger, ed., *Corpus Iuris Civilis*, 11th ed. (Berolini [Berlin]: apud Weidmannos [Weidmann], 1954), 3 vols, vol. 2 [*Codex Iustinianus*], p. 231. The passage is cited in Yves M.-J. Congar, "Quod omnibus tangit, ab omnibus tractari et approbari debet," *Revue historique de droit français et étranger* 35 (1958): 210–59, at pp. 210–11. It is worth noting that in the previous section (C. 5, LIX, 5, pr.) the law had laid down that "the authorization even of one tutor shall be sufficient for all *tutores*, where the management is not divided according to geographical area or portions of the estate," contrary to previous practice for certain kinds of tutorial appointments (1356–7). So the case of terminating the guardianship is an exception to a more general rule which did, in some cases, allow one *tutor* to act in a way that bound others.

3 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, 2nd ed. (Cambridge, MA: MIT Press, 1996), Postscript n.11, at pp. 565–6. Habermas cites Niklas Luhmann,"Quod omnes tangit … Anmerkungen zur Rechtstheorie von Jürgen Habermas," *Rechtshistorisches Journal* 12 (1993): 36–56.

4 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016).

5 Gaines Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," in *Post, Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton: Princeton University Press, 1964), pp. 163–238, at 217.

6 Ulpian, D. XXXIX, 3, 8, cited by Congar, "Quod omnibus tangit," p. 211; the Latin can be found in Iustinianus, *Digesta Iustiniani*, available at http://latin.packhum.org/loc/2806/2/0#261, last accessed September 24, 2023, or in the *Corpus Iuris Civilis*, 16th ed. (Berolini [Berlin]: apud Weidmannos [Weidmann], 1954), 3 vols, vol. 1 [*Institutiones* and *Digesta*, the latter ed. Theodor Mommsen and rev. Paulus Krueger], p. 647.

7 Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 170.

8 Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 205.

9 Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 171.

10 This point is made both about *quod omnes tangit* as a Roman law maxim which makes a demand for a certain kind of unanimity or consensus, but not an absolute one, and more generally about Roman and medieval appeals to the *maior pars*

as a decision procedure, by Wolfgang Ernst, "Maior pars – Mehrheitsdenken in der römischen Rechtskultur," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 132 (2015): 1–67, at 54–5.

11 Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 223. As Post observes there, Edward I in one famous intervention preferred the formulation *quod omnes tangit ab omnibus approbetur;* this is functionally nearly identical to *ab omnibus comprobetur.*

12 In doing so, Post observes ("A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 223), he was "probably influenced by the decretalists, who frequently stated the principle of procedural consent in such words as *omnes quos causa tangit vocandi sunt* ['all those whom the case touches must be summoned', as glossed by Post elsewhere in the same volume, at 172] and referred to Justinian without saying *ab omnibus comprobetur*."

13 Post, "A Romano-Canonical Maxim, *Quod Omnes Tangit*, in Bracton and in Early Parliaments," p. 223.

14 One such critique is advanced by Minh Ly, "A Human Right to Deliberative Justification," *Journal of Politics* 80, no. 4 (2018): 1355–68, who argues that "It is not enough for people to be merely consulted or given the chance to offer feedback on a policy that cannot be changed. Consultative mechanisms … are insufficient. Instead, people must be able to challenge policies in a way that leads to human rights violations [the specific rights on which he focuses] being prevented or stopped" (p. 1356).

15 The idea of common atmospheric ownership and equal emissions entitlements is explored and defended, albeit as being most cogently based on libertarian as opposed to egalitarian presuppositions, by Darrel Moellendorf, "Common Atmospheric Ownership and Equal Emissions Entitlements," in *The Ethics of Global Climate Change*, ed. Denis G. Arnold (Cambridge: Cambridge University Press, 2011), pp. 104–23. Moellendorf is responding to a critique of the idea by Simon Caney expressed *inter alia* in "Climate Change, Energy Rights, and Equality," pp. 77–103 in the same volume. In this contribution I limit myself to proposing how the AAP could make sense on the basis of a global atmospheric commons view, without being able here to defend such a view in full.

16 I am indebted to Stephen Pacala's lectures in an undergraduate course that we co-taught (with Marc Fleurbaey and Rob Nixon) at Princeton University in Spring 2017 (ENV 200: The Environmental Nexus), for the broad outlines and specific references to the science in relation to the carbon budget and, below, to attribution studies.

17 It should however be noted that there are rich people in poor countries for whom any institutional solution based in theory on a per capita basis should ideally account. See S. Chakravarty, H. de Conink, S. Pacala, R. Socolow, and M. Tavoni, "Sharing Global CO_2 Emission Reductions among One Billion High Emitters," *Proceedings of National Academy of Science* 106, no. 29 (2009): 11884–8, for discussion of which I am grateful to Rob Socolow.

18 In the five years between the first drafting of this chapter in fall 2017 and its commitment to press in fall 2022, the proposal considered in the original draft of a closing window of 2100, has already come to appear implausibly late.

19 SBC Energy Institute, 2015, in order to achieve the Paris Agreement path of warming (one of the RCP paths from IPCC AR5) that would be likely to keep warming

less than 2°C and have atmospheric CO2 accumulation not increasing after midcentury [2050].

20 Stephane Hallegatte et al., *Shock Waves: Managing the Impacts of Climate Change on Poverty* (Washington, DC: World Bank, 2016), p. 193.

21 Corinne Le Quéré et al., "Global Carbon Budget 2017," *Earth System Science Data Discussions* 10 (2018): 405–48, at 426 (Figure 5): https://doi.org/10.5194/essd-10-405-2018 (last accessed September 24, 2023).

22 Hallegatte et al., *Shock Waves*.

23 Susan James, "Rights as Enforceable Claims," *Proceedings of the Aristotelian Society* 103 (2003): 133–47, at 136, 138 respectively.

24 Again, some, such as Minh Ly (cited above, n. 14), would contend that the AAP route of giving a hearing and a voice, but not a veto (or even the procedural potential to argue for a veto), is inadequate.

25 Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs* 35, no. 1 (2007): 40–68, argues that the "actually affected" interpretation of the principle must be rejected as it engenders "incoherence" (p. 52). Archon Fung distinguishes "two related but distinct potential difficulties here: endogeneity and indeterminacy," but argues that these difficulties can be ameliorated by taking the principle as "a regulative principle for continuously adjusting the boundaries of inclusion" through political processes: see Archon Fung, "The Principle of Affected Interests: An Interpretation and Defense," in *Representation: Elections and Beyond*, ed. Rogers M. Smith and Jack H. Nagel (Philadelphia: University of Pennsylvania Press, 2013), at 247 and 248 respectively.

26 For an argument that a Rawlsian approach can do better than deliberative democracy in taking account of future generations, see Clare Heyward, "Can the All-Affected Principle Include Future Persons? Green Deliberative Democracy and the Non-Identity Problem," *Environmental Politics* 17 (2008): 625–43. For a more general defense of both the possibility and the moral imperative of considering future people in an open-ended way, see William MacAskill, *What We Owe the Future* (New York: Hachette Press, 2022).

27 For a survey of seven factors that support the thought that greenhouse gas emissions unjustly cause harm – roughly, that these emissions as done by most people in the rich world are actions (not omissions), and that the harm they do is serious, not accidental, generally uncompensated, done for one's own benefit, not fully reciprocal between the global rich and the global poor, and could easily be reduced – see John Broome, *Climate Matters: Ethics in a Warming World* (New York and London: W.W. Norton and Company, 2012), pp. 55–9.

28 For the case of animals, see Pablo Magaña, "Nonhuman Animals and the All Affected Interests Principle," *Critical Review of International Social and Political Philosophy* first published online (July 15, 2022): https://doi.org/10.1080/13698230.2022.2100962.

29 Broome, *Climate Matters,* p. 79.

30 Broome, *Climate Matters*, pp. 75, 76.

31 Melissa Lane, *Eco-Republic: What the Ancients Can Teach Us about Ethics, Virtue, and Sustainable Living* (Princeton: Princeton University Press, 2012), pp. 66–9 and *passim*; Melissa Lane, "Uncertainty, Action, and Politics: The Problem of Negligibility," in *Nature, Action and the Future: Political Thought and the Environment*, ed. Katrina Forrester and Sophie Smith (Cambridge: Cambridge

University Press, 2018), pp. 157–79. My contentions have been criticized by Ewan Kingston, and Walter Sinnott-Armstrong in "What's Wrong with Joyguzzling?" *Ethical Theory and Moral Practice* 21, no. 1 (2018): 169–86; I had originally targeted them in part against Walter Sinnott-Armstrong, "It's Not My Fault: Global Warming and Individual Moral Obligations," in *Perspectives on Climate Change: Science, Economics, Politics, Ethics*, ed. Walter Sinnott-Armstrong and Richard B. Howarth (Amsterdam et al: Elsevier, 2005), pp. 285–307. I am grateful to Ewan Kingston, as well as Richard Tuck, for discussion of these points.

32 The distinction between exposure and vulnerability is central to environmental disaster research. For an application within the United States, see Eric Tate et al, "Flood Exposure and Social Vulnerability in the United States," *Natural Hazards* 106, no.1 (2021): 435–57. I am grateful to Michael Oppenheimer for helping me to appreciate this distinction.

33 Friederike E. L. Otto, Geert Jan van Oldenborgh, Jonathan Eden, Peter A. Stott, David J. Karoly, and Myles R. Allen, "The Attribution Question," *Nature Climate Change* 6, no. 9 (September 2016): 813–16. https://doi.org/10.1038/nclimate3089. They write: "Scientists can now provide reliable answers to the question of whether anthropogenic climate change has altered the probability of occurrence of classes of individual extreme weather events, which often is a relevant question. The emergence of a set of complementary approaches deepens our confidence in these results and paves the way to provide robust answers to questions from stakeholders and the public in the immediate aftermath of an extreme weather event. When communicating these results, it is important to clearly state the probabilistic framing of the attribution question, how the event is defined and the level of confidence in the findings based on physical understanding. If the attribution question is being asked to provide guidance from the present on what the future may hold, in general approaches accounting for the full change in probability provide useful answers" (p. 816).

34 See generally T.A. Carleton and S.M. Hsiang, "Social and Economic Impacts of Climate," *Science* 353, no. 6304 (2016): https://doi.org/10.1126/science.aad9837, and as illustration, R.P. Larrick et al., "Temper, Temperature, and Temptation: Heat-Related Retaliation in Baseball," *Psychological Science* 22 (2011): 423–8.

35 There is a large literature on what I called in *Eco-Republic* the problem of negligibility, in relation to causation and in particular in relation to climate change, my own contributions to which are cited above. See more generally Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), pp. 67–86, who was building on an earlier article by Jonathan Glover, "It Makes No Difference Whether or Not I Do It," *Proceedings of the Aristotelian Society, Supplementary Volumes* 49 (1975): 171–209; Shelly Kagan, "Do I Make a Difference?," *Philosophy & Public Affairs* 39, no. 2 (2011): 105–41; and for a commentary on Kagan focusing primarily on the understanding of "imperceptibility," Julia Nefsky, "Consequentialism and the Problem of Collective Harm: A Reply to Kagan," *Philosophy & Public Affairs* 39, no. 4 (2011): 364–95.

36 Catriona McKinnon, "Climate Change and Corrective Justice," *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 17 (2009): 259–75, at 266.

37 Luke W. Cole and Caroline Farrell, "Structural Racism, Structural Pollution and the Need for a New Paradigm Poverty, Justice, and Community Lawyering: Interdisciplinary and Clinical Perspectives," *Washington University Journal of Law & Policy* 20 (2006): 265–82, at 277.

38 Clarissa Rile Hayward, *How Americans Make Race: Stories, Institutions, Spaces* (Cambridge: Cambridge University Press, 2013), p. 2.
39 Eddie S. Glaude, Jr., *Democracy in Black: How Race Still Enslaves the American Soul* (New York: Crown/Archetype, 2016).
40 For the distinction between perpetrators, facilitators, and contributors, I am indebted to the work of Colleen O'Gorman, *Lessons from Emily Doe: A Survivor-Centric Approach to Sexual Assault*, a thesis presented to the Department of Politics, Princeton University, in partial fulfillment of the requirements for the degree of Bachelor of Arts, April 4, 2017.
41 Linda Gunsberg and Paul Hymowitz, *A Handbook of Divorce and Custody: Forensic, Developmental, and Clinical Perspectives* (Hillsdale, NJ: The Analytic Press, 2005), p. 22.
42 See the general discussion of commons trusts in environmental management, with further references to studies in environmental law, in Alex Zakaras, "Democracy, Children, and the Environment: A Case for Commons Trusts," *Critical Review of International Social and Political Philosophy* 19 (2016): 141–62.
43 See Dennis F. Thompson, "Representing Future Generations: Political Presentism and Democratic Trusteeship," *Critical Review of International Social and Political Philosophy* 13, no. 1 (2010): 17–37.
44 Mustafa Nawaz Khokhar, "Rich Countries Caused Pakistan's Catastrophic Flooding. Their Response? Inertia and Apathy," *The Guardian*, September 5, 2022: www.theguardian.com/commentisfree/2022/sep/05/rich-countries-pakistan-flooding-climate-crisis-cop27; his summary final sentence compresses the interaction of exposure and vulnerability, and the multiple determinates of each.