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Book Review

Why Environmental Policies Fail, by Jan Laitos with Juliana Okulski
Cambridge University Press, 2017, 229 pp, £80 hb, ISBN 9781107121010

Despite decades of environmental law and policy making, the global environment remains imperilled. Human-caused environmental degradation has become so severe and extensive that it threatens to breach several planetary boundaries, possibly making the Earth uninhabitable for humans and other species.[1] Climate change and biodiversity loss may have already reached a tipping point, and other types of environmental damage – including freshwater depletion, ocean pollution, and degradation of ecosystems – may also soon become irrevocable. Are these bleak outcomes a result of incomplete or fragmented environmental laws, ineffective policy design, poor implementation and enforcement, a lack of funding, or some combination of these and other factors?

In *Why Environmental Policies Fail*, Jan Laitos argues that the very nature of environmental policies undermines their effectiveness and makes their failure inevitable. Specifically, Laitos argues that environmental policies suffer from three critical flaws. Firstly, they typically treat humans as separate from and superior to other parts of the environment, and therefore are premised on a flawed understanding of nature. Secondly, environmental policies tend to treat nature as a stationary, rather than a dynamic, system. As such, environmental policies focus on preserving natural spaces in some sort of idealized form, rather than allowing natural spaces to adapt and evolve. Thirdly, environmental policies also tend to treat humans as idealized economic actors – what behavioural economists call *Homo economicus* – rather than the irrational beings humans really are. These three flaws, according to Laitos, have resulted in decades of environmental policies that are seemingly destined to fail.

To develop and support this argument, Laitos divides the book into five parts. Part I serves primarily as an overview of the book's thesis. Part II provides a brief history of environmental policy development in the United States (US) and a grim assessment of current global environmental conditions. Laitos argues that these bleak conditions serve as proof that environmental policies have failed. The remainder of the book then aims to explain *why* environmental policies fail and to offer some recommendations for policy reform. Part III expands upon the three primary causes the author believes are responsible for failed environmental policies. Part IV shifts course by examining ten types of environmental policy (including command-and-control regulatory mandates, market-based programmes, information and disclosure rules, and behavioural strategies) and explaining why each of these policy approaches

[1] E.g., J. Rockström et al., 'A Safe Operating Space for Humanity (2009) 461(7263) *Nature*, pp. 472–5; W. Steffen et al., *Global Change and the Earth System: A Planet under Pressure* (Springer Verlag, 2004).

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is inadequate, incomplete, or flawed. Finally, Part V proposes a new framework for environmental policy.

Part II begins by chronicling the development of environmental policies over four eras in the US. The first era, running from the beginning of the 17th century through to the end of the 19th century, focused on creating laws to promote the use and allocation of natural resources, rather than environmental conservation (pp. 59–60). Laitos argues that this era also established and reinforced the belief that humans were superior to and separate from the natural world (p. 60). As a result, laws developed in later eras to promote resource conservation and sustainable resource use, to preserve pristine and wild areas, and to reduce pollution of air and water resources, focused on protecting resources for human benefit rather than for the good of the environment as a whole (pp. 63–70). Laitos argues that this human-centric view of the natural world is partly responsible for the environmental degradation we are experiencing today. Although the book's harrowing description of the current state of the environment makes it clear that environmental policies have not prevented profound environmental degradation, Part II does not offer much support for the claim that the human-centric nature of environmental policy – as opposed to other design or implementation flaws – has led to policy failure.

Part III endeavours to establish the causal connection by providing three primary arguments for why the current approach to environmental policy design has resulted in policy failure. While the arguments in this part of the book are well researched and offer interesting insights into effective policy design, they also raise questions that the book does not fully address or explore.

Part III first contends that environmental policies fail because they treat humans as being separate from nature. Laitos argues that humans should instead consider themselves an equal and integral component of a 'unified social-ecological system' (SES) (p. 114). He suggests that if policymakers were to recognize that human-based social systems and non-human components of the natural environment are co-dependent and interconnected, they would produce better policies. Although this argument has intuitive appeal, the book does not explain fully why this outcome would necessarily result. Nor does the book provide concrete examples of how policies that fail to view the environment as an SES are inherently flawed. This part of the book would have benefited from more examples and explanations of how the SES approach would necessarily work better and how existing human-centric policies have definitively failed.

Part III next argues that failing environmental policies result in part from the assumption that nature is stationary, rather than dynamic and evolving (pp. 118–27). The part posits that belief in stationarity, combined with the tendency to view humans as separate from the natural world, promotes policies aimed at preservation of pristine areas or restoration of habitats to predetermined baseline conditions that existed before humans despoiled them. The desire to achieve a fixed outcome, however, is contrary to the way in which nature works and misperceives the influence of humanity on the natural world. Thus, Laitos argues, environmental policies premised on an idea of stationarity are designed to fail because natural areas cannot

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return to or remain in a fixed state of preservation. Rather than focus on static preservation, Laitos advocates environmental policies that support the adaptive capacity of ecosystems (p. 127). The fundamental premise of this argument is well founded. Indeed, legal and scientific scholars have observed that 'stationarity is dead' and championed adaptive regulation and management rather than static resource preservation.[2] The book's embrace of adaptive management as a future policy recommendation thus has great merit. However, the book does not adequately explain why a belief in stationarity has led to environmental policy failures thus far. Have otherwise successful preservation laws failed because of their reliance on stationarity? Would they have succeeded if they had embraced a dynamic and adaptive approach to environmental protection? The book does not say. Thus, while it makes a strong case for ensuring that future environmental policies employ adaptive management, the book does not adequately demonstrate that a lack of adaptive policymaking has led to the failure of existing environmental policies.

Part III offers a third reason for environmental policy failure: many environmental policies erroneously presume that humans are rational economic actors (pp. 129–43). As this part explains, economists have long believed that humans embody the characteristics of *Homo economicus*, an ideal economic actor who makes decisions that are rational, selfish, and based on optimization. Policymakers embraced these economists' views and thus enacted policies that aimed to promote economically rational behaviour. As the field of behavioural economics has demonstrated, however, humans rarely exhibit the characteristics of *Homo economicus*. On the contrary, research shows that humans are often irrational, unduly optimistic, altruistic, and cooperative. Thus, the book argues, environmental policies fail because of their reliance on the *Homo economicus* concept. While the foundational argument that humans are economically irrational is based on a deep body of scientific research, the book does not provide factual support for its conclusion that policymakers' undue reliance on economic rationality has caused environmental policy failure. Nor does Laitos explain how research regarding the behaviour of individual human beings applies to institutions, which raises many unanswered questions regarding the application of environmental policies to corporations and governments. More importantly, the book does not explore the distinctions between social problems that could be addressed effectively with a 'nudge' to promote socially beneficial behaviour and those problems that instead require firmer 'shoves' or direct regulation mandating specific performance.[3] Even avid proponents of behavioural nudges, such as Cass Sunstein, do not view them as adequate replacements for regulations designed to prevent harm to others through environmental degradation or species loss.[4] In short, although the book appropriately questions the limits of market-based

[2] E.g., P.C.D. Milly et al., 'Stationarity is Dead: Whither Water Management?' (2008) 319(5863) *Science*, pp. 573–4; R.K. Craig, '"Stationarity is Dead" – Long Live Transformation: Five Principles for Climate Adaptation Law' (2010) 34(1) *Harvard Environmental Law Review*, pp. 9–73.

[3] E.g., R. Bubb & R.H. Pildes, 'How Behavioral Economics Trims Its Sails and Why' (2014) 127(6) *Harvard Law Review*, pp. 1593–678.

[4] C.R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (Yale University Press, 2014), p. 80.

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regulation to change human behaviour, it also seems to support a wholesale replacement of regulation with soft behavioural nudges without fully exploring the implications of such a sweeping change.

While Part III provides categorical explanations for why environmental policies fail, Part IV focuses on the shortcomings of ten specific types of environmental policy, including command-and-control regulations, market-based regulations (such as taxes), information and disclosure rules, and various rights-based strategies. For each policy type, the book identifies several limits or shortcomings. For example, in discussing the limits of command-and-control regulation, the author notes that many environmental regulations are technically, economically, and scientifically complex, and thus impose high administrative and compliance costs on agencies and regulated actors (p. 157). Market-based regulations, as discussed above, may erroneously presume economic rationality and may present distributive justice concerns (pp. 158–62); and rights-based policies, such as the public trust doctrine and the emerging doctrine of Earth jurisprudence, raise tricky issues of enforcement and implementation (pp. 166–71). In short, this part effectively argues that no environmental policy offers a bullet-proof solution to prevent continued environmental degradation.

Part V then outlines a way to correct the environmental policy flaws identified in Part III (and, to a lesser extent, Part IV) through a new environmental policy that reflects both 'how Nature works' and 'how humans behave' (p. 185). First, the book argues that the Earth's integrated social-ecological system should have a positive right to restoration and protection 'in a resilient and accommodating state, so as to create "a global safe operating space" for continued societal development' (p. 200). The book then notes that a positive right will provide the right-holder (that is, the Earth's SES) with a legal claim to obtain a thing or specific form of conduct, in contrast to a negative right, which allows the right-holder to prevent certain types of behaviour. This positive framing, Laitos asserts, should produce more effective policy that reflects behavioural economic models of how human beings behave. Thus, Part V also argues that humans should have a positive duty to act to uphold the Earth's positive right (p. 209). This duty should impose on humans affirmative obligations to take actions that will create public goods and positive externalities. It should also obligate humans 'to reconnect … with the real workings of Nature' so that humans realize they are part of, rather than separate from or superior to, the natural world (p. 213). To effectuate this duty, the book asserts that (i) humans must have accurate information about the environmental impacts of their actions, particularly their consumer choices; (ii) policymakers should adopt environmental laws that treat humans as part of the SES; and (iii) policymakers should develop laws that employ adaptive management. Because Part V aims only to provide an outline of the proposed new policy framework, it does not dive deeply into the specifics of these three solutions.

As with the arguments the book makes in Part III regarding the causes of environmental policy failure, the solutions recommended in Part V are both intriguing and yet raise a host of questions. For example, how do environmental laws that treat humans as a part of the Earth's SES differ in practice from existing

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environmental policies? How will information disclosures and nudges aimed at affecting consumer choices work in places where humans have little consumer power as a result of poverty, poor infrastructure, or other limitations?[5] In practice, how will a positive right differ from a negative one? Hopefully, Laitos will explore these issues in further publications.

Notwithstanding the critiques raised in this review, *Why Environmental Policies Fail* has much to recommend it. It is a highly engaging and thought-provoking book. Its use of both physical and social science is effective in many respects. The book proposes an ambitious redesign of the way in which we currently treat the natural world and environmental policymaking; and it envisions a future in which humans are an integral part and willing stewards of a healthy natural world. Although the book would have benefited from more detailed explanations and facts in certain places, its insights and arguments are well deserving of consideration and further exploration.

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[5] Even for wealthier consumers with access to multiple options, information disclosure may not always provide consumers with accurate or clear information to guide their choices: see A. Rowell, 'Once and Future Nudges' (2017) 82(3) *Missouri Law Review*, pp. 709–26.

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