

On Future Generations' Future Rights*

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SHOULD moral and/or legal rights be granted to members of future generations? The question is not new. Yet, it remains important. It pertains simultaneously to the conceptual realm and to the domain of practical proposals arising out of concern for future generations. Consider just a few of such proposals. First, we can think of specific *institutions* aimed at defending the interests and rights of future generations, such as a set of *reserved seats* in one of the parliamentary chambers,¹ setting up a specialized second chamber,² appointing a commissioner directly attached to one of the chambers (*Knesset* model),³ or instituting specialized administrative bodies such as a guardian/ombudsman⁴ or a specific agency.⁵ For each of these bodies, it also needs to be ascertained how extensive its powers should be: to delay decisions until the relevant arguments have been heard, to request a “future impact” assessment, etc. Second, at the franchise level, proposals have been made regarding the voting rights of various age-groups (that inevitably translate at the birth-cohort level⁶) as well as regarding the possibility for parents to exercise their children’s right to vote.⁷ Third, alternative or complementary indicators are being proposed for our national accounts. Beyond generational accounting,⁸ we can think of approaches such as ecological footprint or genuine savings accounting.⁹ Fourth, *pension* schemes can be redesigned to take into account intergenerational concerns. This

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¹Dobson 1996. Ekeli 2008.

²Tonn and Hogan 2006.

³Shoham and Lamay 2006. The Knesset Commissioner for future generations has now ceased operating.

⁴Agius et al. 1998. Ekeli 2006.

⁵Mank 1996.

⁶Van Parijs 1998.

⁷Hinrichs 2002.

⁸Kotlikoff 1992.

⁹Ponthière 2007. Hamilton and Clemens 1999.

includes, for example, adjusting the level of pension contributions to the number of children, as well as sharing economic risks fairly among succeeding generations.¹⁰

Such practical proposals may result in identifiable outcomes. Yet, finding out about their desirability requires a closer look at some important theoretical issues. The intergenerational context exhibits a unique set of features that make it especially challenging. The temporal direction of causation generates problems of asymmetry of power as well as restrictions to the possibility of giving back to the past. The lack of coexistence among remote generations raises the question whether obligations of justice obtain at all between non-overlapping generations. Distance between some of the generations increases uncertainty as to the effects of our actions or the nature of future generations' preferences or their environment. The sequential nature of intergenerational relationships entails the need to rely on intermediary generations separating us from remote future ones, which leads to potential problems of non-compliance essential for non-ideal theories. Such features make intergenerational issues especially difficult. Does it entail that the hope of coming up with a theory of intergenerational justice involving significant substantive obligations should be abandoned altogether? My guess is that many of these problems have solutions. In any case, it would be unacceptable to claim that they do not without having extensively tried to find them.

This article aims specifically at identifying the nature of the challenges to the very idea of "rights" of members of future generations, as well as the possibility of addressing such challenges. In order to enable us to proceed, a few things should be said first about the possible content of such rights, the possibility of constitutionalising them, and the basic distinction between the "interest" and "will" approaches to rights. Let me first say something about possible content. Using "rights" language presupposes that the legitimacy and significance of the underlying claims be ascertained on other grounds. To a large extent, choosing the language of rights still leaves a wide margin of choice in terms of content. Let me point here at one avenue to examine and decide about what the content of such rights should be. It consists in starting from our standard theories of justice (utilitarianism, egalitarianism, sufficientarianism, libertarianism) and finding out what they entail in the intergenerational realm. Selecting one theory or another makes a difference, both in terms of accounting for the *rationale* for our intergenerational obligations and for defining their very *content*.¹¹ Each of these theories has something to say about the global basket of "goods" (broadly construed) that each generation should transfer to the next. We could assume at first sight that all theories converge on the principle: "we should transfer to the next generation at least as much as we inherited from the previous one." Yet, on closer examination, such a conjecture turns out to be too hasty. For example, a

¹⁰Bichot 1999. Cosandey 2003. Gosseries 2005.

¹¹For an overview, see Gosseries 2008.

utilitarian will tend—as a matter of justice—to require each generation to transfer to the next *more* than it inherited from the previous one. And an egalitarian may defend the view that it is *unjust*—in the name of the least well off, whichever generation she would belong to—to transfer *more* to the next generation than what we inherited from the previous one.¹²

Let me also say something about *constitutional* rights. There can of course be good reasons to upgrade a legal right to the status of a constitutional one. Such reasons include a reference to the importance of the interests at stake, which may require protection against the legislature and special treatment by the judiciary.¹³ Many constitutions and international legal instruments incorporate a concern for future generations. In most cases, the provision refers to the environment and natural resources and deals with future generations as a justification for such environmental/sustainability concerns. There is also a legal debate around the distinction between “common concern” and “common heritage”, both of importance from an international perspective and from an intergenerational one.¹⁴ The reference to future generations in constitutions tends to be introduced through phrases such as “for,” “for the benefit of,” “in the interest of,” and “the environment in which [future generations] will develop.”¹⁵ More demanding are formulations such as “Pennsylvania’s public natural resources are the *common property* of all the people, including generations yet to come.”¹⁶ Yet, to the best of my knowledge, only three constitutions explicitly grant *rights* to future generations. First, the Japanese constitution states that “these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolable rights.”¹⁷ Second, the Norwegian Constitution, as amended in 1992, states that “every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”¹⁸ Third, a 2002 amendment to the Bolivian constitution specifies that all citizens have a fundamental right “to enjoy a healthy environment, ecologically well balanced, and appropriate to her well-being, while keeping in mind *the rights of future generations*.”¹⁹

Besides what has just been said on the content of future generations’ rights and on the issue of their constitutionalisation, let me now say a few words about

¹²Gosseries 2000. Gaspart and Gosseries 2007.

¹³Fabre 2000, ch. 3; cf. Waldron 1999.

¹⁴Agius et al. 1998.

¹⁵Allen 1994, n. 49 ff. Just 1996, n. 88, 99. Tremmel 2006. On future generations in the US legislation and court decisions, see Allen (1994, pp. 723 ff.). See also Argentinian Constitution, art. 41, § 1, and the preamble of the UN Charter.

¹⁶Pennsylvanian Constitution, art. 1, § 27 (my emphasis).

¹⁷Japanese Constitution 1946, art. 11.

¹⁸Norwegian Constitution, art. L 110b, al 1, as amended in 1992.

¹⁹Bolivian Constitution, art. 7(m) as amended on Aug. 8, 2002 (my emphasis and translation).

Hohfeld and the “interest” and “will” theories of rights. Hohfeld’s analytical framework on rights involves eight positions and looks at their relationships.²⁰ Among its key components are the concepts of rights (understood narrowly here as “claims”) and duties, and of powers and disabilities. We shall not aim here at a full examination of the Hohfeldian framework as well as of its implications for issues of intergenerational justice. Instead, we shall mobilize the Hohfeldian tools to understand the nature and implications for the present topic of the “interest” versus “will” conceptions of rights.

The “interest” and the “will” theories of rights clearly conflict.²¹ Yet, they share one goal: producing the best possible account of what should be regarded as rights and of what their function should be. Interest theorists view the function of rights as one of protecting significant interests. For will theorists, this would be an over-inclusive account, running the risk of an inflation of rights such that they will lose their distinctive character. To avoid this, will theorists propose to see rights as zones of freedom to be granted *only* to those able to exercise the powers to waive and/or to seek enforcement of the relevant claims. In Hohfeldian language, while for interest theorists any significant claim could qualify as a right, for their opponents, rights involve minimally a claim-right plus a power. Interest theorists object in turn that the view of will theorists is under-inclusive. For it would force us to abandon the possibility of granting rights to infants for instance, as they lack the cognitive capacity to exercise the power that needs to be attached to a claim for it to qualify as a right. In response, will theorists argue that infants still have interests that can be protected through granting rights directly to those able to exercise powers associated with the relevant claims (in the case of infants, their parents).²² While I will tend to privilege here the interest theory, I will not try to settle the general dispute, even less to caricature the will theory. We shall try to emphasize in the course of examining the four challenges below, what difference it makes to adopt one or the other theory of rights.

We are now ready to engage in a close examination of our four challenges to the possibility and meaningfulness of granting rights—including constitutional ones—to future generations. First, one sometimes hears that it is meaningless to grant rights to individuals who don’t exist. This is the non-existence challenge (section I). There is also the claim that since our actions that are allegedly harmful towards the future will also influence “their” numerical (or *token*) identity (i.e. *who* will end up being born or not, as opposed to *how* they will be, qualitatively speaking), there is a sense in which future people *could not* meaningfully be said to be harmed, and even less wronged. If people cannot be harmed, what would rights protect them against? This is the non-identity challenge (section II). The third problem is that, even if we were to find a solution to the two former challenges, the rights we would grant to future people,

²⁰Hohfeld 1919.

²¹Kramer et al. 1998, pp. 60 ff. Kramer 2001; 2008. Wenar 2005.

²²Kramer 2001, p. 30.

although meaningful, would allegedly not be judicially actionable. This may matter since actionability in court is a significant dimension of enforceability (section III). As to the fourth challenge, it claims that, even if actionability in court were guaranteed, any sanctions on the members of earlier generations for having violated such rights would in fact end up harming the very generations seeking such sanctions. This is the challenge of self-sanction (section IV).

I. THE NON-EXISTENCE CHALLENGE

Our first objection to granting rights to future people draws argument from the present non-existence of future persons.²³ The fact that future individuals do not yet exist seems to entail that they could not have rights; rights need to be ascribed to someone (as opposed to “floating in the air”). This would mean not only that the rights of future people are meaningless, but even that no duties are owed to them. A full examination of this challenge therefore requires us to find out whether duties can make sense without correlative rights (and if so, what could still be the added value of rights), and whether such correlative rights are really out of reach in our context.

A. DO WE NEED RIGHTS AS CORRELATES OF PRESENT DUTIES?

Consider first the option of biting the bullet. That is, let’s say we endorse the claim that attributing rights to future people does not make sense. We would then have to find out whether duties not correlated with rights (non-correlative duties) make sense. For example, Beckerman and Pasek rely on the non-existence challenge to deny *rights* to future people. They argue that “whatever rights future generations may have in the future, they have none now.”²⁴ Yet, they simultaneously claim that “we have a moral obligation to take account of the *interests* of future generations in our policies. . . .”²⁵ Our question is thus twofold. First, can duties without correlative rights *make sense* at all? Second, if non-correlative duties were to make sense, *what could then be gained* from arguing whenever possible for rights correlating with such duties? Answers to both questions are essential in finding out whether the idea of the rights of future generations is *needed* at all.

Let me briefly look first at the reverse issue, that is, whether non-correlative *rights* make sense at all. If the duty-right correlation had a definitional status (correlativity being true by definition), asking whether non-correlative rights are possible would be inseparable from whether non-correlative duties make sense. Lyons claims that the *right to free speech* exemplifies the possibility of a

²³See e.g.: De George in de-Shalit 1995, p. 114. Beckerman and Pasek 2001, ch. 2. For a critique, see Elliot (1989, p. 159).

²⁴Beckerman and Pasek 2001, p. 18.

²⁵Beckerman and Pasek 2001, p. 28 (my emphasis). See also Goodin 2003, p. 211.

non-correlative right.²⁶ For him, “the constitutional right of free speech is independent of, for example, the obligation not to assault [those who exercise this right]. Nor does it correlate with obligations incumbent on Congress.”²⁷ In fact, Lyon’s example involves only one of the specific Hohfeldian prerogatives, a *liberty* that tells us that *x* is free to *y*, but does not entail that *x* is free from *z*. It is indeed plausible to claim that liberties *as such* do not place restrictions on other people’s freedom, regardless of the fact that liberties generally come *in combination with* other Hohfeldian positions that do set restrictions as to what other people are entitled to do.²⁸ In that sense, if we consider a liberty as sufficient to qualify as a right in a broad sense (i.e. as opposed to a Hohfeldian claim-right prerogative), some rights could be non-correlative rights.

What matters more, however, is whether non-correlative *obligations* can make sense at all. Kramer has argued for a definitional correlativity of claim-rights and duties, which does not need to entail any logical, normative or temporal priority.²⁹ Should interest-rights theorists and will-rights theorists necessarily endorse such a claim? For interest-rights advocates, interests may on some occasions not pass the significance test required for the ascription of rights, while still being correlative to duties. Two possible sources of non-correlativity come to mind. First, the interests at stake are sometimes *dispersed* among many holders. While leading to something significant once considering the full set of people affected, the interests at stake would not be so at an individual level. Hence, the relevant threshold of harm and interest would not be met individually. Rights could not be granted, unless we endorse the idea of collective rights which I want to avoid here for reasons of moral individualism.³⁰ Another possible source of non-correlativity relevant to interest-rights theorists has to do with the issue of *demandingness* (or conflict-of-rights avoidance). There are cases in which, despite the significance of the interests of potential right-holders, a state may remain reluctant to grant a right status to such interests. It would be so if the correlative duties were deemed too demanding on duty holders, to the point of violating their rights.³¹

²⁶Lyons 1970, p. 48 ff. Feinberg (1980, p. 153) generalizes the point to “a special ‘manifesto sense’ of ‘right’, in which a right need not be correlated with another’s duty. . . . A person in need . . . is always ‘in a position’ to make a claim, even when there is no one in the corresponding position to do anything against it. . . . When manifesto writers speak of [such claims] as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognised by states here and now as potential rights and consequently as determinants of *present* aspirations and guides to *present* policies.”

²⁷Lyons 1970, p. 51.

²⁸Kramer et al. 1998, p. 11.

²⁹Ibid., pp. 24–6, 29, 35–41, 45.

³⁰Note that the non-correlative *duty* “holder” may be of two types here. It can be single person able to help preserve the interests at stake, her duty being of significant importance. Alternatively, if the dispersion of duty-holders is equivalent to the one of interest-holders, it is worth emphasizing that the concept of a duty still does not necessarily presuppose the same test of significance as the concept of right does with regard to the underlying interests.

³¹For an example, see Van Parijs (1995, pp. 127–30).

As to will theorists, granting rights to *powerless* people is inconceivable to them. If they were willing to defend the idea that all rights are correlative, they would need to propose that whenever powerless people are at stake, substitution rights be directly ascribed to non-powerless people (e.g. parents, proxies, guardians, society as a whole) as correlates of such duties. Such proxy right-holders would, however, not act in their own name. They would have to exercise their rights as defenders of other people's interests. Considering the parent-infant example, note that it does not follow that by granting rights to the parents to act as proxies, we would grant rights to these people to act in defence of the infants' *rights*. For the latter cannot possibly have rights of their own.³² Alternatively, will-rights defenders will have to accept, as interest theorists in the two cases above, but for a different reason (i.e. the meaninglessness of ascribing rights to people unable to exercise a Hohfeldian power), that current obligations would correlate with interests, not with rights.³³

Returning to Beckerman and Pasek, it is now clear that we could give to the quote above either an interest-rights reading ("these future interests are not significant enough to qualify as rights") or a will-rights reading ("these future interests are significant but powerless people cannot be granted rights"). In contrast, if their view meant that "while future people cannot have rights now, they can have interests now," it would be much more problematic. Moreover, having identified cases in which the idea of non-correlative moral and/or legal obligations could obtain, we thus need to consider the added value of still defending the idea of rights of future people, because such rights don't seem to be necessarily needed to defend present obligations. Two sets of remarks are in order here.

First, considering the three possible sources of non-correlativity just mentioned, do they apply to all possible rights of future people? The third one ("powerlessness") does. Future people cannot exercise *today* the power to waive or seek enforcement of a right. As for the two other possible sources of non-correlativity, while one cannot exclude that cases of *demandingness* could arise, it is certainly not true that all candidates to the status of rights of future generations are subject to the *dispersion* problem. We can think of at least *some* rights of future generations that would have to do with very significant impacts on each of the members of future generations (e.g. when it comes to the environment, the public debt, the existence of democratic institutions, etc.). Hence, while will-rights defenders seem bound to abandon the idea of rights of future people, interest-rights defenders could still defend the idea of rights of future people. Would it be worth it?

This brings us to our second point. What is the *added value* of referring to "rights" once we accept that obligations don't *need to* be correlative (as a matter

³²Kramer et al. 1998, pp. 245–7.

³³Steiner (1994, p. 261) writes that "the moral duties present persons have to future persons are not correlative ones."

of conceptual necessity) in all cases? Ascribing rights to future people may still matter, for two reasons. First, rights serve as a label of significance. Upgrading an interest to the status of right is a sign of its special *importance* in the same way as constitutionalising a merely legal right is. It signals something about the significance of the duties to which it correlates. Second, correlating a duty to a right tells us something about the *purpose* of such a duty. It gives a direction to that duty.³⁴ Using the language of rights is thus quantitatively (significance) and qualitatively (purpose) important. This is why instead of simply biting the bullet, we should check whether the idea of rights of future people cannot be rescued from the non-existence challenge.

B. ARE PRESENT RIGHTS OF FUTURE PEOPLE THE ONLY OPTION?

In examining responses to the non-existence challenge, let me first state why granting *present* rights to *future* persons could possibly be problematic. Doing so implies the possibility of ascribing rights to merely potential/possible people.³⁵ Take, for instance, the 1994 UNESCO Declaration of the Human Rights of Future Generations: “Whereas a life worthy of living on planet Earth is a lasting possibility only if persons belonging to future generations are recognised as having *of this moment* certain rights.”³⁶ Elliot suggests a view according to which “there is no present bearer of the right but that, nevertheless, the right exists now and its present existence is contingent on the future existence of some person who will then be the bearer of the right. . . . [Thus] there can be present rights which do not have present bearers.” This does not imply that “the future person is the present bearer of the right.”³⁷ It is doubtful however whether it is consistent to maintain simultaneously that, on the one hand, the right exists now and that, on the other hand, the existence of this right depends upon the existence of someone in the future. In a sense, such rights would already exist while still awaiting for (an) indefinite (number of) bearers.

There are at least two reasons pertaining to each of the two conceptions of rights to reject this type of position. For will-rights theorists, even if future persons could have a claim today, they could not possibly have *power* today. For any type of right, its ascription can only be done if its bearer is able to *exercise* it.³⁸ Because exercising a power to waive or seek enforcement of one’s right presupposes one’s existence, it is a sufficient reason for will theorists to reject the

³⁴Kramer et al. 1998, p. 48. This second function can arguably be fulfilled even if we cannot individualise the correlative rights bearers at the time the duty obtains.

³⁵Elliot (1989) calls it the “concessional view” while Routley and Routley (1977, pp. 157–8) call it the “meinongian view.” There is no need even to assume minimally, as Feinberg (1980, p. 216) does, that “the only noncontingent rights fetuses ever have is the right not to be born. . . .” On potential people more generally, see Fotion and Heller (1997).

³⁶UNESCO—Cousteau Society 1994, p. 184 (Preamble, article 7; my italics).

³⁷Elliot 1989, p. 161.

³⁸Steiner 1983, p. 154. See also Feinberg 1980, pp. 162 ff. Routley and Routley 1977, p. 140. Birnbacher 1988, p. 88.

idea of present rights of future people.³⁹ Steiner goes even further than pointing at present non-existence. He writes that “[. . .] rights are said to entail entitlements, called *powers*, to demand (and perhaps enforce) and to waive compliance with their correlative obligations. A future person is necessarily incapable of either prohibiting or permitting a present person’s defaulting on an obligation, because *two such persons lack any element of contemporaneity*.”⁴⁰ Not only would future existence not suffice, co-existence at some point would also be required. In contrast, for the interest theory of rights, it is the central reference to the notion of interest that does the work here. Holding a right presupposes the existence of an underlying interest. Having an interest presupposes that its holder can be harmed. Arguably, only people who exist today can be harmed today. Therefore, future people cannot be said to have an interest today, and even less so a right. Interest-rights theorists would thus reject a position such as Feinberg’s who writes that “whoever these human beings may turn out to be, . . . they will have interests that we can affect, for better or worse, right now.”⁴¹

I am not claiming here that such arguments cannot be challenged.⁴² Admittedly, they presuppose the rejection of a view according to which rights could be ascribed to people on a purely “relational” basis, in the way that any future or past could be referred to today as having properties today.⁴³ We can certainly say that “Napoleon *is* a past person who has a place of his own in history”, and we can also say that “a person who will exist in 200 years *is* bound to be the descendant of some of us.” However, ascribing rights cannot be understood in such a weak sense if we accept the idea of an underlying connection with the possibility of being harmed. Now, once we reject the possibility of present rights for future people for one of the two reasons just mentioned, two options still remain open to defend rights correlative with present obligations. One consists in ascribing present rights to *present* rather than future people. And the other consists in ascribing to future people *future* rights rather than present ones. Let me examine more closely each of these options.

As to the *present-rights-of-present-persons* option, such present rights would be ascribed to individuals different from those whose interests are at stake. This option would be endorsed by will-rights theorists, not by interest-rights ones. Will-rights advocates give special importance to the “power” dimension of a right, be it at the cost of a lack of alignment of the right with the interest constituting the underlying justification for interest-rights theorists. For will theorists such a lack of alignment is not a problem since they do not conceive of rights as tied together with underlying interests. We can thus easily envisage present generations as right-holders, some of these rights having as a purpose the

³⁹See further section III below.

⁴⁰Steiner 1983, pp. 154–6, 259–61 (my italics).

⁴¹Feinberg 1980, p. 181.

⁴²See Gosseries 2003.

⁴³See on this Kramer 2001, p. 54.

defence of future generations. Imagine three generations: G1 (the oldest cohort), G2 (the middle-one) and G3 (the youngest one). If G1 and G2 overlap at some point and if the same holds for G2 and G3, but not for G1 and G3, we could certainly grant rights to G2 against G1 during the overlap to protect the interests of G3. Given the succession of generations and overlap, the interests of future generations could be preserved by granting present rights to pivotal generations correlative to present obligations.

In contrast, interest-rights advocates are ready to pay the price of ascribing rights to powerless people for the sake of preserving the alignment of these rights with the underlying interests. For them, it makes more sense to grant rights directly to infants (even if they have to be exercised by others) than to grant the rights directly and exclusively to their proxies (entailing that the right-holder would not simultaneously be the interest-holder). Interest theorists of rights are thus reluctant to adopt the present-rights-of-present-people strategy. There is however another option: the *future-rights-of-future-people* one. Here, the right-holders are also the primary interest-holders themselves. And the idea of *future* rights can do a significant amount of the work that *present* rights do.⁴⁴ The *future-rights-of-future-people* view begins with a distinction between two claims. It makes sense to require that for a right or an obligation to exist, its holder should also exist (bearer-attribute contemporaneity).⁴⁵ There is however another contemporaneity requirement that interest theorists are not bound to endorse: the view that, for an obligation to exist, its correlative right would already need to exist.⁴⁶ Under certain conditions discussed below, the right needs not be present for a present obligation to obtain. Hence, the idea of future rights of future people can be meaningful.

The future-rights-of-future-people option is meaningful for an interest theorist, as we shall demonstrate. Should it be rejected by will theorists? Exercising a right presupposes that one exists. It also presupposes the mental capacity to exercise it (or to allow others to do so on one's behalf), a condition not met by babies or by some mentally disabled people. Interestingly enough, the possibility for infants, once they will have become adults, to seek *ex post compensation* (or to decide not to do so) in case of non-compliance with such rights, does not seem to suffice for will-rights theorists to justify granting rights to such infants today. It should remain so *a fortiori* in those intergenerational contexts in which potential rights-violators and power-holders would *never* even coexist. Yet, the fact that infants are only *temporarily powerless* (which contrasts with the cases of permanently comatose, mentally disabled and senile people) and that most of them *will* be able to exercise by themselves the powers associated

⁴⁴De-Shalit (1995, p. 114) refers to "the idea that future people, *if and when* they exist, will have rights." Beckerman and Pasek (2001, p. 21) refer to "the fact that future generations will have interests in the future, and may well have rights in the future . . ."

⁴⁵See Woodward 1986, p. 821. Jones 1992, p. 36.

⁴⁶Laudor (1994, p. 1699) writes, "it cannot be just to claim that a negligent doctor is not negligent simply because there is some lag time between the negligent act and its consequences."

with their Hohfeldian claim-rights, invites doubts as to the will theorist's position on infants rights. If such a "present claim, future power" defence of infant rights could be made, it would then pave the way for two types of conclusions for will theorists. First, infants could be granted rights as infants—which would admittedly not entail that future people could. Second, it implies the possibility of an ex post exercise of power after the action that led to the right violation took place. This could cover the case of an act anterior to the very coming into existence of the affected right. And this is highly relevant for the possibility of *will theorists* taking seriously the idea of future rights whenever there are overlapping generations. In fact, we shall see in section II that for a reason different from the non-existence challenge, generational overlap will be crucial even for interest-rights theorists. What matters here is that the idea of future rights could be meaningful not only to interest-rights but also to will-rights advocates.

Now, the "future rights" proposal implies a rejection of the *obligation-right-contemporaneity* requirement while sticking to the *right-bearer-contemporaneity* one. The latter entails that future rights will necessarily be *conditional* on the existence of their bearer.⁴⁷ A conditional right refers to the idea that when and only when a person *will* come into existence, she *will* have rights. Yet, future rights rest on two further presuppositions. First, due to the *direction of causation*, present actions may have an impact in the future. This makes it possible to have a current obligation correlative to a right that *will* exist. The reverse option of an alleged obligation correlative to a right that *did* exist in the past is clearly philosophically much more problematic.⁴⁸ Second, the future-rights-of-future-people option only works if there is a significant *probability* that there *will be* people in the future. Whatever its size and composition, the human population is not expected to disappear in the near future. Note here that it is one thing to claim that humankind should continue to exist.⁴⁹ It is another to argue that *if* humankind continues to exist, its members will have rights that should be taken into consideration today. My argument presupposes the latter, not the former.

Relying on a direction of causation and on a probabilistic assumption about the existence of future people entails constraints as to the type of future rights that can be envisaged. The first constraint—directly derived from such a conditional nature—is that we should not use this very condition (existence) as an *object* for such rights. In other words, our view is incompatible with the idea of a right to exist understood strictly as a right *to be conceived* (necessarily correlative to an obligation to procreate). A right can only be granted if the

⁴⁷See Birnbacher (1988, p. 120) and Jecker (1987, p. 158) on the distant future (here "conditional") and hypothetical rights, and Feinberg (1980, p. 166) on "birthrights." Compare with Copp (1992, p. 236) and Elliot (1989, p. 164) on conditional rights as conditionality on the circumstances.

⁴⁸Gosseries 2004a, ch. 2.

⁴⁹On the reverse question (i.e. do we have an obligation to let our species die?), see Bennett (1978, pp. 65 ff.).

relevant individual actually exists. This entails that among rights that involve the idea of existence, only two formulations (in bold in table 1 below) are compatible with the conditional nature of future rights. Referring to table 1, formulations 1 to 3 are incompatible with the conditionality requirement. Formulation 4 is not exactly meaningless. However, while it could be fulfilled or unfulfilled⁵⁰ (deprivation opposite), it could not be violated (real opposite), by definition, “ex post” presupposing that the person actually came into existence. Formulation 5 is a possibility, but formulation 6 is probably less ambiguous as it does not at all imply the idea of “right to be born.” Such constraints should be taken into account in phrasing future rights.

A second and related constraint is that as the *number* of future people is currently unknown, rights involving a quantitative dimension (e.g. in terms of a budget calculation or a natural resources index) will have to take into account uncertainties with respect to population change. We may have to adjust our obligations, as the number of future people (for which present generations are responsible) can fluctuate. In fact, the degree to which different theories of intergenerational justice—that will give flesh to such rights—are demography-sensitive, varies.

We have thus argued for the possibility and significance of the *future-rights-of-future-people* option. Both interest and will theorists of rights should take them seriously. Moreover, they are not only a matter for constitutionalists and legal theorists. Arguably, they are actually embodied in actual legislation. A good example is *baby food regulation*. Imagine a can of baby food with a remote expiry date. At the time it is bottled, its future consumer is neither born, nor even conceived. It seems to me that the best account to justify legal restrictions on the type of food that can be bottled in such cans, as well as the legal option to sue for *ex post* damages imposed on the food producer in case of inappropriate content (e.g. bacteria or pieces of glass), is a reference to the future rights of the baby as a consumer.⁵¹

Table 1. *Phrasing future rights*

	<i>ex ante</i>	<i>ex post</i>
<i>Intransitive</i>	1. Right to be born	4. Right to have been born
<i>Transitive positive</i>	2. Right to be born with . . .	5. Right to have been born with . . .
<i>Transitive negative</i>	3. Right not to be born with . . .	6. Right not to have been born with . . .

⁵⁰Thanks to an anonymous referee for this point.

⁵¹One possible challenge is that among the potential clients at the time the food is bottled, there are also some babies who already exist. This may be true, but a realistic account of the reasons of why we care about the quality of such food also has to do, at least in part, with those individuals who are

II. TAKING THE NON-IDENTITY PROBLEM SERIOUSLY

Insofar as interest-rights defenders are concerned, the non-existence challenge rests on the claim that future people cannot possibly be harmed *today* by our current actions. We argued that the fact that they could be harmed *in the future* should suffice. However, the non-identity challenge that we are now going to consider is more radical. It rests on the claim that future people cannot even be said to be *harmed* in the future, when they will have come to existence, by our present actions. This has thus the potential of jeopardizing the very solution proposed to the former challenge. Were this to be the case, even the very idea of future rights would have to be abandoned due to the non-identity problem. Interestingly enough, this problem—remarkably emphasized by Parfit⁵²—is quite unexpected. And it generally gives rise to as much scepticism from the general public as it gives rise to (sometimes excessive) fascination among philosophers. What is it about? And is the idea of future rights really jeopardized by it?

A. HARM AND NON-IDENTITY

Let me start with a wrongful life case to illustrate the problem at work. A practitioner is being asked by prospective parents whether there is any chance that a given disease could be genetically transmitted to their child if they were to decide to conceive one. The doctor answers in the negative and the parents then decide to conceive a child. The child, however, turns out to have the disease after all and the parents eventually find out that the doctor had misinformed them. One may very well think that the doctor *harmed* the parents through his mistake. And as he should have known about the serious risk of genetic transmission, he also *wronged* them; that is, he violated one of their rights (as it results from their contractual relationship with the doctor). We generally refer to suits on such grounds as *wrongful birth*. And many legal systems actually grant damages to parents going to court on wrongful birth grounds.

Yet, a further question remains: did the doctor also harm and wrong *the child itself*? This is generally referred to as a *wrongful life* case. In our example, let us assume that the child, albeit handicapped, has a life worth living. The crucial fact is that the doctor's mistake is also a necessary condition for the handicapped child's very existence. Had the doctor not made this mistake, the parents would have decided not to conceive this child. Hence, the only possible existence for *this* child is the one he actually has, namely one affected with a genetic disease in this case.⁵³

not yet conceived and/or born. Those unconvinced by this could easily construct a hypothetical situation in which only unconceived babies would consume the good (e.g. due to a compulsory resting time of more than nine months required by the recipe).

⁵²Parfit 1984.

⁵³On wrongful life cases, see Roberts (1998).

Whenever we rely on a concept of harm, we compare the current condition of a given person (here the newborn) with her condition as it would have arisen in the absence of the allegedly harmful action. This is referred to as a *counterfactual* notion of harm. Whenever the former condition is worse than the latter, the person has been harmed. This is typically the case in a car accident. We refer to the state of the victim *before* the accident in order to predict the likely state of this victim *at the time of the accident, had the latter not occurred*. However, in wrongful life cases (and more generally in non-identity cases), such a comparison turns out to be impossible since in the absence of the allegedly harmful action, the victim *would not have existed* at all. Once we accept that non-existence cannot be regarded as the state of a person,⁵⁴ we have to conclude that the baby cannot be said to have been harmed by the doctor's mistake.⁵⁵ In such a "non-identity" context, we are traversing outside the scope of our standard concept of harm. And once we consider that ascribing rights to people only makes sense if and only if their violation could be said to result in a harm to these people, this potentially affects, if not the possibility, at least the content that could be given to the rights of future people. Note before moving on that addressing the non-identity problem requires that we provide a diagnosis of the nature of the problem, the breadth of its scope and the available solutions to it. I am not aiming here at a comprehensive examination of the literature on the three points here. What I propose is one answer to each of the three questions.⁵⁶

B. THE SCOPE OF THE PROBLEM

The non-identity challenge is relevant to all cases in which adopting one policy or another will also affect the identity of those who will be born, affecting in turn the possibility of using concepts of harm and rights. By "affecting the identity", we do not simply refer to whether Paul will be short or tall depending on whether we adopt a given food policy or some other course of action (*type-identity*). We refer more radically to whether it is Paul who will be born instead of Ruth (or anybody at all) (*token-identity*).⁵⁷ In other words, some actions will be such that they will affect the token-identity of those who end up being born. In the medical case presented above, we are clearly within the scope of the non-identity problem. And so are we in many other biomedical situations. Typically, those concerned with the fate of the planned person in a cloning case, or with the possible

⁵⁴It is thus important here to separate the problem of *unattributability* (stressed here) from the one of *valuability* or even valuelessness. As Heyd (1992, p. 37) puts it, for example, "the comparison between life and nonexistence is blocked by two considerations: the valuelessness of nonexistence as such and the unattributability of its alleged value to individual subjects. The two considerations are intimately connected: one of the reasons for denying value to the nonexistence of people is the very fact that it cannot be attached to people."

⁵⁵One exception is if life is not worth living, in which case an alternative concept of harm could be relied upon (Gosseries 2004a, pp. 72 ff.).

⁵⁶See further Gosseries 2004a, ch. 1.

⁵⁷On Pierce's type-token distinction, see e.g. Wetzel (2006).

selection-related post-natal sufferings of the child in a preconceptional sex selection case should be aware that the non-identity problem arises here as well. For the child to come, being a cloned individual is the only possible existence, and the same holds for the child whose sex was chosen before conception (e.g. through sperm selection).

Yet, it appears that the scope of the non-identity problem extends far beyond these biomedical cases. Hence, the non-identity challenge should be taken very seriously. While not affecting all our decisions, be they of a bioethical nature or not (e.g. the baby food production example above is not necessarily affected by it), it certainly affects *many* of our policy choices as well as the meaningfulness of ascribing rights to future people in such cases. And it is on whether it is meaningful to extend the scope of the non-identity problem beyond the strictly bio-medical cases that there is certainly room for disagreement. I think that it does extend beyond such cases. Yet, I believe that non-identity does not cover all our actions. And I also believe that there is a way of preserving moral obligations whenever we are *within* the scope of the non-identity problem.

Consider replacing, for instance, our choice between mistaken and non-mistaken medical advice with a choice between a car and bike (mobility choice). If I take a car every day to go to my job, this will have two types of relevant consequences. It will have a negative impact on the present and future state of the atmosphere, given that it will increase emissions. Here, we assume that this impact will be such as to lead to a significant impact on health for present and future persons. However, it will also have an impact on the token-identity of my future child, if any. This is so for the following reason: coming back home earlier or later than if I had taken a bike will also affect the timing of my sexual intercourse. Hence, given the very large number of competing spermatozoa, it is highly likely to affect the very identity of the child I will conceive together with my beloved. In other words, if not all, at least a *very large proportion* of our actions and policy choices in fields such as transportation or energy production without any *direct* connection with procreation choices will still have an impact on the identity of our children, through modifying the timing of our daily activities, including procreative ones. The reader might react to all this with a smile. But there is no reason not to take this problem seriously.

Imagine then a father having to face his daughter. At 17 years of age she has become a green activist and asks him: “why did you not choose the bike rather than the car? The atmosphere would be much cleaner today! And given your circumstances at that time, you had no special reason not to take the bike!” The father may want to answer: “True. Still, had I done so, *you* would not be here. Since your life in such a polluted environment is still worth living, why blame me? I certainly did not harm you. Which one of your rights did I violate then?” Some will find the father’s answer at best misdirected, at worst shocking. And still, the way out may not be as obvious as it seems.

C. THE “LAST JUDGMENT” APPROACH AND THE OVERLAP

Let me now suggest one avenue that applies in the car case, while not being applicable to our earlier medical case.⁵⁸ Before doing so, one point about the vulnerability of will-rights to the non-identity problem. We have seen that the will-rights conception seems more vulnerable to the non-existence challenge than the interest-rights one. It is possible however that the will-rights conception could actually be less vulnerable to the non-identity challenge than the interest-rights one, insofar as the former relies less directly on a concept of interest and on the underlying assumption of harmability. It is worth keeping this in mind, even if we focus here on interest-rights.

Let us thus assume that we want to constitutionalise the right for the members of each generation to inherit an environment in as good a state as the one the previous generation inherited, all else being equal. Future people do not have this right now. But they will, as soon as they come into existence. Still, how can we address the non-identity challenge regarding this right? Let us accept that the fulfilment of the obligation to bequeath a “clean” environment should be assessed *at the end of each person’s life*. In other words, we have a *complete-life obligation* entailing the need for a sort of “last judgment” approach. As long as the father’s pro-car choice was a necessary condition for his daughter’s existence, it remains unobjectionable. Hence, his preconception actions are immune to moral criticism when it comes to alleged harms to his daughter. However, as soon as the daughter is conceived, all the father’s subsequent actions no longer fall within the scope of the non-identity context. There is no reason to hold the view that given his pre-conceptual polluting behaviour, the father’s obligation to bequeath a clean environment should be attenuated accordingly. In principle, we should expect the father to *catch up* as soon as his daughter has been conceived in order to be able, at the end of his life, to eventually meet the requirements of his constitutional obligation. Note that the fact of the father having produced irreversible impacts does not make it impossible for him to catch up. For then, he should act in such a way as to compensate for such negative impacts through substitution measures (e.g. replacing an extinguished species with new energy-saving technology).

This “catch up” argument relies on the existence of a generational *overlap*. If we are dealing with three or four generations ahead, it is less likely that such an overlap would still hold. Hence, our strategy seems not to remain available beyond the overlap. This is worrying as environmental problems often involve long-term impacts. However, there is a solution to this problem too. For we can adopt a *transitive* strategy, that is, one that sets up rights and obligations only

⁵⁸There is an extensive literature, beyond the scope of this article, on the non-identity problem, offering a variety of solutions. For example, Kramer (2001, p. 56) defends the avenue of collective rights. Although I cannot show it here, I suspect that—on top of the general problem that moral individualists may have with collective rights—this avenue itself may be subject to the non-identity problem once we ask ourselves “which” community can be said to be harmed.

between neighbouring generations that will at least at some point in time have a chance of overlapping. And with a chain of such obligations, it still remains possible to take into consideration the interests of *remote* future generations (i.e. those far beyond the overlap).

Consider a world with three generations (G1, G2, and G3). G1 overlaps with G2, but not with G3. G2 overlaps with G3. For all actions falling within the scope of the non-identity problem, members of G1 do not have obligations *towards* members of G3 because all their actions are pre-conceptual with respect to G3. Still, G1 has obligations *towards* G2. And among these obligations *towards* G2, there might be obligations *towards* G2 *about* G3—yet, *not towards* these members of G3. The idea here *is not* that from the point of view of G1, members of G3 matter less morally than those of G2 (e.g. because they are more remote in time). It is rather that given the absence of overlap between G1 and G3 and provided that we find ourselves in a non-identity context—which is not always the case—most actions of G1 that have an impact on G3 are immune to potential moral criticism because they are all “pre-conceptual” actions. It is one thing to say, “I don’t care about remote future people because they matter less morally speaking than my contemporaries.” It is another to say: “Of course they matter equally, but for many of my actions, whatever I do, I cannot be said to actually harm them.”

Still, if it were to turn out that the long-term effects of G1’s actions on the members of G3 were such that it would force G2 to make extra efforts to ensure that G2 fulfils its own obligations towards G3, then G1 may in fact violate its obligations towards G2 (rather than G3). This is what Howarth means when he writes that “we are harming our children by compromising their ability to fulfil their moral obligations while maintaining a favourable way of life for themselves” and that “our responsibility for the distant future follows directly from our obligation to our existing children, not to undifferentiated potential beings whose existence depends on our actions and decisions.”⁵⁹

Importantly, such a transitive approach presupposes that the concept of harm is to be used at the overlap of generations and relies on a specific type of harm (i.e. increased compliance costs for G2 due to G1). The approach also presupposes that the nature of G2’s obligations towards G3 not fully rest on a notion of causal responsibility. Otherwise, G2 would not have extra obligations because of the actions of G1. In the same vein, our theory of intergenerational justice must be such that the obligations of G2 towards G3 are not defined merely on the basis of what it received itself from G1. For in such a case, G2 would simply need to transfer to G3 as much as it received itself from G1, without G2 having to compensate partly for the costs imposed directly by G1 on G3 (typically through what we refer as “time bombs” of various types). Some versions of indirect reciprocity theories of intergenerational justice may be subject to such a problem.

⁵⁹Howarth 1992, pp. 135, 138.

In contrast, properly distributive theories of intergenerational justice will react differently to this problem as they tend to define the obligations of G2 towards G3 out of concern for equality among them, as opposed to exclusively on the basis of what G1 transferred to G2. In short, this transitive way of addressing the non-identity challenge clearly puts constraints on the type of theory of justice that we are able to defend.

This is then how the transitive approach works. Admittedly, in the case just envisaged, G2 should not *fully* compensate G3 for disadvantages resulting from G1's actions, as G2 has no causal responsibility for G1's actions. However, as a matter of distributive justice, G2 can be expected to operate some intergenerational redistribution, such that G3 will not end up worse off than G2, as when a person is morally expected to help another facing some disadvantage caused for example by an earthquake for which neither of them can be held responsible.

Whenever we find ourselves in a non-identity context, given that the rights of future generations should be conceived of as correlates of obligations *towards* future people, they can only apply to *overlapping* generations. This is an extra reason to abandon the expression "Future generations have a right to . . ." For once we acknowledge that the scope of the non-identity context is a significant one, future generations beyond those with which we shall overlap will never have any rights against us, not even future rights. Preference should then be given to formulations such as "Each generation has against the *previous* one a right to . . ." or "Each generation has to the *next* one the obligation to . . .". So far we have thus identified at least three restrictions that future rights will need to comply with in order to remain meaningful, two resulting from the conditional nature of these rights, and one applying to all choices that belong to the scope of the non-identity problem. Yet, none of these restrictions fundamentally challenge the meaningfulness and significance of the idea of rights of future generations. Restricting ourselves to the future rights of the *next* generation(s) with which we shall overlap may seem minimalist. It is however the price to pay if we take seriously the non-identity challenge—but without necessarily extending its scope to all our actions. And this is not too high a price given the possibility of a transitive approach.

Be aware that the strategy relied upon here is different from the one used in the examination of the "present-rights-of-present-people" view as defended by will-rights defenders. There, the idea was that we grant a right to G2 to defend the interests of G3. Here, however, we go one step further because we show that given its own obligations to G3, G2 has an interest of its own at stake, which makes the view actually possible for interest theorists. In fact, in this construction, what generates in me an interest as G2 is that I have an obligation to G3 and therefore an interest in preventing G1 making it heavier for me to comply with this obligation. This helps us in analyzing the dispute between interest and will-rights theorists on the rights of proxies. One way of doing so can

be by reference to primary (the interests recognized in the first place to justify the proxy's obligation towards the powerless interessee) and secondary interests (the interest of the obligee in making compliance with his obligation as light as possible), and this is crucial when the degree of my own obligation to G3 is not (totally) dependent for its definition on G1's compliance or not.

III. UNACTIONABLE RIGHTS?

The third and fourth challenges that I wish to envisage here are of a more practical nature, though no less important. The first of these two last challenges has to do with the idea that the exercise of future rights will necessarily come *too late* when it comes to mobilizing them in court. We shall focus on the issue of the actionability of such rights before the judiciary. Let me insist however on the fact that constitutional rights that are not directly actionable by the interested citizens themselves can still have indirect legal effects (including the settling of interpretative controversies or the leading to a standstill effect in some jurisdictions).⁶⁰ Moreover, the judiciary is not the only avenue to give flesh to these rights. The government, ombudsmen, guardians, parliamentary commissioners are all non-judicial institutions that also have a role to play in this respect. Rights can be enforced by others than the interested individuals,⁶¹ as criminal law prosecutions may illustrate. Finally, rights, once recognized in a constitution, also involve extra-legal effects (including at the symbolic and ideological level) that are far from negligible. We should thus bear in mind that the focus on actionability is quite a narrow one. Yet, it involves an important practical challenge.

In fact, our question in this section is more precisely: are there reasons to believe that rights that are actionable by existing people would not be actionable by future people? Hereafter, I explore two avenues. On the one hand, don't *future class actions* provide an *ex ante* avenue to include future people? On the other hand, don't *preconception tort suits* illustrate the fact that in certain circumstances involving overlap, we have future rights and when they come into existence after the harmful action has taken place, the wrongdoer is *still there* in some cases to be subject to a claim for reparations? In other words, the question is: to what extent is it possible to take advantage of the *overlap* (i.e. when both the harmdoer and the victim co-exist)? Future class suits illustrate the extent to which the judicial system allows for the inclusion of future victims. Preconception tort suits illustrate cases where even after the victim has become one, the wrongdoer is still there, allowing us to rely on "future rights" that have become present ones. The issues we deal with here are both of standing and of "rights against whom?"

⁶⁰On the right to a safe environment, see e.g. Nickel (1993), Haumont and Bodart (2006); on the right to decent housing, see Bernard (2006).

⁶¹See Kramer et al. 1998, p. 9. On the issue of rights' enforceability, see also Kramer (2001, pp. 65–7, 69, 72).

Note that the point I wish to make here does not have to do with the distinction between prevention and reparations. Rights do have a preventive dimension since the possibility of sanctioning their violation operates as deterrent. Instead, what is at stake is the fact that as the distance between the harmful act and the coming into existence of the victim increases, it becomes increasingly unlikely that the wrongdoer will still be there when the victim actually becomes one. In other words, when future people are involved, aren't both the preventive and the reparatory function of rights condemned to vanish? And is reliance on such rights in front of the judiciary or any other forum condemned to fail?

A. PRECONCEPTION TORTS AND THE OVERLAP

Preconception torts illustrate the fact that future rights can make perfect sense whenever the existence of the victim and the wrongdoer *overlap* after the harm has taken place. "Preconception torts" refer to situations where the wrongful action takes place before conception (i.e. before the child exists, even at the foetal stage). And if we consider that the foetus only becomes a person from a certain point onwards (x months), we can also include as relevant *prenatal torts*, such as drug abuse by a mother while she is pregnant (or possibly smoking by other people leading to the involuntary intoxication of the mother).⁶² Wrongful life cases involving preconception diagnostic mistakes are paradigmatic examples of preconception tort claims. Other examples obtain, such as radiation causing gene mutation or a defective can of baby food.⁶³ Consider our food manufacturer producing cans of baby food, *ex hypothesi* more than nine months before the birth of baby x. One of them contains bits of glass that will turn out to harm baby x. The obligation of the manufacturer to produce non-harmful food is best regarded as correlative to rights of consumers to safe food, including rights of future consumers who are not yet born. Two interesting elements of the baby food example are worth stressing. *First*, as in wrongful life, it is the responsibility of a third party (the manufacturer and/or the seller) as opposed to the parent's responsibility, that is at stake. *Second*, contrary to wrongful life, there is no non-identity problem at stake (e.g. the cans may have been bought after conception). The point is that the manufacturer would be wrong to invoke the fact that the baby didn't exist at the moment of his harmful act, to escape any responsibility—which illustrates by the way the limits of the non-identity problem's scope.

⁶²See Bambrick 1987. Banashek 1990. Kennedy 1991. US cases involving a mother harming her child during pregnancy include: *Grodin v. Grodin* (1980) (teeth discoloration as a result of a prescription drug taken during pregnancy); *Stallman v. Youngquist* (1984) (driving negligence of the mother leading to harm to the child); and *Monson* (1986) (criminal prosecution of a mother for soft drug abuse during pregnancy, leading to the death of the child after a few weeks).

⁶³Enneking (1994) discusses a case involving a preconception incorrect blood type recording leading to serious injuries to the child during pregnancy.

Preconception torts have two relevant features. First, the right violation is being invoked after the harm has been done and hence when the future right has come to existence. It is claimed *ex post* that a future right of the (then) future person was constraining *ex ante* the practitioner or the food manufacturer. We thus see a perfect illustration of the practical significance of a future right invoked in front of the judiciary *after* it has come to existence. Second, the “purest” situation here is when an overlap obtains, that is, when after the harm has taken place, the harmdoer and the victim co-exist. A right is not only a *right of* someone (an existing subject) *to* something (an object). It is also a *right against* someone (the obligee), correlative to an obligation *towards* someone (the right holder). We can say that at the moment the harmful action takes place, the baby’s right is still a future one (hence, it does not exist); but when the injury takes place, there is contemporaneity of the harmdoer and the victim. The overlap is crucial here, but for a reason different from the one central in addressing the non-identity problem. It has to do here not with the “complete-life” nature of some of our intergenerational obligations but rather with the continuity of persons from a liability perspective. Of course, legal systems often prolong the legal personality and liability of harmdoers beyond their death by allowing tort actions to be brought against the estate of such deceased persons. Accounting for such an option from a moral point of view is however more complex than in the straightforward overlap case, which explains why the latter is especially interesting.

B. FUTURE CLASS ACTIONS⁶⁴

This leaves us with our second question. General—non-judicial and sometimes not even legal—deterrents may admittedly come in both *ex ante* and *ex post* forms. Moreover, *ex post suing* may perfectly play the role of an effective deterrent whenever overlap is likely to obtain. Is *ex ante judicial* action necessarily bound to fail however? Acting *ex ante*, that is before the future right (and hence its violation) has come to existence, may play a stronger preventive role. It allows to stop the wrongdoer at the moment he is still alive in cases where we cannot expect an existential overlap between the victim and the wrongdoer. Beyond the procreative realm, this is the most common situation as we deal with more remote generations.

Let me start with the Philippine Children’s Case upon which the Philippines Supreme Court decided in June 1993.⁶⁵ The case has become as famous as it has remained isolated.⁶⁶ The plaintiffs were all minors represented by their parents.

⁶⁴Schuwert 1987. Anon 1996. Raskolnikov 1998. See also Rosenkranz (1986) on posterity suits.

⁶⁵The Philippines Supreme Court, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, July 30, 1993, 33 *ILM* 175 (1994). For comments see: Rest 1994; Allen 1994; Just 1996, pp. 617 ff.

⁶⁶Allen 1994.

They were asking the Philippines Supreme Court to order the Department of Environment and Natural Resources to “(1) cancel all existing timber license agreements in the country; (2) cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.” It was claimed that:

The continued allowance [of such license agreements] to cut and deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs—especially plaintiff minors and their successors—who may never see, use, benefit from and enjoy this rare and unique natural resource treasure. This act of defendant constitutes a misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations. . . . Plaintiffs have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by State in its capacity as the *parens patriae*.⁶⁷

A significant move here consisted in including children as plaintiffs, allowing at least for some extension of the time horizon up to the horizon of the children's life. The crux of the case rested however with the fact that the petitioners asserted “that they represent their generation *as well as generations yet unborn*.” The Court found “no difficulty in ruling that they can, for themselves, for others of their generation *and for the succeeding generations*, file a class suit.”⁶⁸ This illustrates the possibility of a class action involving both present *and future still unborn members*. The case is important *first* as an illustration of what difference a right to a healthy environment can make, *second* as a unique application of such a right *to future people*, and *third* because it granted standing to present people to sue not only in their own name (or the one of their existing children), but also in the name of future people (alternatives being guardians, ombudsmen).

Note that such future class actions are perfectly compatible with the transitive solution proposed to the non-identity challenge. However, this is only so if at least one of the two following conditions are met. First, possible violations of the right to a healthy environment can only be invoked in reference to still unborn persons with whom we are likely enough to overlap at some point. Second, non-overlapping future people could be included as well, but not through their own right to a healthy environment. Concern as to these non-overlapping future generations could however be included if we accept to interpret the right to a healthy environment as including the right to an environment healthy enough that transferring it healthy to the generations coming after would not require unreasonable efforts from the (overlapping) generation following us next.

Moreover, this Filipino case needs to be looked at through the wider prism of class actions, a phenomenon that typically developed in the context of mass tort claims involving victims of defective products or toxic chemicals. Instead of each

⁶⁷*Minors Oposa* . . . , supra note 65, 180.

⁶⁸*Minors Oposa* . . . , supra note 65, 185 (my italics).

victim acting individually, the idea consists in grouping individual suits together into a single class suit.⁶⁹ *Future* class actions refer to class actions where plaintiffs “represent” both present and *future* victims.⁷⁰ In such a case, while only some members of the class have so far manifested an injury, the others have an increased risk of injury.⁷¹ And of course, future class actions raise specific legal issues regarding standing requirements⁷² as well as whether the global settlements they lead to are both fair towards and binding on future victims.

To sum up, preconception torts illustrate cases where the notion of future rights can perfectly be relied upon *ex ante* and actioned *ex post* to constrain someone’s action (e.g. a food manufacturer). Whenever the harmdoer is still there when the future right becomes actual and when the injury comes into existence, there is no specific difficulty in suing the harmdoer. The situation becomes more problematic when the current wrongdoer is unlikely to still exist when the harm will come into existence. Future class actions may be of use when *both* present and future victims are at stake. This means that in case of a “time bomb” type of harm, class actions cannot be relied upon. Yet, the interesting point is that while we need to have at least some present victims, future victims can be more numerous and their harm will be considered separately from the harm to present victims. Future victims in a global settlement will be taken into consideration *as such* and each person will count for one. If a fund is being put aside, then the harmdoer may well disappear, and the future victims will benefit at least from partial reparations.

Is there (and should there be) some future for the Philippine children case then? If the injury and the characteristics of the future victims are clearly identifiable, one may expect it. However, there is a thin line between class actions that should remain the job of the judiciary and broader questions that are to be discussed democratically in parliament. This thin line seems to have been crossed in the Philippine’s children claim, the injury lacking particularity and the number of future class members being especially large.⁷³

IV. THE SELF-SANCTION CHALLENGE

Let me finally consider more briefly a second practical challenge to the enforcement of future rights once they have been violated. This last challenge is

⁶⁹A class action is distinct from a collective action, as the former is simply the aggregation of individual claims, whereas the latter is not.

⁷⁰Raskolnikov (1998, p. 2550, n. 33) distinguishes three categories of future victims: *near future* (“have suffered a legally cognisable injury, but have not yet filed a suit), *intermediate futures* (have been exposed to a toxic or defective substance or product but have not yet manifested an injury) and *far futures* (have not yet been exposed or injured but will as a result of the defendant’s past conduct).

⁷¹Anon. 1996, n. 2.

⁷²See Schuwerk 1987, pp. 70 ff.

⁷³Technically, a claim like the Filipino one would probably not be considered mature, at least not for global settlement. That claim, however, was not a claim for damages (Raskolnikov 1998, p. 2550).

best presented by emphasizing the idea of intergenerational dependency. There are two paradigmatic illustrations of such dependency. *Descending dependency* refers to the dependency of the welfare of an earlier generation on the welfare of the next one. This typically occurs in the presence of descending altruism, that is, in situations in which the welfare of parents depends on the welfare of their children. Parents whose children are doing very well, including much better than themselves, will often derive additional well-being from such a situation.⁷⁴ In contrast, *ascending dependency* refers to a situation in which the wealth of children will depend on how much their parents consume for themselves and leave to their children for the latter's consumption. If parents over-consume, they will leave too little to their children.

In case of rights violation by an earlier generation, the next generation will often not dare sanctioning its own parents for such a violation. Sometimes, however, it will, and as we saw, this may even take place in court whenever there is overlap between the two generations. This is the case for example when a generation claims that the public debt per head transferred to the next generation is unjust, children threatening their parents by claiming that the former will be unable or unwilling to pay for the retirement benefits that the latter are counting on.⁷⁵ Some of the strength of legal rights is that their violation could lead to sanction the wrongdoers responsible for it. The challenge is however to envisage sanctions that will not have negative spillover (or backfire) effects on those who are not responsible for such rights violations, or even worse on the victims themselves.

Consider the case of a father convicted for murder. He killed two people and is sent to jail as a result. Clearly, this is not only a sanction for him. His own children will suffer tremendously from his absence without being at all responsible for his actions. In the theory of criminal law, it is what Walker refers to as "obiter punishment."⁷⁶ This is a result of the child's ascending dependency on various levels (affective, financial, etc). And society will generally try to reduce such family-based ascending dependency by providing for state intervention of various forms (child benefits, compulsory education, etc).

Consider now our public debt example and imagine for a moment that the claim of the young generation (G2) is justified. Members of G2 argue that the public debt they inherit is too high. They add that this amounts to a violation of one of their rights (the content of which is left here undefined). In such a case, one way of sanctioning G1 could be to reduce their pension benefits. The problem is that with lesser retirement benefits, members of G1 having reached the age of retirement may simply be tempted to use up their savings. They could try to preserve their disposable income through such substitution. This would mean

⁷⁴The reverse—i.e. children deriving additional welfare from the fact that their parents are better off than they are—is probably much rarer.

⁷⁵Pitton 2006.

⁷⁶Walker 1991, pp. 106–108.

that at the end, members of G2 may not be better off at all since they would lose on the inheritance side what they are trying to recuperate on the pension funding side.

This is what can be referred to as the problem of *self-sanction*.⁷⁷ Whenever the situation of a generation depends on the one of the previous one, sanctioning G1 for not meeting up to the demands of intergenerational justice could tend to produce losses or at least no net benefit (due to substitution effects) for members of G2. To adopt Walker's language, it is a specific type of "obiter punishment." Note that in a standard situation, person A (typically the state) punishes person B (the criminal) which has a negative impact on person C, an innocent third party who depends on him (typically his children). In the present case, generation G2 is both A, the one who seeks punishment (or more precisely "compensation" here which is admittedly not the same) and C, the one who suffers a negative impact from such a punishment.

This does not entail that G2 will necessarily lose something *in net terms* from requiring compensation from G1. For G1 may simply decide to *strictly* substitute what it has to give to G2 with what it would otherwise have transferred anyway at a later stage to G2 (typically a bequest). However, what the challenge of self-sanction clearly shows is that the room for sanctioning rights violations in this realm is *limited*. It certainly requires that intergenerational sanctions (if any) be designed in (targeted) ways that restrict spillover (or backfire) effects on the next generation whose rights have been violated. Focusing on removing non-durable goods from G1 may be one avenue. More generally, avoiding sanctions on goods subject to significant substitution effects should be the goal in such a case.⁷⁸ There is room here for exploring whether considerations such as the age at which we should sanction the wrongdoer or the choice between cash or in-kind sanctions are relevant to this substitution problem.⁷⁹

V. CONCLUSION

Let me conclude briefly. There is no reason to be fetishist about rights. Yet, before abandoning them in the intergenerational context, we need an argument, one such that it would apply against *all* possible candidates of rights of future generations, whatever their content.

We have looked at four challenges to the idea of ascribing rights to future people, the first two having to do with the meaningfulness of doing so, and the

⁷⁷Game theorists will tend to analyse this problem as one of *credibility of ascending threats*. (I am indebted to E. Minelli for this point). For an illustration of a related difficulty in the transgenerational realm, see Gosseries (2006, pp. 36–7).

⁷⁸Notice that such spillover effects could be weaker when it is the next generation that should be sanctioned by the previous one. But even then, especially at old-age, there is a significant degree of descending dependency.

⁷⁹For a game-theoretical treatment of the issue see Fudenberg and Maskin (1986) and Kandori (1992).

last two with the usefulness of doing so. The non-existence challenge can be disposed of by defending the idea of future rights. This imposes some constraints in terms of the phrasing and content of such rights. Yet, this allows us to preserve the idea of rights at a reasonable cost. As to the non-identity problem, it is quite serious. Yet, it does not cover the full scope of our intergenerational relationships, both when it comes directly to bioethical issues or more generally to public policies of various types. Within the problem's scope, the avenue I proposed will entail that we only have obligations towards people if we overlap with them. This imposes a further restriction on the way in which we should envisage future rights. But again, it preserves the idea of rights of future generations at a reasonable cost.

The two other challenges are more practical ones. One has to do with the judicial actionability of future rights. Again, the generational overlap is crucial here and limits such actionability. Yet, it does not reduce actionability to zero. Moreover, we should also insist on the fact that rights recognition can be effective in leading to policy changes without necessarily being actionable in courts. Finally, the self-sanction challenge is something we should bear in mind in designing the *nature* of sanctions in cases of violations of our intergenerational rights. But it does not mean that such sanctions cannot and should not in some cases be enforced.

In the end, the road towards recognizing the rights of future people is probably narrower than what advocates of future generations may wish. Yet, we are far from being at a dead end, as some tempted by expedient scepticism may think.

REFERENCES

- Agius, E., S. Busuttill, with T.C. Kim & K. Yazaki. 1998. *Future Generations and International Law*. London: Earthscan.
- Allen, T. 1994. The Philippine children's case: recognizing legal standing for future generations. *Georgetown International Environmental Law Review*, 6, 713–41.
- Anon. 1996. And justiciability for all? Future injury plaintiffs and the separation of powers. *Harvard Law Review*, 109, 1066–83.
- Bambrick, G. 1987. Developing maternal liability standards for prenatal injury. *St. John's Law Review*, 61 (4), 592–614.
- Banashek, K. 1990. Maternal prenatal negligence does not give rise to a cause of action. *Washington University Law Quarterly*, 68, 189–202.
- Beckerman, W. and J. Pasek. 2001. *Justice, Posterity and the Environment*. Oxford: Oxford University Press.
- Bennett, J. 1978. On maximizing happiness. Pp. 61–73 in R. Sikora and B. Barry (eds), *Obligations to Future Generations*. Philadelphia: Temple University Press.
- Bernard, N. 2006. Le droit constitutionnel au logement comme arrière-plan indissociable du droit du bail. Pp. 1–39 in P. Jadoul et al. (eds), *Le bail de résidence principale*. Brussels: La Chartre.
- Bichot, J. 1999. *Retraites en péril*. Paris: Presses de Sciences-Po.
- Birnbacher, D. 1988. *La responsabilité envers les générations futures*. Paris: PUF.
- Copp, D. 1992. The rights to an adequate standard of living. *Social Philosophy and Policy*, 9, 231–61.

- Cosandey, D. 2003. *La faillite coupable des retraités. Comment nos assurances vieillesse font chuter la natalité*. Paris: L'Harmattan.
- De-Shalit, A. 1995. *Why Posterity Matters: Environmental Policies and Future Generations*. London: Routledge.
- Dobson, A. 1996. Representative democracy and the environment. Pp. 124–39 in W. Lafferty and J. Meadowcroft (eds), *Democracy and the Environment*. Cheltenham: Elgar.
- Ekeli, K. 2006. The principle of liberty and legal representation of posterity. *Res Publica*, 12, 385–409.
- Ekeli, K. 2008. Constitutional experiments: representing future generations through submajority rules. *Journal of Political Philosophy*, this issue.
- Elliot, R. 1989. The rights of future people. *Journal of Applied Philosophy*, 6 (2), 159–69.
- Enneking, A. 1994. The Missouri Supreme Court recognizes preconception tort liability: *Lough v. Rolla Women's Clinic, Inc.* *UMCK Law Review*, 63, 165–84.
- Fabre, C. 2000. *Social Rights Under the Constitution*. Oxford: Oxford University Press.
- Feinberg, J. 1980. *Rights, Justice and the Bounds of Liberty*. Princeton, NJ: Princeton University Press.
- Fotion, N. and J. Heller, eds. 1997. *Contingent Future Persons: On the Ethics of Deciding Who Will Live, or Not, in the Future*. Dordrecht: Kluwer.
- Fudenberg, D. and E. Maskin. 1986. The folk theorem in repeated games with discounting or with incomplete information. *Econometrica*, 54, 533–54.
- Gaspard, F. and A. Gosseries. 2007. Are generational savings unjust? *Politics, Philosophy & Economics*, 6, 193–217.
- Goodin, R. 2003. *Reflective Democracy*. Oxford: Oxford University Press.
- Gosseries, A. 2000. Intergenerational justice: probing the assumptions, exploring the implications. Ph.D. thesis, Louvain-la-Neuve: Université Catholique de Louvain.
- Gosseries, A. 2003. A-t-on des obligations envers les morts? *Revue philosophique de Louvain*, 101, 80–104.
- Gosseries, A. 2004a. *Penser la justice entre les générations: de l'affaire Perruche à la réforme des retraites*. Paris: Aubier-Flammarion.
- Gosseries, A. 2004b. Constitutionalizing future rights? *Intergenerational Justice Review*, 3 (2), 10–11.
- Gosseries, A. 2005. Justice entre les générations et financement des retraites. *Sécurité sociale (CHSS)*, 13, 300–5.
- Gosseries, A. 2006. Egalitarisme cosmopolite et effet de serre. Les séminaires de l'IDDRI, n° 14. Available at: www.iddri.org.
- Gosseries, A. 2008. Theories of intergenerational justice: a synopsis. *Surveys and Perspectives Integrating Environment and Society*, 1 (1), 39–49.
- Hamilton, K. and M. Clemens. 1999. Genuine savings rates in developing countries. *The World Bank Economic Review*, 1, 333–56.
- Haumont, F. and J. Bodart. 2006. Le droit à un environnement sain: le cas de la Belgique. *Annuaire international des droits de l'homme*, 1, 449–78.
- Heyd, D. 1992. *Genethics: Moral Issues in the Creation of People*. Berkeley: University of California Press.
- Hinrichs, K. 2002. Do the old exploit the young? Is enfranchising children a good idea? *Archives Européennes de Sociologie*, 18, 35–58.
- Hohfeld, W. N. 1919. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. D. Campbell and P. Thomas (eds). Aldershot: Ashgate, 2001.
- Howarth, R. 1992. Intergenerational justice and the chain of obligation. *Environmental Values*, 1, 133–40.
- Jecker, N. 1987. The ascription of rights in wrongful life suits. *Law and Philosophy*, 6, 149–65.
- Jones, P. 1992. *Rights*. Basingstoke: Macmillan.

- Just, R. 1996. Intergenerational standing under the Endangered Species Act: giving back the right to biodiversity after *Lujan v. Defenders of Wildlife*. *Tulane Law Review*, 71, 597–633.
- Kandori, M. 1992. Repeated games played by overlapping generations of players. *Review of Economic Studies*, 59, 81–92.
- Kennedy, M. 1991. Maternal liability for prenatal injury arising from substance abuse during pregnancy: the possibility of a cause of action in Pennsylvania. *The Pennsylvania Issue*, 29, 553–78.
- Kotlikoff, L. 1992. *Generational Accounting*. New York: Free Press.
- Kramer, M. 2001. Getting rights right. Pp. 28–95 in M. Kramer (ed), *Rights, Wrongs and Responsibilities*. Basingstoke: Palgrave.
- Kramer, M. 2008. Rights in legal and political philosophy. Pp. 414–27 in K. E. Wittington, R. D. Kelemen and G. A. Caldera (eds), *Oxford Handbook of Law and Politics*. Oxford: Oxford University Press.
- Kramer, M., N. Simmonds and H. Steiner. 1998. *A Debate over Rights: Philosophical Enquiries*. Oxford: Clarendon Press.
- Laudor, M. B. 1994. In defense of wrongful life: bringing political theory to the defense of a tort. *Fordham Law Review*, 62, 1675–704.
- Lyons, D. 1970. The correlativity of rights and duties. *Noûs*, 4, 45–55.
- Mank, B. 1996. Protecting the environment for future generations: a proposal for a “republican” superagency. *NYU Environmental Law Journal*, 5, 444–516.
- Nickel, J. 1993. The human right to a safe environment: philosophical perspectives on its scope and justification. *Yale Journal of International Law*, 18, 281–96.
- Parfit, D. 1984. *Reasons and Persons*. Oxford: Clarendon Press.
- Pitton, C. 2006. Nous ne rembourserons pas vos dettes. *Le Monde*, 28 September, p. 23.
- Ponhière, G. 2007. On the relevancy of the Ecological Footprint for the study of intergenerational justice. Unpublished manuscript, on file with the author.
- Raskolnikov, A. 1998. Is there a future for future claimants after *Amchem Products, Inc. v. Windsor*? *Yale Law Journal*, 107, 2545–82.
- Rest, A. 1994. The Oposa decision: implementing the principles of intergenerational equity and responsibility. *Environmental Policy & Law*, 24 (6), 314–20.
- Roberts, M. 1998. *Child versus Childmaker: Future Persons and Present Duties in Ethics and the Law*. Lanham, MD: Rowman & Littlefield.
- Rosenkranz, J. 1986. A Ghost of Christmas yet to come: standing to sue for future generations. *Journal of Law & Technology*, 1, 67–114.
- Routley, R. and V. Routley. 1977. Nuclear energy and obligations to the future. *Inquiry*, 21, 133–179.
- Schuerwer, R. B. 1987. Future class actions. *Baylor Law Review*, 39, 63–123.
- Shoham, S. and N. Lamay. 2006. Commission for future generations in the Knesset—lessons learnt. Pp. 244–281 in J. Tremmel (ed), *Handbook of Intergenerational Justice*. Cheltenham: Elgar.
- Steiner, H. 1983. The rights of future generations. Pp. 151–165 in D. MacLean and P. G. Brown (eds), *Energy and the Future*. Totowa, NJ: Rowman & Allanheld.
- Steiner, H. 1994. *An Essay on Rights*. Oxford: Blackwell.
- Tonn, B. and M. Hogan. 2006. The House of Lords: guardians of future generations. *Futures*, 38, 115–9.
- Tremmel, J. 2006. Establishment of the rights of future generations in national constitutions. Pp. 187–214 in J. Tremmel (ed), *Handbook of Intergenerational Justice*. Cheltenham: Elgar.
- UNESCO—Cousteau Society. 1994. *Human Rights for Future Generations*. Brussels/Tenerife: Bruylant & Universidad de La Laguna Press.
- Van Parijs, P. 1995. *Real Freedom for All*. Oxford: Oxford University Press.
- Van Parijs, P. 1998. The disfranchisement of the elderly, and other attempts to secure intergenerational justice. *Philosophy and Public Affairs*, 27, 292–333.
- Walker, N. 1991. *Why Punish?* Oxford: Oxford University Press.

- Waldron, J. 1999. *The Dignity of Legislation*. Cambridge: Cambridge University Press.
- Wenar, L. 2005. Rights. In E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*. Available at: <http://plato.stanford.edu>.
- Wetzel, L. 2006. Types and tokens. In E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*. Available at: <http://plato.stanford.edu>.
- Woodward, J. 1986. The non-identity problem. *Ethics*, 96, 804–31.